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Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment

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ABSTRACT: The nexus between guns and alienage presents a window through which to assess the competing constitutional values embodied in the Equal Protection Clause, the federal foreign-affairs power, and the Second Amendment. This Article analyzes the application of equal-protection norms and the federal foreign-affairs power on federal and state statutes that restrict the ability of non-citizens to bear arms. Professor Gulasekaram argues that courts should evaluate alienage restrictions at both the state and federal level under a unified analytic framework that would attempt to reconcile both personhood norms, such as equality, and gate-keeping norms vindicated by reliance on federal-power doctrines. As a result, the power of the federal government to legislate with regard to non-citizens would be reduced while concurrently allowing greater flexibility for states and localities.

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INTRODUCTION

In this era of increased attention to immigration, national security, and terrorism,[1] often overlooked is a constitutional nexus where equal-protection principles, the federal foreign-affairs power, and the Second Amendment coalesce: alienage and the right to bear arms.[2] In a nether-region, hidden from mainstream national debate, lurk federal and state laws that condition gun possession, or aspects of it, on citizenship.[3] Delving into alienage restrictions in firearms laws exposes fundamental flaws within the primary constitutional frameworks used to determine the rights and benefits available to non-citizens. Just as alarming, the current judicial analysis of these firearms laws equivocates between equal-protection and federal-power principles, thereby rendering the constitutionality of alienage classifications unpredictable.[4] Because of the profound impact of these competing constitutional principles on larger debates regarding the significance of citizenship, the rights of non-citizens, the scope of federal power, and ideological commitments to the role of the Second Amendment, this Article proffers a reevaluation and reconciliation of these doctrines and their underlying constitutional values.

One of the constitutional values informing this debate is the right to bear arms—a uniquely American symbol of defiance against tyranny. The marriage between firearms and America traces its roots to the country's founding era; James Madison contended that "the advantage of being armed" was a characteristic "which the Americans possess over the people of almost every other nation."[5] Since that time, gun ownership has occupied a

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1. *See generally, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 5 (2002), *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf ("Our great power leaves these enemies with few conventional options for doing us harm. One such option is to take advantage of our freedom and openness by secretly inserting terrorists into our country to attack our homeland."); STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, THE OPEN DOOR: HOW MILITANT ISLAMIC TERRORISTS ENTERED AND REMAINED IN THE UNITED STATES, 1993–2001 (2002), *available at* http://www.cis.org/articles/2002/theopendoor.pdf.

2. Please note that for purposes of this Article, I use the term "alien" to refer to the class of people who are not citizens. *See* 8 U.S.C. § 1101 (a)(3) (2000). As an immigrant, a former legal permanent resident, and now a naturalized citizen of the United States, I am well aware of the pejorative implications of the term "alien," implications that emphasize the assumed foreignness and difference of otherwise loyal, law-abiding, and patriotic people living in the United States. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303. I use the term in this Article because it is used in statutory language and case law.

3. *See infra* notes 11–15 and accompanying text.

4. *See infra* notes 19–23 and accompanying text.

5. THE FEDERALIST NO. 46, at 244 (James Madison) (Clinton Rossiter ed., 2003).

distinct position in the American popular, political, and legal landscape.[6] For almost a century and a half, however, so central an American trait has provoked dispute over who is sufficiently constituted—that is, sufficiently American—to wield it.[7]

Even while this tension persists, non-citizens throughout American history have wielded arms in U.S. military campaigns and have made the ultimate sacrifice that even the most patriotic citizens are sometimes reluctant to make: giving one's life for the nation.[8] Despite this record of national defense, the right of aliens to bear arms domestically is a murky matter.[9] Currently, those same non-citizens who could be drafted to die for

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6. *See, e.g.*, Joseph Bruce Alonso, *International Law and the United States Constitution in Conflict: A Case Study on the Second Amendment*, 26 HOUS. J. INT'L L. 1, 2 (2003) (arguing that the right to bear arms is uniquely significant in American culture); Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 9 (2002) (discussing claims of American "exceptionalism" regarding violence and gun ownership).

7. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (warning that recognizing "persons of the negro race" as citizens would give them the right "to keep and carry arms wherever they went"); CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 164 (1994) (noting that the increase in laws aimed at firearm possession after 1890 coincided with the increase of labor unions, substantial immigration, and increased nativism).

8. Despite the nation's genocidal colonization of their ancestors' lands, Native Americans have borne arms in defense of U.S. interests throughout American history. *See* TOM HOLM, STRONG HEARTS, WOUNDED SOULS: NATIVE AMERICAN VETERANS OF THE VIETNAM WAR (1996); *see also* U.S. DEPT. OF THE NAVY, NAVY HISTORICAL CENTER, 20TH CENTURY WARRIORS: NATIVE AMERICAN PARTICIPATION IN THE U.S. MILITARY, *available at* http://www.history.navy.mil/faqs/faq61-1.htm. Many interned, second-generation Japanese Americans, inducted while confined in camps, served in the U.S. military to prove their loyalty and patriotism. *See* ERIC MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II *passim* (2003).

Currently federal law requires non-citizen male inhabitants of the United States to register for selective service, and these people can then be conscripted into military service in the event of a draft. *See* Military Selective Service Act, 50 U.S.C. app. § 453 (2000) ("[I]t shall be the duty of every male citizen of the United States, *and every other male person residing in the United States* . . . between the ages of eighteen and twenty-six, to present himself for and submit to registration . . . ." (emphasis added)); *see also* Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L. J. 501, 501–02 (1972).

At the present time, approximately 70,000 foreign-born persons serve in the U.S. military, of which roughly 35,000 are non-citizens. *See* Anita U. Hattiangadi et al., Non-Citizens in Today's Military (Apr. 2005), *available at* http://www.cna.org/news/releases/researchbriefs.aspx; LAURA BARKER & JEANNE BATALOVA, MIGRATION POLICY INST., THE FOREIGN BORN IN THE ARMED SERVICES (2007), *available at* http://www.migrationinformation.org/USfocus/display.cfm?id=572.

Over 140 non-citizens serving in the U.S. military have died already in the War on Terror. *See* Associated Press, *"Gold Star" Moms to Admit Non-Citizens*, June 28, 2005, *available at* http://www.msnbc.msn.com/id/8387014/.

9. Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, *in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 15–20 (Don B. Kates ed., 1979) [hereinafter RESTRICTING HANDGUNS]; John R. Salter, Jr. & Don B. Kates, Jr., *The Necessity of*

the nation on the battlefield can be prohibited from serving on state or local police forces.[10] Further, over twenty states have some form of restriction on firearm possession by non-citizens, generally falling into one of four categories: (1) denial of non-citizen possession;[11] (2) denial of non-citizen concealed carrying;[12] (3) heightened restrictions on non-citizen possession (either general or concealed carrying);[13] or (4) particularized restrictions on non-citizen possession, transport, or use.[14] Federal criminal statutes currently forbid ownership, possession, or transport of firearms by non-

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Access to Firearms by Dissenters and Minorities whom Government Is Unwilling or Unable to Protect, in RESTRICTING HANDGUNS, *supra*, at 185–91.

10. Foley v. Connelie, 435 U.S. 291, 299–300 (1978) (upholding a New York law that prohibited aliens from serving as state troopers).

11. Three states—Hawaii, Indiana, and New York—have enacted flat bans on non-citizen possession of firearms, although each provides exceptions. HAW. REV. STAT. § 134-2(d) (1993 & Supp. 2005); IND. CODE ANN. § 35-47-2-3(e)(4) (West Supp. 2006); N.Y. PENAL LAW § 265.01(5) (McKinney 2006 & Supp. 2007). Two other states—Minnesota and Virginia—absolutely bar non-immigrant aliens from gun possession (although they apparently allow possession by lawful permanent residents). *See* MINN. STAT. ANN. § 624.719 (West 2004); VA. CODE ANN. § 18.2-308.2:01 (2004). One state—Louisiana—prohibits possession by "enemy aliens," a malleable term that could cause significant confusion during the non-sovereignty directed "War on Terror." LA. REV. STAT. ANN. § 14:95(A)(2) (2004).

12. Of the twenty-plus states that restrict alien gun possession, more fall into the second general category than any other. Seven states—Arkansas, Missouri, Montana, New Mexico, North Carolina, Oregon, and South Dakota—deny non-citizens the ability to obtain a concealed weapons permit or license. ARK. CODE ANN. § 5-73-309(a)(1)(A)(i) (2005); MO. REV. STAT. § 571.090(1)(1) (2000); MONT. CODE ANN. § 45-8-321(1) (2005); N.M. STAT. ANN. § 29-19-4 (A)(1) (2004 & Supp. 2006); N.C. GEN. STAT. § 14-415.12(a)(1) (2005); OR. REV. STAT. § 166.291 (2005); S.D. CODIFIED LAWS § 23-7-7.1.1(8) (2006). Oregon allows non-citizens to acquire permits if they declare their intent to naturalize. OR. REV. STAT. § 166.291. Two more states—Arizona and Florida—deny concealed-weapons permits to out-of-state aliens, although they presumably do not restrict the ability of in-state aliens to apply for them. ARIZ. REV. STAT. ANN. § 13-3112(E)(1) (2001 & Supp. 2006); FLA. STAT. § 790.06 (2006).

13. The third general category of state statutory restrictions includes states that impose heightened and more rigorous requirements on aliens to obtain firearm permits. Two states—Massachusetts and Washington—have bifurcated statutory schemes for gun possession that require aliens to apply for special permits that may be limited in duration and require extensive background appraisals, including references from the consul of the non-citizen's country of national origin or references from U.S. citizens familiar with the non-citizen. MASS. GEN. LAWS ch. 140, § 131F (2004); WASH. REV. CODE ANN. § 9.41.170 (West 2006).

14. The fourth and final general category of state restrictions is a catch-all for the remaining particularized, and sometimes odd, set of alienage distinctions in gun laws apparent in the laws of at least four states. Illinois bans non-immigrant aliens from gun possession unless the non-immigrant is using the gun for hunting purposes or is the representative of a foreign government. 430 ILL. COMP. STAT. ANN. 65/4(a)(2)(xi) (2004). Kentucky allows any person to apply for a gun license, but certified gun instructors who teach courses necessary for a gun license must be U.S. citizens. KY. REV. STAT. ANN. § 237.110(2) (West 2006). California's gun licensing laws do not differentiate based on alienage, but aliens cannot transport a firearm in a car, a right that citizens maintain. CAL. PENAL CODE § 12025 (West 2000). North Dakota law prohibits discharge of a firearm within city limits unless that discharge is by a citizen in defense of property. N.D. CENT. CODE § 62.1-02-06 (2003).

immigrant aliens, undocumented aliens, and former citizens who have renounced their citizenship.[15]

Purporting to survey the field, one legal encyclopedia flatly concludes, "noncitizens do not have the right to bear arms under either the Federal Constitution or most state constitutions."[16] Despite this pronouncement, no federal court has actually come to this conclusion, because no such court has addressed the question.[17] The handful of state courts that have considered the issue have not produced consensus.[18]

While some state courts view the question as an equal-protection problem, others view it as a federal-powers question.[19] Thus, these two contemporary constitutional doctrines, chiefly developed in the latter half of the twentieth century, have been the analytic tools used to assess,[20] and sometimes shield, these laws—many of which are the animus-based expressions of an earlier historical period.[21] As a general matter, those courts focusing on equal-protection norms have struck down state restrictions, whereas those focusing on federal preemption and Tenth

15. 18 U.S.C. § 922 (2000).

16. 94 C.J.S. *Weapons* § 7 (2005).

17. In what appears to be the closest recent brush that the issue has had with a federal court, the Ninth Circuit decided that a conviction under the state of Washington's alien-in-possession law did not constitute an "aggravated felony" for federal sentencing purposes. United States v. Sandoval-Barajas, 206 F.3d 853, 855 (9th Cir. 2000). The constitutionality of the state conviction was not at issue, and the court made no mention of the statute's validity *vel non.* In 1914, the U.S. Supreme Court upheld a now-repealed Pennsylvania statute that prohibited non-citizens' killing of wild game except for self-defense and non-citizen possession of shotguns and rifles. Patsone v. Pennsylvania, 232 U.S. 138, 143–44 (1914).

18. *See infra* notes 19–20.

19. *Compare* Chan v. City of Troy, 559 N.W.2d 374 (Mich. Ct. App. 1997) (striking down Michigan's alienage distinction in firearms law as a violation of the Equal Protection Clause of the U.S. Constitution), *with* Washington v. Hernandez-Mercado, 124 Wash. 2d 368, 373, 375–76 (Wash. 1994) (upholding Washington's alienage distinction in firearms law against both preemption and equal-protection challenges), *and* Utah v. Vlacil, 645 P.2d 677, 679–680 (Utah 1982) (upholding Utah's ban on alien gun possession against federal and state constitutional guarantees of the right-to-bear-arms and federal preemption challenges).

Equal-protection analysis ensures a fit between the state's justifications for use of a classification in its laws and the state's means for achieving those justifications. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 9.1–9.7 (2d ed. 2002). The level of judicial scrutiny under such analysis is divided into three tiers—strict scrutiny for suspect classifications, intermediate scrutiny for quasi-suspect classifications, and rational-basis scrutiny for non-suspect classifications. *Id.*

Federal-power analysis may be either federal preemption analysis or federal plenary-power analysis. *See generally id.* §§ 3.5, 4.6, 5.2. Under either analysis, state laws conflicting with federal laws or entrenching upon exclusive domains of federal power are invalidated. *Id.*

20. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 787, 805–07 (1994) (stating that the Supreme Court did not clearly recognize federal preemption until the beginning of the twentieth century and that modern preemption doctrine developed only after the New Deal).

21. *See supra* note 9.

Amendment principles have upheld the restrictions.[22] While a law, such as an alien-in-possession statute, might simultaneously implicate both of these doctrines, courts have intriguingly chosen one or the other as their principal analytic tool when assessing the constitutionality of alienage restrictions.[23]

In light of this framework, my contribution connects the rich scholarship developed around the three constitutional values at stake, namely, the right to bear arms, alienage and citizenship, and federal foreign affairs and immigration.[24] This Article engages these values by critiquing the judicial metrics used to determine the appropriate level of governmental protections and benefits for non-citizens who live in and contribute to the nation. I demonstrate that these judicial metrics depend on categorical analyses that do not accurately account for the underlying empirics of alienage, state and federal competencies, or, for purposes of my study, gun possession in America. Even more profound than this administrability or categorical-fit problem, our current judicial methodology vis-à-vis non-citizens demonstrates America's profound schizophrenia on the subject. On the one hand, courts applying personhood principles, such as equal protection, to alienage questions support notions of America as a land of immigrants, America where acculturation is a laudable goal, and America where adequate opportunity translates into the ability to earn, participate, and contribute. On the other hand, courts applying federal-power principles, which emphasize uniformity and gate-keeping, focus on the necessity of maintaining a politically viable community of Americans, of preserving the primacy of national-security concerns, and of resisting foreign influences in American politics. This Article argues that our current judicial metrics fail to account for these divergent constitutional values in a cohesive and integrated fashion. It further argues that this failure mandates a different methodology for resolving questions of non-citizens' inclusion within the polity—one that accounts for both personhood norms and gate-keeping necessities. This new understanding will necessarily alter the power dynamic between federal and state authorities with regard to alienage.

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22. *See supra* note 19.

23. *See infra* Part III.

24. *See* sources cited *supra* note 1 (listing citizenship and immigration literature); *see also* T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1690–91 (2001); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 407–08 (2002); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 307, 307–08 (2000); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 580–83 (1990). For literature on the right to bear arms, see generally, for example, Sanford M. Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1990); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1993).

Specifically, this Article is based on the fundamental claim that outside the context of the federal government's power over admission of aliens, neither level of government has special or unique authority to act with regard to non-citizens.[25] Therefore, I argue, alienage restrictions at both the federal and state level should be evaluated by courts using tools similar to the ones prescribed by the Constitution for other classifications involving groups of persons or assertions of individual rights.[26] My critique of alien gun laws, which challenges courts' current "immigration exceptionalism,"[27] results in four core claims. First, when state and local authorities create classifications on the basis of U.S. citizenship, courts should apply federal preemption analyses only in the specific and limited circumstances of an actual conflict with positive federal law. Second, when either state/local or federal authorities create alienage restrictions, courts should evaluate such laws under the constitutional rubric designed to evaluate governmental classifications of persons or groups of persons—that is, under the equal-protection standard. Third, under a general equal-protection rubric that requires statutes to have a factual basis and an adequate fit between asserted goals and means, both federal and state authorities should be allowed to assert national-security or gate-keeping goals as justifications for their law-making. Fourth and finally, for all levels of government, courts should assess the alienage restriction in the same manner and avoid giving broad deference to federal law-making on the one hand, and special exceptions to state law-making on the other.

I defend these claims by first critiquing the political-function exception that courts have created to evaluate state alienage restrictions under general equal-protection analysis. Having argued that the alienage context should not alter equal-protection methodology at the state level in any fundamental manner, I then argue that there is little justification for thinking of alienage questions as federal-power problems, either under positive federal firearms law, federal immigration law, or a presumed federal exclusivity over alienage even in the absence of positive law. Finally, I defend the idea that all laws with alienage classifications, at either the state or federal level, should be

25. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864, 869–71 (1989) (describing the courts' very limited role with regard to immigration and arguing that instead of broad plenary power, "courts ought to examine the justifications offered on behalf of federal regulations based on alienage to see if they meet traditional constitutional standards of permissibility"); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–19 (2000) (discussing existence of and factors causing "immigration exceptionalism"); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 42–43 (1996) (arguing that immigration law at the federal level "lacks guiding principles").

26. *See generally* CHEMERINSKY, *supra* note 19, §§ 9.1–9.7 & 10.1–10.10 (discussing judicial methodology for equal-protection claims and fundamental rights under the Due Process and Equal Protection Clauses).

27. *See supra* note 25.

evaluated under the same rubric that would allow all levels of government to assert security or gate-keeping rationales. This progression leads to a unitary analysis that incorporates the divergent values underlying the equal-protection and federal-power doctrines and alters the dynamic between federal and state governments when determining the rights of non-citizens.

Having clarified what this Article will do, let me also clarify what it will not do. First, although many of these laws were passed at the turn of the twentieth century, during moments of heightened xenophobia and racism in the nation's evolution, I do not explore the impact of this history on the viability of alien gun laws.[28] Second, I do not intend to enter the individual-versus collective-right debate that has dominated Second Amendment scholarship.[29] At times this Article assumes, without advocating, an individual right of possession for purposes of exploring the potential equal-protection analyses. Finally, I note that citizenship and immigration processes are hotly debated topics in legal scholarship.[30] Although this Article has implications for both the collective-rights and immigration-control debates, it will not focus on those potential consequences. Further, I use citizenship only in the statutory sense—the fact of being born in the United States or having been naturalized in accordance with the Immigration and Nationality Act.[31] Unless otherwise specified, references to "non-citizens," "aliens," or "alien gun laws" refer to restrictions on legal permanent residents ("LPRs") or nonimmigrant aliens.[32] While I ultimately

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28. *Cf.* Hunter v. Underwood, 471 U.S. 222, 225–33 (1985) (declaring an Alabama constitutional provision disenfranchising felons unconstitutional because the provision's original enactment was motivated by racial animus); Johnson v. Governor of Fla., 405 F.3d 1214, 1223–27 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 650 (2005) (declaring a reenacted Florida constitutional provision disenfranchising felons constitutional because the taint of racially motivated original enactment had been removed).

29. *See supra* note 24; *see also* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 293–95 (2001).

30. *See, e.g.*, Richard Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 340–41, 349–50 (2005) (emphasizing the potential robustness of the citizen/non-citizen divide, especially after passage of the Fourteenth Amendment); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 690–91 (2003) (arguing that citizenship during the colonial and founding era was an unsettled concept that may have had little to do with the Framers' intent when deciding to whom the benefits of the Constitution would inure).

31. I use the term "alien" to refer to the class of people who are not citizens. *See* 8 U.S.C. § 1101 (a)(3) (2000); *see also supra* note 2.

32. I recognize that "non-citizen" or "alien" could refer to at least three statutory subdivisions: (1) Legal permanent residents ("LPRs") (or immigrant aliens or resident aliens); (2) nonimmigrant aliens (or temporary immigrants); and (3) undocumented aliens (or so-called illegal aliens). State laws discriminating against LPRs and nonimmigrant aliens in other areas of regulation have been those subject to rigorous constitutional scrutiny. *See* Toll v. Moreno, 458 U.S. 1, 10–11, 17 (1982) (invalidating state law denying tuition benefits to nonimmigrant aliens); Graham v. Richardson, 403 U.S. 365, 371–72, 376–80 (1971) (invalidating state law denying welfare benefits to resident aliens). In most jurisdictions limiting LPR or nonimmigrant-alien gun possession, undocumented aliens are similarly, if not more, restricted.

believe that most alienage restrictions in gun laws are unconstitutional, based on the xenophobic history of alien gun laws or the proper application of the framework I propose, this Article focuses on the constitutional values informing this result, rather than the result itself.

Part I of this Article focuses on the courts' use of equal protection to test alien gun laws. It argues that examination of alien gun laws demonstrates that state alienage restrictions should not be understood differently than other types of state laws singling out classes of persons, specifically undermining the viability of the political-function exception in state alienage jurisprudence. Part II addresses the competing positions courts consider when alien gun laws are evaluated under federal foreign-affairs powers. Its major focus is on the illegitimacy of according near carte-blanche deference to the federal government by undermining the viability of the distinction between foreign and local affairs and mining the Second Amendment's structural-power implications. Part III exposes the problems with attempting to select between equal-personhood norms and federal-power analyses, and it suggests that in the absence of justifiable federal exclusivity in the area of alienage restrictions, the Constitution's other provisions for understanding the rights of individuals and classes of individuals should control. The Article concludes by suggesting how courts might integrate equal-protection and federal-power principles to determine rights and benefits for non-citizens on normatively more defensible grounds that require reconceiving the interaction of federal and state authority.

I. EQUAL-PROTECTION CHALLENGES TO ALIENAGE DISTINCTIONS IN GUN LAWS

When state courts have struck down alienage restrictions in state firearms statutes, they have done so on equal-protection grounds using strict scrutiny.[33] Here, I explore equal-protection positions for and against the constitutionality of state alien gun laws, critiquing the current judicial methodology for demarcating areas of narrow and broad deference to governmental regulation. In equal-protection analysis, these positions can be organized along three related debates: (1) whether the right to bear arms is a political right or function; (2) whether the right to bear arms is a

See, e.g., ARIZ. REV. STAT. § 13-3112 (LexisNexis 2006); CAL. BUS. & PROF. CODE § 7583.23 (West 2006); 430 ILL. COMP. STAT. 65/4 (2006); N.C. GEN. STAT. § 14–404 (2006); 18 PA. CONS. STAT. § 6109 (2006); R.I. GEN. LAWS § 1-47-7 (2006); UTAH CODE ANN. § 76-10-503 (2006); VA. CODE ANN. § 18.2-308.2:01 (2006).

33. *See supra* note 19. I focus only on state alien gun laws here because equal-protection norms have carried greater valence with state alienage distinctions than with federal ones. *Compare* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (upholding citizenship requirement for federal welfare benefits as an exercise of federal foreign-affairs authority), *with Graham*, 403 U.S. at 370–71, 376–78 (striking down citizenship requirements for state welfare benefits as a violation of both equal protection and federal supremacy). I will return to federal alien gun laws and their viability under equal-protection analysis in Part III.

fundamental right of vulnerable minority groups; and (3) whether the right to bear arms is an individual right.

A. THE RIGHT TO BEAR ARMS AS A POLITICAL RIGHT OR FUNCTION

Although non-citizens are covered by equal-protection guarantees,[34] the precise extent of that coverage has vacillated throughout the last century.[35] While courts sometimes treat non-citizens as a suspect class, deserving of the most stringent scrutiny, at other times they view non-citizens as undeserving of this label, and thus accord them little constitutional protection. One reason for this inconsistency is that in *Yick Wo v. Hopkins*, the seminal case establishing that alien residents are protected by the Equal Protection Clause, the Court's underlying concern was racial animus, not alienage per se.[36] When a legislature uses alienage as a proxy for race, laws surely deserve the most stringent scrutiny.[37] Since *Yick Wo*, however, the Court has held that alienage itself is a suspect classification in the hands of the states, even when it does not overtly operate as a proxy for race.[38] This development conflicts with the fact that alienage is a necessary classification for entry, exit, and naturalization to the country. The Constitution itself uses an alienage distinction, prohibiting aliens from elected positions.[39]

Modern alienage jurisprudence generally treats aliens as a suspect class requiring strict constitutional scrutiny, under which the classification fails.

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34. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886); *see also* Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (stating that non-citizens are covered by the Due Process Clause and must be accorded Fifth and Sixth Amendment rights).

35. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 75, 80–81 (1979) (sustaining a New York law barring aliens from teaching in public schools under the "political function exception"); *Graham*, 403 U.S. at 370–71, 376–78 (striking down state welfare laws conditioning benefits on citizenship); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421–22 (1948) (striking down a California law denying aliens fishing licenses and signaling demise of the "special public interest exception" doctrine); Ohio *ex. rel.* Clarke v. Deckebach, 274 U.S. 392, 396 (1927) (sustaining law barring aliens from operation of billiard halls under the "special public interest exception" to equal-protection law); Truax v. Raich, 239 U.S. 33, 38–42 (1915) (striking down an Arizona law requiring eighty percent of employed persons in business to be natural-born citizens as a violation of the Equal Protection Clause because it unequally regulated the right to work, which is part of personal freedom that is the purpose of the Fourteenth Amendment); Patsone v. Pennsylvania, 232 U.S. 138, 145–46 (1914) (sustaining a law barring aliens from hunting wild game).

36. It was the fact that the law operated to disadvantage laundry owners of Chinese descent that mattered, not that it discriminated against non-citizens. *Yick Wo*, 118 U.S. at 369–70, 374.

37. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 231 (1985) (holding that an Alabama constitutional provision disenfranchising felons was motivated by the desire to disenfranchise African Americans).

38. *See, e.g.*, *Graham*, 403 U.S. at 371–72 (striking down state welfare laws with alienage distinction); *Takahashi*, 334 U.S. at 418.

39. U.S. CONST. art. I, §§ 2–3 (mandating that citizenship is required for U.S. Representatives and Senators); *id.* art. II, § 1 (mandating that natural-born citizenship is required for Presidency).

But the political-function exception to the general rule sometimes ratchets down the level of scrutiny to rationality review.[40] Under the political-function exception, alienage distinctions in activities that are "so closely bound up with the formulation and implementation of self-government,"[41] or tied to a state's ability to define its political community,[42] will survive constitutional scrutiny. Courts using this exception have upheld state restrictions on non-citizens serving as police officers,[43] teaching in public schools,[44] working as probation officers,[45] and sitting on juries.[46]

Does the right to bear arms belong under the political-function exception? State courts that have struck down alienage restrictions in state gun laws have answered this question in the negative.[47] These state-court pronouncements, however, have failed to grapple with the profound implications of their positions. In developing a nuanced answer to the political-function question, I conclude that persuasive reasons exist to consider arms-bearing a political right amenable to alienage restrictions. Accepting that conclusion, however, requires re-envisioning the obligations of citizenship and the existence of the political-function exception.

This Section examines the political nature of the right to bear arms, first from a historical perspective and then by comparison to other activities deemed political by the courts. In both inquiries, I wrestle with the same question of how to square conceptions of "political" rights and inclusion in

40. Sugarman v. Dougall, 413 U.S. 634, 642–43, 646–48 (1973) (striking down a New York law barring aliens from competitive civil-service positions, but speculating that states retain the power to create alienage distinctions for voters, elective office, important non-elective offices, and public-policy decision-makers); *see also* Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (striking down a state law excluding aliens from higher-education financial aid); Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 601–06 (1976) (striking down a Puerto Rico statute banning aliens from engineering practice); *In re* Griffiths, 413 U.S. 717, 721–23 (1973) (striking down a state law barring aliens from being licensed as attorneys) .

41. Bernal v. Fainter, 467 U.S. 216, 221–28 (1984) (illustrating the political-function doctrine and striking down a Texas law barring aliens from becoming notary publics).

42. Foley v. Connelie, 435 U.S. 291, 296 (1978).

43. *Id.* at 299–300.

44. Ambach v. Norwick, 441 U.S. 68, 75–81 (1979).

45. Cabell v. Chavez-Salido, 454 U.S. 432, 441–46 (1982).

46. Perkins v. Smith, 370 F. Supp. 134, 138–39 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976).

47. The Michigan Court of Appeals found in *Chan v. City of Troy* that alien gun possession did not affect the state's ability to define its political community and therefore did not fall into the political-function exception. 559 N.W.2d 374, 379 (Mich. Ct. App. 1997). The court then found that denying permanent residents gun-possession rights was not sufficiently tailored to the goal of public safety, and it struck down the law. *Id.* at 380. The Nevada Supreme Court, in *State v. Chumphol*, followed a similar path, concluding that the state's denial of concealed-weapons licenses to aliens was unconstitutional under strict scrutiny. 634 P.2d 451, 451–52 (Nev. 1981). Like *Chan*, the court found the state's alien gun restriction unrelated to a fundamental government activity. *Id.* California courts have reached the same conclusion. People v. Rappard, 28 Cal. App. 3d 302, 305 (Cal. Ct. App. 1972) (declaring the state's ban on alien concealed-weapon possession unconstitutional as violation of state and federal equal-protection principles).

the political community with underlying commitments to equality. The stakes of this categorization are high; defined as a political right, gun possession welcomes alienage distinctions, but defined as non-political, it cannot.

1. The Historical (D)evolution of a Political Right

Although it does not appear likely that scholars or courts will ever agree on the Second Amendment's purpose, either now or at the time of its origin,[48] many do agree that, at least during the founding era, bearing arms was a political right.[49] As Professor Akhil Amar powerfully argues, the Founders drafted the Second Amendment to address the core concerns of populism and federalism, not individual liberty.[50] Further, he notes that, in the divide between political rights and more general civil rights guaranteed by state governments, bearing arms fell on the political side of the divide:

> Alien men and single white women circa 1800 typically could speak, print, worship, [etc.] . . . , but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for First-Class Citizens. So too, the right to bear arms had long been viewed as a political right, a right of First-Class Citizens.[51]

Arms-bearing was essential to a state's political self-definition because it was critical to the state's ability to assert its sovereignty and independence against a potentially tyrannous central government with a standing army.[52]

The connection Amar draws between voting and arms-bearing is particularly instructive for evaluating the constitutionality of alienage restrictions in gun law.[53] Laws sometimes causally linked voting and gun

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48. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 218–21 (5th Cir. 2001) (presenting, in dicta, historical evidence that the Second Amendment protected an individual's right to bear arms); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 265–66 (1998) (arguing that the Fourteenth Amendment strengthened the individual-rights reading of the Second Amendment). *But see* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 589–92 (2000) (disputing Akhil Amar's view of the impact of the Fourteenth Amendment on the Second Amendment).

49. *See, e.g.*, AMAR, *supra* note 48, at 46–53.

50. *Id.* at 46. *But see* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1446 (disagreeing with Amar's historical account).

51. AMAR, *supra* note 48, at 48. But note that Amar, in Part II of his book ("Reconstruction") argues that the Fourteenth Amendment altered this balance between civil and political rights and converted the right to bear arms into a civil right exercisable by all citizens. *Id.* at 217–23.

52. THE FEDERALIST NO. 46 (James Madison), *supra* note 5, at 295–97.

53. AMAR, *supra* note 48, at 258 ("At the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic *political* right flanking the other main political rights of voting, office holding, and jury service.").

rights, whereas voting was only tenuously correlated with citizenship. In postbellum Arkansas, for example, anti-dueling laws punished improper use of guns by depriving the offender of the rights to vote and hold office.[54] However, state governments did not restrict voting to citizens either at the founding or throughout the nineteenth century.[55] Aliens were allowed suffrage in twenty-two states and territories during most of the 1800s, and aliens remained a part of the electorate in some states well into the twentieth century.[56] This divergence between voting and citizenship suggests that alien-voting bans, although constitutionally permitted, are not constitutionally mandated.[57] When gun laws maintain these close connections with suffrage, alienage restrictions in firearms laws operate similarly to those in voting: they are not constitutionally mandated, but they are permitted.

The post-Reconstruction experience of African American citizens solidified the relationship between guns and voting, but for reasons vastly different than the pre-Reconstruction conception of gun rights and voting as privileges reserved for first-class citizens. Post-Reconstruction, guns were used to ensure the newly minted and inclusive parameters of citizenship.[58] Recently freed African Americans and abolitionists championed the right to bear arms as a necessary measure against the violence of former slave masters, the Ku Klux Klan, state-militia members, and others hostile to their freedom.[59] Although in 1870, the ratification of the Fifteenth Amendment guaranteed blacks voting rights in theory, private violence and state indifference kept blacks from political participation in practice.[60] Gun use by African Americans during that era became necessary to ensure the guarantees of the Reconstruction amendments.[61] Accordingly, Professors Robert Cottrol and Raymond Diamond conclude that the "history of the

54. *See* 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, 1327 (1995) (describing features of the Arkansas Constitution of 1864).

55. Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114–16 (1931); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–1417 (1993).

56. Aylsworth, *supra* note 55, at 114.

57. *But see* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1109 (1977) (arguing that if a state offers anyone within its jurisdiction the right to vote, it cannot deny it to any person, citizen or alien, unless the restriction passes strict scrutiny).

58. *See infra* notes 59–66.

59. AMAR, *supra* note 48, at 258–59; Cottrol & Diamond, *supra* note 54, at 1333.

60. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349 & n.197 (1991) (citing GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (1984)).

61. *See id.*; *see also* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 68–77 (1991).

right to bear arms is, thus, inextricably linked with the efforts to reconstruct the nation and bring about a new racial order."[62] This narrative suggests that bearing arms was, like jury service and voting, a critical right for use as a check against the power of the state in Jim Crow America. Although not a political right for defense of state sovereignty as an organized state militia, the right to bear arms was critical in a core political sense as a guarantor of the right of voting.

Some have argued that firearms were essential to vindicating voting and assembly rights for African Americans beyond Reconstruction and well into the twentieth century.[63] Professor Don Kates explains that in the 1960s, firearm possession was "almost universally endorsed by the black community, for it could not depend on police protection from the KKK."[64] Gun possession by civil-rights activists was critical to the ability of Southern African Americans and civil-rights workers to exercise their rights of assembly and petition.[65] Perhaps more importantly, firearm possession by Southern African Americans appeared to increase governmental accountability to its minority citizens: "Moreover, civil rights workers' access to firearms for self-defense often caused Southern police to preserve the peace as they would not have done if only the Ku Kluxers had been armed."[66]

Thus, through specific periods of the nation's evolution, the right to bear arms was considered or used as a political right, which under modern alienage jurisprudence would allow for citizenship distinctions similar to those that developed in voting, office-holding, and jury-service rules. Once divorced from its political roots, however, the right to bear arms should no longer be restricted in the same manner as voting, office holding, and jury service because the right no longer belongs to the political community. Therefore, the more pressing question is whether intervening historical factors have sufficiently decoupled the right to bear arms from its political foundation so that it is no longer a politically useful instrumentality for defense of state sovereignty or for protection from state action or indifference.

In answering this question, Amar's theory of the Fourteenth Amendment's catalytic power over the Bill of Rights deserves some attention.[67] He posits that the Privileges or Immunities Clause of the Fourteenth Amendment transformed the purely political right to bear arms, exercisable only by first-class citizens, into a civil right, exercisable by a larger

62. Cottrol & Diamond, *supra* note 60, at 343.

63. *See generally* Salter & Kates, *supra* note 9, at 185–91.

64. *Id.* at 186.

65. *Id.* at 188 ("It was only because black neighborhoods were full of people who had guns and could fight back that the Klan didn't shoot up civil rights meetings . . . .").

66. *Id.*

67. AMAR, *supra* note 48, at 258–67.

group. Notably, however, his conception of a larger group would still restrict gun ownership to the political community and would not include aliens. By locating transformative power in the Privileges or Immunities Clause of the Fourteenth Amendment,[68] the consequence of Amar's analysis is that the right to bear arms is at once non-political and individual but still limited only to citizens.[69] Reinvigoration of the Privileges or Immunities Clause, as Amar advocates, justifies a hard division between citizens and aliens for provision of rights with only minimal safeguards for aliens—a result that would essentially eviscerate *Yick Wo* and its progeny.[70]

The difficulty with this reading is that it would allow for alienage distinctions in laws touching on the most fundamental of constitutional rights secured by Article IV and the Bill of Rights (because those rights only inure to citizens), but would strike down alienage distinctions in laws providing less fundamental, voluntary state benefits (because those benefits inure to all persons). However, if the Due Process and Equal Protection Clauses only minimally protect aliens with regard to non-fundamental state beneficence, then federal and state governments should only be able to impose minimally upon or obligate aliens. The fact that aliens once voted, currently pay taxes, are subject to the same criminal enforcement and punishment as citizens, and can be drafted or enlist into military service practically undermines Amar's plausible re-envisioning of the Fourteenth Amendment's clauses.[71] This disparity between substantial obligations imposed on aliens, on the one hand, and theories of minimal governmental guarantees to them, on the other,[72] would require wholesale rethinking of government burdens and benefits if rights could be simultaneously non-political *and* available only to citizens.

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68. The Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). I am not suggesting that Amar would be troubled by this outcome.

69. AMAR, *supra* note 48, at 218–23, 257–68.

70. *See* Epstein, *supra* note 30, at 342–50.

71. Of course, the Court's suffocation of the Privileges or Immunities Clause in the *Slaughter-House Cases* effectively moots the doctrinal consequences of heavy reliance on the citizen/person divide in the Fourteenth Amendment. Slaughter-House Cases, 83 U.S. 36, 60–61, 72–80 (1872) (rejecting a privileges or immunities challenge to a statutory monopoly granted to a specific company); *see* Epstein, *supra* note 30, at 336–40.

72. Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 293–94 (1994) ("Even in our regime of relatively devalued citizenship, citizens enjoy many more important rights than resident aliens do, yet citizens have very few legal obligations that resident aliens do not also have." (internal citations omitted)).

Leaving aside the possibility that the Privileges or Immunities Clause devolved the right to bear arms into a non-political right, other independent reasons exist for believing the right to bear arms has drifted from its political moorings. Undoubtedly, the United States, vis-à-vis foreign powers or vis-à-vis the individual states, is not the same today as it was in 1791. Although "the people" who were voters, jury members, public office holders, and ratifiers of the Constitution might have been the same "people" who would constitute a state "militia" in 1791,[73] the modern-day militia equivalent—the National Guard and federal military forces—are not restricted to white male citizens.[74] Women, minorities, and the poor constitute a significant portion of the Armed Forces.[75] Non-citizens constitute a non-negligible segment of the military, and non-citizen men must register for selective service.[76] Thus, the right to bear arms, at least in militia or military service, is no longer restricted to a select group of first-class citizens.

Second, the Fourteenth Amendment's realignment of federal and state powers reflects a shift to a greater suspicion of state powers and the primacy of national citizenship.[77] Unlike the Founders, who were wary of a federal standing army and federal encroachment on liberty,[78] the Reconstruction Congress showed concern for state intrusions on liberties and the use of armed state citizenry as elements of state oppression.[79] By the early 1900s, state militias, once the critical bulwark against the potential tyranny of the central government, became, in part, creatures of the federal government with the creation of the National Guard system.[80] The rise of the standing federal army and the military-industrial complex has largely mooted both

73. *See* Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (mandating that "all White-male citizens" were part of the militia).

74. 10 U.S.C § 311(a) (2000) (determining the U.S. militia composition to be all male citizens and males who have declared intent to be citizens, as well as female citizens who are members of the National Guard).

75. David R. Segal & Mady W. Segal, *America's Military Population*, 59(4) POPULATION BULL. 9, 18–20, 24–30 (2004); U.S. DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES, FISCAL YEAR 2002 EXECUTIVE SUMMARY (2004), *available at* http://www.dod.mil/prhome/poprep2002/summary/summary.htm.

76. *See supra* note 8.

77. *See* Arver v. United States (Selective Draft Law Cases), 245 U.S. 366, 389–90 (1918) (upholding conscription orders against Thirteenth and Fourteenth Amendment challenges); Yassky, *supra* note 48, at 594, 629–31 (detailing the Fourteenth Amendment's effect on federal-state dynamics and the evisceration of the Second Amendment).

78. *See, e.g.*, U.S. CONST. amends. I–X; THE FEDERALIST NO. 46 (James Madison), *supra* note 5.

79. *Cf.* U.S. CONST. amend. XIV.

80. 10 U.S.C. § 101(c) (2000); *see also* Perpich v. Dep't of Def., 496 U.S. 334, 336–37, 342–43, 350–54 (1990) (upholding the federal government's deployment of the Minnesota National Guard to Central America for training purposes).

the "calling forth" provisions of the Constitution and the need for separate state militias.[81]

Finally, the rights-vindicating and anti-state functions served by African American firearm possession no longer neatly apply today. Although firearms played an important role in ensuring assembly, association, petition, court-access, and voting rights for African Americans through the civil-rights era of the 1960s, subsequent legislative developments, the expansion of the federal commerce power to enact civil-rights laws, and the new limitations on sovereign immunity against civil-rights actions have helped decrease reliance on violence or the threat of violence as a primary method of rights vindication. The Voting Rights Act of 1965, along with greater media exposure, mobility, and information exchange, has largely mooted the role of guns as the guarantors of political rights.[82]

These changes (and a few others, including firearm affordability) appear to have transformed the right to bear arms from a political right—associated with voting, jury service, and holding office—into a non-political right. A practical accounting of obligations imposed by the government on non-citizens suggests that a non-political right must inure to all persons. Under modern alienage jurisprudence, separation of the right to possess a firearm from its political roots allows for heightened review of gun laws under which states would likely fail to show, under strict scrutiny, that the classifications are narrowly tailored to achieve public safety.[83]

Even ignoring the historical devolution of the political nature of the right to bear arms and instead focusing on the specific history of many alien gun laws, courts would still be compelled to invalidate these laws—but for completely different reasons. Most alien gun restrictions were passed during an era of irrational fear and prejudice against immigrants, especially recently arrived Italians.[84] State legislatures enacted these types of gun laws within the

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81. U.S. CONST. art. I, § 15; President Dwight D. Eisenhower, Farewell Address to the Nation (Jan. 17, 1961).

82. Voting Rights Act of 1965, 42 U.S.C. § 1971 (2000); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE EFFECT OF THE VOTING RIGHTS ACT (2005), *available at* http://www.usdoj.gov/crt/voting/intro/intro_c.htm (noting exponential increase in voter registration among African Americans from 1965 to 1988). I make no claim that minorities have adequate political voice or that voting is free from de facto and de jure discrimination. *See, e.g.*, NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS (2006), *available at* http://www.votingrightsact.org. My point is only that means other than threat of violence and armed conflict are more readily available and acceptable for redress.

83. *See, e.g.*, Chan v. City of Troy, 559 N.W.2d 374, 376 (Mich. 1997) (declaring MICH. COMP. LAWS § 28.422(3)(b) (1996), which denied firearm permits to permanent residents, unconstitutional as a violation of the Equal Protection Clause of the U.S. Constitution); State v. Chumphol, 634 P.2d 451, 452 (Nev. 1981) (declaring NEV. REV. STAT. 202.360(2), a law pertaining to aliens in possession of a concealed weapon unconstitutional as violative of equal protection).

84. CRAMER, *supra* note 7, at 179 ("The strong nativist movement that played a part in the KKK's resurgence in the 1920s appears to have also played a part in the passage of laws

first few decades of the twentieth century, when fear of foreign anarchists during the red-scare era, notions of immigrant mental deficiencies, and stereotypes of immigrants' laziness and proclivity towards crime dominated the popular and political consciousness.[85] Although many of these laws have since been amended or modified,[86] the continued existence of some form of alienage restriction in many states' laws[87] suggests that legislatures still believe that legitimate reasons exist for maintaining alienage distinctions. The legislative history regarding these restrictions is sparse, but some states' statutes still appear to be based on the danger to citizens posed by firearms in the wrong (immigrant's) hands.[88] These state restrictions have persisted even as the right to bear arms has unquestionably progressed beyond its original limitation to "first-class" citizens.[89]

Thus, historical context and progression suggest that gun possession is not a political right, and therefore, that alienage restrictions would likely fail. As I demonstrate below, however, this result does not necessarily square with contemporary notions of what is "political," as developed in the case law. Indeed, a closer comparison between gun possession and "political functions" in current jurisprudence undermines the validity of categorical "political" versus "non-political" labels and counsels for abandonment of the political-function exception itself.

2. Bearing Arms as a "Political Function"

Comparing the right to bear arms to the political functions the Supreme Court has identified reveals that gun possession can be both

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prohibiting resident aliens from possession of firearms."); RICHARD NEWBY, KILL NOW, TALK FOREVER: DEBATING SACCO AND VANZETTI (2001); RESTRICTING HANDGUNS, *supra* note 9, at 14–19; Cottrol & Diamond, *supra* note 54, at 1334 (stating that the New York Sullivan Law of 1911, which restricted the sale and carrying of firearms, was aimed at New York City where the "large foreign born population was deemed susceptible . . . and perhaps inclined to vice and crime"); *see also* Korematsu v. United States, 323 U.S. 214 (1944); Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595–96 (1889) (describing the rising racial and cultural tensions that led to the exclusion of Chinese).

85. *See supra* note 84; *see, e.g.*, 1905 N.Y. LAWS, 130 ("No person not a citizen . . . shall have or carry firearms . . . in any public place at any time."); 1909 PA. LAWS 466 (prohibiting alien firearm possession); 1922 MASS. ACTS 563 (prohibiting "an unnaturalized foreign born person" from receiving a license).

86. *See, e.g.*, 1909 PA. LAWS 466 (prohibiting non-citizens from killing wild game and ownership or possession of shotgun or rifle) (later repealed); Patsone v. Pennsylvania, 232 U.S. 138, 143 (1914) (upholding Pennsylvania's ban on non-citizen game-hunting and shotgun or rifle possession against equal-protection and treaty-based challenges).

87. *See supra* notes 11–14.

88. State v. Mendoza, 920 P.2d 357, 366–67 (Haw. 1996) (excerpting portions of Hawaii's constitutional debate focusing on gun possession by the "illegally armed minority").

89. AMAR, *supra* note 48, at 47–49 (describing the right to bear arms at the founding as a political right available only to first-class citizens); *see* 10 U.S.C. § 311 (2000) (including non-citizens with declared intent to naturalize and female citizens in the National Guard as part of the current U.S. militia).

political and non-political in character. But while its inherent nature is not amenable to clean characterization, the consequences of the characterization remain rigid. As a non-political right, the government cannot deny aliens the right to bear arms on equal terms, even though arms use was historically, and is sometimes currently, used politically. On the other hand, recognizing gun possession as a political function allows for the maintenance of alienage restrictions, even though guns are now mostly purchased for recreation and self-defense.[90]

The Supreme Court's alienage jurisprudence in general, and the political-function cases in particular, mark a protracted battle between conservative and liberal Justices over the breadth of the term "political."[91] Supreme Court decisions upholding state regulations as political functions evince a trend towards a broader conception of the scope of activities potentially definable as political.[92] Whereas *Foley v. Connelie*, upholding New York's alienage restriction for state troopers, limited the exception to activities affecting a state's ability to define its "political community," *Ambach v. Norwick*, upholding New York's alienage restriction for public school teachers, widened that standard to include any "significant government function."[93]

As a comparison to gun possession, consider the four occupations or activities that have been deemed to implicate the ability of a state to define its political community or to constitute a significant government function: police officers, public school teachers, probation officers, and jury members.[94] To differing degrees, each participates in exercising the coercive power of the state over community members. All fulfill a state government's role to its people in an area of traditional state concern. Police, probation officers, and jury members share the characteristic of impacting community members' personal liberty. The inclusion of public school teachers in this group rests on the idea that they are role models who inculcate American civic values.[95]

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90. GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 25–26 (1991).

91. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1113 (1994).

92. Cabell v. Chavez-Salido, 454 U.S. 432, 440–47 (1982) (allowing California to maintain alienage distinctions for probation officers); Ambach v. Norwick, 441 U.S. 68, 78–80 (1978); *see Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1405–06 (1983) [hereinafter *Immigration Policy*]; Harold Hungjo Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 78 (1985).

93. *Ambach*, 441 U.S. at 76; Foley v. Connelie, 435 U.S. 291, 302 (1978).

94. *See supra* notes 42–46 and accompanying text.

95. *Ambach*, 441 U.S. at 78–79 ("Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." (citations omitted)).

Gun possession by itself appears to share none of these qualities, thereby validating its classification as a non-political activity. Yet, police officers, and perhaps probation officers, are generally required to carry firearms to assist with their enforcement of the state legislature's rules.[96] Aside from enforcement officers, the simple knowledge of the existence of armed citizens is likely to alter the behavior of state officials, especially when the state or citizen groups threaten to trample on guaranteed liberties.[97] Seen in this light, armed private citizens are the meta-enforcers of state norms because they discipline those tasked with disciplining the polity. Accordingly, gun possession must play some role in either reinforcing the coercive power of the state and altering individual behavior in accordance with that power or, alternatively, in disciplining the police power of the state. Indeed, a closer examination of gun possession within and outside of the official law-enforcement context reveals either that the political-function exception must include general gun possession, that the exception should be abandoned, or that it requires a case-by-case inquiry into the purpose of gun possession before a determination can be made about whether it falls under the political-function exception.

Armed citizens can and do utilize their right to bear arms consistent with the original, political understanding of the right: to help maintain the sovereign and geographic integrity of their state and nation. They do so through state-sanctioned means, such as law enforcement, but they also do so by guarding against governmental intrusions on liberty, disciplining law enforcement into peace-maintenance action, and aiding law-enforcement officials in effectuating policy. As an everyday reality, citizens who exercise their right to bear arms outside of the sanctioned context of law enforcement sometimes use their weapons as a method of extra-legal, extra-political enforcement of state-created legal norms. Before it was prohibited, dueling between white males represented one form of alternative dispute resolution for disagreements that the judicial system now handles.[98] More recently, armed citizens, such as the Michigan Militia, exercised their rights to train with firearms for potential domestic disturbances.[99] In the post-9/11 world, private civilian militia groups have once again gained notoriety as one

96. State-sponsored police forces with firearms were probably not contemplated at the time of the founding, as the first professional, regulated state police forces took shape fifty years after the Second Amendment was ratified. New York City's police department took shape in the mid-1800s. *See* Mission Statement for New York City Police Museum, http://www.nycpolicemuseum.org/html/museum-mission.html (last visited Jan. 31, 2007).

97. Williams, *supra* note 24, at 581. As an example, gun possession by civil-rights workers encouraged state law-enforcement officials to increase vigilance and maintain peace during that era. *Id.*

98. Cottrol & Diamond, *supra* note 54, at 1327–28.

99. *See* Welcome to MichiganMilitia.com, http://www.michiganmilitia.com (last visited Jan. 16, 2007).

method of enforcing federal and state policy.[100] Groups such as the Minutemen Civil Defense Corps have assigned themselves the responsibility of acting as "force-multipliers to assist their monumental task of turning back the tidal wave of people entering our country illegally."[101]

This call to protect the border involves the type of discretionary task that is a fundamental component of political-function activities. In fact, the Congressional Immigration Reform Caucus sent investigators to evaluate the effectiveness of the Minuteman Project.[102] The investigators found that while the official Border Patrol policy downplayed the effectiveness of the armed citizenry, individual officers appreciated the valuable contribution made by the Minuteman Project in decreasing unlawful immigration at the border.[103] Notably, a majority of the Minutemen wield firearms, and many are former law-enforcement and military personnel accustomed to asserting the discretionary, coercive power of the state.[104] Gun possession, as it turns out, is not so cleanly definable as either political or non-political.

True, citizen groups such as the Minuteman Project and other civilian militia groups comprise only a minute (some might say, fringe) segment of the gun-owning population. Arguably, the fact that only a small fraction of citizens use firearms in a political manner cannot transform the entire activity into a political right that the state may restrict only to citizens. Applying this same logic, however, not all public-school teachers are inculcating civic values into students. Teachers who are citizens may not share patriotic ideals about the United States, and a French teacher, whether a citizen or not, may find no room in her class to discuss American civic virtues.[105] The Court's naked assumption that all public school teachers exert the level of discretion that affects policy or sovereign functions is at best an idealized fiction.[106] *Ambach* and *Cabell* stretched this fiction beyond those with only a discretionary function by including occupations that had symbolic value vis-à-vis the community.[107] Stretching the logic of the political-function "exception" so far, as Justice Blackmun warned, threatens to

100. *See* Lara Jakes Jordan, *'Minutemen' to Patrol Arizona Border*, THE ASSOCIATED PRESS, Feb. 21, 2005, *available at* http://www.apfn.net/Messageboard/02-23-05/discussion.cgi.67.html.

101. *See* Chris Simcox, *Preface to Standard Operating Procedures for Minutemen Civil Defense Corps*, http://www.minutemanhq.com/hq/sop.php (last visited Jan. 16, 2007).

102. *See* FREDERICK A. PETERSON & JOHN E. STONE, RESULTS AND IMPLICATIONS OF THE MINUTEMAN PROJECT, FIELD REPORT TO CONGRESSIONAL IMMIGRATION REFORM CAUCUS (2005), *available at* http://www.minutemanhq.com/pdf_files/norwood_minuteman_report_61705.pdf.

103. *Id.* at 14.

104. *Id.* at 6; *see also* Charlie LeDuff, *Poised Against Incursions, a Man on the Border, Armed and Philosophical*, N.Y. TIMES, Aug. 14, 2006, at A16 (describing armed citizens, many ex-military personnel, who stand guard at the U.S.-Mexico border).

105. Ambach v. Norwick, 441 U.S. 68, 84 (1979) (Blackmun, J., dissenting).

106. *Id.* at 80.

107. *Immigration Policy*, *supra* note 92, at 1405.

swallow the rule that alienage classifications are reviewed under strict scrutiny.[108]

Moreover, the political-function exception is not only confronted with this internal hydraulic push to expand, but also external pressures that undermine the political exclusivity of citizenship. Non-citizens are excluded from the political process only in the formalistic sense of exclusion from the right to vote and hold public office. But aliens are not prevented from, and often assert their political participation by, campaigning, contributing to political causes and candidates,[109] engaging in public debate or protest, and inculcating civic values into their children, who may be citizens and future public officeholders, police officers, and teachers.[110] LPRs and other non-exempted aliens must register for the Selective Service and are conscriptable in the event of a draft.[111] The Supreme Court has described the act of "contributing to the defense of the rights and honor of the nation" as the "supreme and noble duty" of the citizen.[112] If Congress can now entrust so highly an esteemed "duty" and "obligation" of the citizen to LPRs, it is surely incongruous to exclude willing and qualified aliens from internal law-enforcement positions. A police officer enforces state-created norms, but so too does a soldier implement foreign affairs and military policy directly and forcefully. In sum, every one of these activities in which aliens participate is a discretionary activity that may often carry more political weight than the right to vote, let alone the right to teach in a public school. Yet despite the actual political import of the underlying activity, the labeling of it as political or not determines the ability of a state to exclude entire classes of people from important rights, benefits, and occupations.

Courts accept that alienage distinctions are sometimes justifiable under the assumption that citizens as a class are more knowledgeable about state and local laws, more assimilated to societal and political mores, and more loyal to state and federal sovereigns.[113] These assumptions fail to account for the fact that aliens come to this country to secure rights and benefits not

108. Cabell v. Chavez-Solido, 454 U.S. 432, 458 (1982) (Blackmun, J., dissenting).

109. Kostas A. Poulakidas, *The Trojan Horse of the 21st Century: Immigrants, Foreign Campaign Contributions, and International Politics*, 6 IND. J. GLOBAL LEGAL STUD. 341, 342–43 (1998) (chronicling the increasing phenomena of immigrant campaign contributions to influence candidate views and policy outcomes). But note that under relevant portions of the Bipartisan Campaign Reform Act of 2002, non-LPR aliens are prohibited from making contributions to federal, state, or local campaigns. 2 U.S.C. § 441e (2000 & Supp. IV 2004).

110. Koh, *supra* note 92, at 94. *But see* Rosberg, *supra* note 2, at 304 (arguing that, because many aliens come to the United States from countries that discourage active political participation, they may have little affinity for non-voting activities that nevertheless affect the political process).

111. *See* 50 U.S.C. app. § 453 (2000).

112. Arver v. United States (The Selective Draft Law Cases), 245 U.S. 366, 390 (1918).

113. Perkins v. Smith, 370 F. Supp. 134, 136–38 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976) (upholding alienage distinctions in jury service).

available elsewhere and thus are likely to take them seriously.[114] Data on criminal prosecutions reveals that non-citizen-offender rates are either comparable or less than citizen-offender rates, with the majority of non-citizen offenses related to immigration offenses (for which their non-citizen status uniquely handicaps them) or drug offenses.[115] Violent crime, including crime with weapons use, is disproportionately lower among non-citizen offenders, and non-citizens exhibit lower recidivism rates.[116] In addition, polls and surveys consistently indicate that native-born citizens possess an appalling lack of knowledge about national and state politics and law.[117] Finally, most LPRs have no intention of returning to their birth countries, having adopted the United States as their new home.[118] Given these facts, many of the concerns regarding knowledge, loyalty, or misuse can easily be addressed by means that would ameliorate gun-possession problems for citizens and non-citizens alike, such as loyalty affirmations, civics instructions, or safety courses.[119] Otherwise, blanket distinctions in gun laws are blatantly over- and under-inclusive with regard to the potential political or significant government function served by gun possession.

These internal and external pressures cast doubt on the exact parameters of political functions and require abandoning the political-function exception altogether. Given the malleability of the activities defined as political and the current utilization of firearms to fulfill discretionary policy purposes, the analysis of the right to bear arms under equal-protection review reveals deep ambivalence to the true nature of both

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114. Koh, *supra* note 92, at 55; *see also* T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 10–21 (1998) (reviewing empirical data regarding language and identity assimilation of immigrants in America).

115. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: NONCITIZENS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 1984–1994, at 1 (1996); JAY CONUI ET AL., JUSTICE DETAINED: THE EFFECTS OF DEPORTATION ON IMMIGRANT FAMILIES 6–9 (2004); John Hagen & Alberto Palloni, *Immigration and Crime in the United States*, *in* THE IMMIGRATION DEBATE 367, 375–82 (James P. Smith & Barry Edmonson eds., 1998).

116. *See supra* note 115; *see also* Susan B. Sorenson & Katherine A. Vittes, *Adolescents and Firearms: A California Statewide Survey*, 94 AM. J. PUB. HEALTH 852, 854 (2004) ("All else being equal, adolescents who were or whose parents were US citizens had substantially higher odds of having a firearm in the home; the latter group also had higher odds of having their own gun.").

117. *See* RON HAYDUK & MICHELE WUCKER, MIGRATION POLICY INST., WORLD POLICY INST., IMMIGRANT VOTING RIGHTS RECEIVE MORE ATTENTION (2004); Gregg Kruppa, *New U.S. Citizenship Test Will No Longer Be a Trivial Pursuit*, DETROIT NEWS, Feb. 13, 2006, *available at* http://detnews.com/apps/pbcs.dll/article?AID=/20060213/POLITICS/602130375/1024/POLITICS; National Constitutional Center, New Survey Shows Wide Gap Between Teens' Knowledge of Constitution and Knowledge of Pop Culture, http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCTeens'Poll.shtml.

118. *See* NAT'L PUB. RADIO, KAISER FAMILY FOUND., KENNEDY SCH. OF GOV'T, SURVEY ON IMMIGRATION IN AMERICA 5 (2004), http://www.npr.org/news/specials/polls/2004/Immigration/summary.pdf.

119. *See* Dorf, *supra* note 29, at 315.

citizenship and gun possession. If the activity (e.g., public-school teaching or firearm possession) is diverse enough to include people who exercise political functions and those who do not, and we accept that in many instances guns do aid in a sovereign or policy function (e.g., law enforcement or active citizen militias), then equal-protection analysis of alienage restrictions in gun laws cannot rely on a rigid and meaningless notion of political.

To the extent that the political-function exception is not abandoned and remains co-existent with alienage restrictions in gun law, courts should inquire into the purpose of an individual's gun possession before determining the constitutionality of the alienage restriction. Purposive evaluation of every individual's gun possession may appear to be a far-fetched idea, but it is one that has enjoyed some resonance in case law.[120] A comparative survey of state constitutional provisions reinforces the notion that jurisdictions have considered the purpose of gun ownership when protecting the right to bear arms. The constitutions of thirty states expressly protect the right to bear arms for self-defense;[121] eleven expressly protect property or home defense;[122] and seven expressly protect recreational gun use for hunting or sporting purposes.[123] Four states individually enumerate all four purposes of gun ownership—state defense, self-defense, property

120. In *People v. Nakamura*, for example, the Colorado Supreme Court in 1936 held the state's alienage restriction unconstitutional on the grounds that it disarmed aliens completely, without allowing exceptions for property protection or self-defense. People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936). The dissent argued that the court should remand the case to determine the purpose of the defendant's gun possession before overturning the indictment. *Id.* at 247–48. Only if it was determined on further factual development that defendant's possession was actually for self or property defense should the indictment be overturned. *Id.* The court also opined that Colorado may restrict hunting or killing of game by aliens, a position that would not withstand constitutional scrutiny today. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–22 (1948).

More recently, the Oregon Supreme Court, interpreting the state constitution's right-to-bear-arms provision, concluded that it limits the legislature's gun-regulating power only when the legislature infringes on the ability to defend self and property. State v. Hirsch, 114 P.3d 1104, 1112 (Or. 2005) (upholding state restrictions on possession by felons); *see also* OR. CONST. art. 1, § 27 ("[T]he people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[].").

121. Those states are: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *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) (citing a compilation of state constitutional provisions by Eugene Volokh).

122. Those states are: Colorado, Delaware, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Texas, and West Virginia. *Id.*

123. Those states are: Delaware, Nebraska, Nevada, New Mexico, North Dakota, West Virginia, and Wyoming. *Id.*

defense, and recreation—in their constitutions.[124] Perhaps most notably, a proposal by Pennsylvania Anti-Federalists during the ratification debates over the Bill of Rights included this specific language in lieu of the language of the Second Amendment: "[T]he people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game . . . ."[125]

These provisions and proposals demonstrate that governmental entities are capable of defining and distinguishing between the four major functions of gun ownership—state defense, self-defense, property defense, and recreation. One of those functions—defense of state (and nation)—is ultimately a political function in the sense that it is closely bound to the ability of a sovereign entity to define its political boundaries. Thus, a non-citizen's right to bear arms may be restricted (subject to rationality review) if that non-citizen intends those arms to serve those political functions, but cannot be restricted (subject to strict scrutiny) if the purpose is self-defense, property protection, or recreation. Indeed, many states that restrict general or concealed firearm possession to non-citizens simultaneously maintain exceptions for hunting or sport purposes.[126] Ironically, this system would penalize those non-citizens who, despite their legal status and inability to vote, possess the civic-minded desire to contribute to the well-being of the state.

In sum, the historical progression and contemporary jurisprudence relevant to equal-protection analysis reveal considerable tension regarding how firearms possession generally, and alien gun laws specifically, should be characterized. Any understanding of the gun right as a political right supports notions of gun rights as collective rights, as it would be intrinsically tied to the definition of the state. Such a reading, however, may justify increased state control over firearms outside of the citizenship context. Thus, building a coherent understanding of political rights and functions justifies alienage restrictions in gun laws only under a strong version of the political-function exception that would then allow greater governmental control over arms, even when not used in the political sense; conversely, this same understanding justifies dismantling those alienage distinctions, but only at the expense of undermining the existence of the political-function exception altogether.

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124. Those states are: Delaware, Nebraska, North Dakota, and West Virginia. *Id.*

125. THE DISSENT OF THE MINORITY OF THE CONVENTION (1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623–24 (Merrill Jensen ed., 1976).

126. *See, e.g.*, HAW. REV. STAT. §§ 134-2(d), 134-3(a) (1993); N.Y. PENAL LAW §§ 265.01(5), 265.20(4) (McKinney 2000 & Supp. 2006).

B. GUN POSSESSION AS A FUNDAMENTAL RIGHT

The tension between political or ideological commitments to greater or lesser gun control and the problems posed by the legal mechanisms that produce those outcomes would arise again if courts were to consider alien gun possession under a fundamental-rights rubric. A blanket rule of strict scrutiny for alienage restrictions in gun laws—despite the potential political nature of gun usage—finds support in theories of the right to bear arms as a natural or fundamental right of self-defense, bodily integrity, and resistance to criminal conduct.[127] If the right to bear arms is truly a fundamental right, then it would justify searching review across the board for alienage restrictions in gun laws.[128] The Supreme Court, however, has suggested that the right is not fundamental, upholding restrictions on weapons that do not bear "some reasonable relationship to the preservation or efficiency of a well regulated militia."[129] Nevertheless, historical persecution and contemporary prejudice could necessitate reading the right as a fundamental right for politically and physically vulnerable non-citizens, thereby requiring strict scrutiny.[130]

Civil-liberties activists have noted that firearms regulations have "become dumping grounds for revenge against unpopular groups."[131] In the international context, it has been well documented that the Nazis used gun control to weaken the political strength of Jews.[132] Similarly, on the domestic front, overt and de facto racial restrictions on the right to bear arms during the nineteenth century ensured that newly freed slaves would remain defenseless against an armed, and often hostile, white populace.[133] Under these circumstances, gun ownership was a virtual necessity for African Americans to survive, defend property, and participate in the political

127. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 89 (1992); Salter & Kates, *supra* note 9, at 186–90. Liberties that are considered critical and important to American democracy are deemed "fundamental rights" by the Supreme Court and are subjected to strict scrutiny when those liberties are inequitably distributed. *See* CHEMERINSKY, *supra* note 19, § 10.1. Examples of such rights are voting and access to courts. *Id.*

128. *See, e.g.*, People v. Nakamura, 62 P.2d 246, 247 (Colo. 1936) (striking down alienage restriction in gun laws because it deprived the alien of right to defend self and property).

129. United States v. Miller, 307 U.S. 174, 178 (1939); *see also* United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984) (citing *Miller* for the proposition that "the right to possess a gun is clearly not a fundamental right").

130. *Cf.* Wishnie, *supra* note 30, at 725–28 (developing a theory of "extraordinary speech" and arguing that immigrants' right to petition must be specifically protected).

131. David T. Hardy & Kenneth L. Chotiner, *The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibition*, *in* RESTRICTING HANDGUNS, *supra* note 9, at 208; *cf.* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 841–60 (1997) (cataloging historical link between domestic disturbances and harsh immigration laws).

132. Alonso, *supra* note 6, at 24–26.

133. Cottrol & Diamond, *supra* note 60, at 344–49.

process.[134] After the turn of the century, as young blacks returned from wielding arms for the United States in World War I, they found themselves stripped of their firearms domestically when they attempted to fight for equal rights at home.[135] Armed black men prosecuting war abroad were innocuous, but armed black men agitating at home were dangerous.

Just as a culture of grotesque racial hierarchy informed by slavery served as the basis for racially restrictive gun laws before and after the Civil War, the pre- and post-World War I culture of nativism served as the basis for alienage restrictions in gun laws appearing at the turn of the twentieth century.[136] In the period from 1870 to 1934, handgun prohibition in general, and alien possession laws in particular,[137] dramatically increased due to popular sentiments regarding immigrants' proclivity to laziness, inherent violence, anarchy, and diminished mental capacity.[138] Ironically, it was politically secure citizen groups who imagined threats to their personhood, which then led to alienage restrictions in gun laws.[139] The mid-twentieth century debates over Hawaii's then-nascent constitution reveal this dynamic. In a 1996 case attempting to decipher whether the state constitution protected an individual or collective right, the Hawaii Supreme Court quoted extensively from the Proceedings of the Hawaii Constitutional Convention of 1950, specifically noting one representative's insistence that the government must protect U.S. citizens' right to bear arms against the "illegally armed minority."[140]

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134. *Id.* at 345 (stating that possessing weapons "was vital as a means . . . of preventing virtual reenslavement of those formerly held in bondage"); *see also* AMAR, *supra* note 48, at 265 (noting political support in the North for African Americans' civil rights and need to own guns).

135. *See* Cottrol & Diamond, *supra* note 60, at 353–55 (noting that gun-control statutes aimed at disarming African Americans and discussing the grave consequences that occurred when African Americans attempted to defend their rights by using guns).

136. *See supra* notes 84–89 and accompanying text.

137. *See supra* notes 84–89 and accompanying text.

138. *See supra* notes 84–89 and accompanying text.

139. *See, e.g.*, State v. Mendoza, 920 P.2d 357, 366–67 (Haw. 1996); *cf.* Cottrol & Diamond, *supra* note 54, at 1329 (arguing that analytical construct of Arkansas' nineteenth-century gun laws "mask[ed] concerns respecting the carrying of weapons by the state's black citizens").

140. *Mendoza*, 920 P.2d at 366–67 (quoting Committee of the Whole Rep. No. 5, *in* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII of 1950, at 14–15). Representatives from the convention stated:

> BRYAN: . . . I think the reason that this is in here is because we don't want to see the legislature pass a law absolutely prohibiting the use or the ownership of firearms by the citizens. You'll find in history that it is the illegally armed minority that actually we're faced with as far as the trouble is concerned. The legally armed majority are the ones that should have the right to protect themselves and I believe that this provision gives it to them . . . .
>
> FUKUSHIMA: . . . If we did not have such a section in, the legislature can very well go ahead and discriminate non-citizens from citizens. This has been attempted

Conversely, from the perspective of racial minorities, the possession of guns by this non-virtuous citizenry—former slave masters, militia men participating in Klan-related activity, law-enforcement personnel with racist preconceptions, and other nativist forces—was exactly what necessitated their own possession.[141] In a perversion of Madison's famous expanding-political-sphere argument in *The Federalist 10*,[142] this culture of mutually reinforcing fear and violence required ever-increasing populations of gun owners. As Professor David Williams notes, people who own guns for self-defense do not associate their ownership with participation in an organized setting, but rather with fear of others owning guns.[143] For racially distinct communities, each group justified its own ownership rights by reference to another group's ownership.[144]

The obvious problem is that the political majority will always outgun the politically vulnerable minorities in this arms race. This same cycle of citizen paranoia and alien fear threatens to replicate itself with certain immigrant groups today; the only difference is the substitution of the target ethnic group. In one of the vignettes in *Crash*, the Oscar-winning film about multi-ethnic race relations in contemporary Los Angeles, a foreign-born Middle-Eastern shopkeeper, after receiving repeated ethnic and xenophobic taunts and threats, purchases a handgun to protect himself, his family, and his store.[145] When his store is subsequently looted and vandalized, he misguidedly discharges his weapon in an attempt to exact revenge on a blameless Mexican American locksmith. While the story is Hollywood fiction, the sentiment and fear is not.[146] As Professors Leti Volpp and Muneer Ahmad detail, in post-9/11 America, Middle Eastern and South

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

Id. (emphasis omitted).

141. Cottrol & Diamond, *supra* note 60, at 357–58.

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

143. Williams, *supra* note 24, at 592. Consider also the popular bumper sticker that reads: "If you outlaw guns, only outlaws will have them."

144. David Hemenway, Sara J. Solnick & Deborah R. Azrael, *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 124–28 (1995) (noting that the majority of the population—including gun owners—feel less safe when others acquire guns).

145. CRASH (Lions Gate Films 2005).

146. *See* Human Rights Watch, *"We Are Not the Enemy" Hate Crimes Against Arabs, Muslims, and Those Perceived to Be Arab or Muslim After September 11*, 14 HUM. RTS. WATCH, No. 6 (G), 11–24 (2002); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism?,"* 16 PACE INT'L L. REV. 19, 30–32 (2004) (noting that 82,581 young Arab men dutifully obeyed a Department of Justice order to appear at immigration offices, but none were charged with terrorism-related crimes).

Asian Americans have been the victims of hundreds of hate crimes and several violent deaths.[147]

Notions of perceived foreignness, perceived alienage, and perceived disloyalty underlie the distrust and racial profiling of "Arab-looking" persons.[148] The recurring and wrong-headed attempts by armed citizens to stop or deter terrorism on the domestic front could soon lead to those "Arab-looking" immigrant groups arming themselves for self-preservation.[149] As studies of gun acquisition have noted, sales of firearms in the United States increased after the 1993 World Trade Center attack and spiked again after the 2001 attacks.[150] Since these weapons are likely not going to be taken into foreign theatres of war by their purchasers, the idea seems to be that they are necessary for national, state, and personal defense from domestic terrorist threats. When kept domestically, terrorism-related xenophobia has and will implicate gun use in identifiably racial, ethnic, and nationality-based violence.[151]

Here, the political nature of the right to bear arms as evidenced by the African American experience comes full circle. Gun possession protected political rights for African Americans by ensuring the more fundamental right of physical self-protection. Thus, committing to a strong right-to-bear-arms position based on self-defense principles is in tension with concomitant beliefs that only citizens should possess guns. If self-defense and bodily integrity have any valence as fundamental rights, then at a minimum the means of securing the right to bear arms should not be unequally denied to those who most require it. Hence, guaranteeing gun rights for vulnerable

147. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265–67 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1580–82 (2002).

148. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 340 (2002); Volpp, *supra* note 147, at 1584.

149. For an example of perceptions of links between firearms, terrorism, and illegal immigration, see the Guns Unified Nationally Endorsing Dignity website at http://guned.com (last visited Dec. 12, 2005) (linking illegal immigration to terrorism and encouraging armed citizens to help deter the threat) (on file with the Iowa Law Review); *see also* Michigan Militia, http://www.michiganmilitia.com (last visited Jan. 16, 2007) (same); John Perazzo, Illegal Immigration & Terrorism, http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=5147 (last visited April 6, 2007); The Threat of Terrorism Is from Illegal Aliens, http://www.eagleforum.org/psr/2001/oct01/psroct01.shtml (last visited April 6, 2007).

150. Arie Bauer et al., *A Comparison of Firearms-Related Legislation on Four Continents*, 22 MED. & L. 105, 110 (2003) (chronicling a thirty-percent increase after 1993 attacks); CATO INST., GUN SALES JUMP AFTER SEPTEMBER 11 (2001), *available at* http://www.cato.org/dispatch/11-06-01d.html.

Notably, not only terrorist attacks, but nature-created, human-intensified, domestic crises such as Hurricane Katrina also appear to cause an increase in gun sales. Sasha Talcott, *Halted Gun Sales Infuriate Customers*, BOSTON GLOBE, Sept. 11, 2005, at A19 (describing post-Katrina handgun frenzy in Louisiana).

151. *See, e.g.*, Human Rights Watch, *supra* note 146; Volpp, *supra* note 147, at 1578.

groups strikes close to the core of the Second Amendment's purpose and historical progression. Originally intended as protection for the states from oppressive central-government tyranny, and then arguably as individual citizens' protection from state tyranny, the fundamental-rights reading would now suggest that gun rights are essential to aliens' equal bodily protection from citizen tyranny.

C. THE INDIVIDUAL-RIGHT VIEW AND ALIENAGE RESTRICTIONS

Even if the right to bear arms is not fundamentally necessary to vulnerable-group protection, non-citizens may be part of "the people" who can assert the right under an individual-right interpretation of the Second Amendment.[152] Although not neatly covered by the equal-protection doctrine, defining the parameters of "the people" in the Second Amendment and the Constitution generally implicates ideals of inclusiveness and equitable access to constitutional rights. One of the major battles in legal scholarship and popular discourse rages over identifying the boundaries of the right to bear arms, and specifically, whether the right to bear arms guaranteed by the Second Amendment is individual or collective.[153] To the extent the Amendment protects only a collective right—i.e., a right inextricably tied to a state's ability to maintain a militia—gun possession becomes a paradigmatic sovereign function at the heart of the state's ability to define its political community. If, however, the Amendment protects an individual right of possession for any purpose,[154] alienage restrictions pose problems of inequitable treatment depending on the breadth of the term "the people."

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152. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."). The individual-rights perspective posits that individuals retain the ability to enforce the Second Amendment when governmental restrictions unreasonably obstruct an individual's gun ownership or possession. Under this view, the first clause of the Amendment (the preamble or justification clause) helps elucidate the need for the right, but it does not absolutely constrain the right in any specific manner. *See* Volokh, *supra* note 24, at 807 ("I believe the justification clause may *aid* construction of the operative clause but may not *trump* the meaning of the operative clause . . . ."). The Second Amendment's second clause (the operative clause) then, could be read much like the First Amendment's speech clause: a robust, individually enforceable right that only tolerates limited and necessary restrictions. The First Amendment does not absolutely protect defamation, false advertising, fighting words, or obscenity; nor does it allow for shouting "fire" in a public theater.

153. *See* Dorf, *supra* note 29; *supra* note 24; *see also* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1204–24 (1996); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1737–39 (1995).

154. *See* U.S. Dep't of Justice, Memorandum Opinion for the Attorney General, Whether the Second Amendment Secures an Individual Right (2004), *available at* http://www.usdoj.gov/olc/secondamendment2.htm (arguing that the Second Amendment protects an individual right to bear arms).

Under an individual-rights view, the only meaningful restraint in the text would be the class of individuals who could enforce the right. The Second Amendment, like the First, Fourth, Ninth, and Tenth Amendments, does not structure rights along a citizen/non-citizen dichotomy, instead maintaining that rights of "the people" to keep and bear arms "shall not be infringed."[155] Along with the Federal Constitution, seventeen state constitutions also formulate the right to bear arms with reference to "the people."[156] The remaining states frame the right as one retained by "citizens"[157] or "persons."[158] The alienage restrictions in state gun laws, however, are only loosely connected with how the right is framed in the state constitutions. Notably, of the eighteen constitutions that limit the right to "citizens," only nine states maintain actual statutory restrictions on non-citizen gun possession.[159] Similarly, nine states that formulate the right as one retained by "the people" maintain some form of alienage classification in their gun laws.[160] Of the remaining five states with gun laws conditioned on citizenship, one frames the right as held by "persons," one uses the terminology "all men," and three are states with no arms-related constitutional provisions.[161] Thus, in the fifty-one constitutions in effect, usage of the word "citizen" in a constitutional provision does not necessarily correlate with an alienage distinction in practice. However, usage of either "citizen" or "the people" does correlate with the most restrictive definitions of the class to whom the right applies.

If "the people," like "citizens," represents the most limited formulation of who may possess or carry weapons, the most obvious question is who exactly are the people that can assert this individual right to bear arms? Although never specifically considered in the context of the Second Amendment, the question is a hotly debated one that most recently came before the Supreme Court in a case addressing the Fourth Amendment's guarantee that "the people" shall be secure from unreasonable searches.[162]

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155. U.S. CONST. amend. II.

156. Use of "the people": Alabama, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Massachusetts, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Utah, Vermont, Virginia, and Wisconsin. For this note and *infra* notes 157–58, see Volokh, *supra* note 121.

157. Use of "citizen" or "every citizen": Alabama, Arizona, Alaska, Connecticut, Illinois, Louisiana, Maine, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Washington, and Wyoming. One state, Kentucky, formulates the right as one held by "all men," a vestige of the state constitution of 1891.

158. Use of "person," "every person" or "persons": Colorado, Delaware, Michigan, Montana, Nebraska, New Hampshire, and West Virginia. One state, North Dakota, frames the right as one of "individuals."

159. *See supra* notes 11–14.

160. *See supra* notes 11–14.

161. *See supra* notes 11–14.

162. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 267 (1990) (ruling that the Mexican citizen apprehended in Mexico at the behest of U.S. federal law-enforcement officials, brought into the United States to be criminally tried in a U.S. court under U.S. law, and whose

The Supreme Court, in *United States v. Verdugo-Urquidez*, read this potentially expansive language narrowly, declaring that "the people" of those amendments refers to a class that "[is] part of a national community or [has] otherwise developed sufficient connection with this country to be considered part of that community."[163] It appears likely that the rights entailed in the amendments inure to a class more inclusive than just loyal, participatory citizens, even under the narrow reading in *Verdugo-Urquidez*. In fact, before *Verdugo-Urquidez*, the Supreme Court already had ruled that non-citizens within the United States, including undocumented aliens, received Fourth, Fifth, Sixth, and Eighth Amendment protections in criminal proceedings and that LPRs receive First Amendment protections.[164]

If "the people" does not refer to the binary citizen/non-citizen divide, to what specific division does it refer? Although there is no definite answer to the question, it would appear to include U.S. citizens and then some portion of aliens, possibly both legal and undocumented, that has developed these "sufficient connections." Here, many state alien gun regulations posit a notable incongruity because they demarcate a hard citizen/non-citizen line for arms bearing. But, according to the Supreme Court, the same rights that extend to citizens must also extend to all non-citizens who can demonstrate sufficient connection to the national community. At a minimum, this would have to include LPRs who pay taxes, all aliens who register for selective service, and depending on the prevailing version of consensual citizenship, perhaps non-immigrant or undocumented aliens as well. In any case, while the line of sufficient connection may survive scrutiny when drawn at non-immigrant aliens, it may not survive when drawn brightly at non-citizenship.

After *Verdugo-Urquidez*, it is unclear exactly who the other non-citizens are that benefit from these constitutional guarantees. Although the exact contours of Second Amendment beneficiaries remain indeterminate, my discussion illustrates that the individual-rights proponent who also endorses alienage restrictions would have to be committed to a highly restrictive reading of the Amendment's text—a reading at odds with the Court's most constrained notion of "the people" and with equality ideals.

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residence in Mexico was subsequently searched without a warrant, was not one of "the people" protected by the Fourth Amendment); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . .").

163. *Verdugo-Urquidez*, 494 U.S. at 265. *But see* Wishnie, *supra* note 30, at 681 & n.74 (cataloging legal scholarship and case law criticizing *Verdugo-Urquidez*).

164. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896) (declaring that non-citizens are covered by the Due Process Clause and must be accorded Fifth and Sixth Amendment rights); Bosniak, *supra* note 91, at 1061 nn.42–43 (citing cases in support).

II. FEDERAL-POWER CHALLENGES TO ALIENAGE DISTINCTIONS IN GUN LAWS

Alienage restrictions, outside the context of naturalization and admissions procedures, traverse an area of regulatory interest (e.g., welfare and firearms) and also single out a class of persons (non-citizens). Understood primarily as statutes affecting regulatory interests, courts may engage in the analysis detailed in Part I using domestic legal norms related to personhood. However, courts have sometimes chosen to assess alienage restrictions by focusing on the statute's classification of "non-citizens" and therefore have evaluated those laws under the structural framework of federal power. Similar to the equal-protection context, the federal-power framework fails to account for the realities of state and federal interaction, foreign policy, and firearms, resulting in the disutility of the judicial metric. More fundamentally, reliance on the locus of decision-making as the methodology by which to determine non-citizens' rights reifies the unwarranted deference awarded to the federal government when acting in its role as gate-keeper of the national community.[165]

Under the broad umbrella of federal power, courts can compare the structural-power dilemmas in laws with alienage restrictions along three dimensions: (1) preemption of state law by comparison to positive federal law in the area of regulatory interest (e.g., state firearms law compared to federal firearms law);[166] (2) preemption of state law by comparison to positive federal law in the area of immigration and non-citizens; or (3) invalidation of state law by reference to a purportedly exclusive area of

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165. Legomsky, *supra* note 24, at 307–10; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 275–77; Wu, *supra* note 25, at 42, 47–48.

166. Based on the Supremacy Clause of the U.S. Constitution, the preemption doctrine requires that even when a state law is enacted within an acknowledged state power, it must yield if it "interferes with or is contrary to federal law." U.S. CONST. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ."); Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (explaining the preemption doctrine's basis in the Supremacy Clause). *But see* Gardbaum, *supra* note 20, at 813–14 (arguing that preemption is not based on the Supremacy Clause and that recognizing the disconnect will have significant implications for preemption law).

In general, courts divide preemption into express preemption, which occurs when a statute on its face expresses congressional intent to preempt vel non, and implied preemption, which occurs when Congress is silent as to preemptive scope. *Gade*, 505 U.S. at 98. Preemption has three recognized varieties: conflict, obstacle, and field. *Id.* Conflict preemption occurs when dual compliance is a physical impossibility; obstacle or "impeding federal purpose" preemption occurs when state regulations frustrate achievement of federal purposes and objectives; field preemption occurs when the existing federal regulatory scheme is so pervasive or the federal interest is so dominant that the federal scheme is presumed to occupy the area and preclude state regulation. *See, e.g., id.*; Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141–42 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 235–36 (1947); Hines v. Davidowitz, 312 U.S. 52, 62–69 (1941); CHEMERINSKY, *supra* note 19, § 5.2, at 378 ("Although these types of preemption are presented as distinct categories, in practice they often overlap."); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 205–06.

federal power over foreign affairs and non-citizens, even in the absence of positive federal law.[167] The Foreign Commerce, Treaty, and Naturalization Clauses of the Constitution presumptively create federal exclusivity in foreign affairs and immigration.[168]

Although these three ways in which federal power impacts alienage restrictions require different substantive analyses, all share two common features that justify consideration under the same rubric. First, all three require a court to decide that a statute that bridges regulatory interests, non-citizens, and potential foreign-policy consequences is primarily or quintessentially about one of those areas. Second, all three require courts to separate matters that are "foreign" from those that are "local" for purposes of determining which level of government is uniquely competent to legislate in the area. Both of these quandaries defy sensible and predictable judicial decision-making. Moreover, any choice a court makes with regard to either question demonstrates commitment to one set of constitutional values to the exclusion of other, important constitutional values. As this Article argues, however, there is no persuasive justification for understanding alienage restrictions as immigration or foreign-affairs related, especially in the context of firearms law.

On the *federal* side, choosing between domestic and foreign labels for the statute creates a dispositive difference in the outcome of a case. If a court deems a federal law, such as a federal alien gun law, a firearms law, domestic legal norms would govern the alienage restriction—most notably equal-protection norms—and would spawn the debates detailed in Part I. Conversely, if a court characterizes the law as an immigration or foreign-affairs statute, it will instead leniently defer to the political branches' authority.[169] Thus, the choice of the characterization—as either a domestically focused firearms law (hence, potentially strict equal-protection scrutiny) or an immigration law (hence, deference to federal power)—is outcome determinative for federal law.

On the *state* side, the question of which doctrine to apply—equal protection or federal preemption—hinges on the characterization of the statute, which can again be outcome determinative. Categorization of an alien gun statute as a firearms law either leads to an application of equal-

167. *See* CHEMERINSKY, *supra* note 19, § 3.5. Analytically, this type of federal-power analysis is analogous to Dormant Commerce Clause analysis, in which state laws with substantial effects on interstate commerce are invalidated even in the absence of contradictory or conflicting federal law-making. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978).

168. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . ."); *id.* art. I, § 8, cl. 4 ("Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *id.* art. II, § 2, cl. 2 ("[The President shall] have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .").

169. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (upholding gender distinction in a federal immigration statute); Mathews v. Diaz, 426 U.S. 67, 79–81 (1976) (upholding alienage distinction in federal welfare law).

protection and/or a lax preemption inquiry. Indeed, the few state cases that have upheld alienage restrictions in state firearms regulations have done so by focusing on federal power and specifically assessing the interplay between state gun prohibitions and federal gun prohibitions.[170] These courts chose not to treat alien gun laws as immigration laws. Doing so would generally lead to bypassing equal-protection inquiry altogether and invalidating the law as an intrusion on the exclusive federal immigration power.[171]

Below, I first analyze *state* alien gun laws as firearms laws and then as immigration or foreign-affairs laws, concluding that under either formulation federal-power principles do not sufficiently account for the descriptive reality of foreign affairs and firearms to justify their continued use as a judicial metric. In the larger context of governmental regulation of non-citizens, my discussion highlights the problems inherent in attempting to classify laws as either regulating domestic affairs or foreign affairs, against a backdrop of highly intermingled state and federal action with regard to both domestic and national issues. With regard to foreign-affairs-based preemption, I argue that the structural power components of the Second Amendment provide a specific reason to abandon federal-preemption analysis. As a by-product of this obfuscation between the domestic and foreign spheres and continued reliance on a presumed federal power in the area of immigration and foreign affairs, courts have been free to abandon the general personhood norms, such as equal protection,[172] that should apply when persons are denied rights or benefits.

A. *Federal Power and Alien Gun Laws as Gun Laws*

Because state alien gun laws involve both domestic- and foreign-affairs issues, preemption may occur via reference to either the federal firearms schemes or federal foreign policy. When understood solely as gun laws, courts assess these statutes against the federal firearms scheme.[173] While the outcome in such an inquiry is likely non-preemption, my analysis reveals the

170. State v. Vlacil, 645 P.2d 677, 680–81 (Utah 1982); State v. Hernandez-Mercado, 879 P.2d 283, 288–89 (Wash. 1994).

171. *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–19 (1948); Hines v. Davidowitz, 312 U.S. 52, 65–69 (1941).

172. *See Hernandez-Mercado*, 879 P.2d at 290–91. In *Hernandez-Mercado*, the court stated that:

> The State claims that [the statute] is necessary to promote a compelling interest in public safety. . . . The State's argument is weak, but so is [petitioner's] argument on equal protection of the laws. In any constitutional challenge a statute is presumed constitutional unless its unconstitutionality is proved beyond a reasonable doubt.

Id. at 290 (citations omitted); *see also Vlacil*, 645 P.2d at 680 (responding to an equal-protection claim by stating, "[t]his Court has previously held that the statute under which defendant was convicted is a proper exercise of police power by the state").

173. *Vlacil*, 645 P.2d at 679.

fallacy of dividing a statute into its constituent parts for purposes of federal-power analysis.

Congress specifically contemplated concurrent state firearm regulation and therefore enacted a preemption or savings clause with the Gun Control Act.[174] Section 927 of the federal criminal code provides in relevant part that federal firearms regulation should not be construed as indicating a congressional intent "to occupy the field" to the exclusion of state law "unless there is a direct and positive conflict between [state and federal law] so that the two cannot be reconciled or consistently stand together."[175] In effect, § 927 declares that only conflict-preemption, and not field-preemption, claims are viable for gun laws.[176]

Viewed solely as a firearms law, the savings clause appears to immunize state gun laws with alienage classifications from preemption. Statutes and opinions confirm that gun regulation is an area of joint federal and state concern, but one that in the balance falls clearly within traditional state police powers and will not lightly be tread upon by the federal commerce power.[177] Outside the context of alienage classifications, generally applicable state and local gun regulations have consistently survived preemption attacks.[178]

Within the aliens and guns context, federal law criminalizes possession and transport by undocumented aliens, non-immigrant aliens, and those who have renounced citizenship.[179] State gun regulations tend to restrict those categories and more.[180] Arguably, the federal legislation intended to create increased state prohibitions.[181] A preemption problem would only arise if states decreased restrictions and expanded gun rights to those federally prohibited classes of non-citizens, placing the two statutes in direct conflict.

The difficulty with this logic, however, is that it inevitably boils down to whether Congress knew the precise scope of what it was attempting to

174. 18 U.S.C. § 927 (2000) ("Effect on State Law").

175. *Id.*

176. See *supra* notes 166–67 and accompanying text for an explanation of field and conflict preemption.

177. United States v. Lopez, 514 U.S. 549, 561–63 (1995); Richmond Boro Gun Club, Inc. v. New York, 896 F. Supp. 276, 282–83 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 689 (2d Cir. 1996); *cf.* Printz v. United States, 521 U.S. 898, 918–25 (1997).

178. *See, e.g.*, Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996) (finding no preemption of state tort claims by federal law); *Richmond Boro Gun Club*, 896 F. Supp. at 285–89 (rejecting a preemption claim against a New York City law that forbade certain assault weapons within the city).

179. *See, e.g.*, 18 U.S.C. § 922(d)(5), (d)(7), (g)(5), (g)(7) (2000).

180. *See supra* notes 11–14.

181. *See* Oefinger v. Zimmerman, 601 F. Supp. 405, 409–10 (W.D. Pa. 1984), *aff'd*, 779 F.2d 43 (3d Cir. 1984) (stating that the Gun Control Act intended to assist state firearm regulation and encourage adoption of more stringent gun-control laws).

preempt. To rephrase this as a question, did Congress intend or anticipate § 927 to apply specifically to more stringent alienage restrictions in state law? Courts "often look to implicit evidence of congressional intent in interpreting the *scope* of the preemption clause, or in ascertaining intended preemptive scope beyond the preemption clause" when answering this question.[182]

The preemption or savings clause in the federal firearms law reveals general federal intent regarding state law, but it does not reveal much, if anything, about Congress's intent regarding gun laws that have ancillary or direct effects on immigration. Indeed, a survey of the legislative history of the 1968 Gun Control Act and the 1993 Brady Bill amendments to the Act reveals that Congress never specifically considered the topic of immigrant firearm possession in its appraisal of potential preemption.[183] Discussion regarding preemption focused on the extent of the regulation authorized by the interstate-commerce power and how that power would interact with state police powers.[184] While this evidence is not conclusive, it does tend to mute the blanket applicability of § 927, especially when gun laws impact an ostensibly exclusive area of federal power. At the very least, my analysis shows that treating state gun statutes with both domestic and foreign implications solely as issues of local regulation rests on an uneasy fiction about congressional intent.

B. FEDERAL POWER AND ALIEN GUN LAWS AS IMMIGRATION LAWS

Courts could alternatively choose to understand laws that affect both a local regulatory area (e.g., firearms) and non-citizens as foreign-affairs or immigration statutes. Doing so necessitates conducting federal plenary-power analysis. Ultimately, this only exacerbates the problem of selecting the proper legal doctrine with which to assess the statute's constitutionality based on a distinction between foreign and domestic affairs. I conclude that even against a plenary-power standard, the realities of federal and state national-security regulation and firearms laws should disfavor the use of federal power to invalidate these statutes. My conclusion allows for greater state control in these areas, a result at odds with established notions of broad deference to federal regulation in matters affecting non-citizens.

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182. Goldsmith, *supra* note 166, at 206 (emphasis added).

183. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993); *A Bill to Provide for a Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearing Before the Subcomm. on the Constitution of the S. Comm. of the Judiciary*, 101st Cong. (1991), *microformed on* Cong. Info. Serv. No. 91-S521-20; *Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. (1991), *microformed on* CIS No. 91-H521-62; *1993 House Hearings*, 103d Cong. 239; *Hearings on S. 300, 552, 580, 674, 675,.678, 798, 824, 916, 917, 1007, 1094, 1194, 1333 and 2050 Before the S. Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 90th Cong. (1967), *microformed on* CIS No. 90-S1833-1.

184. *See supra* note 177 and accompanying text.

In the context of foreign affairs and immigration, the *federal* political branches are often described as having plenary power.[185] That power largely immunizes federal actions from judicial review and significantly impacts the federalism balance.[186] Courts will often find state laws that directly impact immigration or foreign affairs preempted as a matter of field, obstacle, or dormant preemption principles, even in the absence of federally enacted positive law.[187] I leave discussion of the broad discretion afforded *federal* alienage distinctions under the plenary-power doctrine for Part III.A.

1. Distinguishing "Foreign" and "National" from "Domestic" and "Local"

There are several significant, although ultimately unpersuasive, reasons to believe that state alien gun laws should be preempted and invalidated as entrenching upon federal immigration or foreign-affairs powers. Accepting the following rationale for preemption showcases the stark disparity between outcomes under domestic, as opposed to foreign-affairs, federal schemes. First, because the Constitution expressly assigns power over naturalization to Congress,[188] state laws that encourage or discourage either entry into the United States or naturalization will likely be preempted.[189] State laws disincentivizing immigration are unremarkable in their unconstitutionality because they demonstrate both a bare desire to discriminate and they infringe on the core of federal primacy over immigration.[190] The flip side of the coin—providing incentives to naturalize (as opposed to discouraging entry)—also fails as a justification for state alienage distinctions.[191] These cases are fairly easy to resolve: both kinds of state laws eradicate any meaningful ability to maintain uniformity over naturalization at the federal level.[192]

185. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

186. *Compare* Mathews v. Diaz, 426 U.S. 67, 84–85 (1976) (upholding federal alienage classification in welfare benefits), *with* Graham v. Richardson, 403 U.S. 365, 375–80 (1971) (striking down state alienage classifications in welfare benefits); *see also* Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

187. *See supra* notes 166–70 and accompanying text; *see also* Hines v. Davidowitz, 312 U.S. 52, 68–70 (1941) (stating that although it is possible to comply concurrently with federal immigration regulations and state alien-registration requirements, the state statutes are preempted by federal exclusive power in the field).

188. U.S. CONST. art. 1, § 8, cl. 4.

189. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 10–11 (1977) (striking down a New York bar on financial assistance in higher education to resident aliens).

190. Examining Bd. of Eng'rs v. Flores De Otero, 426 U.S. 572, 605 (1976) (invalidating Puerto Rico's prohibition against non-citizens obtaining private civil-engineering licenses when Puerto Rico proffered entry deterrence and naturalization incentives as justifications).

191. *See Nyquist*, 432 U.S. at 11.

192. U.S. CONST. art. I, § 8; *Nyquist*, 432 U.S. at 11.

Relatedly, the Supreme Court, in *Traux*, *Takahashi*, and *Graham*, held that federal plenary power preempted state laws that so closely affected the very existence and livelihood of non-citizens after lawful entry that they were tantamount to denying entry.[193] These cases suggest any regulation of firearms abridging non-citizens' livelihood runs afoul of federal prerogatives to allow non-citizens residence and work opportunity. Under this rationale, occupations requiring gun possession could not be denied to aliens,[194] putting this analysis at odds with the political-function logic barring aliens from positions that require firearms.

Second, federal power may preempt state firearms laws if those laws create foreign-relations consequences.[195] Alexander Hamilton, in *The Federalist No. 80,* warned of the possibility of state criminal sanctions galvanizing negative international responses and recommended federal solutions to such situations.[196] One could argue federal law preempts alienage distinctions in state firearms regulation because foreign nations may perceive them as a slight against their subjects thereby causing international-relations problems.[197] This may especially hold true when the non-citizens are religiously discrete and racially identifiable, in which case state alienage restrictions in gun laws promote the perception that a foreign nation's subjects cannot adequately defend their homes, families, or themselves in the face of an armed American citizenry with religious or ethnic prejudices.[198] Congress itself was sensitive to these potential foreign-

193. Graham v. Richardson, 403 U.S. 365, 378–80 (1971) (striking down state regulations restricting welfare benefits to citizens); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–19 (1948) (striking down a state regulation restricting the ability of non-citizens to obtain commercial fishing licenses); Truax v. Raich, 239 U.S. 33, 40–42 (1915) (striking down state regulation mandating private employers hire minimum percentages of natural-born citizens).

194. In some cases, this might require invalidating the entire provision, as with Kentucky's ban on non-citizens working as firearms-safety instructors, or it might require invalidating the alienage provisions to the extent they prevent earning a livelihood in occupations that necessitate firearms. Examples of such occupations could involve police officers (subject to the viability of the political-function exception), private security officers, and ranchers.

195. *See* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (preempting an Oregon succession law that denied rights to aliens from Eastern Bloc countries because of foreign-relations concerns).

196. THE FEDERALIST NO. 80, at 474–76 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The States . . . are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union . . . [t]he peace of the WHOLE ought not to be left at the disposal of the PART.").

197. *Id.*; *see also* Hines v. Davidowitz, 312 U.S. 52, 62–65 (1941) (noting national and international consequences of individual state action); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 141–42 (1994) (arguing that in *Hines*, the Court conflated treatment of aliens with the prospect of war).

198. *See, e.g., Beyond 9/11*, THE STATESMAN (Calcutta, India), Sept. 22, 2002, *available at* 2002 WLNR 7602103 (discussing Indians' reactions to post-9/11 hate crimes and U.S. immigration rules); *cf.* Volpp, *supra* note 147, at 1591–95 (discussing and comparing attitudes toward Japanese-Americans during World War II and attitudes toward Arab-Americans currently).

relations consequences when it enacted selective-service provisions that exempt certain "treaty aliens" from registration requirements to avoid negative foreign-relations consequences with those nations.[199] Federal preemption seems justified in this circumstance because individual states can export negative externalities to the nation or to other individual states.[200]

As recent reactions in and by Muslim nations to cartoon depictions of the Islamic Prophet Mohammad in private Danish newspapers indicate, some local actions can have severe international consequences, including attribution of local or private enterprise action to an entire nation.[201] In addition, the international reaction to the Guantanamo Bay detentions demonstrates that foreign nations are vigilant towards American slights or perceived slights to treatment of non-citizens.[202] The same is true when a state executes a foreign national who hails from a nation that forbids the death penalty.[203] This heightened international vigilance is complemented by increased American xenophobia and suspiciousness at home after September 11.[204] This increased prejudice is visibly directed towards Asian economic interests, as well as all entities and people deemed "Arab," as proven by Congress's reaction to last year's proposed Unocal buy-out by a Chinese company and a more recent knee-jerk reaction to domestic port control.[205] Because guns are such a volatile, and perhaps fundamentally

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199. Roh & Upham, *supra* note 8, at 506 (noting political sensitivities that required exempting so-called "treaty aliens" from compulsory U.S. military service).

200. *See* McCulloch v. Maryland, 17 U.S. 316, 435 (1819) (invalidating Maryland's tax on the national bank); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225 (1999) ("The rule has been functionally justified as eliminating serious externalities that will be inherent in state foreign policymaking activity.").

201. *See* Elif Thornafak, *Hate Speech*, TURKISH DAILY NEWS, Feb. 12, 2006, *available at* 2006 WLNR 2654294 ("The fact that various European newspapers reprinted the cartoons and united to show their support for the Jyllands-Posten paper has strengthened the feeling elsewhere that there is a 'European bloc against Islam.'"); *Muslim Anger at Danish Cartoons*, BBC NEWS, Oct. 20, 2005, *available at* http://news.bbc.co.uk/2/hi/europe/4361260.stm. *But see* Spiro, *supra* note 197, at 163 (arguing that foreign nations do not view individual states as "coincident" with the United States).

202. *See* Thomas Fuller & Brian Knowlton, *Losing High Ground on Moral Leadership: U.S. Seen Hurt by Iraq War, Detentions, and "Incredible Harm" of Prison Abuse*, INT'L HERALD TRIB., July 5, 2004, at 1.

203. *See* Medellin v. Dretke, 544 U.S. 660, 662–64 (2005) (dismissing certiorari petition as improvidently granted and discussing a Fifth Circuit opinion about Texas's pending execution of Mexican national without notifying Mexican diplomatic authority); AMNESTY INT'L, VIOLATION OF THE RIGHTS OF FOREIGN NATIONALS UNDER SENTENCES OF DEATH (1998), *available at* http://www.deathpenaltyinfo.org/article.php?scid=31&did=580.

204. *See supra* note 148 and accompanying text.

205. *See* Akram & Johnson, *supra* note 148, at 340 (noting and criticizing post 9/11 dragnet response aimed at Arabs); *America's Ports and Dubai: Trouble on the Waterfront*, ECONOMIST, Feb. 25, 2006, at 33 (detailing the American public's reflexive xenophobia to announcement that control of U.S. ports would be turned over to a company based in Dubai, United Arab

necessary,[206] instrumentality, creating inequitable possession rights may very well require factoring in the foreign-relations consequences of state alien gun laws.

Finally, positive federal statutory oversight of non-citizens' arms use arguably is pervasive enough to occupy the entire field. Federal firearms law only prohibits undocumented aliens and nonimmigrant aliens from gun ownership, possession, or transport. But, as noted above, by the express terms of § 927, the non-preemptive effect of the federal prohibitions appears settled.[207] Even so, because state restrictions on non-citizen possession span two areas of regulation—firearms and treatment of aliens—non-preemption of one lends no guidance on whether federal law also preempts the other. Federal immigration law is quite detailed in its entry requirements for legal permanent residents and nonimmigrant aliens.[208] These requirements include those intended to preserve domestic safety and internal security.[209]

More importantly, congressional action regarding alien military service is nuanced, reflecting considered thought about the concept of armed non-citizens participating in the paradigmatic political activity of national defense.[210] First, Congress expressly recognized non-citizens by providing for selective-service registration of all "male citizens of the United States, and every other male person residing in the United States."[211] Second, Congress attached a benefit to registration and service for non-citizens by expediting naturalization processes for compliant non-citizens.[212] Conversely, federal law places a burden on the failure to register or serve by instituting a permanent bar to citizenship for noncompliant non-citizens.[213] This two-fold carrot-and-stick approach evidences congressional intent to eliminate middle ground and to tie the political act of defending the nation through use of arms to achieving full membership in the political community. In addition, in order to appease political concerns, federal law immunizes nonimmigrant aliens and "treaty aliens," but also consciously does not exempt some aliens even though principles of international comity might have argued in favor of doing so.[214] Taken together, these provisions reflect measured thought regarding the non-citizens' armed participation in

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Emirates); Volpp, *supra* note 147, at 1585 (discussing Richard Reid and Timothy McVeigh and ineffectiveness of racial profiling against such potential terrorists).

206. *See supra* Part I.B (regarding guns as a fundamental right of political minorities).

207. *But see supra* notes 174–84 and accompanying text (questioning whether 18 U.S.C. § 927 intends to preempt and supersede state laws regarding treatment of aliens).

208. 8 U.S.C. §§ 1101, 1182–1189 (2000).

209. *Id.* § 1105.

210. *See generally* Roh & Upham, *supra* note 8.

211. 50 U.S.C. app. § 453 (2000).

212. 8 U.S.C. §§ 1439–1440.

213. *Id.* § 1426.

214. Roh & Upham, *supra* note 8, at 502–06.

national defense, even at the price of possible difficulties in certain foreign relations. Arguably, combining Congress's limited prohibitions in federal firearms law with its comprehensive military-service provisions indicates that Congress may have intended to occupy the field of aliens and arms, thereby justifying preemption of alien gun laws qua immigration laws.

Despite these reasons, the case against federal preemption of state alien gun laws (i.e., upholding the laws)—even when those laws are characterized as immigration or foreign-affairs laws—is more persuasive, in part because it implicitly accounts for the inability to differentiate domestic legal norms from foreign-affairs-related metrics. First, preemption would be premised on a doctrinally weak basis. Second, the rationale of the potential foreign-relations consequences of state laws cannot easily be cabined. Third, current case law and political realities demonstrate a blurring of the federal/domestic divide in foreign affairs, marked by an increase in the extent to which the federal and state governments both regulate issues that affect foreign affairs. Finally, the Second Amendment's structural attributes undermine a strong federal preemption position. When understood as an anti-federal-power check, the Second Amendment provides a counterbalance against unbridled federal preemptive power over state laws that have ancillary immigration and foreign-affairs consequences in the firearms or national-security contexts.

The Supreme Court has indicated that simply because a government regulation impacts non-citizens, courts should not reflexively deem the regulation an immigration law.[215] But, for this premise to hold, immigration power must be construed to correspond snugly with conditions of entry and naturalization.[216] Outside of those specific areas, aliens should be governed by general constitutional norms, including equal protection.[217] To extend the power over uniform naturalization to any regulation that involves non-citizens would be effectively to grant unbounded enforcement and law-making authority to Congress—a result at odds with the limits courts have placed on other congressional powers in our system of enumerated federal

215. De Canas v. Bica, 424 U.S. 351, 355 (1976); *see also* Bosniak, *supra* note 91, at 1097 (arguing that *Wong Wing* stands for the proposition that the "mere fact that the object of government power is an alien does not mean that the government is exercising its immigration power").

216. U.S. CONST. art. 1, § 8 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); Rosberg, *supra* note 2, at 325 ("It is in the area of admission and exclusion of aliens that the government's need for flexibility is greatest."); Wu, *supra* note 25, at 39 ("National sovereignty must be accepted. National sovereignty, however, establishes only that the nation can regulate its borders.").

217. Chan v. City of Troy, 559 N.W.2d 374, 375–76 (Mich. Ct. App. 1996) (striking down a state alien gun law under equal-protection strict-scrutiny analysis); Bosniak, *supra* note 91, at 1058.

powers.[218] According to this view, laws with effects on immigration should only be preempted by an express federal legislative provision or an actual conflict between federal and state law. This "minimalist" approach to the federal foreign-affairs power, by focusing on express- and conflict-preemption principles, stands on firm originalist, doctrinal, and functional foundations. Claims of a broad and exclusive plenary power, on the other hand, stem from the very fact of sovereignty or functionalist reasoning with little empirical foundation.[219] Beyond the narrow range of legislation described above, preemption becomes an exercise in judicial discovery of a real or imagined congressional intent that Congress could have specified if it wanted or had the political backing to do so.

Second, judicial focus on the foreign-relations consequences of state regulation is always tricky because of its potentially expansive reach. It requires that courts fix the meaning of "foreign relations" while the content of foreign policy remains a moving target for the political branches.[220] The strong version of the foreign-relations-consequences rationale was developed chiefly during the Cold War, the Korean War, and the Vietnam Conflict.[221] During those periods the Supreme Court and the political branches were sensitive to the identifiable foreign-policy implications of state actions that undermined the ability of the nation to speak as one voice about specific conflicts and ideologies attached to particular nations.[222] In today's world of domestic and home-grown threats, a nebulous war on terror, and dangerous non-state actors, the same political considerations do not neatly apply. I do not claim that our current situation requires less sensitivity to foreign-relations costs. However, national security and foreign affairs have become simultaneously more locally focused and internationally diverse, ranging from domestic wiretaps to military action or threatened military action in areas across the globe and against groups with no national affiliations. These

218. *See* United States v. Morrison, 529 U.S. 598, 608–09 (2000); United States v. Lopez, 514 U.S. 549, 552–58 (1995).

219. *See, e.g.*, Goldsmith, *supra* note 166, at 208 (arguing that courts should stop considering foreign-relations consequences and should make preemption decisions "on the narrowest possible ground, which . . . is rarely broader than obstacle preemption of a particular sort"); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 368–69 (1999) (arguing that current federal-preemption strategies lack a firm originalist foundation); *cf.* Gardbaum, *supra* note 20, at 771–73 (arguing that the Supremacy Clause only covers express and conflict preemption and that beyond those parameters, preemption becomes an exercise of judicial discretion). *But cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (preempting Massachusetts' law imposing sanctions on Burma as an obstacle to objectives and purposes of federal law).

220. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621–22 (1997).

221. *See supra* notes 219–20.

222. *See, e.g.*, Spiro, *supra* note 200, at 1227–30.

conditions make it difficult to discern how or where the one voice of the nations speaks today.

In addition, considering the foreign-policy consequences of every state action leads to a line-drawing problem because courts cannot easily define what consequences are significant enough to warrant preemption.[223] Scholarly literature identifies several instances of state and local regulations that have or could have potentially caused international responses, including local regulation of diplomatic parking, state tax schemes that affected foreign corporations, and state execution of aliens.[224] Preempting every one of these situations would greatly erode local regulation and undermine the general state police power. Moreover, it may not be advisable for courts to investigate the concrete foreign-affairs consequences of state laws, and any judicially created blanket rule regarding which consequences would require preemption is equally unwise.[225] While a harsh alienage restriction in a California gun law could cause significant international reaction in countries as varied as Mexico and Iran, the same restriction in North Dakota may not have the same international effect. To make sensible rulings and standards, courts would have to undertake the investigatory function of the political branches.

The actual international impact of state alien gun laws is difficult to ascertain, especially given that many of these restrictions have survived for decades without creating apparent international outcry. This difficulty probably exists because firearms are not as widely available in other countries that do not value private possession as we do in the United States.[226] Therefore, because inequitable domestic-possession laws may not offend the ethos of the foreign nation vis-à-vis firearms, it follows that they may not raise foreign ire in the same manner as, for example, state tax schemes or executions that contradict the legal or ethical norms of a foreign nation.

A third and related reason federal laws should not preempt state alien gun laws is that, as a practical matter, the federal versus domestic divide for immigration and foreign-affairs regulation is becoming porous, a result that may be both historically inevitable and normatively desirable. Professor

223. Spiro, *supra* note 197, at 156–57.

224. *Id.* at 167; Goldsmith, *supra* note 220, at 1620; Goldsmith, *supra* note 166, at 196–97 nn.91–95.

225. *But see* Spiro, *supra* note 200, at 1253 (disagreeing with Goldsmith and explaining "Why Courts Have Done It Better"); *cf.* Harold Hungjo Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1847 (1998) (noting that "*Zschernig* has been appropriately criticized for its failure to delineate clearly when a state's decision has such international repercussions that it should be deemed specifically preempted").

226. *See, e.g.*, Bauer et al., *supra* note 150, at 107 ("The acquisition of firearms by private individuals is easier in the United States than other western democracies."); Dorf, *supra* note 29, at 330 (noting that no constitution written since the fall of communism contains right-to-bear-arms provisions).

Spiro vividly argues that the "notion that the federal government now has or will any time soon restore a monopoly over U.S. foreign relations is a fiction to which only the fossilized striped-pants set can continue to cling."[227] A recent flourish of literature notes the increasing role of local and state officials in foreign affairs and matters that touch on immigration.[228] The New York City Police Department's anti-terrorism measures overlap and sometimes supersede the federal government's efforts. More importantly, the NYPD's anti-terrorism unit often acts independently of its federal counterparts, even on the internationally sensitive issues of national security and foreign events.[229] In Arizona and Texas, citizens and local law enforcement participate in federal-border-control efforts.[230] Most recently, the State of California circumvented the White House and signed an agreement with the United Kingdom to cooperate in combating global warming.[231] These examples undermine reflexive suspicion of any state rule inhibiting the federal government's flexibility in responding to changing world conditions.[232] Given congressional inertia, inter-agency squabbling,[233] and insufficient enforcement manpower,[234] localities may very well be the better responders to the domestic effects of international threats.[235]

The Supreme Court, while still employing doctrines premised on rigid foreign versus domestic distinctions, appears to have recognized the need for some delegation of immigration-related matters to the states, at least in areas of traditional, core state control. In *De Canas v. Bica*, the Court noted that the federal immigration laws may make room for consistent state regulation of undocumented alien employment, especially given that the

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227. Spiro, *supra* note 197, at 162; *see also* Goldsmith, *supra* note 220, at 1622.

228. *See, e.g.*, Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83 (2005); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323 (2005); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

229. William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, NEW YORKER, July 25, 2005, at 58.

230. Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 532–34 (2006).

231. Associated Press, *U.K. California Strike Global Warming Deal*, USA TODAY, Aug. 1, 2006, *available at* http://www.usatoday.com/news/washington/2006-07-31-global-warming_x.htm (noting that California is the twelfth largest producer of greenhouse gases, ranking it higher than most nations).

232. Mathews v. Diaz, 426 U.S. 67, 81 (1976).

233. *See, e.g.*, Bob Drogin, Eric Lichtblau & Greg Kirkorian, *CIA, FBI Disagree on Urgency of Aug. 27 Cable Warning of Terrorists Entering U.S.*, L.A. TIMES, Oct. 28, 2001.

234. *See* PETERSON & STONE, *supra* note 102, at 22 (detailing manpower deficit); *Port and Maritime Security Strategy: Hearing Before the Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure*, 107th Cong. 22–85 (2001) (statement of Admiral James M. Loy, Commandant of the U.S. Coast Guard).

235. *See* Finnegan, *supra* note 229, at 58.

core of state police power includes control over employment and labor relations, wages, and working conditions.[236] Like the labor and employment field, gun regulation falls within traditional, core state public-safety and criminal regulatory powers.[237]

While overseeing this relatively recent devolution of power, the Supreme Court has also facilitated the transformation of formerly state-controlled, citizen-soldier groups into creatures of the federal government.[238] The Court confirmed the hybrid nature of today's National Guard, delineating its control by both state and federal sovereignties.[239] Both of these related factors—erosion of the federal/domestic divide on security issues and opportunity for concurrent state and federal regulation on certain matters—bolster the case that the foreign versus domestic divide is not hermetic and therefore militates against any analytic methods that would treat them as such.

2. The Second Amendment's Anti-Federal-Power Implications

While the factors proffered above independently undermine notions of federal exclusivity with regard to alienage restrictions, in the specific area of alien gun laws, the Second Amendment uniquely impacts the preemption analysis in a way that other public welfare or general police power laws do not. Although dormant foreign-affairs preemption and specific immigration supremacy may override many areas of traditional state police power, those federal doctrines are especially attenuated in the field of gun control because the Second Amendment itself has federalism implications.[240] Professor Michael Perry, in his appraisal of equal-protection law, argued that it is difficult to justify high burdens for federal alienage classifications "unless an exercise of discretion by the federal government in immigration and naturalization matters implicates a particular constitutional provision or doctrine that constrains federal power generally."[241] The Second Amendment provides that particular constitutional constraint on federal power.

I rely on four indisputable conditions to support this contention, while still recognizing the disagreement over individual versus collective rights

236. De Canas v. Bica, 424 U.S. 351, 357–58 (1976) (ruling that California's law prohibiting employment of aliens not entitled to lawful residence when doing so would negatively affect lawful resident workers was not *per se* preempted by federal immigration law).

237. United States v. Lopez, 514 U.S. 549, 561–63 (1995).

238. *See* Perpich v. Dep't of Def., 496 U.S. 334, 334–35 (upholding the federal government's deployment of the Minnesota National Guard to Central America for training purposes).

239. *Id.* at 345–49.

240. David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 639–42 (2000); *cf.* Reynolds & Kates, *supra* note 153, at 1762–64.

241. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1062 (1979).

interpretations of the Amendment. First, the Supreme Court, in 1886, ruled in *Presser v. Illinois* that the Second Amendment is a limitation on congressional, not state, power.[242] Second, the most recent Court case dealing with the Second Amendment cited *Presser* approvingly.[243] Third, at least six circuit courts support *Presser*'s holding that the Second Amendment is a limitation only on federal legislation.[244] Finally, the Amendment has remained an unincorporated right.[245]

These conditions ensure that strong federal foreign-affairs power coincides with an anti-federal-power check in the realm of firearms control and state security concerns.[246] While the Second Amendment's federal-power check has not been used to invalidate federal legislation,[247] the Amendment nevertheless persists, unmodified in the Constitution and unaddressed by the Supreme Court.[248] To the extent its continued existence still means something, it must at least function as a structural warning against unconstrained, even if unexercised, federal power—especially in areas affecting domestic security and regulation of domestic conduct.

I concede that my proposal is odd in its apples-versus-oranges character. The federal foreign-affairs power is not being bound by a contrary political or structural concern in the foreign-affairs context; rather it is bound by an express federal-power check in the seemingly unrelated domestic arena of gun possession. I say seemingly because the opening clause of the Second Amendment includes the word militia.[249] And while the militia originally referred to the defense organs of individual states, the Constitution's "calling forth" provisions clearly provide a federal role for those state units, most likely in the event of a large domestic insurrection or an international

242. Presser v. Illinois, 116 U.S. 252, 265 (1886) ("[The Second Amendment] is a limitation only upon the power of Congress and the National government and not upon that of the States."). *But see* United States v. Emerson, 270 F.3d 203, 221 n.13 (5th Cir. 2001) (questioning *Presser*'s vitality because it was a pre-incorporation case).

243. United States v. Miller, 307 U.S. 174, 182 n.3 (1938).

244. *See* Bach v. Pataki, 408 F.3d 75, 84 & n.22 (2d Cir. 2005) (citing case law in accord from the First, Fourth, Sixth, Seventh, and Ninth Circuits). *But see* Parker v. District of Columbia, 478 F.3d 370, 378 (D.C. Cir. 2007) (holding that the Second Amendment "flat out guarantees an individual right 'to keep and bear Arms'"); *Emerson*, 270 F.3d at 227–60 (opining, in dicta, that the Second Amendment protects an individual's right to bear arms).

245. CHEMERINSKY, *supra* note 19, § 6.3, at 478–86.

246. *Cf.* Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) ("The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority . . . . The Second Amendment similarly [to the First] appears to contain an express limitation on the Government's authority.").

247. *See, e.g.*, *Miller*, 307 U.S. at 177, 183 (upholding the National Firearms Act against Second Amendment challenge); Yassky, *supra* note 48, at 589 n.2.

248. *But see* KOPEL ET AL., *supra* note 121 (arguing that the Court has addressed the Second Amendment in many cases, even if the issues did not directly involve firearms regulations).

249. U.S. CONST. amend. II.

war.[250] The Constitution also gives Congress the responsibility of prescribing "the discipline" for the state militia.[251] These clauses suggest that the Framers duly considered the link between firearms, federal power, and limitations on that power. This link between firearms and federal affairs creates a closer, apples-to-apples comparison between the federal foreign-affairs power and the anti-federal-power check found by courts in the Second Amendment.

Other examples of resolutions of conflicting constitutional values may provide some assistance in evaluating a "limited federal power" reading of the amendment. In the out-of-state wine cases from the Supreme Court's 2005 term, unexercised federal commerce power, which nevertheless proscribed state regulation of interstate commerce, was juxtaposed with a claim of particularized, express state control by virtue of the Twenty-First Amendment.[252] Although the five-Justice majority did not read the two constitutional provisions to conflict directly, the four dissenting Justices posited exactly that, concluding that in such a conflict the particularized constitutional carve-out for liquor immunized state laws that discriminated against out-of-state interests.[253] By virtue of express delineation, the Constitution appears to place firearms, like alcohol, in a special category immune from extensive federal regulation. The analogy to the wine cases is ultimately imperfect, because unlike the Twenty-First Amendment, which carves out an express area of state control over a particular commercial good,[254] the Second Amendment does not expressly carve out an area of state control. Reading it as such would require a collective-rights interpretation—a reading that is bitterly contested.[255]

A more fitting analogy is the interplay between the federal treaty power and customary international law, on the one hand, and their potential conflict with federalism limits on federal power, on the other.[256] As some

250. *Id.* art. II, § 2, cl. 1.

251. *Id.* art. I, § 8.

252. Granholm v. Heald, 544 U.S. 460, 484–86 (2005) (striking down Michigan's alcohol regulation scheme that treated out-of-state wineries differently than in-state wineries for purposes of direct sale to in-state consumers).

253. *Id.* at 494 (Stevens, J., with O'Connor, J., dissenting) ("But ever since the adoption of the Eighteenth Amendment and the Twenty-First Amendment, our Constitution has placed commerce in alcoholic beverages in a special category."); *id.* at 497–527 (Thomas, J., with Rehnquist, C.J., Stevens, J., and O'Connor, J., dissenting) ("As this Court explained, . . . the text and history of the Twenty-first Amendment demonstrate that it displaces liquor's negative Commerce Clause immunity, not other constitutional provisions." (citations omitted)).

254. U.S. CONST. amend. XXI (repealing the Eighteenth Amendment's national ban on alcohol sale and distribution and stating that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited").

255. *See supra* notes 24, 129, 153.

256. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 861–70 (1997).

have argued, dormant federal foreign-affairs power could make treaties and customary international law preemptive and binding on states, even when those international legal forms touch on areas of core state concern that the federal government may not be able to reach using domestic lawmaking powers, such as the Commerce Clause.[257] Regardless of whether those scholars are correct, the United States has recently begun to ratify multinational treaties that include reservations appended by the United States that clarify that the treaty will not alter the federalism balance.[258] Such reservations suggest that the political branches view implied limitations on federal power, embodied in specific provisions like the Commerce Clause, as prudential constraints on their broad federal foreign-affairs power. Similarly, the Second Amendment operates to provide a specific limit on the preemptive potential of federal foreign-affairs and immigration power.

My goal in elucidating the arguments for and against preemption is to showcase the dynamism underlying questions of what is foreign and domestic, as well as to undermine justifications for the use of those categories to determine the rights of persons within the national polity. In addition, this dichotomy between national and local promotes the fiction that the primary or quintessential nature of a statute implicating multiple regulatory areas definitively can be determined. That fiction masks the sensitive political questions and empirical accounts of federal and state competency required of a nuanced understanding of foreign and domestic affairs. Most important, a robust federal-power analysis also runs counter to the general constitutional narrative of the twentieth century by permitting courts to avoid the vindication of personhood norms in an area affecting discrete classes of persons.

III. GUNS AND ALIENS—EQUAL PROTECTION OR/AND FEDERAL POWER

This Article has maintained that courts assess state and federal alienage restrictions in general, and alien gun laws in particular, by unpredictably parsing statutes that affect domestic regulatory areas and non-citizens in order to determine whether to use an equal-protection or a federal-power analysis to decide the statute's constitutionality.[259] As an example of this

257. *Id.* at 861–63. *But see generally* Koh, *supra* note 225 (disputing Bradley's and Goldsmith's account of customary international law).

258. U.S. DEP'T OF STATE, MEMORANDUM SUMMARIZING U.S. VIEWS AND PRACTICE IN ADDRESSING FEDERALISM ISSUES IN TREATIES (2002), *available at* http://www.state.gov/s/l/38637.htm (summarizing federalism provisions in U.S. treaties and international agreements).

259. As Professor Jack Goldsmith notes, during the Elian Gonzales saga in late 1999, Florida courts were forced to decide whether state family law or federal immigration law would apply when resolving Elian's custody. Goldsmith, *supra* note 166, at 175–76. Faced with a conflict between a traditional area of exclusive state control (family law) and an area of exclusive federal power (immigration and foreign affairs), the court determined the "fundamental nature" of the case was immigration and preempted the state custody claim. *Id.* (citing *In re* Lazaro Gonzalez, No. Civ. A 00-0074, 2000 WL 492102 (Fla. Cir. Ct. Apr. 13, 2000)

classification system at work, consider Justice Blackmun's simple, strong, directive wording in the first sentence of his evaluation of alienage restrictions in a state welfare law in *Graham v. Richardson*: "These are welfare cases."[260] From his initial choice, he then immediately focuses on an equal-protection analysis of alienage distinctions in state welfare law. Classifying the case as immigration-related, however, would have required application of a different set of legal norms that do not apply in the domestic-law sphere.[261]

Justice Blackmun's characterization of the law in *Graham* turned out to be inconsequential. Because he also justifies his opinion on alternative preemption grounds, he could just as easily have started the opinion with: "These are immigration cases." This happy convergence between the welfare and immigration classifications and the two corresponding doctrines, however, is not always the case. One need only move to *Graham*'s federal cousin, *Mathews v. Diaz*, to see the tension at work. In *Mathews*, the Court characterized an alienage distinction in federal welfare law as an immigration case and proceeded to analyze it under the federal plenary-power doctrine, under which the Court declines to exercise much, if any, judicial scrutiny.[262]

This framework is deficient because it does not adequately account for the fluidity of domestic and foreign affairs or the important democratic values represented by the Equal Protection Clause. Moreover, it allows governmental regulation of non-citizens to escape the manner in which the Constitution otherwise binds governmental treatment of personhood. When statutes bridge local regulatory affairs and non-citizens' interests, thereby implicating divergent constitutional norms, courts have at least two options. The first option—the one courts have opted to use—is to choose between conflicting constitutional values and proceed with one mode of analysis. The second option—the one I posit is a better decision—is to determine how

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and Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000), *cert. denied*, 530 U.S. 1270 (2000)). Elian's country of residence was at stake in the courts' decisions.

Professor Linda Bosniak's explication of the divide between "inside" immigration law and "outside" immigration law alludes to this same dispositive framing problem: within "inside" immigration law, aliens are at the mercy of the federal government's plenary power; within "outside" immigration law, aliens are governed by generally applicable legal norms. Bosniak, *supra* note 91, at 1058.

260. Graham v. Richardson, 403 U.S. 365, 366 (1971). Professor Wishnie draws attention to this language as well. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493, 569 (2001).

261. This was also the case in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), where the Court determined that California's prohibition of commercial fishing licenses to non-citizens was an immigration law because it related too closely to the federal government's power to allow entry and residence to immigrants. Because it was deemed an immigration law, the Court (a) did not engage in a serious equal-protection analysis, and (b) invalidated the state law as an intrusion on federal power. *See id.* at 416, 418–19.

262. Mathews v. Diaz, 426 U.S. 67, 81 (1976).

these conflicting values and doctrines work together at both the federal and state levels to produce a cohesive analytical framework. Each option represents a distinct vision of federalism, the nation's commitment to non-citizens' rights, and the meaning the polity accords to citizenship.

A. EQUAL PROTECTION OR FEDERAL POWER

As with Justice Blackmun's characterization of the "welfare" statute in *Graham*, there are many instances when a court's categorization of a statute leads the court to apply one constitutional doctrine over another. But that decision is inconsequential to the result. Multiple commentators and the Supreme Court itself have noted that the Court's equal-protection alienage jurisprudence is just as coherent as preemption cases, if not more so.[263] The choice of which doctrine to use has little bearing on the outcome: statutes that violate equal protection would be preempted; statutes valid under equal protection would not be preempted. Alien gun laws, however, do not always produce this symmetry of outcomes between equal protection and federal-power application. As equal-protection claims, alienage restrictions in state gun laws are likely to fail under strict scrutiny.[264] As preemption claims,

263. *See* Toll v. Moreno, 458 U.S. 1, 11 n.16 (1982); David Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070–73 (1979); *see also* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 1014 (1995) ("The Equal Protection Clause is not indispensable to justify a rule prohibiting state discrimination against aliens.").

For example, in cases involving state alienage restrictions outside of the political-function exception, the Court would have reached the same result under either an equal-protection or federal-powers framework. *See e.g.*, Bernal v. Fainter, 467 U.S. 216, 227–28 (1984); *Toll*, 458 U.S. at 10–12, 17; Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 601–06 (1976); Sugarman v. Dougall, 413 U.S. 634, 641–49 (1973); *Graham*, 403 U.S. at 374–76. As equal-protection cases, the alienage classifications in welfare, civil service, education, and employment all failed strict scrutiny. As preemption cases, state alienage classifications in those areas would have been deemed attempts to regulate immigration directly or to regulate activities so closely related to entry and abode as to make the state laws an incursion on federal power. Similarly, in cases involving state alienage restrictions within the political-function exception, the choice of doctrine makes little difference in the outcome. *See, e.g.*, Cabell v. Chavez-Solido, 454 U.S. 432, 442 (1982); Ambach v. Norwick, 441 U.S. 68, 76–81 (1979); Foley v. Connelie, 435 U.S. 291, 299–300 (1978).

Re-evaluating those cases under the preemption doctrine, the laws are valid, not because of lower equal-protection scrutiny, but because exclusive federal power was up against another sovereign's (a state's) self-defining power, in which the federal government is excluded from interfering except in the most extreme circumstances. *Cf.* Luther v. Borden, 48 U.S. 1, 46–47 (1849) (declining to decide which entity constituted the official governmental authority of Rhode Island). This same is true for cases dealing with federal alienage distinctions. *Mathews v. Diaz*, 426 U.S. 67 (1976), dealing with a federal law, was expressly handled as a federal-powers case. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), a case striking down a federal civil-service law with alienage classifications, also fits this framework. Because the law was promulgated by an administrative agency, the Court essentially treated the agency like a state for purposes of federal preemption. Since the civil-service commission did not share the immigration power with the federal political branches, its treatment of aliens was invalidated. *Id.* at 105–17.

264. *See supra* Part I.

however, alien gun restrictions are likely to survive despite exclusive federal power over aliens.[265] This binarism creates outcome inconsistencies in two critical situations: (1) federal alienage restrictions, and (2) state alienage restrictions that would survive equal-protection analysis, but may nevertheless be adjudged preempted.[266]

Leaving aside the potential for asymmetrical results, the more important problem presented by the potential for differing analyses is that each methodology betrays fundamentally divergent understandings of non-citizens in the national polity and of federal and state competencies. On the one hand, vindicating national-security and uniformity needs through federal plenary-power analysis demonstrates commitment to a strong gate-keeping function for government. Under this rationale, federal power can preempt state action both supportive and antagonistic to non-citizens' rights.[267] On the other hand, vindicating notions of America as a land of immigrants and economic and social opportunity through the Equal Protection Clause demands that the government commit to ideals of acculturation and inclusion. Under this rationale, federal and state governments should abide by the same standards of equal personhood, with the exception of the federal creation of national rules and procedures for admission and naturalization into the national community.

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265. *See supra* Part II.

266. In the state alien gun-law context, this latter situation arises if one considers gun possession to be political in nature and/or maintains a restrictive notion of "the people" and, simultaneously, believes that alien gun laws strike too close to immigration issues to be left to state control.

Notably, these two positions, which decouple at the doctrinal level, are conceptually correlated: to the extent one believes gun possession is a political right, one will also likely believe that immigrants should not enter the country with the automatic ability to possess one and that eventual non-citizen possession should be contingent on proving loyalty or commitment to the political community.

Alternatively, the disconnect in state law also arises if one accepts that the consequence of Amar's theory of incorporation allows the limitation of arms-bearing to citizens, thereby avoiding equal-protection scrutiny, but remaining potentially problematic with regard to the federal foreign-affairs power. See *supra* Part I.A.1 for an explanation of how Amar's theory of "refined incorporation," by emphasizing the Privileges or Immunities Clause of the Fourteenth Amendment, allows for the limitation of certain rights to citizens.

267. Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1625–30 (1995). On this point, consider the preemption of California's Proposition 187, which denied welfare and educational benefits to non-citizens. *See* 1994 Cal. Legis. Serv., Prop. 187 (Westlaw 1994). In the aftermath of that preemption, however, federal welfare law devolved welfare decision-making power to states, permitting alienage restrictions with regard to welfare benefits. *See* Wishnie, *supra* note 260 at 493–97. In 2001, California enacted a law providing in-state college tuition benefits to anyone—citizen or undocumented alien—having attended high school in the state for three years. CAL. EDUC. CODE § 68130.5 (Deering 2002). That law is now facing federal preemption challenges in state court. Martinez v. Regents, No. CV 05-2064 (Cal. Super. Ct. Oct. 6, 2006) (order denying preemption challenge).

The scholarly literature appears to provide three ways of approaching this vacillation between equality ideals and structural power norms. First, courts can treat states as "demi-sovereigns"[268] and abandon both doctrines when state law impacts aliens. Second, courts can accept that the characterization of alien gun laws—as either domestic, regulatory-related (hence, equal protection) or alien-related (hence preemption)—will dictate the outcome and develop effective criteria to determine which category they should use. This method assumes that both doctrines are of commensurate constitutional value and that the use of either one is a syllogistic by-product of selecting the appropriate category for the legislation at issue. The third way out of the dilemma is to select the normatively more appropriate doctrine and apply it. Under this method, this Article argues that equal protection is the more appropriate heuristic because classifying based on alienage is a choice to treat a class of people uniquely and thus requires personhood-focused methodologies.

1. Abandoning Both Doctrines

The first solution to the problem of selecting between constitutional doctrines is borrowed from Professor Spiro's provocative observation that "states are . . . taking on some of the attributes of nationhood . . . . They are modern demi-sovereigns."[269] Courts taking this approach avoid having to classify alien gun laws as either equal-protection or preemption cases because neither survives in a framework where federal exclusivity over immigration has ceased to exist and states are permitted to regulate immigration. Under this proposed regime, alienage classifications in state law would no longer be alienage discrimination; rather they would be permissible immigration regulation.[270] Thus, the devolution of immigration power to states resolves the characterization problem by dismantling the categories themselves—states can make alienage distinctions, so no equal-protection issues arise, and states can affect immigration, so no preemption issues arise.

While this approach might resolve the need for binary selection, it is, to say the least, a disproportionate solution to the problem, which leaves very few guaranteed protections for politically voiceless, unpopular, and vulnerable groups.[271] It solves the categorization problems, but it creates larger problems inconsistent with equal-protection guarantees and constitutional commitments.[272]

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268. Spiro, *supra* note 197, at 163.

269. *Id.*

270. Linda Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 184 (1994) (responding to Professor Spiro).

271. *Id.* at 189–90 (criticizing Professor Spiro's proposal for leaving aliens at the mercy of the states).

272. *Cf.* Wishnie, *supra* note 260, at 504–09.

2. Effective Selection Criteria

If courts instead attempt to make an informed choice between equal-protection and federal foreign-affairs power analyses, the difficulty lies in developing a nuanced—in Goldsmith's terminology "fine-grained"—method of selection that eschews the blunderbuss approach of choosing by reference to either the general chapter of the state or federal code (e.g., "Firearms")[273] or defaulting every statute using the word "alien" or "citizen" into the federal-power category. In the state-law context, commentators have suggested that courts can make the fine-grained choice either by examining the purpose of the state law,[274] or by balancing state and federal interests to determine if the state law only incidentally affects federal interests.[275]

Although these suggestions sound workable, it is unclear how helpful they are in practice, especially in the alien gun context. The xenophobic origins of some state alien gun laws compel the conclusion that the primary purposes of many laws are bare animus and immigration deterrence. This presents an easy case for unconstitutionality under a purpose analysis, regardless of whether a court relies upon the equal-protection or the federal-power doctrine. However, when federal and state laws are enacted with public safety, monitorability, and information-gathering rationales, the high stakes of choosing the right doctrine manifest more clearly.[276] Traditional areas of sovereign state governance may weigh differently in the federal-power and equal-protection analyses. Alternatively, a balancing approach might help us determine whether federal power preempts a state law by differentiating between incidental immigration effects and nation-compromising effects, but it could do so only through a series of nebulous heuristics such as determining when "it is crucial that the nation speaks with one voice."[277]

Ultimately, those who have suggested purpose and interest-balancing inquiries have also concluded that the best outcome is federal-foreign-affairs minimalism, which requires positive federal law before state laws are preempted.[278] While laudable, insistence on positive law as the solution to

273. 18 U.S.C. §§ 921–930 (2000).

274. Goldsmith, *supra* note 166, at 199.

275. Manheim, *supra* note 263, at 987–88.

276. *See* Bach v. Pataki, 408 F.3d 75, 87 (2d Cir. 2005) (upholding a New York law denying firearms licenses to an out-of-state resident against an Article IV Privileges and Immunities challenge, and ruling that out-of-staters were the "peculiar source of evil" that the law meant to address because they presented monitorability and local-control problems for authorities (citing Hicklin v. Orbeck, 437 U.S. 518, 526 (1978))).

277. Wang v. Matsaitis, 416 F.3d 992, 1005 (9th Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962), for the proposition that the field of foreign affairs requires that the "nation speaks with one voice").

278. *See supra* note 219. *See generally* Ramsay, *supra* note 219 (arguing that courts should uphold state statutes even if they affect foreign policy unless specifically prohibited by treaty, statutes, or specific constitutional text).

federal-power problems accounts for neither congressional inertia nor a host of public choice and accountability problems that prevent clear statutory federal statements.[279] Even if purpose or balancing inquiries were effective heuristics for *state* laws, they do not shed light on what to do with *federal* alienage distinctions. In the absence of positive law, and without excessive investigation into hazy congressional intent, the ability of a court to make a correct choice regarding which doctrine to use is highly suspect.

Despite these possible methods, choosing between the doctrines is still, at best, an inexact science with dispositive consequences. Given this imprecision, courts constrained to the binary choice between equal protection or federal power should instead opt for predictability by consistently applying the doctrine better suited to evaluating governmental regulation of classes of people.

3. The Normative Choice—Equal Protection

The third way out of the doctrinal-selection dilemma is to determine which constitutional norm is weightier and always apply that one when regulations implicate multiple constitutional doctrines. In cases involving alienage classifications, preemption provides a coherent descriptive foundation for the entire line of cases, but that does not necessarily make it an equally appropriate assessment tool. Federal-power analysis has had the pernicious effect of permitting the federal government to elude equal-protection norms.[280] As Dean Harold Koh observes, choosing federal foreign-affairs power over equal protection elevates a structural norm of power sharing over a substantive norm of equal personhood.[281] Immunizing the federal government from these personhood norms reduces the weight and legitimacy of the equal-protection doctrine.[282] The Supreme Court, when not presented with an overtly foreign-affairs issue, has recognized that both federal and state governments are equally bound by ideals of equality.[283]

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279. *See, e.g.*, Koh, *supra* note 225, at 1854 (describing the federal legislative process as "notoriously dominated by committees, strong-willed individuals, collective-action problems, and private rent-seeking"). Especially in the area of immigration and regulation of non-citizens, federal legislators can shelter themselves from the political consequences of hardline stances, as those most affected by those regulations—non-citizens—cannot vote. In addition, federal legislators from states where a low number of immigrants arrive and settle need be less worried about repercussions from naturalized, voting immigrants for their support of anti-immigrant policies.

280. *See* Mathews v. Diaz, 426 U.S. 67, 84–87 (1976); *Immigration Policy*, *supra* note 92, at 1418; Perry, *supra* note 241, at 1063–67.

281. Koh, *supra* note 92, at 97.

282. Perry, *supra* note 241, at 1062.

283. Koh, *supra* note 92, at 95–96 n.224 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."));

Conversely, equal protection is a more normatively appropriate doctrine to apply when courts confront alien gun statutes (at least for LPRs and nonimmigrant aliens) because it recognizes non-citizens' contributions to American society and it sends a preferable symbolic message about an egalitarian America.[284] As the Supreme Court has noted repeatedly, aliens pay taxes, serve on school boards and local governments, serve in the military, are subject to all criminal laws, and must register for Selective Service.[285] Equal-protection analysis helps soften some of the duplicity latent in demanding these obligations but denying or limiting other protections and benefits of the welfare state.[286]

The current inseparability of international and domestic affairs generally, and the potential structural implications of the Second Amendment specifically, both favor even-handed application of the equal-protection norm to both state and federal governments. Federal preemption was more urgent and meaningful before the era of globalization and America's ascendancy as the world's sole military and economic superpower.[287] However, many current scholars recognize the blurring of the line between foreign and domestic affairs.[288] The Supreme Court itself has recognized the need for some concurrent, non-conflicting state regulation of aliens.[289] This vitiates the need for separate equal-protection standards for federal and state statutes.

The Second Amendment in particular alters the balance relied on by the Court to dilute the equal-protection norm for federal legislation impacting non-citizens—a balance it attempted to strike between equal-protection interests and immigration and foreign-affairs interests.[290] When one views the Amendment as a check on federal regulatory power, the proper balance places the federal foreign-affairs interest on one side and equal-protection norms plus a constitutional anti-federal check on the other.[291] Using this scale, the federal government cannot avoid stringent

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Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government [than it imposes on states].").

284. Koh, *supra* note 92, at 73 (noting that Justice Blackmun in *Mauclet* portrayed aliens as "valued contributors to American society"); *see also Immigration Policy*, *supra* note 92, at 1418.

285. Graham v. Richardson, 403 U.S. 365, 376 (1979); Nyquist v. Mauclet, 432 U.S. 1, 4 (1977); *see also* Raskin, *supra* note 55, at 1460–65; *see also* Michael D. Patrick, *Actions that Jeopardize U.S. Citizenship*, N.Y. L. J., Sept. 26, 1994, at 3.

286. Legomsky, *supra* note 72, at 288–89, 294.

287. Zschernig v. Miller, 389 U.S. 429, 436–40 (1968) (striking down an Oregon succession law aimed at citizens of Eastern Bloc countries during the Cold War); Goldsmith, *supra* note 166, at 198.

288. *See supra* notes 227–28 and accompanying text.

289. De Canas v. Bica, 424 U.S. 351, 356–57 (1976).

290. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 95–96 (1978).

291. I note again the potential orthogonal relationship between federal immigration power and limits on federal firearms regulation. *See supra* Part II.B.

scrutiny when creating alienage classifications for gun possession, even in the post-9/11 world, where heightened national-security concerns are oft-cited as justification for increasing federal power.[292] Important national-security concerns were the underpinning of the strong, broad federal foreign-affairs power through the Second World War and the Cold War, so they have always been implicitly accounted for. Moreover, any unique post-9/11 national-security concerns favoring increased federal power coincide with the practical devolution of immigration and security enforcement to local officials. Further, federal immigration law already bars admission of aliens who are apparent criminal and security risks.[293] Again, the balance favors an undiluted equal-protection norm when the federal government creates alienage distinctions unrelated to entry, exit, and naturalization.

The Supreme Court may have already silently recognized this erosion and moved to greater scrutiny of federal restrictions under equal protection. In *De Canas*, the Court evinced some recognition that non-conflicting state regulatory power, in the absence of positive federal law, may be exercised in the previously exclusive field of federal regulation over undocumented aliens.[294] The recognition in *De Canas* becomes even more significant when considered in light of the progression from *Fiallo v. Bell*[295] in 1977 to *Nguyen v. INS* in 2001.[296] In both of those cases, the Court upheld the constitutionality of gender classifications in federal immigration provisions that gave entry and citizenship preferences to children born out of wedlock, depending on whether the parent within the United States was the mother or father.[297] The critical difference between the two cases is that the Court decided *Fiallo* exclusively by deferring to federal immigration power, whereas the Court decided *Nguyen* by ruling that the government had met its equal-protection burden.[298] The *Nguyen* Court, while citing *Fiallo*, expressly declined to consider deference to federal foreign-affairs power.[299] Both the choice in *De Canas* to permit non-conflicting state regulation and the choice in *Nguyen* to employ equal-protection analysis are counter-intuitive. Given the contentious equal-protection cases that the Court faced in the

292. *Cf.* OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY (2002), *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf.

293. 8 U.S.C. § 1182(a)(2)–(3) (2000) (defining criminal and terrorism-related grounds for classifying "inadmissible aliens").

294. *De Canas*, 424 U.S. at 356–63 (upholding California regulations that prescribed the conditions under which hiring of undocumented aliens was prohibited).

295. Fiallo v. Bell, 430 U.S. 787, 792 (1977).

296. Nguyen v. INS , 533 U.S. 53, 60–61 (2001).

297. In both cases, if the biological mother was making the application, the preferences applied, whereas fathers making the same application were not entitled to the same presumptions. *Id.* at 56–59; *Fiallo*, 430 U.S. at 788–92.

298. *Nguyen*, 533 U.S. at 58–59; *Fiallo*, 430 U.S. at 791–92.

299. *Nguyen*, 533 U.S. at 72–73.

intervening twenty-four years,[300] and the wide berth given to federal immigration and foreign-affairs claims, the Court's unwillingness to invalidate the law in *De Canas* and willingness to apply the heightened-scrutiny inquiry in *Nguyen* could signal a silent acceptance of the equal-protection standard at both the state and federal levels, as well as a curbing of unconstrained federal power.[301]

Courts that remain wedded to a strict doctrinal divide between federal power and equal protection are required to make difficult and sometimes unworkable decisions regarding the appropriate methodology they should use when analyzing the constitutionality of a firearms statute with alienage distinctions. In this binary system, the subtle movement of precedent and the importance of the egalitarian ideal counsel courts consistently to apply the "domestic" equal-protection norm to all problems—whether federal, state, foreign, or domestic. But a more complete understanding of governmental and judicial treatment of non-citizens requires reconciliation of the divergent constitutional values undergirding each doctrine. This rethinking is critical because it allows the polity to balance more accurately the ideals of equality and disciplined government with the need to define a sustainable political community. Alien gun laws provide us with an opportunity to consider a comprehensive framework that avoids this increasingly unpredictable divergence between foreign and domestic constitutional principles.

B. *EQUAL PROTECTION WITH FEDERAL POWER (AND THE SECOND AMENDMENT)*

Courts should analyze laws with alienage restrictions under a framework that strips the talismanic power from the labels used within the judicial doctrines discussed above and instead seek to reconcile the underlying constitutional values that the doctrines represent. The doctrinal divisions cause harm because selecting one doctrine inherently devalues the other.[302]

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300. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (racial classification for law-school admissions); United States v. Virginia, 518 U.S. 515 (1996) (exclusion of women); Romer v. Evans, 517 U.S. 620 (1996) (sexual orientation); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (racial classification for medical-school admissions).

301. I recognize that *Fiallo* and *Nguyen* dealt with federal gender discrimination as part of the federal immigration power, whereas *Mathews* dealt with federal alienage discrimination as part of the immigration powers. I cite these cases only as examples of the interplay between federal powers and equal-protection scrutiny. *See* Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 8 (2005) (noting that the Court considers invidiousness of classification when it perceives Congress and the Executive need little or no flexibility); Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1498 & n.23 (2003) (book review) (arguing that *Nguyen* signals the Court's chipping away at the plenary-power doctrine).

302. Rosberg, *supra* note 2, at 338 (arguing that the Court has declined to play a role when immigration is "even remotely involved" and that such abdication "must be seen as an invitation to Congress to act capriciously and without significant concern for the legitimate interests of resident aliens").

For example, the Supreme Court's framing of *Mathews* as an immigration case meant that it applied an "astonishingly lenient" version of the rational-basis test.[303] Conversely, alienage cases that strike down laws under an equal-protection analysis rarely, if ever, consider how immigration or foreign affairs affects the decision-making process. As it turns out, Justice Blackmun was wrong when he characterized *Graham* as a welfare case; the reality is that it was both a welfare case and an immigration case.[304]

Simply because the normative balance favors equal protection does not mean that important foreign-policy concerns cease to exist. They do; the difficulty is determining how to account for them. Unless the Constitution requires completely open borders with a free flow of people in and out of the United States, federal officials should at a minimum be able to make reasonable political determinations regarding standards for entry and naturalization. Some alienage distinctions are not only permissible, they are necessary—at least to the extent they inform Congress's power to create a "uniform rule of naturalization."[305]

The limited necessity of alienage classifications should alter the equal-protection analysis by enlarging the possible governmental interests that could satisfy the first part of a strict-scrutiny inquiry.[306] National security, gate-keeping, and the maintenance of a political community as justifications would almost always pass muster as compelling governmental interests. Simultaneously, my proposal would permit, and encourage, states to assert previously "federal" gate-keeping justifications for their laws affecting non-citizens and would force the federal government to submit its laws to the same judicial scrutiny as states when it creates alienage classifications. This revised methodology provides a more meaningful analysis than the current one, even when the results are the same under both, because it forces concurrent consideration of structural-power principles and personhood norms. A comprehensive framework recognizes that regulations may implicate foreign affairs, domestic legal norms, state sovereignty, and Second Amendment concerns of sovereign and personal security all at the same time.

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303. *Id.* at 284.

304. *See supra* notes 261–62 and accompanying text.

305. U.S. CONST. art. I, § 8, cl. 4. Michael Perry illuminates this point:

> Alienage is conventionally, if implicitly, regarded as a morally relevant status. Few would take issue with the proposition that the members of a political community may appropriately decide whether, to what extent, and under what conditions persons who are not members may enter the territory of the political community and share its resources and largesse.

Perry, *supra* note 241, at 1061.

306. Koh, *supra* note 92, at 102; Rosberg, *supra* note 2, at 325 ("It is in the area of admission and exclusion of aliens that the government's need for flexibility is greatest.").

Although the overarching goal of my project is to integrate these necessary but divergent constitutional values, this Article's proposal grounds the analysis of alienage distinctions in the equal-protection framework of heightened scrutiny for four primary reasons. First, the framework developed to address claims of inequitable governmental treatment of persons or the uneven distribution of fundamental rights is appropriately suited to assess a problem of separate treatment of alien persons with no political voice. Second, unlike the federal-power analysis, the equal-protection methodology is pliable. Since its utility is ensuring the appropriate fit between governmental goals and the means to achieve those goals, the equal-protection analysis can account for the values and justifications used in federal-power analysis. Third, as Dean Aleinikoff and Professor Legomsky have noted, judicial treatment of aliens and immigration has been marked by virtual abdication of judicial review, as well as the judiciary's resistance to the constitutional changes of the twentieth century.[307] Whereas the pure preemption and federal foreign-affairs-powers doctrines allow virtually standardless congressional action and limited court review of such action,[308] the tailoring requirement of equal protection induces courts to interrogate the government's justifications and factual basis before permitting uneven treatment of persons within the national sovereignty. Finally, equal-protection methodology is necessary because the tailoring prong of the analysis helps root out improper legislative motives, such as racial animus, xenophobia, and other irrational prejudice. This is of special concern here because both alienage classifications and firearms restrictions have some legitimate bases and some improper ones. Applying federal-power principles without testing them against ends-means scrutiny dismisses legitimate motives, while masking improper ones. Ends-means scrutiny implicitly disciplines both federal and state legislatures into considering the fit between restrictions on non-citizens and the obligations imposed upon them.

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307. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864, 869–71 (1989); *see also id.* at 870 (describing the courts' very limited role with regards to immigration and arguing that instead of broad plenary power, "courts ought to examine the justifications offered on behalf of federal regulations based on alienage to see if they meet traditional constitutional standards of permissibility"); Legomsky, *supra* note 25, at 1616–19 (discussing the existence of and factors causing "immigration exceptionalism"); *see also* Wu, *supra* note 25, at 47. Wu argues:

> [T]he erosion of the entire surrounding terrain of constitutional theory leaves little support for this last remaining piece of nineteenth-century racial case law. If the other doctrines were rightly repudiated, so too the plenary power doctrine should be "as application of constitutional principles to facts as they had not been seen by the Court before."

Id. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)).

308. Goldsmith, *supra* note 220, at 1698–1705; Koh, *supra* note 92, at 98; Wu, *supra* note 25, at 42.

An ideal framework for analyzing alienage distinctions, then, accounts for the gate-keeping and security concerns of federal-power analysis, but brings treatment of aliens back into the "fold of modern constitutional law."[309] The incorporative framework I suggest assumes that laws and regulations affecting non-citizens may sometimes be necessary and important, but requires the government to engage in significant consideration before it distributes rights and burdens along the line of citizenship. This framework allows courts to recognize real differences between state and federal competencies in the context of alienage distinctions in federal law, as the federal government's foreign-affairs power may create specific compelling interests regarding naturalization and may override state prerogatives on politically sensitive topics. The tailoring part of the analysis will likely lead Congress to produce the type of positive federal legislation that preemption minimalists have been advocating. Meanwhile, if the federal government has a compelling interest, courts will respect Congress's prerogative as a co-equal branch and will vindicate congressional intuition in creating the legislation.

This shift to a consideration of federal security and immigration interests in the equal-protection analysis is less drastic than it may seem. The Supreme Court may have already implicitly incorporated federal foreign-power concerns into the equal-protection analysis in its reasoning in *Nguyen*.[310] In that case, the federal government's important interest in requiring proof of one's parentage to access certain immigration benefits, and therefore entry to the country, satisfied the first prong of intermediate equal-protection scrutiny.[311] To save the current federal firearms law, the government would have to provide proof that the temporary nature of a nonimmigrant alien's stay in the United States presents peculiar safety problems to justify a blanket denial of possession rights to nonimmigrant aliens.[312]

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309. Aleinikoff, *supra* note 307, at 870; Wu, *supra* note 25, at 42 ("There was a time when immigration law was animated by nativist principles.").

310. Nguyen v. INS, 533 U.S. 53, 53 (2001).

311. *Id.* at 61–64.

312. *Cf.* Bach v. Pataki, 408 F.3d 75, 88 (2d Cir. 2005) (upholding New York's restriction on licenses for out-of-state residents against an Article IV Privileges and Immunities challenge and ruling that the state demonstrated that out-of-staters were the "peculiar source of evil" towards which the restriction was aimed).

Subjecting the current federal firearms law that prohibits nonimmigrant aliens' gun-possession rights to both the binary and comprehensive framework demonstrates the value of the latter approach. Under the binary framework, a court's broad deference to the distinction in federal firearms law, if understood as an immigration law, would lead the court to uphold the law. In its only other case addressing classifications that specifically bar nonimmigrant aliens from obtaining in-state tuition, the Court invalidated a *state* law on federal foreign-affairs preemption grounds. Toll v. Moreno, 458 U.S. 1 (1982). Presumably, had Congress made that same distinction, the Court would likely have upheld the law. This same reasoning seems applicable to the federal firearms statute's restrictions on nonimmigrant-alien gun possession.

On the state side, a comprehensive framework resolves the tension in cases where the equal-protection and preemption analyses would yield disparate results. States would not be able to use immigration-related rationales to satisfy the compelling-interest prong.[313] State and local entities could, however, assert domestic-security interests as compelling interests to the extent that their local law-enforcement policies entail local enforcement of national-security principles. For example, New York City, because of its substantial involvement in anti-terrorism policy and comprehensive firearm regulation, may be able to show a compelling interest (although it would still have to satisfy the means-end prong). Perhaps more importantly, allowing states to consider gate-keeping and security concerns would produce legislation and judicial review that more accurately reflect the actual policy goals of the state. As a by-product, the state's voting community would have a greater understanding of the way its elected leaders have chosen to balance the competing constitutional values at stake. Finally, reviewing state and federal laws regarding alienage under the same basic framework encourages a new brand of federalism for determining the place of non-citizens in the national community. Under the framework proposed by this Article, federal exclusivity and unchecked power would be curbed, while states' consideration of gate-keeping necessities would increase, thereby producing greater bargaining and cooperation between federal and state entities on immigration and alienage issues.

On a doctrinal level, grounding the constitutional analysis in a basic equal-protection framework that requires heightened scrutiny but also recognizes that alienage distinctions are necessary in limited circumstances, eliminates the schizophrenia of classifying aliens as a suspect class on some occasions but not others. The model proposed here assumes that aliens are always discrete and insular minorities for equal-protection purposes but allows sovereign interests to satisfy the compelling-interest inquiry. It also recognizes that, in limited circumstances, an alienage classification may be narrowly tailored to satisfy that compelling interest. Thus, for state cases, the comprehensive framework eliminates the necessity of a separate political-

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In the incorporated framework this Article presents, however, the federal government must present a compelling interest served by the denial of these rights to nonimmigrants. Presumably, immigration interests such as ensuring peaceful residency before gun possession, creating a durational record of compliance with U.S. criminal laws, and other information-gathering concerns could help make the case for a compelling government interest. And there very well might be real differences between LPRs and nonimmigrant aliens that justify the distinction. *See* Rosberg, *supra* note 2, at 277 (describing different categories into which individuals may fall based on their reasons for being in the country). Even if the governmental interests were deemed compelling, however, a court would still have to consider whether the demarcation of all nonimmigrant aliens as a group is narrowly tailored to meet those ends.

313. *See* Rosberg, *supra* note 2, at 294 ("The existence of these special federal interests may explain why the federal government can demonstrate a compelling need for a particular classification even though a state could not.").

function exception to strict scrutiny. Rather than rely on an all-or-nothing process that involves debating the content of the malleable term "political," courts would assess whether states possess a compelling interest in, for example, conditioning eligibility of their law-enforcement personnel, probation officers, or teachers on citizenship. In the area of alien gun laws, this framework may require governments to use more narrowly tailored means such as loyalty oaths, residency requirements, or mandatory safety courses.[314] At minimum, it would seem that restrictions on LPR gun possession would have to be invalidated, bringing state law into line with federal law.

The consistent recognition of LPRs and nonimmigrant aliens as discrete and insular minorities deserving of treatment as a suspect class accords with the idea that exclusion itself may be more important than the underlying reasons for exclusion. Women comprise a numerical majority of our country's population and have rights to participate in the political process,[315] but it is still appropriate to extend judicial protection to gender classifications.[316] Likewise, white citizens were never legally or historically subordinated to another ethnic group, nor do they comprise a discrete and insular minority, yet laws restricting whites' access to educational and work opportunities are subject to review under strict scrutiny.[317] Therefore, simply because good reasons exist for creating alienage classifications in limited circumstances should not alone render the fact of exclusion immune from strict scrutiny.

CONCLUSION

Rethinking constitutional doctrines in light of the realities of alienage, foreign affairs, state and federal powers, and gun possession in America requires the rejection of the false binarisms inherent in a political versus non-political, foreign versus domestic, and equal-protection versus federal-power analytical mode. This Article aimed to expose and reconcile the competing fundamental constitutional values at work in the nexus of firearms and citizenship—an area that provides an illuminating view of the larger debates surrounding individual rights, political rights, structural

314. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 462–63 (1982) (Blackmun, J., dissenting) (suggesting loyalty oaths); WYO. STAT. ANN. § 6-8-104(b) (2005) (instituting residency requirements for citizens and LPRs); Dorf, *supra* note 29, at 315, 342 (noting that the Pennsylvania Constitution of 1776 required loyalty oaths for firearms so that the state could assess trustworthiness of those with guns); Gerald Rosberg, *Discrimination Against the "Nonresident" Alien*, 44 U. PITT. L. REV. 399, 403–04 (1983).

315. U.S. CONST. amend. XIX; U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: HIS AND HER DEMOGRAPHICS 67 (2000), *available at* http://www.census.gov/population/pop-profile/2000/profile2000.pdf.

316. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996).

317. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2002); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (upholding strict-scrutiny analysis for all racial classifications).

powers, structural restrictions, personhood norms, and inclusion in our national polity. I maintain that eroding the doctrinal walls that separate equal-protection and federal-power principles produces an analysis more mindful of the divergent values underlying the doctrines. More importantly, the incorporative framework presented here brings us closer to a cohesive understanding of non-citizens' place in our national community because it compels courts and legislatures at both the state and federal levels to reconcile the competing constitutional ideals at stake when they use citizenship as the dividing line for rights and benefits.