ARTICLES

Dangerousness & the Undocumented

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The Supreme Court's most recent Second Amendment opinion, United States v. Rahimi, *centers the question of dangerousness in right to bear arms challenges. There, the Court upheld 18 U.S.C. § 922(g)(8), the federal criminal prohibition on possession of firearms by those subject to a civil domestic violence order, opining that legislatures could regulate the right to bear arms of those who were proven credible threats to public safety.* Rahimi, *however, left open the question whether dangerousness might be imputed to an entire group, absent individual determinations of threat or danger. The several lower federal court cases adjudicating 18 U.S.C. § 922(g)(5), the federal criminal prohibition on possession of firearms by unlawfully present noncitizens, place this concern in sharp relief. Many federal judges have imputed dangerousness to that population in upholding the federal alien-in-possession ban. Some have suggested that violation of immigration law indicates a general propensity for lawlessness, while others obliquely reference public safety threats by noncitizens to buttress their conclusions.*

This Article argues that if federal courts take the Supreme Court's prescribed methodology in Rahimi *and* New York Rifle & Pistol Ass'n, Inc. v. Bruen *seriously, they must require legislatures to substantiate the link between immigration status and public threat. All available criminological data, however, fails to validate such a connection. Permitting courts to continue upholding federal and state restrictions on noncitizen firearm possession based on innuendo and stereotype reinvigorates the xenophobia of long-discarded judicial thinking, excises noncitizens from fundamental constitutional guarantees without justification, and undermines the coherence of the Court's emerging Second Amendment jurisprudence.*

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TABLE OF CONTENTS

INTRODUCTION

Announcing his candidacy for President in July 2015, Donald Trump painted a somber picture of American decline, darkened by threat from foreign sources. He began by decrying the U.S.'s trade losses to China and Japan before zeroing in on the true source of the problem: immigrants. Infamously, he contrasted the "best and the finest" who were in his audience, with the lowly "drug-dealers," "rapists,"

and "criminals" who come from south of the border.[1] For the remainder of his candidacy and his first term as president, he highlighted immigrant criminality, sprinkling in tragic tales of citizens killed by unlawfully present noncitizens to personalize his nebulous invocations of immigrant threat.[2] Trump's 2024 reelection returned with vigor to the narrative of immigrant violence and lawlessness.[3] Unauthorized immigrants, he wrongly but loudly proclaimed, were the cause of gangland threats and social disintegration in some neighborhoods[4] and insatiable household pet eaters in others.[5] His brand of race-baiting xenophobia, however, is only the most recent iteration of a well-worn narrative. Tapping into the specter of foreigners' inherent dangerousness has been an effective and persistent trope throughout American political history.[6]

This broad staining of noncitizens as violent scofflaws and public safety threats is not just the hackneyed playbook of populist demagogues. Relevant to legal discourse, legislatures and courts traffic in these perceptions and stereotypes as well. The output of those bodies echoes through time, with law and judicial opinion calcifying the connection between immigrants and danger for generations. Indeed, foundational Supreme Court opinions from yesteryear explicitly exploit the immigrant–danger nexus to justify their holdings.[7] The eras of Chinese exclusion, Japanese-American incarceration, and post-9/11 selective criminal enforcement against Arabs and Muslims—and the federal court opinions each spawned—provide ready, if ugly, examples.[8]

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1. Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017); Louis Nelson, *Trump: Criminals Will Be Deported First*, POLITICO (Nov. 13, 2016), https://www.politico.com/story/2016/11/donald-trump-immigrants-criminals-231293; Cris Moody, *Donald Trump Digs in on Immigration*, CNN (July 9, 2015), https://www.cnn.com/2015/07/07/politics/trump-immigration-rapists-mexicans-clinton [https://perma.cc/NQT3-GWW4].

2. *See* Gregory Korte, *Trump Says He'll Make Kate Steinle's Killer a 2020 Campaign Issue*, USA TODAY (Dec. 1, 2017), https://www.usatoday.com/story/news/politics/2017/12/01/trump-says-hell-make-kate-steinles-killer-2020-campaign-issue/912603001/ [https://perma.cc/JDL2-K9XK].

3. *See* Lauren Irwin, *Trump Hails 'Justice' for Laken Riley After Migrant Found Guilty of Murder*, THE HILL (Nov. 20, 2024), https://thehill.com/regulation/court-battles/5000409-donald-trump-laken-riley-jose-ibarra-sentencing/; Donald J. Trump, Nomination Acceptance Speech at the 2024 Republican National Convention (July 18, 2024) (claiming an "invasion" of immigrants committing crimes).

4. *See* Jonathan Weisman, *How the False Story of a Gang 'Takeover' in Colorado Reached Trump*, N.Y. TIMES (Sep. 15, 2024), https://www.nytimes.com/2024/09/15/us/politics/trump-aurora-colorado-immigration.html.

5. Merlyn Thomas & Mike Wendling, *Trump Repeats Baseless Claim About Haitian Immigrants Eating Pets,* BBC (Sep. 15, 2024), https://www.bbc.com/news/articles/c77l28myezko [https://perma.cc/ECF8-UZL6].

6. *See, e.g.*, Dallas Card et al., *Computational Analysis of 140 Years of U.S. Political Speeches Reveals More Positive But Increasingly Polarized Framing of Immigration*, 119 PNAS, no. 31, 2022, at 1; Marcella Alsan, Katherine Eriksson & Gregory Niemesh, *Understanding the Success of the Know-Nothing Party* 1–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28078, 2020); Mario Koran, *'A Failed Experiment:' The Racist Legacy of California Governor Pete Wilson*, THE GUARDIAN (July 31, 2020), https://www.theguardian.com/us-news/2020/jul/31/california-pete-wilson-governor-affirmative-action [https://perma.cc/CM9N-Y9C9].

7. *See infra* Section III.A.

8. *See id*.

This stereotyping is not just a malady of bygone decades or the product of groupthink during wartime or terrorist attacks. Contemporary federal courts continue to paint immigrants as economic, cultural, and criminal threats in everyday civil and criminal matters. A set of less-heralded cases dealing with the Second Amendment rights of noncitizens places the immigrant–danger nexus in sharp relief.[9] In those cases, currently percolating in multiple lower federal courts across the country,[10] courts must either embrace or reject government justifications that rely on the presumed public safety threat of noncitizens. This Article examines the relationship between immigrants and dangerousness in that context, arguing that courts must tread carefully in these contemporary noncitizen gun cases lest they reinstantiate the xenophobia of the past. Courts' acceptance of the immigrant–danger trope not only belies available empirical evidence regarding immigrants and violent crime, it also undermines the Supreme Court's newly announced principles of Second Amendment analysis, delegitimizing its professed fidelity to historical inquiry and its focus on individualized threat determinations.

The Supreme Court's trio of Second Amendment cases from the past sixteen years—*District of Columbia v. Heller*,[11] *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[12] and *United States v. Rahimi*[13]—provide lower courts with the doctrinal basis to scrutinize and strike down gun restrictions. Simultaneously, however, they permit courts to consider dangerousness in determining if banning gun possession is proper, a principle that conveniently can be deployed to reject Second Amendment challenges by particular individuals or groups. The federal government in *Rahimi* defended the constitutionality of a federal firearms law that criminalized possession by those subject to a domestic violence restraining order by arguing that Founding Era gun laws included gun restrictions based on "dangerousness."[14] In siding with the government, the Supreme Court opined that legislatures could ban those who "pose a credible threat to the physical safety of another."[15]

Grounding Second Amendment analysis in a dangerousness or threat principle has much to commend it, judged either by historical harbingers or the need to address modern-day public safety exigencies. Indeed, the *Rahimi* majority seemed to revel in the convenient convergence between history and common sense in that case.[16] The Court's comfort with considering the threat posed by those like Rahimi

9. *See infra* Section III.B.

10. *See infra* notes 235–38.

11. 554 U.S. 570 (2008) (ruling that the Second Amendment protects an individual right to possess firearms for self-defense and striking down D.C.'s virtual ban on handgun possession).

12. 597 U.S. 1 (2022) (striking down discretionary permitting for issuance of concealed carry licenses and directing courts to evaluate gun restrictions using "text, history, and tradition").

13. 602 U.S. 680 (2024) (upholding federal criminal prohibition on possession by those subject to a civil restraining order).

14. United States v. Rahimi, 61 F.4th 443, 456–57 (5th Cir. 2023); *see also* Brief for Petitioner at 7, 22–23, 28, 42–43, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915).

15. *Rahimi*, 602 U.S. at 702.

16. *See id.* at 698 ("Taken together, the [historical record of surety and going armed laws] confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.").

appears widely shared. Scholars and courts across the ideological spectrum have countenanced some form of dangerousness principle as both a historically derivable and practically workable standard for gun prohibitions.[17] Indeed, prior to both *Bruen* and *Rahimi*, then-Circuit Judge Amy Coney Barrett insisted that "legislatures have the power to prohibit dangerous people from possessing guns," even as she voted to strike down the application of a felon-in-possession law.[18]

When applying such a principle, can legislatures categorically define entire groups of individuals as dangerous or threatening? The *Rahimi* majority left the question of categorical group-based exclusions open, noting that it need not answer it to uphold the federal criminal law in that case.[19] Unlike the civil order provision, however, most other federal and state group prohibitions do not require an individual hearing or finding of particularized threat prior to disarmament.[20] In the felon-in-possession context, some judges have understood the status of "felon" to operate as a sufficient proxy for dangerousness,[21] while others have insisted that dangerousness requires more individualized assessment, leading them to conclude felons cannot be categorically disarmed.[22] For example, the Third Circuit en banc struck down the federal felon-in-possession ban as applied to an individual convicted of making false statements to procure food stamps, opining that the government's attempt to "stretch dangerousness" to cover non-violent felons was "far too broad."[23]

Among the other group-based exclusions that do not require an individualized determination of public safety threat or danger are federal and state prohibitions on gun possession by several classes of noncitizens. Currently, several state and

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17. *See, e.g.*, Peter N. Salib & Guha Krishnamurthi, *Will* Bruen *Kill Cops?*, 93 FORDHAM L. REV. ONLINE 11, 19, 27–28 (2024); Natalie Nanasi, *Reconciling Domestic Violence Protections and the Second Amendment*, 59 WAKE FOREST L. REV. 131, 168–70 (2024); F. Lee Francis, *Defining Dangerousness: When Disarmament is Appropriate*, 56 TEX. TECH L. REV. 593, 596–97 (2024).

18. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

19. *Rahimi*, 602 U.S. at 698–99 ("While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, we note that Section 922(g)(8) applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another.") (citation omitted).

20. *See generally Firearm Prohibitions*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/firearm-prohibitions/ [https://perma.cc/TF35-68MF] (last visited Oct. 26, 2025) (cataloging various types of gun restrictions at the state level).

21. *See, e.g.*, United States v. Torres, 911 F.3d 1253, 1254 (9th Cir. 2019) ("[T]he government has a strong interest in preventing people who already have disrespected the law (including . . . felons) . . . from possessing guns." (quoting United States v. Meza-Rodriguez, 798 F.3d 664, 673)) (alterations omitted).

22. *See, e.g.*, Range v. Att'y Gen., 124 F.4th 218, 230–32 (3d Cir. 2024) (striking down federal felon-in-possession law as applied) (en banc rehearing after remand from the Supreme Court post-*Rahimi*). *See generally* Chip Brownlee, *More Than a Thousand Felons Have Challenged Their Gun Bans Since the Supreme Court's* Bruen *Decision*, THE TRACE (Sep. 12, 2024), https://www.thetrace.org/2024/09/felon-gun-ban-law-bruen-supreme-court/ [https://perma.cc/TDK9-SU3C].

23. *Range*, 124 F.4th at 229–30. The defendant in *Range* was convicted of the felony of making false statements to procure food stamps. *Id.* at 231.

federal laws condition aspects of gun ownership, if not outright forbid it, on immigration status. Some state enactments from the early-twentieth century were repealed or otherwise struck down by state courts as violative of state constitutions,[24] but several regulations persist today.[25] Federal immigration law makes violation of a firearms law a basis for deportation.[26] Federal criminal law renders gun possession by persons "illegally or unlawfully in the United States" a federal crime, codifying that prohibition in 18 U.S.C. § 922(g)(5),[27] adjacent to the federal felon-in-possession ban and the provision at issue in *Rahimi*.[28] Most federal courts that have considered noncitizens' Second Amendment challenges have rejected them, either by excising noncitizens or unlawfully present noncitizens completely from "the people" of the Second Amendment, analogizing unlawfully present noncitizens of today to prohibited groups of the Founding Era like Loyalists to the British Crown,[29] or—as is the focus of this Article—by opining that legislatures may ban immigrant gun possession by imputing dangerousness based on immigration status.[30] Importantly, no court upholding the criminal prohibition has required an individualized determination of dangerousness.

No current academic literature addresses federal courts' conflation of immigrants with danger or criminality in the context of firearms restrictions. This Article rectifies that deficit and makes three novel contributions to both Second Amendment and immigration law scholarship. First, it provides a taxonomy of the various judicial approaches to rejecting noncitizens' Second Amendment claims, showing why and how dangerousness may soon become the dispositive concern for courts in immigrant gun cases. Second, this Article's critique of these judicial approaches demonstrates how courts have explicitly and implicitly instantiated a two-tier constitutional system that systemically degrades fundamental protections for noncitizens. Regardless of judicial approach, federal courts have engaged in bespoke Second Amendment analysis when the subjects of regulation are noncitizens. Third, this Article highlights the unsubstantiated assumptions about dangerousness and public

24. *See, e.g.*, Sandiford v. Commonwealth, 225 S.E.2d 409, 411 (Va. 1976) (reversing conviction of unnaturalized noncitizen convicted of illegal possession of a "sawed-off shotgun for an offensive or aggressive purpose"); People v. Rappard, 104 Cal. Rptr. 535, 536–37 (Cal. Ct. App. 1972) (striking down state law conditioning gun possession on citizenship).

25. *See, e.g.*, N.Y. PENAL LAW § 256.01(5) (2024) (banning noncitizen possession of firearm, with exceptions); MINN. STAT. § 624.719 (1986) (bar on nonresident possession); VA. CODE ANN. §18.2-308.2:01 (2008) (ban on noncitizen, nonresident possession); ARK. CODE ANN. § 5-73-309(1) (2024) (ban on noncitizen, nonresident ability to receive concealed carry permit).

26. 8 U.S.C. § 1227(a)(2)(C) (making certain firearms convictions deportable offenses).

27. Note that § 922(g)(5) contains two provisions: § 922(g)(5)(A) bars possession for noncitizens "illegally or unlawfully in" the country; § 922(g)(5)(B) bars possession by nonimmigrants, with an exception for nonimmigrants who may have permission to possess a gun for competitions or have a hunting or sporting license. 18 U.S.C. § 922(g)(5)(A)–(B).

28. 602 U.S. 680 (2024) (evaluating constitutionality of § 922(g)(8)).

29. *See infra* Section II.B.

30. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978, 987, 989 (8th Cir. 2023); United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1075 (D. Nev. 2023) ("[A]rmed, unlawful aliens could pose a threat to . . . law enforcement who attempt to apprehend and remove them." (quoting United States v. Torres, 911 F.3d 1253, 1254 (9th Cir. 2019))).

threat courts have indulged when evaluating firearms restrictions on noncitizens, connecting current jurisprudence on noncitizens and firearms to a long judicial history of xenophobic stereotyping. Ultimately, this Article argues that courts must harmonize and consistently apply constitutional methodology, even when the regulated category is the politically unpopular population of unlawfully present persons and even when the regulatory subject is their firearm possession. Because the subjects of these regulations are guns and immigrants—both of which have been subject to exceptional and underappreciated interpretative modes[31]—careful attention to the jurisprudential framework is critical. How courts choose to resolve noncitizens' firearms rights against Second Amendment challenges can impact constitutional jurisprudence generally, immigration jurisprudence generally, or both together in ways thus far undertheorized in scholarly literature in either field.

This Article proceeds in four parts. Parts I and II, respectively, address the two dominant strands of jurisprudence on noncitizens' firearms rights thus far. Part I critiques courts that excise noncitizens from the "the people" of the Second Amendment and courts that deploy deferential judicial review because they view gun restrictions on noncitizens as immigration regulation.[32] These paths to denying the Second Amendment rights of noncitizens clash with and potentially weaken other Bill of Rights protections for noncitizens, including diminished guarantees in criminal proceedings. Part II then critiques courts' reliance on historical gun regulations to uphold modern noncitizen gun prohibitions. It argues that courts must ignore our sordid past of citizenship-based firearms restrictions intended to maintain white supremacy and that courts place outsized reliance on laws enacted to disarm Loyalists to the British Crown during the Revolutionary War. Neither is a justifiable or defensible use of history.

While these two judicial approaches have thus far dominated noncitizens' right to bear arms challenges, *Rahimi* centralized considerations of dangerousness.[33] Thus, the core focus of this Article is Part III, which assesses courts' use of the dangerousness principle to reject challenges by noncitizens. In theory, dangerousness represents a sensical way to tether historical gun laws to present-day group restrictions on firearm possession. Applying that framework in the context of unlawfully present noncitizens, however, requires care and nuance thus far not evidenced in judicial decisions. Specifically, Part III argues that foreigners have

31. *See generally* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329 (2024); Pratheepan Gulasekaram, *Second Amendment Immigration Exceptionalism*, 77 VAND. L. REV. EN BANC 51 (2024); Darrell Miller, *What's So Special About the Right to Keep and Bear Arms*, DUKE CTR. FOR FIREARMS L. BLOG (Dec. 20, 2023), https://firearmslaw.duke.edu/2023/12/whats-so-special-about-the-right-to-keep-and-bear-arms [https://perma.cc/G3MF-KUC9]; Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65 (2023).

32. This exclusion based on identification of rightsholders in the text of the Amendment is termed by some commentators as "*Bruen* Step One" and by others as "*Bruen* Step Zero," to the extent the court relies on *Heller*'s "law-abiding citizen" language. *See* Jeff Campbell, *There is No* Bruen *Step Zero: The Law-Abiding Citizen and the Second Amendment*, 26 UDC L. Rev. 69, 70–71 (2023); Leo Barnabei, Note, Bruen *as* Heller*: Text, History, and Tradition in Lower Courts*, 92 FORDHAM L. REV. ONLINE 1, 18 (2024). For purposes of this Article, how one characterizes *Bruen*'s analytic stage is irrelevant.

33. United States v. Rahimi, 602 U.S. 680, 698 (2024).

long been assumed to be dangerous in the American legal and jurisprudential tradition, but often that tradition has reflected xenophobic and racialized fear, rather than any verifiable correlation with public safety threats. As such, modern courts must reconsider the assumptions underlying their decisions to uphold categorical disarmament of unlawfully present noncitizens. Finally, Part IV compares the dangerousness calculation for unlawfully present noncitizens to other group-based prohibitions, arguing that consistent and uniform consideration of dangerousness need not yield similar outcomes for every prohibited group. The Article concludes by suggesting alternative ways of evaluating noncitizen gun restrictions.

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A final introductory note before beginning. As I have done with my prior work on this topic, I wish to state unequivocally that I do not write to advance a deregulatory firearms agenda. I believe that the Second Amendment can and should be read to permit comprehensive firearm restrictions for all persons in the United States. My primary purpose is to interrogate discrimination against noncitizens with regards to fundamental constitutional guarantees. The Second Amendment provides a particularly revealing prism through which to determine constitutional rightsholders and evaluate the judicial methodology used to identify them. Equality in the right to bear arms might facilitate a general constitutional order that protects all persons regardless of immigration status.

I. IMMIGRATION EXCEPTIONALISM AND THE SECOND AMENDMENT

At least in relationship to modern mainstream constitutional jurisprudence, at times immigration law is notoriously exceptional.[34] Often citing the Court's first cases testing Congress's admissions policies,[35] modern federal courts, including the Supreme Court, sometimes apply lax and highly deferential standards to constitutional claims by noncitizens.[36] This deficit is most notable in the area of

34. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583 (2017); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."). Importantly, Adam Cox recently argued in response to many scholars that immigration jurisprudence accorded with general constitutional and administrative law analysis from at least the late 1800s until the mid-to-late 1900s, and that clear examples of immigration exceptionalism are a recent invention of the past few years. Cox, *supra* note 31, at 329. Even under Cox's conception, contemporary immigration constitutionalism—at least as it concerns due process and First Amendment analysis—departs from mainstream constitutional analysis in those areas.

35. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (upholding Chinese Exclusion Act). *But see* Cox, *supra* note 31, at 346 (arguing that the Court's Chinese Exclusion Era cases do not reflect exceptional constitutional modes of interpretation).

36. *See, e.g.*, DHS v. Thuraissigiam, 591 U.S. 103, 103, 140 (2020) (denying habeas and due process protections to unauthorized noncitizen attempting to challenge legality of expedited removal proceedings and denial of asylum claim); Trump v. Hawaii, 585 U.S. 667, 710 (2018) (upholding, against First Amendment challenge, Presidential Proclamation banning noncitizens from several majority-Muslim countries).

individual rights where courts have rejected noncitizens' equal protection, due process, and First Amendment challenges by deferring to Congress's power to make rules for noncitizens that would be unacceptable if applied to citizens.[37] This exceptionalism, however, has limits. The Supreme Court has blessed this exceptionalism with regards to federal admissions and deportations policies, but not with regards to domestic criminal enforcement.[38]

Post-*Heller* and even sometimes post-*Bruen*, some lower courts have adopted this judicial mode in gun possession cases involving noncitizens either to reject Second Amendment protection altogether or to exempt that category of right to bear arms cases from *Bruen*'s prescribed inquiry. The former approach relies on textual exegesis, the latter on a structural inference. First, Section A below explains how courts have posited that noncitizens, or at least unlawfully present noncitizens, simply are excluded from Second Amendment protections because they cannot be part of "the people" who may keep and bear arms. Second, Section B reviews how one court recently posited that, as a structural separation of powers matter, federal courts should not overrule Congress's decisions regarding noncitizens.[39] Thus, that court exempted the federal alien-in-possession ban from *Bruen*'s methodology, even as it implied that all other group-based gun restrictions must meet that constitutional standard.[40] With either tack, noncitizens are excised completely from the Second Amendment. Underappreciated is the broader impact of this form of analysis on other constitutional rights, including its potential to calcify a two-tier constitutional structure based on citizenship status.[41]

A. EXCLUDING NONCITIZENS FROM "THE PEOPLE"

Both pre- and post-*Bruen*, some federal courts have avoided meaningful scrutiny of the federal prohibition on noncitizen possession by cutting noncitizens out of "the people" of the Second Amendment. As I have detailed elsewhere,[42] however, equating "the people" with citizens cannot be squared with history, save for judicial interpretations premised on racial subordination. The Constitution enumerates "citizens" and "citizenship" for specific provisions,[43] suggesting that "the people"—if

37. *See* Rubenstein & Gulasekaram, *supra* note 34, at 594–95.

38. *See infra* Sections I.A. and I.B.

39. *See* United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1254 (E.D. Wash. 2024); *infra* Section I.B.

40. *See Vazquez-Ramirez*, 711 F. Supp. 3d at 1254 (noting that *Bruen* required the government to show "that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." (quoting Bruen v. Heller, 597 U.S. 1, 19 (2022)).

41. Before proceeding, I should note that I have addressed both forms of exceptionalism in recent scholarship. See generally Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437 (2023), which provides an in-depth analysis of whether noncitizens, including unlawfully present noncitizens, are part of "the people"; and Pratheepan Gulasekaram, *Second Amendment Immigration Exceptionalism*, 77 VAND. L. REV. EN BANC 51 (2024), which focuses on courts' broad structural deference to Congress in enacting firearms laws for noncitizens. Below, I draw from that research and highlight the system-wide effects of subscribing to either approach.

42. *See generally* Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41.

43. *See, e.g.*, U.S. CONST. art. I, § 3 (citizenship as a qualification for Senate); U.S. CONST. art. II, § 1 (being a "natural born Citizen" as a qualification for Presidency); U.S. CONST. art. IV (specifying the privileges and immunities of the "Citizens" of each state); U.S. CONST. amend. XIV, § 1 (providing that

it contemplates specific rightsholders at all—cannot mean the same thing as "citizen." Studies of the meaning of the phrase by scholars in other disciplines further supports the notion that "the people" has no fixed meaning, at least with regards to identifying or delimiting specific populations of rightsholders.[44]

The anti-canonical case of *Dred Scott v. Sandford* was the Supreme Court's first attempt to inscribe content to "the people."[45] In doing so, however, the Court expressly equated "the people" with white citizens, thus ruling that no Black person, whether free or enslaved, could invoke the jurisdiction of federal courts as a citizen of the United States.[46] The Court limited the racial ambit of both "the people" and citizenship expressly because recognizing a broader "the people" would have allowed non-whites to exercise and enjoy Bill of Rights guarantees.

The Supreme Court revisited the scope of "the people" 133 years later in *United States v. Verdugo-Urquidez*.[47] *Verdugo* produced a fractured opinion, holding that to that the extent "the people" denoted rightsholders, it included an indeterminate class of noncitizens defined case-by-case based on the quality and quantity of their connections to the "national community."[48] Importantly, *Verdugo* preserved the possibility that an unlawfully present noncitizen with sufficient ties to the nation might be considered part of "the people" protected by the Fourth Amendment.[49] Subsequently, *Heller* (while purporting to affirm *Verdugo*'s principle) posited without explanation or justification that "the people" meant all those with connections to the "political community," referencing Second Amendment rightsholders as "Americans" and "law abiding citizens."[50]

Today some federal courts have adopted *Heller*'s obiter dicta delimitation of rightsholders wholesale.[51] The Fifth and Eighth Circuits, for example, held both that "the people" of the Second Amendment is not coterminous with "the people" in other Bill of Rights protections and, further, that only citizens are part of the "the people" who may keep and bear arms.[52] The Eleventh Circuit, in comparison, started with the proposition that noncitizens may be part of the "the people," but concluded that unlawfully present ones could not be.[53] Those formulations, and especially *Heller*'s limitation of "the people" to the "political community,"

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all those born in the United States, and subject to the jurisdiction thereof, are "citizens" of the United States).

44. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, 208–09 (1978); *see also* Catherine Y. Kim, *Citizenship Outside the Courts*, 57 U.C. DAVIS L. REV. 253, 256 (2023).

45. 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

46. *Id.* at 404, 407.

47. 494 U.S. 259 (1990) (decided 133 years after the 1857 decision in *Dred Scott*).

48. *Id.* at 265.

49. *Id.* at 265, 272–73.

50. District of Columbia v. Heller, 554 U.S. 570, 580–81, 625 (2008).

51. *But see, e.g.*, United States v. Meza-Rodriguez, 798 F.3d 664, 669 (7th Cir. 2015) (declining to adopt *Heller*'s restrictions on "the people" because it identified that portion of the Court's opinion as dicta).

52. United States v. Medina-Cantu, 113 F.4th 537, 542 (5th Cir. 2024) (relying on United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)); United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023).

53. United States v. Jimenez-Shilon, 34 F.4th 1042, 1045, 1049 (11th Cir. 2022).

reduce "the people" to some subset of citizens, as they emphasize current, future, or potential ability to participate in democratic self-governance.[54] Yet, at least since the late nineteenth century, neither the Bill of Rights guarantees nor constitutional protections that inure to "the people" or to "persons" have been limited to citizens or a subclass thereof.[55]

Moreover, such an interpretation reverberates beyond the Second Amendment, exacerbating legitimacy concerns for law enforcement practices. For example, while constraining "the people" of the Second Amendment, *Heller* also notes that the phrase appears in the First and Fourth Amendments and should be read consistently throughout those iterations, consistent with principles of intratextual analysis.[56] If so, then the Fourth Amendment guarantee against unreasonable searches and seizures also only covers "law-abiding citizens."[57] As an initial matter, such an interpretation would lead to the absurd consequence of requiring a conclusion that a person is "law-abiding" before they could exercise Fourth Amendment rights, with the added absurdity that the more law-abiding one is, the less likely they will need to assert the Fourth Amendment. Moreover, the legality of police searches or detentions would depend on immigration status, which in many cases may only be revealed well after the search or seizure. The warrant requirement prior to a search would apply depending on the presence or not of citizens. In criminal trials, the admissibility of evidence subject to the exclusionary rule might vary depending on the immigration status of the defendant, a concern wholly divorced from the defendant's underlying conduct and whether that conduct meets the elements of a crime.[58] In sum, courts that have read "the people" of the Second Amendment narrowly while maintaining the phrase's interpretive consistency with other constitutional provisions, appear to have ignored or undertheorized the systematic effects of their reasoning.

Federal courts might ignore *Heller*'s (and *Verdugo*'s) admonitions to interpret "the people" of the Second Amendment consistently with the phrase's use in other amendments. Doing so, however, requires a theory explaining why rightsholders of the Second Amendment are distinct from rightsholders in other fundamental constitutional guarantees, despite same verbiage being used to describe them. Thus far, no court has proffered such theory or rationale, save a half-hearted and unconvincing

54. Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1087 (2013) (noting the various possibilities identifying members of the "political community").

55. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (rejecting Texas' argument that unlawfully present children were outside protection of the Equal Protection Clause); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding a violation of the Fifth Amendment's Due Process Clause in claim raised by deportable noncitizens); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (permitting noncitizens to raise Equal Protection Clause claim against city laundry ordinance).

56. District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008) (attempting to harmonize interpretation of "the people" across uses in the Bill of Rights); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 759 (1999).

57. *See Heller*, 554 U.S. at 635 (the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); U.S. CONST. amend. IV.

58. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1496–97.

attempt by the Fifth Circuit.[59] That court's view, however, contradicts *Heller*, which reads the phrase consistently across its uses in the Bill of Rights.[60] To be sure, despite the absence of a cogent defense in case law, it may be possible to differentiate Second Amendment rightsholders from those in the First and Fourth Amendments based on the respective purposes of the three provisions.[61] Far from justifying a limitation of "the people" to citizens for the right to bear arms, however, a purposivist inquiry into the three amendments suggests the opposite. Whereas it may be possible to defend exclusion of noncitizens from certain aspects of First and Fourth Amendment protection, the Court's insistence that an individualized right of armed self-defense animates the Second Amendment mandates that it must be read to cover a broad population of individuals, irrespective of immigration status.[62]

B. IMMIGRATION PLENARY POWER AND FIREARM REGULATION

While excising noncitizens from "the people" textually excludes them from the right to bear arms, at least one court has relied on structural inferences to achieve the same result. In *United States v. Vazquez-Ramirez*, one federal court took the surprising tack of exempting the federal ban on possession by the unlawfully present from mainstream constitutional review.[63] Instead, in contrast to every other federal court having considered the issue,[64] the district court held that the judiciary's role was quite limited when it came to federal criminal law targeting noncitizens.[65]

To be sure, since the Court's consideration of the first federal immigration laws, broad structural deference to the federal political branches has been a defining feature. Employing what scholars would later term the "plenary power doctrine,"[66] the Court provided Congress significant leeway in making admissions and deportations policy and in delegating authority to the Executive to enforce

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59. United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011) (contrasting "the people" of the Second Amendment from "the people" of the Fourth Amendment because one protected an "affirmative" right and the other a "protective" right).

60. *See Heller*, 554 U.S. at 579–80.

61. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1498–99 (proffering a possible rationale for differentiating rightsholders protected by the various uses of "the people" in the Bill of Rights).

62. *See id.* at 1501–18.

63. *See* 711 F. Supp. 3d 1249, 1259–60 (E.D. Wash. 2024). For full disclosure, I served as an expert witness on behalf of the defendant, Oscar Vazquez-Ramirez, submitting a written Declaration and providing live testimony on the background of 18 U.S.C. § 922(g)(5) and the regulation of gun possession by noncitizens. *See id.* at 1258 (noting my involvement in the case).

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

65. *See Vazquez-Ramirez,* 711 F. Supp. 3d at 1255, 1259–60.

66. In immigration law, the "plenary power doctrine" is the term given to the significant judicial deference provided to Congress when making immigration decisions, thus insulating broad exercises of federal authority. Although many scholars trace the doctrine's origin to the Chinese exclusion cases, recent work by Adam Cox argues that the Court's early views on Congress's regulatory power of immigration may have been unexceptional, given the jurisprudence of the time. Cox, *supra* note 31, at 332–33.

such policy.[67] Over time and cases, this deferential jurisprudence arguably has led to immigration exceptionalism in constitutional law, which scholars have attempted to rationalize, minimize, and/or criticize.[68] Importantly, while this exceptionalism expressly gives Congress wide berth to discriminate because of citizenship status, its scope of application is limited. The Court has extended its structural deference only to admissions, deportations, and the terms and conditions of various immigration statuses.[69]

Vazquez-Ramirez, however, expanded this judicial deference into the realm of domestic criminal law and Bill of Rights protections. Rejecting the noncitizen defendant's Second Amendment challenge to the constitutionality of a § 922(g)(5) charge, the court's primary rationale eschewed *Bruen*'s methodology, instead wholly exempting the federal law from the mainstream constitutional inquiry.[70] The court flatly posited, "*Bruen*'s new test does not apply to § 922(g)(5) in the same way that it applies to other § 922(g) provisions . . . because the statute focuses on noncitizens."[71] Accordingly, its evaluation of the federal criminal ban was limited to its most deferential scrutiny, predictably leading to the conclusion that criminalizing unlawfully present persons' gun possession was reasonably related to Congress's legitimate interests in promoting public safety.[72]

Perhaps unwittingly, for the first time in constitutional jurisprudence, the *Vazquez-Ramirez* court imported the Court's plenary power rationale to override an individual rights guarantee in the Bill of Rights, invoked to challenge a criminal prosecution.[73] The Supreme Court itself has limited its deference to political branches to admission and removal policies or to restrictions in federal public benefits that do not implicate any extant constitutional provisions.[74] Even as the Court permitted Congress to enact laws affecting noncitizens that would be "unacceptable if applied to citizens,"[75] it also clarified that such deference applied only when Congress addressed the "admission of aliens" or "the power to expel or exclude aliens."[76] Even the Court's most clear (and mostly indefensible)

67. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."); Chae Chan Ping v. United States, 30 U.S. 581, 606 (1889) (holding that the Court should defer to congressional determinations of admissions policy).

68. *See generally* Cox, *supra* note 31, at 341–42.

69. *See* Gulasekaram, *supra* note 31, at 53–55.

70. *See Vazquez-Ramirez*, 711 F. Supp. 3d at 1254, 1258–60.

71. *Id.* at 1254.

72. *Id.* at 1254–55, 1259–60.

73. *See id.* at 1254. *But see* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that the federal government violated noncitizens' Fifth and Sixth Amendment protections when it forced deportable noncitizens into hard labor prior to deportation).

74. Gulasekaram, *supra* note 31, at 53–55.

75. Mathews v. Diaz, 426 U.S. 67, 80 (1976) (upholding distinctions between citizens and certain classes of noncitizens with regards to eligibility for federal welfare benefits).

76. Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Fiallo *ex rel.* Rodriguez v. Bell, 430 U.S. 787, 793 & n.5, 795 n.6, nn. 5–6 (1977).

examples of immigration exceptionalism in modern jurisprudence—*Trump v. Hawaii* and *DHS v. Thuraissigiam*—addressed admissions and deportation policies.[77] Outside of admission and removal, the Court has extended exceptional deference only to federal welfare provisions,[78] to which no person regardless of citizenship status can claim a constitutional right.

Moreover, the Court has never suggested that noncitizens—even unlawfully present noncitizens—are stripped of Bill of Rights protections in the criminal process. In run-of-the-mill criminal settings, unlawfully present noncitizens have been able to invoke a variety of procedural and substantive guarantees.[79] This holds true even with regard to federal immigration-related crimes of unlawful entry or unlawful reentry,[80] which are the most prosecuted of all federal crimes.[81]

As such, the district court's primary rationale in *Vazquez-Ramirez* is novel as a jurisprudential matter and unfaithful to decades of high Court jurisprudence. The implications are shocking and reach much broader than textual excision of noncitizens (or unlawfully present noncitizens) from "the people" of the Second Amendment. In the Bill of Rights, the phrase delimits those who may invoke the petition and assembly rights in the First Amendment,[82] the right to keep and bear arms,[83] and the right against unreasonable searches and seizures.[84] By imputing immigration exceptionalism more broadly, *Vazquez-Ramirez*'s rationale cannot be cabined to gun possession, isolated Bill of Rights protections, criminal law, or just to unlawfully present noncitizens. Instead, the opinion's constitutional logic permits discrimination against all noncitizens, including lawful permanent residents, across any civil or criminal regulatory field. The logic at minimum would portend a two-tiered criminal justice system that would treat and punish citizens and noncitizens disparately for the same criminal conduct and more generally construct a separate Constitution in toto for noncitizens.[85]

The district court in *Vazquez-Ramirez* may not have considered or appreciated these far-ranging and systematic consequences. Indeed, the remainder of the opinion appends *Bruen* analysis as an alternative basis for the result.[86] This alternative basis renders the court's exceptionalism discussion unnecessary and therefore even more

77. *See generally* DHS v. Thuraissigiam, 591 U.S. 103 (2020); Trump v. Hawaii, 585 U.S. 667 (2018).

78. Gulasekaram, *supra* note 31, at 53–55.

79. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (holding that incorrect advice regarding the immigration consequences of a guilty plea provided by an attorney to a noncitizen-defendant in a criminal trial violated the noncitizen's Sixth Amendment right to effective assistance of counsel).

80. *See* Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (holding that Congress could not impose criminal punishment without judicial trial and adhering to Bill of Right protections).

81. *See* MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 307553, FEDERAL JUSTICE STATISTICS, 2022 1 (2024).

82. U.S. CONST. amend. I ("[T]he right of the people peaceably to assemble . . .").

83. U.S. CONST. amend II ("[T]he right of the people to keep and bear Arms . . .").

84. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .").

85. Gulasekaram, *supra* note 31, at 56–59 (arguing that the logic of exceptionalism in § 922(g)(5) cases cannot be cabined to Second Amendment claims and implicates other constitutional provisions).

86. United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1255–59 (E.D. Wash. 2024).

perplexing and insidious. Interpretative theories that promote unchecked federal authority over immigrants, even if rarely used or dispositive, are jurisprudential loaded guns, conveniently accessible in moments of real or perceived national crisis to instantiate xenophobic and draconian enforcement schemes against noncitizens, especially those from minoritarian racial and religious backgrounds.[87] Indeed, Justices like Samuel Alito seemingly aspire to a two-tiered Constitution that immunizes federal, state, or local governments from constitutional accountability for any form of discrimination or enforcement against noncitizens.[88] Although born of the niche intersection of guns and unlawfully present noncitizens, *Vazquez-Ramirez* reifies that broader constitutional vision.

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The two varieties of immigration exceptionalism outlined above are potentially far-reaching and impactful in ways thus far underappreciated by courts and commentators. To date, however, only a minority of courts that have considered the nexus of immigrants and firearms have adopted exceptionalist modes. Other courts have sidestepped the thorny questions of how to interpret "the people" and whether constitutional doctrine only covers the regulation of citizens. Instead, they have upheld § 922(g)(5) by searching through American legal history and tradition for regulations analogous to the modern prohibition on unlawfully present noncitizens.[89]

II. HISTORICAL GROUP-BASED PROHIBITIONS AND THE UNLAWFULLY PRESENT

Since *Bruen* instantiated a history-focused approach to the Second Amendment,[90] federal courts have increasingly tied their rejection of noncitizens' Second Amendment claims to their identification of founding era analogs. Rummaging through firearms regulations of the Founding Era yields two potential historical harbingers for modern-day gun regulations premised on citizenship status. One has mostly been left unmentioned by courts, while the other has been conjured by several courts seeking historical analogues for § 922(g)(5). First, during colonial, Founding, and post-ratification eras, several jurisdictions enacted race-based disarmament laws that doubled as proxies for disarming those outside of

87. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 679–80 (2018); Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) ("A military order, however unconstitutional, is not apt to last longer than the military emergency .... But once a judicial opinion rationalizes such an order ..., the Court for all time has validated the principle of racial discrimination .... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

88. *See generally* DHS v. Thuraissigiam, 591 U.S. 103 (2020) (Alito, J., authoring majority opinion denying habeas and due process rights to noncitizen); Kansas v. Garcia, 589 U.S. 191 (2020) (Alito, J., authoring majority opinion upholding application of state identity theft laws for regulation of noncitizen employment); Pratheepan Gulasekaram, *Immigration Enforcement Preemption,* 84 OHIO. ST. L.J. 535, 553-55 (2023).

89. *See infra* Part. II.

90. *See* 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring) (directing courts to evaluate gun restrictions using "text, history, and tradition").

the rights-bearing political community of white citizens.[91] Second, during the Revolutionary War, some colonies enacted ordinances providing for the disarmament of those loyal to the British Crown.[92]

This Part argues that courts must confront the noxious history of racially subordinating gun laws and that history should give judges pause when considering immigration-status-based disarmament, given that immigration law itself operated as a form of racial exclusion and subordination. Further, judicial attempts to analogize present-day disarmament of unlawfully present noncitizens to that of British Loyalists rest on faulty assumptions about how Loyalists were treated vis-à-vis membership in their respective political communities and gloss over legally relevant differences between categorical status-based prohibitions and those that turn on choices and attestations of loyalty.[93]

A. THE PROBLEM OF "SORDID" HISTORICAL SOURCES

Bruen's novel methodology, as applied to noncitizen gun regulation, is notable for the historical laws that litigants and courts conspicuously avoid mentioning. Namely, colonies and states in the Founding period maintained several exclusions based on race and enslaved status. Those racial exclusions were often framed in opposition to citizenship and membership in the American polity.[94] As such, they likely are the most relevant comparators to modern-day prohibitions based on immigration status but largely have been missing from federal courts' search for § 922(g)(5)'s historical antecedents.

Pre- and post-Ratification, several jurisdictions passed laws expressly prohibiting non-whites from owning firearms. These various colonial (and later state) laws in differing incantations forbade "negros," "mulattos," "mestizos," "Indians," "slaves," and "free negros" from possessing firearms.[95] At the time, racial categories also defined membership and inclusion in the national and political communities of the nation. Indeed, they were often juxtaposed with "citizens" or "white citizens" during a time when only whites could be citizens of states or the United States.[96] Prohibitions on gun trading with Native Americans typified the salience of both race and citizenship. State laws punished "citizens" engaging in gun

91. *See infra* Section II.A.

92. *See infra* Section II.B.

93. *See* Pratheepan Gulasekaram, *Loyalty Disarmament and the Undocumented*, 125 COLUM. L. REV. F. 29, 36–37 (2025).

94. *See* Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1478–79.

95. *See id.* at 1478–80, nn. 217–25 (collecting colonial, Founding, post-Ratification, and mid-19th century sources that conditioned firearms possession or use on membership and/or race); DUKE CTR. FOR FIREARMS L., *Repository of Historical Gun Laws,* https://firearmslaw.duke.edu/repository-of-historical-gun-laws/advanced-search [https://perma.cc/3XBZ-L42C] (last visited Oct. 26, 2025) (sources categorizing laws by "Subjects," including "Race and Slavery Based" laws); Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders, in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 131, 135–37 (Joseph Blocher et al. eds., 2023).

96. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103 ("That, any Alien being a free white person . . . may be admitted to become a citizen thereof . . . .") (repealed 1795).

transactions with "any Indian."[97] Early militia laws limited the duty and privilege of participating in the militia to "free, able-bodied, white male citizens," again directly conflating political membership in the state with firearm use, while excluding those outsiders who, at that time, could not lawfully become members of the political community of citizens.[98] In short, the most direct lineal ancestors of modern-day prohibitions on gun possession by noncitizens—constructed by law as outsiders to our national or political community—are those "sordid sources" of the late eighteenth and nineteenth centuries.[99]

In *Dred Scott v. Sandford*, the Supreme Court placed its imprimatur on this conflation of citizenship, race, and constitutional text. There, the Court infamously narrowed the scope of "the people" to white citizens, expressly arguing that any other interpretation would permit Blacks to wield firearms.[100] The relationship between these group-based exclusions and the regulation of noncitizen gun possession becomes even clearer considering the inextricable link between immigration regulation and race. Race determined whether one could acquire permission to enter the country from the beginning of federal immigration regulation until the mid-twentieth century.[101] Even after admission, acquiring citizenship was racially contingent until the mid-twentieth century, delimiting those with a claim on political participation and unquestioned ability to invoke constitutional protection—first to whites only, and then, post-Civil War, to whites and "persons of . . . African descent."[102] In accord, immigration-related crimes still in force were enacted with the purpose of removing particular racial minorities from the national community.[103] Indeed, both de jure and de facto racialized admissions policies continue today.[104]

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97. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1478–9, n.218 ("Nor shall any person sell, give or barter . . . any gun or guns, powder, bullets, shot, lead, to any Indian whatsoever, or to any person inhabiting out of this jurisdiction . . . ." (quoting Acts Respecting the Indians, ch. 58, § 2, 1633 Mass. Laws 37)).

98. *See, e.g.*, Act of June 22, 1793, § 2, reprinted in 2 *The Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807*, at 579 (Boston, J.T. Buckingham 1807) (limiting militia membership to eighteen- to forty-five-year-old "free, able-bodied white male citizen [s]" of Massachusetts or any other state).

99. Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 30–34 (2023).

100. Dred Scott v. Sandford, 60 U.S. 393, 404–05, 416–17 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

101. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18–40 (2004); Immigration Act of 1924, Pub. L. No. 68-139, § 4, 43 Stat. 153 (1924) (codifying national origins quotas that severely restricted immigration from outside Western and Northern Europe).

102. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006) (chronicling the decades of 'racial naturalization' cases).

103. *See* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053–54 (2022).

104. *See* E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 454 (2022) (arguing that the maintenance and regulation of national borders, though facially neutral, privilege whiteness); Gabriel J. Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271, 1278, 1285–87 (2020).

Despite the close ties between immigration control, gun regulation, and race, courts mostly have avoided invoking this particular legal tradition of Founding Era race-based firearms laws, but fail to explain their disutility in assessing present-day regulations on noncitizens. Professor Jacob Charles suggests that lawyers, courts, and commentators who countenance reliance on historical analogs can "embrace," "abstract," or "renounce" those historical laws that conditioned gun laws on expressly racial terms.[105] As per Charles, to embrace such laws would be to endorse them and the discrimination on which they are based; to abstract from such laws would be to condemn their historical application but to derive a general principle for contemporary use; and to renounce such laws would be to reject their contemporary relevance and legality, as reinvoking them reifies the harm and stigma to historically excluded populations.[106]

Most courts or elected officials would be unlikely to explicitly embrace such laws as guides for the present day. To do so would imbue the racially subordinating gun laws of yesteryear with dispositive power today, thereby running roughshod over modern anti-discrimination guarantees and equal protection jurisprudence. In comparison, some courts abstract from those prior gun laws, reasoning that colonies and states were focused on groups they perceived as threatening to the prevailing social order.[107] Certainly, at the time, wide-spread armament of slaves, free Blacks, and Indians would present existential threat to a society based on white nationalism. Abstracting from those laws then leaves us in the position of the Solicitor General in *Rahimi* or Justice Barrett prior to *Bruen*, arguing for a "dangerousness" principle to evaluate modern day restrictions.[108] Part III of this Article squarely considers this possibility and the concerns with its application in the specific context of noncitizens' firearm possession.

In Professor Charles' typology, this leaves renunciation as the final option for courts, including those considering the constitutionality of § 922(g)(5).[109] But, nearly every federal court upholding the federal alien-in-possession ban post-*Bruen* has done so with nary a mention of this odious history of gun regulation for the purposes of subordinating particular groups.[110] Perhaps some intend their non-acknowledgement to function as an implicit renunciation. Surely, however, many judges may be concerned that surfacing this white nationalistic past undermines the history-focused judicial project in general, including *Bruen*'s "originalism-by-analogy" sub-species of originalism.[111] This concern might be especially

105. Charles, *supra* note 99, at 34–35.

106. *Id.*

107. *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 698 (2024); Kanter v. Barr, 919 F.3d 437, 45 (7th Cir. 2019) (Barrett, J., dissenting).

108. Brief for the Petitioner at 7, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915); *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

109. *See* Charles, *supra* note 99, at 35; *cf.* Ahilan T. Arulanantham, *Reversing Racist Precedent*, 112 GEO. L.J. 439, 459 (2024) (arguing that modern courts must acknowledge the racist foundations of prior cases, and explain why modern cases can be resolved without relying on the racist principles that underly prior jurisprudence).

110. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978 (8th Cir. 2023).

111. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28–29 (2022).

pressing with regards to the regulation of noncitizens, given that immigration admission and enforcement has explicitly operated as a proxy for white nationalism.[112] As a result, courts appear willing to paint an incomplete historical picture of the nature of status-based firearms regulations, and the specific exclusion of outsiders to the political community.[113] Doing so serves instrumental ends, but deepens the intellectual bankruptcy of history-focused judicial methodologies.

Whatever the reason, as a practical matter, ignoring those sordid sources takes those discriminatory historical laws off the table as comparators for modern-day regulation. The result is that litigators and judges are relegated to relying on other group or status-based prohibitions from the Founding Era as ancestors of current status-based regulations. Thus, the disarmament of British Loyalists during the Revolutionary War awkwardly takes center stage.[114]

B. THE UNLAWFULLY PRESENT AND BRITISH LOYALISTS

To many who do not follow the Court's Second Amendment jurisprudence closely, it may seem outlandish to query the constitutionality of the federal alien-in-possession ban, first enacted in 1968,[115] by inquiring about the meaning of colonial statutes in the 1770s disarming individuals sympathetic to a nation with which the colonies were at war.[116] Yet, purporting to keep faith with *Bruen*, several federal district courts and at least one circuit court have done just that, equating British Loyalists with those in violation of immigration laws.[117]

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112. *See, e.g.*, Muzaffar Chishti & Julia Gelatt, *A Century Later, Restrictive 1924 U.S. Immigration Law Has Reverberations in Immigration Debate*, MIGRATION POL'Y INST., May 15, 2024, https://www.migrationpolicy.org/article/1924-us-immigration-act-history [https://perma.cc/B3QJ-ZE3J]; Fish, *supra* note 103, at 1054; Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200–01 (2019); *see also* Arulanantham, *supra* note 109, at 444, 82–83.

113. *See* Christina Mulligan, *Diverse Originalism, History & Tradition*, 99 NOTRE DAME L. REV. 1515, 1516 (2024).

114. Note that Section II.B below summarizes a prior, more focused examination of the Loyalist gun law analogy in Gulasekaram, *Loyalty Disarmament & the Undocumented*, 125 COLUM. L. REV. F. 29 (2025).

115. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 922 82 Stat. 1213 (current version at 18 U.S.C. § 922 (1968)).

116. *See, e.g.,* A.W. Geisel, Rearmament and the Constitution 11 (May 24, 2024) (unpublished manuscript) (on file with author) ("American Revolution-era colonial laws that demanded the disarmament of loyalists, defectors, and anyone else who refused to swear an oath of allegiance . . . . — wartime measures passed in a state of emergency and likely designed as much to ensure adequate munitions for the rebels as they were to ensure public safety—are probably not the most probative evidence concerning the way the later-enacted Second Amendment would have been understood to apply, in peacetime, to people who could demonstrate that they pose no threat to the safety of others").

117. *See, e.g.*, United States v. Jimenez-Shilon, 34 F.4th 1042, 1047–49 (11th Cir. 2022); United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1258–9 (E.D. Wash. 2024); United States v. Leveille, 659 F. Supp. 3d 1279, 1283–84 (D.N.M. 2023); United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1070–71 (D. Nev. 2023); United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124, 128–29 (D.P.R. 2023); United States v. DaSilva, No. 21-CR-267, 2022 WL 17242870, at *8–10 (M.D. Pa. Nov. 23, 2022); United States v. Carbajal-Flores, No. 20-cr-00613, 2022 WL 17752395, at *3–4 (N.D. Ill. Dec. 19, 2022); *see also* United States v. Perez, 6 F.4th 448, 462–63 (2d Cir. 2021) (Menashi, J., concurring) (citing historic loyalty-based disarmament laws, but using a tiers of scrutiny approach pre-*Bruen*).

This analogy, however, fails for four reasons which several courts have glossed over in their seeming haste to dispose of noncitizens' constitutional claims and avoid *Bruen*'s politically unpopular consequences.[118] First, Loyalists living in the colonies during the Revolutionary period were not considered outsiders to the political community.[119] Second, statutes disarming Loyalists were triggered or forestalled by active choice and conduct, rather than by a fixed background condition.[120] Third, the national security exigency of disarming Loyalists, who rejected the existence of an independent nation, cannot be squared with the goals of unauthorized noncitizens who presumably migrated because they desire the nation to exist and flourish, as they integrate into its civic and economic fabric.[121] Finally, to the extent attestations of loyalty matter for present-day gun possession, the comparison to Loyalist disarmament is dramatically underinclusive, and better serves as the historical analogue to other extant federal regulations premised on oath-taking.

For some courts, the critical connection between those who violate immigration laws and those remaining loyal to the British Crown is the perception that both categories are outsiders to their respective political communities. Presently, federal and state laws for the most part exclude unlawfully present persons from voting and other forms of self-governance, including elected office and jury service.[122] When prosecuted for their immigration violations, as non-members of the political community, unlawfully present noncitizens can be, and sometimes are, banished from the country,[123] a fate from which members of the political community are immune. The defect in this line of reasoning, however, is that Loyalists to the British monarchy who lived in the colonies were not treated as outsiders. Professor Amanda Tyler's historical research instead reveals that "the dominant understanding" during the Revolutionary War was that "those disaffected to the American cause [were] squarely within the political community of rights-bearing members."[124] These Founding Era laws thus turned on a division within the political community, rather than separating members of the political community from outsiders to that community.

Second, as the Supreme Court instructs, the comparative mechanics of historical and current gun prohibitions are not only important, but dispositive.[125]

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118. *See* cases cited *supra* note 117.

119. Amanda L. Tyler, Rahimi*, Second Amendment Originalism, and the Disarming of Loyalists During the American Revolution*, LAWFARE (Nov. 30, 2023, at 13:32 ET), https://www.lawfaremedia.org/article/rahimi-second-amendment-originalism-and-the-disarming-of-loyalists-durin g-the-american-revolution [https://perma.cc/P4KM-54B7].

120. *See infra* note 126.

121. Gulasekaram, *supra* note 93, at 37.

122. *See* U.S. CONST. art. I, § 2 (limiting eligibility for federal elected office to "citizens"); 28 U.S.C. §1865(b) (barring noncitizens from federal jury service).

123. *See* 8 U.S.C. § 1182(a) (listing categories of individuals ineligible for visas to enter the country); 8 U.S.C. § 1227(a) (listing categories of deportable noncitizens, including provisions for temporary or permanent bans from reentering the United States).

124. Tyler, *supra* note 119; *see also* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 109 (2017).

125. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022) (instructing lower courts to use the metrics of "how" and "why" to determine the adequacy of a historical analogue).

The Loyalist disarmament laws were structured and triggered differently than present-day disarmament of unlawfully present noncitizens. With regards to the "how" of Loyalist disarmament, those historical laws required responsive, affirmative conduct by those who were to be disarmed, with the ultimate disposition dependent on that response.[126] The various colonial-era laws empowered a local official—sometimes the head of the local militia—to disarm an individual who refused to take an oath or affirmation of fidelity to the cause of independence.[127] In other words, the statutes always presented the individual with an opportunity to verify that their firearm possession would not pose an existential threat to the emerging states.[128] Indeed, in *Rahimi*, the Court predicated its ruling on the existence of a prior judicial hearing in which there was an individualized determination of the safety concerns presented by the defendant.[129] In contrast, § 922(g)(5) turns on a background status that likely was triggered by an immigration violation from years, if not decades, in the past.[130]

Third, the "why" of Loyalist disarmament is mismatched with the purpose of disarming based on non-compliance with immigration law. The late-1700s disarmament laws responded to a historical moment of existential crisis to a nascent nation. Guns in the hands of Loyalists would have been a direct, immediate, and critical threat to the ability of colonial militias and armies to fight the British forces. Fundamentally, Loyalists rejected the legitimacy and desirability of an independent nation.[131] As such, permitting them to remain armed might have subverted the emerging nation's existence.[132] In contrast, unlawful presence is an administrative violation[133] unrelated, by itself, either to existential concerns for the country or to the dangerousness of the individual. Indeed, on this score, the difference between Loyalists and unauthorized migrants is stark and oppositional:

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126. *See, e.g.*, Act of Apr. 2, 1779, ch. 101, 1779 Pa. Laws 199, §§ 4–5 ("An Act . . . for disarming persons who shall not have given attestations of allegiance and fidelity to this State, or some other of the United States."); Act of May 5, 1777, ch. 3, 1777 Va. Acts 8 ("An Act to oblige the free male inhabitants of this State above a certain age to give assurances of allegiance to the same, and for other purposes").

127. *See* sources cited *supra* note 126.

128. *Cf.* United States v. Leveille, 659 F. Supp. 3d 1279, 1284 (D.N.M. 2023).

129. United States v. Rahimi, 602 U.S. 680, 711 (2024).

130. *See* 18 U.S.C. § 922(g)(5). For additional background, see Jeffrey S. Passel & Jens Manuel Krogstad, *What We Know About Unauthorized Immigrants Living in the U.S.*, PEW RSCH. CTR. (July 22, 2024), https://www.pewresearch.org/short-reads/2025/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/ [https://perma.cc/3E8Z-WNK8]; and Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH CTR. (June 12, 2019), https://www.pewresearch.org/short-reads/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/ [https://perma.cc/5X3J-NTL7] (noting that in 2017, the median unauthorized adult noncitizen spent 15.1 years in the United States).

131. Gulasekaram, *supra* note 93, at 37.

132. *Cf.* Arulanantham, *supra* note 109, at 490 (quoting James Madison's "condemnation" of the 1798 Alien and Sedition Acts, and arguing "Madison believed [that] the federal government's power over noncitizens from countries against which the United States was *not* at war was no greater than its power over citizens, as the Constitution had not granted Congress any such power." (emphasis in original)).

133. *See* Arizona v. United States, 567 U.S. 387, 396, 407 (2012) ("Removal is a civil, not criminal matter . . . [a]s a general rule, it is not a crime for a removable alien to remain present in the United States.").

unlawfully present migrants presumably entered without authorization, overstayed a visa, or avoided removal after a deportation order *because* they not only support the continued existence of the United States, but also imagine their future within what they perceive to be a secure and flourishing nation.[134]

Finally, the presumed relationship between those historical disarmament statutes and § 922(g)(5) partly is based in a theory of oath-taking and demonstrations of allegiance, with immigration status operating as a proxy for the same.[135] Lawful permanent residents, however, do not take oaths of allegiance to the United States and maintain their foreign nationality, and yet are not prohibited from possessing firearms by federal law.[136] Indeed, to the extent pledging allegiance to the nation animates the federal ban, it is worth noting that millions of unlawfully present persons recite the Pledge of Allegiance every day in public schools.[137] Many have taken the additional step of serving in the United States' military, bearing arms on behalf of the nation.[138]

Moreover, if allegiance and oath-taking and -breaking are the dispositive elements of colonial-era disarmament laws, the direct lineal descendants of those laws are other, adjacent provisions of federal gun law. Section 922(g)(6) prohibits firearm possession by those who have dishonorably discharged from the armed forces and § 922(g)(7) bans possession by those who have renounced U.S. citizenship.[139] In both cases, individuals would have sworn or adopted oaths to the United States,[140] and later reneged on, violated, or later abandoned the obligations of those attestations. To the extent Founding Era disarmament statutes presage

134. *See, e.g.*, United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762, at *4–5 (M. D. Tenn. June 21, 2023) (rejecting comparison to Loyalist disarmament and noting that Loyalists were denying the legitimacy of the emerging nation, whereas unlawfully present immigrants do not "wish to subvert the existence" of the nation).

135. *Cf.* United States v. Leveille, 659 F. Supp. 3d, 1279, 1283–85 (D.N.M. 2023) (arguing that historical prohibitions focused more on "allegiance" than on membership in a particular group, and noting, but dismissing, concern that historical prohibitions regulated those who "refused" to take an oath and §922(g)(5) targets those who may not even have an opportunity to taken oath).

136. *See* 18 U.S.C. § 922(g) (omitting lawful permanent residents from list of prohibited categories of persons); *Profiles on Lawful Permanent Resident*, OFF. OF HOMELAND SEC. STATS., U.S. DHS, https://ohss.dhs.gov/topics/immigration/lawful-permanent-residents/profiles [https://perma.cc/M726-2B2X] (last visited Oct. 26, 2025) (describing lawful permanent residents as "foreign nationals granted the right to live in the United States").

137. *Cf.* Plyler v. Doe, 457 U.S. 202, 202 (1982) (striking down state law denying unlawfully present children a free public education); United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1251 (E.D. Wash. 2024) (affirming that the noncitizen defendant was brought to the country when he was seven years old, and attended public school in the country from elementary through high school).

138. Candice Bredbenner, *A Duty to Defend? The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946*, 24 J. POL'Y HIST. 224, 231–36 (2012) (explaining how military participation has remained an obligation for male noncitizens throughout American history even when noncitizens were otherwise denied rights); Deenesh Sohoni & Yosselin Turcios, *Discarded Loyalty: The Deportation of Immigrant Veterans*, 24 LEWIS & CLARK L. REV. 1285, 1291–94 (2020) (noting noncitizens' participation in U.S. military during times of conflict).

139. 18 U.S.C. § 922(g)(6)–(7).

140. *See* 8 U.S.C. § 1448(a) (Oath of Naturalization); 10 U.S.C. § 502(a) (Oath of Enlistment).

contemporary laws, these prohibitions approximate the purpose and structure of those historical laws. But for § 922(g)(5), the historical analogue test fails.

III. IMMIGRANT CRIMINALITY & DANGEROUSNESS

While the interpretative modes discussed in Parts I and II continue to animate federal court decisions, *Rahimi* foregrounds consideration of the dangerousness of a prohibited group. Although the *Rahimi* majority (along with three concurring opinions) insisted that the Court's approach was originalist and history-bound,[141] the Court's historical inquiry coincidentally yielded a result consonant with the Justices' "common sense."[142] In *Rahimi*, the commonsense outcome was that Congress could disarm individuals presenting a credible threat to other persons or to public safety.[143] Based on *Rahimi*'s understanding of history and commonsense, it stands to reason that discourse about the relative danger and threat presented by prohibited groups might feature more prominently across Second Amendment jurisprudence going forward, including with regards to prohibitions on noncitizens such as in § 922(g)(5).

Scholars and commentators from differing ideological perspectives have endorsed using dangerousness as the proper lens through which to evaluate gun restrictions, even if for differing reasons. Those invested in originalist inquiries might be willing to play the "level of generality game" to abstract a dangerousness principle from historical regulations, perhaps because reading history too rigidly would impose irrational and nonsensical constraints on present-day public policy.[144] A jurisprudential landscape hewn too close to *Bruen*'s historical methodology would invalidate wide swathes of current gun regulations, allowing firearms in the hands of those clearly unfit to wield them.[145] Only the truly radical Second Amendment absolutists maintain that fanatical view.[146] Others who discount the utility of historical inquiry might more forthrightly embrace the dangerousness principle because it can address contemporary public policy concerns. Their interpretative methodology would not require abstracting from the gun regulations of yesteryear and would therefore focus on the safety concerns caused by the increasing lethality and availability of firearms in our modern society.[147] Either way, for the near future, the dangerousness principle

141. United States v. Rahimi, 602 U.S. 680, 708, 711 (2024) (Gorsuch, J., concurring).

142. *Id.* at 682, 698.

143. *See id.* at 693.

144. *See* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 566, 593 (2025).

145. *See Rahimi*, 602 U.S. at 759–78 (Thomas, J., dissenting) (arguing that the Second Amendment analysis prescribed in *Bruen* should lead to striking down the federal ban on possession by those with domestic violence orders); *see also* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023) (striking down 18 U.S.C. § 922(g)(8)).

146. *See* cases cited *supra* note 145.

147. *See, e.g.,* Darrell A.H. Miller & Jennifer Tucker, *Common Use, Lineage, and Lethality*, 55 U.C. DAVIS L. REV. 2495, 2497 (2022); Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 NW. U. L. REV 139, 139–40, 144 (2021) (arguing that the government's interest in protecting public spaces from threat and intimidation justifies regulation of firearms).

is here to stay. Judges might explicitly embrace it or implicitly, if not begrudgingly, acquiesce to it. Either way, the combination of *Bruen* and *Rahimi* seem to compel it.

The rub, however, lies in the application of that principle to particular classes and contexts. Applying dangerousness to categorical prohibitions on noncitizens in general, or the unlawfully present specifically, is uniquely fraught. Throughout American jurisprudence, courts have perpetuated the trope of the dangerous foreigner, sometimes derived from explicitly racist and xenophobic ideas.[148] Political majorities and courts assign a similar relationship between immigration status and crime as they do to racial minorities (Blacks, in particular) and crime.[149] As many have documented, crimes by Black individuals are often cast as maladies of the entire race and culture.[150] Similarly, when dealing with racially distinct groups of noncitizens, the attributes of one noncitizen are attributed to the failings of the group. That intuition underlies Donald Trump's consistent highlighting of individual instances of noncitizen violent crime to characterize an entire population as criminals and justify broad immigration enforcement policies against large swathes of the American population.[151] As in the context of race and crime, his rhetoric and policies reinforce the notion that immigrant dangerousness is a "collective failing," and, as such, merits a collective punishment.[152] Fundamentally, upholding the federal criminal prohibition on possession by unlawfully present noncitizens trades on that same logic, justifying the group-based exclusion with a collective attribution of dangerousness. This is especially critical given the lack of sociological and empirical data to substantiate the connection between noncitizens, including unlawfully present noncitizens, and violence or criminality.[153]

The remainder of Part III below critiques the dangerousness principle as courts in noncitizen firearm cases have applied it and offers three related observations. First, "danger" and "threat" often have been conjured by federal courts as the rationale for upholding federal and state regulation of noncitizens, even outside the weapons context. This judicial discourse about the dangers posed by unauthorized migrants, however, historically has relied upon racial stereotypes and xenophobic

148. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 219 (1944) (relying on notions of the inherent Japanese disloyalty to justify military orders incarcerating over one hundred thousand U.S. citizens of Japanese descent); Chae Chan Ping v. United States, 130 U.S. 581, 607 (1889) (emphasizing the "danger" of Chinese immigration).

149. *See* Ashley Jardina & Spencer Piston, *The Politics of Racist Dehumanization in the United States*, 26 ANN. REV. POL. SCI. 369, 377 (2023); Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST., Mar. 13, 2024, at 6, https://www.migrationpolicy.org/sites/default/files/publications/FRS-PRINT-2024-FINAL.pdf [https://perma.cc/V4AG-8H6X] (noting that most immigrants are racially not white).

150. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011).

151. *See, e.g.*, Irwin, *supra* note 3.

152. *Cf.* John Pfaff, *County Prosecution and State Preemption: The Confusing Politics of Criminal Legal Reform and Backlash* 114 J. CRIM. L. & CRIMINOLOGY 981, 1005 (2024) (noting the manner in which the race of alleged perpetrators is viewed by the electorate in discussing the disconnect between mostly white voters and particular candidates for district attorney).

153. *See infra* Section III.C.

tropes.[154] Second, even when courts eschew the explicit xenophobia of the past, they replicate contemporary forms of it by conflating immigrants and criminality. Jurists rely on causal connections between noncitizens and proclivity towards crime without evidence of a link or which are directly contradicted by available sociological evidence.[155] Third, the approach to dangerousness this Article advocates needs not alter consideration of the myriad of federal, state, and local regulations that categorically disarm groups, including the mentally ill, children, those subject to domestic violence orders, or those under criminal indictment.[156] The assessments of credible threat *Rahimi* requires, the historical pedigree of other group-based regulations, and the tighter connection between those groups and public threat determinations may justify a different outcome.

Finally, as this Article has maintained throughout, disentangling immigration status from dangerousness and criminality does not mean noncitizens generally or unauthorized noncitizens specifically cannot be disarmed. That result, however, must either be achieved through a generalized dangerousness principle that would force courts to defer to legislative judgements about dangerousness regarding a wide variety of groups or through a particularized and nuanced assessment of danger that might permit the disarmament of some subsets of noncitizens, but not most permanent residents or the unlawfully present.

A. THE INHERENT DANGER OF FOREIGNNESS

The dangerousness of foreigners has occupied legislative and judicial imagination throughout American history. This long tradition of conflating foreignness and threats to safety magnifies the stakes of current federal courts' reliance on similar tropes in noncitizen gun possession cases. The contemporary context—involving firearms prohibitions—might provide some cover for judicial indulging of these stereotypes, given the lethality of the regulated commodity. Ultimately, however, when modern courts ascribe danger to immigration status as the basis for upholding noncitizen gun laws, they reify and replicate the regrettable xenophobia of the past in present day.

Federal and state governments have assumed noncitizens to be nefarious public safety threats from the start of immigrant regulation, and courts mostly have rubber stamped and amplified that construction.[157] Even more striking, the idea of the dangerous foreigner far predated the concerns of weapons possession. Judicial decisions imagined the very existence of the foreign-born individual and their racial distinctness from the American citizenry as constituting a public safety threat.[158] Any subsequent violent conduct then was ascribed to their foreignness, without any connection to their possession of weaponry.

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154. *See infra* Section III.A.

155. *See infra* Section III.B.

156. *See* 18 U.S.C. § 922(g) (listing categories of persons who may not possess firearms).

157. *See infra* notes 165, 170.

158. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . . I allude to the Chinese race.").

The importance of identifying courts' conflation of foreignness with danger goes beyond the well-documented claim that nineteenth century judges relied on racist stereotypes and xenophobia.[159] It seems clear they did. The more nuanced concern for this Article is the degree and consistency with which immigration status has operated as a proxy for threat to the polity and the citizenry. Moreover, this legislative and judicial presumption was racially defined. In early cases citizenship was expressly the "white citizenry," with lack of citizenship and foreignness denoting non-white racial groups.[160] By the time state and federal governments began to regulate noncitizen's firearms possession in the twentieth century,[161] they were only amplifying and crystallizing a long-standing, but nebulous, fear of foreigners *qua* foreigners.

Some of the first immigration law decisions from the Supreme Court upheld the constitutionality of state laws that placed bond and registration requirements on ship masters carrying foreign born to major ports in the United States.[162] While early cases did not comment on the racial or ethnic makeup of the migrants,[163] the Court's opinions focused on the necessity of states protecting themselves prospectively from the harms created by the foreign born, equating humans with tainted commercial items. In *Mayor of New York v. Miln*, for example, the Court compared the foreign born to "unsound and infectious" goods imported from a ship, thus justifying the same treatment as substandard commercial articles.[164]

The racial exclusiveness of citizenship and the inherent danger of noncitizens were explicitly conjoined a decade later in *Dred Scott v. Sandford*. Black people, as noncitizens, presented too much of a public safety threat to be trusted with firearms, a point that was too obvious for the Supreme Court to substantiate beyond an appeal to the shared sensibilities of propertied whites.[165] The inherent danger of non-white noncitizens permeated political discourse even after the Civil War

159. *See, e.g.*, Arulanantham, *supra* note 109, at 470–76.

160. *See, e.g.*, Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790) ("That, any Alien being a free white person . . .").

161. *See* Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670, 672 ("Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.")

162. *See, e.g.*, Mayor of New York v. Miln, 36 U.S. 102, 142–43 (1837).

163. In the early 1900s, these ships would have carried European migrants, rather than those from Asia or Africa. *See* NGAI, *supra* note 101 at 18–20; Antoine Resche, *European Migrants' Crossings to the United States*, DIGIT. ENCYC. OF EUR. HIST., https://ehne.fr/en/encyclopedia/themes/europe-europeans-and-world/ports-tools-european-expansion/european-migrants%27-crossings-united-states-1880-1925 [https://perma.cc/NBS5-Y35C] (last visited Oct. 26, 2025) ("From 1880 to 1914 . . . some 20 million Europeans crossed the ocean to reach the United States . . .").

164. 36 U.S. at 142–43 ("We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infections articles imported, or from a ship, the crew of which may be labouring under an infectious disease.").

165. Dred Scott v. Sandford, 60 U.S. 393, 416–17 (1856).

and the Fourteenth Amendment's overturning of *Dred Scott*.[166] In debating whether citizenship should be opened to the Chinese in 1866, for example, one Senator described the Chinese as incapable of operating within law and republican institutions, arguing that participation in representative forms of government and taking on the rights and responsibilities of citizenship were "obnoxious to their very nature."[167] The description of Chinese as "obnoxious" is notable because the term carried a slightly different meaning in its nineteenth century uses. At that time, its use to describe the Chinese likely meant to convey that, as a group, Chinese immigrants were "blameworthy" and liable to engage in criminal or other harmful activity.[168] The Court again adopted that usage a few decades later, as a Justice in *Fong Yue Ting v. United States* used the adjective to describe the Chinese, [169] ultimately upholding the deportation provisions of the Chinese Exclusion Act.[170]

These two ideas—foreignness as a proxy for danger and racial categories as a proxy for threat—conjoined in the Court's late 1800s cases adjudicating the first federal immigration laws. Many commentators, including Ahilan Arulanantham, have shown that beliefs about racial inferiority and superiority were vital to the Court's reasoning and the outcome in the foundational Chinese Exclusion Cases, *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.[171] In both, the Court's nakedly racist perspective was based on conflating foreignness and danger:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[172]

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166. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

167. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Edgar Cowan).

168. *See* WILLIAM A. WHEELER, A DICTIONARY OF THE ENGLISH LANGUAGE 496 (Ceauncey A. Goodrich & Noah Porter eds., 1872) ("Obnoxious: 1. Liable to censure, reprehensible; blameworthy. 2. Hence, offensive; odious; hateful . . .); CHARLES RICHARDSON, NEW DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1838) ("Obnoxious . . . subject to punishment for a fault or crime."); JOHN SIMPSON & EDMUND WEINER, THE OXFORD ENGLISH DICTIONARY (2nd. ed. 1989) ("Obnoxious . . . 1. Liable, subject, exposed, open (*to* anything harmful, or undesirable . . . 2. Liable to punishment or censure; guilty, blameworthy, reprehensible . . . . 3. Subject to the rule, power, or authority of another . . . hence, submissive, obsequious, deferential . . . . 5. Hurtful, injurious . . . 6. . . . [O]ffensive, objectionable, odious, highly disagreeable . . . .") (noting uses over time); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("Obnoxious [:] 1. Subject; answerable . . . . 2. [s]ubject to . . . . punishment; . . . . 4. Reprehensible; censurable, not approved . . . . 5. Odious; hateful; offensive . . . .") (1828).

169. 149 U.S. 698, 743 (1893) (Brewer, J., dissenting).

170. *Id.* at 714, 732.

171. *See* Arulanantham, *supra* note 109, at 485–87.

172. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

The Court's description of "vast hordes" posing threat to an unspecified "us"—the white citizenry—deepened its tying of foreignness and race to threat.[173] In a subsequent paragraph, the Court noted that it was immaterial to its decision that there were "no actual hostilities" or "existence of war" with China.[174] In other words, the Supreme Court permitted Congress to treat racially distinct foreigners as public safety threats, regardless of the actual danger they posed.

The pattern of equating non-whiteness with foreignness and foreignness with danger is one that can be traced through any number of subsequent cases, many of which rely on *Chae Chan Ping* and *Fong Yue Ting* and their rhetoric and claims about immigrants.[175] As legal scholar Eric Fish has documented, when criminalizing unlawful entry in 1929, Congress expressly relied on eugenics-based notions of racial superiority, which motivated it to provide a statutory tool to keep out the "racial threat to white Americans" posed by Mexicans.[176] By the mid-twentieth century, the Supreme Court began conflating foreignness and danger in areas of domestic regulation outside of the admission and deportation context.

The duo of *United States v. Hirabayashi* and *Korematsu v. United States* represent the nadir of this strand of judicial thinking.[177] In those cases, upholding the curfew orders and the incarceration of Americans of Japanese descent, race and perceived foreignness dictated the Court's evaluation of dangerousness.[178] In those cases, the Court mediated and delimited the relationship between citizenship and constitutional rights with racial boundaries.[179] Neither formal citizenship nor birth on U.S. territory shielded Japanese Americans from treatment as dangerous foreigners in the Court's imagination. A shared racial and ethnic background with "the Japanese Empire" was sufficient for the Court to label an entire category of citizens and residents as security threats likely to endanger the physical safety of "American" citizens and residents.[180] Indeed, in a harbinger to present-day calls to deny citizenship, some tried to strip Japanese Americans born on American soil of their birthright.[181] The government's and the Court's collective

173. *Id.* at 591–606.

174. *Id.* at 606.

175. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952); *see also* Arulanantham, *supra* note 109, at 485, 504–05.

176. Fish, *supra* note 103, at 1075–80 (noting that House Committee Expert Eugenics Agent Harry Laughlin's 1928 report to the House "argued that the immigration of Mexicans posed an existential racial threat to white Americans").

177. *See* 320 U.S. 81, 98–99 (1943); 323 U.S. 214, 223–24 (1944).

178. *See Hirabayashi*, 320 U.S. at 98-99; *Korematsu*, 323 U.S. at 223–24*; see also* Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 79 ("By contrast, from the early 1900s onward, Japanese immigrants were so perceived, which led to new forms of Asian American stereotypes, namely the idea of disloyalty and allegiance to a threatening foreign military power. Japanese Americans were portrayed as an imminent 'fifth column' threat within the United States, waiting to be activated at the emperor's command, so that the plowshares of Japanese immigrant farmers would transform into swords at the whim of a foreign power." (citations omitted)).

179. *See* Volpp, *supra* note 178, at 75–77.

180. *See Korematsu*, 323 U.S. at 223.

181. Regan v. King, 49 F. Supp. 222, 223 (N.D. Cal. 1942) (summary rejection of claim by San Francisco voters that citizens of Japanese descent born in the United States should be stripped of

attribution of threat motivated by racial group stereotyping was so evident and odious that decades later, the Acting U.S. Solicitor General apologized for the government's "mistake," noting that even contemporaneously available evidence and intelligence reports belied the xenophobic and racist representations of the government to the Court.[182]

In the post-World War II period, both legislatures and courts reconsidered some of their xenophobic policies and accompanying judicial rationales. Outright and explicit animus based on race and foreignness could no longer go unscrutinized in the United States, given the United States's allies in the conflict and the thousands of racial minorities, including Japanese Americans, who fought against fascism and Nazism abroad.[183] In a set of cases in the 1970s, for example, the Court confronted the several extant state occupational licensing regulations which one scholar described as demonstrating that legislatures "[did] not trust aliens with animals, a corpse, or even a person's hair or beard."[184] Although the Court rolled back some of the most egregious cases of "alienage" discrimination, it nevertheless left in place doctrinal leeway for legislatures to continue other forms of discrimination against noncitizens.[185] Federal and state legislatures were more than willing to take advantage of this legal space, actively framing noncitizens, especially unlawfully present noncitizens, as the root cause of societal ills and finding ways consonant with Supreme Court precedent to continue discrimination based on stereotype and innuendo.[186]

Post-9/11, federal immigration and counterterrorism enforcement policies and federal court response (albeit at the lower federal court level) returned to the well-worn pattern of painting racial and religious outsiders as both foreign and inherently dangerous.[187] To be sure, some post-9/11 federal responses, including

citizenship and purged from voter roles), *aff'd,* 134 F.2d 413 (9th Cir. 1943), *cert. denied*, 319 U.S. 753 (1943).

182. Neal Katyal, Acting Solic. Gen. of the U.S., *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEP'T OF JUST., OFF. OF THE SOLIC. GEN. (May 20, 2011), https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases [https://perma.cc/4973-CQQD].

183. *See generally* LYN CROST, HONOR BY FIRE: JAPANESE AMERICANS AT WAR IN EUROPE AND THE PACIFIC (1994) (describing the experiences and sacrifices of Japanese-American soldiers); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (William Chafe, Gary Gerstle & Linda Gordon eds., 2000) (arguing that the Cold War played a role in facilitating desegregation).

184. Simona F. Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HASTINGS CONST. L.Q. 1029, 1037, 1048–52 (1975).

185. *Id.* at 1039, 1048–52.

186. Cybelle Fox, *"The Line Must be Drawn Somewhere": The Rise of Legal Status Restrictions in State Welfare Policy in the 1970s*, 33 STUD. IN AM. POL. DEV. 275, 277, 284, 288, 297 (2019) (showing how in both 1970s California and New York, legislative efforts were centered on "[c]onstructing [u]nauthorized [i]mmigrants as a [p]roblem"); *see, e.g.*, De Canas v. Bica, 424 U.S. 351, 355 (1976).

187. Sahar F. Aziz, CAUGHT IN A PREVENTIVE DRAGNET: SELECTIVE COUNTERTERRORISM IN A POST-9/11 AMERICA, 47 GONZ. L. REV. 429, 430 (2011/12) (discussing U.S. no-tolerance, post-9/11 counterterrorism policy: "The message was, if there had ever been any doubt, that the 9/11 attacks confirmed Muslims and Arabs are inherently violent and intent on destroying the American way of life").

passage of the USA PATRIOT Act, purported to operate based on conduct (terroristic activities) and not based on ascribing dangerousness based on race, religious background, or national origin.[188] Yet, the objects of enforcement were overwhelmingly and disproportionately Muslim, Arab, or South Asian, including through a policy of Mosque infiltration by federal enforcement agents.[189] Other administrative policies expressly singled out Muslim and Arab noncitizens, without a focus on specific conduct. The National Security Entry-Exit Registration System (NSEERS) program registered, fingerprinted, and interrogated over 85,000 young men from Middle Eastern countries.[190] A mere eleven individuals were ever determined to have ties to terrorism.[191] Yet, many caught in the dragnet were removed, technically for minor immigration law violations,[192] but unmistakably with the effect of painting the Muslim and perceived-to-be-Muslim population as deserving objects of enforcement. The common thread in both the enforcement of general counterterrorism legislation and the "special registration" program is the conflation of "Muslim" or "South Asian" with foreignness and an inherent existential national security threat and personal public safety threat, all with the support and acceptance of the American public.[193] Immigration courts and federal courts operated in the background, turning back selective prosecution and other challenges to the racially targeted post-9/11 programs.[194] The post-9/11 enforcement paradigm, one which arguably still operates today, thus crystallized the stereotyped and racialized conflation of noncitizens and terroristic danger, despite the clear ineffectiveness of profiling in stemming attacks.

By the mid-to-late 2000s, concerns over foreign terrorism began to spawn a renewed focus on domestic regulation of all noncitizens, regardless of national origin. Several states and localities in that period began enacting immigration enforcement policies, which again traded on claims of immigrant threat and criminality

188. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

189. Immigr. Pol'y Ctr., *Balancing Federal, State, and Local Priorities in Police-Immigrant Relations: Lessons from Muslim, Arab, and South Asian Communities Since 9/11*, IMMIGR. POL'Y IN FOCUS, June 2008, at 1, 6–7; Aziz Huq, *The New Counterterrorism: Investigating Terror, Investigating Muslims*, *in* LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN THE AGE OF TERROR 167, 172 (Richard C. Leone & Greg Anrig, Jr. eds., 2007).

190. *See* Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, MIGRATION POL'Y INST. (May 17, 2011), https://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program.

191. *Id.*

192. *See id.*

193. *See* Leti Volpp, *The Citizen and the Terrorist,* 49 UCLA L. REV. 1575, 1576–83 (2002); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 4 RACE/ETHNICITY: MULTIDISC. GLOB. CONTEXTS 337, 343 (2011).

194. *See, e.g.,* Zerrei v. Gonzales, 471 F.3d 342, 348 (2d Cir. 2006) (finding noncitizen removable for visa overstay, and rejecting equal protection and APA challenges to the NSEERs program); Zafar v. United States Att'y Gen., 461 F.3d 1357, 1362 (11th Cir. 2006) (finding noncitizens removable for visa overstay).

with scant evidence to substantiate the accusation.[195] For example, a court majority struck down most provisions of Arizona's notorious immigrant enforcement law in 2012, but the late Justice Antonin Scalia in part dissented.[196] That he might disagree with the majority's view of preemption, federalism, and the historic powers of states was unremarkable. But, he also added a coda to his opinion, opting to repeat claims about the danger that unlawfully present noncitizens might pose. Like the opinions of the late 1800s, Scalia conjured the language of war and hostility, describing the "siege" and "invasion" of immigrants.[197] Prominent federal jurist Richard Posner rebuked Scalia for these irresponsible and stereotyped statements, arguing that Scalia embedded purportedly "factual" claims about immigrant-caused maladies in a Supreme Court opinion without any evidentiary support or citation.[198]

Eight decades after the constitutional stain of *Korematsu*, *Trump v. Hawaii* purported to relegate *Korematsu* to the dustbin of history, but the impact of that renunciation is contested.[199] Even as it purported to discard *Korematsu*, the Court upheld the exclusion of nationals, including permanent residents and the relatives of U.S. citizens. The majority did so despite ample evidence that the President's security proclamation initially was motivated not by actual terroristic threats by the excluded noncitizens, but rather by conflating the religious background of particular foreigners with violent threat to Americans.[200] Even more recently, in 2023, Justice Samuel Alito was the sole dissenter in a case ruling that states lacked standing to challenge federal immigration enforcement priorities promulgated by the Department of Homeland Security.[201] Alito credited the states' claims of injury and would have permitted the suit to continue based on the "costs, financial and non-financial, inflicted by the release of of certain dangerous

195. *See generally* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM (2015) (presenting empirical evidence that the enactment of enforcement-heavy state and local policies could not be explained by unique or heightened crime or other social problems, as claimed by elected officials).

196. Arizona v. United States, 567 U.S. 387, 416 (2012) (Scalia, J., concurring in part and dissenting in part).

197. *Id.* at 419, 436 (Scalia, J., concurring in part and dissenting in part) (arguing that "States could exclude from their territory dangerous or unwholesome goods" and stating "Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.").

198. Richard A. Posner, *Supreme Court Year in Review; Justice Scalia Offers No Evidence to Back Up His Claims about Illegal Immigration*, SLATE (June 27, 2012, at 10:21 ET), https://slate.com/news-and-politics/2012/06/supreme-court-year-in-review-justice-scalia-offers-no-evidence-to-back-up-his-claims-about-illegal-immigration.html [https://perma.cc/65T8-BQJF].

199. *See* Cox, *supra* note 31, at 434–37; Trump v. Hawaii, 585 U.S. 667, 710 (2018).

200. Trump v. Hawaii, 585 U.S. at 710; *see also* Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power and Immigration Law*, AM. CONST. SOC'Y (2018), https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/ [https://perma.cc/5LBF-BEW4].

201. *See* United States v. Texas, 599 U.S. 670, 670, 672 (2023) (ruling that Texas and Louisiana do not have Article III standing to challenge the immigration enforcement priorities implemented by the Biden Administration).

criminal aliens."[202] Predictably, his opinion was long on allegation, but woefully short on substantiating noncitizen criminality, the nature of their criminality, or the specific financial and non-financial costs to states attributable to particular unlawfully present noncitizens.

As these episodes suggest, the Court has at times been complicit in generating and amplifying the xenophobia and racism of coordinate federal branches. Moreover, federal jurists' reamplification of these stereotypes is not the province of a distant and regrettable past. Persistent judicial silence in the face of, and acquiescence to, unsubstantiated claims of noncitizen threat and danger are now resurgent. As Professor Arulanantham documents, the Department of Justice and federal courts routinely rely on those tainted precedents today.[203] Beyond reifying cases from a bygone era with bygone mores, however, members of contemporary federal courts still conjure the trope of immigrant criminality and danger, and always without substantiation.

Recounting this jurisprudential history does not sumply rehash the well-established claim that the federal courts have, at times, been the locus and fount of xenophobic conflation of immigrants and threat. Rather, this background helps crystallize the stakes of modern incantations of noncitizens' proclivity to criminality or public safety threat. The decision by the government or courts in cases about noncitizens' firearm possession to centrally feature claims about immigrant danger conjures this sordid past. In these cases, most modern courts repeat the same mistakes of prior discredited eras, facilitating continued discrimination on the basis of immigration status.

B. NONCITIZEN CRIMINALITY AND FIREARMS REGULATION

Like the long history of Supreme Court stereotyping of immigrant danger, contemporary federal courts still associate immigration status with a public safety threat without substantiating their actual risk. Federal courts in the early years were mostly absent from the discourse of noncitizens and firearm possession.[204] In part, this was due to the absence of federal firearms restrictions, including any that touched upon noncitizen possession. State legislatures were the first to specifically ban noncitizens from firearm possession, starting in the late 1800s and

202. *Id*. at 723 (Alito, J., dissenting).

203. Arulanantham, *supra* note 109, at 441–44.

204. Note that in *Presser v. Illinois*, 116 U.S. 252 (1886), the Court obliquely dealt with foreign affiliated groups and gun possession. There, the court upheld the state's prohibition on armed groups drilling in public on the grounds that the Second Amendment only constrained federal regulation and did not apply against the states. *Id*. at 264–65. Presser was a U.S. citizen, but it is worth noting that the group prohibited from marching was the Lehr und Wehr Verein, composed of many German-born and German American residents in the United States. *Id*. at 254; Walter Struve, 26 INT'L LAB. & WORKING-CLASS HIST. 104, 106 (1984) (reviewing KEIL HARTMUT & JOHN B. JENTZ, GERMAN WORKERS IN INDUSTRIAL CHICAGO, 1850–1910: A COMPARATIVE PERSPECTIVE (1983)). *Presser*'s holding was overruled by *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment was incorporated against states and localities).

early 1900s.[205] Those early state laws led to state court decisions focusing on protection of state resources, alongside their concerns about the foreign born.[206] By the mid-1900s, Congress also began to regulate firearm possession based on immigration status but now with a focus on the subversiveness and disloyalty of noncitizens and their threats to the republic.[207] Eventually federal law and state laws began to conflate noncitizens, especially unlawfully present ones, with the type of interpersonal danger and threat that undergirds modern jurisprudence.

Several early state regulations were concerned with conserving hunting and gaming resources for national and state citizens, as opposed to a broader worry about racially distinct foreigners.[208] Nevertheless, those laws were enacted at a time when federal law racially restricted the acquisition of citizenship.[209] As such, the gaming laws of the era could very well have reflected both protectionism and xenophobia. Indeed, the "alien land laws" of the early twentieth century prohibited "aliens ineligible for citizenship" from owning land as a euphemistic proxy for banning property acquisition by Asian immigrants.[210] At least one state court case expressly linked the two forms of prohibitions, reasoning that if a state

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205. *See infra* notes 208, 212–213, and accompanying text. As noted in Part II, however, colonies and states in the Founding and post-Ratification eras enacted several prohibitions on racial outsiders incapable of being citizens—free Blacks, enslaved people, Indians—from possessing or purchasing firearms. *See supra* Part II. Historical Group-Based Prohibitions and the Unlawfully Present.

206. See, e.g., *Ex Parte* Ramirez, 226 P. 914, 920–21 (1924); *see also* Patsone v. Pennsylvania, 232 U.S. 138, 144 (1914) (upholding state law preventing noncitizens from hunting wild game and stating "[t]he question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent").

207. *See infra* note 217 and accompanying text.

208. *See, e.g.*, 1909 Pa. Laws 466 ("[I]t shall be unlawful for *any unnaturalized foreign born resident* to hunt for or capture or kill, in this Commonwealth, any wild bird or animal, either game or otherwise, of any description excepting in defense of person or property; and to that end it shall be unlawful for *any unnaturalized foreign born resident*, within this Commonwealth, to either own or be possessed of a shotgun or rifle of any make." (emphasis added)); 1905 Utah Laws 197 ("It shall be unlawful for *any non-resident person or for resident who is not a citizen of the United States* to kill any game, animals, birds or fish in this State, without first having procured the license to do so hereinafter provided for. *Any non-resident person or any resident who is not a citizen of the United States*, upon the payment to the State Commissioner, of the sum of twenty-five dollars, shall be entitled to receive a license . . . which will entitle him to hunt and kill game . . . ." (emphasis added)); 1899 Wyo. Sess. Laws 32–33 ("*Any person who is a bona fide citizen of the state* of Wyoming shall, upon payment of one dollar . . . be entitled to receive . . . a gun license, which . . . shall permit such person to . . . hunt and kill any of the animals . . . . Any person who is not a resident of the State of Wyoming, shall upon payment . . . of the sum of forty dollars to be entitled to receive . . . a license . . ." (emphasis added)); 12 Del. Laws 365 (1863) ("It shall be unlawful for *any person not being a citizen of this State*, to catch, take, or kill . . . any [wild game] . . . and any boat or vessel, . . . and any gun . . . shall be forfeited and maybe seized . . ." (emphasis added)).

209. *See generally* LOPEZ, *supra* note 102 (reviewing history of racially-exclusive naturalization in United States); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923) (denying Sikh person of naturalization because they were not "white").

210. *See generally* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (discussing "alien land laws" of Washington and California).

could "protect itself" from noncitizen land ownership, so too could it "protect itself" from noncitizen firearm possession.[211]

Other state enactments overtly outlawed noncitizen firearms possession[212] or, in some instances, public or concealed carrying of firearms.[213] Similar to earlier federal court opinions on immigration regulation, state court opinions also conflated noncitizens with public safety threats and danger. For example, upholding the state's 1923 prohibition on concealed carry by noncitizens, the California Supreme Court spoke of noncitizen disarmament as an essential prophylactic against threats to public safety and national security, whether in times of war or peace and whether supported by evidence or not:

> The purpose of the act is to conserve the public welfare, to prevent any interference with the means of common defense in times of peace or war, to insure the public safety by preventing unlawful use of firearms. It cannot be assumed that the Legislature did not have evidence before it . . . to justify the legislation, as, for instance, that unnaturalized foreign-born persons and persons who have been convicted of a felony were more likely than citizens to unlawfully use

211. *Ex Parte* Rameriz, 226 P. 914, 920–21 (1924) (citing with approval judicial opinions upholding state alien land laws in upholding California statute prohibiting noncitizens from carrying concealed weapons, stating "[i]f rights in land may be denied to aliens by the state, there would seem no reason why in the exercise of its police power it might not also protect itself against the ownership, traffic in, and use of firearms by aliens.").

212. *See, e.g.*, 1925 Ind. Acts 496–97 ("SEC. 7. The clerk of any circuit court of the State of Indiana, shall, upon application of *any citizen having a bona fide residence or place of business within the State of Indiana*, . . . and a permit to carry a firearm concealed upon his person . . . issue a permit to such citizen to carry a pistol or revolver within the State of Indiana, ... SEC. 9. No person shall within the State of Indiana sell, deliver or otherwise transfer a pistol or revolver to *a person who he has reasonable cause to believe either is not a citizen* or has been convicted of a felony against the person or property of another . . ." (emphasis added)); 1919 Colo. Sess. Laws 416 ("[I]t shall be unlawful for *any unnaturalized foreign-born resident* to hunt for or capture or kill, in this state, any wild bird or animal, either game or otherwise, of any description, excepting in defense of persons or property; and to that end it shall be *unlawful for any unnaturalized foreign-born resident*, within this state, to either own or be possessed of a shotgun or rifle of any make, or a pistol or firearm of any kind." (emphasis added)).

213. *See, e.g.*, 1925 Nev. Stat. 54 ("[N]o unnaturalized foreign-born person . . . . shall own or have in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person."); 1925 Or. Laws 469–71 ("[I]t shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm, as hereinafter provided in section 8 hereof. . . . This section shall not be construed to prohibit *any citizen of the United States*, over the age of eighteen years, who resides or is temporarily sojourning within this state . . . from owning, possessing or keeping within his place of residence or place of business any pistol, revolver or other firearm capable of being concealed upon the person, and no permit or license to purchase, own, possess or keep any such firearm at his place of residence or place of business shall be required of *any such citizen*." (emphasis added)); 1923 Cal. Stat. 695 ("[N]o *unnaturalized foreign born person* and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the State of California . . . shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person." (emphasis added); 1911 Wash. Sess. Laws 303 ("It shall be unlawful for *any person who is not a citizen of the United States* . . . to carry or have in [their] possession at any time any shot gun, rifle, or other firearm." (emphasis added)).

> firearms or engage in dangerous practices against the government in times of peace or war, or to resort to force in defiance of law.[214]

Notable in the state court opinion is the elision of noncitizen status with being a felon. In other words, some legislatures and courts of the time equated lack of citizenship (which many could not change because of their race) with committing a crime.

This association between the status of noncitizens and the status of convicted felons later informed Congress's restrictions on noncitizen firearm possession. During the height of Asian exclusion, Congress passed the "Anarchist Exclusion Act" of 1903, providing the U.S. government the ability to exclude noncitizens on the basis of their proclivity to engage in armed overthrow of the United States.[215] That a country would attempt to shield itself from existential threat is not surprising. That particular legislation, however, was inspired in part by the assassination of President William McKinley in 1901 by Leon Czolgosz using a pistol. Although Czolgosz was a U.S. citizen and likely born in the United States in 1873, media reports misidentified him as an "alien," amplifying the public hysteria about noncitizens as violent national threats.[216]

Federal legislative efforts turned to the specific concern of noncitizens and firearms during Prohibition and the "Tommy gun" era of the 1920s and 1930s.[217] Responding to the sensationalized crime of that era, Congress passed the first comprehensive federal firearms restrictions in 1934.[218] From 1935 through 1937, several legislative proposals followed that attempted specifically to disarm noncitizens or provide for their deportation for possession of firearms.[219] Though unsuccessful, the lawmakers' discussion of these bills reveals that they were motivated by stereotypes and the popular linkage between foreigners and organized crime, with

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214. *Ex Parte* Ramirez, 226 P. 914, 921 (1924)

215. The Anarchist Exclusion Act is also known as the Immigration Act of 1903, Pub. L. No. 162, 32 Stat. 1213.

216. *See* Cary Federman, *The Life of an Unknown Assassin: Leon Czolgosz and the Death of William McKinley*, 14 CRIME, HIST. & SOCY'S 85, 86 (2010); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 994 (2002).

217. MICHAEL A. FOSTER, CONG. RSCH. SERV., R45629, FEDERAL FIREARMS LAW: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS 1–2 (2019); *see also History of Gun-Control Legislation*, WASH. POST. (Dec. 22, 2012), https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html (noting President Franklin D. Roosevelt's "New Deal for Crime" legislation to address the sensationalized crime of the era).

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

219. *See*, *e.g.*, H.R. 6391, 75th Cong. § 2 (1937) (§ 2 of the bill provided for deportation of noncitizens with a conviction for "possessing or carrying any firearm . . . within five years of the institution of deportation proceedings"); H.R. 5573, 75th Cong. §§ 2–3 (1937) (§ 2 of the bill providing for deportation of noncitizens "convicted of possessing or carrying any concealed or dangerous weapon" and § 3 providing for deportation for possessing or carrying an automatic or semi-automatic weapon); S. 2969, 74th Cong. (1936) ("Kerr-Coolidge" bills introduced by Sen. Coolidge with provision to deport noncitizen for "crime of possessing or carrying any concealed or dangerous weapon"); H.R. 8163, 74th Cong. (1935) (bill introduced by Rep. Judge Kerr with similar concealed weapon deportation provision).

lawmakers making unsubstantiated claims that noncitizens were the "gunmen" and "racketeers" responsible for gang violence.[220]

Ultimately, Congress passed the first federal restrictions on immigrant gun possession with the Alien Registration Act of 1940, which provided for the deportation of noncitizens for violations of laws regulating the possession of automatic weapons and "sawed-off" shotguns.[221] Legislative debate in the lead up to the Act focused on the concern that noncitizens with firearms were "subversives" who would use firearms to inflict mass casualties on Americans.[222] As noted, *Hibayashi* and *Korematsu*, which followed soon after the Alien Registration Act, perpetuated the notion that foreigners, or those perceived to be foreign because of their race, were disloyal national security threats capable of inflicting mass violence against the rest of the American citizenry.[223]

Only in 1968 did Congress first criminalize firearm possession by unlawfully present noncitizens, enacting the criminal provision that would later be codified into 18 U.S.C. § 922(g)(5).[224] The legislative record leading up to the 1968 Act is sparse and mostly unhelpful in explaining why Congress decided to include unlawfully present noncitizens as one of the prohibited groups. Lumping all of the Act's group-based exclusions together, one Senator noted that "the recent history of this Country is full of illustrations of assassinations and murders committed with firearms" by those groups.[225] None of the Senator's examples, however,

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220. *See*, *e.g.*, JOE STARNES ET AL., DEPORTATION OF CRIMINALS, PRESERVATION OF FAMILY UNITS, PERMIT NONCRIMINAL ALIENS TO LEGALIZE THEIR STATUS, H.R. REP. No. 74-1110, at 4 (1935) (report from Rep. Kerr stating that exclusion of gun possession from "crimes involving moral turpitude" has permitted "many vicious racketeers, gangsters, and extortionists" to avoid deportation, thereby necessitating new immigration legislation that specifically targets concealed weapons); *see also* Ernst W. Puttkammer, *Legislation Affecting the Deportation of Aliens*, 3 U. CHI. L. REV. 229, 233–34 (1936) (lauding Kerr-Coolidge bills, arguing "[i]t inflicts no hardship on the law-abiding alien and is a greatly needed weapon against the alien gunman and racketeer"); *Deportation Bill Passed by House*, N.Y. TIMES, June 11, 1937, at 9 (noting that proponents of H.R. 6391 argued that it would help deport 23,000 "alien gunmen and racketeers").

221. Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670, 672 (amending Section 19 of the Immigration Act of 1917, codified as amended at 8 U.S.C. § 155) ("Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.").

222. For House discussion of H.R. 5138, later enacted as the Alien Registration Act of 1940, see 86 CONG. REC. 9029–36 (1940); 86 CONG. REC. 8340–47 (1940); 84 CONG. REC. 9532–41, 10354–85, 10445–56 (1939). *See generally* 84 CONG. REC. 10358 (1939) (Congressman Hobbs: "Our guests in this country have no right to abuse our hospitality by arming themselves with that kind of paraphernalia .... We maintain that these guests of ours in our national home are perfectly welcome to live here if they will not insist upon having or carrying machine guns or similar death-dealing weapons. Such weapons are made for one purpose only—to take human life"); 84 CONG. REC. 9537 (1939) (Congressman Smith: "It is a little difficult for me to understand why Members of Congress should object to the deportation of those folk who come here from foreign countries and indulge in the use of machine guns and sawed-off shotguns upon our population"). The Senate also held hearings focused on the bill's potential to target disloyalty and subversive activities. *See, e.g., Crime to Promote Overthrow of Government: Hearing on H.R. 5138 Before the Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. (1940).

223. *See supra* notes 177–80 and accompanying text.

224. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82. Stat. 236 (1968).

225. 114 CONG. REC. 14773 (1968) (STATEMENT OF SEN. RUSSELL B. LONG).

implicated noncitizens, or for that matter, any category of persons beyond felons.[226] Instead, consistent with the history of the Chinese Exclusion Acts, the Alien Registration Act, and the extra-judicial incarceration of Japanese Americans, Congress in 1968 implicitly conflated immigration status with criminality and dangerousness. Mimicking those prior eras, the lack of evidentiary basis did not present an obstacle, as federal officials immediately enacted the provision without further debate.[227]

Neither the 1940 firearms deportation law nor the 1968 criminal prohibition garnered significant legal challenge or judicial attention when passed. The deportation provision has never faced constitutional challenge due primarily to cases like *Fong Yue Ting* which shield Congress's deportation laws from meaningful judicial scrutiny.[228] Later courts have demurred to the political branches' immigration authority to shield Congress's substantive admissions and deportation policies from searching constitutional review, even when those policies might otherwise implicate constitutional principles.[229] The federal criminal prohibition on gun possession also did not face Second Amendment challenges, consistent with the Court's pre-*Heller* interpretation of the right to bear arms.[230] In the absence of Second Amendment challenges, one federal court entertained an equal protection challenge to § 922(g)(5) but rejected it, noting that unlawfully present noncitizens were not a suspect class warranting heightened scrutiny.[231] Instead, the Second Circuit had little trouble finding that Congress had a rational basis to disarm unlawfully present noncitizens.[232]

In *Heller* and subsequent cases, however, the Supreme Court reinterpreted the Second Amendment to protect a robust right of self-defense from private, interpersonal violence.[233] Despite this reimagining of the Second Amendment's

226. *See generally id*. *See also* Leo Barnebei, *Noncitizens and the Second Amendment* 13–14 (on file with author) (highlighting same exchange in the Congressional Record).

227. *See* Barnebei, *supra* note 226, at 14 (noting that after Sen. Long's remarks, and despite the desire of some to study the matter further, others began yelling for an immediate vote on the Senate floor, and the Long Amendment was passed without further debate).

228. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893).

229. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 705–06 (2018) (declining to apply extant religious discrimination principles and precedent, including the religious animus standard from Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), to Presidential Proclamation); Fiallo v. Bell, 430 U.S. 787, 798–99 (1977) (providing Congress with wide deference to enact admissions category that discriminated on the basis of sex and marital status, inconsistent with then-emerging equal protection standards); Kleindenst v. Mandel, 408 U.S. 753, 769 (articulating a "facially legitimate and bona fide" standard to assess exclusion of nonimmigrant visa applicant against First Amendment free speech challenge).

230. United States v. Miller, 307 U.S. 174, 174, 181–82 (1939) (rejecting Second Amendment challenge to provision of the 1934 National Firearms Act, holding that the Amendment protected gun-bearing in the context of militia participation, and that prohibitions on private ownership of machine guns and short-barrelled shotguns did not violate the Constitution).

231. United States v. Toner, 728 F.2d 115, 115 (2d Cir. 1984) (upholding federal provision preventing firearm possession by unlawfully present noncitizens).

232. *Id.*

233. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 628–29 (2007) (discussing utility of handguns in self-protection).

purpose and power to limit firearm regulation, vestiges of the pre-*Heller* conflation of unlawfully present noncitizens with threat and danger persist. In a number of cases, federal courts have approved of, or outright posited that, Congress may categorically define a class based on immigration status as dangerous in ways that can supersede a constitutional guarantee to self-protection. The Eighth Circuit, for example, based its reasoning on the assertion that unlawfully present noncitizens would be more likely to possess firearms through illegal methods;[234] the federal district court in Nevada posited that "armed, unlawful aliens could pose a threat to . . . law enforcement who attempt to apprehend and remove them";[235] the federal district court in New Mexico compared the unlawfully present to felons, concluding that nebulous "public safety concerns" overrode the need for self-protection for felons and the unlawfully present;[236] and a federal district court in Tennessee upheld § 922(g)(5) because of the "potential" that unlawfully present noncitizens would not comply with registration requirements, "which may" diminish their commitment to communal obligations.[237] In *United States v. Leveille*, the trial court recognized that unlawfully present noncitizens may be the subject of hate crimes and "may very well" have "a great need for armed self-protection," but nevertheless deferred to Congress's determination "that these needs are secondary to broader safety concerns about firearm possession within these groups."[238] Typical of such cases, the court opinion is devoid of any specifics regarding the nature of these broader safety concerns and does not explain why a fundamental constitutional right can be brushed aside when balanced against these nebulous safety concerns.

The fatal problem with these decisions is that they disregard a right that the Supreme Court describes as "fundamental" to self-defense and preservation, and which pre-existed the Constitution,[239] on nebulous speculation. Yet, none of the courts upholding § 922(g)(5) required the government to provide evidence to substantiate their speculations regarding the harms posed by unlawfully present persons. Moreover, federal courts' suppositions about the unlawfully present are so general that they might be applied to any number of groups.[240] Many individuals have incentives to avoid detection by law enforcement, and any individual who is armed and confronted by law enforcement poses a threat to law enforcement. In other words, relying on these broad and generic claims resets Second Amendment analysis to a pre-*Heller* rational basis standard, without grounding in history and without consideration of the individual and fundamental nature of the right to bear arms post-*Heller*.

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234. United States v. Sitladeen, 64 F.4th 978, 989–90 (8th Cir. 2023).

235. United States v. Gil-Solano, 669 F. Supp. 3d 1063, 1075 (D. Nev. 2023) (quoting United States v. Torres, 911 F.3d 1253, 1264 (9th Cir. 2019)).

236. United States v. Leveille, 659 F. Supp. 3d 1279, 1285 (D.N.M. 2023).

237. United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762, at *5–6 (M.D. Tenn. June 21, 2023).

238. 659 F. Supp. 3d at 1285.

239. District of Columbia v. Heller, 554 U.S. 570, 593–94 (2007).

240. *See supra* notes 235–38.

Finally, these modern-day claims about noncitizens in § 922(g)(5) cases are concerning because of the background from whence they derive. Even when courts tailor their decisions to unlawfully present migrants alone, nebulous appeals to lawlessness and dangerousness must be scrutinized because of the long history of courts and legislatures masquerading xenophobic stereotypes as facts. By rubber-stamping the governments' conflation of immigration status with criminality or violence, these modern courts implicitly reify the rejected rationales of prior cases. Over time, the associations between immigrants and dangerousness tend to accrete and cement such that judges state the connection between the two as a judicially cognizable and dispositive fact. In doing so, fidelity to precedent operates to perpetuate the racism and xenophobia of the past, while superficially appearing cleansed of those bigoted underpinnings.[241]

C. CRIME, VIOLENCE, AND THE UNLAWFULLY PRESENT

If unlawful presence causes or correlates with dangerousness or a public safety threat, it seems reasonable to expect that the legislators, prosecutors, and courts would marshal such evidence in defense of firearms laws predicated on immigration status. Even if such substantiation was unnecessary in a pre-*Heller* world, it is critical to judicial resolution post-*Heller*, *Bruen*, and *Rahimi*. Instead, courts either have imputed threat or criminality to the unlawfully present by fiat, conjectured about the immigration status's relationship to lawlessness, or speculated on the noncitizen-defendant's dangerous characteristics that were not the subject of an individualized hearing.[242] As one careful federal court recently noted, however, there is no evidence that immigration status, including unlawful presence, is linked to either criminality in general or violent dangerousness in particular.[243] It is this linkage (or lack thereof) that should be critical when depriving any individual of a constitutional right to armed self-defense.

Various empirical investigations spanning the last few decades reveal that immigration status *qua* immigration status is unrelated to crime, including violent crime.[244] This statement requires one prefatory clarification. Federal law criminalizes many migrants for being migrants. Beginning in 1929, as part of the Undesirable Aliens Act, Congress criminalized unlawful entry and unlawful reentry.[245] Although these crimes have no specific or discernable human victims and are not associated with property loss or damage, they are the most charged federal

241. *See* Arulanantham, *supra* note 109, at 494–97 (showing how racist precedent evolved into citation for a neutral principle of judicial deference between the Chinese Exclusion Cases and *Trump v. Hawaii*).

242. *See* cases cited *supra* notes 234–37; *see also* United States v. Torres, 911 F.3d 1253, 1256 (9th Cir. 2019) (recounting claims about the noncitizen-defendant's possible past gang affiliation, despite the lack of criminal convictions related to any such allegation).

243. United States v. Benito, 739 F. Supp. 3d 486, 494–95 (S.D. Miss. 2024).

244. *See, e.g.,* Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 451–52 (2009).

245. 8 U.S.C. §§ 1325–1326. Unlawful entry is usually charged as a misdemeanor; unlawful reentry is charged as a felony. Fish, *supra* note 103, at 1051, 1053.

crimes and occupy the dockets of several federal courts in the southern border region.[246] They render noncitizens the majority of all federal arrestees.[247] While these immigration-related crimes may render a *portion* of the unlawfully present population amenable to criminal prosecution,[248] this type of potential "criminality" is far afield from the dangerousness relevant to firearm possession or violent crime.[249] Moreover, since these crimes were only added to the immigration code in 1929, they could not constitute a historical basis for determining noncitizens' criminality and dangerousness.

Setting aside the crimes related to unlawful entry, for nearly a century and a quarter, social scientists and elected officials have studied and attempted to substantiate the immigration–crime nexus. Researchers have proffered several hypotheses to explain why increased immigration or increased presence of immigrants might impact crime in general and more specifically might increase violence. One demographics-based theory suggests that immigration might increase the number and percentage of individuals, especially males, in their teen and young-adult years which tend to be the most crime-prone gender and age groups.[250] Another hypothesis relies on "social disorganization" or "social dislocation" theory,[251] arguing that immigration fragments and disrupts residential stability and population homogeneity, which then stunt the development of ties and shared values necessary for "informal social control" of crime.[252] Along the lines of populist economic claims, another theory posits that immigration increases labor market competition and thus

246. Fish, *supra* note 103, at 1053, 1053 n.3.

247. MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 253116, IMMIGRATION, CITIZENSHIP, AND THE FEDERAL JUSTICE SYSTEM, 1998-2018 7 (2019) (documenting that since 2008, the majority of federal arrestees have been noncitizens, and that in 2018, approximately 64% of federal arrestees were noncitizens).

248. It is worth noting that currently, most unlawfully present persons in the country cannot be prosecuted for entry crimes as they did not unlawfully enter the country. Neither 8 U.S.C. § 1325 nor § 1326 can be charged against those who overstay a visa, and in recent years, visa-overstays have constituted the majority of the yearly change in the undocumented population. *See* 8 U.S.C. §§ 1325–1326; ROBERT WARREN, CENTER FOR MIGRATION STUD. N.Y., US UNDOCUMENTED POPULATION CONTINUED TO FALL FROM 2016 TO 2017, AND VISA OVERSTAYS SIGNIFICANTLY EXCEEDED ILLEGAL CROSSINGS FOR THE SEVENTH CONSECUTIVE YEAR, 1 (2019), https://cmsny.org/wp-content/uploads/2019/01/US-Undocumented-Population-Continued-to-Fall-from-2016-to-2017-and-Visa-Overstays.pdf [https://perma.cc/GTN7-J2LJ].

249. Further, as Professor Eric Fish persuasively argues, these portions of the federal immigration code may be unconstitutional as measured by contemporary racial discrimination doctrine. *See* Fish, *supra* note 103, at 1091–98. Congress created those crimes with the avowed purpose of protecting whites from the racial groups who would migrate across the southern border. *Id.* at 1067–75. These laws criminalizing the act of migration are derived from the same milieu of racist lawmaking of the Asian exclusion laws that preceded them, and the Japanese incarceration policies that followed. *See supra* notes 169–80.

250. Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, 1 ANN. REV. CRIMINOLOGY 63, 66–67 (2018).

251. *See generally* CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENCY IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (1969) (analyzing social disorganization in cities with high immigrant populations).

252. Ousey & Kubrin, *supra* note 244, at 449.

raises unemployment and poverty concerns, which might arguably incentivize certain types of crime.[253] Finally, some theorize that immigrants and immigration are related to black markets, such as the illicit controlled substance market, enterprises which are associated with increased violence.[254]

Contra these hypotheses, countervailing theories provide some basis for explaining a negative relationship between immigration and crime. In response to the social dislocation claims, some theorists suggest that immigrants revitalize local communities, including through entrepreneurship, stable family structures, and filling vacant housing, thereby contributing to the economic and social factors that tend to lower crime rates.[255] For example, some theorists maintain that the strong interconnectedness and ties typical of immigrant communities facilitate social organization and informal monitoring systems that promote social cohesion and help moderate criminal or antisocial behavior.[256] These robust networks and communities can then help absorb new immigrants and minimize social dislocation and disorganization.

As documented in Section III.A, many legislatures and courts reify causal and correlative connections between immigrants or foreigners and proclivity towards violence or crime. These speculative fears seem to have motivated Congress to create several commissions in the early twentieth century to study the immigration–crime nexus, with the underlying assumption being that the commissions would indeed prove a positive correlation. Yet, those century-old assessments conducted after periods of high migration from Southern and Eastern Europe or those which study the migrant Mexican population concluded that immigrants are less prone to commit crimes than are native born.[257]

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253. Ousey & Kubrin, *supra* note 250, at 67 (citing Lesley Williams Reid, Harald E. Weiss, Robert M. Adelman & Charles Jaret, *The Immigration-Crime Relationship: Evidence Across U.S. Metropolitan Areas*, 34 SOC. SCI. RES. 757 (2005), and Roger Waldinger, *Black/Immigrant Competition Re-Assessed: New Evidence from Los Angeles*, 40 SOCIO. PERSP. 365 (1997)).

254. *Cf.* David Green, *The Trump Hypothesis: Testing Immigration Populations as a Determinant of Violent and Drug-Related Crime in the United States*, 97 SOC. SCI. Q. 506, 521 (2016) (finding no link between immigrant populations and violent crime, but "some evidence of a small but significant association between undocumented immigrants and drug-related crime").

255. *See* Robert M. Adelman, Yulin Yang, Lesley Williams Reid, James D. Bachmeier & Mike Maciag, *Using Estimates of Undocumented Immigrants to Study the Immigration-Crime Relationship*, J. CRIME & JUST., 2020, at 3, 19; Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 375 (2017).

256. *See* Casey T. Harris & Ben Feldmeyer, *Latino Immigration and White, Black, and Latino Violent Crime: A Comparison of Traditional and Non-Traditional Immigrant Destinations*, 42 SOC. SCI. RSCH. 202, 205 (2013); Ben Feldmeyer, *Immigration and Violence: The Offsetting Effects of Immigrant Concentration on Latino Violence,* 38 SOC. SCI. RSCH. 717, 729 (2009); Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PNAS 32340, 32346 (2020).

257. Carolyn Moehling & Anne Morrison Piehl, *Immigration, Crime, and Incarceration in Early Twentieth-Century America*, 46 DEMOGRAPHY 739, 739–40 (2009) (noting that the Dillingham Commission (in the U.S. Immigration Commission Reports (1911)) found "no satisfactory evidence" that crime was more prevalent among the foreign-born). The same was true of the Wickersham Commission in 1931. *Id* at 740. *See generally* Rubén G. Rumbaut, Katie Dingeman & Anthony Robles, *Immigration and Crime and the Criminalization of Immigration*, *in* ROUTLEDGE INTERNATIONAL

These historical studies were attempts to inform congressional debates about admissions decisions or funding and enforcement concerns.[258] That is to say, the studies were intended to justify immigration policy writ large, including limitations on the quantity and geographic origin of foreigners. Since that time, repeated claims of immigrant criminality have spawned a cottage industry of social scientists who consistently have studied the connection for the past several decades, each time responding to then-contemporary and recurrent concerns over the immigrant–crime nexus. Here, I summarize the findings of more recent studies for a different purpose: to the extent the studies reveal a positive or negative relationship between noncitizens and violence or violent crime, they can inform the claims made by legislatures and courts about the danger noncitizens might pose if permitted to possess firearms on par with the citizen population.

The findings from the early 1900s are consistent with conclusions reached by contemporary researchers. A 2018 meta-analysis of the results of immigration–crime empirical studies shows that most studies show a null or nonsignificant association between immigration and crime; in fact, of the statistically significant findings, the majority showed a negative correlation.[259] In other words, the overwhelming conclusion of the studies conducted thus far suggests that immigration has "null or negative" effects on crime rates.[260] This also is true for violent crime,[261] even if some of the studies on property crime have yielded less determinate results.[262] Researchers dubbed this negative correlation between immigrants and crime and lower rates of criminality relative to the native-born population the "immigrant paradox," as it persists despite theoretical possibilities—predicated on diminished access to economic and social integration—which would otherwise predict high levels of immigrant criminality.[263]

Delving into individual studies, Professor Rubén Rumbaut and his co-authors note that while the foreign-born population more than doubled from 1990 to 2015 (with the number of unlawfully present noncitizens tripling in that span), violent crime rates reached historic lows and property crimes fell sharply as well.[264] Most

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HANDBOOK OF MIGRATION STUDIES 725 (Steven J. Gold & Stephanie J. Nawyn eds., 2d ed. 2019); Light & Miller, *supra* note 255, at 370 (noting that the immigration–crime nexus has been a focus of criminological study since the early twentieth century).

258. *See* Moehling & Piehl, *supra* note 257, at 739–41; *see also* Rumbaut et al., *supra* note 257, at 726.

259. Ousey & Kubrin, *supra* note 250, at 69.

260. *Id.*; Light & Miller, *supra* note 255, at 394.

261. Light & Miller, *supra* note 255, at 394.

262. *See, e.g.*, Jorg L Spenkuch, *Understanding the Impact of Immigration on Crime*, 16 AM. L. & ECON. REV. 177, 182 (2014) (focusing on data from 1980–2000, and finding that "immigration increases [burglary, larceny, and motor vehicle theft] as well as robberies, but has almost no effect on rates of rape and aggravated assault"). *But see* Adelman et al., *supra* note 255, at 18 (using cross-sectional data and estimates of the undocumented population for 2014 and finding that "as immigration—in this case, unauthorized immigration specifically—increases in metropolitan areas, crime decreases. In particular, overall property crime, burglary, and larceny decrease with increases in undocumented immigration.").

263. Adelman, et al., *supra* note 255, at 3; *cf.* Robert J. Sampson, *Rethinking Crime and Immigration*, 7 CONTEXTS 28, 29 (2008) (discussing the "Latino Paradox").

264. Rumbaut, et al., *supra* note 257, at 727.

strikingly, the decline in crime rates was consistent even in cities that traditionally have received and continue to serve as primary destinations for new migrants, including New York, Los Angeles, Miami, Chicago, El Paso, and San Diego, as well as in newer destinations for migrants, such as Austin, Texas. The disparity between foreign-born and native-born criminality is also reflected in incarceration rates, with data from 2010 showing that for males between eighteen and thirty-nine years of age, the native-born were incarcerated at over double the rate of immigrants.[265] Indeed, as per Rumbaut's previous study in 2008, the disparity in incarceration rates for that age demographic was even greater for less-educated Mexican, Salvadoran, and Guatemalan men residing in the U.S.[266] A more recent Stanford University study from researchers affiliated with the National Bureau of Economic Research confirms and amplifies Rumbaut's findings, noting that immigrants have had similar or lower incarceration rates for the past 150 years, with declining rates of immigrant incarceration relative to the native-born population over the past half-century.[267]

To be sure, one of the limitations of Rumbaut's study and others is their undifferentiated focus on the "foreign-born" without further distinctions based on immigration status.[268] In some ways, Rumbaut's broad categorization is useful, as other research suggests that many people might conflate "illegal" immigrants with immigrants generally when formulating their perceptions about the immigrant crime threat,[269] especially when combined with research finding that the children of immigrants and assimilated immigrants have higher rates of crimes than, respectively, their parents and unassimilated immigrants.[270] These findings suggest that proclivity towards crime in general is in part a process of assimilation and "Americanization," rather than endemic to noncitizens.[271] This finding ironically provides reason to suggest that *Heller* and *Bruen*'s use of "law-abiding citizens"[272] should be

265. *Id*. (citation omitted).

266. RUBÉN G. RUMBAUT, UNDOCUMENTED IMMIGRATION AND RATES OF CRIME AND IMPRISONMENT: POPULAR MYTHS AND EMPIRICAL REALITIES 10 (2008).

267. *See* Ran Abramitsky, Leah Platt Boustan, Elisa Jácome, Santiago Pérez & Juan David Torres, *Law-Abiding Immigrants: The Incarceration Gap Between Immigrants and the U.S.-Born, 1850-2020* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23-20, 2023).

268. RUMBAUT, *supra* note 266 at 8–9; Abramitsky, et al., *supra* note 267, at 1 (providing differences in crime rates for "foreign-born" versus "native-born"); *see* Adelman et al., *supra* note 255, at 2 ("As consistent as [research suggesting null or negative relationship between immigration and crime] has been across the years, little research takes into account undocumented immigrants' influence on crime." (citations omitted)); Ousey & Kubrin, *supra* note 250, at 80–81 (2018) (noting that crime data often do not capture an individual's immigrant status, and that official crime data do not distinguish between documented and undocumented immigrants); Light & Miller, *supra* note 255, at 371 (noting that in a meta-analysis of 51 studies from 1990–2014, none focused on unauthorized immigration flows).

269. *See* Andrew J. Baranauskas & Jacob I. Stowell, *Perceptions of Immigrants as a Criminal Threat: The Role of Negative Affect and Ethnocentrism*, 15 RACE & JUST. 92, 108 (2025) ("[A]ffect towards 'illegal' immigrants specifically is associated with perception of criminal threat for all immigrants. This indicates that people are generalizing from their feelings towards 'illegal' immigrants when assessing the risk posed by immigrants in general.").

270. *See* Rumbaut et al., *supra* note 257, at 729; RUMBAUT, *supra* note 266, at 11.

271. *See* RUMBAUT, *supra* note 266, at 11.

272. District of Columbia v. Heller, 554 U.S. 570, 625 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022).

understood to differentiate between classes of citizens (who are more prone to criminality) because noncitizens are, as a group, much less likely to suffer from the concerns that would render some citizens unfit for firearm possession.

Nevertheless, singling out the effects of unauthorized immigrants on crime is important both because the federal alien-in-possession ban excludes those "illegally present" from firearm ownership and because there is at least a theoretical possibility that undocumented migrants might have a different relationship to violence and crime than other immigrant categories.[273] For example, the "social displacement" or "social disorganization" theory of immigrant crime might have greater purchase with undocumented populations who may be more restricted from forming economic and social ties within their communities than lawfully present counterparts (which may then impact cohesion and other informal social control mechanisms, and thereby increase crime).[274] Relatedly, because most lawful permanent residents must meet stringent admissibility criteria including criminal history checks and poverty-based restrictions,[275] lawfully present noncitizens might be less inclined to engage in criminal behavior. Finally, the age and gender demographics of the undocumented population—because it skews younger and more male than the rest of the noncitizen population—suggests the demographic might be more likely to engage in violent or criminal behavior.[276]

Addressing these hypotheses, research by Professors Michael Light and T.Y. Miller attempted to single out the immigration–crime nexus for the unlawfully present population.[277] Their longitudinal study[278] of criminal, socioeconomic, and demographic data across all fifty states and Washington, D.C. from 1990–2014 found that "[i]ncreased concentrations of undocumented immigrants are associated with statistically significant *decreases* in violent crime."[279] Importantly their data focused on offenses that comprise the violent crime index, namely murder, robbery,

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273. 18 U.S.C. § 922(g)(5).

274. *See* Adelman et al., *supra* note 255, at 5 ("At the individual-level, the underlying factors that support the immigrant paradox (i.e., self-selection effects, cultural and familial practices, ethnic enclaves, and maintaining clear criminal records) may operate differently for undocumented immigrants than for other immigrants."); Light & Miller, *supra* note 255, at 373; *see also* Ousey & Kubrin, *supra* note 250, at 67.

275. *See* 8 U.S.C. § 1182(a)(1)–(9) (providing criteria that noncitizens must pass to the satisfaction of a consular officer or U.S. Citizenship and Immigration Services official to receive lawful permanent status or a nonimmigrant visa).

276. Ousey & Kubrin, *supra* note 250, at 66–67.

277. *See generally* Light & Miller, *supra* note 255.

278. Both Light and Miller, as well as researchers Graham Ousey and Charis Kubrin, note the importance and potential impact of assessing the immigration–crime nexus through longitudinal versus cross-sectional studies. *See* Light & Miller, *supra* note 255, at 371; Ousey & Kubrin, *supra* note 250, at 79 (noting that "[a]nother important shortcoming in the literature is the relative absence of longitudinal research and the implications of using cross-sectional data and models" and suggesting that more weight be given to longitudinal studies).

279. Light & Miller, *supra* note 255, at 383–84, 388 (further noting that "[r]ather than causing higher crime, increased undocumented immigration since 1990 is generally associated with lower rates of serious violence, although this relationship seems qualified depending on the specific type of violence and weighting scheme") (emphasis added).

aggravated assault, and rape.[280] This criminological specification would appear to accord with primary public safety concerns associated with firearm possession and the purpose behind disarmament statutes. Notably, Light and Miller's findings remained robust even after testing against potential confounding explanations, including the possibility that undocumented migrants were selecting low-violence areas and whether their results were the product of less reporting (instead of less crime).[281] Professor Robert Adelman's subsequent cross-sectional study using estimates of the undocumented population from 2014 teased out the effects observed by Light and Miller, but at the metropolitan area level (instead of at the state-level) where unauthorized immigrants tend to concentrate.[282] Again, Adelman and his co-authors' findings support Light and Miller's results. Namely, as unauthorized immigration increased in metropolitan areas, crime decreased.[283]

Finally, another body of research queries whether "immigrant-friendly," "pro-immigrant," "integrationist," or "enforcement mitigation" types of local policies—sometimes popularly (but imprecisely) referenced under the umbrella of "sanctuary" policies which disengage localities from federal enforcement efforts—correlate with crime.[284] Again, available research suggests that these forms of local non-enforcement or non-cooperation policies and practices are negatively associated with property and violent crime rates, especially in communities with higher proportions of Latinos in general.[285]

A more nuanced version of the social dislocation thesis eschews broad, undifferentiated reliance on immigration writ large across the country and zeroes in on the social disruption that occurs in particular destinations[286] and the racial friction caused by incoming migrants relative to the incumbent community.[287] As newly arriving Latino immigrants are moving to "new" immigrant destinations (like cities in North Carolina) instead of overwhelmingly to "traditional" immigrant receiving destinations (like large metro areas in California), the attendant social dislocation might be more pronounced in the communities that lack a long history

280. *Id.* at 379.

281. *Id.* at 390–92. But note earlier researchers suggest that underreporting is a "serious concern for those who study immigration and crime" with "[d]omestic violence, sexual assault, and gang violence" constituting the bulk of crimes that immigrants underreport. *See* Ousey & Kubrin, *supra* note 250, at 81.

282. *See generally* Adelman et al., *supra* note 255.

283. *Id.* at 18.

284. *See* Marta Ascherio, *Do Sanctuary Policies Increase Crime? Contrary Evidence From a County-Level Investigation in the United States*, SOC. SCI. RSCH., Aug. 2022, at 1,2.

285. *See id.* at 8 (analyzing county level data post 2013); *see also* David K. Hausman, *Sanctuary Policies Reduce Deportations Without Increasing Crime*, 117 PNAS 27262, 27265 (2020); TOM K. WONG, CTR. FOR AM. PROGRESS, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY, 1 (2017), https://www.americanprogress.org/article/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ [https://perma.cc/NR7Q-9PV2] ("Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties.").

286. *See, e.g.*, David M. Ramey, *Immigrant Revitalization and Neighborhood Violent Crime in Established and New Destination Cities*, 92 SOC. FORCES 597, 599 (2013).

287. *Id.*, at 604–05 (querying the relationship to crime of immigrants moving into traditionally Black neighborhoods); George J. Borjas, Jeffrey Grogger & Gordon H. Hanson, *Immigration and the Economic Status of African-American Men*, 77 ECONOMICA 255, 255 (2010).

of immigration.[288] Thus far, however, criminological studies that have tested the hypothesis have failed to substantiate this "new destinations" theory.[289] In addition, localities that are presumed to be more affected by undocumented migrants—and therefore, migrant crime—have not experienced greater crime. Although no other states record crime data by immigrant status, Texas (led by a governor who has made immigrant danger his signature policy directive[290]) does.[291] Yet, Texas's own data shows that noncitizens commit fewer crimes in the state than citizens.[292] And, in general, so-called "sanctuary jurisdictions" also experience fewer crimes, including violent crime, than non-sanctuary jurisdictions.[293]

Relatedly, some argue that recently arrived Latinos exacerbate intra-minority community instability by competing with or displacing low-skilled Black workers.[294] Focusing specifically on the question of homicide reduction, Professor Michael Light sought to tease out the more nuanced version of social dislocation theory which suggests that Latino immigrants settling in non-traditional destinations might influence homicide rates, especially for Black communities.[295] Using a longitudinal study from 1990–2010 of the largest metropolitan areas in the United States, Light found that Latinos were more likely to settle in areas with higher rates of violence but that their presence correlated negatively with

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288. *See, e.g.*, Ramey, *supra* note 286, at 599 (citing background literature and describing theoretical basis for new destinations being situated differently vis-à-vis immigrant crime than traditional destinations); Harris & Feldmeyer, *supra* note 256, at 205 ("Rather than reinforcing conventional institutions and bolstering social capital networks, an influx of Latino immigrants into communities with little previous exposure to immigration may create the types of conflict, strain, and disruptive effects . . . that are expected to generate crime according to traditional social disorganization and anomie perspectives . . . ." (citations omitted)); Edward S. Shihadeh & Raymond E. Barranco, *The Imperative of Place: Homicide and the New Latino Migration*, 54 SOCIO. Q. 81, 94–97 (2013) (arguing that, for the period from 1990–2000 "social dislocation theory remains highly relevant for understanding Latino immigration and crime," and noting a positive relationship between Latino immigrants and higher levels of violence in new destinations).

289. Ramey, *supra* note 286, at 622 (finding that regardless of destination type, higher levels of immigrant composition or immigrant growth are not associated with higher crime rates, in line with the "immigrant revitalization" theory). *But see* Ousey & Kubrin, *supra* note 250, at 78 (noting the need for research to account for the nuance and complexity of destination context, and the possibility that new destinations might have a positive immigrant–crime relationship); Light & Miller, *supra* note 255, at 394 ("[A] logical extension of this article would be to explore the undocumented–violence nexus across different contexts.").

290. *See, e.g.*, Rafael Bernal, *Abbott Ties Immigrants to Crime Days After Biden Southern Border Move*, THE HILL (June 6, 2024, at 12:28 ET), https://thehill.com/latino/4707821-abbott-texas-immigrants-biden-southern-border-executive-order/ [https://perma.cc/7W24-FPBJ].

291. *See* Alex Nowrasteh, *Illegal Immigrant Murderers in Texas, 2013–2022*, CATO INST. 2 (June 26, 2024), https://www.cato.org/policy-analysis/illegal-immigrant-murderers-texas-2013-2022 [https://perma.cc/37X8-DYND].

292. *Id.* at 4 (finding that "[d]uring the 10-year span from 2013 to 2022, the homicide conviction rate in Texas was 2.2 per 100,000 illegal immigrants, 1.2 per 100,000 legal immigrants, and 3.0 per 100,000 native-born Americans").

293. *See generally* Hausman, *supra* note 285; Yuki Otsu, *Sanctuary Cities and Crime,* 192 J. ECON. BEHAV. & ORG. 600 (2021); Wong, *supra* note 285.

294. *See, e.g.*, Harris & Feldmeyer, *supra* note 256, at 206.

295. *See generally* Michael T. Light, *Re-Examining the Relationship Between Latino Immigration and Racial/Ethnic Violence*, 65 SOC. SCI. RSCH. 222 (2017).

homicides.[296] In contrast to research finding that Black communities were likely to bear the brunt of recent Latino immigration, Light's study argues that Black communities have experienced lowered homicide rates after waves of Latino immigration.[297]

Finally, more recent work digs into more nuanced aspects of the immigration–crime link. Criminologists Charis Kubrin and John Hipp's recent study, for example, attempts to tease out the specific effects of "immigrant heterogeneity" or "immigrant diversity" as it relates to crime.[298] They note that theoretical perspectives on the expected effect of population heterogeneity differ, with some research suggesting that diversity might exacerbate the concerns of social dislocation theory, whereas other studies suggest that heterogeneity can reduce conflict among groups and contribute to less neighborhood crime.[299] Assessing the effect of three types of heterogeneity created by immigrant populations—(1) racial and ethnic; (2) language; and (3) country of origin—their overall findings did not support a strong positive correlation between immigrant diversity and crime in neighborhoods across nearly 350 cities, especially with regards to violent crime.[300] To the extent racial and ethnic difference had a modest positive relationship to violent crime, the authors note that the immigration status has "little import" separate from racial and ethnic diversity in neighborhoods regardless of immigration status.[301] Along some metrics, increased immigrant diversity was correlated with lower neighborhood crime rates, consistent with the immigrant revitalization hypothesis and the theory that increased contact between different immigrant groups might foster intergroup tolerance.[302]

Taken together, these studies affirm a simple bottom line: claims by legislatures, enforcement officials, or jurists that rely upon a causative or correlative relationship between unlawfully present immigrants and dangerousness—or at least the type of dangerousness that would matter for justifying prohibiting arms possession—at best cannot be substantiated; at worst, the claim is belied by the weight of available evidence and gets it exactly backwards. To be sure, despite the consistency and weight of the results of the criminological research in this area, the studies have limitations. Most, for example, use data from immigration flows prior to 2010.[303] More work must be done with regards to new and more recent immigration flows and the changing demographics, destinations, nationalities, and circumstances of more recently

296. *Id.* at 232, 235.

297. *Id.*

298. *See generally* Charis E. Kubrin & John R. Hipp, *Immigration and Crime: The Role of Immigrant Heterogeneity*, 62 J. RSCH. CRIME & DELINQ. 772 (2025).

299. *Id.* at 774–79.

300. *Id.* at 774, 800–01. Their analysis showed that language diversity associated with higher levels of property crime, but lower levels of violent crime; that racial and ethnic heterogeneity is the "least consequential diversity dimension" with no relationship to property crime; and diversity of country of origin had "strong negative effects" on both violent and property crimes. *Id.*

301. *Id.* at 800.

302. *Id.* at 800–01.

303. *See, e.g.*, Light, *supra* note 295, at 226–27 (noting that study used data from 1990-2010). Even Kubrin and Hipp's 2025 study of the effects of immigrant diversity on crime rates is limited to data from 2009-2011. Kubrin & Hipp, *supra* note 298, at 784.

arriving noncitizens. Still, at minimum, these empirical studies demonstrate that immigration status cannot be used as proxy for the type of dangerousness or lawlessness that matters for firearm possession.

None of this, of course, is to suggest that noncitizens generally and unlawfully present persons specifically do not commit violent crimes, are always trustworthy with firearms, or are never involved with transnational gangs and cartels. Sometimes, unlawfully present persons commit violent crimes with guns.[304] But they do not do so at a rate higher than citizens, who are not categorically forbidden from owning firearms based on their membership status.[305] Indeed, even in a counterfactual world in which immigration status marginally correlated with crimes or violence, a group-based prohibition would still be problematic under *Rahimi*'s focus on individualized threat assessment.[306]

Modern Second Amendment challenges from noncitizens acutely center the debate over whether unlawfully present noncitizens pose outsized danger or a safety threat. The data reviewed above, however, reveals the impossibility of imputing dangerousness based on immigrant status, even unlawful immigrant status. Thus, these cases by noncitizens raising Second Amendment claims present an emerging opportunity to course correct judicial assumptions about noncitizens, in the context in which those stereotypes have the most immediate and impactful legal significance. Rectifying reliance on stereotypes here, where the doctrinal focus on dangerousness is most acute, would then have salutary effects on federal court jurisprudence in other areas that similarly traffic in notions of immigrant threat and lawlessness.

D. LAW-ABIDANCE AND PRUDENTIAL CONCERNS ABOUT UNLAWFULLY PRESENT PERSONS

Despite the weight of criminological data that rejects the immigrant–crime and immigrant–violence nexuses, it remains possible that immigration status—and especially unlawful presence—might implicate other public safety concerns. Accordingly, some pre-*Bruen* courts attempted to justify the categorical criminal ban on gun possession by unlawfully present persons by articulating factors appurtenant to unlawful status without relying on unlawful status per se as the determinant of dangerousness or threat. This form of analysis takes two distinct forms. First, some courts rely on language in *Heller* that limits Second Amendment rights to "law-abiding" citizens.[307] Those cases argue that unlawfully present immigrants have evinced disregard for immigration laws and therefore cannot be considered

304. As noted in the Introduction, Donald Trump often highlights the tragic deaths of Kate Steinle and Laken Riley as examples. *See supra*, notes 2–3.

305. *See, e.g.*, SUZANNE STRONG & MARK MOTIVANS, BUREAU OF JUST. STAT., DOJ, NCJ 252647, NON-U.S. CITIZENS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 1998–2018 6 (2021) (showing percent of U.S. citizens versus undocumented noncitizens charged with weapons offenses); 18 U.S.C. § 922(g) (limiting ban on firearm possession to certain noncitizens).

306. United States v. Rahimi, 602 U.S. 680, 700 (2024) ("[T]he Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others.").

307. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008). Most recently, in the felon-in-possession context, the Eighth Circuit rejected facial and as-applied challenges brought by a defendant with a decades-old controlled substance conviction and whose civil rights were restored under state law,

"law-abiding."[308] Another set of cases suggest that the practical enforcement concerns related to unlawful status justify a broad criminal ban.[309] While superficially distinct from direct reliance on the immigrant–crime nexus, both of these alternative approaches nevertheless suffer from the same conceptual and empirical deficits.

1. Unlawfully Present Noncitizens as Non-Law-Abiding

Jurisprudence that focuses on the non-"law-abiding" nature of unlawfully present noncitizens stands on shaky textual, doctrinal, and practical ground. To begin, nothing in the Second Amendment's text limits arms rights to citizens, let alone law-abiding ones.[310] *Heller* and *Bruen* framed the right as such,[311] but as I have argued elsewhere and some federal courts have acknowledged, the limitation to citizens is fiat and dicta.[312] While some lower federal courts have recognized the imprudence of relying on that description to identify the rightsholders of the Second Amendment, other federal courts, like the Fourth Circuit, have leaned in to *Heller* and *Bruen*'s rhetoric.[313] Post-*Bruen*, courts and the federal government have made this argument to exclude rightsholders, including in the Department of Justice's brief in *Rahimi*.[314] At least in the context of domestic violence abusers, the Supreme Court rejected the idea that they could be disarmed because they are not "responsible," holding that the standard was too nebulous and indeterminate a basis on which to deprive a fundamental right.[315]

Perplexingly, despite *Rahimi*'s rejection of that line of argumentation, the Eighth Circuit subsequently cited *Bruen* and *Heller*'s "not law-abiding" language as a primary basis for rejecting facial and as-applied challenges to § 922(g)(1), the federal felon-in-possession prohibition.[316] Looking to historical exclusions of religious and racial minorities, as well as statutes permitting property forfeiture for non-violent crimes, the Eighth Circuit concluded that the "historical record suggests that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence."[317] Had that Court of Appeals heeded *Rahimi*'s caution, it might have recognized that the descriptor "deviated from legal norms" carries the same indeterminacy as depriving individuals of firearms rights because they are not "responsible."[318]

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broadly interpreting historical firearms laws as countenancing dispossession of non-law-abiding citizens. United States v. Jackson, 110 F.4th 1120, 1126 (8th Cir. 2024).

308. *See, e.g.*, United States v. Carpio-Leon, 701 F.3d 974, 978–81 (4th Cir. 2012).

309. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978, 989 (8th Cir. 2023).

310. *See* U.S. CONST. amend. II.

311. *See Heller*, 554 U.S. at 635; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 5 (2022).

312. *See* Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 42, at 1468.

313. *Carpio-Leon*, 701 F.3d at 978, 981 (discussing the use of the phrase "law-abiding" citizens in *Heller*, later used in *Bruen*, 597 U.S. at 5 (2022)).

314. Brief for the Petitioner at 10–13, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915).

315. United States v. Rahimi, 602 U.S. 680, 701 (2024) ("'Responsible' is a vague term. It is unclear what such a rule would entail.").

316. *See* United States v. Jackson, 110 F.4th 1120, 1127 (8th Cir. 2024).

317. *Id.*

318. *Rahimi*, 602 U.S. at 701–02.

Depriving unlawfully present noncitizens of gun rights because they fall into a category of non-law-abiding individuals suffers from the same, if not greater, indeterminacy and vagueness concerns as applying that standard in felon-in-possession cases. First, to use unlawful presence to designate a person as "non-law-abiding" for purposes of firearm possession is to frame proclivity to law-breaking as the predictable consequence of violating immigration regulations. In other words, if the noncitizen was willing to enter without documentation or overstay a visa, then they—as a category of people—do not evince respect for the rule of law[319] and cannot be trusted to otherwise comply with societal norms or laws. Yet, this type of extrapolation is precisely what the criminological and sociological literature reviewed earlier is meant to test and precisely what those tests reveal as unsupportable and unsound.[320]

Second, unlawful presence is not a criminal violation, and deportation, according to the Supreme Court, is not punishment in the constitutional sense.[321] Rather unlawful presence is a civil, administrative transgression that can be a grounds for expulsion from the country.[322] But, if that category of immigration status violations is sufficient to deprive one of Second Amendment rights, then Congress and state legislatures may disarm many citizens who have transgressed any law or regulation.[323]

To be sure, unlawful presence does involve transgressing federal law.[324] But, if the broad purpose of disarming "untrustworthy" persons or those prone to disobeying the law suffices, then most, if not all, current legal restrictions on firearms possession should likely be upheld, and *Rahimi*'s focus on adjudicated "credible threats" is mere dicta.[325] The sweeping ambit of "untrustworthy" or "law-breaker" might include the unlawfully present, but it would also include any number of scofflaws, regulatory violators, and those suspected of being rule-breakers. As a ready example, traffic violations and non-compliance with administrative regulations could form the basis for disarmament, providing an end-run around the Second Amendment. Indeed, wide swathes of the population would fall into groups that would cozily fit a general theory of dangerousness if that is the broad principle the Court's methodology directs us to distill from historical gun regulations.

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319. *See, e.g.,* United States v. Sitladeen, 64 F.4th 978, 989 (8th Cir. 2023); United States v. Leveille, 659 F. Supp. 3d 1279, 1285 (D.N.M. 2023).

320. *See supra* Section III.C.

321. *See generally*, Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings,* 43 HARV. C.R.-C.L. L. REV. 289 (2008).

322. *See* Arizona v. United States, 567 U.S. 387, 396, 407 (2012) ("Removal is a civil, not criminal matter . . . [a]s a general rule, it is not a crime for a removable alien to remain present in the United States.").

323. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1461–63. Prior to being overturned, one of the Fifth Circuit judges made this same point in the appellate court decision in *Rahimi*. *See* 61 F.4th 443, 464–65 (5th Cir. 2023) (Ho, J., concurring).

324. *See* 8 U.S.C. § 1182(a)(9)(B); 8 U.S.C. §§ 1325, 1326; *see also* Arizona, 567 U.S. at 395.

325. *See* United States v. Rahimi, 602 U.S. 680, 693 (2024).

2. Unlawful Presence as Proxy for Prudential Concerns

In other pre-*Bruen* and pre-*Rahimi* cases, some courts credited the government's asserted interests in regulating factors appurtenant to unlawful presence, without directly relying on unlawful presence as a proxy for dangerousness. There are multiple variations of this type of judicial approach, but at base, each relies on an underlying factual claim and assumption about immigration status. For example, the Eighth Circuit rejected a § 922(g)(5) challenge, opining "those in the United States without authorization may be more likely to acquire firearms through illegitimate and difficult-to-trace channels."[326] The federal district court for Nevada baldly stated "people unlawfully in this country have an 'incentive to falsify information and evade law enforcement,'" and that "'armed, unlawful aliens could pose a threat to . . . law enforcement who attempt to apprehend and remove them.'"[327] Another federal district court, in Tennessee, stated "[u]nlawful presence in the United States correlates with potential noncompliance with certain government registrations and identification, which may result in different levels of communal participation."[328]

This sampling of claims from federal courts raises at least two concerns. First, it's not clear that any of these rationales can be advanced under *Bruen*'s history-focused analogical inquiry. At base, the public policy concerns regarding the difficulty of tracing, or registration of individuals or firearms, should only matter if federal and state regulation in the Founding Era addressed a similar social problems through similar means. Otherwise, the invocation of contemporary policy concerns regarding firearm possession by unlawfully present persons is irrelevant to originalist interpretation and pertinent only to assessing the government's justification in a tiers of scrutiny approach. If historical regulations might be interpreted at a level of generality justifying modern day regulations that disarm those who might acquire firearms through illegitimate channels, those who have an incentive to evade law enforcement, and those who do not comply with registration requirements, that would mean that many modern prohibitions are constitutional. Felons, those who have committed crimes (whether violent or not) but have not yet been caught, and those who oppose government monitoring and registration generally, immediately come to mind as populations who would fit that criterion, and thus gun laws disarming them and similar groups presumptively should be lawful under this line of thinking.

Second, these federal court statements are stated as common knowledge and truth about the behavior and incentives for a category of persons.[329] Accordingly, these justifications are amenable to verification and substantiation. Not surprisingly, like courts that have more directly connected immigrants and dangerousness or

326. United States v. Sitladeen, 64 F.4th 978, 989 (8th Cir. 2023)

327. United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1075 (D. Nev. 2023) (quoting United States v. Torres, 911 F.3d 1253, 1264 (9th Cir. 2019)).

328. United States v. Escobar-Temal, No. 3:22-cr-00393, 2023 WL 4112762, at *5 (M.D. Tenn. June 21, 2023)

329. *See supra* notes 326–28.

criminality, federal courts relying on these enforcement-related justifications provide no evidence or support for their contentions.[330] If it is true that unlawfully present noncitizens present unique enforcement concerns, it would stand to reason that the government could substantiate that claim without having to revert to probabilistic claims of what unauthorized status "might" lead to or incentivize. Hypothesizing the range of conceivable effects of policies—without providing any substantiation—is the defining hallmark of the Court's most deferential, rational basis tier of judicial scrutiny.[331] Such a presumption and judicial deference might have made sense pre-*Heller*, even as it related to noncitizen disarmament,[332] but not after *Heller* insisted that Second Amendment challenges be analyzed akin to other fundamental guarantees.[333]

To be clear, this Article does not discount the possibility that enforcement-related concerns specific to unlawful presence or immigration status potentially might justify government regulation of those classes of persons. To do so under *Bruen*'s methodology, however, requires a historical tether.[334] Further, if that tether exists, the government's claims about the behavior and characteristics of the unlawfully present population require more than judicial fiat and supposition. Finally, similar to forthright claims about immigrant criminality and dangerousness, courts advancing enforcement-related justifications for disarming noncitizens should be aware of the long history of conflating noncitizens with dangerousness, often because of blatantly racist arguments. Contemporary judicial justifications for treating noncitizens differently must at least contend with that past,[335] which means vigilantly and conspicuously divorcing verifiable enforcement concerns for noncitizen populations from stereotypes and assumptions descended from the racist and xenophobic past. To avoid replicating those maladies, courts must approach the exclusion of noncitizens from fundamental Bill of Rights protections with the same rigor (or deference) they would apply to other group-based restrictions.

IV. RECONSIDERING DANGEROUSNESS, FIREARM POSSESSION, AND THE UNLAWFULLY PRESENT

Thus far, this Article has critiqued the various approaches taken by federal courts to the question of noncitizen firearm possession, with an in-depth focus on the trope of "dangerousness" deployed by courts and elected officials to justify differential treatment of noncitizens across different fields of regulation, including

330. *See supra* notes 326–28.

331. *See generally* R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review,* 45 S. ILL. U. L.J. 415 (2021).

332. *See* United States v. Miller, 307 U.S. 174, 178 (1939); United States v. Toner, 728 F.2d 115, 128–29 (2d Cir. 1984).

333. District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (seeking to understand and harmonize the meaning of "the people" in the Second Amendment with its other uses in the Constitution); *see also* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 25 (2022) ("This Second Amendment standard accords with how we protect other constitutional rights.").

334. *See Bruen*, 597 U.S. at 19.

335. *See supra* Section III.A.

firearm possession. If courts' rationales are undertheorized and undermined by existing data on immigrant dangerousness, how should they be assessing the regulation of noncitizens, especially with regards to firearms?

The stakes of correcting this line of jurisprudence are high. The Trump Administration's promises of uber-enforcement and the rhetoric used to justify those policies have painted the noncitizen population as dangerous and violent criminal threats.[336] As Trump and his surrogates tell it, "mass deportation" is the solution to that perceived threat. Like the late 1800s and the 1940s,[337] today's federal and state elected officials[338] and federal judges, like Circuit Judge James Ho,[339] have irresponsibly (and disingenuously in Ho's case[340]) equated immigration with foreign invasion, conjuring the tropes of existential military threat to the United States. Meanwhile, the Court's diminishment of due process and habeas protections for noncitizens apprehended in the U.S.[341] paves the way for more widespread use of summary removal procedures, like expedited removal, to achieve the goal of mass deportations.

Undoubtedly, all these draconian and enforcement-heavy responses will be challenged in federal court, either as violations of extant statutes or the Constitution. In those cases, the federal courts' underlying conception of noncitizens—or, more specifically, their willingness to indulge oft-repeated stereotypes and generalizations about that population's danger to the citizen population—naturally will influence judicial assessment of the justifications proffered by federal officials to justify harsher enforcement mechanisms. Specifically, the more a federal court accepts and adopts "immigrant danger" or "immigrant criminality" narratives, the more likely they are to uphold federal enforcement policies against statutory and constitutional challenges. Conversely, the more a court unpacks and investigates the link between noncitizens and actual or proven danger or threat, the more likely it will question or strike down enforcement-heavy policies or laws that distinguish based on immigrant status. This Article's review of the jurisprudential background and current empirical

336. *See* Proclamation No. 10886, 90 Fed. Reg. 8327, 8327 (Jan. 20, 2025).

337. Kate Linthicum, *The Dark, Complex History of Trump's Model for His Mass Deportation Plan*, L.A. TIMES (Nov. 13, 2015, at 03:00 ET), https://www.latimes.com/nation/la-na-trump-deportation-20151113-story.html [https://perma.cc/TQG2-QBE5] (recounting the scale and violations of mass deportations during "Operation Wetback" under the Eisenhower Administration).

338. *Id.*; *see also* William Melhado, *Gov. Greg Abbott Embraces "Invasion" Language About Border, Evoking Memories of El Paso Massacre,* TEX. TRIB. (Nov. 18, 2022, at 15:00 ET), https://www.texastribune.org/2022/11/18/texas-greg-abbott-immigration-invasion-el-paso/ [https://perma.cc/8S9S-WT2Z].

339. Jacqueline Thomsen, *James Ho's Post-Election Remarks Fuel Supreme Court Speculation,* BLOOMBERG L. (Dec. 17, 2024, at 04:45 ET), https://news.bloomberglaw.com/us-law-week/james-hos-post-election-remarks-fuel-supreme-court-speculation [https://perma.cc/X355-QXYA] ("Ho pointed to his writings on the appeals court, in which he embraced the declaration by Texas. Gov. Greg Abbott (R) of an 'invasion' on the state's border with Mexico in litigation.").

340. Michael Hiltzik, *A Trump Judge Dropped His Unwavering Support for Birthright Citizenship to Conform to Trump's View*, L.A. TIMES (Jan. 24, 2025, at 03:00 ET), https://www.latimes.com/business/story/2025-01-24/column-a-trump-judge-dropped-his-unwavering-support-for-birthright-citizenship-to-conform-to-trumps-view [https://perma.cc/85UV-YW54].

341. DHS v. Thuraissigiam, 591 U.S. 103, 140 (2020).

work on immigrant danger, in the context of firearms prohibitions, intends to push courts towards the latter path.

Section A below considers the relationship between unlawfully present noncitizens and other group-based, categorical exclusions in firearms law. Applying a consistent analytic methodology across all groups does not yield the same results for all group-based exclusions. Section B then considers alternate ways by which courts and legislatures might approach the regulation and legality of firearm possession by particular noncitizens.

A. THE UNLAWFULLY PRESENT AND OTHER PROHIBITED CLASSES

Investigating the link between immigration status and dangerousness or threat raises questions about other group-based firearm prohibitions. *Rahimi* addressed federal law's criminalization of those subject to a civil domestic abuse order.[342] Other provisions of § 922 disarm convicted felons, drug addicts, those with mental illness, those under criminal indictment, dishonorable discharges from the military, and those who have renounced their citizenship.[343] State laws mimic some of these prohibitions[344] and add others as well, including disarming individuals under certain age thresholds.[345]

Despite an 8-1 decision upholding the prohibition against domestic abusers in *Rahimi*,[346] the opinion can be read narrowly enough to permit challenges to other group- or status-based prohibitions. After all, a key factor motivating the majority's decision was the individualized assessment of threat Rahimi received in a civil hearing, prior to the domestic violence order. While some justices questioned the level of process and legitimacy of that hearing,[347] the *Rahimi* majority insisted that the hearing established Rahimi as a "credible threat."[348] Because other group-based prohibitions do not require individualized assessments of threat,[349] it remains likely that other group- or status-based prohibitions will continue to be litigated or be the subject of constitutional challenges soon. But, even if all group-based prohibitions must be assessed under the same methodological framework, the outcomes need not match. Restrictions on noncitizens or unlawfully present noncitizens stand apart

342. United States v. Rahimi, 602 U.S. 680, 688 (2024).

343. 18 U.S.C. § 922(g)(1)–(9) (felons (g)(1), controlled substance abusers (g)(3), "mental defective" or "committed to a mental institution" (g)(4), dishonorable discharges (g)(6), renunciation of citizenship (g)(7)).

344. *See generally Firearm Prohibitions*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/firearm-prohibitions/ [https://perma.cc/TF35-68MF] (last visited Oct. 26, 2025) (cataloging various types of gun restrictions at the state level).

345. Rocky Mountain Gun Owners v. Polis, 121 F.4th 96, 104 (10th Cir. 2024) (upholding Colorado's law raising minimum age for gun purchase from 18 to 21); *see Has the State Raised the Minimum Age for Purchasing Firearms?*, EVERYTOWN FOR GUN SAFETY, https://everytownresearch.org/rankings/law/minimum-age-to-purchase/ [https://perma.cc/F5FH-59G8] (last visited Oct. 26, 2025) (cataloging state minimum gun-purchase-age laws).

346. *See* 602 U.S. at 683.

347. *Id.* at 771 (Thomas, J., dissenting).

348. *Id.* at 687, 689.

349. *See, e.g.*, 18 U.S.C. § 922(g)(3).

both in the purpose of the regulated category and the constitutional scrutiny federal courts have used to assess immigration status distinctions.

First, although *Rahimi* left open the question of categorical prohibitions on firearms possession, both that case and *Bruen* insisted that the comparative purposes and mechanics between historical laws and modern-day counterparts were dispositive. As the Supreme Court put it, both the "how" and the "why" of regulations from respective eras need to match.[350] Immigration status prohibitions are more vulnerable to challenge than most other group-based distinctions when compared to the how and why of historical regulations. There is no indication that any Founding Era laws restricting firearms on citizenship status match the purpose of modern-day prohibitions based on immigration status. Federal immigration statuses in the way we understand them today did not exist in the Founding Era, and were, at the earliest, a creation of the late nineteenth century and only a creation of the mid-to-late twentieth century in the way current federal law uses the term "illegally in the United States."[351] Moreover, citizenship or membership-based exclusions from the Founding Era were either created to maintain racial hierarchies or functioned as national security laws to mitigate existential threats to the emerging republic.[352] They were not based on violations of admissions categories, unauthorized border crossings, or deportation laws.

Even if the "why" matched, however, *Rahimi* requires attention to the comparative "hows" of historical and contemporary regulations. In *Rahimi*, the majority blessed the comparison between English and Founding Era "surety" and "going armed" laws and § 922(g)(8)'s prohibition on those with a civil domestic violence order because they shared the characteristic of individualized determinations.[353] The majority opinion insisted that it was upholding § 922(g)(8) because the historical record countenanced modern-day gun restrictions imposed after individuals were given notice of court proceedings that resulted in a finding of credible threat to the physical safety of another.[354] And the Court noted that the firearm ban for those individuals was temporary—only in place as long as the restraining order was in force.[355]

Of course, most, if not all, other § 922(g) provisions and many state prohibitions do not require hearings or findings of threat to individuals and are not subject to a time limit.[356] In that regard, the felon-in-possession category may share

350. *Rahimi*, 602 U.S. at 698 ("This provision is 'relevantly similar' to those founding era regimes in both why and how it burdens the Second Amendment right."); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 29 (2022). ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar . . ., we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.").

351. Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1470–71.

352. *See supra* Part II.

353. *Rahimi,* 602 U.S. at 681–82.

354. *Id*. at 690 ("When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may . . . be banned from possessing firearms while the order is in effect.").

355. *Id*. at 699.

356. *See* 18 U.S.C. § 922(g); *Firearms Prohibitions*, *supra* note 344.

some of the heterogeneity with respect to the danger of individuals in the group with the unlawfully present category.[357] Not surprisingly then, federal courts, including the Third Circuit sitting en banc, have held the federal felon-in-possession statute unconstitutional as-applied even prior to *Rahimi*.[358] Whether *Rahimi*'s insistence on an individualized hearing to substantiate the finding of dangerousness will affect this outcome remains to be seen. At the very least, however, courts may take note of the fact that felony convictions result from state court or Article III federal court trials, in accordance with Bill of Rights protections.[359] While underlying felony proceedings do not focus on dangerousness per se, at the very least they adjudge facts about the defendant's conduct and might form the basis of upholding a felon ban under *Rahimi*.

Thus far, only a small minority of courts in § 922(g)(5) cases have ever conducted any inquiry regarding the category of unlawfully present persons and danger that might justify disarmament. The few that have done so concluded that § 922(g)(5) was unconstitutional, both as applied and facially.[360] And, unlike a felony conviction, simple unlawful presence is an administrative concern,[361] which carries no inherent relationship to violence or threat. It does not require a state or federal court determination, and in many cases, does not require an immigration court proceeding in front of an immigration judge.[362]

For other group prohibitions, it would defy both basic common sense and historical evidence to strike down the restrictions, as statutes then, as now, were enacted for the same purposes. Take, for example, age-based restrictions on gun possession. Although some courts in the wake of *Bruen* have struck down age-related restrictions,[363] it is not at all clear that Supreme Court doctrine or analytic framework mandates that result. Indeed, age restrictions which prohibit young members of the polity from purchasing or owning firearms for example reflect similar judgements throughout American history about the wisdom of allowing non-adults to wield deadly arms.[364] The same might be said for prohibitions on

357. *See* Range v. Att'y Gen., 124 F.4th 218, 224, 230–32 (3d Cir. 2024).

358. *Id.* at 232.

359. *See* U.S. CONST. amends. V, VI.

360. *See* United States v. Benito, 739 F. Supp. 3d 486, 496 (S.D. Miss. 2024); United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 673 (W.D. Tex. 2023).

361. *See* Arizona v. United States, 567 U.S. 387, 396, 407 (2012).

362. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 195–96 (2017).

363. Worth v. Jacobson, No. 21-cv-1348, 2023 WL 3052730, at *1 (D. Minn. Apr. 14, 2023) (striking down state restrictions on public carry for 18-20 year olds); Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 689 F. Supp. 3d 203, 209–10, 218 (E.D. Va. 2023) (nationwide injunction against law prohibiting federally licensed dealers from selling handguns to 18-20 year olds). *But see* Rocky Mountain Gun Owners v. Polis, 121 F.4th 96, 104 (10th Cir. 2024) (upholding state raising minimum age for gun purchase to 21).

364. *See generally* Megan Walsh & Saul Cornell, *Age Restrictions and the Right to Keep and Bear Arms, 1791–1868*, 108 MINN. L. REV. 3049 (2024) (showing that age restrictions in American law, including for firearms laws, are deeply rooted in American historical tradition); *see* Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 647 F. Supp. 508, 523 (W.D. La. 2022) (the Second

mentally-ill individuals or those with diminished mental capacity.[365] In all such prohibitions, the comparative "why" of regulation persists from the Founding Era to the modern day, even if the comparative "how" might differ at the margins.

Second, unlike any other prohibited category, immigration status is distinct from a constitutional perspective. In contrast to the groups covered by other firearms prohibitions, the Court has, in domestic regulations, sometimes applied rigorous equal protection scrutiny to so-called "alienage" discrimination and immigration-category-based distinctions in law.[366] For example, the Court labeled lawful permanent residents a suspect class for some purposes, applying strict judicial scrutiny to strike down the unequal treatment of noncitizens.[367] In *Plyler v. Doe*, a decades-old landmark case about the right of unlawfully present children to access free public primary school education, it even applied heightened scrutiny to discrimination against portions of the unlawfully present population.[368] As such, federal and state criminal prohibitions on the unlawfully present arguably require more judicial skepticism than other forms of group-based exclusions.

Indeed, although most federal courts solely have viewed noncitizens' challenges to gun restrictions solely through the lens of Second Amendment jurisprudence,[369] some state courts have assessed state-level restrictions on noncitizens through an equal protection framework.[370] Fundamental to this approach is recognizing the lack of any substantiated connection between noncitizens and public threat. State appellate courts in a number of cases, including a few challenging state bans on noncitizens' concealed carry, rejected the state legislatures'

Amendment did not protect rights of 18–20 year olds to purchase handguns from federally licensed dealers).

365. Williams v. McFadden, 685 F. Supp. 3d 345, 353 (W.D.N.C. 2023) (denying preliminary injunction on a facial challenge to state law requiring disclosure of mental health records to obtain concealed handgun permit).

366. *See generally* T. ALEX ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 498–512 (9th ed. 2020) (reviewing alienage cases).

367. Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking down state law prohibiting noncitizens from accessing public benefits, defining the excluded noncitizens as a suspect class and using strict scrutiny); Sugarman v. Dougall, 413 U.S. 634, 636, 646 (1973).

368. Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (striking down Texas law prohibiting undocumented children from getting a free public elementary school education as an equal protection violation).

369. One notable exception in my research is *United States v. Toner*, which upheld the conviction of two foreign-nationals under § 922(g)(5) prior to *Heller*, applying rational basis review. 728 F.2d 115, 128 (2d Cir. 1984).

370. State v. Ibrahim, 269 P.3d 292, 297 (Wash. Ct. App. 2011) (striking down as equal protection violation under the federal Constitution a state law requiring noncitizens to register firearms, but not requiring citizens to do the same); State v. Chumphol, 634 P.2d 451, 452 (Nev. 1981) (striking down state concealed carry prohibition on noncitizens, stating "[a] person does not exhibit a tendency toward crime merely because he or she is a noncitizen"); People v. Rappard, 104 Cal. Rptr. 535, 536 (Cal. Ct. App. 1972) (striking down state ban on noncitizens' concealed carry of firearms, stating that "alienage – has no reasonable relationship to the threat to public safety which [the firearm law] was ostensibly designed to prevent"); *cf* Rafaelli v. Comm. of Bar Exam'rs, 496 P.2d 1264, 1266 (Cal. 1972) (striking down state ban on noncitizens practicing law, stating that the prohibition was a "lingering vestige of a xenophobic attitude" left over from an era restricting legal practice to those who were "male" and "white").

attempts to categorically associate noncitizen status with inherent danger. Importantly, these state bans restricted the firearms rights of all noncitizens, including lawful permanent residents.[371] This factor still appears important, as some courts striking down gun restrictions noted the categorical and complete nature of the exclusion as a significant factor motivating their decisions.[372]

To be sure, some of these state court cases were decided prior to *Heller* and *Bruen* and the reinvigoration of the Second Amendment. In those earlier cases, state courts explicitly note the flawed factual basis for the legislature's distinction between noncitizens and citizens.[373] Both California and Nevada courts recognized that the problem with using immigration status as the basis for exclusion from rights and privileges (including firearm ownership) was that legislatures often enacted those laws based on stereotypes and generalizations about the danger and threat posed by noncitizens.[374] In the California appeals court's view, the evidence—the "common knowledge that several million aliens are living in this country and that the vast majority are peaceful and law-abiding"—verified that they were no more a threat than anyone else.[375] While the court did not substantiate its claim with other empirical evidence, its intuition is consistent with the number of studies that have answered the concern to which the court alludes.[376] But even post-*Heller*, at least one state court focused on equal protection analysis rather than Second Amendment inquiry. The state of Washington's Supreme Court in *State v. Ibrahim* found that permanent residents were part of the "the people" and that the lack of connection between immigration status and danger was dispositive to striking down the state law.[377]

Notably, the cases that have used an equal protection framework have involved restrictions on all noncitizens or claims by permanent residents who are lawfully

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371. *See Ibrahim*, 296 P.3d at 294, 297; *Chumphol*, 634 P.2d at 451–52; *Rappard*, 104 Cal. Rptr. at 536.

372. S*ee, e.g.*, *Rappard*, 104 Cal. Rptr. at 536–37 ("Any classification which treats all aliens as dangerous and all United States citizens as trustworthy rests upon a very questionable basis.").

373. *See, e.g.*, *id.* at 536 (deciding the case in 1972, the court noted that "[t]he [state of California contends] that this statute is the necessary means of promoting the compelling state interest of public safety. They predicate this contention on the proposition [that] the possession of concealable firearms by aliens is inherently dangerous to public safety.").

374. *See Chumphol,* 634 P.2d at 452 ("A person does not exhibit a tendency toward crime merely because he or she is a noncitizen."); *Rappard*, 104 Cal. Rptr. at 536–37 ("Any classification which treats all aliens as dangerous and all United States citizens as trustworthy rests upon a very questionable basis .... Classifications based upon alienage, as Justice Mosk said, '... is the lingering vestige of a xenophobic attitude which ... should now be allowed to join those (other) anachronistic classifications among the crumbled pedestals of history.'" (quoting *Rafaelli*, 496 P.2d at 1266)).

375. *Rappard*, 104 Cal. Rptr. at 536.

376. *See supra* Section III.C.

377. 269 P.3d 292, 297 (Wash. Ct. App. 2011) ("There is nothing in the 'statutory scheme' which establishes that the status of being foreign-born of itself creates 'dangerous hands' in the context of firearms control ... [The state law] is not necessary to safeguard the State's interest in keeping 'firearms out of dangerous hands.'" (quoting State v. Hernandez-Mercado, 879 P.2d 283, 289 (Wash. Ct. App. 1994)).

present in the country, rather than a focus on unlawfully present noncitizens.[378] Indeed, both the California and Nevada state courts issued their opinions in a moment when the Supreme Court finally began addressing citizenship distinctions, striking down state restrictions on permanent residents in welfare provisions and public employment.[379] State legislatures had not yet begun systematic discrimination against unlawfully present noncitizens as a particular sub-class of noncitizens.[380] Regardless of whether unlawfully present noncitizens were the object of the state legislation, however, the key aspect of an equal protection approach is that it requires the government to justify the distinction between citizens and noncitizens, without relying on generalizations and xenophobic tropes.[381] That analysis might yield different results for various noncitizen categories, but the important step is that the judicial inquiry is conducted in the first place. And, more fundamentally, these cases reaffirm that immigration status—in contrast to other prohibited categories—has a different constitutional stature and mandates more careful constitutional inquiry.[382]

B. ALTERNATIVE APPROACHES FOR COURTS AND LEGISLATURES

Striking down § 922(g)(5) or state-level firearms restrictions contingent on immigration status does not mean noncitizens' possession is beyond federal or state regulation. This Article's call for courts to put the government through their paces rather than rely on generalizations about noncitizens and danger contemplates that the government still might meet their burden. And of course, noncitizens would not be exempt from generally applicable firearms regulations. And finally, taking group-based dangerousness assessments seriously might nudge legislatures towards more innovative and new forms of firearm regulation.

First, legislatures might be able to substantiate the need for restricting firearms access for certain groups of noncitizens.[383] Unlike most of the unlawfully present population and lawful permanent residents, several categories of nonimmigrants likely possess fewer attachments to the national community and may be more unlikely to develop the substantial connections that at least one Supreme Court

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378. *See Ibrahim*, 296 P.3d at 294; *Chumphol*, 634 P.2d at 451–52; *Rappard*, 104 Cal. Rptr. at 536; *see also* Fletcher v. Haas, 851 F. Supp. 2d 287, 288, 303 (D. Mass. 2012) (in a pre-*Bruen* case, applying heightened scrutiny to determine that the state could not meet the ends-means relationship necessary to sustain a ban on gun possession by lawful permanent residents).

379. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking down state laws denying welfare benefits to lawful permanent residents); Sugarman v. Dougall, 413 U.S. 634, 636, 646 (1973).

380. *See* Plyler v. Doe, 457 U.S. 202 (1982) (striking down Texas attempt to exclude undocumented children from public elementary schools); DeCanas v. Bica, 424 U.S. 351 (1976) (upholding California's attempt to regulate employment of unauthorized noncitizens).

381. *See Rappard*, 104 Cal. Rptr. at 537 ("[The state of California has not] sustained [its] burden of establishing that the classification . . . not only promotes a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.").

382. As Section I.B notes, the Court's extreme deference to federal and state regulation of noncitizens applies in the context of admission and deportation decisions, not in the context of everyday, domestic regulation.

383. *See* 18 U.S.C. § 922(g)(5)(B).

opinion suggests are required for constitutional protection.[384] Some nonimmigrants whose presence is highly limited—tourists and other short term visitors—might justifiably be prevented from firearm purchase. Their short stay in the country, along with the likelihood that they will not require or acquire long-term housing,[385] might justify a different result than for other noncitizens. Many classes of nonimmigrants are prohibited from working in the country and may not be permitted to bring family members with them[386] and thus may not possess the home and family protection concerns that permeate *Heller* and *Bruen*'s rhetoric.[387] As such, government justifications tied to the lack of long-term home residence, for example, might justify prohibitions in gun purchase.

Ironically, current federal statutory prohibitions get this relationship exactly backwards. Those "illegally in" the country have been categorically barred from gun ownership, with courts extending the ambit of "illegally in" to Deferred Action for Childhood Arrivals (DACA) recipients who have long-term presence and significant familial, cultural, educational, and economic ties to the United States.[388] Meanwhile, many nonimmigrants—temporary visitors—are not categorically barred from possession.[389] Section 922(g)(5)(B) prohibits possession by

384. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); *see also* Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1452–55 (discussing the application of the substantial connections test); D. Carolina Nuñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 88 (2011). Elsewhere, I have argued that *Verdugo*'s "test" is not a useful method to determine rightsholders under the Bill of Rights. *See* Gulasekaram, *The Second Amendment's "People" Problem*, *supra* note 41, at 1454–55. Nevertheless, to the extent it is one of the standards used by the Court to make those decisions, application of the standard may exclude some nonimmigrants and other temporarily present noncitizens.

385. *See* 8 C.F.R. § 214.1 (detailing requirements and limited stay for several nonimmigrant categories, including requirement that they maintain foreign residence which they do not plan to abandon).

386. *See id.*

387. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 9–10 (2022).

388. Federal courts that have assessed § 922(g)(5)(A) prosecutions of DACA recipients generally have read the statute to cover anyone who does not possess a lawful immigration status, regardless of whether their presence in the United States is protected under deferred action. *See, e.g.*, United States v. Lopez, 929 F.3d 783, 786 (6th Cir. 2019) ("The Secretary's grant of deferred action under DACA . . . did not—and could not—change Lopez's status as an alien 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A). Instead that relief represented only the Secretary's decision temporarily not to prosecute him for that status."); United States v. Arrieta, 862 F.3d 512, 515 (5th Cir. 2017) ("[Our] precedent reveals that immigration 'status' is the key factor in determining the applicability of Section 922(g)(5)(A)."); United States v. Bernal-Salinas, No. 20-cr-244, 2022 WL 4084412, at *2 (E.D. N.C. Sept. 6, 2022) ("A recipient of deferred action under DACA continues to lack lawful immigration status, and is still prohibited from possessing a firearm pursuant to Section 922(g)(5), whether or not deferral under DACA is current or has been terminated." (quoting United States v. Velarde-Pelayo, No. 17-cr-385, 2018 WL 941717, at *3 (D. Utah Feb. 16, 2018))).

To be clear, my own view is that these courts mistakenly understand the meaning of "illegally or unlawfully in" the country and mistakenly conflate statutory immigration status with lawful presence. That discussion, however, is beyond the scope of this Article.

389. Importantly, possession of a nonimmigrant visa excludes those who do not technically apply for a nonimmigrant visa to the United States for temporary visits. For example, individuals from "Visa-Waiver" countries need not apply for tourist visas; neither do Canadians on temporary visits nor Mexican nationals with Border Crossing Cards. *See* Firearms Disabilities for Certain Nonimmigrant

nonimmigrants but contains an exception if the noncitizen has been admitted for lawful hunting purposes or is in possession of a hunting permit issued in the U.S.[390]As a further oddity, neither part of the statute covers noncitizens who enter lawfully but without a nonimmigrant visa. Thus, individuals temporarily visiting the U.S. under the Visa Waiver Program are not covered by § 922(g)(5), meaning those whose visits are the most constrained time-wise and purpose-wise are most at liberty to possess a firearm.[391] For those nonimmigrants who receive a visa, their ability to possess a firearm depends, in turn, on the ease of their ability to obtain a hunting permit from the multiple jurisdictions that issue such licenses, and the varied requirements for obtaining licenses in those jurisdictions.[392] In sum, current law clearly distinguishes between classes of noncitizens but oddly appears to permit firearm ownership by those whose conditions of stay or temporary duration of stay arguably require more caution. A more sensical use of that authority, consistent with current interpretations of the scope of the Second Amendment and empirically sound legislative justifications, might differentiate based on the temporariness and expected ties of the noncitizen to the country.

Second, noncitizens, including unlawfully present noncitizens, would be subject to generally applicable restrictions on gun possession that directly implicate dangerousness and do not depend on immigration status. These would include permitting and licensing schemes, background check requirements, red flag laws, past-criminal-history-related bars, and any other gun restrictions keyed to public

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Aliens, 77 Fed. Reg. 33625 (June 7, 2012) (to be codified at 27 C.F.R. pt. 478) ("The Department of Justice has now determined that the relevant statutory prohibitions on transfer and possession of firearms and ammunition apply only to nonimmigrant aliens who were admitted to the United States under a nonimmigrant visa, and that the prohibitions do not apply to nonimmigrant aliens who lawfully entered the United States without a visa.").

390. 18 U.S.C. § 922(y)(2)(A) ("Subsection[] . . . (g)(5)(B). . .[does] not apply to any alien . . . lawfully admitted . . . under a nonimmigrant visa, if that alien is (A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States."). Section 922(g)(5)(B) was added to the § 922(g)(5) prohibitions in 1999 as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. 105-277, 112 Stat. 2681, and was motivated in part by a nonimmigrant who purchased a firearm in Florida, and then traveled to New York City, where he shot seven people (killing one and then himself) in the Empire State Building. Ron Scherer, *Gun-Control Laws Scrutinized After Empire State Shooting*, CHRISTIAN SCI. MONITOR (Feb. 27, 1997), https://www.csmonitor.com/1997/0227/022797.us.us.5.html [https://perma.cc/69D6-N6BD] ("In the wake of Sunday's gunfire . . . anti-gun legislators are asking for new federal rules to close some loopholes that allowed a Palestinian tourist to buy a gun in Florida and shoot seven people in New York."). The congressional bill that became § 922(g)(5)(B) when introduced was known as the Durbin-Kennedy Empire State Building Counter-Terrorism Act, and was eventually enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, 112 Stat. 2681; s*ee also* WILLIAM J. KROUSE, CONG. RSCH. SERV. R44189, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF): FY 2016 APPROPRIATIONS 15 n. 47 (2015) (noting the relationship between the shooting incident and the introduction of the bill).

391. *An FFL Tip Sheet for Processing NICS Checks for Non-U.S. Citizens/Aliens*, FBI (Aug. 2023), https://www.fbi.gov/file-repository/cjis/nics-ffl-tip-sheet-for-non-us-citizens-purchasing-firearms-august-2023.pdf/view (noting that a Federal Firearms Licensee may process a background check for nonimmigrant noncitizens admitted without a visa); *U.S. Visa Waiver Program,* DHS, https://www.dhs.gov/visa-waiver-program [https://perma.cc/843P-6X5Q] (last visited Oct. 26, 2025).

392. *See* 18 U.S.C. § 922(y)(2)(A).

threat and danger.[393] For example, in striking down the application of § 922(g)(5) to a noncitizen-defendant, an Illinois district court noted that the defendant had not violated other gun restrictions or demonstrated non-compliance with reporting requirements.[394] Such liability focuses on the actual danger of the individual or class of individuals without implicating stereotypes about immigrants generally, or the unlawfully present specifically. Focusing on permitting and licensing schemes of general applicability might nevertheless disparately impact some unlawfully present persons, as they may be less likely to possess the type of documentation that may be required for such regulations. Importantly, however, such disparate impact is unlikely to be a legal or constitutional concern, as it neither would be the result of intentional exclusion nor reliant on stereotype.

CONCLUSION

The rhetoric of immigrant criminality and violent danger is resurgent in American politics. Distressing as such claims are when repeated by elected officials, the peril of immigrant danger talk is amplified when adopted by legislatures and federal courts. Cases deciding the constitutionality of the federal criminal prohibition on gun possession by unlawfully present noncitizens place this concern in sharp relief. Rather than adopt the persistent xenophobic tropes of immigrant danger and criminality, these cases present the opportunity for courts to reexamine categorical exclusions in gun law. That reexamination, in line with this Article, must reject false narratives about immigrant danger, which result in the categorical exclusion of noncitizens from firearms possession.

In the end, this Article's concern is not deregulation but rather fair treatment of noncitizens by legislatures and courts. As such, nothing in this Article should be taken to reject broad and capacious understandings of dangerousness that would permit legislatures reasonably to regulate any number of groups. If the Court's current project is to examine Second Amendment claims more closely, including scrutiny of the particularized danger of prohibited groups, then it may not leave noncitizens out of that inquiry. Doing so reifies the mistakes of bygone eras, undermines the coherence of the Court's gun jurisprudence, and masks the consequences of the Court's nominal and malleable history-focused analysis.

393. *See, e.,g.*, 18 U.S.C. § 922(g)(1).

394. United States v. Carbajal-Flores, 720 F. Supp. 3d 595, 601 (N.D. Ill. 2024).