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LOYALTY DISARMAMENT AND THE UNDOCUMENTED

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Since the Supreme Court's District of Columbia v. Heller *decision in 2008, lower federal courts have wrestled with Second Amendment claims raised by categories of people excluded from gun possession. Among those cases, several have been brought by noncitizens challenging their prosecutions under 18 U.S.C. § 922(g)(5), the federal criminal ban on possession by unlawfully present noncitizens. In the post-*Heller *§ 922(g)(5) cases, judges have opined on whether unlawfully present noncitizens were among "the people" who had the right to bear arms and whether the government regulation met the appropriate level of constitutional scrutiny. More recently, however, the Supreme Court abandoned the tiers of scrutiny approach. In* New York State Rifle & Pistol Association v. Bruen *in 2022, the Court prescribed a novel history-focused inquiry in its stead. Since then, the federal government and several lower federal courts have sought to justify present-day gun restrictions by searching for historical antecedents created to address analogous public policy concerns in analogous ways. In conducting that historical inquiry for § 922(g)(5), several courts have conjured Revolutionary War–era statutes that disarmed Loyalists to the British Crown. This Piece explains why such an analogy is a poor fit, arguing that the respective statutes serve incommensurate purposes and operate in materially different ways. It concludes with the suggestion that continued reliance on* Bruen*'s methodology (and attendant analogies to Loyalist disarmament) portends diminished and precarious constitutional protections for noncitizens with regard to their self-protection and, more broadly, other fundamental constitutional guarantees.*

INTRODUCTION

Over the past two years, "loyalty-based" gun laws have taken on an importance they have not had since the Revolutionary period, when some colonial governments sought to disarm sympathizers to the British Crown.[1]

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1. See Amanda L. Tyler, *Rahimi*, Second Amendment Originalism, and the Disarming of Loyalists During the American Revolution, Lawfare (Nov. 30, 2023), https://

This renewed interest is the product of the Supreme Court's *New York State Rifle & Pistol Association v. Bruen* decision, which directed courts to seek historical analogues when assessing the constitutionality of modern gun regulations.[2] Post-*Bruen*, those Founding-era restrictions have been especially prevalent in Second Amendment cases challenging the federal prohibition on possession by unlawfully present noncitizens, codified in 18 U.S.C. § 922(g)(5).[3] On closer examination, however, this analogy is a poor fit. This Piece explains what seems to have eluded multiple federal jurists: The undocumented immigrants of today are not the Tories of the American Revolution.

The stakes of this misguided comparison are high, and clarifying the disconnect is pressing. In the twelve years between *District of Columbia v. Heller*[4] and *Bruen*, federal courts uniformly upheld the federal ban on possession by unlawfully present noncitizens using a tiers of scrutiny approach.[5] Post-*Bruen*, however, disagreements over the constitutionality of gun laws conditioned on immigration status are beginning to surface in lower federal courts.[6] Moreover, the constitutional rights of noncitizens,

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www.lawfaremedia.org/article/rahimi-second-amendment-originalism-and-the-disarming-of-loyalists-during-the-american-revolution [https://perma.cc/5PB5-QMSB] (discussing the renewed significance of loyalty-based gun laws); see also Joyce Lee Malcolm, To Keep and Bear Arms: The Origin of an Anglo-American Right 140–41 (1994) (describing colonial gun restrictions imposed on Native Americans, enslaved Black people, and Catholics); Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 115–16 (2011) (explaining how colonial gun restrictions targeted people deemed "untrustworthy"); Robert H. Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 Law & Hist. Rev. 139, 159–61 (2007) (exploring the history of gun regulation based on "membership in the body politic," which eventually sprouted loyalty-based gun laws); Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 505 (2004) ("Loyalty oaths also disarmed portions of the population during the Founding Era.").

2. See 142 S. Ct. 2111, 2131–33 (2022) (striking down a discretionary state permitting scheme for issuing concealed carry licenses and prescribing a text, history, and tradition methodology for Second Amendment cases).

3. See 18 U.S.C. § 922(g)(5) (2018). Note that subsection (g)(5)(A) criminalizes possession by those "illegally or unlawfully in the United States." Subsection (g)(5)(B) criminalizes possession by those who have "been admitted to the United States under a nonimmigrant visa," subject to an exception specified in the statute. The litigated cases almost exclusively involve prosecutions under (g)(5)(A).

4. 554 U.S. 570, 628 (2008) (holding that the Second Amendment protects individuals' right to possess firearms for self-defense).

5. See, e.g., United States v. Perez, 6 F.4th 448, 450 (2d Cir. 2021); United States v. Torres, 911 F.3d 1253, 1257 (9th Cir. 2019); United States v. Meza-Rodriguez, 798 F.3d 664, 672–73 (7th Cir. 2015); United States v. Carpio-Leon, 701 F.3d 974, 983 (4th Cir. 2012); United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012).

6. Several post-*Bruen* cases uphold the federal ban on possession by unlawfully present noncitizens. See, e.g., United States v. Medina-Cantu, 113 F.4th 537, 538–39 (5th Cir. 2024); United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023); United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1260 (E.D. Wash. 2024); United States v. De Los Santos-Santana, Crim No. 23-311 (GMM), 2024 WL 98556, at *4–5 (D.P.R. Jan. 8, 2024);

especially their Bill of Rights protections, have been a recurring theme in recent Supreme Court terms.[7] Not only do immigrant gun decisions threaten noncitizens' access to gun rights, but, more importantly, the excision of noncitizens from the Second Amendment portends diminished and segregated constitutionalism for noncitizens across the board.[8]

This Piece proceeds as follows. First, it explains why lower courts have sought guidance from Founding-era Loyalist disarmament laws and provides examples of those historical statutes. It then explains the relevance of the arguments in, and outcome of, the Supreme Court's most recent Second Amendment case, *United States v. Rahimi*, to the question of noncitizen disarmament. Third, this Piece explains why those loyalty-based historical laws are not analogous to modern federal laws banning unlawfully present noncitizens from possessing guns, focusing on the disjuncture between the respective laws' purposes and mechanics. It notes, however, that those laws may yet be relevant to assessing the constitutionality of other contemporary federal gun regulations. Finally, this Piece clarifies the stakes of this misguided analogy in Second Amendment cases, arguing that it contributes to diminished and second-class constitutionalism for all noncitizens across other fundamental liberties and protections.

United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1072 (D. Nev. 2023); United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124, 129 (D.P.R. 2023); United States v. Trinidad-Nova, 671 F. Supp. 3d 118, 125 (D.P.R. 2023); United States v. Leveille, 659 F. Supp. 3d 1279, 1285 (D.N.M. 2023); United Sates v. Carbajal-Flores, No. 20-cr-00613, 2022 WL 17752395, at *4 (N.D. Ill. Dec. 19, 2022); United States v. DaSilva, No. 3:21-CR-267, 2022 WL 17242870, at *12 (M.D. Pa. Nov. 23, 2022). More recently, however, a few district courts have struck down the law or its application to a particular defendant. See United States v. Benito, 739 F. Supp. 3d 486, 494, 496 (S.D. Miss. 2024) (rejecting the government's proposed historical analogue of Native American and Catholic disarmament at the Founding); United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 664, 673 (W.D. Tex. 2023) (rejecting the existence of a sufficiently analogous historical tradition, as "the notion of illegal immigration did not exist" at the Founding), rev'd in part, No. 24-50022, 2024 WL 5318254 (5th Cir. Nov. 6, 2024).

7. See, e.g., Dep't of State v. Muñoz, 144 S. Ct. 1812, 1827 (2024) (evaluating a due process challenge to a visa denial for a noncitizen spouse of a U.S. citizen); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1981–83 (2020) (considering due process and habeas challenges to a noncitizen's asylum proceedings); Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) (ruling that the lower court misapplied the doctrine of "constitutional avoidance" to read a right to period bond hearings into the statutes permitting noncitizen detention).

8. See Pratheepan Gulasekaram, The Second Amendment's "People" Problem, 76 Vand. L. Rev. 1437, 1496–519 (2023) [hereinafter Gulasekaram, "People" Problem] (arguing that excluding noncitizens from the Second Amendment influences the interpretation of other Bill of Rights protections and constitutional guarantees for noncitizens); see also Pratheepan Gulasekaram, Second Amendment Immigration Exceptionalism, 77 Vand. L. Rev. En Banc 51, 52–53 (2024) [hereinafter Gulasekaram, Second Amendment Exceptionalism] (criticizing the district court opinion in United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249 (E.D. Wash. 2024), for undertheorizing the consequences of its rationale on noncitizens' other constitutional rights).

I. THE SECOND AMENDMENT AND HISTORICAL ANALOGUES

In *Heller*, the Supreme Court held for the first time that the Second Amendment is an individual right grounded in self-defense.[9] Despite this novel interpretation, most courts in the wake of *Heller* still upheld the majority of challenged statutes, applying the traditional tiers of scrutiny approach to constitutional analysis.[10] In the 2022 *Bruen* decision, however, the Court expressly abandoned the tiers of scrutiny approach, and prescribed a "text and history" focused methodology instead.[11] As the *Bruen* majority instructs, the government must justify present-day gun laws by providing historical analogues that addressed similar societal problems in similar ways.[12]

Faithful to *Bruen*'s instructions, courts deciding the constitutionality of modern gun laws have sought guidance from a variety of arms restrictions from England as well as from the Founding era. In cases challenging prosecutions under the federal ban on possession by unlawfully present noncitizens, the government and courts have, in several cases, sought to analogize the federal prohibition to enactments during the Revolutionary period that sought to disarm Loyalists to the British monarchy.[13]

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9. See District of Columbia v. Heller, 554 U.S. 570, 576–600 (2008).

10. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–27 (2022) (describing the lower courts' coalescene around a two-step approach).

11. See id. at 2135–40.

12. See id. at 2131–34.

13. See, e.g., United States v. Jimenez-Shilon, 34 F.4th 1042, 1047–49 (11th Cir. 2022) (relying on historical exclusions of Native Americans, enslaved people, and Loyalists to conclude that unlawfully present noncitizens are not protected by the Second Amendment); United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1259 (E.D. Wash. 2024) (ruling that prohibitions on noncitizens are subject to rational basis review and relying on Loyalist disarmament statutes to establish a historical tradition of disarming "persons deemed disloyal or of questionable allegiance"); United States v. Gil-Solano, 699 F. Supp. 3d 1063, 1069 (D. Nev. 2023) (relying on Founding-era laws that prohibited gun possession by those who did not swear an oath of allegiance to the sovereign); United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124, 129 (D.P.R. 2023) (comparing unlawfully present noncitizens to groups that were disarmed for threatening social order during the colonial era); United States v. Leveille, 659 F. Supp. 3d 1279, 1284 (D.N.M. 2023) (finding that historical restrictions on those "who did not swear an oath of allegiance or otherwise might be considered national outsiders" was sufficiently analogous to § 922(g)(5)); United States v. Carbajal-Flores, No. 20-cr-00613, 2022 WL 17752395, at *3 (N.D. Ill. Dec. 19, 2022) (justifying § 922(g)(5) through the fact that some colonies banned gun ownership by those unwilling to take an oath of allegiance to the state); United States v. DaSilva, No. 3:21-CR-267, 2022 WL 17242870, at *10 (M.D. Pa. Nov. 23, 2022) (comparing unlawfully present noncitizens to those who lacked undivided allegiance at the Founding); see also United States v. Perez, 6 F.4th 448, 462–63 (2d Cir. 2021) (Menashi, J., concurring in the judgment) (citing historic loyalty-based disarmament laws to determine that unlawfully present noncitizens were not part of "the people" protected by the Second Amendment); cf. United States v. Rahimi, 61 F.4th 443, 456–57 (5th Cir. 2023) (discussing Loyalist disarmament laws), rev'd, 144 S. Ct.

Generally, these Revolutionary-period laws authorized officials to disarm individuals who did not make attestations of fidelity to the newly independent colonies or otherwise evinced their disagreement with the struggle for independence.[14] For example, in 1776, the colony of Massachusetts sought to disarm those persons "notoriously disaffected to the cause of America, or who refuse to associate to defend by arms the *United American Colonies*, against the hostile attempts of the British fleets . . . ."[15] Similarly, in 1777, Virginia required all freeborn male inhabitants of the state to take an oath of allegiance to the state and directed commanding officers of the militia to disarm any "recusants" who declined the affirmation.[16] Pennsylvania's government in both 1776 and 1779 authorized commanding officers of the militia to take arms from those "suspected to be disaf[f]ected to the independ[e]nce of this state."[17]

In addition to the several lower federal courts invoking these historical statutes, the relevance and import of the Loyalist laws prominently featured in briefing and argument for *Rahimi*, concerning the federal gun possession ban on those subject to a domestic violence restraining order.[18] At the Founding and in the post-Ratification period, there were no laws that restricted firearm possession by domestic violence abusers.[19] As such,

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1889 (2024); Brief for the United States at 7, 22–23, 42–43, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 5322645 [hereinafter *Rahimi* United States' Brief] (same).

14. See supra note 1; see also Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. Rev. 1521, 1548–49 (2010) [hereinafter Gulasekaram, "The People" of the Second Amendment]; Gulasekaram, "People" Problem, supra note 8, at 1469–73.

15. See Act of Mar. 14, 1776, ch. VII, 1775–1776 Mass. Act at 31–32, 35, reprinted by Duke Ctr. for Firearms L., https://firearmslaw.duke.edu/laws/act-of-mar-14-1776-ch-vii-1775-1776-mass-act-at-31-32-35 [https://perma.cc/PU2Q-FQW2] (last visited Oct. 19, 2024).

16. See An Act to Oblige the Free Male Inhabitants of This State Above a Certain Age to Give Assurances of Allegiance to the Same, and for Other Purposes, reprinted in 9 The Statutes at Large: Being a Collection of All the Laws of Virginia From the First Session of the Legislature, in the Year 1619, 281–82 (Richmond, J. & G. Cochran Printers, William Waller Hening ed., 1821).

17. See An Act . . . for Disarming Persons Who Shall Not Have Given Attestations of Allegiance and Fidelity to This State, Pa. Laws 193, §§ 4–5 (1779), reprinted by Duke Ctr. for Firearms L., https://firearmslaw.duke.edu/laws/1779-pa-laws-193 [https://perma.cc/W478-NTBF] (last visited Oct. 13, 2024); An Ordinance Respecting the Arms of Non-Associators, 1776 Pa. Laws 11, § 1.

18. See *Rahimi* United States' Brief, supra note 13, at 7, 22–23, 42–43 (arguing that the United States has a long tradition of disarming those who are not law-abiding and responsible); Brief for Respondent at 12–17, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 6391053 [hereinafter *Rahimi* Respondent's Brief] (arguing that the Founding generation did not deal with domestic violence through banning the possession of weapons but through surety proceedings, criminal prosecution, and divorce). Ultimately, the Supreme Court upheld 18 U.S.C. § 922(g)(8). See *Rahimi*, 144 S. Ct. at 1903.

19. See United States v. Rahimi, 61 F.4th 443, 455–61 (5th Cir. 2023) (rejecting the government's multiple proffered historical analogues to 922(g)(8) as insufficiently similar to disarmament based on domestic violence); Joseph Blocher & Eric Ruben, Originalism-

Rahimi maintained that 18 U.S.C. § 922(g)(8) needed to be struck down as it lacked a sufficient historical tradition.[20] Former U.S. Solicitor General Elizabeth Prelogar countered that historical regulations, including the Loyalist disarmament statutes, evinced a general valence toward disarming those who were provably dangerous.[21] Like laws disarming Loyalists to the British Crown, the federal government argued, the modern domestic violence ban deprived firearms from those unfit to wield them.

Ultimately, an 8-1 majority of the Supreme Court rejected Rahimi's challenge and upheld the federal prohibition.[22] Common sense and the consequences of letting Rahimi possess a gun seem to have been on the minds of several Justices.[23] The Court appeared uncomfortable reading the Second Amendment to protect the arms-bearing rights of the likes of Rahimi, who had an extensive history of violent interactions with his domestic partner (some involving guns).[24] Nevertheless, the majority also took pains to tether its conclusion to historical regulations rather than common sense and consequences. The Court cited the "going armed" laws of the English Crown[25] and the "surety" laws of England and, later,

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by-Analogy and Second Amendment Adjudication, 133 Yale L.J. 99, 117 (2023) ("[T]here were no historical laws specifically prohibiting gun possession by domestic-violence offenders in 1791.").

20. See *Rahimi* Respondent's Brief, supra note 18, at 12–17.

21. See *Rahimi* United States' Brief, supra note 13, at 7, 22–23, 42–43.

22. *Rahimi*, 144 S. Ct. at 1903. Justice Clarence Thomas was the lone dissenter. See id. at 1930.

23. Id. at 1901 ("Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."); cf. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."). This concern was also evident at oral argument in *Rahimi*:

> Chief Justice Roberts: Well, to the extent that's pertinent, you don't have any doubt that your client's a dangerous person, do you?
>
> Mr. Wright: Your Honor, I would want to know what "dangerous person" means. At the moment—
>
> Chief Justice Roberts: Well, it means someone who's shooting, you know, at people. That's a good start.

Transcript of Oral Argument at 79, *Rahimi*, 144 S. Ct. 1889 (No. 22-915), 2023 WL 9375567 [hereinafter *Rahimi* Oral Argument Transcript].

24. See *Rahimi* Oral Argument Transcript, supra note 23, at 12–13 (statement of Barrett, J.) ("I think there would be little dispute that someone who was guilty, say, or even had a restraining order—that domestic violence is dangerous, ok. So someone who poses a risk of domestic violence is dangerous."); see also *Rahimi*, 144 S. Ct. at 1895 (detailing Rahimi's multiple instances of using physical threats and violence toward his partners, including brandishing and discharging a firearm).

25. See *Rahimi*, 144 S. Ct. at 1899, 1901 (citing English laws from the 1600s prohibiting individuals from "go[ing] armed to terrify the King's subjects" (alteration in original) (internal quotation marks omitted) (quoting Sir John Knight's Case, 87 Eng. Rep. 75, 76 (K.B. 1686))).

the Founding period[26] to ground its conclusion that the government may, consistent with the Second Amendment, disarm individuals who pose a credible threat to the physical safety of others.[27] Three concurring Justices conspicuously added opinions to assure readers that the result was a straightforward application of *Bruen*'s originalist, history-focused interpretation.[28] Because the majority focused on "going armed" and "surety" laws, however, the Court found it unnecessary to consider the Loyalist disarmament regulations that had been discussed prominently in the Fifth Circuit opinion and in briefing and oral argument for the Supreme Court.[29]

Despite the Court's inattention to the Loyalist disarmament laws in *Rahimi*, the Loyalist gun laws of the Founding era feature prominently in other pending and future Second Amendment claims in federal and state courts.[30] This is especially true for future § 922(g)(5) challenges.[31] Several federal courts, including the Eleventh Circuit, have expressly and exclusively relied on Founding-era British Loyalist disarmament laws as a basis for upholding the modern-day prohibition on unlawfully present noncitizens' firearm possession.[32] In those cases, judges have opined that the historic exclusions represented the disarmament of those who were disloyal to America and outside the nation's political community, claiming the same to be true of unlawfully present persons today.[33] Unlawfully pre-

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26. See id. at 1899–90 (citing laws that were forms of "preventive justice" that required potentially dangerous individuals to post a bond (internal quotation marks omitted) (quoting 4 William Blackstone, Commentaries on the Laws of England 145–46 (London, 10th ed. 1787))).

27. See id. at 1901.

28. See id. at 1907–10 (Gorsuch, J., concurring) ("The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*."); id. at 1910–12 (Kavanaugh, J., concurring) ("History, not policy, is the proper guide."); id. at 1924–26 (Barrett, J., concurring) (explaining and defending the "basic premises of originalism").

29. See id. at 1901–02; see also United States v. Rahimi, 61 F.4th 443, 456–57 (5th Cir. 2023) (discussing Loyalist disarmament regulations); *Rahimi* United States' Brief, supra note 13, at 22–23 (same); *Rahimi* Respondent's Brief, supra note 18, at 24–25 (same); *Rahimi* Oral Argument Transcript, supra note 23, at 4 (statement of Elizabeth Prelogar, Solic. Gen.) ("Throughout our nation's history, legislatures have disarmed those who have committed serious criminal conduct or whose access to guns poses a danger, for example, loyalists . . . .").

30. See Blocher & Ruben, supra note 19, at 110 (describing how courts engaging in historical analogical reasoning may adjust "the level of generality at which the historical inquiry is conducted [to] mitigate the risk of anachronism").

31. Indeed, at least one district court considered the import of the Loyalist disarmament statues to § 922(g)(5) post-*Rahimi*, but rejected the analogy. See United States v. Benito, 739 F. Supp. 3d 486, 495 (S.D. Miss. 2024).

32. See supra note 13.

33. See, e.g., United States v. Leveille, 659 F. Supp. 3d 1279, 1283–85 (D.N.M. 2023) (finding "that the historical restrictions on individuals who did not swear an oath of allegiance or otherwise might be considered national outsiders is sufficiently similar to Section 922(g)(5) to support the law as it exists today").

sent noncitizens, in their view, are "threatening or suspect" to the prevailing governmental and social order, just as Loyalists were in 1776.[34] As with the domestic violence restraining order prohibition upheld in *Rahimi*, it seems clear that most federal courts are skittish about recognizing the Second Amendment rights of noncitizens, and especially unlawfully present noncitizens.[35]

II. BRITISH LOYALISTS AND UNLAWFULLY PRESENT NONCITIZENS

In response to this recent focus on Loyalist disarmament laws, this Piece maintains that the loyalty-based disarmament of the Founding era cannot justify present-day immigration status restrictions under *Bruen* and *Rahimi*'s methodology for three reasons. The first two reasons implicate the comparative purposes and mechanics between historical and modern regulations. Both *Bruen* and *Rahimi* treat these factors as dispositive.[36] *Bruen* relieved lower courts of the obligation to find a "dead ringer" or "historical *twin*,"[37] instead requiring them to seek an analogue that matches the "how and why" of the contemporary regulation.[38] *Rahimi* clarified that *Bruen*'s analysis requires considering whether the modern

34. See, e.g., United States v. Trinidad-Nova, 671 F. Supp. 3d 118, 123 (D.P.R. 2023) ("Congress, thus, to some degree, deemed aliens without legal status to be untrustworthy and in need of disarming, akin to those groups disarmed at the time of the founding."). In fact, some courts have cited this author's prior research on immigrants and gun regulation as justifying the link between those historical regulations and § 922(g)(5). See, e.g., United States v. Jimenez-Shilon, 34 F.4th 1042, 1048 (11th Cir. 2022) (quoting Gulasekaram, "The People" of the Second Amendment, supra note 14, at 1548–49); United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124, 129 (D.P.R. 2023) (quoting Gulasekaram, "The People" of the Second Amendment, supra note 14, at 1548–49); *Trinidad-Nova*, 671 F. Supp. 3d at 123 (quoting Gulasekaram, "The People" of the Second Amendment, supra note 14, at 1548–49).

35. See supra note 6; see also Pratheepan Gulasekaram, "The People", Citizenship, and Firearms, Duke Ctr. for Firearms L. Second Thoughts Blog (Jan. 13, 2022), https://firearmslaw.duke.edu/2022/01/the-people-citizenship-and-firearms [https://perma.cc/95R5-YYHB] [hereinafter Gulasekaram, Citizenship and Firearms] (arguing that some courts "trade on innuendo about immigrant criminality and tendency to lawless behavior" when rejecting noncitizens' Second Amendment claims). But see *Benito*, 739 F. Supp. 3d at 495–96 (rejecting analogy between Loyalist disarmament and § 922(g)(5)); United States v. Carbajal-Flores, 720 F. Supp. 3d 595, 601 (N.D. Ill. 2024) (finding that, as applied, a noncitizen's history did not reveal dangerousness); United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 673 (W.D. Tex. 2023) (striking down § 922(g)(5)), rev'd in part, No. 24-50022, 2024 WL 5318254 (5th Cir. Nov. 6, 2024).

36. See United States v. Rahimi, 144 S. Ct. 1889, 1897–99 (noting that "[w]hy and how" a regulation burdens the right to bear arms is central to a court's inquiry (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128 (2022))).

37. See *Bruen*, 142 S. Ct. at 2133.

38. See *Bruen*, 142 S. Ct. at 2133. How to measure the sufficiency of the analogical comparison was, and is, anyone's guess, a point illustrated by the several post-*Bruen* courts vexed by *Bruen*'s malleable framework. See, e.g., United States v. Bullock, 679 F. Supp. 3d 501, 517–39 (S.D. Miss. 2023) (striking down the application of the federal "felon-in-possession" law as applied to the defendant and noting the concerns and indeterminacy

regulation "is consistent with the principles that underpin our regulatory tradition."[39] Beyond the relevant motivating principle, *Rahimi* further explained that the respective manner and scope of statutory operation matters in Second Amendment analysis.[40]

First, the "particular problem"[41] presented by Loyalists and the reasons Founding-era jurisdictions sought to disarm them cannot be transported to noncitizen disarmament today. Identifying as a Loyalist during the Revolutionary War meant rejecting the legitimacy and existence of the new nation as a sovereign entity. By contrast, both the general noncitizen and the unlawfully-present populations are comprised nearly exclusively of those who have left a home country and migrated precisely because they hope to integrate into and contribute to the civic, social, and economic life of a thriving nation.[42] Second, the Founding-era restrictions were conditioned on choice and continuing conduct. By contrast, § 922(g)(5) and other noncitizen firearms regulations automatically restrict gun ownership based on immigration status and categorically exclude without exception.

In addition to the respective "why" and "how" of the statutes, a third concern, tied to Loyalists' membership in colonial communities, disconnects that unique historical group from the unlawfully present of today. Loyalists who resided in the colonies during the Revolutionary War and Founding period were treated as part of the political community, not as outsiders. Thus, neither the ability to politically participate in self-government nor the membership of the individual in the political community has ever been the categorical dividing line for firearm possession.

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inherent in applying *Bruen*'s methodology); see also *Rahimi*, 144 S. Ct. at 1924–26 (Barrett, J., concurring) (acknowledging the level-of-generality problem as to selecting historical analogues and then positing that, in this case, the Court found "just the right level of generality").

39. *Rahimi*, 144 S. Ct. at 1898.

40. See *Rahimi*, 144 S. Ct. at 1898 ("Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding.").

41. *Rahimi*, 144 S. Ct. at 1898 (directing courts to determine if the "particular problems" addressed by Founding-era laws imposed "similar restrictions for similar reasons" as current regulations).

42. See Undocumented Immigrants, New Am. Econ., https://www.newamericaneconomy.org/issues/undocumented-immigrants/ [https://perma.cc/U7RG-4MGK] (last visited Feb. 5, 2025) ("Most undocumented immigrants come to the United States because of work opportunities."); Why Do Immigrants Come to the US?, USAFacts, https://usafacts.org/articles/why-do-people-immigrate-us/ [https://perma.cc/TB7C-KUH3] (last updated Aug. 1, 2024) (noting that "[o]f all people legally immigrating to the US in 2021, about 42% came for work, 32% for school, and 23% for family").

A. *The "Why" of Loyalist and Noncitizen Disarmament*

The purpose of Loyalist disarmament laws in the Founding period was not to disarm noncitizens or immigrants or to address the problems of irregular migration. Indeed, the existence of a category of individuals known as "illegally" or "unlawfully present" under federal law would not have been cognizable until after 1875 at the earliest, and not until the late 1900s in the way the term is used in statutes today.[43] Moreover, to read those early loyalty laws as countenancing immigrant disarmament would be farcical. Many Americans at the Founding were immigrants or descendants of recent immigrants who migrated for economic gain or to escape various forms of persecution.[44]

Rather, Loyalist disarmament laws were the emerging nation's proto-national security laws. They sought to smoke out existential threats to the cause of independence. A British sympathizer with a firearm living among colonial residents fighting for independence presented a national security threat, which then dictated their fitness for firearm possession during wartime.[45]

In contrast, § 922(g)(5)'s categorical ban on unlawfully present persons possessing firearms is not premised on allegiance (or lack thereof) to the United States or support for the country as a sovereign nation. As a practical matter, noncitizens, and perhaps especially unlawfully present noncitizens, are likely to be among those most committed to the nation's continued flourishing.[46] Indeed, snapshots of the unauthorized population and deportation trends today suggest that very few noncitizens present national security threats.[47] Instead, the overwhelming majority of

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43. Gulasekaram, "People" Problem, supra note 8, at 1470–71 (internal quotation marks omitted) (quoting 18 U.S.C. § 922(g)(5)(A)-(B) (2018)).

44. See United States v. Benito, 739 F. Supp. 3d 486, 494 (S.D. Miss. 2024) (striking down application of § 922(g)(5) and remarking, "[t]o its credit, the government does not maintain that early Americans disarmed or feared immigrants," which would be "preposterous" because "[e]arly Americans *were* immigrants").

45. Tyler, supra note 1 ("There is no question that loyalists who supported the British in the Revolutionary War posed an enormous threat to the national security of the new state, and that is why many states responded aggressively to that threat.").

46. See supra note 42 and accompanying text.

47. See Criminal Grounds for Deportation, Transactional Recs. Access Clearinghouse (July 29, 2022), https://trac.syr.edu/immigration/reports/685/ [https://perma.cc/C7D2-3CFU] (tracking numbers and bases for criminal-related charges for deportation); Fewer Immigrants Face Deportation Based on Criminal-Related Charges in Immigration Court, Transactional Recs. Access Clearinghouse (July 28, 2022), https://trac.syr.edu/immigration/reports/690/ [https://perma.cc/7G2T-9R8G] (describing the decline in the number of criminal-related charges listed on Notices to Appear in deportation proceedings); see also Elizabeth Neumann, Nat'l Immigr. F., Immigration Is Not a National Security Threat 9 (2021), https://immigrationforum.org/wp-content/uploads/2021/03/Immigration-Is-Not-a-Security-Threat-3_4_2021.pdf [https://perma.cc/K7MV-AY6C] (stating that "[t]he vast majority of undocumented immigrants living in the U.S. are not threats to national security"); Alex Nowrasteh, Cato Inst., Terrorism and Immigration: A

unlawfully present noncitizens are fleeing economic deprivation, violence, and persecution.[48] Thus, far from resisting a new political order, their existential priority is to integrate into the economic and civic life of a flourishing and stable nation.[49]

Finally, unlike during the Revolutionary period, the United States is not in active military conflict with the nations from which the overwhelming majority of unlawfully present noncitizens, and certainly those who have been subjects of post-*Bruen* (g)(5) prosecutions, hail.[50] If the United States were to be involved in such a conflict today, one would assume a variety of national security and terrorism laws—the more closely-related

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Risk Analysis, 1975–2022, at 1–2 (2023), https://www.cato.org/sites/cato.org/files/2023-08/PA%20958_appendix_update.pdf [https://perma.cc/E9TD-R9YA] ("[T]he annual chance of an American being murdered in a terrorist attack by a refugee is about 1 in 3.3 *billion*, while the annual chance of being murdered in an attack committed by an illegal immigrant is zero.").

48. See Jessica Bolter, Migration Pol'y Inst., Explainer: Illegal Immigration in the United States 3 (2019), https://www.migrationpolicy.org/sites/default/files/Explainer-IllegalImmigration-PRINT-Final.pdf [https://perma.cc/N7S5-AWZ8] (discussing the rise in Central American migration and how it "stems from a combination of factors, including violence, insecurity, poverty, and lack of opportunity at home"); Sergio Martínez-Beltrán, Despite a Fortified Border, Migrants Will Keep Coming, Analysts Agree. Here's Why., NPR (Apr. 22, 2024), https://www.npr.org/2024/04/22/1244381584/immigrants-border-mexico-asylumillegal-immigration [https://perma.cc/J74H-G8JK] (noting that surges in unlawful border crossings "can be attributed not only to seasonal migration patterns, but an increase of people displaced by war, poverty, and climate factors in all continents").

49. See Jeffrey S. Passel & Jens Manuel Krogstad, What We Know About Unauthorized Immigrants Living in the U.S., Pew Rsch. Ctr. (Nov. 16, 2023), https://www.pewresearch.org/short-reads/2024/07/22/what-we-know-about-unauthorized-immigrants-living-in-the-us/ [https://perma.cc/SND6-BHJU] (last updated July 22, 2024) (noting that, out of an estimated population of 11 million unauthorized noncitizens, 8.3 million were working in 2022 and that the unauthorized immigrant share of the labor force is higher than their share of the U.S. population).

50. See, e.g., United States v. Sitladeen, 64 F.4th 978, 982 (8th Cir. 2023) (noncitizen-defendant was a Canadian national); United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 653 (W.D. Tex. 2023), rev'd in part, No. 24-50022, 2024 WL 5318254 (5th Cir. Nov. 6, 2024) (Mexican national); Expert Report and Declaration of Pratheepan Gulasekaram at 3, United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249 (E.D. Wash. 2024) (No. 2:22-CR-00087-RMP), ECF No. 41-1 (Mexican national); United States' Response in Opposition to Defendant's Motion to Dismiss the Indictment on Second Amendment Grounds at 2, United States v. Vizcaíno-Peguero, 671 F. Supp. 3d 124 (D.P.R. 2023) (Crim. No. 22-168 (FAB)), ECF No. 37 (Dominican national); Affidavit in Support of Criminal Complaint at 2, United States v. Leveille, 659 F. Supp. 3d 1279 (D.N.M. 2023) (No. 1:18-CR-02945-WJ), ECF No. 1 (Haitian national); Government's Brief in Opposition to Motion to Dismiss at 4, United States v. DaSilva, No. 3:21-CR-267, 2022 WL 17242870 (M.D. Pa. Nov. 23, 2022), ECF No. 50 (Brazilian national); see also Passel & Krogstad, supra note 49 (noting that the five countries with the largest unauthorized immigrant populations in the United States are Mexico, El Salvador, India, Guatemala, and Honduras).

descendants of the Loyalist disarmament laws—would suffice to disarm and prosecute present-day noncitizens who present an existential threat.[51]

B. *The "How" of Loyalist and Noncitizen Disarmament*

If the "why" of Loyalist disarmament mismatches with present-day noncitizen disarmament, the "hows" of the respective prohibitions fare no better. For comparative purposes, the critical takeaway is that the Loyalist disarmament statutes required conduct and process before disarmament. States disarming Loyalists during the Founding period presented a choice to their residents, asking them to affirm or decline to affirm their allegiance to the emerging Republic.[52] Importantly, the statutes triggered firearm dispossession only after responsive conduct. As per the language of the various provisions, a Loyalist could avoid disarmament by taking an oath or affirmation; the laws permitted a local official (perhaps the local militia leader) to disarm the Loyalist if they rejected the oath or otherwise expressed disaffection with the cause of independence.[53] In sum, residents of the newly declared independent colonies could avoid disarmament by affirming that they were not existential threats.

By contrast, contemporary laws that condition firearms possession on immigration status are triggered by migration-related processes or conditions that often occurred years, if not decades, in the past.[54] Moreover, the assignment of that immigration status, by itself, is disconnected from any finding of a public safety threat or national security concern. This is important because unlawful presence is not necessarily, or even likely, an indicator of criminal activity.[55] Noncitizens caught and apprehended by

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51. See 18 U.S.C. §§ 2332, 2339(a)–(b), 2339(d) (2018) (outlining criminal sanctions for providing material support to and receiving military training from terrorists or terrorist organizations and prescribing penalties for acts of terrorism).

52. See supra notes 14–17 and accompanying text.

53. See supra notes 14–17 and accompanying text.

54. See, e.g., *Vazquez-Ramirez*, 711 F. Supp. 3d at 1251 (describing how the defendant was brought to the country as a child and had lived without legal status for several decades prior to being charged with a § 922(g)(5)(A) violation); see also Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, 5 Facts About Illegal Immigration in the U.S., Pew Rsch. Ctr. (Nov. 18, 2014), https://www.pewresearch.org/short-reads/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s [https://perma.cc/5QFQ-739J] (last updated June 12, 2019) (noting that, in 2017, the median unauthorized adult noncitizen had spent 15.1 years in the United States).

55. See, e.g., Rubén G. Rumbaut, Katie Dingeman & Anthony Robles, Immigration and Crime and the Criminalization of Immigration *in* Routledge International Handbook of Migration Studies 472, 474 (Steven J. Gold & Stephanie J. Nawyn eds., 2nd ed. 2019) ("The evidence demonstrating lower rates of criminal involvement among immigrants is strongly supported by a growing number of contemporary studies."); Robert M. Adelman, Yulin Yang, Lesley Williams Reid, James D. Bachmeier & Mike Maciag, Using Estimates of Undocumented Immigrants to Study the Immigration–Crime Relationship, 44 J. Crime & Just. 375, 392 (2020) (using cross-sectional data and estimates of the undocumented population in 2014 and finding that "as immigration—in this case, unauthorized

immigration officials while entering the country unlawfully might be charged and prosecuted under relevant immigration laws.[56] But an even higher portion of the unlawfully present population entered lawfully, later committing the administrative violation of overstaying a visa.[57] This class of unlawfully present noncitizens cannot be subject to criminal liability based on their immigration status or means of entering the country.[58]

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immigration specifically—increases in metropolitan areas, crime decreases" and that "overall property crime, burglary, and larceny decrease with increases in undocumented immigration"); David Green, The Trump Hypothesis: Testing Immigrant Populations as a Determinant of Violent and Drug-Related Crime in the United States, 97 Soc. Sci. Q. 506, 521 (2016) (finding no link between immigrant populations and violent crime but "some evidence of a small but significant association between undocumented immigrants and drug-related crime"); Michael T. Light & Ty Miller, Does Undocumented Immigration Increase Violent Crime?, 56 Criminology 370, 370 (2018) (noting that the immigration–crime nexus has been a focus of criminological study since the early twentieth century, but "significant gaps remain in the literature"); Ran Abramitzky, Leah Platt Boustan, Elisa Jácome, Santiago Pérez & Juan David Torres, Law-Abiding Immigrants: The Incarceration Gap Between Immigrants and the US-Born, 1870–2020, at 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31440, 2024), https://www.nber.org/system/files/working_papers/w31440/w31440.pdf [https://perma.cc/ZD45-GUUQ] ("[A]s a group, immigrant men have had a *lower* incarceration rate than US-born men for the last 150 years of American history."). On crime in so-called "sanctuary" jurisdictions, see Tom K. Wong, Ctr. for Am. Progress, The Effects of Sanctuary Policies on Crime and the Economy 1 (2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/01/SanctuaryJurisdictions-report.pdf [https://perma.cc/VA83-C7L5] ("Crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties."); Marta Ascherio, Do Sanctuary Policies Increase Crime? Contrary Evidence From a County-Level Investigation in the United States, Soc. Sci. Rsch., Aug. 2022, at 4 (analyzing county-level data post-2013); David K. Hausman, Sanctuary Policies Reduce Deportations Without Increasing Crime, 117 Proc. Nat'l. Acad. Scis. 27,262, 27,263 (2020) (finding "no evidence that sanctuary policies threaten public safety"). At least one court cited some of this evidence in a § 922(g)(5) case. See United States v. Benito, 739 F. Supp. 3d 486, 494 (S.D. Miss. 2024) (citing various studies supporting the statement that "there's no evidence that undocumented immigrants are more dangerous than documented immigrants or citizens").

56. See, e.g., 8 U.S.C. §§ 1325–1326 (2018) (establishing criminal penalties for "[i]mproper entry by alien" and "reentry of removed aliens").

57. See, e.g., Robert Warren, Ctr. for Migration Stud., US Undocumented Population Continued to Fall From 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year 1 (2019), https://cmsny.org/wp-content/uploads/2019/01/US-Undocumented-Population-Continued-to-Fall-from-2016-to-2017-and-Visa-Overstays.pdf [https://perma.cc/7JM2-KZEA] ("For the past 10 years, the primary mode of entry to the undocumented population has been to overstay temporary visas."); Robert Warren & Donald Kerwin, The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million, 5 J. on Migration & Hum. Sec. 124, 125 (2017) ("[T]wo-thirds of those [undocumented immigrants] who arrived in 2014 did not illegally cross a border, but were admitted (after screening) on non-immigrant (temporary) visas, and then overstayed their period of admission or otherwise violated the terms of their visas.").

58. See Jill H. Wilson, Andorra Bruno, Abigail F. Kolker & Audrey Singer, Cong. Rsch. Serv., R47848, Nonimmigrant Overstays: Overview and Policy Issues 20 (2023) (discussing the various noncriminal penalties that can result from overstaying a nonimmigrant admission); see also Richard Gonzales, For 7th Consecutive Year, Visa Overstays Exceeded

Further, § 922(g)(5) cannot be overcome by a later evidentiary showing or oath. Most obviously, nothing in modern noncitizen gun regulations, including in § 922(g)(5), provides an exception for noncitizens who can demonstrate or attest to loyalty to the United States.[59] The disjuncture between the federal criminal ban and loyalty to the nation is evidenced by the tens of millions of noncitizens whom the provision does *not* cover. Lawful permanent residents, for example, do not take loyalty oaths or make attestations of allegiance during their immigration process, and yet federal law does not criminalize their firearm possession.[60] In addition, noncitizens, including unlawfully present noncitizens, have borne arms on behalf of the nation in times of war, engaging in the most high-stakes form of national service and sacrifice.[61] Yet, despite the clear evidence of service and loyalty in defense of the nation, as per § 922(g)(5), some of those noncitizens could be disarmed for personal gun possession in defense of self and family.[62] To the extent an active statement of allegiance remains relevant to gun possession, many noncitizens—including huge swaths of the unlawfully present population—regularly pledge their allegiance to the United States. For example, unlawfully present noncitizens brought to the United States as children undoubtedly would have recited the Pledge of Allegiance countless times.[63]

Illegal Border Crossings, NPR (Jan. 16, 2019), https://www.npr.org/2019/01/16/686056668/for-seventh-consecutive-year-visa-overstays-exceeded-illegal-border-crossings [https://perma.cc/3TV6-DWBB]; Mark Hugo Lopez, Jeffrey S. Passel & D'Vera Cohn, Key Facts About the Changing U.S. Unauthorized Immigrant Population, Pew Rsch. Ctr. (Apr. 13, 2021), https://www.pewresearch.org/short-reads/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/ [https://perma.cc/3EMN-J7J9].

59. See 18 U.S.C. § 922(g)(5) (2018).

60. See id. (prohibiting only unlawfully present noncitizens and nonimmigrants from gun possession); see also Fletcher v. Haas, 851 F. Supp. 2d 287, 305 (D. Mass. 2012) (striking down a state criminal provision that prohibited lawful permanent residents from possessing firearms). To be sure, all noncitizens, including permanent residents, may be deported for violating state or local firearms laws. See 8 U.S.C. § 1227(a)(2)(C).

61. See Candice Bredbenner, A Duty to Defend? The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946, 24 J. Pol'y Hist. 224, 231–36 (2012) (explaining how required military participation has remained an obligation for male noncitizens throughout American history, even as other rights and obligations have been denied noncitizens); Charles E. Roh, Jr. & Frank K. Upham, The Status of Aliens Under United States Draft Laws, 13 Harv. Int'l L.J. 501, 501–04 (1972) (documenting how noncitizens were drafted into the U.S. military during times of conscription); Deenesh Sohoni & Yosselin Turcios, Discarded Loyalty: The Deportation of Immigrant Veterans, 24 Lewis & Clark L. Rev. 1285, 1291–94 (2020) (documenting the federal government's history of using noncitizens to fulfill military demands during times of conflict).

62. See 18 U.S.C. § 922(g)(5) (offering no exception for possession in defense of self and family).

63. See, e.g., Declaration of Oscar Vazquez-Ramirez at 1, United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249 (E.D. Wash. 2024) (2:22-CR-00087-RMP), ECF No. 41-2 [hereinafter Declaration of Oscar Vazquez-Ramirez] (noting that the noncitizen defendant was brought to the country at seven years old and attended public schools in Washington for elementary, middle, and high school).

Notably, outside the context of national security and core governmental integrity, federal law rarely deprives noncitizens of constitutional rights as a penalty for criminal prosecution. The federal prohibition on political expenditures by nonpermanent resident noncitizens is illustrative.[64] Unlike the right to bear arms, which the Court maintains is a right of armed personal defense from private violence,[65] the diminution of noncitizens' First Amendment rights in the campaign finance context is premised on preserving the integrity of the state.[66] In other words, the Court has permitted Congress to criminalize noncitizens' speech when that prohibition is tied directly to protecting citizens' capacity for self-government from undue or distortive influence from foreign sources.[67] Like the disarming of Loyalists, the expenditure restriction might be understood as a measure intended to preserve the Republic. And even then, these present-day expenditure restrictions rest on dubious constitutional ground in light of the Court's more recent expansion of free expression rights in campaign finance.[68] Similarly, in modern constitutional jurisprudence, the Court has expressly rejected forced attestations of allegiance as part of everyday civilian life.[69] In the immigration realm, Congress did away with provisions of the immigration code that premised naturalization on noncitizens' promising to be loyal prior to their applications for citizenship.[70]

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64. See 52 U.S.C. §§ 30109(d), 30121(a)(1)(A), 30121(b) (2018) (banning all nonpermanent residents from making "a contribution or donation . . . in connection with a Federal, State, or local election," with penalties including imprisonment and monetary fines); see also Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 291 (D.D.C. 2011) (validating Congress's determination that foreign contributions and expenditures pose a risk to candidate elections), aff'd, 565 U.S. 1104 (2012).

65. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2143 (2022) ("[H]andguns . . . are indisputably in 'common use' for self-defense today. They are, in fact, 'the quintessential self-defense weapon.'" (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008))).

66. See Gulasekaram, "People" Problem, supra note 8, at 1501–09 (discussing how restrictions on noncitizens' political speech are "premised on an existential threat to the project of democratic self-governance and the constitutional republic").

67. See id. at 1501; see also Michael Kagan, When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment, 57 B.C. L. Rev. 1237, 1255–58 (2016) (discussing legal decisions related to foreign influence and political corruption).

68. See Kagan, supra note 67, at 1256–61 (critiquing the persistence of the political expenditure ban in light of the Court's skepticism of campaign funding restraints based on speaker identity, as articulated in Citizens United v. FEC, 558 U.S. 310 (2010)).

69. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down state law requiring the Pledge of Allegiance in school); cf. Baumgartner v. United States, 322 U.S. 665, 676–68 (1944) (refusing to set aside a naturalization oath and denaturalize a citizen based on his subsequent statements in support of Hitler and the German Reich).

70. For over a century and a half, federal law required those seeking citizenship to first file a "Declaration of Intention," in which the noncitizen would pledge under oath that they would renounce all prior allegiances to foreign sovereigns and become loyal United States citizens. See History of the Declaration of Intention (1795–1952), Nat'l Archives, https://www.archives.gov/research/immigration/naturalization/history-dec-of-intent [https://perma.cc/RAT2-NGJU] (last visited Oct. 11, 2024). Following that filing, the

C. *Loyalists, Unlawfully Present Noncitizens, and Membership in a Political Community*

Even if the Loyalist disarmament statutes fit poorly with the "how" and "why" of contemporary noncitizen gun bans, some courts have suggested that the relevant point of comparison is the status of the prohibited category of individuals vis-à-vis the political community of the nation.[71] As that argument goes, Loyalists could be disarmed because they were considered outsiders to the core members of the newly independent colonies.[72] Similarly, those courts maintain, unlawfully present noncitizens are outsiders to the political community of the United States, as they generally are barred from participating in elections, holding office or positions of public trust, and even contributing to candidates and political campaigns.[73]

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noncitizen would have to wait a specified period prior to applying for naturalization. Id. Congress made the Declaration of Intention optional in 1952 with the codification of immigration law into the Immigration and Nationality Act. See 8 U.S.C. § 1445(f) (2018). It is worth noting that even during the period when the Declaration was mandatory, several exceptions (including one for noncitizens in the military and foreign women married to U.S. citizens) applied that would permit a noncitizen to naturalize without filing the attestation. See Nat'l Archives, supra. During the period of its enforcement, some states conditioned benefits or property rights for noncitizens on filing the Declaration. See Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 8–9 (2006) ("The Homestead Act of 1862 . . . made noncitizens eligible for grants of land once they filed declarations.").

71. See United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022) ("[I]t seems clear enough that [undocumented immigrants] are not inherently 'part of [the] national community' . . . ." (third alteration in original) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990))); id. at 1048 (stating the proposition that "an individual's . . . 'membership in the political community' . . . was regarded as 'a precondition to the right to keep and bear arms'" (quoting United States v. Perez, 6 F.4th 448, 462 (2d Cir. 2021) (Menashi, J., concurring))).

72. See, e.g., id. at 1047–48 (describing how membership in the political community required undivided allegiance to the newly independent sovereign); United States v. Leveille, 659 F. Supp. 3d 1279, 1283–85 (D.N.M. 2023) (pointing to Pennsylvania's deprivation of firearms for those who refused to "swear an oath declaring allegiance to the commonwealth" and "abjuring all allegiance to the British monarchy" (internal quotation marks omitted) (quoting Churchill, supra note 1, at 159)).

73. See *Leveille*, 659 F. Supp. 3d at 1284 ("Today's immigration system functions as an attempt to define the nation's members and nonmembers."); see also U.S. Const. art. I, § 2, cl. 2 (requiring that members of the House of Representatives be citizens for at least seven years); U.S. Const. art. I, § 3, cl. 1 (requiring that members of the Senate be citizens for at least nine years); U.S. Const. art. II, § 3, cl. 5 (requiring that the President be a citizen); Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against requiring voters to present proof of citizenship when registering to vote and to present identification when voting on election day, but not addressing these policies' constitutionality); Kagan, supra note 67, at 1239 ("[F]ederal election law may prohibit immigrants from making even small expenditures to speak for or against candidates in an election."); Who Can and Cannot Vote, USAGov, https://www.usa.gov/who-can-vote [https://perma.cc/5X8V-RTLE] (last updated Sept. 26, 2024) ("Non-citizens, including permanent legal residents, cannot vote in federal, state, and most local elections.").

The fundamental flaw with this reasoning, however, is that, contra courts that have suggested that the ban on Loyalists equates to a ban on those *outside* the political community, the Founding-era laws instituted an *intra-political community* distinction. As Professor Amanda Tyler's historical research reveals, "as the Revolutionary War unfolded, the dominant understanding viewed those disaffected to the American cause as squarely within the political community of rights-bearing members."[74] In other words, those laws did not create a hard line between core members of the political community (who we might today deem citizens and putative citizens) and outsiders/foreigners (who we might today deem noncitizens, especially unlawfully present ones). As such, early American history is devoid of precursors that doled out gun rights based on membership in political bodies.

Moreover, if membership in the political community was the dividing line for the Second Amendment, the Loyalist disarmament laws would implicate more than § 922(g)(5)'s ban on unlawfully present persons. All noncitizens, including long-term permanent residents, are legally "outside" the political community in the sense that they generally cannot vote in elections, hold many elected offices, serve on juries, or contribute to candidates and campaigns as freely as citizens can.[75] Thus, a theory based on the (inaccurate) presumption that Loyalists were considered outsiders would countenance a far-reaching set of federal and state restrictions on noncitizens' constitutional rights beyond just firearms rights.[76]

D. *Loyalist Disarmament and Other Federal Firearm Prohibitions*

Importantly, rejecting the relevance of Loyalist disarmament laws to § 922(g)(5) does not mean completely disregarding those historical regulations. Loyalist disarmament statutes arguably remain relevant for evaluating the viability of other present-day gun restrictions that implicate oath taking and other indicia of allegiance. For example, lawful permanent residents perform the Oath of Allegiance as a final step before

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74. See Tyler, supra note 1.

75. See supra note 73; see also Amy R. Motomura, Note, The American Jury: Can Noncitizens Still be Excluded?, 64 Stan. L. Rev. 1503, 1502 (2012) ("In the United States, all jurors must be U.S. citizens.").

76. See, e.g., United States v. Medina-Cantu, 113 F.4th 537, 539 (5th Cir. 2024) (relying on United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011), for the proposition that noncitizens are not part of "the people" who may bear arms); United States v. Vazquez-Ramirez, 711 F. Supp. 3d 1249, 1253–55 (E.D. Wash. 2024) (holding that gun regulations that target noncitizens need not be subject to *Bruen*'s inquiry); see also Gulasekaram, Second Amendment Exceptionalism, supra note 8, at 52–53 (explaining and critiquing the consequences of the federal district court's rationale in *Vazquez-Ramirez*); Gulasekaram, "People" Problem, supra note 8, at 1459–61 (explaining and critiquing consequences of the Fifth Circuit's interpretation in *Portillo-Munoz*).

naturalizing into citizens,[77] and anyone, including noncitizens, joining the United States military takes the Oath of Enlistment.[78] These present-day attestations more closely resemble the loyalty attestations of the Revolutionary period. As such, two other § 922(g) disqualifications—(g)(6)'s criminalization of possession by those who have been dishonorably discharged from the armed forces and (g)(7)'s criminalization of possession by those who have renounced U.S. citizenship—mimic the ethos and justifications of the Revolutionary-period disarmament statutes.

In short, under *Bruen* and *Rahimi*'s search for historical analogues, the Founding-era disarmament laws might speak to the viability of other federal statutes, just not § 922(g)(5)'s categorical exclusions based on immigration status.

IV. SECOND AMENDMENT METHODOLOGY AND THE PITFALLS OF MISGUIDED HISTORICAL FOCUS

This Piece has thus far argued that judicial attempts to conform Loyalist disarmament statutes to § 922(g)(5) ignore critical "why" and "how" disparities and misconstrue the status of the respective groups. More broadly, this strand of jurisprudence helps demonstrate the significant limitations and unworkability of *Bruen*, *Rahimi*, and their history-focused framework as a way to evaluate any contemporary firearms restrictions, including § 922(g)(5).[79] Beyond the analogical dissimilarities, it bears noting that many status-based regulations enacted during the Founding and post-Ratification eras were expressly white supremacist, race-based firearm prohibitions on enslaved persons, free Black people, and Indigenous people,[80] produced by a highly constricted electorate.[81]

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77. See 8 U.S.C. § 1448(a) (2018).

78. 10 U.S.C. § 502(a) (2018).

79. See Gulasekaram, "People" Problem, supra note 8, at 1467–75 (outlining several ways in which such "appeals to historical antecedents" are "irredeemably flawed" and "ill-equipped" to resolve today's inquiries).

80. See id. at 1478–80 nn.217–225 (collecting citations to statutes from the colonial period through Reconstruction); see also Joseph Blocher & Caitlan Carberry, Historical Gun Laws Targeting "Dangerous" Groups and Outsiders, *in* New Histories of Gun Rights and Regulations: Essays on the Place of Guns in American Law and Society 131, 144 (Joseph Blocher, Jacob D. Charles & Darrell A. H. Miller eds., 2023) ("[W]hile we might find such outdated laws altogether irrelevant, we can alternatively look to them as a lesson that gun regulations, especially those targeting particular classes of persons, should be closely scrutinized for discriminatory motive and violations of Equal Protection."); Repository of Historical Gun Laws, Duke Ctr. for Firearms L., https://firearmslaw.duke.edu/repository-of-historical-gun-laws/advanced-search [https://perma.cc/6EL8-VKQZ] (last visited Oct. 17, 2024) (organizing historical gun laws by subject, including "race and slavery based" prohibitions).

81. See United States v. Benito, 739 F. Supp. 3d 486, 492 (S.D. Miss. 2024) ("It is not clear why 21st century Americans should defer to many early Americans' racist beliefs about Native Americans or religious intolerance toward Catholics."); see also Joy Milligan & Bertrall L. Ross II, We (Who Are Not) the People: Interpreting the Undemocratic

These groups (all of whom would have been considered noncitizens) posed a "danger" to the exclusively all-white, all-male, propertied class that enacted, enforced, and enjoyed the fruits of then-extant brutal systems of racial subjugation. One of *Bruen*'s many shortcomings is its failure to grapple with discarded biases and hierarchies of the past, which its methodology inherently invites.[82]

Nevertheless, so long as *Bruen*'s poorly formulated and malleable methodology governs (even as clarified by *Rahimi*), courts must be willing to apply its teachings consistently, even when the subjects of regulation are the politically unpopular group of unlawfully present noncitizens. After all, the right to armed self-defense extolled by *Bruen* would seem equally important to anyone who might fear for their personal safety from private violence. Many unlawfully present noncitizens have grown up, lived, studied, and worked in this country for decades and share the impulse to protect themselves and their family members.[83]

Of course, other arguments remain to gird the federal ban on possession by unlawfully present noncitizens. As *Rahimi* reminds us, "The Second Amendment permits more than just those regulations identical to ones that could be found in 1791,"[84] and good reasons exist to disarm many people, including some noncitizens, given the lethality of firearms and the prevalence of gun violence today.[85] The *Rahimi* Court assured that historical regulations support modern laws that disarm individuals who present credible public safety threats.[86] To the extent the antiquated regulations of the Founding period are of any utility to modern firearms

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Constitution, 102 Tex. L. Rev. 305, 307–10 (2023) (noting that most of the Constitution was adopted under a framework of "systematic exclusion in which some types of people were ineligible for political voice" and arguing that this democratic deficit must factor into modern interpretations of the document).

82. See Jacob D. Charles, On Sordid Sources in Second Amendment Litigation, 76 Stan. L. Rev. Online 30, 32 (2023) ("By dint of its own historical method, *Bruen* sanctifies appeal to the statutes of an unequal society."); Gulasekaram, "People" Problem, supra note 8, at 1472–75 (discussing how *Bruen*'s focus on history "hazards replicating the discriminatory and subordinating legal structures of the past"); Danny Y. Li, Antisubordinating the Second Amendment, 132 Yale L.J. 1821, 1892–98 (2023) (arguing that *Bruen*'s history and tradition approach fails to "combat subordination" and address the ways that the expansion of Second Amendment rights can harm communities of color).

83. See, e.g., Declaration of Oscar Vazquez-Ramirez, supra note 63, at 1 (detailing the defendant's fear of physical harm to him and his citizen children from the crime in his neighborhood in Othello, Washington).

84. See United States v. Rahimi, 144 S. Ct. 1889, 1897–98 (2024).

85. See id. at 1906 (Sotomayor, J., concurring) (citing data and studies about the danger of firearms in private possession).

86. See id. at 1896–98 (majority opinion) (explaining why English and Founding-era "surety" and "going armed" laws support a federal prohibition on possession by those subject to a civil domestic violence order).

concerns, this approach might be the most sensible use of history.[87] To be sure, such a general principle also might militate in favor of upholding the criminal ban on possession by at least some unlawfully present persons.

Even so, three observations are in order.[88] First, the federal courts that have analogized Founding-era loyalty disarmament to § 922(g)(5) have not relied on a broad "dangerousness" principle.[89] Rather, they have uncritically equated "loyalty" during the Revolutionary War with present-day federal immigration status categories, while ignoring evidence that Loyalists were considered part of the political community. Second, none of the opinions reconcile the fact that unlawful or "illegal" presence would not have been a cognizable immigration status until the late nineteenth century at the earliest, and really only in the mid-to-late twentieth century in the way § 922(g)(5) and other modern regulations use the term.[90] Indeed, the federal firearms-based deportation law first appeared in 1940, with criminal prohibitions on noncitizen possession first enacted a couple decades later in 1968.[91] Third, if "dangerousness" is the general principle to be drawn from the historical analogy, it stands to reason that putative risk of harm would factor into the justifications for the present-day regulations. Courts that have equated unlawful immigration status with dangerousness have done so by misguidedly relying on innuendos and stereotypes, without empirical evidence, as forthcoming work details.[92]

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87. See id. at 1903–06 (Sotomayor, J., concurring) (emphasizing focus on "principles" that can be drawn from history, and approving of the "Court reject[ing] [a] rigid approach to the historical inquiry"); id. at 1926–27 (Jackson, J., concurring) (critiquing *Bruen*'s methodology as unclear but joining the majority opinion).

88. The question of the threat and danger posed by noncitizens is addressed in greater detail in forthcoming work. See Pratheepan Gulasekaram, Dangerousness and the Undocumented, 114 Geo. L.J. (forthcoming) (on file with the *Columbia Law Review*) [hereinafter Gulasekaram, Dangerousness].

89. Note, however, that some recent district court opinions have dismissed indictments based on § 922(g)(5) because noncitizens as a category are not dangerous, while others have focused on the specificity of the "danger" presented by the unlawfully present noncitizen and ruled § 922(g)(5) unconstitutional as applied because of that noncitizen defendant's lack of a violent, criminal past. Compare United States v. Benito, 739 F. Supp. 3d 486, 494 (S.D. Miss. 2024) ("The problem is this: there's no evidence that undocumented immigrants are more dangerous than documented immigrants or citizens. Study after study indicates the opposite."), with United States v. Carbajal-Flores, 720 F. Supp. 3d 595, 601 (N.D. Ill. 2024) (holding that applying § 922(g)(5) to the defendant was unconstitutional because he did not have a violent criminal record).

90. See Gulasekaram, "People" Problem, supra note 8, at 1470–71 (noting that people evading federal immigration law and finding themselves "unlwafully present" in the United States was not a persistent problem during the eighteenth century or for most of the nineteenth century and that illegal presence as used in 922(g)(5) was a "legal construction" of the late twentieth century).

91. Id. at 1484–91 (detailing the history of firearms-based deportation laws and criminal prohibitions on possession by "illegally present" noncitizens).

92. See Gulasekaram, Dangerousness, supra note 88, at 2; see also Gulasekaram, Citizenship and Firearms, supra note 35, at 4. But see *Carbajal-Flores*, 720 F. Supp. 3d at 601 ("The government argues that Carbajal-Flores is a noncitizen who is unlawfully present in

Conventional judicial methodology (even under *Bruen* and *Rahimi*) would seem to require something more than fiat and assumption to substantiate the link between the prohibited category and the type of dangerousness that justifies curtailing a constitutional right.

CONCLUSION

Fundamentally, this Piece is not intended to advocate for the armament of noncitizens. Rather, this Piece highlights yet another instance in which courts have engaged in sloppy reasoning and ill-fitting analogies, which has gone unrecognized because the subjects of regulation are a politically unpopular subgroup of noncitizens.[93] Such immigration exceptionalism in the obscure and seemingly innocuous case of unlawfully present immigrants' gun possession rights portends a wider gulf in fundamental constitutional guarantees for much broader swaths of the populace.[94]

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this country. . . . The Court finds that [his nonviolent] criminal record, containing no improper use of a weapon, . . . support[s] a finding that he poses a risk to public safety . . . .").

93. See Gulasekaram, Second Amendment Exceptionalism, supra note 8, at 56–58 ("[T]he [*Vazquez-Ramirez*] opinion's exceptional deference would permit Congress to run roughshod over constitutional safeguards in all regulatory fields, both civil and criminal, involving any category of noncitizen."); David S. Rubenstein & Pratheepan Gulasekaram, Immigration Exceptionalism, 111 Nw. U. L. Rev. 583, 594–99 (2017) (describing how the courts have used the plenary power doctrine in substantive constitutional rights cases to regulate immigration).

94. See Gulasekaram, Second Amendment Exceptionalism, supra note 8, at 56–57.