# SCOTUS 1AC

## 1AC – Harrison RR

### FW

First, The 1AC is a politics of invention, a revolution which introduces new performances into the world - we adopt this positionality in the 1AC as an invitation to adopt This standpoint and invent further alternatives.

Marriott in **‘**14, [Marriott, David. "No lords A-leaping: Fanon, CLR James, and the politics of invention." Humanities 3.4 (2014): 517-545. SK]

“I should constantly remind myself”, writes Fanon, “that **the real leap consists in introducing invention into existence**” ([1], p. 229). And just before this sentence: “I am not a prisoner of History [l’Histoire]. I should not seek there for the meaning of my destiny” ([1], p. 229). In all of Fanon’s writings I know of no passage that sums up, to the same extent, the enigma of his thought. The point of these gestures seems to be that “invention”, so often invoked as though it were eo ipso something historical, is here the figure for a kind of radical untimeliness that entails a leap, and **this leap** cannot be anticipated, nor can it be prepared for, nor **can[not] it be traced back to a prior historical moment to be interrogated as such**. To leap, then, is more than a rhetorical figure; indeed, we need to see it as the very conceptuality that Fanon puts into play here, as that which cuts through the continuum of history: and in its wake only remnants remain. Fanon needs to remind himself of this. He needs to remind himself of the devastating consequences of invention and of history. (In this he is closely related to Benjamin, whose angelus novus is just as essentially a figure of danger and hope (cf. [2])). **Invention, because it is a radical transformation, is not reducible to** economy or strategy, and therefore, we might want to say, yet another form of **political calculation**. Nor is it a mode for utopia, whose possibility can now be resurrected in a myth of perfectibility, when the oppressed take a dialectical leap into the “open air of history” ([2], p. 253). This is why **invention is not reducible to any kind of teleological schema**. **Despite the primary role which history plays in the meaning of colonial subjection**, **clinging to its truth or whatever happens to be regarded as its truth can only be imprisoning**, **or backward-looking, for the inventor**. Although none of Fanon’s texts are explicitly devoted to this configuration, the ethical-political implications of invention can be seen throughout Fanon’s work, although it is less obvious what these implications might be. I want to argue that **this situation is already inventive, insofar as it gives rise in Fanon’s work to a singular politics of invention, and one premised on a leap that is neither a catastrophe or fall, advent or realization and is mostly incomprehensible to what came before.** From there it is but a step to the notion that invention is revolution **and that the true task of politics is to** embrace or demand **this imperious leap.** **Political reinvention**, on this view, **begins with interruption or fracture**, **and not memory or recollection**, **and cannot but appear as violent to the use of traditional concepts**, in politics, **of negation and affirmation**. Therefore, if one says—as Fanon has just said—that this invention can never be “enslaved” by the past, and its meaning circumscribed by history, **what the leap implies is a situation of radical indecision whose emergence introduces something entirely new into the world.** Humanities 2014, 3 519 To do justice to Fanon’s thinking one must therefore never lose sight of **invention**—which, to be sure, **opens up a fracture or hole in History.** **This more explicitly radical opening can be characterized as taking place in a space between a “phenomenological” critique of race** (including the space given to race by Césaire or Sartre), **and a “political” attempt to retrieve a sense of rebellion that avoids the “pitfalls” of spontaneity**: vengeance, indiscipline, an immediacy which is both “radical and totalitarian” ([3], p. 105). Fanon wants both to register the force of phenomenology’s (or more radically) Sartre’s suspicion of historicism in the traditional figuring of black invention, and Césaire’s powerful claim, in his Cahier, that blackness be re-considered first as anti-invention, prior to what he calls the purity of its failure. There is, however, a caveat: Sartre’s rendering of negritude slams the door shut on black creativity and encloses it in an historicism; and in Césaire, black existence, whose meaning plunges from abyss to mythical abyss, finds a last refuge in a “‘bitter brotherhood’ that imprisons all of us alike” ([1], p. 124). The reference to Césaire seems almost as essential to Fanon as the reference to Sartre, and one way of tracking a path through Fanon’s work is to follow the great chapter in Black Skin, White Masks devoted to Césaire’s Cahier and Sartre’s Orphée Noir. In this chapter on le vecu noir, or black lived experience, the focus is on how Sartre reduces black creativity to neo-Marxist truth or dogma and how Césaire renders black existence in terms of predetermined myths. Both **positions**, incidentally, are felt to be imprisoning: they **cease being inventive the moment they sublate the heterogeneous and singular into fixed ontologies or concepts**. SK

#### We need to reconstruct our paradigms about debate – in LD we need to talk about material solutions and obligations not simply theoretical representations and performances.

Curry, [Dr. Tommy J. Curry The Cost of a Thing: A Kingian Reformulation of a Living Wage Argument in the 21st Century. 2014. SK]

**Despite the pronouncement of debate as an activity and intellectual exercise pointing to the real world consequences of dialogue, thinking, and (personal) politics when addressing issues** **of** racism, sexism, **economic disparity, global conflicts, and death, many of the discussions concerning these ongoing challenges to humanity are fixed to a paradigm which sees the adjudication of material disparities and sociological realities as the conquest of one ideal theory over the other.** In “Ideal Theory as Ideology,” Charles Mills outlines the problem contemporary theoretical-performance styles in policy debate and **value-weighing in Lincoln-Douglas are confronted with in their attempts to get at the concrete problems in our societies.** At the outset, Mills concedes that “ideal theory applies to moral theory as a whole (at least to normative ethics as against metaethics); [s]ince ethics deals by definition with normative/prescriptive/evaluative issues, [it is set] against factual/descriptive issues.” At the most general level, **the conceptual chasm between what emerges as actual problems in the world** (e.g.: racism, sexism, poverty, disease, etc.) **and how we frame such problems theoretically—the assumptions and shared ideologies we depend upon for our problems to be heard and accepted as a worthy “problem” by an audience—is the most obvious call for** an anti-ethical paradigm, since such **a paradigm [which] insists on the actual as the basis of what can be considered normatively.** Mills, however, describes this chasm as a problem of an ideal-as-descriptive model which argues that for any actual-empirical-observable social phenomenon (P), an ideal of (P) is necessarily a representation of that phenomenon. In the idealization of a social phenomenon (P), one “necessarily has to abstract away from certain features” of (P) that is observed before abstraction occurs. **This gap between what is actual (in the world), and what is represented by theories and politics of debaters proposed in rounds threatens any real discussions about the concrete nature of oppression** and the racist economic structures **which necessitate tangible policies and reorienting changes in our value orientations.** As Mills states: “What distinguishes ideal theory is the reliance on idealization to the exclusion, or at least marginalization, of the actual,” so what we are seeking to resolve on the basis of “thought” is in fact incomplete, incorrect, or ultimately irrelevant to the actual problems which our “theories” seek to address. **Our attempts to situate social disparity cannot simply appeal to the ontologization of social phenomenon—meaning we cannot suggest that the various complexities of social problems** (which are constantly emerging and undisclosed beyond the effects we observe) **are totalizable** **by any one set of theories within an ideological frame** **be it our most cherished notions of Afro-pessimism, feminism, Marxism, or the like.** At best, **theoretical endorsements make us aware of sets of actions to address ever developing problems in our empirical world,** but even this awareness does not command us to only do X, but rather do X and the other ideas which compliment the material conditions addressed by the action X. As a whole, debate (policy and LD) neglects the need to do X in order to remedy our cast-away-ness among our ideological tendencies and politics.SK

Because the resolution begs a normative question, I value morality. However, having a debate about morality before recognizing the evils of structural violence is nonsensical because structural violence precludes conceptions of fairness and due by systematically morally and political excluding people, while also allowing us to become blind to the injustice they suffer.  **Opotow** explains,

Violence is the exertion of physical force so as to injure or abuse. Johan Galtung (1969) directs our attention to overt vs. more subtle forms of violence. **Direct violence is immediate**, concrete, **physical violence** committed by and **on particular**, identifiable **people**. Even when it is committed from afar, as in missile launches, particular people decide what to do, particular people activate weaponry at a particular moment, and particular people are victims. **Structural violence, in contrast, is** less obvious than direct violence. It is gradual, **imperceptible, and normalized** as the way things are done; **it determines whose voice is systemically heard or ignored,** who gets particular resources, and who goes without. In structural violence, agency is blurred and responsibility is unclear; there may not be any one person who directly harms an- other. **Structural violence normalizes unequal access to** such social and economic **resources** as education, wealth, quality housing, civic services, **and political power**. Direct and structural violence have different manifestations, but they are clearly related and interdependent. Ethnic cleansing, a euphemism for mass murder motivated by ethnic conflict, is direct violence that results from many kinds of structural violence, forces which have intertwined in “a long-forgotten history coming back to haunt us, a history full of thousands of economic, social, ethical, territorial, cultural and political problems that remained latent and unnoticed un- der the surface of totalitarian boredom” (Vaclav Havel, quoted by Burns, 1992, p. 3). On the other hand, direct violence can give rise to long-term structural violence. Rape as a weapon of war has long-lived effects on victims and their society. Raped individuals are often reluctant to come forward because they fear exacerbating the debasement they and their families have already experienced. In some societies, mass rape has produced social, economic, and political inequalities; for example, in 1998, rape directed at Chinese women in Indonesia was tactically employed to wrest control of Indonesia’s commerce away from Chinese citizens (Mydans, 1998). Both structural and direct violence result from moral justifications and rationalizations. Morals are the norms, rights, entitlements, obligations, responsibilities, and duties that shape our sense of justice and guide our behavior with others (Deutsch, 1985). Morals operationalize our sense of justice by identifying what we owe to whom, whose needs, views, and well-being count, and whose do not. Our morals apply to people we value, which define who is inside our scope of justice (or “moral community”), such as family members, friends, compatriots, and coreligionists (Deutsch, 1974, 1985; Opotow, 1990; Staub, 1989). We extend considerations of fairness to them, share community resources with them, and make sacrifices for them that foster their well- being (Opotow, 1987, 1993). **we see other kinds of people** such as enemies or strangers **outside our scope of justice**; they are morally excluded. Gender, ethnicity, religious identity, age, mental capacity, sexual orientation, and political affiliation are some criteria used to define moral exclusion. Excluded people can be hated and viewed as “vermin” or “plague” or they can be seen as expendable non-entities. In either case, disadvantage, hardship, and exploitation inflicted on them seems normal, accept- able, and just—as “the way things are” or the way they “ought to be.” Fairness and deserving seem irrelevant when applied to them **and harm befalling them elicits neither remorse**, outrage, **nor demands for restitution;** instead, harm inflicted on them can inspire celebration. Many social issues and controversies, such as aid to school drop-outs, illegal immigrants, “welfare moms,” people who are homeless, substance abusers, and those infected with HIV are essentially moral debates about who deserves public resources, and thus, ultimately, about moral inclusion. When we see other people’s circumstances to be a result of their moral failings, moral exclusion seems warranted. But when we see others’ circumstances as a result of structural violence, moral exclusion seems unwarranted and unjust… Although **moral exclusion**, direct **and structural violence,** and social injustice are ubiquitous, they **are not inevitable. Inclusionary thinking is fostered by** valuing one’s connections to and interdependence with others, while seeing the mutually constructive possibilities of those connections as beneficial. Maintaining relationships depends on being committed to **extending considerations of fairness**, being willing to make sacrifices, **and being willing to allocate** and share **resources** to preserve those relationships with distant as well as close people. While we tend to en- vision peace as an outcome, peace is an inclusionary process. In the long run, cultures of peace, characterized by human rights, tolerance, democracy, free flow of information, non-violence, sustainable development, peace education, and equality of men and women will depend upon moral inclusion. Social conflicts can foster injustice, but they also motivate social change that advances social justice. Constructive conflict processes can maximize social outcomes, but they are not intuitive and need to be learned (Colelman & Deutsch, this volume; Deutsch, 1973; Opotow & Deutsch, 1999). Appreciation of diversity, trust, and respect are difficult to achieve, taking considerable skill, effort, maturity, and patience to accomplish. To achieve these constructive outcomes, **communication needs to** unflinchingly **address rather than suppress real structural inequalities** that take some people’s needs into account while disregarding, disrepecting, and excluding others. **By so doing, we can enlarge the scope of justice,** foster equality, and promote peace in the twenty- first century

Opotow implies that the existence of structural violence is far from inevitable. Instead of merely accepting and recreating the exclusion, individuals must recognize the existence of structural violence and promote social justice. My framework precludes all normative frameworks because systematic, invisible violence allows us to arbitrarily exclude individuals from our scope of justice, resulting in both dehumanization and a loss of moral agency for those individuals. **Moreover**, because the judge can use the ballot to determine what is accepted as truth in the round, they assume the role of the intellectual, which carries with it the obligation to deconstruct hegemonic, systematic truths, such as those that promote continued structural violence. **Foucault** explains,

It seems to me that what must now be taken into account in **[T]he intellectual is not the ‘bearer of universal values.’** **Rather**, it’s **the person** occupying a specific position – but **who**se specificity **is linked**, in a society like ours, **to** the general functioning of an apparatus of **truth**. In other words, the intellectual has a three-fold specificity: that of his class position (whether as petty-bourgeois in the service of capitalism or ‘organic’ intellectual of the proletariat); that of his conditions of life and work, linked to his condition as an intellectual (his field of research, his place in a laboratory, and political and economy demands to which he submits of against which he rebels, in the university, the hospital, etc.); lastly, the specificity of the politics of truths in our societies. And **it’s with this** last **factor that [their]** his **position can take on** a general **significance** and that his local, specific struggle can have effects and implications which are not simply professional or sectorial. The intellectual can operate and struggle at the general level of that regime of truth which is so essential to the structure and functioning of our society. **There is a battle** ‘for truth,’ or at least **‘around truth’** – it being understood once again that by truth I do not mean ‘the ensemble of truths which are to be discovered and accepted,’ but rather ‘the ensemble of rules according to which the true and false are separated and specific effects of power attached to the true’, it being understood also that it’s not a matter of a battle ‘on behalf’ of the truth, but of a battle about the status of truth **and the** economic and political **role it plays**. It is necessary to think of the political problems of intellectuals not in terms of ‘science’ and ‘ideology’, but in terms of ‘truth’ and ‘power’. And thus the question of the professionalization of intellectuals and the division between intellectual and manual labour can be envisaged in a new way. All this must seem very confused and uncertain. Uncertain indeed, and what I am saying here is above all to be taken as a hypothesis. In order for it to be a little less confused, however, I would like to put forward a few ‘propositions’ – not firm assertions, but simply suggestions to be further tested and explained. **‘Truth’ is** to be understood as a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements. ‘Truth’ is **linked** in a circular relation **with** system of **power**s **which** produces and **sustain** it, and to effects of power which it induces and which extend it. **A regime** of truth. This regime is not merely ideological or superstructural; it was a condition of the formation and development of capitalism. And it’s this same regime **which [is], subject to** certain **modification**s, operates in the socialists countries (I leave open here the question of China, about which I know little). **The** essential political problem for the **intellectual** **is not to criticize** the ideological contents supposedly linked to science, or **to ensure that his own** scientific **practice** is accompanied by a correct ideology, **but** **that of ascertaining the possibility of** constitution a **new** politics of **truth.** The problem is not changing people’s consciousness’s – or what’s in their heads – but the political, economic, institutional regime of the production of truth. **It’s** not **a matter** of emancipating truth from every system of power (which would be a chimera, for truth is already power) but **of detaching the power of truth from** the forms of **hegemony**, social economic and cultural, within which it operates at the present time. [Michel Foucault, “Power and Knowledge,” 1980, Print.]

### Inherency

#### First, Supreme Court reticence to rule on 2nd amendment cases has left handgun bans off the table and is slowing political momentum

Matt Ford, The Atlantic, December 7-2015, associate editor at The Atlantic, where he covers news. ["Supreme Court Declines Case on Assault-Weapons Ban", http://www.theatlantic.com/politics/archive/2015/12/supreme-court-gun-rights/419160/] bcr

Monday’s refusal to hear Friedman is the latest episode in the Supreme Court’s strange silence on the Second Amendment since handing down two landmark rulings, D.C. v. Heller and McDonald v. Chicago, in 2008 and 2010. As the national debate over the role of firearms in American society intensifies with each mass shooting or proposed gun-control measure, the justices have refused to hear a single major gun-rights case since they applied the Second Amendment to the states five years ago. The Court’s silence hasn’t been for want of a significant case. In June, the justices declined to hear a challenge to San Francisco’s requirement that handguns must be either disabled with trigger locks or stored in locked containers when not in use. The city ordinance was similar, though not identical, to the one struck down by the Supreme Court in D.C. v. Heller in 2008. Last year, the justices ignored two NRA-led cases challenging federal and state age restrictions on firearm purchases. And in 2013, the Court refused a case that sought to overturn New York’s strict regulations on carrying handguns outside the home. The cumulative effect of these denials (and many others) is a bizarre unwillingness to participate in a legal revolution that the Court itself ignited. First, some history. For most of the republic’s existence, the Bill of Rights, including the Second Amendment, only applied to the federal government. Then, in the 1927 case Gitlow v. New York, the justices ruled that the Fourteenth Amendment’s Due Process Clause extended the protections of the First Amendment’s Free Speech Clause to laws passed by state and local governments. The ruling sparked a slow-burning revolution in American constitutional law over the next half-century as the justices steadily began what constitutional scholars refer to as “selective incorporation”: the application of the Bill of Rights to the states, piece by piece.

### Advocacy

#### Advocacy Text: The Supreme Court will reinterpret the second amendment to allow a handgun ban. Enforcement through normal means. Aff reserves the right to clarify.

### Solvency

#### First, dissent opinion from *Heller* upholds the second amendment to a militia standard and allows handgun ban in municipal areas, overturning precedent.

(1) Nelson Lund and (2) Adam Winkler, GMU National Constitution Center Interactive Constitution, Sep 14, 2015, 1-George Mason University School of Law 2- UCLA School of Law ["THE SECOND AMENDMENT", http://www.law.gmu.edu/assets/files/publications/working\_papers/LS1523.pdf] bcr

Until recently, the judiciary treated the Second Amendment almost as a dead letter. In District of Columbia v. Heller (2008), however, the Supreme Court invalidated a federal law that forbade nearly all civilians from possessing handguns in the nation’s capital. A 5–4 majority ruled that the language and history of the Second Amendment showed that it protects a private right of individuals to have arms for their own defense, not a right of the states to maintain a militia. The dissenters disagreed. They concluded that the Second Amendment protects a nominally individual right, though one that protects only “the right of the people of each of the several States to maintain a well‐regulated militia.” They also argued that even if the Second Amendment did protect an individual right to have arms for self‐defense, it should be interpreted to allow the government to ban handguns in high‐crime urban areas.

#### Second, breaking from *Heller* and *McDonald* is this best bet for handgun bans – it tailors the second amendment to local interests which skirts preemption laws – municipalities model the 1AC’s ruling

Joseph Blocher, The Yale Law Journal, October 2013,- Joseph Blocher’s principal academic interests include federal and state constitutional law, the First and Second Amendments, capital punishment, and property. His articles have been published or are forthcoming in the Yale Law Journal, Stanford Law Review, California Law Review, University of Pennsylvania Law Review, The University of Chicago Law Review, New York University Law Review, Duke Law Journal and other journals, as well as in the online editions of the Yale Law Journal, Harvard Law Review, Virginia Law Review, Texas Law Review, Northwestern University Law Review, and others. He returned to his hometown of Durham to join the Duke Law faculty in 2009, and received the law school’s Distinguished Teaching Award in 2012. Before coming to Duke, he clerked for Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit. He also practiced in the appellate group of O’Melveny & Myers, where he assisted the merits briefing for the District of Columbia in District of Columbia v. Heller. Blocher received his B.A., magna cum laude and Phi Beta Kappa, from Rice University, and studied law and economic development as a Fulbright Scholar in Ghana and as a Gates Scholar at Cambridge University, where he received an M.Phil in Land Economy. He received his J.D. from Yale Law School, where he served as comments editor of the Yale Law Journal, symposium editor of the Yale Law & Policy Review, notes editor of the Yale Human Rights & Development Law Journal, participated in or directed several clinics, and was co-chair of the Legal Services Organization. ["Firearm Localism", http://www.yalelawjournal.org/article/firearm-localism] bcr

Judges and scholars have questioned the wisdom and coherence of the historical-categorical approach,22 and many lower courts seem to have shelved it in favor of the pragmatic balancing described by Justice Breyer in his Heller dissent.23 The latter, which has much in common with the standards of scrutiny found in other areas of constitutional law, evaluates the constitutionality of gun control laws based on the strength of the governmental and private interests involved and the degree to which a given law serves the former while protecting the latter.24 Here, too, the case for local tailoring of Second Amendment analysis is straightforward, for the simple reason that cities and rural areas generally have different gun-related interests and face different gun-related challenges.25Part III broadens the frame by showing how ongoing debates about the general virtues of constitutional localism are relevant to firearm localism and vice versa. Some constitutional rights are already locally tailored,26 and a growing number of scholars have explored and celebrated the role of localism in constitutional law.27 Of course, the question of whether any particular right should be locally tailored is ultimately a specific and normative one,28 which is why the argument for firearm localism is built on a foundation of geographic tailoring that is unique to gun rights and gun control. But the broader case for constitutional localism confirmsthat this would not mean treating the Second Amendment as some kind of second-class right.Section III.B shows how localism arguments would impact not only federal constitutional doctrine, but also state law. Over the past few decades, most states—acting largely in response to local-level handgun bans29—have passed laws forbidding or simply limiting municipal gun control.30 These preemption laws do not reach all cities, nor do they forbid all gun control, so a localized Second Amendment would have significant reach even under current law. But many of the arguments for Second Amendment localism also suggest that broad preemption laws are an undesirable break from historical practice. Especially in the wake of Heller and McDonald, which constitutionally guarantee the rights that preemption laws purport to protect, the laws themselves can and should be modified or repealed.

### ADV – Court Precedent (2 Scenarios)

#### First, the court’s narrow ruling in *Heller* sets the precedent for court power preservation – two implications:

#### Little A – Allows deconstruction of broader gun control laws

#### Little B – Overloads court control and erodes democratic checks

#### That makes overturning the precedent key

BENJAMIN S. SOFTNESS, University of Pennsylvania Law Review, 2013, Executive Editor, University of Pennsylvania Law Review, Volume 161. J.D. Candidate, 2013, University of Pennsylvania Law School; B.A., 2006, Amherst College. ["PRESERVING JUDICIAL SUPREMACY COME HELLER HIGH WATER ", https://www.pennlawreview.com/print/Softness-161-U-Pa-L-Rev-623.pdf] bcr

In 2011, Dick Heller—of Heller fame—lost his appeal before the D.C. Circuit.188 He had argued that D.C.’s emergency legislation, enacted in the wake of Heller I, as it might now be called, failed to cure the original constitutional defect.189 Dissenting from the panel opinion, Judge Kavanaugh wrote in twenty words what I hope I have conveyed in a few thousand: “Heller, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation.”190 In my view, that was precisely the point. The Court never intended to effect “a dramatic upheaval in the law”191—only to announce an important new rule and preserve its power. On that score, it appears to have succeeded. The Court made a strong legal statement in uncharted constitutional waters, and it did so narrowly. It commanded very little action and thus largely avoided the risk of defiance. If power-preserving minimalism was at play, it may not have been to the exclusion of other minimalist forces. Professor Sunstein has written—and Justice Frankfurter would likely agree—that “minimalism is the appropriate course for [adjudicating] large-scale moral or political issues” because it is “democracy-forcing.”192 This approach may have been particularly prudent with respect to gun control, since “the cultural contingency of the gun debate makes it a difficult dispute for the Court to ‘settle’ through constitutional law.”193 In other words, right up to the discrete legal boundary set by the Court, Americans ought to decide what gun control laws are necessary through their elected representatives. On the other hand, the Court may have been wedging its figurative foot in the door, preparing its own effort to chip away at the legality of gun control. There is support for the argument that foot-in-the-door minimalism was not at play here,194 but it may be too early to say. In any event, given its historical and jurisprudential similarities to Brown and Marbury, Heller can be accurately categorized as an instance of power-preserving minimalism. I am certainly not the first to suggest that the Court is concerned about its public perception.195 I have, however, tried to provide a framework that helps categorize the Court’s decisions in a way that accounts for their impact on the Court’s role and influence. That framework is a subtle expansion on Cass Sunstein’s observation that narrow decisions are “a common starting point for doctrinal innovation.”196 Narrow decisions are also sometimes key to the Court’s power over legal doctrine more generally. That the Court may need to take deliberate steps to preserve its influence should not be surprising in light of the foundations of judicial supremacy.197 Without power, judgments are mere opinions without practical force. Understanding when power preservation is at play, and (perhaps more critically) when it is called for, matters because judicial supremacy is a “national treasure.”198 By preserving its soft power in cases that permit that tactic, the Court retains the ability to exert a more forceful checking function on the other branches in cases unlike Heller—cases in which the luxury of minimalism is unavailable. These cases may include, as Justice Stone wrote in the famous Footnote Four, laws that affect “discrete and insular minorities,” the very enactment of which reflect a failure of the democratic process.199 Cases like these are, by hypothesis, countermajoritarian and thus stretch the Court’s power to require change. These cases present problems that cannot be solved through politics. When they arise, the Court’s ability to settle the law and enforce constitutional justice where no other branch can do so is crucial. And although we tend to take that power for granted, history teaches that preserving it is harder than it looks.

#### Scenario 1 – Court Power

#### First, Expanded court power leads to court supremacy – undermines constitutional intent and harms minorities

Larry Kramer, New York Times, 7-6-2015 - president of the William and Flora Hewlett Foundation, is a constitutional historian and the author of “The People Themselves: Popular Constitutionalism and Judicial Review.” He is a former dean of Stanford Law School. ["The Supreme Court's Power Has Become Excessive", http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-courts-power-has-become-excessive] bcr

“You must vote,” I often hear, “because the next president will pick who sits on the Supreme Court!” That such a statement should even be made tells us that something has gone seriously wrong with our democracy. Certainly the Supreme Court has a role in American government, but not the overblown one it has come to play. That five ideologically driven lawyers should have final say over the Constitution's meaning should offend anyone who believes in democracy. Liberals are happy with the court right now, because they got some big wins in June. I happen to like those outcomes, too, but I don’t understand why progressives would overlook how the court has systematically done its best to undermine everything they care about for the past 40 years — as it likewise did for the first 150 years, until the Warren Court flipped things around for a short time in the 1950s and 60s. Plus, the outcomes last week could just as easily have gone the other way, and then what? Do same-sex couples think they had no rights before the Supreme Court spoke, and have rights after only because five justices said so? What if Justice Kennedy had woken up on the other side of the bed the day the court ruled? This is not a left/right point. It’s a point about how the meaning of our Constitution should be finally determined. Is it really the case that the fundamental law of the land, made by “We, the People,” depends on the ideologically driven whims of five lawyers? There is a place for judicial review in constitutional democracy, just not for judicial supremacy. The idea that the justices have final say over the meaning of our Constitution — that once they have spoken, no matter what they say, our only recourse is the nearly impossible task of amending the Constitution or waiting for some of them to change their minds or die or retire — ought to offend anyone who believes in democratic government. It rests on a myth: that the court needs this overweening power to protect minorities. Yes, the court has occasionally done so, but much more often it has done the opposite. Time and time again, we have seen it take political movements and legislation to get rights and make them secure. Virtually no progress was made on race, after all, until Congress enacted the Civil Rights Acts of 1964 and 1965 — laws the Supreme Court has been working hard for years to weaken and destroy. That the people who wrote and ratified our Constitution wanted or expected the court to have such power is a fairy tale. They emphatically did not fight a revolution to replace a monarchy with an oligarchy.

#### Scenario 2 – Trafficking

This advantage argues that mcdonald v heller prevents a ban on hanguns that allows massive amount of stolen weapons. It then argues that trafficked weapons empower Mexican cartels, who work with ISIS, who are likely to launch a nuclear lone wolf attack that results in escalaction. Well warranted and redundantly structured, this hyperconcentrates your offense.

#### First, lack of bans stemming from *Heller* and *McDonald* mean more stolen handguns in circulation in the underground market

(1) Philip J. Cook and (2) Jens Ludwig, Washington Post, 6-13-2010, - 1-Philip J. Cook is the ITT/Terry Sanford professor of public policy at Duke University. 2-Jens Ludwig is the McCormick Foundation professor of social service administration, law and public policy at the University of Chicago. ["Five myths about gun control", http://www.washingtonpost.com/wp-dyn/content/article/2010/06/11/AR2010061103259.html] bcr

Fans of the Heller decision in D.C., and people hoping for a similar outcome in Chicago, believe that eliminating handgun bans and having more households keep guns for self-protection leads to less crime. The rationale: More guns enable more people to defend themselves against attackers; there might also be a general deterrent effect, if would-be criminals know that their victims could be armed. Such arguments cannot be dismissed. The key question is whether the self-defense benefits of owning a gun outweigh the costs of having more guns in circulation. And the costs can be high: more and cheaper guns available to criminals in the "secondary market" -- including gun shows and online sales -- which is almost totally unregulated under federal laws, and increased risk of a child or a spouse misusing a gun at home. Our research suggests that as many as 500,000 guns are stolen each year in the United States, going directly into the hands of people who are, by definition, criminals. The data show that a net increase in household gun ownership would mean more homicides and perhaps more burglaries as well. Guns can be sold quickly, and at good prices, on the underground market.

#### Second, stolen handguns on the underground market comprise the backbone of arms trafficking to Canada and Mexico

Law Center to Prevent Gun Violence, 1-1-2012, ["Statistics on Gun Trafficking &amp; Private Sales", http://smartgunlaws.org/gun-traffickingprivate-sales-statistics/] bcr

More than half a million firearms are stolen each year in the United States and more than half of stolen firearms are handguns, many of which are subsequently sold illegally.2 The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) issued a comprehensive report in 2000 detailing firearms trafficking investigations involving more than 84,000 diverted firearms, finding that federally licensed firearms dealers were associated with the largest number of trafficked guns – over 40,000 – and concluded that the dealers’ “access to large numbers of firearms makes them a particular threat to public safety when they fail to comply with the law.”3 According to ATF, one percent of federally licensed firearms dealers are responsible for selling almost 60 percent of the guns that are found at crime scenes and traced to dealers.4 Nearly a quarter of ATF gun trafficking investigations involved stolen firearms and were associated with over 11,000 trafficked firearms – including 10% percent of the investigations which involved guns stolen from residences.5 ATF’s limited compliance inspections between 2008 and 2010 found that over 62,000 firearms were missing from licensees’ inventories with no record of sale.6 The Bureau also identified over 16,000 firearms that had disappeared from gun manufacturers’ inventories without explanation between 2009 and the middle of 2011.7 A 1997 U.S. Department of Justice survey found that 8.4% of state prison inmates who used or possessed a firearm during the offense for which they were incarcerated obtained the gun from the illegal market.8 Random inspections by ATF have uncovered that a large percentage of dealers violate federal law, and that percentage is growing.9 An estimated 40% of the guns acquired in the U.S. annually come from unlicensed sellers who are not required by federal law to conduct background checks on gun purchasers.10 Nearly 80% of Mexico’s illegal firearms and most recovered crime guns in major Canadian cities are imported illegally from the U.S.11 For additional information on illegal gun trafficking and gun tracing, visit the Mayors Against Illegal Guns’ Trace Data Center. For additional information about private sales, including background information and state and local laws on the topic, see the Law Center’s Private Sales Policy Summary. Douglas S. Weil & Rebecca C. Knox, Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms, JAMA 1759, 1759-60 (1996). [↩] Philip J. Cook & James A. Leitzel, “Smart” Guns: A Technological Fix for Regulating the Secondary Market 7, Terry Sanford Institute of Public Policy, Duke University, Working Paper Series SAN01-10 (July 2001). [↩] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers ix, x (June 2000). [↩] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, Commerce in Firearms in the United States 14 (Feb. 2000). [↩] Id. at 11, 41. [↩] Brady Center to Prevent Gun Violence, Missing Guns 1 (January 2011). [↩] Brady Center to Prevent Gun Violence, Missing Guns: Lost and Dangerous 1 (September 2011). [↩] Bureau of Justice Statistics Special Report, U.S. Department of Justice, Firearm Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities 6 (Nov. 2001), at http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf. [↩] Brady Center to Prevent Gun Violence, “‘Trivial Violations’? The Myth of Overzealous Federal Enforcement Actions Against Licensed Gun Dealers” 1 (Sept. 2006). [↩] Philip J. Cook & Jens Ludwig, Guns in America: National Survey on Private Ownership and Use of Firearms, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997). [↩] Wintemute, Garen J., Gun Shows Across a Multistate American Gun Market: Observational Evidence of the Effects of Regulatory Policies, 13 Inj. Prevention 150, 150 (2007), at “http://injuryprevention.bmj.com/cgi/reprint/13/3/150. See also Alicia A. Caldwell, ATF: Most Illegal Guns in Mexico Come from U.S., Associated Press, Aug. 11, 2008 (ATF states that nearly all illegal guns seized in Mexico – 90 to 95 percent – originally come from the U.S.). [↩]

#### Third, weapons trafficking fuels instability in Mexico by empowering cartels – current regulations make clamping impossible

Diana Wueger, Atlantic, 7-6-2011, writes on international and domestic small-arms topics at Gunpowder and Lead. ["How American Guns Proliferate in Mexico and Fuel Drug Violence", http://www.theatlantic.com/international/archive/2011/07/how-american-guns-proliferate-in-mexico-and-fuel-drug-violence/241387/] bcr

The ATF's apparent disregard for the second and third order effects of this operation are troubling. But Fast and Furious points to a larger problem: the role of American firearms in Mexico's drug war and the abdication of American responsibility for them. A Congressional report released June 9 by Democratic Senators Dianne Feinstein, Charles Schumer, and Sheldon Whitehouse concluded that American weapons are fueling drug violence in Mexico, and that U.S. policymakers have not responded adequately. While there are legitimate questions about what percentage of drug cartels' guns came from American federal firearms licensees, over 20,000 firearms found at Mexican crime scenes in 2009 and 2010 were proven to have come from the U.S. This, of course, does not include the unknowable number of U.S.-sourced weapons still in the hands of drug cartels. These are not insignificant statistics, but there's also nothing new to this story. Law enforcement has faced an uphill battle ever since the U.S. promised, in 2007, to clamp down on arms trafficking to Mexico. In 2009, the ATF brought arms trafficker George Iknadosian to trial on charges of knowingly supplying the Sinaloa cartel with firearms; the judge threw the case out, concluding that the evidence was insufficient to convict him. The Fast and Furious operation was an attempt to use scarce resources in a new way, but this operation underscores the ATF's inability to interdict arms traffic and suggests that the ATF continues to be understaffed, underfunded, and poorly managed while Congress looks the other way.

#### Cartel power legitimizes violence against citizens – makes every humanitarian violation more likely in Mexico.

Longmire’14, [Sylvia Longmire (former Air Force officer and Special Agent with the Air Force Office of Special Investigations. She is also a former Senior Intelligence Analyst for the State of California, where she specialized in covering Mexico and the southwest border. She received her Master’s degree from the University of South Florida in Latin American and Caribbean Studies. Ms. Longmire is an award-winning columnist for Homeland Security Today magazine, and is a contributing editor for Breitbart Texas. She was a guest expert on The History Channel’s “Brad Meltzer’s Decoded,” and has consulted for the producers of National Geographic Channel’s “Border Wars” and “Drugs, Inc.” series. Ms. Longmire’s first book, Cartel: The Coming Invasion of Mexico’s Drug Wars, published in September 2011, was nominated for a Los Angeles Times Book Prize. Her most recent book, Border Insecurity: Why Big Money, Fences, and Drones Aren’t Making Us Safer, was published in April 2014.), How Mexican Cartels Are Changing the Face of Immigration, The Fletcher Forum of World Affairs, vol.38:2 summer 2014. SK]

This massacre is just one example in which **Mexican cartels are changing the nature of northbound human migration in Latin America.** Los Zetas, in particular, are **increasingly preying on vulnerable immigrants, viewing them as a potential source of ransom money or forced labor**. But Los Zetas are certainly not the only drug trafficking group involved in reaping the profits of the human smuggling business. A report by the Woodrow Wilson International Center for Scholars stated, “Factions of many [organized crime groups] engage in similar activities, either directly or indirectly. The Gulf Cartel appears to be the most active, and works with both the Mexican police and Mexican migration officials in order to capture its victims.” It also said, “Factions of the Juárez and Tijuana cartels also collect piso [a tax, or toll] from local Los Zetas, in particular, are increasingly preying on vulnerable immigrants, viewing them as a potential source of ransom money or forced labor. 111 vol.38:2 summer 2014 how mexican cartels are changing the face of immigration smugglers and may, in the case of Juárez, be directly involved in trafficking. Portions of the old La Familia Michoacana, now called the Caballeros Templarios (the Knights Templar), and the Sinaloa Cartel have also reportedly displaced coyotes operating in their territories and have attempted to take over this business.”5 Acclaimed journalist and producer for Al Jazeera America, Christof Putzel discovered this first-hand while filming a documentary for the nowdefunct Current TV’s Vanguard series. In November 2010, Putzel and Mexican-American filmmaker Juan Carlos Frey recorded their attempt to smuggle themselves across the southwest border in a manner as close as possible to that of hundreds of thousands of migrants every year. “What was nuts is that, when we initially planned to shoot this, we thought we would just get some ‘mom and pop’ coyote operation, and those things don’t exist anymore. The cartels run the show,” Putzel said about his experience. “So we needed to get permission from the cartels to do this [episode]. Part of the deal was, they would be okay with us doing it as long as we only talked about migrants and didn’t mention anything about drug trafficking. They really didn’t want us reporting on that at all.”6 **Immigration attorneys on the U.S. side of the border are seeing more and more cases of immigrants being coerced at gunpoint to work as drug mules**. The cartels threaten them and their family members, giving them strict orders on where to haul drug loads as heavy as sixty pounds over unforgiving terrain and under penalty of death. Elizabeth Rogers, a federal public defender in West Texas, has said most of her recent backpacker cases claim coercion. “About a year and a half ago, ourselves as well as our investigators started seeing these clients that would say, I don’t care how long I’m going to get [in jail time], I can’t go home — they’ll kill me,” she told National Public Radio in 2011. “[We] have grown men, rawboned cowboy guys from Chihuahua, begging for protection from deportation.”7 Raul Miranda, a criminal defense attorney in Tucson, Arizona, has said about one-third of his clients have claimed they were unwilling drug mules. “They’re told by the people— who obviously work for the cartels—that they have to carry the bundle, or they’ll reduce the fee that they’re going to have to pay, or they’ll forgive the **As a result of the increasing violence in Mexico and the** targeting of innocent immigrants by drug cartels**, the number of applications for asylum by Mexican nationals passing through U.S. immigration courts is skyrocketing. the fletcher forum of world affairs** vol.38:2 summer 2014 112 fee. But the people who are telling them this are armed, and the people feel threatened if they say no.”8 As a result of the increasing violence in Mexico and the targeting of innocent immigrants by drug cartels, the number of applications for asylum by Mexican nationals passing through U.S. immigration courts is skyrocketing. In 2005, there were 2,670 applications filed, and that number rose to 2,818 in 2006. By 2010, applications had increased to 3,231, and nearly doubled to 6,133 in fiscal year 2012. However, between 2007 and 2011, only 2 percent of requests from Mexico were granted, compared to 38 percent of requests from Chinese nationals and 89 percent of Armenian applicants.9 Unfortunately, while the nature of cross-border migration has changed significantly in the last decade, immigration laws and the guidelines for granting asylum have not. Asylum has historically been associated with the Cold War and communism, and refugees fleeing the political and social oppression imposed on them by tyrants. In decades past, we would hear about “defectors” from places like the Soviet Union, Cuba, and North Korea. Today, China and Cuba are still popular countries for citizens with asylum requests, but U.S. courts are host to more and more applicants from countries like Afghanistan, Iraq, Iran, Somalia, and Pakistan—nations categorized as failed or failing states with governments that cannot protect their citizens, and in some cases, are actively oppressing their freedoms and rights. Requesting asylum has not really been a popular or necessary option for Mexican immigrants until drug-related violence started spreading in earnest and the ties between government officials, law enforcement officers, and the cartels became stronger and more blatant. In some cases, it is very clear that the Mexican government is unable to provide adequate protection to an asylum applicant, the police are directly involved in the harm being caused, and the local government is obviously looking the other way while it happens. But in other cases, requesting asylum becomes a last-ditch effort by illegal immigrants to avoid deportation when they never would have considered applying if they hadn’t gotten caught. This only delays the inevitable and clogs up the already backed-up immigration court system. As comprehensive immigration reform plans progress through U.S. political channels, it is important to keep an eye on asylum provisions and how As the drug war continues in Mexico, fear may become the primary motivating factor for migrants heading north, rather than the lure of better economic opportunities. 113 vol.38:2 summer 2014 how mexican cartels are changing the face of immigration they might change; it could have a huge impact on how these cases are processed in the future. As the drug war continues in Mexico, fear may become the primary motivating factor for migrants heading north, rather than the lure of better economic opportunities. As **one asylum applicant stated** after her application was denied, “**I will not hesitate to stay here illegally. I would rather do that than ever go to Mexico again, even if it means illegal re-entry. It’s not that I want to live in the U.S. I never did. But** I cannot go back**. I do not want to die.”**10 Whether it is Mexicans, Cubans, Chinese, or Iraqis, foreigners will always want to come to the United States. Most of them will not be able to enter or stay here legally. Because the security situation in Mexico and Central America has deteriorated so badly over the last decade, citizens of those countries are more motivated than ever to run the risks of the northbound journey. And it does not matter to them how many border patrol agents get assigned to the border, or how many miles of fence the government builds. Maybe twenty years ago it was easier to detect undocumented immigrants along our borders, process them, and send them back to their home countries. But now our cross-border traffic has become a blur—a gray area where drug traffickers and migrants blend together and have become more difficult to separate. It is clear that as long as the United States is safer than Mexico— which will be the case for the foreseeable future—Mexican and Central American citizens will go to great lengths to come here and avoid being returned home, no matter what border enforcement actions we take or laws we pass. It’s also guaranteed that as long as the American demand for illegal drugs continues, Mexican cartels will exploit every aspect of crossborder migration for their own profit-seeking purposes. SK

Two impacts:

**A.** Either citizens stay in Mexico and are forced into slavery or trafficking or

**B.** Citizens are forced to migrate to America where they are subject to xenophobia

### ADV – Reformulation

#### The Heller decision defines an interpretation of the “people” which arbitrarily excludes foreigners – the gun rights rhetoric upholds the same exclusionary tendencies seen in the early ages – rejection is key. [Means the status quo regulates minority possession of guns and the aff is key to shift away from biased criminalization]

Gulasekaram, [Pratheepan Gulasekaram (Professor of Law. Santa Clara University School of Law, J.D., Stanford Law School.), “‘THE PEOPLE’ OF THE SECOND AMENDMENT: CITIZENSHIP AND THE RIGHT TO BEAR ARMS”, 85 N.Y.U. L. Rev. 1521 (2010). SK]

Much of Second Amendment scholarship—and the dispute between the majority opinion and dissents in Heller is no exception— conjures conflicting histories regarding gun regulation in America. The historical debate rehashes the longstanding argument about whether the Second Amendment should be understood as a collective or individual right. Less explored, however, is the historical relationship between guns and citizenship. As Part I concludes that Heller’s apparent reformulation of “the people” is jurisprudentially and normatively unsound, Part II situates **Heller’s nascent citizenship talk** within historical context. Such a reading of Heller **develops a richer understanding of exclusionary firearms regulation and helps to illuminate the perniciousness of contracting the meaning of “the people.”** Although Heller’s language raises anew the possibility that gun rights might be citizens’ rights, this rhetorical and legal maneuver in the majority opinion, it turns out, is unremarkable in American legal history. The white majority has often used gun regulation as a tool to keep firearms out of the hands of politically unpopular groups that it 107 See, e.g., Wong Wing v. United States, 163 U.S. 228, 237 (1896) (ruling that federal government violated Constitution when it imposed hard labor as punishment prior to deportation of unlawful immigrants without trial). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 23 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1543 deemed to be too dangerous. The fact that contemporary citizenship limitations on gun rights fit neatly into this historical theme and tradition of restriction does little to justify Heller’s potential for excluding noncitizens from gun rights. Rather, it condemns such a possibility. **Heller’s pronouncement is situated within a historical narrative that has long kept firearms from noncitizens and racial minorities**. Surveying critical moments in the evolving relationship between firearms and citizenship reveals this cohesive narrative centered on both maintaining a racially exclusive conception of citizenship and disarming noncitizens. Such legal proscriptions coincided with increased immigration from outside of western and northern Europe and with increasingly racially and ethnically diverse citizenship.108 The expanded racial inclusiveness of citizenship after the Civil War and the period of mass migration which followed coincided with an era of regulation related to firearms and immigration.109 From the early years of the republic through the mid-twentieth century, explicit and thinly veiled alienage and racial prohibitions helped maintain racial exclusivity in firearms possession. More recently, as racial, national origin, and alienage distinctions have been subjected to heightened judicial scrutiny,110 lack of gun rights has nevertheless remained a marker of second-class membership and diminished privileges. **The story of citizenship and guns is, in large part, one of** racial prejudice and xenophobic paranoia**, motivated by a fear of a racialized or foreign “Other” presenting danger to white,** Anglo-Saxon, Protestant **citizens** and the nation’s republican institutions.111 The purpose of tying together this narrative is to showcase a recurring strand of American gun possession and regulation—a strand that consistently conflicts with other deeply ingrained constitutional values based on equality. To the extent that Heller reinvigorates the potential for citizenship-conscious regulation, it does so in the shadow 108 See infra Part II.B (discussing migration from Asia, Latin America, and southern and eastern Europe). 109 See infra Part II.B (discussing proliferation of gun regulation). 110 Graham, 408 U.S. at 376–77 (1971) (subjecting state alienage distinctions in welfare law to strict judicial scrutiny and striking down Arizona’s and Pennsylvania’s provisions limiting public benefits to noncitizens). 111 See e.g., Williams, supra note 27, at 882–83 (“In other words, the People have their unity in opposition to the hypothesized ‘Other’ (Jews, Blacks, bankers, etc.) that seeks to oppress the People.”); see also Devon W. Carbado, Racial Naturalization, 57 AM. Q. 633, 637 (2005) (arguing that naturalization is not equalizing societal factor due to prevalence of racial prejudice and paranoia in society today); cf. Jonathan Todres, Law, Otherness, and Human Trafficking, 49 SANTA CLARA L. REV. 605, 607 (2009) (“Otherness, with its attendant devaluation of the Other, facilitates the abuse and exploitation of particular individuals. Otherness operates across multiple dimensions to reinforce a conception of a virtuous ‘Self’ and a lesser ‘Other.’”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 24 8-NOV-10 8:48 1544 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 of a legacy marred by racialized and xenophobic fears. This is significant because in other constitutional contexts, the Court has deployed examination of history and tradition to undergird its determination of the scope of a fundamental right.112 Thus, unable to withstand the constitutional and doctrinal inquiry in Part I, exclusionary gun rights are also stained by a dubious historical legacy, as this Part reveals. Subsequently, Part III will probe whether any other coherent theory of citizenship-only rights may nevertheless justify the citizenship reading of the Second Amendment. Relying on the work of historians, this Article chronicles watershed moments in the relationship between the right to bear arms and ideas of citizenship. At the outset, I must concede that I am not an historian, and this Article does not purport to provide a complete historical survey of noncitizen gun possession. As such, the claims made here are solely correlative and not causative; that is, this Article suggests a strong correlation between times of intense racism and xenophobia, related legislative or judicial expressions, and gun regulations aimed at politically less powerful groups. I have chosen specific and representative legal landmarks to help highlight three persistent overlapping storylines: (1) citizenship as a malleable and unstable concept—its content often manipulated by political majorities and determined by the ability of certain demographic groups to lay claim to their status and its attendant privileges; (2) disarmament as a badge of enslavement and inferior membership status, and, its corollary, armament as a sign of free and full citizenship;113 and (3) foreigners and foreign influences as sinister and dangerous to the physical safety of citizens and the well-being of republican institutions. While not offering a definitive historical profile, I explain that these three themes are persistent features of the American legal and political landscape. And although these themes resonate generally in the 112 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) (arguing that rights protected by Due Process Clause could be determined in part by “continual insistence upon respect for the teachings of history”). Compare Michael H. v. Gerald D., 491 U.S. 110, 122–24 (1989) (Scalia, J., plurality opinion) (limiting substantive due process rights to fundamental rights grounded in history and tradition), with id. at 139 (Brennan, J., dissenting) (engaging in colloquy about importance, applicability, and understanding of history, which together govern interpretation of fundamental rights under Due Process Clause of Fourteenth Amendment). 113 See, e.g., Carl T. Bogus, Race, Riots, and Guns, 66 S. CAL. L. REV. 1365, 1374 (1993) (“From [the perspective that the Second Amendment was motivated by anxieties over slave control], the Second Amendment appears to be a remnant from an era that ended in 1865 when the Thirteenth Amendment was enacted and slavery was abolished.”); David Thomas Konig, The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People To Keep and Bear Arms,” 22 LAW & HIST. REV. 119, 147 (2004) (associating disarmament with slavery). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 25 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1545 American story, their specific manifestation in gun regulation showcases the centrality of the Second Amendment in constructions of American citizenship and identity. The subsections in Part II divide noncitizen and racially motivated gun regulation into three time periods: (1) the founding to the Civil War; (2) Reconstruction to the early decades of the twentieth century; and (3) the mid-twentieth century to present day. I choose these three segments because each includes milestone declarations regarding noncitizen gun possession and the importance of citizenship. This Part argues that **fear- and prejudice-based regulation of noncitizen and minority possession [of guns]** have been a persistent feature in the background of the American legal landscape. Additionally, this part showcases the malleability and instability of citizenship as a storehouse for important rights. These themes, which resonate in Heller, **[and] persist to present day**. SK

Heller substantiates that the desire to own a gun is specifically an assimilation tactic crafted by the elites and the desire to “become American”, which heightens xenophobia and creates American exclusivity.

Gulasekaram, [Pratheepan Gulasekaram (Professor of Law. Santa Clara University School of Law, J.D., Stanford Law School.), “‘THE PEOPLE’ OF THE SECOND AMENDMENT: CITIZENSHIP AND THE RIGHT TO BEAR ARMS”, 85 N.Y.U. L. Rev. 1521 (2010). SK]

The paradox of inclusion and exclusion highlighted by this Article lies at the heart of citizenship distinctions in firearms regulations. Since the republic’s founding, when **gun rights were congruent to core political rights available to only white, propertied, first-class citizens, the associative progression of gun rights and citizenship caused a significant enlargement in the pool of eligible gun owners through the nineteenth century**. Yet, when the fundamental nature of citizenship changed in the late nineteenth century to include previously excluded Washington, and Wyoming. Id. at 922. Yet, only nine of those states maintain statutory alienage distinctions for gun possession or use. Id. at 895 nn.11–14. The remaining states that maintain alienage distinctions for arms bearing frame the right as one held by “persons” or “all men,” or have no arms-related constitutional provisions. Id. at 922. 288 See, e.g., Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) (declaring that noncitizens are covered by Due Process Clause and must be accorded Fifth and Sixth Amendment rights); People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in gun laws because it deprived alien of right to defend self and property); People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922) (“[A] constitution like ours[ ] grant[s] to aliens who are bona fide residents of the state the same rights . . . as native-born citizens, and to every person the right to bear arms for the defense of himself and the state . . . .”); Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. REV. 1047, 1060–61 & nn.42–43 (1994) (arguing that noncitizens, including undocumented immigrants, are entitled to Fourth, Fifth, Sixth, and Eighth Amendment protections in criminal proceedings, at a minimum). But see Wishnie, supra note 76, at 669, 747 (noting, but then justifying through his theory of “extraordinary speech,” First Amendment’s varied protection of different classes of noncitizens). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 58 8-NOV-10 8:48 1578 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 races and immigrant groups, expansion of gun rights stalled. Into the twentieth century, legislative and judicial efforts, mostly agnostic about interpretations of “the people” in the Amendment, reaffirmed latent societal fears regarding the nationality and color of those permitted to possess guns. Even as constitutional scrutiny of citizenship distinctions generally grew more strict, the white majority continued a pattern of de facto disarmament of minorities and created a complex web of firearms restrictions for noncitizens. This historical analysis shows the continued tensions in the American psyche among community, citizenship, and belonging. This Article also examined Heller’s focus on individual rights **and self-defense, as well as its** narrowing of the conception of “the people**”** in the Second Amendment. Taking Heller’s meaning and import at face value, the holding **would** seem to expand gun rights by limiting extreme state regulation, while simultaneously **contract**ing **the universe of those who may own guns and claim the Second Amendment’s protections**. Unsurprisingly then, the post-Heller world of gun regulation continues and augments the historical tension between gun rights and citizenship. As such, Heller’s citizenship talk requires considerable reconsideration and revision. **As a right of personal self-defense,** **gun ownership is connected to citizenship status tangentially at best** unless noncitizens present the primary source of armed danger within the country. **This, however, has not been the case** since the early days of the republic, when threats from British loyalists, noncitizen Native Americans, and slave insurrections occupied the attention of the citizen majority. **These same nebulous fears of danger to the citizen population from armed foreigners motivated prosecution of recently immigrated German laborers training for their defense, spurred various state alien-in-possession laws at the beginning of the twentieth century, animated debates over Hawaii’s then-nascent right-to-bear arms provision during the state’s Constitutional Convention in the 1950s, and still galvanizes arms purchases in present day**.289 But now, as was the case then, no empirical data linking specific threats to citizens from noncitizen possession have ever been proffered to substantiate these fears. Indeed, the description of key moments in the narrative of alien gun laws in Part II of this Article highlights the hyperbolized and stereotypical conceptions of noncitizen and nonwhite aggression animating regulation of noncitizen possession. Of course, one of the ironies of citizens’ concerns about noncitizen firearm possession is that personal gun ownership and the use of fire- 289 See supra Part II (discussing racial and xenophobic contours of gun regulation). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 59 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1579 arms for private ends is a uniquely American ethos, anathema to most immigrants.290 If noncitizens are not a unique violent threat to the citizenry, then firearms regulations of noncitizens are justifiable only when citizens’ arms possession accompanies concomitant arms-related duties and obligations to the state or to state watchdog militias. But neither Heller nor contemporary gun advocates recommend conditioning gun ownership on public-oriented duties. If anything, the absence of required military service for citizens, combined with federal laws allowing for—in fact, incentivizing—noncitizen military service, evince a specific desire to expand public-oriented, state-protective gun ownership beyond citizens. Those attempting to possess guns as a safeguard against governmental tyranny—the so-called modern militia movement—are a minority fringe, often too tainted with racial or religious prejudice or xenophobic fervor to be treated as legitimate citizen endeavors tasked with guarding against state tyranny.291 Moreover, immigration law requires that those wishing to become citizens express their political beliefs through nonviolent and orderly expressions.292 Stripped of these justifications, state or federal firearms restrictions on noncitizens appear grounded only in irrational and unsupportable fears about foreigners or a desire to make citizenship more valuable for its own sake. **Linking gun rights with other citizenship rights imbues citizenship with** greater substantive value**, constructing it as the legal category triggering the rights of both self-rule and self defense**. But unlike with other citizenship rights, the limitation of the right to armed self-defense finds no independent support or rationale save a desire to keep instruments of deadly violence as a privilege of citizenship and a survival advantage for citizens. 290 Arie Bauer et al., A Comparison of Firearms-Related Legislation on Four Continents, 22 MED. & L. 105, 107 (2003) (“The acquisition of firearms by private individuals in the USA is easier than in most other western countries.”); Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 CHI-KENT L. REV. 291, 330 (2001) (noting that no constitutions written since fall of communism contain right-to-bear-arms provisions). 291 See Holthouse, supra note 24, at 11–12 (discussing increasing credence given by militia groups to “fringe conspiracy theories”); see also Jesse McKinley & Malia Wollan, New Border Fear: Violence by a Rogue Militia, N.Y. TIMES, Jun. 27, 2009, at A9, available at http://www.nytimes.com/2009/06/27/us/27arizona.html (“[Minutemen patrols at the U.S.- Mexico border] initially drew praise from some political leaders, including Gov. Arnold Schwarzenegger of California, but also raised concerns that the activities were thin veils for racism and xenophobia.”). 292 8 U.S.C. § 1424(a) (2006) (barring naturalization of those associated with or advocating overthrow of government by force); id. § 1427(a)(3) (requiring “attach[ment] to the principles of the Constitution” and “good moral character”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 60 8-NOV-10 8:48 1580 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 **Thus, the irony of noncitizen exclusion from gun rights** enabled by Heller **is that it irreparably undermines the opinion’s watershed interpretation of the Second Amendment**. Our legal and political regime simply cannot bear the significance of the right to bear arms and the meaning of “the people,” when one is read expansively and the other interpreted jealously. In light of history, text, and logic, “the people” of the Second Amendment must include more than citizens. Indeed, devoid of ad hoc—and ultimately unjustifiable—exceptions, “the people” may comprehend several classes of persons. Nonviolent felons293 and even undocumented persons can present colorable claims to exercise the right of reasonable armed self-defense. “The people” in the Second Amendment, as it does elsewhere in the Federal Constitution, resists easy mapping onto the terrain of citizenship and noncitizenship. One possibility is that the phrase is akin to “nation” in that it refers to a nebulous concept based in shared meaning and aspiration. Like “nation,” it does not itself provide bright-line limitations on who might be included within that aspiration, allowing for expansion and contraction as the republic evolves. Or, as Justice Kennedy suggested, “the people” might refer to the importance of a right, as opposed to the class it delimits.294 Both fail to explain how or why the Second Amendment mandates limitations of its guarantees to citizens. The preceding analysis illuminates the profound implications of Justice Scalia’s description of those to whom the right to bear arms inures. More importantly, it exposes the interpretative and doctrinal difficulties with limiting “the people” of the Federal Constitution to citizens. SK

## Solvency Modules

### Stock 1AC

#### Notes

This version allows for a sole advantage and a decent sized util FW. Best for preempting alternative frameworks and having a solid, focused offense scenario.

#### Observation 1 – Framework

#### Observation 2 – Inherency

#### First, Supreme Court reticence to rule on 2nd amendment cases has left handgun bans off the table and is slowing political momentum

Matt Ford, The Atlantic, December 7-2015, associate editor at The Atlantic, where he covers news. ["Supreme Court Declines Case on Assault-Weapons Ban", http://www.theatlantic.com/politics/archive/2015/12/supreme-court-gun-rights/419160/] bcr

Monday’s refusal to hear Friedman is the latest episode in the Supreme Court’s strange silence on the Second Amendment since handing down two landmark rulings, D.C. v. Heller and McDonald v. Chicago, in 2008 and 2010. As the national debate over the role of firearms in American society intensifies with each mass shooting or proposed gun-control measure, the justices have refused to hear a single major gun-rights case since they applied the Second Amendment to the states five years ago. The Court’s silence hasn’t been for want of a significant case. In June, the justices declined to hear a challenge to San Francisco’s requirement that handguns must be either disabled with trigger locks or stored in locked containers when not in use. The city ordinance was similar, though not identical, to the one struck down by the Supreme Court in D.C. v. Heller in 2008. Last year, the justices ignored two NRA-led cases challenging federal and state age restrictions on firearm purchases. And in 2013, the Court refused a case that sought to overturn New York’s strict regulations on carrying handguns outside the home. The cumulative effect of these denials (and many others) is a bizarre unwillingness to participate in a legal revolution that the Court itself ignited. First, some history. For most of the republic’s existence, the Bill of Rights, including the Second Amendment, only applied to the federal government. Then, in the 1927 case Gitlow v. New York, the justices ruled that the Fourteenth Amendment’s Due Process Clause extended the protections of the First Amendment’s Free Speech Clause to laws passed by state and local governments. The ruling sparked a slow-burning revolution in American constitutional law over the next half-century as the justices steadily began what constitutional scholars refer to as “selective incorporation”: the application of the Bill of Rights to the states, piece by piece.

#### Plan Text: The Supreme Court will reinterpret the second amendment to allow a handgun ban. Enforcement through normal means. Aff reserves the right to clarify.

#### Observation 3 – Solvency

#### First, dissent opinion from *Heller* upholds the second amendment to a militia standard and allows handgun ban in municipal areas, overturning precedent.

(1) Nelson Lund and (2) Adam Winkler, GMU National Constitution Center Interactive Constitution, Sep 14, 2015, 1-George Mason University School of Law 2- UCLA School of Law ["THE SECOND AMENDMENT", http://www.law.gmu.edu/assets/files/publications/working\_papers/LS1523.pdf] bcr

Until recently, the judiciary treated the Second Amendment almost as a dead letter. In District of Columbia v. Heller (2008), however, the Supreme Court invalidated a federal law that forbade nearly all civilians from possessing handguns in the nation’s capital. A 5–4 majority ruled that the language and history of the Second Amendment showed that it protects a private right of individuals to have arms for their own defense, not a right of the states to maintain a militia. The dissenters disagreed. They concluded that the Second Amendment protects a nominally individual right, though one that protects only “the right of the people of each of the several States to maintain a well‐regulated militia.” They also argued that even if the Second Amendment did protect an individual right to have arms for self‐defense, it should be interpreted to allow the government to ban handguns in high‐crime urban areas.

#### Second, breaking from *Heller* and *McDonald* is this best bet for handgun bans – it tailors the second amendment to local interests which skirts preemption laws – municipalities model the 1AC’s ruling

Joseph Blocher, The Yale Law Journal, October 2013,- Joseph Blocher’s principal academic interests include federal and state constitutional law, the First and Second Amendments, capital punishment, and property. His articles have been published or are forthcoming in the Yale Law Journal, Stanford Law Review, California Law Review, University of Pennsylvania Law Review, The University of Chicago Law Review, New York University Law Review, Duke Law Journal and other journals, as well as in the online editions of the Yale Law Journal, Harvard Law Review, Virginia Law Review, Texas Law Review, Northwestern University Law Review, and others. He returned to his hometown of Durham to join the Duke Law faculty in 2009, and received the law school’s Distinguished Teaching Award in 2012. Before coming to Duke, he clerked for Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit. He also practiced in the appellate group of O’Melveny & Myers, where he assisted the merits briefing for the District of Columbia in District of Columbia v. Heller. Blocher received his B.A., magna cum laude and Phi Beta Kappa, from Rice University, and studied law and economic development as a Fulbright Scholar in Ghana and as a Gates Scholar at Cambridge University, where he received an M.Phil in Land Economy. He received his J.D. from Yale Law School, where he served as comments editor of the Yale Law Journal, symposium editor of the Yale Law & Policy Review, notes editor of the Yale Human Rights & Development Law Journal, participated in or directed several clinics, and was co-chair of the Legal Services Organization. ["Firearm Localism", http://www.yalelawjournal.org/article/firearm-localism] bcr

Judges and scholars have questioned the wisdom and coherence of the historical-categorical approach,22 and many lower courts seem to have shelved it in favor of the pragmatic balancing described by Justice Breyer in his Heller dissent.23 The latter, which has much in common with the standards of scrutiny found in other areas of constitutional law, evaluates the constitutionality of gun control laws based on the strength of the governmental and private interests involved and the degree to which a given law serves the former while protecting the latter.24 Here, too, the case for local tailoring of Second Amendment analysis is straightforward, for the simple reason that cities and rural areas generally have different gun-related interests and face different gun-related challenges.25Part III broadens the frame by showing how ongoing debates about the general virtues of constitutional localism are relevant to firearm localism and vice versa. Some constitutional rights are already locally tailored,26 and a growing number of scholars have explored and celebrated the role of localism in constitutional law.27 Of course, the question of whether any particular right should be locally tailored is ultimately a specific and normative one,28 which is why the argument for firearm localism is built on a foundation of geographic tailoring that is unique to gun rights and gun control. But the broader case for constitutional localism confirmsthat this would not mean treating the Second Amendment as some kind of second-class right.Section III.B shows how localism arguments would impact not only federal constitutional doctrine, but also state law. Over the past few decades, most states—acting largely in response to local-level handgun bans29—have passed laws forbidding or simply limiting municipal gun control.30 These preemption laws do not reach all cities, nor do they forbid all gun control, so a localized Second Amendment would have significant reach even under current law. But many of the arguments for Second Amendment localism also suggest that broad preemption laws are an undesirable break from historical practice. Especially in the wake of Heller and McDonald, which constitutionally guarantee the rights that preemption laws purport to protect, the laws themselves can and should be modified or repealed.

#### Observation 4 – Advantage

### Flex 1AC

#### Notes

This affirmative includes additions to inherency and solvency that gains offense off solving for homicides and suicides. One could either have an exceedingly long framework with no advantage (More deont oriented framing allows you to sit on framework), or a short FW with one advantage (Best for rounds were you don’t need to defend util heavily and want diversified offense.

#### Observation 1 – Framework

First, The 1AC is a politics of invention, a rupture within the traditional schema which plague the very ground we rest on which unshackles us from static notions of history and recognizes identity as fluid not fixed. It a revolution which introduces new performances into the world - we adopt this positionality in the 1AC as an invitation to adopt This standpoint and invent further alternatives.

Marriott in **‘**14, [Marriott, David. "No lords A-leaping: Fanon, CLR James, and the politics of invention." Humanities 3.4 (2014): 517-545. SK]

“I should constantly remind myself”, writes Fanon, “that **the real leap consists in introducing invention into existence**” ([1], p. 229). And just before this sentence: “I am not a prisoner of History [l’Histoire]. I should not seek there for the meaning of my destiny” ([1], p. 229). In all of Fanon’s writings I know of no passage that sums up, to the same extent, the enigma of his thought. The point of these gestures seems to be that “invention”, so often invoked as though it were eo ipso something historical, is here the figure for a kind of radical untimeliness that entails a leap, and **this leap** cannot be anticipated, nor can it be prepared for, nor **can[not] it be traced back to a prior historical moment to be interrogated as such**. To leap, then, is more than a rhetorical figure; indeed, we need to see it as the very conceptuality that Fanon puts into play here, as that which cuts through the continuum of history: and in its wake only remnants remain. Fanon needs to remind himself of this. He needs to remind himself of the devastating consequences of invention and of history. (In this he is closely related to Benjamin, whose angelus novus is just as essentially a figure of danger and hope (cf. [2])). **Invention, because it is a radical transformation, is not reducible to** economy or strategy, and therefore, we might want to say, yet another form of **political calculation**. Nor is it a mode for utopia, whose possibility can now be resurrected in a myth of perfectibility, when the oppressed take a dialectical leap into the “open air of history” ([2], p. 253). This is why **invention is not reducible to any kind of teleological schema**. **Despite the primary role which history plays in the meaning of colonial subjection**, **clinging to its truth or whatever happens to be regarded as its truth can only be imprisoning**, **or backward-looking, for the inventor**. Although none of Fanon’s texts are explicitly devoted to this configuration, the ethical-political implications of invention can be seen throughout Fanon’s work, although it is less obvious what these implications might be. I want to argue that **this situation is already inventive, insofar as it gives rise in Fanon’s work to a singular politics of invention, and one premised on a leap that is neither a catastrophe or fall, advent or realization and is mostly incomprehensible to what came before.** From there it is but a step to the notion that invention is revolution **and that the true task of politics is to** embrace or demand **this imperious leap.** **Political reinvention**, on this view, **begins with interruption or fracture**, **and not memory or recollection**, **and cannot but appear as violent to the use of traditional concepts**, in politics, **of negation and affirmation**. Therefore, if one says—as Fanon has just said—that this invention can never be “enslaved” by the past, and its meaning circumscribed by history, **what the leap implies is a situation of radical indecision whose emergence introduces something entirely new into the world.** Humanities 2014, 3 519 To do justice to Fanon’s thinking one must therefore never lose sight of **invention**—which, to be sure, **opens up a fracture or hole in History.** **This more explicitly radical opening can be characterized as taking place in a space between a “phenomenological” critique of race** (including the space given to race by Césaire or Sartre), **and a “political” attempt to retrieve a sense of rebellion that avoids the “pitfalls” of spontaneity**: vengeance, indiscipline, an immediacy which is both “radical and totalitarian” ([3], p. 105). Fanon wants both to register the force of phenomenology’s (or more radically) Sartre’s suspicion of historicism in the traditional figuring of black invention, and Césaire’s powerful claim, in his Cahier, that blackness be re-considered first as anti-invention, prior to what he calls the purity of its failure. There is, however, a caveat: Sartre’s rendering of negritude slams the door shut on black creativity and encloses it in an historicism; and in Césaire, black existence, whose meaning plunges from abyss to mythical abyss, finds a last refuge in a “‘bitter brotherhood’ that imprisons all of us alike” ([1], p. 124). The reference to Césaire seems almost as essential to Fanon as the reference to Sartre, and one way of tracking a path through Fanon’s work is to follow the great chapter in Black Skin, White Masks devoted to Césaire’s Cahier and Sartre’s Orphée Noir. In this chapter on le vecu noir, or black lived experience, the focus is on how Sartre reduces black creativity to neo-Marxist truth or dogma and how Césaire renders black existence in terms of predetermined myths. Both **positions**, incidentally, are felt to be imprisoning: they **cease being inventive the moment they sublate the heterogeneous and singular into fixed ontologies or concepts**. SK

Because the resolution begs a normative question, I value morality. However, having a debate about morality before recognizing the evils of structural violence is nonsensical because structural violence precludes conceptions of fairness and due by systematically morally and political excluding people, while also allowing us to become blind to the injustice they suffer.  **Opotow** explains,

Violence is the exertion of physical force so as to injure or abuse. Johan Galtung (1969) directs our attention to overt vs. more subtle forms of violence. **Direct violence is immediate**, concrete, **physical violence** committed by and **on particular**, identifiable **people**. Even when it is committed from afar, as in missile launches, particular people decide what to do, particular people activate weaponry at a particular moment, and particular people are victims. **Structural violence, in contrast, is** less obvious than direct violence. It is gradual, **imperceptible, and normalized** as the way things are done; **it determines whose voice is systemically heard or ignored,** who gets particular resources, and who goes without. In structural violence, agency is blurred and responsibility is unclear; there may not be any one person who directly harms an- other. **Structural violence normalizes unequal access to** such social and economic **resources** as education, wealth, quality housing, civic services, **and political power**. Direct and structural violence have different manifestations, but they are clearly related and interdependent. Ethnic cleansing, a euphemism for mass murder motivated by ethnic conflict, is direct violence that results from many kinds of structural violence, forces which have intertwined in “a long-forgotten history coming back to haunt us, a history full of thousands of economic, social, ethical, territorial, cultural and political problems that remained latent and unnoticed un- der the surface of totalitarian boredom” (Vaclav Havel, quoted by Burns, 1992, p. 3). On the other hand, direct violence can give rise to long-term structural violence. Rape as a weapon of war has long-lived effects on victims and their society. Raped individuals are often reluctant to come forward because they fear exacerbating the debasement they and their families have already experienced. In some societies, mass rape has produced social, economic, and political inequalities; for example, in 1998, rape directed at Chinese women in Indonesia was tactically employed to wrest control of Indonesia’s commerce away from Chinese citizens (Mydans, 1998). Both structural and direct violence result from moral justifications and rationalizations. Morals are the norms, rights, entitlements, obligations, responsibilities, and duties that shape our sense of justice and guide our behavior with others (Deutsch, 1985). Morals operationalize our sense of justice by identifying what we owe to whom, whose needs, views, and well-being count, and whose do not. Our morals apply to people we value, which define who is inside our scope of justice (or “moral community”), such as family members, friends, compatriots, and coreligionists (Deutsch, 1974, 1985; Opotow, 1990; Staub, 1989). We extend considerations of fairness to them, share community resources with them, and make sacrifices for them that foster their well- being (Opotow, 1987, 1993). **we see other kinds of people** such as enemies or strangers **outside our scope of justice**; they are morally excluded. Gender, ethnicity, religious identity, age, mental capacity, sexual orientation, and political affiliation are some criteria used to define moral exclusion. Excluded people can be hated and viewed as “vermin” or “plague” or they can be seen as expendable non-entities. In either case, disadvantage, hardship, and exploitation inflicted on them seems normal, accept- able, and just—as “the way things are” or the way they “ought to be.” Fairness and deserving seem irrelevant when applied to them **and harm befalling them elicits neither remorse**, outrage, **nor demands for restitution;** instead, harm inflicted on them can inspire celebration. Many social issues and controversies, such as aid to school drop-outs, illegal immigrants, “welfare moms,” people who are homeless, substance abusers, and those infected with HIV are essentially moral debates about who deserves public resources, and thus, ultimately, about moral inclusion. When we see other people’s circumstances to be a result of their moral failings, moral exclusion seems warranted. But when we see others’ circumstances as a result of structural violence, moral exclusion seems unwarranted and unjust… Although **moral exclusion**, direct **and structural violence,** and social injustice are ubiquitous, they **are not inevitable. Inclusionary thinking is fostered by** valuing one’s connections to and interdependence with others, while seeing the mutually constructive possibilities of those connections as beneficial. Maintaining relationships depends on being committed to **extending considerations of fairness**, being willing to make sacrifices, **and being willing to allocate** and share **resources** to preserve those relationships with distant as well as close people. While we tend to en- vision peace as an outcome, peace is an inclusionary process. In the long run, cultures of peace, characterized by human rights, tolerance, democracy, free flow of information, non-violence, sustainable development, peace education, and equality of men and women will depend upon moral inclusion. Social conflicts can foster injustice, but they also motivate social change that advances social justice. Constructive conflict processes can maximize social outcomes, but they are not intuitive and need to be learned (Colelman & Deutsch, this volume; Deutsch, 1973; Opotow & Deutsch, 1999). Appreciation of diversity, trust, and respect are difficult to achieve, taking considerable skill, effort, maturity, and patience to accomplish. To achieve these constructive outcomes, **communication needs to** unflinchingly **address rather than suppress real structural inequalities** that take some people’s needs into account while disregarding, disrepecting, and excluding others. **By so doing, we can enlarge the scope of justice,** foster equality, and promote peace in the twenty- first century

Opotow implies that the existence of structural violence is far from inevitable. Instead of merely accepting and recreating the exclusion, individuals must recognize the existence of structural violence and promote social justice. My framework precludes all normative frameworks because systematic, invisible violence allows us to arbitrarily exclude individuals from our scope of justice, resulting in both dehumanization and a loss of moral agency for those individuals. **Moreover**, because the judge can use the ballot to determine what is accepted as truth in the round, they assume the role of the intellectual, which carries with it the obligation to deconstruct hegemonic, systematic truths, such as those that promote continued structural violence. **Foucault** explains,

It seems to me that what must now be taken into account in **[T]he intellectual is not the ‘bearer of universal values.’** **Rather**, it’s **the person** occupying a specific position – but **who**se specificity **is linked**, in a society like ours, **to** the general functioning of an apparatus of **truth**. In other words, the intellectual has a three-fold specificity: that of his class position (whether as petty-bourgeois in the service of capitalism or ‘organic’ intellectual of the proletariat); that of his conditions of life and work, linked to his condition as an intellectual (his field of research, his place in a laboratory, and political and economy demands to which he submits of against which he rebels, in the university, the hospital, etc.); lastly, the specificity of the politics of truths in our societies. And **it’s with this** last **factor that [their]** his **position can take on** a general **significance** and that his local, specific struggle can have effects and implications which are not simply professional or sectorial. The intellectual can operate and struggle at the general level of that regime of truth which is so essential to the structure and functioning of our society. **There is a battle** ‘for truth,’ or at least **‘around truth’** – it being understood once again that by truth I do not mean ‘the ensemble of truths which are to be discovered and accepted,’ but rather ‘the ensemble of rules according to which the true and false are separated and specific effects of power attached to the true’, it being understood also that it’s not a matter of a battle ‘on behalf’ of the truth, but of a battle about the status of truth **and the** economic and political **role it plays**. It is necessary to think of the political problems of intellectuals not in terms of ‘science’ and ‘ideology’, but in terms of ‘truth’ and ‘power’. And thus the question of the professionalization of intellectuals and the division between intellectual and manual labour can be envisaged in a new way. All this must seem very confused and uncertain. Uncertain indeed, and what I am saying here is above all to be taken as a hypothesis. In order for it to be a little less confused, however, I would like to put forward a few ‘propositions’ – not firm assertions, but simply suggestions to be further tested and explained. **‘Truth’ is** to be understood as a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements. ‘Truth’ is **linked** in a circular relation **with** system of **power**s **which** produces and **sustain** it, and to effects of power which it induces and which extend it. **A regime** of truth. This regime is not merely ideological or superstructural; it was a condition of the formation and development of capitalism. And it’s this same regime **which [is], subject to** certain **modification**s, operates in the socialists countries (I leave open here the question of China, about which I know little). **The** essential political problem for the **intellectual** **is not to criticize** the ideological contents supposedly linked to science, or **to ensure that his own** scientific **practice** is accompanied by a correct ideology, **but** **that of ascertaining the possibility of** constitution a **new** politics of **truth.** The problem is not changing people’s consciousness’s – or what’s in their heads – but the political, economic, institutional regime of the production of truth. **It’s** not **a matter** of emancipating truth from every system of power (which would be a chimera, for truth is already power) but **of detaching the power of truth from** the forms of **hegemony**, social economic and cultural, within which it operates at the present time. [Michel Foucault, “Power and Knowledge,” 1980, Print.]

#### Observation 2 – Inherency & Harms

#### First, Supreme Court reticence to rule on 2nd amendment cases has left handgun bans off the table and is slowing political momentum

Matt Ford, The Atlantic, December 7-2015, associate editor at The Atlantic, where he covers news. ["Supreme Court Declines Case on Assault-Weapons Ban", http://www.theatlantic.com/politics/archive/2015/12/supreme-court-gun-rights/419160/] bcr

Monday’s refusal to hear Friedman is the latest episode in the Supreme Court’s strange silence on the Second Amendment since handing down two landmark rulings, D.C. v. Heller and McDonald v. Chicago, in 2008 and 2010. As the national debate over the role of firearms in American society intensifies with each mass shooting or proposed gun-control measure, the justices have refused to hear a single major gun-rights case since they applied the Second Amendment to the states five years ago. The Court’s silence hasn’t been for want of a significant case. In June, the justices declined to hear a challenge to San Francisco’s requirement that handguns must be either disabled with trigger locks or stored in locked containers when not in use. The city ordinance was similar, though not identical, to the one struck down by the Supreme Court in D.C. v. Heller in 2008. Last year, the justices ignored two NRA-led cases challenging federal and state age restrictions on firearm purchases. And in 2013, the Court refused a case that sought to overturn New York’s strict regulations on carrying handguns outside the home. The cumulative effect of these denials (and many others) is a bizarre unwillingness to participate in a legal revolution that the Court itself ignited. First, some history. For most of the republic’s existence, the Bill of Rights, including the Second Amendment, only applied to the federal government. Then, in the 1927 case Gitlow v. New York, the justices ruled that the Fourteenth Amendment’s Due Process Clause extended the protections of the First Amendment’s Free Speech Clause to laws passed by state and local governments. The ruling sparked a slow-burning revolution in American constitutional law over the next half-century as the justices steadily began what constitutional scholars refer to as “selective incorporation”: the application of the Bill of Rights to the states, piece by piece.

#### Second, best studies prove the *Heller* and *McDonald* cases strike down popular gun bans which adds to growing handgun murders and suicides – unchallenged, increase deconstruction of gun laws will compound the issue.

Josh Sugarmann, Huffington Post, 6-28-2010, Executive Director, Violence Policy Center ["McDonald Gun Case: More Deaths, Unending Litigation", http://www.huffingtonpost.com/josh-sugarmann/mcdonald-gun-case-more-de\_b\_627688.html] bcr

The winners in today's Supreme Court decision in McDonald v. Chicago? The gun lobby and gunmakers. Each seeks nothing less than the complete dismantling of our nation's gun laws in a cynical effort to try and stem the long-term drop in gun ownership and save the fading gun industry. Today's decision, which applies nationwide the Court's 2008 ruling in District of Columbia v. Heller that there is a Second Amendment right to keep a handgun in your home for self-defense, is viewed as a vital step in expanding this battlefield. The losers? America's communities and the victims of gun violence. The 30,000 lives claimed annually by gun violence and the families destroyed in the wake of gun homicides, suicides, murder-suicides, and mass shootings mean little to the gun lobby and the firearm manufacturers it protects. Today's decision will only add to this toll. At the same time, the decision will result in an inevitable tide of frivolous pro-gun litigation that will force cities, counties, and states to expend scarce resources to defend longstanding, effective public safety laws. More guns means more gun death. States with lax gun laws and higher gun ownership rates consistently lead the nation in per capita gun death, while states with strict gun laws and lower gun ownership have lower gun death rates. In 2007, the most recent year for which data is available, the five states with the highest per capita gun death rates were Louisiana, Mississippi, Alaska, Alabama, and Nevada. Each of these states had a per capita gun death rate far exceeding the national per capita gun death rate of 10.34 per 100,000 for 2007. By contrast, states with strong gun laws and low rates of gun ownership had far lower rates of firearm-related death. Ranking last in the nation for gun death was Hawaii, followed by Rhode Island, Massachusetts, Connecticut, and New York. And contrary to the claims of the gun lobby, America's cities are not waiting expectantly to exercise this newfound right offered by the Court. According to DC Police Chief Cathy Lanier, in the two years since the 2008 Heller decision overturning DC's handgun ban, only 900 firearms have been registered in the District that otherwise could not have been registered before the ruling. The citizens of DC have thus far rejected the wrong-headed notion that more guns make us safer. One can only hope that Chicago's citizens will do the same.

#### Plan Text: The Supreme Court will reinterpret the second amendment to allow a handgun ban. Enforcement through normal means. Aff reserves the right to clarify.

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Until recently, the judiciary treated the Second Amendment almost as a dead letter. In District of Columbia v. Heller (2008), however, the Supreme Court invalidated a federal law that forbade nearly all civilians from possessing handguns in the nation’s capital. A 5–4 majority ruled that the language and history of the Second Amendment showed that it protects a private right of individuals to have arms for their own defense, not a right of the states to maintain a militia. The dissenters disagreed. They concluded that the Second Amendment protects a nominally individual right, though one that protects only “the right of the people of each of the several States to maintain a well‐regulated militia.” They also argued that even if the Second Amendment did protect an individual right to have arms for self‐defense, it should be interpreted to allow the government to ban handguns in high‐crime urban areas.

#### Second, breaking from *Heller* and *McDonald* is this best bet for handgun bans – it tailors the second amendment to local interests which skirts preemption laws – municipalities model the 1AC’s ruling

Joseph Blocher, The Yale Law Journal, October 2013,- Joseph Blocher’s principal academic interests include federal and state constitutional law, the First and Second Amendments, capital punishment, and property. His articles have been published or are forthcoming in the Yale Law Journal, Stanford Law Review, California Law Review, University of Pennsylvania Law Review, The University of Chicago Law Review, New York University Law Review, Duke Law Journal and other journals, as well as in the online editions of the Yale Law Journal, Harvard Law Review, Virginia Law Review, Texas Law Review, Northwestern University Law Review, and others. He returned to his hometown of Durham to join the Duke Law faculty in 2009, and received the law school’s Distinguished Teaching Award in 2012. Before coming to Duke, he clerked for Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit. He also practiced in the appellate group of O’Melveny & Myers, where he assisted the merits briefing for the District of Columbia in District of Columbia v. Heller. Blocher received his B.A., magna cum laude and Phi Beta Kappa, from Rice University, and studied law and economic development as a Fulbright Scholar in Ghana and as a Gates Scholar at Cambridge University, where he received an M.Phil in Land Economy. He received his J.D. from Yale Law School, where he served as comments editor of the Yale Law Journal, symposium editor of the Yale Law & Policy Review, notes editor of the Yale Human Rights & Development Law Journal, participated in or directed several clinics, and was co-chair of the Legal Services Organization. ["Firearm Localism", http://www.yalelawjournal.org/article/firearm-localism] bcr

Judges and scholars have questioned the wisdom and coherence of the historical-categorical approach,22 and many lower courts seem to have shelved it in favor of the pragmatic balancing described by Justice Breyer in his Heller dissent.23 The latter, which has much in common with the standards of scrutiny found in other areas of constitutional law, evaluates the constitutionality of gun control laws based on the strength of the governmental and private interests involved and the degree to which a given law serves the former while protecting the latter.24 Here, too, the case for local tailoring of Second Amendment analysis is straightforward, for the simple reason that cities and rural areas generally have different gun-related interests and face different gun-related challenges.25Part III broadens the frame by showing how ongoing debates about the general virtues of constitutional localism are relevant to firearm localism and vice versa. Some constitutional rights are already locally tailored,26 and a growing number of scholars have explored and celebrated the role of localism in constitutional law.27 Of course, the question of whether any particular right should be locally tailored is ultimately a specific and normative one,28 which is why the argument for firearm localism is built on a foundation of geographic tailoring that is unique to gun rights and gun control. But the broader case for constitutional localism confirmsthat this would not mean treating the Second Amendment as some kind of second-class right.Section III.B shows how localism arguments would impact not only federal constitutional doctrine, but also state law. Over the past few decades, most states—acting largely in response to local-level handgun bans29—have passed laws forbidding or simply limiting municipal gun control.30 These preemption laws do not reach all cities, nor do they forbid all gun control, so a localized Second Amendment would have significant reach even under current law. But many of the arguments for Second Amendment localism also suggest that broad preemption laws are an undesirable break from historical practice. Especially in the wake of Heller and McDonald, which constitutionally guarantee the rights that preemption laws purport to protect, the laws themselves can and should be modified or repealed.

#### Third, best studies prove that DCs law led to reductions in suicide and murders – considers population shifts and disproves alternate weapons theories

Becky Bowers, Politifact, 1-17-2013, Editor, Real Time Economics at The Wall Street Journal Previous Tampa Bay Times - Times Publishing Co, The Poynter Institute, The St. Petersburg Times Education California State University-Chico ["Marco Rubio says after D.C. passed gun laws, 'violence skyrocketed'", http://www.politifact.com/truth-o-meter/statements/2013/jan/28/marco-rubio/marco-rubio-says-after-dc-passed-gun-laws-viol/] bcr

But back to Rubio. In his Fox News interview, he didn’t claim the gun ban caused the crime rate to rise. But he does say that the gun laws are "not going to solve the problem," citing D.C.’s experience as an example. We know that violent crime didn’t simply "skyrocket" in the District after the handgun ban passed in 1976. It took a rocky path with peaks in 1981 and 1993, and has generally fallen since then. A similar trend echoed across the United States. That suggests a wide range of factors at work, not merely D.C.’s gun laws. Some experts who study violence, such as Alfred Blumstein of Carnegie Mellon University, say the early ‘80s peak and fall can largely be attributed to the baby boomer generation entering their teens and 20s and then growing up. (People tend to be more law abiding as they age.) The later U.S. peak, Blumstein said, came with crack cocaine and President Ronald Reagan’s war on drugs. And the fall in violent crime since then? Theories include the passage of Roe vs. Wade and a reduction in environmental lead. Blumstein argues an important part of the explanation was the decline in the demand for crack as people saw its effects in older friends and relatives, "and aggressive actions by police in taking the guns off the street." Ah, so, back to gun laws. What, if any, role did they play in violent crime in the District of Columbia? There’s not a lot of fresh research on the subject, since Congress put a chill on government-funded firearms research starting in the late ‘90s. (Something that the president’s recent executive actions seek to reverse.) But Garen Wintemute, director of the Violence Prevention Research Program at the University of California at Davis School of Medicine, pointed us to a 1991 study in the New England Journal of Medicine. "Sen. Rubio couldn't be more wrong," he told PolitiFact. The study, conducted by a research group at the University of Maryland and University at Albany, examined suicides and homicides in the District of Columbia compared with nearby cities from 1968 to 1987. They found that the adoption of the gun-licensing law "coincided with an abrupt decline" in gun-related deaths not found just across the border. Nor were there increases in homicides or suicides that didn’t use guns. "Our data suggest that restrictions on access to guns in the District of Columbia prevented an average of 47 deaths each year after the law was implemented," the authors concluded. Despite widely circulated Internet criticism to the contrary, researchers did consider the effects of population changes, including age and population size. They got similar results. How did the laws help? The researchers argued the data supported something called the weapon-choice theory. When people don’t have easy access to guns, some will use a less deadly form of force. So even if the number of assaults and suicide attempts stays the same, with fewer guns, deaths drop. The researchers argued their results showed it was reasonable to assume that even with violent crime rising, restrictions on gun access had "a preventive effect." In other words, even if "violence skyrocketed," as Rubio said, that’s not direct evidence that D.C.’s gun laws failed to help. Of course, they also didn’t fully "solve the problem."

#### Observation 4 – Advantage

## Gulasekaram

Part I analyzes **Heller’s limitation of the meaning of “the people” in the Second Amendment to citizens** in light of precedent discussing the appropriate methodology for defining constitutional language which **establishes who is entitled to particular privileges and rights**. Concluding that such a limitation is doctrinally unsound, Part II situates **Heller’s alienage restriction within a historical narrative of firearms regulation and citizenship status**. Here, the Article showcases the ways in which **citizenship restrictions in the firearms context have operated as a proxy for racial discrimination, helped construct sinister versions of the foreign “other” unfit to wield arms, and contributed to the indeterminacy of citizenship’s content.** Buttressing the conclusions reached in Parts I and II, Part III explores whether Heller’s citizenship limitations can be saved by analyzing and defining when gun rights comport with theories underlying “citizenship rights” or rights the judiciary has interpreted as being guaranteed only to citizens. By exploring other rights limited to citizens, such as voting and jury service, this Article argues that the phrase “the people” of the Second Amendment cannot be limited to citizens, except through interpretations at odds with an individualized, self defense–related conception of arms bearing. **Since Heller’s restriction of “the people” to citizens has no basis in precedent that interprets constitutional language or that defines citizenship rights, it should be reconsidered, particularly in light of the historical correlation among xenophobia, racism, and restrictions on access to firearms**. SK

### Who is a “person”

**The lack of attention by** litigants and **academics to the “citizens” specified by the Heller majority** makes sense if the reference was inadvertent or was a colloquial allusion to a general class of persons to whom all civil rights inure.54 Such a reading, however, **imputes a significant degree of sloppiness and imprecision into a profound pronouncement on the scope of a fundamental right**. In a doctrinal world where citizenship as a legal status often matters, casual usage of the term “citizen” to describe rights beneficiaries is problematic.55 **The** majority’s **references to the arms-bearing right of “Americans” conjures classic images of a nation** (as opposed to a state) **in which the category houses all those believing in the ideals and values represented by the term**. Unfortunately, **the term does not aid in specific allocations of constitutional rights unless “Americans” is understood to be synonymous with “citizens.”** The term “**citizens” specifically defines a legal status noted in the Constitution and created by U.S. immigration and naturalization law**.56 As such, interpreting the Second Amendment to effect a citizenship restriction affects the rights of a substantial portion of the population and implicates federal and state legal frameworks regulating the treatment of noncitizens. A complex web of federal and state regulations governs noncitizen firearm use and possession. As noted, federal law deems firearm possession by undocumented persons a crime.57 The federal immigration code includes “firearms offenses” in the category of violations that trigger deportation of any noncitizen, including legal permanent residents.58 In addition, a citizenship restriction in the Second Amendment could bear upon the constitutionality of the laws of several states that prohibit, limit, or treat noncitizen firearm possession unequally now that the Amendment has been incorporated. Heller’s references to “citizens” and “members of the political community” then invite the question of whether the Constitution compels reading “the people” of the Second Amendment to mean In altering—and thereby contracting—the definition of “the people” to political membership as a function of constitutional interpretation, the Heller majority recalls Dred Scott’s express limitation on constitutional reach and departs from more recent precedent. This move of redefining and constricting “the people,” as Professor Angela Harris notes, has long been one of the tools employed by empowered elites to ostracize nonwhite, non-males from the Constitution’s largesse.87 Extending that logic to another politically vulnerable group like noncitizens helps highlight the marginalizing potential of Heller’s sub silentio tightening of Verdugo-Urquidez. 88 If intentional, Heller’s rhetorical shift appears to continue a restrictionist project by some members of the Court to protect only citizens from governmental action.89 But even if unintentional, the majority’s allusions to “citizens” and “members of the political community”90 provide previously unavailable constitutional sanction to noncitizens’ exclusion from constitutional protection. In the context of the case, the restriction is even more poignant because of the unique nature of the right in question: the right to possess an instrumentality of deadly force. As Part II will argue, Heller’s consequences for noncitizens’ rights—and for immigrants’ subordination to the citizenry’s armament—continues a theme prevalent in federal and state regulation of noncitizens’ firearm possession. Undoubtedly, one could argue that Heller gun rights are sui generis and that “the people” in the Second Amendment is narrower and more precisely defined than in other constitutional provisions. While this interpretation is plausible, it would undermine the Heller majority’s painstaking exegesis of “the people,” including the guidance sought from other constitutional allusions to the phrase.91 In addition, it ironically would contradict Heller’s fundamental holding regarding the individualized and self-protective characteristics of the right to bear arms. If “the people” referenced in the Second Amendment meant citizens, while the same phrase in the Fourth Amendment meant a broader class of persons with substantial connections, then the Second Amendment is exceptional in requiring obligation and loyalty to—and recognition by—the state in order to seek its protection. Conditioning the right on an intimate tie to the state suggests that the Amendment is not actually about self-defense, but about state-defense.92 As discussed in Part II.A, precolonial and early colonial gun laws in some states limited such rights to subsects of the citizenry: white males deemed loyal to state interests.93 However, Heller rejected this reading in its characterization of the Second Amendment right as an individual right to self-defense, and therefore its tightening of “the people” relative to its other uses in the Constitution is plausible only at the expense of its keystones. SK

Much of Second Amendment scholarship—and the dispute between the majority opinion and dissents in Heller is no exception— conjures conflicting histories regarding gun regulation in America. The historical debate rehashes the longstanding argument about whether the Second Amendment should be understood as a collective or individual right. Less explored, however, is the historical relationship between guns and citizenship. As Part I concludes that Heller’s apparent reformulation of “the people” is jurisprudentially and normatively unsound, Part II situates **Heller’s nascent citizenship talk** within historical context. Such a reading of Heller **develops a richer understanding of exclusionary firearms regulation and helps to illuminate the perniciousness of contracting the meaning of “the people.”** Although Heller’s language raises anew the possibility that gun rights might be citizens’ rights, this rhetorical and legal maneuver in the majority opinion, it turns out, is unremarkable in American legal history. **The white majority has often used gun regulation as a tool to keep firearms out of the hands of politically unpopular groups** that it 107 See, e.g., Wong Wing v. United States, 163 U.S. 228, 237 (1896) (ruling that federal government violated Constitution when it imposed hard labor as punishment prior to deportation of unlawful immigrants without trial). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 23 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1543 deemed to be too dangerous. The fact that contemporary citizenship limitations on gun rights fit neatly into this historical theme and tradition of restriction does little to justify Heller’s potential for excluding noncitizens from gun rights. Rather, it condemns such a possibility. **Heller’s pronouncement is situated within a historical narrative that has long kept firearms from noncitizens and racial minorities**. Surveying critical moments in the evolving relationship between firearms and citizenship reveals this cohesive narrative centered on both maintaining a racially exclusive conception of citizenship and disarming noncitizens. Such legal proscriptions coincided with increased immigration from outside of western and northern Europe and with increasingly racially and ethnically diverse citizenship.108 The expanded racial inclusiveness of citizenship after the Civil War and the period of mass migration which followed coincided with an era of regulation related to firearms and immigration.109 From the early years of the republic through the mid-twentieth century, explicit and thinly veiled alienage and racial prohibitions helped maintain racial exclusivity in firearms possession. More recently, as racial, national origin, and alienage distinctions have been subjected to heightened judicial scrutiny,110 lack of gun rights has nevertheless remained a marker of second-class membership and diminished privileges. **The story of citizenship and guns is, in large part, one of racial prejudice and xenophobic paranoia, motivated by a fear of a racialized or foreign “Other” presenting danger to white,** Anglo-Saxon, Protestant **citizens** and the nation’s republican institutions.111 The purpose of tying together this narrative is to showcase a recurring strand of American gun possession and regulation—a strand that consistently conflicts with other deeply ingrained constitutional values based on equality. To the extent that Heller reinvigorates the potential for citizenship-conscious regulation, it does so in the shadow 108 See infra Part II.B (discussing migration from Asia, Latin America, and southern and eastern Europe). 109 See infra Part II.B (discussing proliferation of gun regulation). 110 Graham, 408 U.S. at 376–77 (1971) (subjecting state alienage distinctions in welfare law to strict judicial scrutiny and striking down Arizona’s and Pennsylvania’s provisions limiting public benefits to noncitizens). 111 See e.g., Williams, supra note 27, at 882–83 (“In other words, the People have their unity in opposition to the hypothesized ‘Other’ (Jews, Blacks, bankers, etc.) that seeks to oppress the People.”); see also Devon W. Carbado, Racial Naturalization, 57 AM. Q. 633, 637 (2005) (arguing that naturalization is not equalizing societal factor due to prevalence of racial prejudice and paranoia in society today); cf. Jonathan Todres, Law, Otherness, and Human Trafficking, 49 SANTA CLARA L. REV. 605, 607 (2009) (“Otherness, with its attendant devaluation of the Other, facilitates the abuse and exploitation of particular individuals. Otherness operates across multiple dimensions to reinforce a conception of a virtuous ‘Self’ and a lesser ‘Other.’”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 24 8-NOV-10 8:48 1544 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 of a legacy marred by racialized and xenophobic fears. This is significant because in other constitutional contexts, the Court has deployed examination of history and tradition to undergird its determination of the scope of a fundamental right.112 Thus, unable to withstand the constitutional and doctrinal inquiry in Part I, exclusionary gun rights are also stained by a dubious historical legacy, as this Part reveals. Subsequently, Part III will probe whether any other coherent theory of citizenship-only rights may nevertheless justify the citizenship reading of the Second Amendment. Relying on the work of historians, this Article chronicles watershed moments in the relationship between the right to bear arms and ideas of citizenship. At the outset, I must concede that I am not an historian, and this Article does not purport to provide a complete historical survey of noncitizen gun possession. As such, the claims made here are solely correlative and not causative; that is, this Article suggests a strong correlation between times of intense racism and xenophobia, related legislative or judicial expressions, and gun regulations aimed at politically less powerful groups. I have chosen specific and representative legal landmarks to help highlight three persistent overlapping storylines: (1) citizenship as a malleable and unstable concept—its content often manipulated by political majorities and determined by the ability of certain demographic groups to lay claim to their status and its attendant privileges; (2) disarmament as a badge of enslavement and inferior membership status, and, its corollary, armament as a sign of free and full citizenship;113 and (3) foreigners and foreign influences as sinister and dangerous to the physical safety of citizens and the well-being of republican institutions. While not offering a definitive historical profile, I explain that these three themes are persistent features of the American legal and political landscape. And although these themes resonate generally in the 112 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment) (arguing that rights protected by Due Process Clause could be determined in part by “continual insistence upon respect for the teachings of history”). Compare Michael H. v. Gerald D., 491 U.S. 110, 122–24 (1989) (Scalia, J., plurality opinion) (limiting substantive due process rights to fundamental rights grounded in history and tradition), with id. at 139 (Brennan, J., dissenting) (engaging in colloquy about importance, applicability, and understanding of history, which together govern interpretation of fundamental rights under Due Process Clause of Fourteenth Amendment). 113 See, e.g., Carl T. Bogus, Race, Riots, and Guns, 66 S. CAL. L. REV. 1365, 1374 (1993) (“From [the perspective that the Second Amendment was motivated by anxieties over slave control], the Second Amendment appears to be a remnant from an era that ended in 1865 when the Thirteenth Amendment was enacted and slavery was abolished.”); David Thomas Konig, The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People To Keep and Bear Arms,” 22 LAW & HIST. REV. 119, 147 (2004) (associating disarmament with slavery). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 25 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1545 American story, their specific manifestation in gun regulation showcases the centrality of the Second Amendment in constructions of American citizenship and identity. The subsections in Part II divide noncitizen and racially motivated gun regulation into three time periods: (1) the founding to the Civil War; (2) Reconstruction to the early decades of the twentieth century; and (3) the mid-twentieth century to present day. I choose these three segments because each includes milestone declarations regarding noncitizen gun possession and the importance of citizenship. This Part argues that **fear- and prejudice-based regulation of noncitizen and minority possession [of guns]** have been a persistent feature in the background of the American legal landscape. Additionally, this part showcases the malleability and instability of citizenship as a storehouse for important rights. These themes, which **resonate in Heller**, **[and] persist to present day**. SK

The pre-Revolution and founding-era firearm restrictions were harbingers for the themes that have consistently pervaded gun regulation. First, prohibitions on ownership by African Americans literally ensured continued enslavement and kept free blacks in the same position as slaves vis- `a-vis firearms.114 Second, disarmament of British loyalists and some religious minorities was rooted in distrust of foreign influences in the new republican nation.115 Third, since only “FirstClass citizens” were allowed to vote, bear arms, and serve on juries,116 many other citizens—poor whites, women, minors, free blacks—were denied many fundamental rights presently associated with citizenship.117 Accordingly, citizenship was only tenuously connected to rights,118 whereas, in today’s doctrinal world, such rights would be 114 CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 26 (2006) (“[Colonial racial divisions in militia service] soon encompassed not only slaves but free blacks as well.”); LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 50 (1975) (describing early laws preventing blacks from gun ownership). 115 See infra notes 137–41 and accompanying text (discussing disarmament based on foreign identity in early republic). 116 AMAR, supra note 102, at 48, 258–59. 117 Id. 118 See KETTNER, supra note 63, at 323 (“[T]he right to the elective franchise had never seemed absolutely inherent in the status [of citizenship]; it had always been subject to a wide range of limitations and qualifications even among the white citizenry.”); see also Wishnie, supra note 76, at 690–91 (arguing that citizenship during colonial and founding era was “unsettled concept” that may have had little to do with framers’ intent when deciding to whom constitutional benefits would inure). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 26 8-NOV-10 8:48 1546 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 considered fundamentally connected to one’s citizenship status.119 Furthermore, this section will showcase how the citizenship reading of “the people” uncomfortably reinvigorates the abandoned reasoning of Dred Scott v. Sanford. Pre–Revolutionary War gun regulation did not necessarily depend on categories of legal citizenship but rather on a conception of membership in the national community contingent upon race, wealth, and gender. Before the Revolutionary War and the founding of the republic, firearms were prevalent among the white population.120 Some colonial governments also required loyalty oaths before firearm possession.121 Prevailing firearm laws in various states allowed for the disarmament of Catholics122 and poor whites.123 Blacks, whether free or enslaved, were heavily regulated, and colonial law generally disarmed them.124 Several colonial governments also forbade the selling of arms and ammunition to members of Indian tribes.125 By the time of the Constitution’s framing, statutes in the several states made guns a privilege of “First-Class Citizens,” meaning that only select citizen males could legitimately exercise the right to bear 119 See, e.g., Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (stating that Constitution protects right of citizens to vote). 120 Robert H. Churchill, Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment, 25 LAW & HIST. REV. 139, 142, 147 (2007) (noting that militia members armed themselves and thus most white males were accustomed to carrying guns). 121 Cornell, supra note 27, at 221, 228–29 (describing Pennsylvania’s Test Acts and asserting that those who refused to take loyalty oath could be disarmed). 122 CRAMER, supra note 114, at 24. 123 See Churchill, supra note 120, at 156 (discussing scholarship identifying legislation intended to disarm Catholics and Quakers); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 FORDHAM L. REV. 487, 507 (2004) (recounting eighteenth-century laws conditioning firearms on loyalty oaths and disarmament of certain religious minorities); see also Cornell, supra note 27, at 221, 228–29 (describing Pennsylvania’s loyalty oath). 124 KENNETT & ANDERSON, supra note 114, at 50 (discussing first recorded legislation restricting gun ownership by free blacks in Virginia in 1640); Churchill, supra note 120, at 148 (detailing North Carolina’s slave disarmament law); Thomas N. Ingersoll, Free Blacks in a Slave Society: New Orleans, 1718–1812, 48 WM. & MARY Q. 173, 178–79 (1991) (recounting Louisiana’s 1751 adoption of provisions from royal Black Code of 1724 that required nonslaveholders to stop any black carrying any potential weapon). But see Cottrol & Diamond, supra note 17, at 326 (noting that South Carolina allowed some free blacks to possess firearms to help control slave population for a brief period). 125 See, e.g., THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 138–40 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850) (creating restriction against selling ammunition to Indian tribe members); 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 392 (Nathaniel B. Shurtleff ed., Boston, William White 1853) (demanding severe punishment for those who broke ban on selling ammunition or guns to Indian tribe members). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 27 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1547 arms.126 As Akhil Amar reminds us, at that time, arms bearing was considered congruent to voting, holding public office, or serving on juries—rights associated with each other and denied even to many citizens.127 Militia membership and its attendant firearms rights and obligations were not extended to include poor whites until the first decades of the nineteenth century.128 This racialized, gendered,129 and class-stratified understanding of persons permitted to own guns—and exercise other core political rights—began finding legislative imprimatur in immigration and militia regulations. First, the Uniform Naturalization Act of 1790 ensured that only whites were permitted to naturalize into citizens.130 Second, after the First Congress passed the Bill of Rights and the Uniform Naturalization Act, the second Congress passed the Militia Act of 1792, specifying that the militia of the several states were to consist only of “white male citizen[s].”131 Individual state constitutions codified restrictions on “Negroes, Mulattoes, and Indians” serving in state militias132 or expressly limited firearms to “free white men.”133 Indeed, the framers of the Constitution understood firearms to be uniquely American, while simultaneously circumscribing those considered American along ethnic and religious markers. While James Madison boasted that gun rights were an “advantage” that Americans 126 AMAR, supra note 102, at 48; see also Cornell, supra note 27, at 235 (“[T]he meaning of the right to bear arms, unlike virtually any other right described in either state constitutions or the Federal Constitution was colored by the inchoate notions of class and rank that shaped American politics in this period.”). 127 AMAR, supra note 102, at 48 (noting classification of such rights as those reserved to “First-Class Citizens”). 128 Slotkin, supra note 2, at 56 (“Colonial militias excluded from service those residents who were not classed as freemen, a category that included poor whites . . . . The expansion of citizenship rights . . . through the Age of Jackson extended the franchise and the right and obligation of militia service to the white male portion of the excluded classes.”). 129 I am not arguing that women were prevented from owning arms; rather, prevailing statutes and legal opinions gendered arms bearing in important ways. Women were excluded from militia service as were Indians and Negroes. A 1915 commentary baldly asserts that females could be prohibited from gun possession. See Lucilius A. Emery, The Constitutional Right To Keep and Bear Arms, 28 HARV. L. REV. 473, 476 (1915) (“Women, young boys, the blind, tramps, persons non compos mentis, or dissolute in habits, may be prohibited from carrying weapons.”). 130 An Act to Establish an Uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103 (1790). 131 Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (“Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states . . . who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . . .”). 132 KY. CONST. of 1850, art. VII (“The militia of this Commonwealth shall consist of all free able-bodied male persons (negroes, mulattoes, and Indians excepted).”). 133 TENN. CONST. of 1834, art. I, § 26 (“That the free white men of this State have a right to keep and to bear arms for their common defence.”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 28 8-NOV-10 8:48 1548 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 possessed over the peoples of other nations,134 his coauthor, John Jay, projected a homogenous (albeit inaccurate) vision of the American people: With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence. This country and this people seem to have been made for each other, and it appears as if it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.135 Taken together, the racial exclusions from militia service, racial restrictions in naturalization law, and expanding access for poor whites produced racially discriminatory gun rights, buttressed by racially discriminatory citizenship laws. As slaves were clearly not considered citizens—indeed, they were considered only three-fifths of a person136—and naturalization and militia service were legally restricted to whites, firearms were, in effect, only the privilege of whites. Certain white inhabitants were also disarmed, but only those who could not claim the perceived ancestry, religion, or belief in the same principles of government extolled by John Jay.137 As notable examples, both loyalists to the English crown138 and certain religious minorities were disarmed by statute in the colonies and newly declared states.139 Thus, an early feature of the emerging republic was 134 THE FEDERALIST NO. 46, at 238 (James Madison) (Lawrence Goldman ed., 2008) (“Besides the advantage of being armed, which the Americans possess over the people of almost every other nation . . . .”). 135 THE FEDERALIST NO. 2, supra note 134, at 15–16 (John Jay). 136 U.S. CONST. art. I, § 2. 137 CRAMER, supra note 114, at 38 (“While blacks and indentured white servants were often not enough trusted with guns to serve as armed members of the militia, free whites were generally trusted with firearms. There were some exceptions: Particular religious minorities were not trusted . . . .”). 138 See, e.g., Churchill, supra note 120, at 149–50 (noting Loyalist outcry at threat of being disarmed); Cornell & DeDino, supra note 123, at 506 (noting use of loyalty oaths to “deal with the potential threat coming from armed citizens who remained loyal to Great Britain”). 139 See CRAMER, supra note 114, at 28 (“Many of the indentured servants were Irish, suffering from ‘incorrigible rudeness and ferocity,’ and of suspect loyalty in a war against a European foe.” (quoting PHILLIP ALEXANDER BRUCE, 2 INSTITUTIONAL HISTORY OF \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 29 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1549 the disarmament of groups associated with foreign elements. On this reading, the right to bear arms exists precisely because of foreign influences in the American polity, and the Second Amendment gives constitutional imprimatur to Americans’ xenophobia. Exclusion of noncitizens from arms bearing, when citizenship is used as a proxy for loyalty, has been and can be continually justified by this formative ethic. Arguably then, at least from this early understanding, Heller’s restriction of gun rights to citizens stands on firm historical ground. The specific type of foreign element at issue, however, limits the modern-day utility of this justification for noncitizen disarmament. In addition to distinguishing gun possession as an American “advantage,”140 James Madison critiqued the monarchical and “tyrannical” governments of Europe for not trusting their constituents with arms.141 Living under such regimes, those foreigners could not be expected to understand, to respect, or to be trusted to defend the republican institutions of America or the freedoms and liberties enjoyed by long-time residents and supporters of the new states. The international order, however, has changed drastically from Madison’s time. Construing the Second Amendment’s exclusion of foreigners in light of The Federalist Papers suggests that the fundamental issue underlying mistrust of noncitizen gun possession was their inexperience and unfamiliarity with democracy and democratic institutions. Such caution made sense in an international order with one fledgling democracy, but, today, most nation-states are ostensibly democratic regimes.142 Thus, while initially attractive as a justification for presentday noncitizen firearm prohibitions, early understandings of the arms right do not survive evolutions in international governance. This “lone-democracy” syndrome of the framers also explains the relationship between firearms and voting at the founding. Both were rights of “First-Class Citizens”143 and could be denied to most Blacks, VIRGINIA IN THE SEVENTEENTH CENTURY 7 (1910)); KENNETT & ANDERSON, supra note 114, at 49 (“In the aftermath of the Antinomian controversy in 1637, the Massachusetts leaders ordered seventy-six followers of Anne Hutchinson and the Reverend John Wheelwright disarmed.”); Churchill, supra note 120, at 157 (noting disarmament of Catholics unwilling to swear undivided allegiance to the “Hanoverian dynasty and to the Protestant succession”). 140 See THE FEDERALIST NO. 46, supra note 134, at 238 (James Madison). 141 Id. (“[I]t is not certain that with [firearms] alone they would not be able to shake off their yokes.”). 142 See Daniel Griswold, Globalization, Human Rights, and Democracy, EJOURNAL USA (Feb. 1, 2006), http://www.america.gov/st/econ-english/2008/June/20080608100830xjy rreP5.512637e-02.html (“[T]he percentage of the world’s governments that are democracies has reached 64 percent, the highest in the 33 years of Freedom House surveys.”). 143 For a discussion of this concept, see supra note 127 and accompanying text. \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 30 8-NOV-10 8:48 1550 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 women, and aliens. In other words, both were privileges and tools of self-governance, and only those capable of understanding democratic values were capable of wielding the vote and the gun.144 That both were denied even to some citizens is indicative of the founding-era lawmakers’ comfort with the disaggregation of fundamental political rights from the concept of citizenship. Citizenship itself was racially defined, but not all citizens could be entrusted with all rights. In an era when some white citizens could not access core political rights, citizenship mattered more as a rank with symbolic meaning than as a rights repository.145 Since only a select class—John Jay’s “unified people”— could, as a matter of right, vote and own guns, legislatures found it unnecessary to use citizenship as a method of excluding undesirables. Over time, however, citizenship and important rights, including the right to bear arms, converged. Dred Scott v. Sanford confirmed this convergence by ensuring that important rights would be tied to citizenship and that citizenship would remain racially exclusive.146 Dred Scott expressly equated disarmament with enslavement and lack of citizenship. Thus the transitive logic of race, citizenship, and firearms developed during the early days of the republic—only whites could be citizens, only citizens could own guns, ergo only whites could own guns—crystallized with Dred Scott. 147 While overruled by the Fourteenth Amendment and vilified as a low point in American jurisprudence, the case reveals a great deal about the relationships among race, citizenship, and firearms. On the central question presented by Dred Scott, the Court ruled that as a “descendant[ ] of Africans who were imported into this country, and sold as slaves,”148 Dred Scott could not be a citizen of the United States. In reaching its conclusion, the Court, for the first time, expressly equated “the people” in the Constitution with citizens of the United States: “The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Govern- 144 AMAR, supra note 102, at 161 (“In a society that saw itself under siege after Nat Turner’s rebellion, access to firearms had to be carefully restricted, especially for free blacks.”); Konig, supra note 113, at 139 (explaining desire for militia to consist of citizens and especially property holders). 145 See Stephen H. Legomsky, Why Citizenship?, 35 VA. J. INT’L L. 279, 291 (1994) (considering different reasons for concept of citizenship, including its symbolic content). 146 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 421 (1856) (noting “uniform course of legislation” that “marked and stigmatized” free Blacks and slaves and using this course of legislation as evidence that free blacks and slaves were not perceived as “citizens”). 147 Id. at 416–17. 148 Id. at 403. \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 31 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1551 ment through their representatives.”149 Compounding this restrictive definition, Chief Justice Taney proceeded to paint a racially homogenous view of “the people,” justifying racially exclusive citizenship by noting that if blacks could be U.S. citizens, courts would have to permit them all the attendant rights: “It would give to persons of the negro race . . . the right to . . . go where they pleased at every hour of the day or night without molestation, . . . the full liberty of speech . . . [the right] to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”150 Within the course of a few paragraphs, Dred Scott modified the content of citizenship and the meaning of arms bearing. While the opinion’s musings about the racial composition of citizenry were squarely dismissed by the Fourteenth Amendment’s Citizenship Clause,151 other aspects of the opinion appear to have exerted lasting influence. First, the opinion gave weight to the interpretation of “the people” as limited to “citizens.” Although United States v. VerdugoUrquidez152 casts doubt on such a restricted reading, Heller’s return to political membership as the lynchpin of “the people” suggests Dred Scott’s continued relevance. Second, although citizenship was only loosely associated with political rights such as voting, jury service, and arms bearing in the republic’s early years,153 Dred Scott imbued citizenship status with significant heft, enumerating it as the legal category that triggered fundamental rights. Finally, the case represents the first time the Supreme Court opined on the nature and importance of the right to bear arms in a postrevolutionary society. Tellingly, Justice Taney employs the simple logic of the danger posed by a gun-wielding, free-moving, racialized noncitizen to infer a personal safety imperative for citizens in the Second Amendment: It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence 149 Id. at 404. 150 Id. at 417 (emphasis added). 151 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.”). 152 494 U.S. 259, 265 (1990) (asserting that “the people” refers to persons part of national community or those who have “developed sufficient connection” with that community to be considered part of it); see infra Part I.A (discussing how Heller’s understanding of “the people” contradicts Verdugo-Urquidez’s interpretation of the same phrase). 153 See AMAR, supra note 102, at 48–49 (distinguishing between political rights held by elite class of “First-Class Citizens,” and general civil rights held by other members of polity, including women and certain white aliens). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 32 8-NOV-10 8:48 1552 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.154 Emblematic of a judicial trend in citizenship and alienage discussions persisting even in the present day, the opinion assumes the dangerousness of noncitizens without offering any empirical support before the Court. Thus, Dred Scott continued the tropes of gun ownership that took root in the founding era while also creating a novel overlap between citizenship and gun rights. The case reaffirmed the congruence between enslavement and disarmament, as it simultaneously kept Scott in servitude and denied him firearms privileges. In addition, it reaffirmed fear of gun ownership by a sinister and foreign “Other.”155 Unlike the foreigners with whom founding-era lawmakers were concerned—British loyalists, and southern and eastern Europeans unaccustomed to republican institutions—the midnineteenth-century Court focused on foreigners who were even more remote to the political community:156 noncitizens who, while living under a republican government, posed too great a danger to the citizen population to own guns.157 And since Dred Scott began with the premise that citizenship was highly substantive, it took the corollary position that citizenship was racially exclusive. Of course, during this era—indeed throughout the nineteenth century and into the 1920s—some aliens were permitted to vote in some states. Although this fact complicated citizenship’s post–Dred Scott status as the storehouse of important rights such as arms bearing, the concomitant racial exclusions in alien suffrage reaffirmed prevailing conceptions of who exactly was capable of exercising selfsovereignty. The aliens that could vote under these various statutes were specific white aliens, and so, just like the founding era, rights of 154 Dred Scott, 60 U.S. at 417. 155 See supra note 111 and accompanying text. 156 As commentators have argued, nineteenth-century slave laws acted as immigration laws, in many ways. See Carbado, supra note 111, at 640–45 (“Slavery was a kind of forced naturalization, a process in which blacks were simultaneously denationalized from Africa and domesticated to (but never fully incorporated in) America. Dred Scott was the key case in enacting this denationalization and domestication.”). Also note that the persistence of slavery is often credited with forestalling any federal immigration laws, as slave states were concerned that federal regulation of immigration would inevitably impact slavery. Gerald L. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 COLUM. L. REV. 1833, 1865–73 (1993). The first federal immigration bills appear only after the end of chattel slavery. Id. at 1887 n.347. 157 Cottrol & Diamond, supra note 17, at 335–36 (“The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety.”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 33 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1553 suffrage and arms bearing were intimately tied to race. However, the post–Civil War legal disconnect between citizenship and race ushered in a new era of gun regulation intended to limit noncitizen and minority gun rights. SK

Significant upheavals in the laws of gun ownership and citizenship began when the Court overruled Dred Scott and expanded the definition of citizenship to include non-whites. Lack of gun rights transformed from a distinction separating the enslaved from the free into a marker of inferior citizenship. As citizenship became racially inclusive, and as racially varied foreigners began entering the country in greater numbers, efforts to restrict immigration and proscribe gun rights also increased.158 Significant immigration and its attendant social dislocations coincided with gun regulations intended to prohibit noncitizen ownership. These regulations were based on stereotypes regarding the violent and anarchic tendencies of southern and eastern European, Asian, and Latino immigrants. Finally, as immigration and citizenship became more racially diverse, state law undermined the ability of nonwhites to access citizenship rights. While the Fourteenth Amendment guaranteed equal rights to all citizens (and persons) in theory, in practice, post–Civil War Black Codes relegated many new citizens to inferior membership status. Concurrently, racial bars to naturalization and the persistence of state alien-in-possession statutes allowed citizenship to remain a repository for important rights as long as the law explicitly and implicitly denied access to full political and civil membership to disfavored persons. Although the Fourteenth Amendment nullified Dred Scott, neither it nor the abolitionist movement challenged the opinion’s basic logic that the legal status of citizenship should trigger significant rights. Instead, by arguing that citizenship and, consequently, arms bearing, should include more than the white citizenry, the abolitionist movement, culminating in the Fourteenth Amendment, reified Dred Scott’s linkage between citizenship and rights.159 By abolishing slavery 158 KENNETT & ANDERSON, supra note 114, at 167 (“Added to this rising concern was a disturbing and alien element. The public had always been sensitive to the dangers of armed minorities such as blacks and Indians, but this concern took on new dimensions as cities filled with unassimilated masses of immigrants from southern and eastern Europe.”). 159 See AMAR, supra note 102, at 262–63 (“[A]ntislavery theorists emphasized the personal right of all free citizens—white and black . . . to own guns for self-protection.”); Robert E. Shalhope, The Right To Bear Arms: A View from the Past, 13 REV. AM. HIST. 347, 348 (1985) (“These abolitionists integrated the right of the citizen to bear arms into their theory of ‘national citizenship.’”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 34 8-NOV-10 8:48 1554 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 and expanding the racial inclusiveness of citizenship, the Reconstruction Amendments had the consequence of allowing, at least in theory, newly minted black citizens to bear arms. Accordingly, southern states were readmitted to the union after the Civil War on the express condition that they provide all persons the “full and equal benefit of all laws and proceedings for the security of persons and property,”160 and the Freedmen’s Bureau Act of 1866 contained a specific guarantee of arms rights regardless of color.161 Soon after the Fourteenth Amendment required the recognition of blacks as citizens, the Supreme Court in United States v. Wong Kim Ark ruled that Chinese persons born within the nation’s territorial boundary were citizens by virtue of the Fourteenth Amendment as well.162 These constitutional revolutions dismantling the racial exclusiveness of citizenship spurred both firearms restrictions aimed at disarming these new citizens and federal immigration limitations designed to repel other racial demographics from joining the American polity. The Chinese Exclusion Act of 1882 suspended the immigration and naturalization of persons of Chinese birth and ancestry entirely.163 As professors Robert Cottroll and Raymond Diamond have documented, various black codes in Reconstruction America specifically regulated the type and manner of black gun ownership.164 The constitutional expansion of citizenship’s racial portfolio and swift federal action to limit racially diverse foreigners from entering the country galvanized states to limit important rights associated with citizenship—including arms bearing—to white citizens. Indeed, the two foundational Supreme Court firearms cases of the postbellum period—United States v. Cruikshank165 and Presser v. Illinois166— were in essence, respectively, race and immigration cases.167 Osten- 160 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. 161 Freedmen’s Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176–77 (“[I]n every State or district . . . the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.”). 162 169 U.S. 649, 688 (1898) (“The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined . . . since the adoption of the Fourteenth Amendment of the Constitution.”). 163 Act of May 6, 1882, Pub. L. No. 47-126, § 1, 22 Stat. 58, 58 (suspending immigration from China); id. § 14, 22 Stat. at 61 (barring Chinese from obtaining U.S. citizenship). 164 Robert J. Cottrol & Raymond T. Diamond, “Never Intended To Be Applied to the White Population”: Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?, 70 CHI.-KENT L. REV. 1307, 1324–27 (1995). 165 92 U.S. 542 (1875). 166 116 U.S. 252 (1886). 167 Importantly, as Rebecca Hall and Angela Harris note, while prevailing commentary understands Cruikshank to be a “race” case, we should recognize that it is also a case \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 35 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1555 sibly, the cases dealt with the constitutional principle and structural norm of federalism, with the Court in each case upholding the respective state gun and militia statutes by ruling that the Second Amendment limited only federal law making.168 A closer look at the facts of these oft-cited gun cases, however, illustrates the pervasive struggle to understand how gun ownership could and should relate to citizenship. The Cruikshank opinion devotes only a paragraph to the Second Amendment before dismissing its applicability based on the fact that only state law was at issue in the case.169 The case itself, however, originated from the brutal “Colfax Massacre” in Louisiana, in which a racially charged armed conflict erupted between blacks and a white mob in the wake of a disputed election.170 Notably, the victims carried firearms specifically to protect themselves while vindicating their political rights.171 During the violence, blacks were disarmed and forced to surrender by the white mob.172 Sources indicate, however, that even after surrender, several dozen blacks were murdered by whites with firearms.173 Contemporary commentary understood the perpetrators’ actions as motivated by self-defense and presumed, about the attempts of black women to defy both gender and racial subordination. Rebecca Hall & Angela P. Harris, Hidden Histories, Racialized Gender, and the Legacy of Reconstruction: The Story of United States v. Cruikshank, in WOMEN IN THE LAW STORIES (Elizabeth M. Schneider & Stephanie M. Wildman, eds., forthcoming 2010). 168 Cruikshank, 92 U.S. at 553 (“The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”); Presser, 116 U.S. at 265 (“But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.” (citing Cruikshank)). 169 Cruikshank, 92 U.S. at 553. 170 See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 550–51 (2002) (discussing election dispute leading to Colfax Massacre); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 117–20 (2008) (same). 171 See Hall & Harris, supra note 167; NAT’L PARK SERV., U.S. DEPT. OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS 10 (2009), available at http://www. nps.gov/history/nhl/themes/VotingRightsThemeStudy.pdf; see also KEITH, supra note 170, at 95–96. 172 Hall & Harris, supra note 167. 173 Id. (“They also shot nearly fifty Black men, who had surrendered.”); see also McDonald v. City of Chicago, No. 08-1521, slip op. at 9 (U.S. June 28, 2010) (“Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men [in the Colfax Massacre]. Cruikshank himself allegedly marched unarmed African-American prisoners through the streets and then had them summarily executed.” (footnotes omitted)); McDonald, slip op. at 4 (Thomas, J., concurring in judgment) (“[In Cruikshank], the Court held that members of a white militia who had brutally murdered as many as 165 black Louisianians congregating outside a courthouse had not deprived the victims of their privileges as American citizens to peaceably assemble or to keep and bear arms.”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 36 8-NOV-10 8:48 1556 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 without evidence, the dangerousness of the black protestors.174 Although Cruikshank held that the Second Amendment is not incorporated against the states, the case resulted in the dismissal of indictments against white defendants accused of disarming and assaulting black political protesters. Similarly, Presser, decided approximately eleven years after Cruikshank, reaffirmed Cruikshank’s federalism ruling regarding state regulation of firearms.175 Here, the Court dismissed a challenge to the constitutionality of an Illinois law that regulated when and how militia organizations could drill, train, and march.176 The challengers, ethnic German workers, lost their appeals and remained convicted under state law.177 At issue was their creation of a militia organization known as the “Lehr und Wehr Verein” (Education and Defense Association) to protect the mostly eastern European labor class, many of whom were recently immigrated, from corporate security forces and the state national guard.178 Some members of Lehr und Wehr Verein also advocated socialism.179 The defendants were arrested and convicted when, during one of their training drills, they marched on Chicago streets with their firearms.180 Notably, the defendants were acting as part of a private militia, training specifically to protect themselves from ethnic-oriented violence and repression. In both Cruikshank and Presser, the Court’s rulings likely were correct statements of then-contemporary constitutional power-sharing principles. As Professor Leti Volpp reminds us, even though gun violence in both cases was perpetrated by private forces, at least in part, “[s]imply because the state does not officially sponsor an activity does not mean that the state does not bear a relationship to that activity.”181 Thus, in affirming the structural principle of federalism, the Court acquitted an armed white mob that had disarmed and killed blacks and convicted immigrant workers who displayed their firearms. 174 Id. (describing racial paranoia of defendants as motivating their violence). 175 Presser, 116 U.S. 252, 265 (1886); see NRA of America v. City of Chicago, 567 F.3d 856, 858 (7th Cir. 2009) (“Presser and Miller reaffirmed [Cruikshank’s holding] that the Second Amendment applies only to the Federal Government.” (internal quotations and citation omitted) (alteration in original)), rev’d sub nom. McDonald v. Chicago, No. 08- 1521, slip op. (U.S. June 28, 2010). 176 Presser, 116 U.S. at 266–68. 177 Id. at 269 (affirming judgment of Illinois Supreme Court). 178 Stephen P. Halbrook, The Right of Workers To Assemble and To Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States, 76 U. DET. MERCY L. REV. 943, 947–48 (1999). 179 Id. at 948. 180 See, e.g., The Lehr und Wehr Verein, N.Y. TIMES, July 20, 1886, at 5 (“[T]he Lehr und Wehr Verein, then 40 strong, paraded in the streets of Chicago armed with rifles.”). 181 Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1583 (2002). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 37 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1557 By so doing, the Supreme Court reified the exclusivity of firearms and violence as tools for white citizens during the Reconstruction period into the turn of the century. Moreover, in this same period, Dred Scott’s notion of citizenship as an exclusive rights repository came under significant pressure. Both the continuance of noncitizen voting privileges in some jurisdictions182 and state legislative efforts to keep firearms from newly recognized, nonwhite citizens eviscerated the significance of citizenship for disfavored groups. In addition, these legislative efforts and Supreme Court decisions undermined the Fourteenth Amendment’s ideal of including persons of disparate racial, ethnic, and national groups as full members of the political community. While thinly disguised, racially discriminatory gun laws proliferated during Reconstruction,183 the turn of the twentieth century brought increased regulation of noncitizen ownership. The end of the 1800s and the early decades of the 1900s witnessed the rise of labor unions and the anarchist movement, both intimately associated with foreign ideologies and the increase of foreign-born persons in the United States.184 Fueling these fears, the firearm-aided assassination of President McKinley in 1901 was mistakenly thought to be the work of a noncitizen, immigrant anarchist.185 Although the assassin turned out to be a U.S. citizen by his birth in the United States, the years following the incident witnessed the 1902 renewal of the Chinese Exclusion Acts,186 and the passage of the 1903 Alien Immigration Act, the latter of which prevented “anarchists” from entering or gaining citizenship.187 Concurrent with entry restrictions on dangerous for- 182 See Aylsworth, supra note 85, at 114–16 (detailing alien voting privileges for specific white aliens in several states throughout nineteenth century and into twentieth century). 183 See Cottrol & Diamond, supra note 164, at 1324–49 (describing Black Codes, Jim Crow laws, and postbellum regulation of race and guns). 184 KENNETT & ANDERSON, supra note 114, at 167 (“Added to this rising concern was a disturbing and alien element. . . . Marxism crossed the Atlantic; anarchism came too, producing a series of violent incidents that culminated in the assassination of President William McKinley. The swarthy, hirsute, and wild-eyed anarchist became the new shibboleth.”). 185 See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 166 (6th ed. 2008) (“In a new wave of xenophobia that followed the assassination of President McKinley by an anarchist mistakenly believed to be an immigrant . . . .”). In fact, the assassin, Leon Czologosz, was an American citizen, made so by his birth in Michigan. A. WESLEY JOHNS, THE MAN WHO SHOT MCKINLEY 36 (1970). He was, however, influenced by anarchist teachings. Id. at 122–23. 186 Act of May 6, 1882, Pub. L. No. 47-126, 22 Stat. 58; see also MICHAEL E. MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, at 212 (2003) (discussing renewal of Chinese Exclusion Act and Immigration Act of 1903). 187 Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213. \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 38 8-NOV-10 8:48 1558 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 eigners, many citizens began attributing the increased urban violence in New York City to racial minorities and recent immigrants from southern Europe.188 While immigration generally causes social dislocations,189 popular sentiment at the time attributed the urban gun violence specifically to the innate proclivities of the new wave of immigrants, whose violence was of a different character than that of Anglo-Saxon immigrants of the past.190 Given this backdrop of xenophobia and racial fear, it is no accident that significant state and federal gun laws emerged at the same time as large-scale immigration and the nation’s first comprehensive immigration laws. Both sets of statutes—firearms and immigration restrictions—regulated dangerous elements in American society.191 Representative of these conjoined suspicions is In re Rameriz, a 1924 case challenging the constitutionality of California’s criminalization of noncitizen gun possession.192 The defendant, Mr. Rameriz, was convicted under California law for being a noncitizen in possession of a firearm.193 Relying on Cruikshank and Presser, Rameriz rejected the immigrant-defendant’s Second Amendment challenge, instead focusing its analysis on why the statute withstood equal protection claims.194 Unsurprisingly, the California Supreme Court relied on prevailing stereotypes regarding immigrants’ propensity for violence and dangerousness to the citizen population to justify the statute’s alienage discrimination.195 Contemporaneous accounts of the statute’s 188 See Concealed Pistols, N.Y. TIMES, Jan. 27, 1905, at 6 (“[Prohibiting concealed pistols] would prove corrective and salutary in any city filled with immigrants and evil communications, floating from the shores of Italy and Austria-Hungary. New York police reports frequently testify to the fact that the Italian and other south Continental gentry here are acquainted with the pocket pistol . . . .”). 189 Weisberg, supra note 3, at 18 (“Of course, social dislocations associated with immigration probably caused some increases in crime and violence, but in a way consistent with this overall picture. Most typically, immigrants cause a brief increase in crime until they are assimilated—unless they bring ‘civilization’ with them.”). 190 See KENNETT & ANDERSON, supra note 114, at 167 (“With the foreigner came alien ideas that altered the traditional pattern of violence.”). 191 See, e.g., Leti Volpp, “Obnoxious to Their Very Nature”: Asian Americans and Constitutional Citizenship, 5 CITIZENSHIP STUD. 57, 63–66 (2001) (describing popular attitudes and state treatment of persons of Chinese and Japanese descent). 192 In re Rameriz, 193 Cal. 633, 641–42 (1924) (evaluating constitutionality of statute that declared “no 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”), abrogated by People v. Rappard, 28 Cal. App. 3d 302 (1972). 193 193 Cal. at 652. 194 Id. at 644–52 (“The question presented here is whether, in the exercise of the police power, the segregation of aliens constitutes an unlawful discrimination against that class.”). 195 Id. at 642 (“While such a danger [of armed noncitizens attacking the government] may seem improbable at the present time, yet, in the time of war, it becomes very real danger indeed, particularly as a few thousand organized aliens . . . could so cripple our \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 39 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1559 enactment link citizenship with race and reveal the law’s true intent and purpose—to prevent gun possession by Asian and Latino immigrants.196 In addition to California, New York enacted an alien-inpossession prohibition in 1905,197 and Pennsylvania’s restriction on noncitizen gun use passed constitutional muster under the Supreme Court’s analysis in Patsone v. Pennsylvania. 198 Similarly, even statutes that regulated types of firearms—as opposed to who could own or use them—were motivated by fears of immigrant violence. The most prominent and well-studied law of this genre was New York’s Sullivan Law, passed in 1911.199 Ostensibly, the law regulated a type of cheap, easily available class of handguns— manufactured in foreign countries—known popularly as the “Saturday Night Specials.”200 However, contemporaneous news accounts and commentary reveal an underlying legislative motive to keep firearms out of the hands of recently immigrated Italian migrants in New York City.201 The type of gun at issue was closely associated with Italian immigrants, the poor, and other racial minorities in urban areas, and legislators were convinced of the inherent propensity of those groups to armed violence.202 These gun regulations came into force in the context of larger social, political, and legal movements influenced by immigration. Legislatures in California, Pennsylvania, and New York enacted their respective gun laws shortly after the United States experienced the highest percentage of foreign-born persons ever recorded.203 The influx of immigrants from southern and eastern Europe and Asia, basic industries and our transportation facilities as to make us practically powerless in conducting war.”). 196 Id.; see also KENNETT & ANDERSON, supra note 114, at 173 (discussing crime wave attributed to Asian and Italian immigrants). 197 KENNETT & ANDERSON, supra note 114, at 178. 198 232 U.S. 138 (1914). I chose California, New York, and Pennsylvania as representative states because of their significant general populations and sizable immigrant populations. But note that in at least one state, the highest court struck down the state’s alien gun prohibition. See People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in state gun law because it deprived aliens of right to defend themselves and their property). 199 Act of May 25, 1911, ch. 195, 1911 N.Y. Laws 442 (codified at N.Y. PENAL LAW § 265.01(5) (McKinney 2008)). 200 See Cottrol & Diamond, supra note 164, at 1334–35 & n.174 (discussing “Saturday Night Specials”). 201 See supra note 188. 202 See KENNETT & ANDERSON, supra note 114, at 167, 173 (discussing popular conceptions regarding propensities of minorities to engage in violence). 203 The highest percentage of foreign-born individuals in the United States occurred in 1890 when 14.8% of the population was foreign-born. In 1910, the foreign-born made up 14.7%. See CAMPBELL J. BROWN & EMILY LENNON, U.S. BUREAU OF THE CENSUS, HISTORICAL CENSUS STATISTICS ON THE FOREIGN-BORN POPULATION OF THE UNITED \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 40 8-NOV-10 8:48 1560 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 alarm over the potential presence of anarchist and socialist political parties, and fears about the criminality of immigrants led to the first comprehensive federal immigration law in the 1920s.204 Although the federal government had long practiced Chinese exclusion,205 Congress banned all immigrants from Asia in 1917 after having previously barred Asian immigrants from naturalizing into citizens.206 The 1924 immigration law limited immigration from a number of disfavored regions while favoring inflow from northern and western Europe.207 Combined with the firearms restrictions emerging during the same period, the effect was clear: to limit dangerous foreigners’ ability to enter the country, curtail the ability of those already here to become full members of the political community, and deprive those already here of the ability to bear arms, either for defense from, or protest against, the citizen population.208 Along with heralding major immigration limitations on Asian and other disfavored foreigners, the mid-1920s also marked the end of noncitizen voting in the United States.209 Noncitizens—more specifically, white noncitizens—had been permitted to vote in a number of states in the mid-1800s and beyond.210 But when the Fourteenth and Fifteenth Amendments jeopardized the validity of such racial distinctions in voting, as Asians, Blacks, and others became potential citizens, and as immigration rapidly increased from non-Western STATES: 1850–1990, (Feb. 1999) [hereinafter HISTORICAL CENSUS STATISTICS], available at http://www.census.gov/population/www/documentation/twps0029/twps0029.html. 204 ALEINIKOFF ET AL., supra note 185, at 170–71 (discussing the Immigration Act of 1924). 205 Id. at 164. 206 See supra note 163 and accompanying text (discussing Chinese Exclusion Act). 207 ALEINIKOFF ET AL., supra note 185, at 170–71 (“The goal of the bill . . . was to ensure that northern and western Europeans still had access to the United States while southern and eastern European immigration would be restricted.”). 208 Id. at 165; cf. State v. Mendoza, 920 P.2d 357, 366–67 (Haw. 1996). Mendoza chronicles how this same unsubstantiated fear of noncitizen violence permeated Hawaii’s Constitutional Convention and discussion of the state’s nascent right to bear arms provision. Focused exclusively on danger to citizens from noncitizens’ gun possession, one of the delegates argued: You’ll find in history that it is the illegally armed minority that actually we’re faced with as far as the trouble is concerned. The legally armed majority are [sic] the ones that should have the right to protect themselves and I believe that this [state constitutional] provision [ensuring gun rights only to citizens] gives it to them. Id. (statement of Representative Bryan). In response, others took the view that as a civil right of self-defense, noncitizens had just as much cause to own guns as citizens. Id. at 367 (statement of Representative Fukushima). 209 Aylsworth, supra note 85, at 114; see also Raskin, supra note 85, at 1397–98 (noting prevalence of noncitizen voting in U.S. legal history). 210 Raskin, supra note 85, at 1397. \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 41 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1561 European sources, all states that had previously allowed noncitizen voting repealed their laws and enacted citizen-only suffrage provisions.211 Voting and arms bearing, once linked as rights of “First-Class Citizens,”212 had at once become more widely dispersed (by the increased inclusiveness of citizenship) and more narrow (by the exclusion of noncitizens from both). Their coupling in early American history highlights the democratizing potential of both. Thus, two prominent agents of political and social change from the revolutionary era—the ballot and the bullet—remained concentrated in the hands of the predominantly white citizenry by the early twentieth century. SK

These representative events, opinions, and legislative acts of the Early Republic, the Reconstruction, the post-Reconstruction era, and the early twentieth century showcase the dark history of overt race and alienage-based gun restrictions. The constitutional revolution of the mid-twentieth century, however, led to increasing judicial scrutiny for covert and overt discrimination.213 In addition, Congress repealed racial bars to naturalization,214 and the citizenry strayed far away from John Jay’s conception of a homogenous “unified people.”215 In light of this constitutional evolution, the elimination of the underlying racial distinctions and the expanded availability of citizenship could potentially justify Heller’s understanding of “the people” as “citizens.” However, even as citizenship became racially heterogeneous, and judicial pronouncements mandated equal rights, guns remained a divisive marker of race and citizenship. First, as with the post–Civil War period, gun prohibitions persisted as a marker of second-class or inferior citizenship. Second, the danger to the citizen population from immigrants still animated, and animates, firearms law from mid-century to present day. And finally, the dynamic and indeterminate connections among guns, citizenship, and race keep the content of citizenship in flux. Given the persistence of these themes, even 211 Aylsworth, supra note 85, at 114. 212 See supra note 127 and accompanying text (discussing Amar’s concept of “First-Class citizens”). 213 See Korematsu v. United States, 323 U.S. 214 (1944) (upholding military order for internment of Japanese but noting that racial classifications require heightened judicial scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (striking down alienage distinctions in state welfare law, relying on, in part, heightened judicial scrutiny). 214 ALEINIKOFF ET AL., supra note 185, at 174–75 (discussing John F. Kennedy’s commitment to abolishing national origins quota system, which culminated in its repeal in the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911). 215 See THE FEDERALIST NO. 2, supra note 134, at 15 (John Jay). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 42 8-NOV-10 8:48 1562 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 after the Court’s landmark equal protection decisions on race and alienage, firearms restrictions continue to expose the significant problems of limiting “the people” to citizens. Throughout the mid-twentieth century, gun statutes like the California alien-in-possession prohibition upheld in In re Rameriz used citizenship status as a proxy for racial exclusion.216 Such laws remained viable because federal law prevented entire racial groups from naturalizing until the passage of the Immigration and Naturalization Act in 1952.217 In addition, the Supreme Court’s modern race and alienage jurisprudence had yet to take root. In the same period during which Rameriz allowed explicitly prejudicial and stereotypical misconceptions of immigrants to suffice as reasons for keeping guns away from immigrants, inchoate notions of danger to the white population from racial minorities in the civil rights movement appear to have influenced firearms purchases and regulation in the 1960s. During the slavery era, the number of guns in white hands and the number of slaves were seen as being directly proportional; as a slave owner increased his population of slaves, he was obliged to provide more guns to white militia members as a safety measure against the “public hazard” of more black bodies.218 The mid-twentieth century civil rights movement prompted members of the white majority to adopt a similar calculation. As minorities began protesting, marching, and engaging in other acts of civil disobedience in pursuit of equal rights, gun sales began to increase steadily.219 From a steady 216 See supra notes 192–95 (discussing Rameriz decision). Although the state employed a citizenship distinction, contemporaneous commentary focused on the perceived dangerousness of certain racial groups. See, e.g., S.F. CHRON., Jul. 15, 1923, at 3, available at http:// www.claytoncramer.com/primary/other/1923ConcealedWeaponsLaw.jpg (noting that “[i]t was largely on the recommendation of R.T. McKissick, President of the Sacramento Rifle and Revolver Club, that Governor Richardson approved the measure” because it would have “[a] salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin descent”). 217 ALEINIKOFF ET AL., supra note 185, at 173 (noting Immigration and Nationality Act’s repeal of Japanese exclusion provisions). 218 CRAMER, supra note 114, at 37 (“Slaves were a kind of public hazard; if a master wished to buy more slaves, he was obligated to provide white members of the militia.”). 219 DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES A-3 to -5 (2000) [hereinafter COMMERCE IN FIREARMS]. These figures were assembled by calculating the U.S. production, as measured by manufacturers’ shipments, plus U.S. imports, minus U.S. exports of firearms. From 1968 to 1969, there was a small drop in firearms sales attributable to the enactment of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. See Franklin E. Zimring, Firearms and Federal Law: The Gun Control Act of 1968, 4 J. LEGAL STUD. 133, 167 (1975) (“Handgun imports in 1969, the first year under the Gun Control Act, were less than a third of 1968’s record volume . . . .”). Amongst other things, this Act limited the importation of foreign-made “Saturday Night Specials” into the United States, which depressed \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 43 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1563 state of roughly 2 million guns sold per year between 1947 and 1961, sales rose to 5 million in 1968 and remained high through 1974.220 A number of causative factors may explain this significant increase in gun possession, including a marked rise in violent crime.221 However, the coincidence of the rise in gun purchasing also indicates that unrest in the constitutional and social order temporally correlated to a significant arming of the white citizenry.222 This general arming of the white population during the constitutional revolution of the mid-twentieth century was accompanied by legislation that disproportionately affected racial minorities. Congress passed major comprehensive firearm regulation in 1968, in the wake of the civil rights skirmishes, crime rate increases, and the assassinations of President Kennedy, Martin Luther King, Malcolm X, and Robert F. Kennedy.223 Ostensibly a regulation of all guns, the Act was understood by contemporary commentators to have as an underlying concern the cheaper and more accessible firearms that were most likely to be purchased in urban areas.224 Since the urban communities were disproportionately populated by racial minorities, the Gun Control Act of 1968 also disproportionately disarmed racial minorities as putative gun owners. In addition, Congress passed the Act two years after the formation of armed resistance groups such as the Black Panther Party (originally named the Black Panther Party for Self-Defense).225 The Black imported firearms. See generally id. at 170–73 (discussing how depression of imported handguns led to an increase in production of domestic “Saturday Night Specials”). Outside this one year aberration, there was a steady rise in gun sales until 1974, when 6.4 million firearms were purchased in the United States. COMMERCE IN FIREARMS, supra, at A-3 to -5; see also KENNETT & ANDERSON, supra note 114, at 220 (“In the twenty-two year period from 1946 until the Gun Control Act of 1968, American industry sold some 45 million small arms into the domestic civilian market, as many as it had sold in the preceding half century. During the same period about 10 million imported arms were sold.”). 220 COMMERCE IN FIREARMS, supra note 219, at A-3 to -5. 221 Note that this may be a consequence of high gun sales as well as a cause. See, e.g., Bogus, supra note 113, at 1384 (“Guns fuel [Los Angeles area] violence. More than sixtysix percent of all murders are committed with firearms.”). 222 See KENNETT & ANDERSON, supra note 114, at 224–25 (“With the late 1950s also came a rise in public concern over certain internal problems that did or could involve the gun. The New Republic warned as early as 1956 that the growing civil rights controversy was causing tremendous sales of firearms in southern communities.”). 223 The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–929 (2006)); see also Zimring, supra note 219, at 147–48; 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 238–39 (Gregg Lee Carter ed., 2002) [hereinafter 1 GUNS IN AMERICAN SOCIETY]. 224 1 GUNS IN AMERICAN SOCIETY, supra note 223, at 238–39 (noting focus of gun control advocates on small, cheap handguns prevalent in poor black neighborhoods). 225 See id. at 63–64 (“In California in the mid-1960s, the Panthers began carrying rifles and shotguns openly—as California law allowed—in order, the Panthers claimed, to pro- \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 44 8-NOV-10 8:48 1564 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 Panthers themselves gained their first significant notoriety when they marched on the California capitol in protest of a state gun ban.226 Similarly, in his manifesto, Negroes with Guns, Robert Williams details the furor and fear created by his call to defend black communities with firearms.227 Notable in Mr. Williams’s story is his account of the manner in which law enforcement portrayed his gun use. Combining the major tropes of gun regulation and citizenship, authorities claimed that Williams’s firearms were not only illegally held but were also foreign made.228 Playing to Cold War suspicions, local authorities purportedly claimed that Williams’s firearms were from Russian suppliers, thus merging fears of black gun ownership with suspicions of sinister outsiders.229 The law enforcement response in this case was emblematic of larger measures which had a disproportionate disarming effect on non-whites. Citizens who should have enjoyed all the rights and privileges of citizenship were nevertheless relegated to a diminished membership in the national community.230 Fears of racial minorities and racially defined foreigners began conflicting with the emerging constitutional changes of the mid-to-late twentieth century. Undoubtedly, by the latter part of the twentieth century, changes in constitutional law at the Supreme Court level with regard to race, national origin, and alienage changed the way lower courts viewed racial and alienage distinctions.231 This shift in constitutect victims of police brutality. The California legislature promptly enacted legislation restricting the carrying of long guns in public places.”). 226 Clayborne Carson, Preface to THE BLACK PANTHERS SPEAK xi (Philip S. Foner ed., 1970). 227 ROBERT F. WILLIAMS, NEGROES WITH GUNS (Wayne State University Press 1998) (1962). 228 Id. at 59–60. 229 Id. 230 See Bogus, supra note 113, at 1366 (questioning whether “gun control impose[s] a disproportionate burden on inner city residents, particularly those in minority communities”). 231 There were a number of changes that affected how courts treated legislation which used race and/or alienage categorizations. See Graham v. Richardson, 403 U.S. 365, 370–80 (1971) (striking down state welfare laws conditioning benefits on citizenship based on heightened scrutiny and alternatively on preemption grounds). Even if Graham is understood to mandate an equal protection inquiry for state alienage distinctions—and not invalidation through preemption analysis—subsequent cases have developed the important political exception to the rules in Graham, under which strict scrutiny does not apply to state alienage distinctions with respect to jobs, offices, and positions that go to the heart of a state’s governance and sovereign self-definition. See infra note 269 and accompanying text. Prior to Graham, the Court’s understanding of alienage distinctions was based on other judicial doctrines and exceptions. Compare Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 394 (1927) (sustaining law barring aliens from operation of billiard halls under exception to equal protection law for regulations “passed in the interest of and for the benefit of the public”), with Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 420–21 \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 45 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1565 tional thinking is evidenced in People v. Rappard, in which the California Supreme Court struck down the same alien-in-possession statute it had upheld fifty years earlier in In re Rameriz. 232 Again, the court decided the issue as an equal protection problem and not as a Second Amendment issue. The court’s decision to do so, as well as its reasons for overruling In re Rameriz, reveal a great deal about the shift in the polity’s increasing interactions with immigrants during the intervening five decades. By the time of People v. Rappard, constitutional thinking regarding the viability of alienage distinctions in domestic affairs had radically changed.233 In 1930, 83% of the foreignborn population hailed from Europe with only 1.9% and 5.6% from Asia and Latin America, respectively.234 By 1980, only 39% were from Europe, while 19.3% and 33.1% came from Asia and Latin America, respectively.235 Stricter judicial scrutiny meant that the government had to proffer evidence substantiating the need for noncitizen disarmament; requiring such production led, in instances like Rappard, to the discovery that the assumptions regarding the inherent violence and dangerousness of immigrants underlying regulations and judicial opinions were incorrect or hyperbolized.236 Categorized by the court as an equal protection issue, the ruling in Rappard reveals more about the inevitability of ethnically diverse immigrants in the population than it does about the right to bear arms. As more immigrants from racially varied backgrounds began permanently residing and naturalizing in the United States, prejudices regarding the perceived inability to assimilate and dangerousness of those immigrants presumably waned. Thus, the ruling is more easily explained by evolving attitudes and assumptions about immigrants than it is by the Court’s changing conceptions of “the people” protected by the Second Amendment. Moreover, by overruling state gun laws with alienage distinctions on equal protection grounds, courts (1948) (striking down California law denying aliens fishing licenses and signaling demise of “special public interest” doctrine). 232 People v. Rappard, 104 Cal. Rptr. 535, 537 (Ct. App. 1972). 233 See supra note 231. 234 HISTORICAL CENSUS STATISTICS, supra note 203, tbl.2, available at http://www. census.gov/population/www/documentation/twps0029/tab02.html. 235 Id. 236 See, e.g., John Hagen & Alberto Palloni, Immigration and Crime in the United States, in THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 367, 372 (James P. Smith & Barry Edmonston eds., 1998) (compiling and analyzing data about immigration waves and crime, indicating that “arrest rates and immigration rates were only weakly if at all related”); ALEINIKOFF ET AL., supra note 185, at 164–65 (“Immigrants were statistically more likely to commit minor offenses than were the native born who tended to commit property crimes and crimes of personal violence.”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 46 8-NOV-10 8:48 1566 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 were able to avoid difficult interpretative problems associated with the scope of the Second Amendment. While equal protection consideration has led to the invalidation of some such statutes,237 avoidance of Second Amendment challenges has also permitted other courts to use a federal power framework to uphold the same alienage distinctions.238 Complicating matters further, application of equal protection principles to alienage distinctions is itself unpredictable and depends on whether federal or subfederal entities are legislating.239 This bipolarity of more recent alien gun-possession decisions is a symptom of a larger doctrinal debate as to how best to understand governmental action towards noncitizens within the territorial boundary. While equal protection and due process frameworks contemplate noncitizens as potential members of the national community—i.e., as “Americans in waiting”240—who deserve significant judicial protection, federal power and preemption frameworks treat noncitizens as outsiders and security threats under the control of the sovereign’s foreign policy prerogatives. This mode of unpredictable adjudication, based on different doctrinal frameworks and incapable of defining who is encompassed within either federal or state constitutional right-to-bear-arms provisions, has led to the current diversity of state alien gun laws.241 At present, over twenty states have some restriction on noncitizen gun possession. The remaining states appear to regulate without regard to citizenship status. The restrictions in the alienage-conscious states fall into four broad categories: (1) general prohibition of noncitizen possession (with specific exceptions); (2) prohibition of noncitizen concealed carrying; (3) heightened restrictions or more onerous requirements for noncitizen possession (either general or concealed 237 See, e.g., Chan v. City of Troy, 559 N.W.2d 374, 375–76 (Mich. Ct. App. 1997) (striking down Michigan’s alienage distinction in firearms law as violation of federal equal protection guarantee). 238 See, e.g., State v. Vlacil, 645 P.2d 677, 679–81 (Utah 1982) (upholding Utah’s ban on alien gun possession against federal and state constitutional guarantees of right to bear arms and federal preemption challenges); State v. Hernandez-Mercado, 879 P.2d 283, 286–90 (Wash. 1994) (upholding Washington’s alienage distinction in firearms law against both preemption and equal protection challenges). 239 Compare Mathews v. Diaz, 426 U.S. 67 (1976) (upholding alienage distinctions in federal welfare law), with Graham v. Richardson, 403 U.S. 365 (1971) (striking down alienage distinctions in state welfare law). 240 See HIROSHI MOTOMURA, AMERICANS IN WAITING 9 (2006) (“I have coined the term immigration as transition. It treats lawful immigrants as Americans in waiting, as if they would eventually become citizens of the United States, and thus confers on immigrants a presumed equality.”). 241 See generally Gulasekaram, supra note 12, at 894–96 & 895 nn.11–14 (listing all state gun statutes that discriminate based on alienage). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 47 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1567 carrying); and (4) particularized restrictions on specific aspects of noncitizen possession, transport, or use.242 Federal criminal statutes currently forbid ownership, possession, or transport of firearms by undocumented immigrants, temporary immigrants, and former citizens who have renounced their citizenship.243 Yet, as an immigrant crosses the legal threshold into citizenship, he or she must swear to take up arms on behalf of the nation or to perform other military or national service.244 In addition, federal law provides an incentive for noncitizens who bear arms in defense of the nation or in prosecution of armed conflict. Under 8 U.S.C. § 1439, noncitizens serving in the armed forces earn a reduced residency requirement for naturalization.245 The allowance for noncitizen military participation and the expedited citizenship process for military arms bearing oddly juxtaposes against the Supreme Court’s ruling that states may limit state police forces to citizens.246

Noncitizens may bear arms on behalf of the sovereignty outside the territorial United States or when they pose a danger only to other noncitizen foreigners, but they also may be prohibited from doing so inside the territorial boundary. That these **restrictions persist despite development of an equal protection framework that frowns upon alienage restrictions** in the domestic arena indicates two distinct strands in American culture, both resulting in alienage distinctions. On the one hand, **the continuance of these alien gun laws in nearly half the states showcases the stickiness of citizens’ fear of foreigners and the desire to imbue citizenship with greater substantive content**. **Even as the citizenry becomes more racially diverse, and experience with immigrants increases, the endurance of a perceived nebulous threat to citizen safety from foreign sources finds life in the law**.247 On the other hand, some of the states with alienage firearms restrictions—Illinois, Massachusetts, and New York, for example—are also those with high immigrant populations, and those with generally more ameliorative policies towards immigrants. In short, even as the American republic matures, the tropes of gun ownership related to racial fear and xenophobia endure. As the statutes of several states attest, **citizenship as a qualification for gun possession still holds sway. Heller affirms this distinction**, **purporting to protect only the right of citizens to bear arms—excluding noncitizens** from the Constitution’s umbrella. And as Heller’s reimagining of Verdugo-Urquidez and other recent decisions regarding fundamental rights evinces, the content of citizenship remains in flux.263 There is nothing unnatural or perverse, as some would claim, about the exclusion of noncitizens from arms rights—but that statement is true only when contemporary exclusions are read to conform with an odious and prejudicial tradition. Fundamentally, **when citizenship itself is an undetermined and malleable legal category, Heller’s static interpretation of “the people” rests on** ever-moving—and therefore **unstable—ground**. SK

### Guns and Citizenship

Despite the inability of Heller’s ruminations on citizens’ gun rights to withstand precedential or historical scrutiny, the question persists: Can any conceptually cogent defense be proffered to resurrect a citizens-only right to bear arms? Without such a defense, the Heller decision seems to fall into a historical tradition where gun rights are restricted due to racist and xenophobic fears. In other words, a theoretically coherent defense of gun rights as citizenship Urbina, Fearing Obama Agenda, States Push To Loosen Gun Laws, N.Y. TIMES, Feb. 24, 2010, at A1, available at http://www.nytimes.com/2010/02/24/us/24guns.html. 261 Holthouse, supra note 24, at 11–12 (chronicling increase in call to arms for militia groups and hate groups in wake of recession and election of nonwhite President); see also Mara Schiavocampo, Homegrown Hate Groups Increase in Number, MSNBC.COM, June 10, 2009, http://www.msnbc.msn.com/id/30876593/ (finding all-time high of 926 hate groups currently operating in United States). 262 See Holthouse, supra note 24, at 11–12 (“[T]he conspiracy theories that are now taking root in the movement . . . include the belief that a massive cover-up has been conducted regarding Barack Obama’s birth certificate . . . .”). 263 See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (upholding indefinite detention of U.S. citizen but recognizing that some process is due); Boumediene v. Bush, 128 S. Ct. 2229 (2008) (recognizing noncitizen constitutional right to challenge legality of detention under certain circumstances). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 51 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1571 rights—a defense not proffered thus far either in Heller or in legal commentary—might yet salvage a restrictive reading of the Second Amendment. Comparing gun rights to other rights attached to citizenship, however, this Part argues that citizenship distinctions on firearm possession do not comport with the theories underlying other citizenonly privileges when the Second Amendment is read as a right of armed self-defense. Here, this Article will taxonomize rights that are either already or potentially citizen-only rights to develop a theory explaining when rights are appropriately limited to the political community. Arguing that rights are properly limited to the citizenry only when public oriented or otherwise facilitative of democratic participation, Part III concludes that firearms rights, as imagined by Heller, do not conform to this theory unifying citizenship rights. This unifying theory does have some traction in the First Amendment context. Namely, noncitizens’ speech rights have been restricted despite having both public-oriented and private-oriented purposes.264 However, Heller focuses only on the private-oriented, self-protection aspects of firearm possession. Therefore, uneven free expression guarantees to noncitizens—wherein protection for speech regarding self-government and democracy may be different for noncitizens than for citizens—cannot justify Heller’s potential to treat citizens and noncitizens unequally vis- `a-vis firearms. In essence, the suite of theoretically defensible citizenship rights cannot include gun rights unless the Second Amendment is read as a right of armed defense of, or from, the state—a reading diametrically opposed to Heller’s.

**The constitutionalization of armed self-defense elevates gun possession into the pantheon of other prized individual liberties such as speech, religion, and procedural rights in criminal trials**.265 Of course, simply because the Court centralizes a right does not assure its evenhanded application across citizenship status. Currently, the only right that the Constitution prevents noncitizens from exercising is the right to hold federal public office.266 In addition, state and federal provi- 264 See infra note 270. 265 Levinson, supra note 16, at 657–59 (discussing inconsistency of legal academy’s vigorous protection of certain Amendments and minimization of others). 266 U.S. CONST. art. I, § 2, cl. 2 (“No person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . .”); id. art. I, § 3, cl. 3 (“No person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States . . . .”); id. art. II, § 1, cl. 4 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 52 8-NOV-10 8:48 1572 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 sions limiting voting267 and jury service268 to citizens have been upheld as consistent with—although not mandated by—the Constitution. Equal protection guarantees generally invalidate state laws that draw distinctions based on alienage, except when states are protecting a political function.269 In addition, some speech and associations by noncitizens can result in dire consequences that would never attach to a citizen exercising his or her First Amendment rights.270 Finally (and nontrivially) citizens maintain a right not to be deported.271 Below, this Article will first discuss core political rights, such as voting, public office, and jury service, before returning to the more nuanced case of speech rights. Finally, this section presents welfare rights as the sole area in which citizenship distinctions are currently tolerated, providing some support to Heller’s citizenship implications. However, it concludes that the normatively dubious rationale for citizen-only welfare assistance provides scant support for citizen-only firearms rights. A few common threads unite the current suite of citizenship rights. First, voting, jury service, and public office are basic features of a system of self-governance, as each allows direct participation in the several branches of government. Second, the Court’s jurisprudence similarly permits alienage distinctions in state lawmaking only when 267 See 18 U.S.C. § 611 (2006) (making it unlawful for any noncitizen to vote for candidate for federal office). Arguably, the Constitution strongly suggests voting as a citizenship-related right. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race . . . .”); id. amend. XIX, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged . . . .”); id. amend. XXIV, § 1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . .”); id. amend. XXVI (“The right of citizens of the United States . . . to vote shall not be denied or abridged . . . .”). 268 28 U.S.C. §§ 1861, 1865 (2006). 269 See, e.g., Ambach v. Norwick, 441 U.S. 68, 81 (1979) (upholding state alienage distinction in hiring public school teachers); Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding state alienage distinction in hiring state troopers); Graham v. Richardson, 403 U.S. 365, 382–83 (1971) (striking down state alienage distinction in eligibility for welfare). 270 See 8 U.S.C. § 1182(a)(3)(D) (2006) (declaring any immigrant “who is or has been a member of . . . [any] totalitarian party” inadmissible); id. § 1424 (barring citizenship based on certain advocacy); Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (upholding denial of entry to scholar with communist associations against claims that doing so violated First Amendment rights of citizens to hear him speak); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (upholding against First Amendment challenges constitutionality of Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 640 (current version at 18 U.S.C. §§ 2385–2387 (2006)), which allows deportation of legal permanent residents for membership in Communist Party); Wishnie, supra note 76, at 668–69 (discussing whether Supreme Court’s suggested limitations on noncitizen First Amendment rights is appropriate). 271 See 8 U.S.C. § 1227 (2006) (allowing removal of “aliens”); Lopez v. Franklin, 427 F. Supp. 345, 347 (E.D. Mich. 1977) (“It is manifest that deportation may not be imposed upon citizens born in the United States . . . .”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 53 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1573 sovereign self-definition and self-government functions are potentially implicated.272 Finally, the right not to be deported is at the very center of what it means to be a member of a political community recognized by the international order. International norms against the creation of stateless persons dictate that, at minimum, a sovereign must refrain from expelling its members into a protectionless purgatory.273 As an initial matter, the right to bear arms is unlike the right to vote, hold public office, serve on a jury, or hold government positions because firearms possession has multiple, severable purposes. In contrast to the purposes potentially attributable to the Second Amendment—self-defense, sovereign-defense, and sovereign-monitoring—voting, jury service, public office, and core governmental positions have only one primary function: to facilitate and foster participation in a system of self-government. Jury service has a checksand-balances function as well (to discipline executive and legislative power), aligning it with the sovereign-monitoring function of firearms rights.274 However, even this purpose of jury service is publicoriented, intended to maintain a system of self-government. So, compared with these citizenship-related rights and benefits, gun rights qua self-defense rights are dissimilar to voting, jury service, holding public office, and sovereign self-definition imperatives because none of those rights is premised on self-oriented or self-preservation rationales. The notion of armed self-defense integral to Heller is divorced from the self-governance protected by citizen-only rights. A more nuanced theory accounts for citizenship-conscious free speech rights. In the First Amendment arena, the Court allows alienage distinctions for speech and association rights when noncitizens’ expression potentially undercuts the republican form of government established by the Constitution; such distinctions discourage speech with a tendency fundamentally to alter the governmental system into which the noncitizen wishes to enter or remain.275 272 See supra note 269 and accompanying text (discussing political function exception). 273 UNITED NATIONS HIGH COMM’R ON REFUGEES, STATELESSNESS: AN ANALYTICAL FRAMEWORK FOR PREVENTION, REDUCTION, AND PROTECTION, at v (2008), available at http://unhcr.org.ua/files/mf30\_e.pdf (“International legal standards recommend the adoption of safeguards . . . in order to prevent statelessness from occurring, either at birth or later in life. Human rights treaties contain a number of safeguards but the most comprehensive set of standards . . . [is] the 1961 Convention on the Reduction of Statelessness.”). 274 As Professor Steve Higginson helpfully noted, jury service also performs a checks and balances function, allowing the citizenry to directly curtail executive overreaching. While I agree that this is different from self-governance, it is still a democracy-enhancing, public-oriented function. 275 8 U.S.C. § 1424 (2006) (prohibiting naturalization of noncitizens associated with totalitarian regimes or Communist Party, or those advocating violent overthrow of government). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 54 8-NOV-10 8:48 1574 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 Undoubtedly, the fact that the background doctrinal framework for the First Amendment permits citizenship distinctions complicates a unified theory of citizen-only rights. However, **Heller’s constitutional enshrining of a right of armed self-defense does not allow for importation of the variegated First Amendment framework for noncitizens**. The public good at stake in the First Amendment contrasts with the private interests highlighted by the Court’s analysis in Heller. The first clause of the Second Amendment directly posits a public-directed rationale for gun rights. Arguably then, the right to bear arms, like the right to free speech, must apply unevenly to noncitizens if their gun possession undermines national preservation. But in this analogy between the Second Amendment and other constitutional guarantees, alienage distinctions in gun laws make sense only when the right to bear arms is understood to have a public or civic purpose. In other words, noncitizens are rightly excluded from Second Amendment protections only when the Amendment’s first clause is read as a limitation on the second, protecting gun possession in a public or civic-minded capacity, the exact reading rejected by Heller. 276 If the Second Amendment were read to exclude noncitizens only when those noncitizens use or possess firearms in a political sense against state or federal governments or when noncitizens use them to defend the state or federal government, the right to bear arms might comport with the selective alienage restrictions on the rights to free expression. Heller’s narrowing of the Second Amendment’s reach, however, condones blanket exclusions of citizen gun ownership regardless of rationale or purpose. The federal government has not excluded noncitizens from state-related firearm use; to the contrary, it expressly allows—indeed incentivizes—noncitizens’ military participation and use of arms in that capacity. In addition, the political-function exception to heightened equal protection inquiry for state alienage restrictions directly supports the political reading of the Second Amendment rejected in Heller. 277 In the state arena, noncitizens may be prohibited from becoming state troopers precisely because the job entails the potential for coercive and state-sanctioned use of force over citizens and other residents for public-oriented ends. The dilemma caused by the two prevailing purposes of the Second Amendment—sovereign-related defense and self-defense—is in stark tension with only noncitizen dispossession. For citizens, the 276 District of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008) (“Reading the Second Amendment as protecting only the right to ‘keep and bear arms’ in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as ‘the people.’”). 277 See supra note 269 and accompanying text (discussing political function exception). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 55 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1575 two purposes can coexist comfortably. Citizens as persons may require self-defense, and citizens as citizens may be required to defend their sovereignty from internal and external threats to their freedom. For noncitizens, however, the purposes can be at odds. In moments of internal and external threat to national security, deprivation of noncitizen gun rights may advance public-oriented, national preservation goals, similar to curtailment of certain speech threatening our republican order. Doing so, however, undermines the self-oriented notions underlying Heller’s vision of gun usage. If the Second Amendment is truly about self-defense, and self-defense is fundamental, then it is incongruous to limit entire classes of persons to whom it applies.278 Presumably, in light of the historical disarmament presented in Part II and contemporary events, noncitizens require self-defense just as much, if not more, than citizens.279 Even in recent years, the number of incidents of violent hate crimes against foreigners and perceived foreigners has increased dramatically.280 Perhaps a better comparison for the current state of gun rights, and Heller’s citizenship implications, is the current state of welfare rights for noncitizens. These rights are generally governed by equal protection jurisprudence unless preemption and supremacy principles arise. Previously, under the rule of Graham v. Richardson, state alienage distinctions in public benefit provisions were struck down as equal protection violations.281 More recently, however, some states— with the blessing of post-Graham federal legislation282—have limited certain welfare and public assistance benefits to citizens.283 While limitations in social service provisions might coincide with the other citi- 278 See United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning Heller’s ad hoc exclusion of certain classes of persons, including former felons). 279 Cf. Cottrol & Diamond, supra note 17, at 359–60 (1991) (“[T]he right [to bear arms] may have had greater and different significance for blacks and others less able to rely on the government’s protection . . . .”). 280 See supra notes 250–51 and accompanying text (discussing increase in violence against Arab and south Asian Americans after 9/11); see also, e.g., S. POVERTY LAW CTR., CLIMATE OF FEAR: LATINO IMMIGRANTS IN SUFFOLK COUNTY 5 (2009), http://www.spl center.org/sites/default/files/downloads/splc\_suffolk\_report\_0.pdf (noting 40% rise in hate crimes directed at Latinos between 2003 and 2007). 281 403 U.S. 365, 376 (1971). I should note here, however, that Graham may also be understood as a preemption and Supremacy Clause case, as the Court based part of its holding on federal exclusivity principles. 282 8 U.S.C. § 1624 (2006) (purporting to devolve decisions regarding limiting beneficiaries of public assistance to states and to allow states to maintain alienage distinctions in welfare). 283 For example, the Tenth Circuit Court of Appeals upheld Colorado’s decision to rescind healthcare benefits to several classes of noncitizens. Soskin v. Reinertson, 353 F.3d 1242, 1265 (10th Cir. 2004). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 56 8-NOV-10 8:48 1576 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 zenship rights if the economic community of the United States was also restricted to citizens, our current system allows for employment of noncitizens and collects tax payments from noncitizens—including undocumented persons.284 Moreover, as an empirical matter relevant to policy concerns, noncitizens consume far less in social services than do citizens.285 Thus, alienage distinction in welfare benefits are practically difficult to justify. In addition, because of the disjunction between welfare benefits and self-government prerogatives, alienage distinctions in welfare benefits are theoretically difficult to justify. Thus it should come as no surprise that citizenship classifications in public assistance laws vary across states and are currently in constitutional turmoil.286 Similarly, state alien gun laws are varied and in constitutional turmoil. Just as the incongruity between the economic community and political community complicate alienage restrictions in public assistance, incongruity between those potentially requiring self-defense ability and the political community undermines alienage restrictions in gun law. Like welfare rights, armed self-defense is unrelated to selfgovernance and thus should be analyzed under equal protection and structural norms. State alienage distinctions are also like welfare rights insofar as gun rights yield no cohesive theory of when and why firearms should be limited to only citizens.287 284 See generally IMMIGRATION POLICY CTR., ASSESSING THE ECONOMIC IMPACT OF IMMIGRATION AT THE STATE AND LOCAL LEVEL (2010), http://www.immigrationpolicy. org/sites/default/files/docs/State\_and\_Local\_Study\_Survey\_041310\_1.pdf (discussing economic impact of immigrants). 285 Peter J. Cunningham, What Accounts for Differences in the Use of Hospital Emergency Departments Across U.S. Communities?, 25 HEALTH AFFAIRS w324, w324 (2006); Alexander N. Ortega et al., Health Care Access, Use of Services, and Experiences Among Undocumented Mexicans and Other Latinos, 167 ARCHIVES OF INTERNAL MED. 2354, 2354 (2007), available at http://www.cha.wa.gov/?q=files/HealthCareAccessAmong UndocumentedMexicansandotherLatinos.pdf. 286 See, e.g., Reinertson, 353 F.3d at 1265 (upholding Colorado statute denying certain healthcare assistance to several classes of noncitizens); Aliessa ex rel. Fayad v. Novello, 754 N.E.2d 1085, 1088 (N.Y. 2001) (striking down law denying state healthcare benefits based on alienage). 287 Sixteen state constitutions, like the U.S. Constitution, use “the people” to describe right-holders. See Eugene Volokh, The Right To Keep and Bear Arms as Provided for in State Constitutions, in DAVID B. KOPEL ET AL., SUPREME COURT GUN CASES: TWO CENTURIES OF GUN RIGHTS REVEALED 29, 29–35 (2004). These states are Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Massachusetts, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Utah, Vermont, and Virginia. Id.; see Gulasekaram, supra note 12, at 922 & nn.156–58 (listing states that use “the people,” “citizens,” “persons,” and other designations in their state constitutions). Nine of those states maintain some form of alienage restriction in their gun laws. Gulasekaram, supra note 12, at 895 nn.11–14. Eighteen states use the specific term “citizen” in their right-to-bear-arms provisions: Arizona, Alaska, Connecticut, Illinois, Louisiana, Maine, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 57 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1577 Thus, the puzzle of Heller’s citizenship talk comes full circle. Textually, structurally, and in light of Verdugo-Urquidez, the right to bear arms cannot inure to only “citizens” unless the Second Amendment’s protections are conditioned on obligations to the state. But the individual rights perspective supported by Heller rejects an interpretation constraining the Second Amendment to the state-oriented prefatory clause. On the other hand, if the Amendment is neither shackled to state defense nor to arms bearing in a military-related sense but is instead animated by concerns over armed self-protection, then robbing the most vulnerable in our society of that right makes little sense.288 In sum, the legacy of noncitizen gun regulation suggests a pattern based not in sovereignty-related interpretations of the Second Amendment, but rather fears of foreigners and racial minorities presenting threats to prevailing majorities. Against this history, grounding the Second Amendment in a personal self-defense imperative precludes logical justification for limiting firearms rights to citizens. SK

### Conclusion

Heller substantiates that the desire to own a gun is specifically an assimilation tactic crafted by the elites and the desire to “become American”, which heightens xenophobia and creates American exclusivity.

Gulasekaram,

The paradox of inclusion and exclusion highlighted by this Article lies at the heart of citizenship distinctions in firearms regulations. Since the republic’s founding, when **gun rights were congruent to core political rights available to only white, propertied, first-class citizens, the associative progression of gun rights and citizenship caused a significant enlargement in the pool of eligible gun owners through the nineteenth century**. Yet, when the fundamental nature of citizenship changed in the late nineteenth century to include previously excluded Washington, and Wyoming. Id. at 922. Yet, only nine of those states maintain statutory alienage distinctions for gun possession or use. Id. at 895 nn.11–14. The remaining states that maintain alienage distinctions for arms bearing frame the right as one held by “persons” or “all men,” or have no arms-related constitutional provisions. Id. at 922. 288 See, e.g., Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part) (declaring that noncitizens are covered by Due Process Clause and must be accorded Fifth and Sixth Amendment rights); People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in gun laws because it deprived alien of right to defend self and property); People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922) (“[A] constitution like ours[ ] grant[s] to aliens who are bona fide residents of the state the same rights . . . as native-born citizens, and to every person the right to bear arms for the defense of himself and the state . . . .”); Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. REV. 1047, 1060–61 & nn.42–43 (1994) (arguing that noncitizens, including undocumented immigrants, are entitled to Fourth, Fifth, Sixth, and Eighth Amendment protections in criminal proceedings, at a minimum). But see Wishnie, supra note 76, at 669, 747 (noting, but then justifying through his theory of “extraordinary speech,” First Amendment’s varied protection of different classes of noncitizens). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 58 8-NOV-10 8:48 1578 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 races and immigrant groups, expansion of gun rights stalled. Into the twentieth century, legislative and judicial efforts, mostly agnostic about interpretations of “the people” in the Amendment, reaffirmed latent societal fears regarding the nationality and color of those permitted to possess guns. Even as constitutional scrutiny of citizenship distinctions generally grew more strict, the white majority continued a pattern of de facto disarmament of minorities and created a complex web of firearms restrictions for noncitizens. This historical analysis shows the continued tensions in the American psyche among community, citizenship, and belonging. This Article also examined **Heller’s focus on individual rights and self-defense, as well as its narrowing of the conception of “the people”** in the Second Amendment. Taking Heller’s meaning and import at face value, the holding **would** seem to expand gun rights by limiting extreme state regulation, while simultaneously **contract**ing **the universe of those who may own guns and claim the Second Amendment’s protections**. Unsurprisingly then, the post-Heller world of gun regulation continues and augments the historical tension between gun rights and citizenship. As such, Heller’s citizenship talk requires considerable reconsideration and revision. **As a right of personal self-defense,** **gun ownership is connected to citizenship status tangentially at best** unless noncitizens present the primary source of armed danger within the country. **This, however, has not been the case** since the early days of the republic, when threats from British loyalists, noncitizen Native Americans, and slave insurrections occupied the attention of the citizen majority. **These same nebulous fears of danger to the citizen population from armed foreigners motivated prosecution of recently immigrated German laborers training for their defense, spurred various state alien-in-possession laws at the beginning of the twentieth century, animated debates over Hawaii’s then-nascent right-to-bear arms provision during the state’s Constitutional Convention in the 1950s, and still galvanizes arms purchases in present day**.289 But now, as was the case then, no empirical data linking specific threats to citizens from noncitizen possession have ever been proffered to substantiate these fears. Indeed, the description of key moments in the narrative of alien gun laws in Part II of this Article highlights the hyperbolized and stereotypical conceptions of noncitizen and nonwhite aggression animating regulation of noncitizen possession. Of course, one of the ironies of citizens’ concerns about noncitizen firearm possession is that personal gun ownership and the use of fire- 289 See supra Part II (discussing racial and xenophobic contours of gun regulation). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 59 8-NOV-10 8:48 November 2010] “THE PEOPLE” OF THE SECOND AMENDMENT 1579 arms for private ends is a uniquely American ethos, anathema to most immigrants.290 If noncitizens are not a unique violent threat to the citizenry, then firearms regulations of noncitizens are justifiable only when citizens’ arms possession accompanies concomitant arms-related duties and obligations to the state or to state watchdog militias. But neither Heller nor contemporary gun advocates recommend conditioning gun ownership on public-oriented duties. If anything, the absence of required military service for citizens, combined with federal laws allowing for—in fact, incentivizing—noncitizen military service, evince a specific desire to expand public-oriented, state-protective gun ownership beyond citizens. Those attempting to possess guns as a safeguard against governmental tyranny—the so-called modern militia movement—are a minority fringe, often too tainted with racial or religious prejudice or xenophobic fervor to be treated as legitimate citizen endeavors tasked with guarding against state tyranny.291 Moreover, immigration law requires that those wishing to become citizens express their political beliefs through nonviolent and orderly expressions.292 Stripped of these justifications, state or federal firearms restrictions on noncitizens appear grounded only in irrational and unsupportable fears about foreigners or a desire to make citizenship more valuable for its own sake. **Linking gun rights with other citizenship rights imbues citizenship with greater substantive value, constructing it as the legal category triggering the rights of both self-rule and self defense**. But unlike with other citizenship rights, the limitation of the right to armed self-defense finds no independent support or rationale save a desire to keep instruments of deadly violence as a privilege of citizenship and a survival advantage for citizens. 290 Arie Bauer et al., A Comparison of Firearms-Related Legislation on Four Continents, 22 MED. & L. 105, 107 (2003) (“The acquisition of firearms by private individuals in the USA is easier than in most other western countries.”); Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 CHI-KENT L. REV. 291, 330 (2001) (noting that no constitutions written since fall of communism contain right-to-bear-arms provisions). 291 See Holthouse, supra note 24, at 11–12 (discussing increasing credence given by militia groups to “fringe conspiracy theories”); see also Jesse McKinley & Malia Wollan, New Border Fear: Violence by a Rogue Militia, N.Y. TIMES, Jun. 27, 2009, at A9, available at http://www.nytimes.com/2009/06/27/us/27arizona.html (“[Minutemen patrols at the U.S.- Mexico border] initially drew praise from some political leaders, including Gov. Arnold Schwarzenegger of California, but also raised concerns that the activities were thin veils for racism and xenophobia.”). 292 8 U.S.C. § 1424(a) (2006) (barring naturalization of those associated with or advocating overthrow of government by force); id. § 1427(a)(3) (requiring “attach[ment] to the principles of the Constitution” and “good moral character”). \\server05\productn\N\NYU\85-5\NYU503.txt unknown Seq: 60 8-NOV-10 8:48 1580 NEW YORK UNIVERSITY LAW REVIEW [Vol. 85:1521 **Thus, the irony of noncitizen exclusion from gun rights enabled by Heller is that it irreparably undermines the opinion’s watershed interpretation of the Second Amendment**. Our legal and political regime simply cannot bear the significance of the right to bear arms and the meaning of “the people,” when one is read expansively and the other interpreted jealously. In light of history, text, and logic, “the people” of the Second Amendment must include more than citizens. Indeed, devoid of ad hoc—and ultimately unjustifiable—exceptions, “the people” may comprehend several classes of persons. Nonviolent felons293 and even undocumented persons can present colorable claims to exercise the right of reasonable armed self-defense. “The people” in the Second Amendment, as it does elsewhere in the Federal Constitution, resists easy mapping onto the terrain of citizenship and noncitizenship. One possibility is that the phrase is akin to “nation” in that it refers to a nebulous concept based in shared meaning and aspiration. Like “nation,” it does not itself provide bright-line limitations on who might be included within that aspiration, allowing for expansion and contraction as the republic evolves. Or, as Justice Kennedy suggested, “the people” might refer to the importance of a right, as opposed to the class it delimits.294 Both fail to explain how or why the Second Amendment mandates limitations of its guarantees to citizens. The preceding analysis illuminates the profound implications of Justice Scalia’s description of those to whom the right to bear arms inures. More importantly, it exposes the interpretative and doctrinal difficulties with limiting “the people” of the Federal Constitution to citizens. SK

## Advantages

### ADV – Court Precedent (2 Scenarios)

This advantage articulates that the heller and mcdonald decisions gives the court too much power and allow deconstruction of gun laws, which results in two distinct offense offense modules. Scenario 1 indicates that two much court power breaks down rule of law in the US which spills over, and Scenario 2 indicates that erosion of gun control allows arms trafficking which fuels global conflict. It provides diversity in impact scenarios, as takes a soft left approach while maintaining sizeable impacts.

#### First, the court’s narrow ruling in *Heller* sets the precedent for court power preservation – two implications:

#### Little A – Allows deconstruction of broader gun control laws

#### Little B – Overloads court control and erodes democratic checks

#### That makes overturning the precedent key

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In 2011, Dick Heller—of Heller fame—lost his appeal before the D.C. Circuit.188 He had argued that D.C.’s emergency legislation, enacted in the wake of Heller I, as it might now be called, failed to cure the original constitutional defect.189 Dissenting from the panel opinion, Judge Kavanaugh wrote in twenty words what I hope I have conveyed in a few thousand: “Heller, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation.”190 In my view, that was precisely the point. The Court never intended to effect “a dramatic upheaval in the law”191—only to announce an important new rule and preserve its power. On that score, it appears to have succeeded. The Court made a strong legal statement in uncharted constitutional waters, and it did so narrowly. It commanded very little action and thus largely avoided the risk of defiance. If power-preserving minimalism was at play, it may not have been to the exclusion of other minimalist forces. Professor Sunstein has written—and Justice Frankfurter would likely agree—that “minimalism is the appropriate course for [adjudicating] large-scale moral or political issues” because it is “democracy-forcing.”192 This approach may have been particularly prudent with respect to gun control, since “the cultural contingency of the gun debate makes it a difficult dispute for the Court to ‘settle’ through constitutional law.”193 In other words, right up to the discrete legal boundary set by the Court, Americans ought to decide what gun control laws are necessary through their elected representatives. On the other hand, the Court may have been wedging its figurative foot in the door, preparing its own effort to chip away at the legality of gun control. There is support for the argument that foot-in-the-door minimalism was not at play here,194 but it may be too early to say. In any event, given its historical and jurisprudential similarities to Brown and Marbury, Heller can be accurately categorized as an instance of power-preserving minimalism. I am certainly not the first to suggest that the Court is concerned about its public perception.195 I have, however, tried to provide a framework that helps categorize the Court’s decisions in a way that accounts for their impact on the Court’s role and influence. That framework is a subtle expansion on Cass Sunstein’s observation that narrow decisions are “a common starting point for doctrinal innovation.”196 Narrow decisions are also sometimes key to the Court’s power over legal doctrine more generally. That the Court may need to take deliberate steps to preserve its influence should not be surprising in light of the foundations of judicial supremacy.197 Without power, judgments are mere opinions without practical force. Understanding when power preservation is at play, and (perhaps more critically) when it is called for, matters because judicial supremacy is a “national treasure.”198 By preserving its soft power in cases that permit that tactic, the Court retains the ability to exert a more forceful checking function on the other branches in cases unlike Heller—cases in which the luxury of minimalism is unavailable. These cases may include, as Justice Stone wrote in the famous Footnote Four, laws that affect “discrete and insular minorities,” the very enactment of which reflect a failure of the democratic process.199 Cases like these are, by hypothesis, countermajoritarian and thus stretch the Court’s power to require change. These cases present problems that cannot be solved through politics. When they arise, the Court’s ability to settle the law and enforce constitutional justice where no other branch can do so is crucial. And although we tend to take that power for granted, history teaches that preserving it is harder than it looks.

#### Scenario 1 – Court Power

#### First, Expanded court power leads to court supremacy – undermines constitutional intent and harms minorities

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“You must vote,” I often hear, “because the next president will pick who sits on the Supreme Court!” That such a statement should even be made tells us that something has gone seriously wrong with our democracy. Certainly the Supreme Court has a role in American government, but not the overblown one it has come to play. That five ideologically driven lawyers should have final say over the Constitution's meaning should offend anyone who believes in democracy. Liberals are happy with the court right now, because they got some big wins in June. I happen to like those outcomes, too, but I don’t understand why progressives would overlook how the court has systematically done its best to undermine everything they care about for the past 40 years — as it likewise did for the first 150 years, until the Warren Court flipped things around for a short time in the 1950s and 60s. Plus, the outcomes last week could just as easily have gone the other way, and then what? Do same-sex couples think they had no rights before the Supreme Court spoke, and have rights after only because five justices said so? What if Justice Kennedy had woken up on the other side of the bed the day the court ruled? This is not a left/right point. It’s a point about how the meaning of our Constitution should be finally determined. Is it really the case that the fundamental law of the land, made by “We, the People,” depends on the ideologically driven whims of five lawyers? There is a place for judicial review in constitutional democracy, just not for judicial supremacy. The idea that the justices have final say over the meaning of our Constitution — that once they have spoken, no matter what they say, our only recourse is the nearly impossible task of amending the Constitution or waiting for some of them to change their minds or die or retire — ought to offend anyone who believes in democratic government. It rests on a myth: that the court needs this overweening power to protect minorities. Yes, the court has occasionally done so, but much more often it has done the opposite. Time and time again, we have seen it take political movements and legislation to get rights and make them secure. Virtually no progress was made on race, after all, until Congress enacted the Civil Rights Acts of 1964 and 1965 — laws the Supreme Court has been working hard for years to weaken and destroy. That the people who wrote and ratified our Constitution wanted or expected the court to have such power is a fairy tale. They emphatically did not fight a revolution to replace a monarchy with an oligarchy.

#### Scenario 2 – Trafficking

This advantage argues that mcdonald v heller prevents a ban on hanguns that allows massive amount of stolen weapons. It then argues that trafficked weapons empower Mexican cartels, who work with ISIS, who are likely to launch a nuclear lone wolf attack that results in escalaction. Well warranted and redundantly structured, this hyperconcentrates your offense.

#### First, lack of bans stemming from *Heller* and *McDonald* mean more stolen handguns in circulation in the underground market

(1) Philip J. Cook and (2) Jens Ludwig, Washington Post, 6-13-2010, - 1-Philip J. Cook is the ITT/Terry Sanford professor of public policy at Duke University. 2-Jens Ludwig is the McCormick Foundation professor of social service administration, law and public policy at the University of Chicago. ["Five myths about gun control", http://www.washingtonpost.com/wp-dyn/content/article/2010/06/11/AR2010061103259.html] bcr

Fans of the Heller decision in D.C., and people hoping for a similar outcome in Chicago, believe that eliminating handgun bans and having more households keep guns for self-protection leads to less crime. The rationale: More guns enable more people to defend themselves against attackers; there might also be a general deterrent effect, if would-be criminals know that their victims could be armed. Such arguments cannot be dismissed. The key question is whether the self-defense benefits of owning a gun outweigh the costs of having more guns in circulation. And the costs can be high: more and cheaper guns available to criminals in the "secondary market" -- including gun shows and online sales -- which is almost totally unregulated under federal laws, and increased risk of a child or a spouse misusing a gun at home. Our research suggests that as many as 500,000 guns are stolen each year in the United States, going directly into the hands of people who are, by definition, criminals. The data show that a net increase in household gun ownership would mean more homicides and perhaps more burglaries as well. Guns can be sold quickly, and at good prices, on the underground market.

#### Second, stolen handguns on the underground market comprise the backbone of arms trafficking to Canada and Mexico

Law Center to Prevent Gun Violence, 1-1-2012, ["Statistics on Gun Trafficking &amp; Private Sales", http://smartgunlaws.org/gun-traffickingprivate-sales-statistics/] bcr

More than half a million firearms are stolen each year in the United States and more than half of stolen firearms are handguns, many of which are subsequently sold illegally.2 The Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) issued a comprehensive report in 2000 detailing firearms trafficking investigations involving more than 84,000 diverted firearms, finding that federally licensed firearms dealers were associated with the largest number of trafficked guns – over 40,000 – and concluded that the dealers’ “access to large numbers of firearms makes them a particular threat to public safety when they fail to comply with the law.”3 According to ATF, one percent of federally licensed firearms dealers are responsible for selling almost 60 percent of the guns that are found at crime scenes and traced to dealers.4 Nearly a quarter of ATF gun trafficking investigations involved stolen firearms and were associated with over 11,000 trafficked firearms – including 10% percent of the investigations which involved guns stolen from residences.5 ATF’s limited compliance inspections between 2008 and 2010 found that over 62,000 firearms were missing from licensees’ inventories with no record of sale.6 The Bureau also identified over 16,000 firearms that had disappeared from gun manufacturers’ inventories without explanation between 2009 and the middle of 2011.7 A 1997 U.S. Department of Justice survey found that 8.4% of state prison inmates who used or possessed a firearm during the offense for which they were incarcerated obtained the gun from the illegal market.8 Random inspections by ATF have uncovered that a large percentage of dealers violate federal law, and that percentage is growing.9 An estimated 40% of the guns acquired in the U.S. annually come from unlicensed sellers who are not required by federal law to conduct background checks on gun purchasers.10 Nearly 80% of Mexico’s illegal firearms and most recovered crime guns in major Canadian cities are imported illegally from the U.S.11 For additional information on illegal gun trafficking and gun tracing, visit the Mayors Against Illegal Guns’ Trace Data Center. For additional information about private sales, including background information and state and local laws on the topic, see the Law Center’s Private Sales Policy Summary. Douglas S. Weil & Rebecca C. Knox, Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms, JAMA 1759, 1759-60 (1996). [↩] Philip J. Cook & James A. Leitzel, “Smart” Guns: A Technological Fix for Regulating the Secondary Market 7, Terry Sanford Institute of Public Policy, Duke University, Working Paper Series SAN01-10 (July 2001). [↩] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers ix, x (June 2000). [↩] Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, Commerce in Firearms in the United States 14 (Feb. 2000). [↩] Id. at 11, 41. [↩] Brady Center to Prevent Gun Violence, Missing Guns 1 (January 2011). [↩] Brady Center to Prevent Gun Violence, Missing Guns: Lost and Dangerous 1 (September 2011). [↩] Bureau of Justice Statistics Special Report, U.S. Department of Justice, Firearm Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities 6 (Nov. 2001), at http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf. [↩] Brady Center to Prevent Gun Violence, “‘Trivial Violations’? The Myth of Overzealous Federal Enforcement Actions Against Licensed Gun Dealers” 1 (Sept. 2006). [↩] Philip J. Cook & Jens Ludwig, Guns in America: National Survey on Private Ownership and Use of Firearms, U.S. Department of Justice, National Institute of Justice Research in Brief 6-7 (May 1997). [↩] Wintemute, Garen J., Gun Shows Across a Multistate American Gun Market: Observational Evidence of the Effects of Regulatory Policies, 13 Inj. Prevention 150, 150 (2007), at “http://injuryprevention.bmj.com/cgi/reprint/13/3/150. See also Alicia A. Caldwell, ATF: Most Illegal Guns in Mexico Come from U.S., Associated Press, Aug. 11, 2008 (ATF states that nearly all illegal guns seized in Mexico – 90 to 95 percent – originally come from the U.S.). [↩]

#### Third, weapons trafficking fuels instability in Mexico by empowering cartels – current regulations make clamping impossible

Diana Wueger, Atlantic, 7-6-2011, writes on international and domestic small-arms topics at Gunpowder and Lead. ["How American Guns Proliferate in Mexico and Fuel Drug Violence", http://www.theatlantic.com/international/archive/2011/07/how-american-guns-proliferate-in-mexico-and-fuel-drug-violence/241387/] bcr

The ATF's apparent disregard for the second and third order effects of this operation are troubling. But Fast and Furious points to a larger problem: the role of American firearms in Mexico's drug war and the abdication of American responsibility for them. A Congressional report released June 9 by Democratic Senators Dianne Feinstein, Charles Schumer, and Sheldon Whitehouse concluded that American weapons are fueling drug violence in Mexico, and that U.S. policymakers have not responded adequately. While there are legitimate questions about what percentage of drug cartels' guns came from American federal firearms licensees, over 20,000 firearms found at Mexican crime scenes in 2009 and 2010 were proven to have come from the U.S. This, of course, does not include the unknowable number of U.S.-sourced weapons still in the hands of drug cartels. These are not insignificant statistics, but there's also nothing new to this story. Law enforcement has faced an uphill battle ever since the U.S. promised, in 2007, to clamp down on arms trafficking to Mexico. In 2009, the ATF brought arms trafficker George Iknadosian to trial on charges of knowingly supplying the Sinaloa cartel with firearms; the judge threw the case out, concluding that the evidence was insufficient to convict him. The Fast and Furious operation was an attempt to use scarce resources in a new way, but this operation underscores the ATF's inability to interdict arms traffic and suggests that the ATF continues to be understaffed, underfunded, and poorly managed while Congress looks the other way.

#### Cartel power legitimizes violence against citizens – makes every humanitarian violation more likely in Mexico.

**Longmire ’14**, [Sylvia Longmire (former Air Force officer and Special Agent with the Air Force Office of Special Investigations. She is also a former Senior Intelligence Analyst for the State of California, where she specialized in covering Mexico and the southwest border. She received her Master’s degree from the University of South Florida in Latin American and Caribbean Studies. Ms. Longmire is an award-winning columnist for Homeland Security Today magazine, and is a contributing editor for Breitbart Texas. She was a guest expert on The History Channel’s “Brad Meltzer’s Decoded,” and has consulted for the producers of National Geographic Channel’s “Border Wars” and “Drugs, Inc.” series. Ms. Longmire’s first book, Cartel: The Coming Invasion of Mexico’s Drug Wars, published in September 2011, was nominated for a Los Angeles Times Book Prize. Her most recent book, Border Insecurity: Why Big Money, Fences, and Drones Aren’t Making Us Safer, was published in April 2014.), How Mexican Cartels Are Changing the Face of Immigration, The Fletcher Forum of World Affairs, vol.38:2 summer 2014. SK]

This massacre is just one example in which **Mexican cartels are changing the nature of northbound human migration in Latin America.** Los Zetas, in particular, are **increasingly preying on vulnerable immigrants, viewing them as a potential source of ransom money or forced labor**. But Los Zetas are certainly not the only drug trafficking group involved in reaping the profits of the human smuggling business. A report by the Woodrow Wilson International Center for Scholars stated, “Factions of many [organized crime groups] engage in similar activities, either directly or indirectly. The Gulf Cartel appears to be the most active, and works with both the Mexican police and Mexican migration officials in order to capture its victims.” It also said, “Factions of the Juárez and Tijuana cartels also collect piso [a tax, or toll] from local Los Zetas, in particular, are increasingly preying on vulnerable immigrants, viewing them as a potential source of ransom money or forced labor. 111 vol.38:2 summer 2014 how mexican cartels are changing the face of immigration smugglers and may, in the case of Juárez, be directly involved in trafficking. Portions of the old La Familia Michoacana, now called the Caballeros Templarios (the Knights Templar), and the Sinaloa Cartel have also reportedly displaced coyotes operating in their territories and have attempted to take over this business.”5 Acclaimed journalist and producer for Al Jazeera America, Christof Putzel discovered this first-hand while filming a documentary for the nowdefunct Current TV’s Vanguard series. In November 2010, Putzel and Mexican-American filmmaker Juan Carlos Frey recorded their attempt to smuggle themselves across the southwest border in a manner as close as possible to that of hundreds of thousands of migrants every year. “What was nuts is that, when we initially planned to shoot this, we thought we would just get some ‘mom and pop’ coyote operation, and those things don’t exist anymore. The cartels run the show,” Putzel said about his experience. “So we needed to get permission from the cartels to do this [episode]. Part of the deal was, they would be okay with us doing it as long as we only talked about migrants and didn’t mention anything about drug trafficking. They really didn’t want us reporting on that at all.”6 **Immigration attorneys on the U.S. side of the border are seeing more and more cases of immigrants being coerced at gunpoint to work as drug mules**. The cartels threaten them and their family members, giving them strict orders on where to haul drug loads as heavy as sixty pounds over unforgiving terrain and under penalty of death. Elizabeth Rogers, a federal public defender in West Texas, has said most of her recent backpacker cases claim coercion. “About a year and a half ago, ourselves as well as our investigators started seeing these clients that would say, I don’t care how long I’m going to get [in jail time], I can’t go home — they’ll kill me,” she told National Public Radio in 2011. “[We] have grown men, rawboned cowboy guys from Chihuahua, begging for protection from deportation.”7 Raul Miranda, a criminal defense attorney in Tucson, Arizona, has said about one-third of his clients have claimed they were unwilling drug mules. “They’re told by the people— who obviously work for the cartels—that they have to carry the bundle, or they’ll reduce the fee that they’re going to have to pay, or they’ll forgive the **As a result of the increasing violence in Mexico and the targeting of innocent immigrants by drug cartels, the number of applications for asylum by Mexican nationals passing through U.S. immigration courts is skyrocketing. the fletcher forum of world affairs** vol.38:2 summer 2014 112 fee. But the people who are telling them this are armed, and the people feel threatened if they say no.”8 As a result of the increasing violence in Mexico and the targeting of innocent immigrants by drug cartels, the number of applications for asylum by Mexican nationals passing through U.S. immigration courts is skyrocketing. In 2005, there were 2,670 applications filed, and that number rose to 2,818 in 2006. By 2010, applications had increased to 3,231, and nearly doubled to 6,133 in fiscal year 2012. However, between 2007 and 2011, only 2 percent of requests from Mexico were granted, compared to 38 percent of requests from Chinese nationals and 89 percent of Armenian applicants.9 Unfortunately, while the nature of cross-border migration has changed significantly in the last decade, immigration laws and the guidelines for granting asylum have not. Asylum has historically been associated with the Cold War and communism, and refugees fleeing the political and social oppression imposed on them by tyrants. In decades past, we would hear about “defectors” from places like the Soviet Union, Cuba, and North Korea. Today, China and Cuba are still popular countries for citizens with asylum requests, but U.S. courts are host to more and more applicants from countries like Afghanistan, Iraq, Iran, Somalia, and Pakistan—nations categorized as failed or failing states with governments that cannot protect their citizens, and in some cases, are actively oppressing their freedoms and rights. Requesting asylum has not really been a popular or necessary option for Mexican immigrants until drug-related violence started spreading in earnest and the ties between government officials, law enforcement officers, and the cartels became stronger and more blatant. In some cases, it is very clear that the Mexican government is unable to provide adequate protection to an asylum applicant, the police are directly involved in the harm being caused, and the local government is obviously looking the other way while it happens. But in other cases, requesting asylum becomes a last-ditch effort by illegal immigrants to avoid deportation when they never would have considered applying if they hadn’t gotten caught. This only delays the inevitable and clogs up the already backed-up immigration court system. As comprehensive immigration reform plans progress through U.S. political channels, it is important to keep an eye on asylum provisions and how As the drug war continues in Mexico, fear may become the primary motivating factor for migrants heading north, rather than the lure of better economic opportunities. 113 vol.38:2 summer 2014 how mexican cartels are changing the face of immigration they might change; it could have a huge impact on how these cases are processed in the future. As the drug war continues in Mexico, fear may become the primary motivating factor for migrants heading north, rather than the lure of better economic opportunities. As **one asylum applicant stated** after her application was denied, “**I will not hesitate to stay here illegally. I would rather do that than ever go to Mexico again, even if it means illegal re-entry. It’s not that I want to live in the U.S. I never did. But I cannot go back. I do not want to die.”**10 Whether it is Mexicans, Cubans, Chinese, or Iraqis, foreigners will always want to come to the United States. Most of them will not be able to enter or stay here legally. Because the security situation in Mexico and Central America has deteriorated so badly over the last decade, citizens of those countries are more motivated than ever to run the risks of the northbound journey. And it does not matter to them how many border patrol agents get assigned to the border, or how many miles of fence the government builds. Maybe twenty years ago it was easier to detect undocumented immigrants along our borders, process them, and send them back to their home countries. But now our cross-border traffic has become a blur—a gray area where drug traffickers and migrants blend together and have become more difficult to separate. It is clear that as long as the United States is safer than Mexico— which will be the case for the foreseeable future—Mexican and Central American citizens will go to great lengths to come here and avoid being returned home, no matter what border enforcement actions we take or laws we pass. It’s also guaranteed that as long as the American demand for illegal drugs continues, Mexican cartels will exploit every aspect of crossborder migration for their own profit-seeking purposes. SK

Two impacts:

**A.** Either citizens stay in Mexico and are forced into slavery or trafficking or

**B.** Citizens are forced to migrate to America where they are subject to xenophobia

# 2AC

## Court Power

#### Balanced constitution is key to federalism which prevents domestic turmoil and war – state level implementation of gun ban is net better

Steven G. Calabresi, Michigan Law Review, December 1995 Northwestern University School of Law. B.A. 1980, J.D. 1983, Yale, [""A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez on JSTOR", http://www.jstor.org/stable/1289947?seq=1#page\_scan\_tab\_contents] bcr

Small state federalism is a big part of what keeps the peace in countries like the United States and Switzerland. It is a big part of the reason why we do not have a Bosnia or a Northern Ireland or a Basque country or a Chechnya or a Corsica or a Quebec problem. [51](http://www.lexis.com/research/retrieve?_m=ee7ca1d6fbb003c7a6ecec5c625b6564&csvc=bl&cform=bool&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzb-zSkAk&_md5=89cd79e3cd743db7d961de6128b607f0#n51) American federalism in the end is not a trivial matter or a quaint historical anachronism. American-style federalism is a thriving and vital institutional arrangement - partly planned by the Framers, partly the accident of history - and it prevents violence and war. It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare. It is part of the reason why democratic majoritarianism in the United States has not produced violence or secession for 130 years, unlike the situation for example, in England, France, Germany, Russia, Czechoslovakia, Yugoslavia, Cyprus, or Spain. There is nothing in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document. There is nothing in the U.S. Constitution that should absorb more completely the attention of the U.S. Supreme Court.

#### Second, Weapons trafficking increases hotspot instability and undermines foreign policy

Federation of American Scientists International Crime Threat Assesment, December 2000, 2K This Global assessment was prepared by a US Government interagency working group in support of and pursuant to the President's International Crime Control Strategy. Representatives from the Central Intelligence Agency; Federal Bureau of Investigation; Drug Enforcement Administration; US Customs Service; US Secret Service; Financial Crimes Enforcement Network; National Drug Intelligence Center; the Departments of State, the Treasury, Justice, and Transportation; the Office of National Drug Control Policy; and the National Security Council participated in the drafting of this assessment. ["International Crime Threat Assessment", http://fas.org/irp/threat/pub45270chap2.html] bcr

Illicit gray- and black-market arms sales became an increasing problem during the 1990s and pose an array of threats to US national security and foreign policy interests. The end of the Cold War and the winding down of several regional conflicts, such as those in Lebanon and Central America, increased the availability of both newly produced and used weapons. The items typically sold on the illegal arms market include spare parts for large weapons systems, particularly for clients under UN embargoes or sanctioned by the original seller; small arms, including assault rifles, and man-portable antitank and antiaircraft weapons; and ammunition for both small arms and larger artillery and armor systems. In some cases, however, larger military systems also are sold. The US Government estimates that military equipment worth several hundred million dollars is sold annually on the illegal arms market to countries under UN arms embargoes. Insurgents, terrorists, and organized criminal groups acquire smaller quantities of small arms and other light infantry weapons on the illegal arms market. Most illegal arms sales are through the gray arms market, which has been dominated by individual brokers--and their arms brokering firms--during the past decade. Gray-market arms transfers exploit legitimate export licensing processes, usually by using false paperwork to disguise the recipient, the military nature of the goods involved, or--more rarely--the supplier. Obtaining licenses, however fraudulent, allows gray-market players to make deals appear legitimate, helping them to arrange payment and international transportation for transactions that can be valued at millions of dollars and involve hundreds of tons of weapons. In some cases, however, large illegal arms shipments arranged by gray arms brokers will be smuggled as contraband. Illicit arms sold or transferred to combatants in Afghanistan and the former republics of Yugoslavia were often provided by foreign suppliers donating and transporting tens of millions of dollars worth of weapons disguised as "humanitarian aid." The end of the Cold War has made the bloated defense industry and large inventory of weapons in Russia and other former Warsaw Pact countries an easy mark for gray-market brokers. Since 1992, for example, combatants in civil conflicts in Afghanistan and the republics of the former Yugoslavia have purchased dozens of complete helicopters and fighter aircraft from gray arms suppliers. Brokers also acquire military equipment from US and other Western suppliers. Black-market arms transfers do not go through an export licensing process. Rather, smugglers rely exclusively on hiding contraband arms from government officials. Black-market transfers usually involve smaller quantities of weapons, often pilfered from military stocks or gunshops. The theft and illegal sales of weapons and other military stocks has become a significant problem in Russia. Organized crime groups have become increasingly involved in arms trafficking since the end of the Cold War, taking advantage of both the availability of large numbers of infantry weapons from the former Soviet Bloc countries and regional conflicts. In the midst of conflicts in the former Yugoslavia, Italian and Russian criminal organizations have been buying and selling military-style arms on the black market, and criminal groups operating in the region are increasingly well armed. Threats to US Security Interests Illicit arms sales help fuel conflicts and undermine US political and military efforts to promote stability in several regions of the world. The illegal arms trade has helped arm combatants in the former Yugoslavia and Africa. Countries under UN or other international arms embargoes in which the United States participates are major clients in the illicit arms market. Purchases by insurgents and factions in civil war increase the risk to US military personnel and law enforcement officers operating in hostile environments overseas. Insurgents and extremists acquire some small arms and ammunition to augment their own inventories of weapons. Although terrorist groups frequently try to obtain weapons on their own, their greatest source of conventional military weapons continues to be state sponsors like Iran and Libya. Drug traffickers and organized criminal groups have increasingly turned to the illicit arms market in the 1990s. In addition to smuggling weapons via the black market, these organizations have used gray-market acquisitions of military weapons to strengthen their ability to defend their operations from government forces and rival organizations

## Trafficking

#### Isis smuggles across mexico border – attack escalates and waiting increases the risk

Todd Beamon, Newsmax, 5/23/2015, Associate Editor at Newsmax Media Inc. Past, Independent Journalist ["ISIS Suggests It Can Smuggle a Nuke Into US Through Mexico", http://www.newsmax.com/Newsfront/isis-nuclear-bomb-smuggle/2015/05/23/id/646474/] bcr

The Islamic State is using the latest issue of its propaganda magazine Dabiq to pose the "far-fetched" hypothetical of purchasing its first nuclear weapon from Pakistan within a year and getting it into the United States through the porous Southern border. The terrorists raise the issue in an op-ed piece entitled "The Perfect Storm" that it attributes to John Cantlie, the British photojournalist whom ISIS took hostage in November 2012, The Independent reports. Cantlie has since appeared in many of the group's propaganda videos. Here are the key sections of the piece, according to the Independent Journal Review: "Let me throw a hypothetical operation onto the table. The Islamic State has billions of dollars in the bank, so they call on their wilayah (Province) in Pakistan to purchase a nuclear device through weapons dealers with links to corrupt officials in the region. The weapon is then transported overland until it makes it to Libya, where the mujahidin move it south to Nigeria. "Drug shipments from Colombia bound for Europe pass through West Africa, so moving other types of contraband from East to West is just as possible. The nuke and accompanying mujahidin arrive on the shorelines of South America and are transported through the porous borders of Central America before arriving in Mexico and up to the border with the United States. "From there it’s a quick hop through a smuggling tunnel and hey presto, they’re mingling with another 12 million 'illegal' aliens in America with a nuclear bomb in the trunk." The article readily admits, however, that the scenario is "far-fetched," though warning: "It’s the sum of all fears for Western intelligence agencies and it’s infinitely more possible today than it was just one year ago. "And if not a nuke, what about a few thousand tons of ammonium nitrate explosive? That’s easy enough to make." The piece, according to the Independent, also discussed how the militant Islamic group Boko Haram and others are uniting to create a global movement. Two months ago, Boko Haram pledged its support to ISIS. The alignment, according to Cantlie's piece, comes as the Islamic State has seized "tanks, rocket launchers, missile systems, anti-aircraft systems" from the United States and Iran. The op-ed then raises the nuclear scenario, the Independent reports. The op-ed follows disclosures by the Obama administration that U.S. Delta Forces killed ISIS finance chief Fathi ben Awn ben Jildi Murad, known as Abu Sayyaf, on April 15 in a rare ground operation in Syria. Murad's wife, known as Umm Sayyaf, was taken into custody for interrogation, U.S. officials said. The piece also comes as U.S. Border Patrol officials report a surge in illegal immigrants from Central America being apprehended while crossing into the U.S. at the border. In addition, Judicial Watch reported last month that ISIS has set up a training camp in northern Mexico just eight miles from El Paso, Texas. Further, an ISIS attack in the U.S. would pale compared to "the attacks of the past," the op-ed piece states. "They’ll [ISIS] be looking to do something big, something that would make any past operation look like a squirrel shoot, and the more groups that pledge allegiance the more possible it becomes to pull off something truly epic. "Remember, all of this has happened in less than a year," the piece continued. "How more dangerous will be the lines of communication and supply a year on from today?"