GREEN CARDS AND GUNS: A POST-MCDONALD CONSIDERATION OF THE FUTURE OF VIRGINIA’S AND NEW YORK’S RESIDENT ALIENS’ FIREARMS RIGHTS

Erin D Bender
GREEN CARDS AND GUNS: A POST-McDONALD CONSIDERATION OF THE FUTURE OF VIRGINIA’S AND NEW YORK’S RESIDENT ALIENS’ FIREARMS RIGHTS

Erin D. Bender*

I. INTRODUCTION

“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.”¹

The Second Amendment’s twenty-seven words have sparked debate and controversy since their ratification. One debate that occurred in federal courts was whether the Second Amendment created an individual or collective right to keep and bear arms, with many federal circuits ruling in favor of a collective right.² The Supreme Court settled this debate in 2008 by holding that the Second Amendment confers an individual right to keep and bear firearms and

---

* J.D., 2011, University of Richmond School of Law; B.A., 2008, Randolph-Macon College.

¹ U.S. CONST. amend. II. (emphasis added).

² See, e.g. Nordyke v. King, 319 F.3d 1185, 1191 (9th Cir. 2003) (confirming that the “Second Amendment guarantees a collective right for the states to maintain an armed militia and offers no protection for the individual’s right to bear arms”); Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002) (Second Amendment only protects a collective right); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999) (Second Amendment appears to only protect a collective right); Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996) (Second Amendment only provides a collective right); Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995) (Second Amendment does not provide an absolute individual right to keep and bear firearms); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (Second Amendment does not protect an individual right to possess military arms); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976) (“It is clear that the Second Amendment guarantees a collective rather than an individual right.”); cf. United States v. Toner, 728 F.2d 115, 128 (2nd Cir. 1984) (finding the right to possess a gun or other firearm is not a fundamental right); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (“To apply the amendment so as to guarantee appellant’s right to keep an unregistered firearm which has not been shown to have any connection with the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy.”). But see United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (rejecting the collective rights view and holding the Second Amendment does guarantee an individual right to keep and bear arms).
other weapons. This right is not unlimited and individuals cannot rely on the Second Amendment to provide absolute protection for their right to keep and bear arms. The Supreme Court’s decision in District of Columbia v. Heller (“Heller”) did not foreclose debate over the Second Amendment. Instead, the debate shifted to whether the Supreme Court should incorporate the Second Amendment to apply to state and local governments. Many federal courts of appeals addressed this issue, and all but one determined that there is no need to incorporate this individual right against the states.

On June 28, 2010, the Supreme Court issued its opinion in McDonald v. City of Chicago (“McDonald”) and held that the “Second Amendment right is fully applicable to the States.” When the Court heard oral arguments in McDonald, Alan Gura, the attorney who also argued on behalf of Heller, argued that the Supreme Court should incorporate the Second Amendment through either the Fourteenth Amendment’s Privileges or Immunities Clause or its Due Process Clause. A plurality of the Court declined to consider incorporation under the Privileges or

---

4 See id.
5 See Nat’l Rifle Ass’n of America v. City of Chicago, 567 F.3d 856, 857-58 (7th Cir. 2009), (determining the individual right protected by the Second Amendment should not be incorporated against the states and that this is an issue that should only be addressed by the Supreme Court to ensure the uniformity of law), cert. granted and remanded, 561 U.S. __, 130 S. Ct. 3544 (2010); Maloney v. Cuomo, 554 F.3d 56, 58 (2nd Cir. 2009), (finding that the Second Amendment only limits the federal government in imposing restrictions on the individual right to keep and bear arms), cert. granted and vacated sub nom. Maloney v. Rice, 561 U.S. __, 130 S. Ct. 3541 (2010); Love, 47 F.3d at 123 (holding that the Second Amendment does not apply to the states); Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (finding that the Second Amendment does not apply to the states); Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) (affirming that the Second Amendment only prevents the federal government from infringing upon the rights protected). But see Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) (finding that the Due Process Clause of the Fourteenth Amendment does incorporate the Second Amendment against state and local governments), reh’g en banc ordered, 575 F.3d 890 (9th Cir. 2009), vacated and remanded, 611 F.3d 1015 (9th Cir. 2010).
7 See id. at __, 130 S. Ct. at 3025; Heller, 554 U.S. at 572.
Immunities Clause and instead determined that the Second Amendment would be incorporated through the Due Process Clause.\(^9\)

The history of the Second Amendment has been to allow restrictions “so long as these restrictions do not materially encumber or frustrate absolutely the core purposes of the right.”\(^10\) For example, the Heller Court specifically mentioned the constitutionality of laws prohibiting felons and the mentally ill from possessing firearms should not be doubted.\(^11\) In the midst of this debate, few have commented on the intersection between the Second Amendment and the constitutional rights of resident aliens.\(^12\) The United States has a long history of restricting

---

\(^9\) See McDonald, 561 U.S. at _, 130 S. Ct. at 3030-31 (plurality opinion) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.”).

\(^10\) Id. at _, 130 S. Ct. at 3050 (plurality opinion) (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in Heller.”). Justice Thomas wrote a concurrence in McDonald expressing his belief that the “right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.” Id. at _, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment).


firearm possession by non-citizens.\textsuperscript{14} However, as will be seen, “citizenship restrictions in gun laws make little sense in light of\textit{Heller}’s understanding of the Second Amendment as a self-defense right.”\textsuperscript{15}

This article analyzes the impact incorporation of the Second Amendment right will have on resident aliens in Virginia and New York and the extent to which their individual rights to possess firearms could be limited. Part II examines the evolution of the doctrine of incorporation under the Fourteenth Amendment’s Due Process Clause and how the Court has extended provisions of the Bill of Rights to protect non-citizens. Part III provides an overview of the majority and plurality opinions written by Justice Alito in\textit{McDonald}. Finally, Part IV discusses the impact incorporation of the Second Amendment through the Due Process Clause could have on Virginia and New York’s documented and undocumented aliens and to what extent, if any, these jurisdictions could continue to limit aliens’ individual rights to keep and bear arms.

II. FROM BARRON TO SELECTIVE INCORPORATION: AN OVERVIEW OF THE COURT’S APPROACH TO INCORPORATION UNDER THE FOURTEENTH AMENDMENT’S DUE PROCESS CLAUSE

A. An Overview of Incorporation Doctrine

Originally, the Bill of Rights only applied to the federal government and did not limit states.\textsuperscript{16} The Supreme Court first touched upon the idea of incorporation in 1897, when it determined the Fourteenth Amendment requires due process of law and just compensation when

\begin{footnotesize}
\begin{itemize}
    \item[14] See Gulasekaram, “\textit{The People},” supra note 13, at 1526-27.
    \item[15] Id. at 1527.
    \item[16] See Barron v. City of Baltimore, 32 U.S. 243, 247 (1833) (determining that the Constitution was established by the people of the United States for themselves and for the federal government but not for individual state governments).\textit{Barron} held that the Fifth Amendment’s Takings Clause, requiring just compensation when private property is taken for public use, did not apply to the states. Id. at 250-51.
\end{itemize}
\end{footnotesize}
private property is taken for state use. However, it was not until 1925 when the Supreme Court first expressly mentioned using the Fourteenth Amendment’s Due Process Clause to incorporate a provision of the Bill of Rights—the First Amendment’s protections of freedom of speech and the press. Since then, the Court has incorporated all but four of the provisions included in the first eight amendments of the Bill of Rights. Notably, the Supreme Court had previously

17 Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897). The Fifth Amendment’s Takings Clause states “… nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V, cl. 5. In holding that the Fourteenth Amendment required states to provide just compensation when taking private property, the Court did not mention anything about incorporating the Fifth Amendment’s Takings Clause to the states. Chicago, Burlington & Quincy R.R. Co., 166 U.S. at 241.

18 Gitlow v. New York, 268 U.S. 652, 630 (1925) (“For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states.”).

19 See McDonald v. City of Chicago, 561 U.S. __, 130 S. Ct. 3020, 3026 (2010) (incorporating the Second Amendment); Schilb v. Kuebel, 404 U.S. 357 (1971) (incorporating the Eighth Amendment’s prohibition against excessive bail); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment’s prohibition of double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the Sixth Amendment’s right to trial by jury in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (incorporating the Sixth Amendment’s requirement to have compulsory process to obtain favorable witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating the Sixth Amendment’s requirement for a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (incorporating the Sixth Amendment’s requirement that criminal defendants have the chance to confront adverse witnesses); Aguilar v. Texas, 378 U.S. 108 (1964) (incorporating the Fourth Amendment’s warrant requirement); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the Sixth Amendment’s protection against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment’s requirement to have assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (incorporating the Eighth Amendment’s prohibition against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Exclusionary Rule as a Fourth Amendment protection); Irvin v. Dowd, 366 U.S. 717 (1961) (incorporating the Sixth Amendment’s right to an impartial jury); Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment’s prohibition against unreasonable search and seizures and the requirement for a warrant based on probable cause); In re Oliver, 333 U.S. 257 (1948) (incorporating the Sixth Amendment’s requirement to give criminal defendants notice of the charges and to have a public trial); Everson v. Board of Ed., 330 U.S. 1 (1947) (incorporating the First Amendment’s establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the First Amendment’s protection of the free exercise of religion); Hague v. Comm. Indus. Org., 307 U.S. 496 (1939) (incorporating the First Amendment’s right to petition); DeJonge v. Oregon, 299 U.S. 353 (1937) (incorporating the First Amendment’s right to freedom of assembly); Near v. Minnesota, 283 U.S. 697 (1931)
decided against Second Amendment incorporation in *Presser v. Illinois* ("*Presser*"),\(^{20}\) but the *Presser* ruling was 124 years old. Therefore, counsel for petitioners in *McDonald* asked the Court to reexamine *Presser* to determine whether the Second Amendment should be incorporated under the Fourteenth Amendment’s Due Process Clause.\(^{21}\) To understand the *McDonald* decision, however, it is necessary to look at the history of the doctrine to see how the Court has defined the current test used to determine whether a right should be incorporated.

In 1908, the Court recognized the possibility of using the Fourteenth Amendment’s Due Process Clause to incorporate provisions from the Bill of Rights and apply them to state governments.\(^{22}\) Afterwards, a divide emerged between those justices favoring total incorporation and those justices favoring selective incorporation.\(^{23}\) In time, selective incorporation became the

---

\(^{20}\) See generally 116 U.S. 252 (1886).

\(^{21}\) See Petitioners’ Brief, supra note 8, at 66.

\(^{22}\) Twining v. New Jersey, 211 U.S. 78, 99 (1908). Even though it mentioned the possibility of incorporation, the *Twining* Court found that the “...exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.” *Id.* at 114.

\(^{23}\) See *Chemerinsky*, supra note 19, at § 6.3.
favored doctrine of the court;\textsuperscript{24} however, those favoring total incorporation almost succeeded because the Court has since incorporated almost all the provisions of the Bill of Rights.\textsuperscript{25}

1. **Total Incorporation Theory**

During the mid-twentieth century, Justice Hugo Black became the main champion of one theory regarding the relationship between the guarantees of the Bill of Rights and the Due Process Clause of the Fourteenth Amendment.\textsuperscript{26} According to Justice Black, the Fourteenth Amendment completely incorporated the provisions of the first eight amendments included in the Bill of Rights and applied them to state and local governments.\textsuperscript{27} However, as noted above, a majority of the Court has never embraced Justice Black’s “total incorporation” theory.\textsuperscript{28}

2. **Selective Incorporation Theory**

Under selective incorporation, the Court focuses on the fundamental nature of the right rather than on a particular aspect presented in a particular case.\textsuperscript{29} In other words, the Court determines whether the particular right or guarantee is one that meets an “idea of fundamental

\textsuperscript{24} An analysis of the debate over total and selective incorporation is beyond the scope of this article. For a more detailed analysis of the debate and the emergence of selective incorporation as the favored doctrine, see Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

\textsuperscript{25} See CHEMERINSKY, supra note 19, at § 6.3. For a discussion of which provisions of the Bill of Rights have been incorporated, see supra notes 18-19 and accompanying text.

\textsuperscript{26} McDonald v. City of Chicago, 561 U.S. _, _, 130 S. Ct. 3020, 3032-33 (2010).

\textsuperscript{27} See Duncan v. Louisiana, 391 U.S. 145, 165 (1968) (Black, J., concurring) (stating a belief that the sponsors of the Fourteenth Amendment and those who opposed the amendment “believed [it] made the first eight Amendments of the Constitution (the Bill of Rights) applicable to the States); Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (first expression of his view that “one of the chief objects that the provisions of the [Fourteenth] Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states”), overruled in part by Malloy v. Hogan, 378 U.S. 1 (1964).

\textsuperscript{28} See supra notes 24-25 and accompanying text.

\textsuperscript{29} Israel, supra note 24, at 291.
principles of ordered liberty embodied in the due process clause.”

Overall, Professor Jerold Israel argues selective incorporation is the better approach because it reduces judicial subjectivity. Under the doctrine, justices are evaluating the right as a whole and not how it applies to the circumstances of a particular case.

The *McDonald* majority noted five features of the selective incorporation approach favored by the Court during the mid-twentieth century. First, the Court has “viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship.” Second, the Court has determined that only those provisions of the Bill of Rights that are protected against state and local infringement are those provisions including rights “of such a nature that they are included in the conception of due process of law.” Despite this statement, the Court has applied various formulations for determining what rights are included in this description. In *Twining v. New Jersey*, the Court referred to those “immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.” In *Snyder v. Massachusetts*, the Court referred to those rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Finally, in *Palko v. Connecticut* (“*Palko*”), the Court noted that only those provisions of the Bill of Rights which were so “implicit in the concept of ordered liberty” were

---

30 Bogen, *supra* note 13, at 122.
31 See Israel, *supra* note 24, at 308-09.
32 Id.
34 Twining, 211 U.S. at 99.
35 Id. at 102 (internal quotation marks omitted).
to be incorporated against the states.\textsuperscript{37} The \textit{Palko} Court then reasoned that the First Amendment’s concepts of freedom of speech, freedom of the press, free exercise of religion, and freedom of assembly were so “implicit in the concept of ordered liberty” that not incorporating them against the states would have “unduly trammeled” speech.\textsuperscript{38} While \textit{Palko} has since been overruled,\textsuperscript{39} many still cite its concept as one way to determine whether a right is fundamental and therefore should be incorporated.

Third, at times the Court, “when inquiring into whether some particular procedural safeguard was required of a State, [asked] if a civilized system could be imagined that would not accord the particular protection.”\textsuperscript{40} In \textit{Duncan v. Louisiana} (“\textit{Duncan}”), Justice White, writing for the majority,\textsuperscript{41} stated:

\begin{quote}
In one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the ‘incorporation’ debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. \textbf{The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . .}\textsuperscript{42}
\end{quote}

Thus, while the majority’s opinion in \textit{Duncan} did integrate the \textit{Palko} Court’s concept of “ordered liberty,” the \textit{Duncan} Court determined whether a particular right is so fundamental to the actual American system of liberty rather than determining whether the right is fundamental to

\begin{footnotes}
\item[38] \textit{Id.} at 324-25.
\item[40] \textit{Duncan v. Louisiana}, 391 U.S. 145, 149 n.14 (1968) (alteration in original).
\item[41] \textit{Id.} at 146.
\item[42] \textit{Id.} at 149 n.14. (emphasis added).
\end{footnotes}
a hypothetical system. Under the Duncan standard, a right can be incorporated under the Due Process Clause—even if it would not meet the Palko standard—as long as the right is found to be necessary to an Anglo-American system of liberty.

Fourth, during the mid-twentieth century, the Court “was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause.” Finally, even if the Court determined that a provision of the Bill of Rights should be incorporated against the states, “the protection or remedies afforded against state infringement sometimes differed from the protection of remedies provided against abridgment by the Federal Government.”

Current selective incorporation doctrine mandates that the Court determine “whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice,” not just whether any “civilized system could be imagined that would not accord the particular protection.” Furthermore, the Court no longer applies different standards depending on whether claims based on incorporated rights are brought in federal or state court. Instead, the Court has determined that all incorporated provisions “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”

43 See id.
44 See Simcha Herzog, Note, Applying the Incorporation Conundrum to the Second Amendment: Can States Infringe on the Individual Right to Keep and Bear?, 23 QUINNIPIAC L. REV. 115, 142-43 (2004); see also Kenneth A. Klukowski, Armed By Right: The Emerging Jurisprudence of the Second Amendment, 18 GEO. MASON U. CIV. RTS. L.J. 167, 190 (2008) (arguing the Second Amendment should be incorporated if it secures an individual right to self-preservation, not just an individual right that exists only to limit the powers of the federal government).
46 Id. at _, 130 S.Ct. at 3032.
47 Duncan, 391 U.S. at 149 & n.14.
49 Id. at 10.
B. The Bill of Rights and Non-Citizens

Notably, all individuals within the United States do not universally possess constitutional rights. The Supreme Court first recognized that resident aliens are included as part of “the people” protected by the Bill of Rights in 1886, when the Court determined that the Fourteenth Amendment protects resident aliens. Since then, the Court has ruled that non-citizens, including undocumented aliens, must receive Fourth, Fifth, Sixth, and Eight Amendment protections in criminal proceedings. Furthermore, aliens also enjoy certain constitutional rights under such constitutional provisions like the Equal Protection Clause, the First Amendment, and the Just Compensation Clause. Therefore, even though Congress holds the power over immigration, the Court has determined that this power does not give Congress the right to disregard aliens’ constitutional rights.

---

50 Calvin Massey, Second Amendment Decision Rules, 60 HASTINGS L.J. 1431, 1435 (2009) [hereinafter Massey, Second Amendment].
52 Gulasekaram, Aliens with Guns, supra note 13, at 923; see also Dale E. Ho, Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism, 19 WM. & MARY BILL RTS. J. 369, 404 (2010) (noting that non-citizens are entitled to the protections of the Bill of Rights).
53 See, e.g., Plyler v. Doe, 457 U.S. 202, 211-12 (1982) (illegal aliens are protected by the Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident aliens are “people” within the meaning of the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (resident aliens enjoy First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931) (aliens are entitled to rights under the Just Compensation Clause of the Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (resident aliens are entitled to Fifth and Sixth Amendment rights). However, even though aliens enjoy First Amendment protection, “the Supreme Court has distinguished the First Amendment rights of aliens from those of citizens, particularly in the area of exclusion and deportation of aliens from the United States.” Maryam Kamali Miyamoto, The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?, 33 HARV. C.R.-C.L. L. REV. 183, 184 (2000). Usually, in immigration cases, courts defer to Congress’ power over the admission of aliens, whereas in alienage cases dealing with the status of aliens after they have been admitted to the United States, courts apply a higher standards of review. Id. at 194. However, Miyamoto argues that there is overlap between these two classes of cases and thus there should be one standard of review. See id.
54 See Miyamoto, supra note 53, at 192.
In 1990, the Court rejected the argument that the “Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.”\textsuperscript{55} In United States v. Verdugo-Urquidez (“Verdugo-Urquidez”), the government obtained an arrest warrant for Verdugo-Urquidez and, with the assistance of Mexican police officers, apprehended him in Mexico and transported him to a Border Patrol station in California.\textsuperscript{56} After the arrest, Drug Enforcement Administration (“DEA”) agents obtained authorization to search Verdugo-Urquidez’s properties in Mexico and seize documents relating to alleged drug activity.\textsuperscript{57} The federal district court granted Verdugo-Urquidez’s motion to suppress evidence seized during the searches, and the Ninth Circuit affirmed this decision.\textsuperscript{58}

In reversing the Ninth Circuit’s decision, the Court determined that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government” and not to protect aliens located outside of territory belonging to the United States from actions taken by the federal government.\textsuperscript{59} According to the Court:

‘The people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, \textit{refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community}.\textsuperscript{60}

Therefore, the Court determined that since Verdugo-Urquidez was a citizen and resident of Mexico at the time of the search and did not have any voluntary connections to the United States,

\textsuperscript{56} \textit{Id.} at 262.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 263.
\textsuperscript{59} \textit{Id.} at 266.
\textsuperscript{60} \textit{Id.} at 265 (emphasis added).
and because the residences searched were located in Mexico, Verdugo-Urquidez could not rely on the Fourth Amendment to suppress any evidence seized.\(^{61}\)

According to Professor Gulasekaram, “states and the federal government have restricted noncitizen possession [of firearms] throughout the nation’s history to maintain racial and citizenship-based supremacy.”\(^{62}\) It is reasonable to assume that limiting the right to keep and bear arms to United States citizens could have textual and structural foundations.\(^{63}\) This would suggest that “the people” protected by the Second Amendment are only those citizens who qualify to serve in the militia—and this reading of “the people” was explicitly rejected by the \textit{Heller} Court.\(^{64}\) Therefore, “if all the people are the inchoate militia, it becomes necessary to explain why only citizens may carry arms if lawfully-resident aliens are part of this inchoate militia.”\(^{65}\) The \textit{Heller} majority specifically approved exclusion of at least two groups of people—felons and the mentally ill—from the individual right to possess firearms.\(^{66}\) However, it is unclear why these groups are excluded because the exclusion “seems contrary to the majority’s all-inclusive reading of ‘the people.’”\(^{67}\)

Overall, the Court “has established that many of the fundamental rights guaranteed to U.S. citizens by the Constitution are also guaranteed to noncitizens.”\(^{68}\) Furthermore, these protections “safeguard by citizens and non-citizens alike against state as well as federal action.”\(^{69}\)

\(^{61}\) \textit{Id.} at 275.
\(^{62}\) Gulasekaram, “\textit{The People},” \textit{supra} note 13, at 1524. (alteration in original). According to Gulasekaram, distinctions based on citizenship status are irrational “unless noncitizens were proven to be the specific and unique source of danger to citizens.” \textit{Id.} at 1532.
\(^{63}\) Massey, \textit{Second Amendment, supra} note 50, at 1437.
\(^{65}\) Massey, \textit{Second Amendment, supra} note 50, at 1437.
\(^{66}\) \textit{Heller}, 554 U.S. at 626.
\(^{68}\) Miyamoto, \textit{supra} note 53, at 188.
\(^{69}\) Ho, \textit{supra} note 52, at 404.
“The people” referred to by the Constitution therefore seems to include both United States citizens and those aliens who have developed sufficient connections with the United States to be entitled to constitutional protections. With regards to firearm possession, many state laws are incongruous with the Verdugo-Urquidez Court’s definition of “the people” because they “demarcate a hard citizen/non-citizen line for arms bearing.” However, according to the Court, the same rights that citizens have must also be extended to those non-citizens who have sufficient connections to the United States community; this would include legal permanent residents who pay taxes, all those who register for the selective service, and perhaps non-immigrant or illegal aliens as well. After Verdugo-Urquidez and Heller, then, it remains unclear who the other non-citizens are who benefit from constitutional protections, and it remains unclear how the Court’s decisions in McDonald and Heller will affect firearm rights granted to aliens by the various states.

III. Incorporating the Second Amendment: Analyzing the Court’s Majority and Plurality Opinions in McDonald

---

70 Gulasekaram, Aliens with Guns, supra note 13, at 923.
71 Id.
72 Id.
73 Id. As Professor Blocker states, “[B]ecause the values behind the categorical exclusions of felons in Heller are opaque, and because the United States has a long history of stringent gun control . . ., it is unclear what other categories of ‘the people’ will find themselves outside the bounds of the Second Amendment.” Blocker, supra note 67, at 414-15. Professor Volokh has also commented on how “the people” in the Second Amendment should be read:
   I’m inclined to say that ‘the right of the people’ should be read in the Second Amendment the same way it has been read in the First and Fourth Amendments: as including the nation’s lawful guests, though not applying to those who are largely unconnected with the country, for instance because they are aliens in foreign countries, or perhaps because they are illegally present in the United States. The right to bear arms is in part aimed at self-defense, something valuable to all people and not just to citizens.”
Volokh, supra note 13, at 1514.
On June 28, 2010, two years after the *Heller* Court recognized an individual right to keep and bear arms for self-defense, the *Heller* Court issued its opinion in *McDonald*. At issue in *McDonald* was the constitutionality of ordinances enacted by Chicago and Oak Park (a suburb of Chicago) that effectively banned handgun possession by private residents. The petitioners brought suit in the United States District Court for the Northern District of Illinois (“District Court”) and sought a declaratory judgment that the handgun bans violated the Second and Fourteenth Amendments. The District Court denied the petitioners’ argument and denied a declaratory judgment. The United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”) affirmed the District Court’s decision. The Supreme Court granted certiorari to the Seventh Circuit’s decision.

A majority of the *McDonald* Court determined that the right to keep and bear arms was so fundamental to the American system of liberty that it should be incorporated through the Fourteenth Amendment; however, only a plurality of the Court held that this right was incorporated through the Due Process Clause and not through the Privileges and Immunities

---


76 *Id.* at _, 130 S. Ct. at 3026 (quoting CHICAGO, ILL., MUNICIPAL CODE §§ 8-20-040(a), 8-20-050(c) (2009); OAK PARK, ILL., MUNICIPAL CODE §§ 27-1-1 (2009), 27-2-1 (2007)).

77 *Id.* at _, 130 S. Ct. at 3027.


79 Nat’l Rifle Ass’n of America v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009), cert. granted and remanded, 561 U.S. _, 130 S. Ct. 3544 (2010). After the Supreme Court remanded the case to the Seventh Circuit for rehearing in light of the Court’s decision in *McDonald*, the Seventh Circuit vacated the judgment of the District Court and remanded the case with instructions to dismiss the case as moot because both Chicago and Oak Park had repealed their handgun ban ordinances. See Nat’l Rifle Ass’n of America v. City of Chicago, Nos. 08-4241, 08-4243, 08-4244, 2010 WL 3398395, at *1 (7th Cir. Aug. 25, 2010).


81 *McDonald*, 561 U.S. at _, 130 S. Ct. at 3042.
Clause.\textsuperscript{82} Not surprisingly, the same Justices who voted in favor of striking down the Washington, D.C. handgun ban in \textit{Heller} also voted to incorporate the Second Amendment against the states.\textsuperscript{83} Except for one change in Court membership, the same Justices dissenting in \textit{Heller} also dissented in \textit{McDonald}.\textsuperscript{84}

Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined Justice Alito in his majority opinion.\textsuperscript{85} First, Justice Alito considered whether the individual right to keep and bear arms contained in the Second Amendment should be incorporated against the states through the Fourteenth Amendment.\textsuperscript{86} According to Alito, this required the Court to determine “whether the right to keep and bear arms is fundamental to our scheme of ordered liberty . . . or . . . whether this right is ‘deeply rooted in this Nation’s history and tradition . . . .’”\textsuperscript{87} Overall, the majority held that the right to keep and bear arms recognized in \textit{Heller} counted “among those fundamental rights necessary to our system of ordered liberty.”\textsuperscript{88} While Justice Alito did consider the history of the right to keep and bear arms, he also relied on the \textit{Heller} Court’s decision that “individual self-defense is ‘the central component’ of the Second Amendment right” to determine that the Second Amendment should be incorporated.\textsuperscript{89} The \textit{Heller} Court

\textsuperscript{82} \textit{Id.} at _, 130 S. Ct. at 3031-31, 3050 (plurality opinion).
\textsuperscript{83} \textit{Compare id.} at _, 130 S. Ct. at 3025 (showing that Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined Justice Alito’s majority opinion), \textit{with} District of Columbia v. \textit{Heller}, 554 U.S. 570, 572, (2008) (showing that Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined Justice Scalia’s majority opinion).
\textsuperscript{84} \textit{Compare McDonald}, 561 U.S. at _, 130 S. Ct. at 3025 (showing that Justices Stevens, Breyer, Ginsburg, and Sotomayor dissented), \textit{with Heller}, 554 U.S. at 572 (showing that Justices Stevens, Souter, Ginsburg, and Breyer dissented).
\textsuperscript{85} \textit{McDonald}, 561 U.S. at _, 130 S. Ct. at 3025.
\textsuperscript{86} \textit{McDonald}, 561 U.S. at _, 130 S. Ct. at 3031.
\textsuperscript{87} \textit{Id.} at _, 130 S. Ct. at 3036 (alteration in original) (internal citations omitted).
\textsuperscript{88} \textit{Id.} at _, 130 S. Ct. at 3042.
\textsuperscript{89} \textit{Id.} at _, 130 S. Ct. at 3036 (citing District of Columbia v. \textit{Heller}, 554 U.S. 570, 599 (2008)).
determined that individuals must have the right to use handguns “for the core lawful purpose of self-defense.”\textsuperscript{90}

In determining that the Second Amendment should be incorporated against the states, Justice Alito briefly described views surrounding the right to keep and bear arms during pre-colonial and colonial times. He noted that the \textit{Heller} Court recognized that the 1689 English Bill of Rights expressly protected an individual right to bear arms for self-defense, and that this right was invoked by American colonists when George III attempted to disarm them during the 1760s and 1770s.\textsuperscript{91} Furthermore, at the time of the drafting of the Bill of Rights, “Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government.”\textsuperscript{92} Justice Alito also noted that the founders of the federal government were not the only ones to consider an individual right to keep and bear arms as fundamental to society. Not only did four states adopt provisions similar to the text of the Second Amendment before the ratification of the Second Amendment, nine more states adopted state constitutional provisions to protect an individual right to keep and bear arms between 1789 and 1820.\textsuperscript{93}

Justice Alito also analyzed how Americans in the nineteenth century still valued the right to keep and bear arms for self-defense even though the threat prompting the inclusion of the Second Amendment in the Bill of Rights—the threat that the federal government would disarm the militia—had faded.\textsuperscript{94} He noted that the \textit{Heller} Court found that after the Civil War, some states that had belonged to the Confederacy passed laws prohibiting African-Americans from possessing firearms, and state militias mainly consisting of ex-Confederate soldiers acted with

\begin{itemize}
  \item \textsuperscript{90} \textit{Heller}, 554 U.S. at 630.
  \item \textsuperscript{91} \textit{McDonald}, 561 U.S. at _, 130 S. Ct. at 3036 (citing \textit{Heller}, 554 U.S. at 591-95).
  \item \textsuperscript{92} \emph{Id.} at _, 130 S. Ct. at 3037 (citations omitted).
  \item \textsuperscript{93} \emph{Id.} at _, 130 S. Ct. at 3037 (citing \textit{Heller}, 554 U.S. at 600-02).
  \item \textsuperscript{94} \emph{Id.} at _, 130 S. Ct. at 3038 (citations omitted).
\end{itemize}
force to take firearms from freed slaves. Even though Union soldiers stationed in the former Confederacy acted to protect the individual right to keep and bear arms, Congress still took legislative action to protect this right. For example, the Freedmen’s Bureau Act of 1866 provided that “‘the right . . . to have full and equal benefit of all laws and proceedings . . ., including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery.’” Furthermore, the Civil Rights Act of 1866, which was thought to protect the same rights as included in the Freedmen’s Bureau Act of 1866, guaranteed the “‘full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.’” However, these legislative remedies were insufficient, and Congress looked to a constitutional amendment to fully protect African Americans.

According to Justice Alito’s majority opinion, the consensus today is that the Fourteenth Amendment was passed to “provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.” The Justice noted that members of Congress who debated the Fourteenth Amendment referred to the right to keep and bear arms as a fundamental right worthy

95 Id. at __, 130 S. Ct. at 3038, 3039 (citing Heller, 554 U.S. at 614-15).
96 Id. at __, 130 S. Ct. at 3039-40.
97 Id. at __, 130 S. Ct. at 3040 (quoting Freedmen’s Bureau Act of 1866, § 14, 14 Stat. 176-77 (emphasis added)).
98 Id. at __, 130 S. Ct. at 3040 (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (current version at 42 U.S.C. § 1981 (2006))). Indeed, Justice Alito stated that “[t]here can be no doubt that the principal proponents of the Civil Rights Act of 1866 mean to end the disarmament of African Americans in the South.” Id. at __, 130 S. Ct. at 3040 n.23. As evidence of this intent, the Justice cited Senator Lyman Trumbull’s and Representative Sidney Clarke’s statements made on the floor of Congress in support of the Act. See id. at __, 130 S. Ct. at 3040 n.23 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 474, 1838-39 (1866)).
99 See id. at __, 130 S. Ct. at 3041.
100 Id. at __, 130 S. Ct. at 3041 (citing Gen. Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 389 (1982)).
of federal protection. Furthermore, in 1868, when the Fourteenth Amendment was ratified, twenty-two of the thirty-seven states in the United States had ratified state constitutional provisions to expressly protect the right to keep and bear arms.

Finally, the majority opinion addressed the respondents’ argument that the Congress which passed the Fourteenth Amendment only saw Section One as an “‘antidiscrimination rule’” and nothing more. If Section One did no more than prohibit discrimination, Justice Alito asserted, then “the First Amendment, as applied to the States, would not prohibit nondiscriminatory abridgments of the rights to freedom of speech or freedom of religion; the Fourth Amendment, as applied to the States, would not prohibit all unreasonable searches and seizures but only discriminatory searches and seizures—and so on.”

Second, as mentioned above, the respondents’ argument completely overlooked the language of Section Fourteen of the Freedmen’s Bureau Act of 1866, which “acknowledged the existence of the right to bear arms.” Third, only outlawing those laws discriminating on the basis of race would have left African Americans vulnerable to abuse at the hands of state militias and state peace officers because presumably any laws banning the possession of guns by all private citizens would still have allowed those acting under state authority to possess firearms. Fourth, the respondents’ argument overlooked the fact that white opponents of the Black Codes would also have been stripped of their rights to keep and bear arms for self-defense if “Congress and the ratifying

101 Id. at __, 130 S. Ct. at 3041 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 1182 (1866) (statement of Sen. Samuel Pomeroy)). Even those members of Congress who believed the Fourteenth Amendment was unnecessary thought that African Americans had an equal right to keep and bear arms for self-defense. Id. at __, 130 S. Ct. at 3041 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 1073 (1866) (statement of Sen. James Nye)).
102 Id. at __, 130 S. Ct. at 3042 (citations omitted).
103 Id. at __, 130 S. Ct. at 3042 (quoting Brief for Municipal Respondents at 64, McDonald, 561 U.S. __, 130 S. Ct. 3020 (2010) (No. 08-1521)).
104 Id. at __, 130 S. Ct. at 3043.
105 Id. at __, 130 S. Ct. at 3043.
106 Id. at __, 130 S. Ct. at 3043.
public had simply prohibited racial discrimination with respect to the bearing of arms.”

Finally, Justice Alito argued that because the Thirty-Ninth Congress “balked at a proposal to disarm [the Southern militias],” the right to keep and bear arms should be “regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner.”

A. Justice Alito’s Plurality Opinion

Justice Alito’s plurality opinion was joined by Chief Justice Roberts and Justice Scalia and Kennedy. Because the petitioners primarily relied on the Fourteenth Amendment’s Privileges and Immunities Clause for incorporation of the Second Amendment, Justice Alito quickly addressed this argument first. According to the petitioners’ argument, the Court should have rejected the “narrow interpretation of the Privileges or Immunities Clause adopted in the Slaughter-House Cases.” However, a plurality of the Court did not see a need to reconsider the Slaughterhouse Cases and therefore “decline[d] to disturb the Slaughter-House holding.”

107 Id. at _, 130 S. Ct. at 3043.
108 Id. at _, 130 S. Ct. at 3043-44 (citing CONG. GLOBE, 39TH CONG., 1ST SESS. 914 (1866)).
109 Id. at _, 130 S. Ct. at 3025.
110 Id. at _, 130 S. Ct. at 3028 (plurality opinion) (citing The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)). A discussion of the Fourteenth Amendment’s Privileges or Immunities Clause and the Court’s subsequent interpretation of the Clause is beyond the scope of this article. For evaluations of both the Slaughterhouse Cases and the Privileges or Immunities Clause, see, e.g., ARNOLD J. LIEN, CONCURRING OPINION: THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT 48 (1957); Richard L. Aynes, Ink Blot or Not: The Meaning of Privileges and/or Immunities, 11 U. PA. J. CONST. L. 1295 (2009); David S. Bogen, Slaughter-House Five: Views of the Case, 55 HASTINGS L.J. 333 (2003); Michael Kent Curtis, Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. REV. 1071 (2000); Daniel J. Levin, Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce, 35 HARV. C.R.-C.L. L. REV. 569 (2000); Trisha Olson, The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment, 48 ARK. L. REV. 347 (1995); William J. Rich,
Overall, Justice Alito’s plurality held that the Second Amendment right to keep and bear arms, as recognized in *Heller*, was incorporated through the Due Process Clause of the Fourteenth Amendment. The plurality opinion also rejected the respondents’ argument that the individual right to keep and bear arms protected by the Second Amendment is “subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.” According to the respondents, a right protected by the Bill of Rights should not be binding on the states if one can imagine any civilized legal system that does not recognize that particular right. However, Justice Alito rejected the respondents’ argument because many of the other Bill of Rights provisions providing rights for those accused of crimes are “virtually unique to [the United States].” Therefore, if the respondents’ argument were accepted, then the United States would possess the only civilized

---

111 *McDonald*, 561 U.S. at _, 130 S. Ct. at 3031 (plurality opinion) (alteration in original). Justice Thomas did not join the Court’s opinion regarding the need to reconsider the Privileges or Immunities Clause and instead wrote a concurrence arguing that the right to keep and bear arms “is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.” *Id.* at _, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment).

112 *Id.* at _, 130 S. Ct. at 3050 (plurality opinion). Justice Thomas did not agree with the plurality opinion because, even though he agreed that the right to keep and bear arms should be regarded as fundamental, he disagreed that “it is enforceable against the States through a clause that speaks only to ‘process.’” *Id.* at _, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment).

113 *Id.* at _, 130 S. Ct. at 3044 (plurality opinion).

114 *Id.* at _, 130 S. Ct. at 3044 (plurality opinion) (citing Brief for Municipal Respondents, *supra* note 82, at 9). Therefore, according to the respondents, “it must follow that no right to possess [handguns] is protected by the Fourteenth Amendment” because “such countries as England, Canada, Australia, Japan, Denmark, Finland, Luxembourg, and New Zealand either ban or severely limit handgun ownership.” *Id.* at _, 130 S. Ct. at 3044 (plurality opinion) (alteration in original) (citing Brief for Municipal Respondents, *supra* note 82, at 21-23).

115 *Id.* at _, 130 S. Ct. at 3044 (plurality opinion) (alteration in original).
legal system in the world.\textsuperscript{116} Furthermore, the governing standard is not whether it is possible to imagine any civilized system that does not protect the particular right;\textsuperscript{117} instead, the Court determines whether the particular right is fundamental to the American scheme of ordered liberty.\textsuperscript{118} Justice Alito also rejected the respondents’ argument that the right contained in the Second Amendment differs from the other provisions in the Bill of Rights because it implicates public safety.\textsuperscript{119} According to Justice Alito, the Second Amendment right is not the only constitutional right that implicates public safety; instead, “[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.”\textsuperscript{120}

The plurality also rejected the respondents’ argument that the Second Amendment should not be incorporated against the states because such an action would be inconsistent with federalism and that state and local governments should therefore be allowed to enact reasonable gun control laws.\textsuperscript{121} According to Justice Alito, a fundamental Bill of Rights guarantee must be fully binding on the states unless stare decisis counsels otherwise; therefore, the states’ “ability to devise solutions to social problems that suit local needs and values” will have limits.\textsuperscript{122} Therefore, state and local governments still can enact reasonable gun control regulations because the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”\textsuperscript{123}

\textsuperscript{116} Id. at __, 130 S. Ct. at 3044 (plurality opinion).
\textsuperscript{117} Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).
\textsuperscript{118} Id. at 149 & n.14; see also id. at 148.
\textsuperscript{119} McDonald, 561 U.S. at __, 130 S. Ct. at 3045 (plurality opinion).
\textsuperscript{120} Id. at __, 130 S. Ct. at 3045 (plurality opinion) (citations omitted).
\textsuperscript{121} Id. at __, 130 S. Ct. at 3045-46 (plurality opinion) (citing Brief for Municipal Respondents, supra note 82, at 18-20, 23).
\textsuperscript{122} Id. at __, 130 S. Ct. at 3046 (plurality opinion).
\textsuperscript{123} District of Columbia v. Heller, 554 U.S. 570, 626 (2008). According to the Heller Court, states can still regulate to forbid felons and the mentally ill from possessing firearms, to prohibit...
Finally, Justice Alito addressed concerns raised by Justices Stevens and Breyer in their respective dissents. Justice Stevens would have held that all rights protected against state infringement by the Due Process Clause do not have to be “identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights.” Justice Alito countered Justice Stevens’ argument by explaining that the Court has, for a half-century, rejected the idea that the Due Process Clause incorporates “‘only a watered-down, subjective version of the individual guarantees of the Bill of Rights.’”

According to Justice Breyer, four factors counseled against the incorporation of the Second Amendment against the states: (1) no popular consensus that the right to keep and bear arms is fundamental exists; (2) the right to keep and bear arms does not protect minorities and those individuals overlooked by those in power; (3) incorporation would significantly intrude on a traditional area of state power and would alter the concept of federalism; and (4) determining the scope of the right to keep and bear arms would require federal judges to answer questions about state and local laws concerning matters outside their expertise. The plurality summarily countered Justice Breyer’s four factors. First, Justice Alito saw no basis for a rule that a provision of the Bill of Rights should only be incorporated when popular consensus that the right is fundamental exists. Second, incorporation of the Second Amendment protects the “rights of minorities and other residents of high-crime areas whose needs are not being met by

---

124 *McDonald*, 561 U.S. at _, 130 S. Ct. at 3093 (Stevens, J., dissenting).
125 *Id.* at _, 130 S. Ct. at 3048 (plurality opinion) (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)).
126 *Id.* at _, 130 S. Ct. at 3124 (Breyer, J., dissenting).
127 *Id.* at _, 130 S. Ct. at 3125 (Breyer, J., dissenting).
128 *Id.* at _, 130 S. Ct. at 3125 (Breyer, J., dissenting).
129 *Id.* at _, 130 S. Ct. at 3126-28 (Breyer, J., dissenting).
130 *Id.* at _, 130 S. Ct. at 3049 (plurality opinion).
elected public officials” because their safety will now be enhanced by possessing handguns for self-defense. Third, Justice Alito noted that Justice Breyer was correct in stating that incorporation limits the legislative freedom of the states, but that this has not stopped the Court from incorporating almost every other provision of the Bill of Rights. Fourth, the plurality argued that the *Heller* Court specifically rejected Justice Breyer’s suggestion of an interest-balancing test requiring judges to assess the costs and benefits of gun control laws that would lead judges to make decisions in an area where they lack expertise.

IV. AFT**E**R **M**CODONALD: INCORPORATION’S EFFECTS ON THE RIGHTS OF VIRGINIA AND NEW YORK’S DOCUMENTED AND undocumented aliens to keep and bear arms

In 1886, the Supreme Court determined that the Due Process and Equal Protection Clauses protect all individuals, when it stated: “The fourteenth amendment to the constitution is not confined to the protection of citizens . . . These provisions are universal in their application . ..; and the equal protection of the laws is a pledge of the protection of equal laws.”

“The general consensus is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control.” Even though the *McDonald* Court held that the Second Amendment’s individual right to keep and bear arms is incorporated against the states through the Due Process Clause, it also failed to establish a standard of review for courts to apply when considering challenges to gun control regulations imposed by state and local governments. In fact, Justice Breyer suggested that drawing the line between constitutional

---

131 Id. at _, 130 S. Ct. at 3049 (plurality opinion).  
132 Id. at _, 130 S. Ct. at 3050 (plurality opinion).  
133 Id. at _, 130 S. Ct. at 3050 (plurality opinion) (citing District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008)).  
135 Blocker, supra note 67, at 378.  
136 McDonald v. City of Chicago, 561 U.S. _, _, 130 S. Ct. 3020, 3050 (plurality opinion).  
137 See id. at _, 130 S. Ct. at 3115 (Stevens, J., dissenting) (“[T]oday’s decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about..."
and unconstitutional regulations can be quite difficult because “state and local gun regulation can become highly complex.”\textsuperscript{138} In a series of hypothetical questions, Justice Breyer raised the question of whether resident aliens should be allowed to possess guns and what types of guns they should be allowed to possess.\textsuperscript{139} Because aliens are “individuals” within the scope of the Due Process and Equal Protection Clauses, it is necessary for federal courts to determine what standard of review to apply to challenges to gun control laws brought by aliens. Therefore, this Part analyzes what standards of review a court might apply to an analysis of the constitutionality of Virginia and New York’s restrictions on aliens’ rights to possess firearms and how these laws may need to change depending on the standard applied.

A. \textit{Standards of Review for Constitutional Challenges Relying on the Due Process and Equal Protection Clauses}

To understand how the federal courts will analyze a constitutional challenge to a regulation affecting firearm possession, it is necessary to understand the three-tier approach to the standard of review that has evolved throughout the Supreme Court’s Due Process and Equal Protection jurisprudence. The Court laid the foundations for the three standards of review in 1938, when the Court upheld a federal law prohibiting the shipment of skimmed milk combined with any fat or oil other than milk fat.\textsuperscript{140} According to the Court, “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within which state and local regulations comport with the \textit{Heller} right—the precise contours of which are far from pellucid—under a standard of review we have not even established.”\textsuperscript{138}

\textsuperscript{138} \textit{Id.} at _, 130 S. Ct. at 3127 (Breyer, J., dissenting).
\textsuperscript{139} \textit{Id.} at _, 130 S. Ct. at 3126-27 (Breyer, J., dissenting) (“Who can possess guns and of what kind? Aliens? Prior drug offenders? Prior alcohol abusers?”).
\textsuperscript{140} \textit{United States v. Carolene Products Co.}, 304 U.S. 144, 145-46, 154 (1938).
the knowledge and experience of the legislators.”[^141]

*United States v. Carolene Products Co.*

(“Carolene Products”) is most remembered for its footnote four, which states:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . ., or national . . ., or racial minorities. . . .; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . . .”[^142]

While lengthy, footnote four mandates that courts should generally presume that laws are constitutional. However, more scrutiny may be required when a law violates a Constitutional provision or individual right, when it restricts political processes, or when it discriminates against groups of “discrete and insular minorities.”[^143] Since *Carolene Products*, the Court has created three standards of review: strict scrutiny, intermediate scrutiny, and rational basis. These standards of review also apply to alleged violations of the Fourteenth Amendment’s Equal Protection Clause because courts must determine whether laws creating distinctions among individuals are justified by sufficient purposes.[^144]

1. **Strict Scrutiny**

[^141]: *Id.* at 152.
[^142]: *Id.* at 152 n.4 (internal citations omitted).
[^143]: *Id; see also* CHEMERINSKY, *supra* note 19, at § 6.5.
Strict scrutiny forms the most intensive level of judicial review courts will use to determine whether a government has violated due process and equal protection. Under strict scrutiny, the government has the burden of proof of showing that the law is constitutional and that it meets a compelling government purpose. If the court believes the government has demonstrated a compelling state interest, the government must also show the law is necessary, i.e., the government must prove the law is the least restrictive or least discriminatory alternative to achieving that government purpose. At times, the Court has also stated that strict scrutiny “means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” As the most exacting standard of review, laws are generally found unconstitutional when courts apply strict scrutiny. This standard is most often used when courts evaluate discrimination based on race or national origin, alienage (with exceptions), and for interference with other fundamental rights such the right to privacy and the right to travel.

2. Intermediate Scrutiny

Intermediate scrutiny is the middle tier used by courts when faced with potential governmental violations of due process and equal protection. Under this standard, courts must determine if there is an important government objective behind the law and if the law is

145 CHEMERINSKY, supra note 19, at § 6.5.
147 See, e.g., Wygant v. Jackson Board of Education, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.” (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)).
149 See CHEMERINSKY, supra note 19, at § 6.5.
150 Id.
151 Id., pg. 540.
substantially related to achieving that objective. Courts use intermediate scrutiny when reviewing laws involving gender classifications, discrimination against children born outside the marital relationship, and discrimination against undocumented alien children in receiving education. It appears that the government also has the burden of proof under intermediate scrutiny.

3. **Rational Basis**

Rational basis is the minimum level of scrutiny used by courts. Under rational basis, courts will uphold laws if they are rationally related to a legitimate government purpose. Unlike strict scrutiny and intermediate scrutiny, where the stated government interest must be the one serving as the purpose of the law, rational basis review does not require the goal to be the actual purpose of the law; instead, any conceivable legitimate purpose is sufficient to meet the

---

153 See, e.g., United States v. Virginia, 518 U.S. 515, 519 (holding that the Equal Protection Clause precluded Virginia from maintaining Virginia Military Institute as an all-male institution); Craig, 429 U.S. at 460 (holding that Oklahoma’s statute allowing females to purchase 3.2% beer starting at age 18 but prohibiting males from buying the same product until age 21 violated the Equal Protection Clause).
154 See, e.g., Lehr v. Robertson, 463 U.S. 248, 265, 267-68 (holding that New York did not violate putative father’s due process and equal protection rights by failing to give him notice of pending adoption proceedings because he could have guaranteed he would receive notice by notifying New York’s putative father registry of his location).
155 See Plyler v. Doe, 457 U.S. 202, 205, 230 (1982) (holding that Texas could not deny free public education to undocumented alien children because the prohibition did not further a substantial state interest).
157 See CHEMERINSKY, supra note 19, at § 6.5.
158 See, e.g., Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (tenant hardship provisions in a city ordinance were designed to serve the legitimate purpose of protecting tenants and so it is rational for the ordinance to treat landlords differently on the basis of whether they have hardship tenants); Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) (Oklahoma law prohibiting opticians from fitting or duplicating lenses without a prescription was rational).
The law’s challenger has the burden to show the law does not meet a conceivable government interest or the law is not a reasonable way to attain that interest. Under rational basis review, courts will uphold most challenged laws. However, the Heller Court dismissed the application of rational basis to determine the constitutionality of gun control regulations.

B. An Overview of Current Approaches to the Standard of Review for Gun Control Regulations

1. State Approaches to Gun Control Regulations

Currently, forty-two states, including Virginia, have constitutional provisions protecting the individual right to bear arms. Despite this, over twenty states have some restrictions on the possession of firearms by non-citizens. These restrictions usually fall into four categories: (1) the general prohibition of possession by non-citizens, with specific exceptions; (2) prohibiting

---

159 See, e.g., Schweiker v. Wilson, 450 U.S. 221, 235 (1981) (“As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.”)

160 CHEMERINSKY, supra note 19, at § 6.5, pg. 540.

161 Id. The Supreme Court has rarely invalidated laws as not meeting rational basis review. Id. But see, e.g., Romer v. Evans 517 U.S. 620, 624, 635 (1996) (invalidating Colorado’s Amendment 2, which prohibited any governmental action to protect homosexuals as a class, as not meeting a legitimate government interest and violating the Equal Protection Clause).


Virginia’s constitutional provision states:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.


164 Gulasekaram, “The People,” supra note 13, at 1566. However, of the eighteen states that have constitutional provisions expressly limiting the right to bear arms to citizens, only nine of these states have statutes restricting possession by non-citizens. Gulasekaram, Aliens with Guns, supra note 13, at 922. Virginia bars non-immigrant aliens from possessing firearms but apparently allows possession by lawful permanent residents. See VA. CODE ANN. § 18.2-308.2:01 (Repl. Vol. 2009). Interestingly, most states that have restrictions on non-citizens’ possession of firearms have exceptions for hunting and other sport. Gulasekaram, Aliens with Guns, supra note 13, at 916.
concealed carrying by non-citizens; (3) placing heightened restrictions or more stringent requirements on non-citizen possession; and (4) placing particular restrictions on specific aspects of possession by non-citizens.\footnote{Id. at 1566-67.}

State courts that have considered what standard of review should be applied to determine the constitutionality of gun regulation measures have uniformly rejected the application of strict scrutiny.\footnote{Winkler, supra note 163, at 705.} Instead, these states apply a deferential “reasonableness regulation” standard.\footnote{Id. at 686.} “Under the reasonable regulation test . . ., the question is whether the challenged law is a reasonable method of regulating the right to bear arms. Even a law backed by legitimate governmental ends, though, can burden the right too much and be unconstitutional under the reasonable regulation test.”\footnote{Id. at 717.} According to Professor Winkler, a complete ban on firearms would not survive under the reasonable regulation standard.\footnote{Id. at 687.} However, nearly all gun control regulations would survive under this standard.\footnote{Id. at 687.}

In determining whether a gun control regulation is constitutional, the most important tool state courts have relied on is categoricalism; that is, determining whether something falls inside or outside of the protected right.\footnote{David B. Kopel & Clayton Cramer, State Court Standards of Review for the Right to Keep and Bear Arms, 50 SANTA CLARA L. REV. 1113, 1114 (2010).} Courts applying a categorical approach are prohibited from weighing interests and only ask whether “the case falls inside certain predetermined, outcome-determinative lines.”\footnote{Blocker, supra note 67, at 381.} Specifically, state courts have relied on categoricalism “in right to arm analyses to decide whether a particular . . . person . . . is inside or outside the right.”\footnote{Id. at 1115.} For
example, in 1921, the state of Michigan had an ordinance requiring aliens to hold permits to possess firearms.\textsuperscript{174} However, the Michigan Supreme Court determined that this ordinance effectively made it a crime for “a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property.”\textsuperscript{175} Therefore, the Zerillo Court affirmed that legal aliens can sometimes have constitutional rights.\textsuperscript{176} After all, “[w]hile the legislature might be able to ban aliens from taking game, the [Michigan] Constitution protect[ed] the right of ‘every person,’ including legal aliens, to self-defense.”\textsuperscript{177}

2. Federal Approaches to Gun Control Regulations

States are not the only sovereigns with the power to regulate the possession of firearms by their citizens; they share this power with the federal government. However, while states are allowed to co-regulate possession and use of firearms with Congress, individual state laws must not conflict or be irreconcilable with federal law.\textsuperscript{178}

The federal government currently “bans firearm possession by temporary immigrants and the undocumented, and firearm offenses are amongst the crimes that can lead to the deportation of legal permanent residents.”\textsuperscript{179} Federal law only allows those aliens who have been admitted

\begin{itemize}
\item \textsuperscript{175} People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922).
\item \textsuperscript{176} Kopel & Cramer, \textit{supra} note 171, at 1178.
\item \textsuperscript{177} \textit{Id.} at 1178-79 (alterations in original). Surprisingly, the Michigan Supreme Court “vindicated the rights of immigrants” during the “height of the resurgence of the second Ku Klux Klan.” \textit{Id.}
\item \textsuperscript{178} See 18 U.S.C. § 927 (2006). § 927 states:
\begin{quote}
No provision of this chapter shall be construed as indicated an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.
\end{quote}
\item \textsuperscript{179} Gulasekaram, “\textit{The People},” \textit{supra} note 13, at 1523.
\end{itemize}
to the United States under an immigrant visa to possess firearms.\textsuperscript{180} However, there are four exceptions for those who have been admitted under nonimmigrant visas: (1) aliens who have been admitted for lawful hunting or sporting purposes or who possess hunting licenses issued in the United States;\textsuperscript{181} (2) those aliens who are official representatives of foreign governments;\textsuperscript{182} (3) officials of foreign governments or distinguished foreign visitors, as long as they have been so designated by the Department of State;\textsuperscript{183} and (4) foreign law enforcement officers of friendly foreign governments who have been admitted for official law enforcement business.\textsuperscript{184} Furthermore, the federal government prohibits aliens who are “illegally or unlawfully in the United States” from possessing firearms.\textsuperscript{185}

Federal courts considering the applicable standard of review to gun control regulations have muddied the waters. For example, in 2001, the Fifth Circuit attempted to articulate the appropriate standard of review after determining that the Second Amendment protects an individual right to possess firearms.\textsuperscript{186} The \textit{Emerson} Court invoked both strict scrutiny and a “reasonableness” review of the Second Amendment’s right.\textsuperscript{187} After \textit{Emerson}, the Department of Justice issued the Ashcroft Memorandum, which supported \textit{Emerson}’s holding that the


\textsuperscript{181} \textit{Id.} § 922(y)(2)(A).

\textsuperscript{182} \textit{Id.} § 922(y)(2)(B)(i)-(ii).

\textsuperscript{183} \textit{Id.} § 922(y)(2)(C).

\textsuperscript{184} \textit{Id.} § 922(y)(2)(D).

\textsuperscript{185} \textit{Id.} § 922(g)(5)(A).

\textsuperscript{186} \textit{See} United States v. Emerson, 270 F.3d 203, 260-64 (5th Cir. 2001).

\textsuperscript{187} Winkler, \textit{supra} note 163, at 690-91.
Second Amendment protects an individual right.\textsuperscript{188} However, the Ashcroft Memorandum also invoked the “inconsistent elements of both strict scrutiny and more deferential review.”\textsuperscript{189} Overall, “the Ashcroft Memorandum suggests the Justice Department may be leaning toward a relatively low level of judicial scrutiny.”\textsuperscript{190}

C. Incorporation of the Second Amendment and Its Potential Effects on Virginia Non-Citizens

1. Documented Aliens

   a. Applying Strict Scrutiny

      i. Restrictions on Firearm Possession

      Courts apply strict scrutiny when determining whether a government action has discriminated against documented aliens.\textsuperscript{191} In 1971, the Court recognized that alienage, like race and nationality, is “inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate.”\textsuperscript{192} Aliens avail themselves of constitutional rights only when

\textsuperscript{188} Id. at 691 (citing Brief for the United States in Opposition app. at 1, Emerson v. United States, 536 U.S. 907 (2002) (No. 01-8780)).
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} See CHEMERINSKY, supra note 19, at § 9.5. Courts may use rational basis when alienage classifications are related to the democratic process and when Congress creates immigration laws with alienage classifications. Id.
\textsuperscript{192} Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1948)). At issue in Graham was an Arizona statute granting welfare benefits only to those aliens who had lived in the United States for at least fifteen years and a Pennsylvania statute only granting welfare benefits to those who were citizens of the United States or those who qualified under federally supported programs. Id. at 366-67, 368. The Court held that state laws denying welfare benefits to resident aliens or to those aliens who have not lived within the United States for a specified amount of time violated the Equal Protection Clause. Id. at 376.
they lawfully come inside the United States and create substantial connections. After all, as Justice Murphy once noted:

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.

Unlike race and nationality, alienage is not immutable because aliens are capable of becoming citizens; however, the Court has applied strict scrutiny because of aliens’ inability to vote and make themselves heard in elections and the political process.

As previously discussed, incorporation under the Due Process Clause means the Second Amendment confers a fundamental right—the right to keep and bear arms for self-defense—thought necessary to our scheme of ordered liberty and justice. However, the Heller Court also determined that the individual right protected by the Second Amendment is not absolute and can be limited. Therefore, Professor Gulasekaram suggests that courts evaluating state and local restrictions on firearm possession based on alienage should evaluate these restrictions according to standards used for equal protection. In fact, Professor Gulasekaram recently noted “a citizenship restriction in the Second Amendment could bear upon the constitutionality

---

193 United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990); see also discussion supra Part II.B.
194 Bridges v. Wixon, 326 U.S. 135, 161 (1945 (Murphy, J., concurring).
195 See Chemerinsky, supra note 19, at § 9.5.
196 See discussion supra Part II.A.2.
198 Gulasekaram, Aliens with Guns, supra note 13, at 898.
of the laws of several states that prohibit, limit, or treat noncitizen firearm possession unequally now that the Amendment has been incorporated."^{199}

As noted above, courts usually treat aliens as a suspect class and apply strict scrutiny to classifications invoking alienage.^{200} However, under the political-function exception to this general rule, distinctions based on alienage in “activities that are ‘so closely bound up with the formulation and implementation of self-government’” will survive rational basis review.^{201}

Professor Gulasekaram suggests that the right to bear firearms has drifted from being a political right because it is no longer limited “to a select group of first-class citizens,” because 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,” and because “the rights-vindicating and anti-state functions served by African American firearm possession no longer neatly apply today.”^{202} Out of the four major functions served by firearm possession—“state defense, self-defense, property defense, and recreation”—state defense fits under the political function exception because it is “closely bound to the ability of a sovereign entity to define its political boundaries.”^{203} Therefore, Professor Gulasekaram suggests that courts apply rational basis review when considering restrictions on non-citizens’ rights to possess firearms for

---

^{199} Gulasekaram, “The People,” supra note 13, at 1532.
^{200} See supra note 191 and accompanying text.
^{201} Gulasekaram, Aliens with Guns, supra note 13, at 902 (citing Bernal v. Fainter, 467 U.S. 216, 221-28 (1984)). Professor Gulasekaram also notes that Equal Protection analysis also asks “whether the right to bear arms is a fundamental right of vulnerable minority groups” and “whether the right to bear arms is an individual right.” Id. at 900-01. According to him, Equal Protection analysis “suggest[s] that gun rights are essential to aliens’ equal bodily protection from citizen tyranny.” Id. at 921. Furthermore, the Heller Court explicitly held that the “Second Amendment confer[s] an individual right to keep and bear arms.” Heller, 554 U.S. at 595. Therefore, Professor Gulasekaram theorizes that “non-citizens may be part of ‘the people’ who can assert the right [to bear arms] under an individual-right interpretation of the Second Amendment.” Gulasekaram, Aliens with Guns, supra note 13, at 921 (alteration in original).
^{202} Id. at 907-08.
^{203} Id. at 916.
political purposes but apply strict scrutiny when considering limitations on their rights to possess for self-defense, property defense, or recreation. 204 Indeed, those state courts that have struck down firearm possession restrictions based on alienage have determined that the right to bear arms does not fall under the political-function exception. 205

According to the *Heller* Court, all of the “textual elements” of the Second Amendment “guarantee the individual right to possess and carry weapons in case of confrontation”—that is, the Court likely meant to constitutionalize the right to self-defense. 206 Two historical facts, both dealing with self-defense, serve as the strongest arguments for applying strict scrutiny to determine the constitutionality of state regulations restricting non-citizens’ rights to possess firearms. First, the “eighteenth century founders generally agreed that the point of the Second Amendment was to secure the means of defense.” 208 Second, “the Reconstruction framers were definitely of the opinion that the Second Amendment included an individual right to possess arms for self-defense.” 209 If non-citizens wish to possess firearms for purposes of self-defense, any state regulations forbidding them from exercising that right should be analyzed under strict

---

204 *Id.* Furthermore, “many states that restrict general or concealed firearm possession to non-citizens simultaneously maintain exceptions for hunting or sport purposes. *Id.* (citing HAW. REV. STAT. §§ 134-2(d), 134-3(a) (1993); N.Y. PENAL LAW §§ 265.01(5), 265.20(4) (Consol. 2000 & Cum. Supp. 2011)).
205 *See, e.g.*, Chan v. City of Troy, 559 N.W.2d 374, 379, 380 (Mich. Ct. App. 1997) (determining that allowing non-citizens to possess firearms did not affect Michigan’s ability to define its political community and that denying permanent residents the right to possess firearms was not narrowly tailored to the goal of public safety); State v. Chumphol, 634 P.2d 451, 451-52 (Nev. 1981) (determining Nevada’s law denying non-citizens from obtaining concealed-weapons licenses was unconstitutional under a strict scrutiny analysis); People v. Rappard, 28 Cal. App. 3d 302, 305 (Cal. Ct. App. 1972) (finding that California’s ban on concealed-weapon possession by non-citizens violated federal and state equal protection principles).
206 *Heller*, 554 U.S. at 592.
207 *See* Blocker, *supra* note 67, at 424.
208 Massey, *Guns, supra* note 11, at 1131.
209 *Id.*
scrutiny. “[T]he limitation of the right to armed self-defense finds no independent support or rationale save a desire to keep instruments of deadly violence as a privilege of citizenship and a survival advantage for citizens.” Strict scrutiny analysis is therefore necessary if “nonviolent felons and even undocumented persons can present colorable claims to exercise the right of reasonable armed self-defense.”

210 See Gulasekaram, Aliens with Guns, supra note 13, at 916. But see Winkler, supra note 163, at 696 (arguing that strict scrutiny should not automatically be applied simply because the individual right to bear arms is included in the Bill of Rights). According to Professor Winkler, the two main theories supporting the application of strict scrutiny are the invidious motive theory and the cost-benefit theory. Id. at 700. Winkler argues that gun control regulations do not have invidious motives because the motive behind these regulations is enhancing public safety. Id. at 701; see also id. at 703 (“There is clearly a place for regulation of the right to bear arms, making strict scrutiny’s presumption of unconstitutionality inappropriate for gun control under the invidious motive theory.”). Under the cost-benefit theory, courts determine whether the right in question is central to the democratic process. Id. at 703-04. According to Winkler, “the recognized need for some degree of regulation of firearms suggests that gun control is ordinary rather than exigent” and therefore the cost-benefit theory does not support the application of strict scrutiny. Id. at 704. Overall, Winkler suggests that a decision to apply strict scrutiny would not only disrupt settled state laws but would raise separation of powers issues by calling into question the validity of many federal gun control laws. Id. at 712-13.

211 Gulasekaram, “The People,” supra note 13, at 1579. Similarly, “it seems odd that felons and the mentally ill should be prohibited categorically from invoking [the Second Amendment] if its “core value . . . is self-defense.” Blocker, supra note 67, at 426. However, the constitutionality of laws prohibiting felons and the mentally ill from possessing firearms is beyond the scope of this article.

212 Gulasekaram, “The People,” supra note 13, at 1580. Furthermore, as Professor Volokh has stated:

Some of the statutes that trigger the laws—minority, alienage, being under indictment, being a felon in those states that allow for restoration of civil rights some years after the conviction—are temporary, and may expire in years or even months. But denying people the ability to defend themselves with firearms for that long remains a substantial burden on self-defense. To be upheld, then, the bans must be justified either by a scope argument (that the constitutional right explicitly or implicitly excludes the prohibited class of people) or by a danger reduction argument (that people in the prohibited class are so unusually dangerous that even a total ban on their gun possession is constitutional.

Volokh, supra note 13, at 1497.
After incorporation, Virginia and New York can still limit documented aliens’ rights to keep and bear arms.\textsuperscript{213} To determine how the application of strict scrutiny would affect the rights of Virginia’s documented aliens, one can compare Virginia and New York’s restrictions on non-citizens’ rights to possess firearms. Virginia law currently states:

> It shall be unlawful for any person who is not a citizen of the United States or who is not a person lawfully admitted for permanent residence to knowingly and intentionally possess or transport any assault firearm or to knowingly and intentionally carry about his person, hidden from common observation, an assault firearm.\textsuperscript{214}

Virginia prohibits non-immigrant aliens from possessing assault firearms, but seems to allow possession by permanent lawful residents.\textsuperscript{215} It also prohibits undocumented aliens from possession, but as discussed later this is likely constitutional.\textsuperscript{216}

As of now, Virginia law does not conflict with federal law because federal law only allows permanent resident aliens to possess firearms.\textsuperscript{217} However, if § 922(g)(5) is ever struck down or repealed, Virginia would need to satisfy strict scrutiny by demonstrating both that state has a compelling state interest for discriminating against non-immigrant aliens and that this law is narrowly tailored to meet that compelling interest.\textsuperscript{218}

---

\textsuperscript{213} See McDonald v. City of Chicago, 561 U.S. __, __, 130 S. Ct. 3020, 3047 (2010).

\textsuperscript{214} VA. CODE ANN. § 18.2-308.2:01(A) (Repl. Vol. 2009). Virginia defines an “assault firearm” as:

> . . . [A]ny semi-automatic center-fire rifle or pistol that expels single or multiple projectiles by action of an explosion of a combustible material and is equipped at the time of the offense with a magazine which will hold more than 20 rounds of ammunition or designed by the manufacturer to accommodate a silencer or equipped with a folding stock.

VA. CODE ANN. § 18.2-308.2:01(C) (2009).

\textsuperscript{215} See Gulasekaram, Aliens with Guns, supra note 13, at 895 n.11.

\textsuperscript{216} See discussion infra Part IV.C.2.


\textsuperscript{218} See Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (law must be narrowly tailored to meet compelling government interest under strict scrutiny); Graham, 403 U.S. at 372 (strict scrutiny must be used to review laws discriminating against alienage).
compelling state interest of public safety and ensuring access to assault weapons is limited. To attempt to demonstrate how Virginia’s law does not satisfy strict scrutiny, a non-citizen residing in Virginia could argue that “grounding the Second Amendment in a personal self-defense imperative preclude logical justification for limiting firearm rights to citizens.”

Furthermore, a non-citizen could argue that the *Heller* Court expressly rejected a reading of the Second Amendment that would limit “the people” to those citizens qualified to serve in the militia.

Despite these arguments, a court would probably view public safety and limiting access to assault weapons as a compelling state interest and determine Virginia can condition possession of assault firearms on citizenship or status as a permanent lawful resident. Even though both citizens and non-citizens can threaten public safety with the use of assault firearms, it is reasonable for Virginia to only allow citizens and those who have been granted permanent resident status to possess assault firearms since these groups have the most substantial connections with the United States.

After all, a strict reading of the statute demonstrates that non-immigrant aliens are only prohibited from possessing assault firearms; the statute is silent on the matter of non-immigrant aliens possessing firearms that are not classified as assault firearms. Therefore, since it appears that Virginia’s non-citizens that have not been admitted for

---

219 *Cf.* Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547, 588 (2009) (discussing how almost all firearms regulations are influenced by a governmental interest in some type of public safety, such as preventing violence or reducing crime).

220 Gulasekaram, “*The People,*” *supra* note 13, at 1577. Indeed, “gun ownership is connected to citizenship status tangentially at best unless noncitizens present the primary source of armed danger within the country.” *Id.* at 1578.


222 *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (only those aliens who have created substantial connections with the United States can avail themselves of constitutional rights).

223 *See* VA. CODE ANN. § 18.2-308.2:01(A) (Repl. Vol. 2009).
permanent residence still would have access to other firearms, a court would determine that § 18.2-308.2:01(A) satisfies strict scrutiny.

Conversely, New York law prohibits any non-citizen from possessing any “dangerous or deadly weapon.” Essentially, New York has a flat ban on possession of any type of firearm by anyone who is not a United States citizen, but the state maintains an exception for non-citizens who wish to possess “rifle[s], shotgun[s] or longbow[s] for use while hunting, trapping, or fishing.” If the Court incorporates the Second Amendment, and a resident alien in New York challenges this law, New York would have to provide a compelling government interest for this law to survive strict scrutiny since it discriminates based on alienage. New York, like Virginia, would most likely argue that law is narrowly tailored to meet the compelling state interest of public safety.

Despite these arguments, a court would probably find this not compelling enough to discriminate based on alienage and prohibit anyone but citizens from possessing any type of firearm for any reason. After all, anyone, not just resident aliens, who possess dangerous or deadly weapons can threaten public safety. Furthermore, as Professor Gulasekaram argues, there is no logical reason for limiting the right to possess firearms for self-defense to citizens. A court reviewing the constitutionality of § 265.01(5) would likely order New York to implement a new statute similar to Virginia’s to permit resident aliens to possess firearms not only for

---

226 See Grutter, 539 U.S. at 326 (law must be narrowly tailored to meet compelling government interest under strict scrutiny); Graham, 403 U.S. at 372 (strict scrutiny must be used to review laws discriminating against alienage).
sporting purposes, but also for self-defense.\textsuperscript{229} Alternatively, a court could order New York to revise the statute to condition ownership by non-citizens based on whether they have formed substantial connections with the United States.\textsuperscript{230}

ii. Restrictions on Concealed Carrying

To determine how the application of strict scrutiny would affect the rights of Virginia and New York’s documented aliens, one can also compare the laws of Virginia and New York concerning concealed carrying permits. Virginia law currently states that “[a]n alien other than an alien lawfully admitted for permanent residence in the United States” “is “deemed disqualified from obtaining a permit” for carrying a concealed handgun.\textsuperscript{231} Although federal law is silent on concealed carrying permits, Virginia law does not conflict because federal law currently only allows permanent resident aliens to possess firearms.\textsuperscript{232}

If a court considered the constitutionality of § 18.2-308(E)(10), it would likely find it unconstitutional under a strict scrutiny analysis. Non-citizens who have not been admitted for permanent residence are already prohibited from “knowingly and intentionally carry[ing] about [their] person[s], hidden from common observation, [...] assault firearm[s].”\textsuperscript{233} However, § 18.2-308(E)(10) constitutes a flat ban on these individuals’ rights to apply for a concealed carry

\textsuperscript{229} Cf. VA. CODE ANN. § 18.2-308.2:01(A) (Repl. Vol. 2009) (prohibiting those aliens who have not been admitted to the United States for permanent residence from possessing assault firearms); see also supra notes 214-223 and accompanying text.

\textsuperscript{230} Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (only those aliens who have created substantial connections with the United States can avail themselves of constitutional rights).

\textsuperscript{231} VA. CODE ANN. § 18.2-308(E)(10) (Supp. 2010). “Lawfully admitted for permanent status” as used in the statute “means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” VA. CODE ANN. § 18.2-308(M) (Supp. 2010).


\textsuperscript{233} VA. CODE ANN. § 18.2-308.2:01(A) (Repl. Vol. 2009).
permit. 234 Bans on carrying firearms “are substantial burdens on the right to defend oneself, and carrying arms is within the scope of the right, alongside home possession.” 235 Furthermore, “[c]oncealed carrying is no longer probative of criminal intent.” 236 If the individual right protected by the Second Amendment is the right to possess firearms for self-defense 237, all of Virginia’s non-citizens should be permitted to “have the tools they need for self-defense until there is solid evidence that possession of those tools will indeed cause serious harm.” 238 Therefore, under strict scrutiny, a court would likely find § 18.2-308(E)(10) unconstitutional unless the Commonwealth demonstrates that allowing non-citizens who are not permanent residents to apply for concealed carry permits would cause a great deal of harm to the public’s safety.

Conversely, New York law is silent on whether non-citizens may apply for a license to carry a firearm. 239 However, one can infer that non-citizens are banned from applying for concealed carry licenses because, as previously mentioned, New York currently bans all non-citizens from possessing “any dangerous or deadly weapon” 240 (except for rifles, shotguns, and longbows possessed for sport purposes). 241 If a court could plausibly find Virginia’s law prohibiting certain non-citizens from applying for concealed carry permits unconstitutional pursuant to a strict scrutiny analysis, then the same court would certainly find § 400.00

234 See VA. CODE ANN. § 18.2-308(E)(10) (Supp. 2010).
235 Volokh, supra note 13, at 1519.
236 Id. at 1523.
238 Volokh, supra note 13, at 1520.
239 See N.Y. PENAL LAW § 400.00(1) (Consol. 2000 & Cum. Supp. 2011) (setting forth the criteria that an applicant for a license needs to meet before a license is issued).
unconstitutional under strict scrutiny as far as the statute does not permit non-citizens to “have the tools they need for self-defense.”

b. Applying the Reasonable Regulation Test

i. Restrictions on Firearm Possession

As previously mentioned, Virginia only permits citizens and those non-citizens admitted to the United States for permanent residence to possess assault firearms. However, the analysis above demonstrates that a court considering the constitutionality of § 18.2-308.2:01(A) would likely find Virginia’s law constitutional under a strict scrutiny analysis because the Commonwealth has compelling state interests of limiting access to assault weapons and protecting public safety. Therefore, because the reasonable regulation test is more deferential than the strict scrutiny analysis, a court applying the reasonable regulation test to § 18.2-308.2:01(A) would find Virginia’s law constitutional.

Conversely, New York prohibits anyone who is not a United States citizen from possessing “any dangerous or deadly weapon” unless they possess rifles, shotguns, and longbows to use for hunting and other sport. The analysis above demonstrates that a court considering the constitutionality of § 265.01(5) would likely determine that the statute fails a strict scrutiny analysis. According to Professor Winkler, “[t]he text of the Second Amendment recognizes a measure of governmental authority to regulate those who possess

242 Volokh, supra note 13, at 1520.
244 See supra notes 217-223 and accompanying text; cf. Anderson, supra note 219, at 588 (discussing how almost all firearms regulations are influenced by a governmental interest in some type of public safety, such as preventing violence or reducing crime).
245 See Winkler, supra note 163, at 686-87.
248 See supra notes 224-30 and accompanying text.
arms” and “recognize[s] a great deal of governmental authority to preserve public safety.”

Usually, courts applying the reasonable regulation test “adopt[ ] a categorical rule: destruction of the right [to possess firearms], such as by disarmament, is per se unconstitutional.” Therefore, a court applying the reasonable regulation test to § 265.01(5) could determine that this statute is constitutional because non-citizens residing in New York have not been completely disarmed because they are statutorily allowed to possess certain weapons for sporting purposes.

However, the same court could reasonably conclude that § 265.01(5) is unconstitutional under the reasonable regulation test because no logical justification exists for prohibiting non-citizens from possessing firearms for self-defense.

ii. Restrictions on Concealed Carrying

As mentioned above, Virginia law currently states that “[a]n alien other than an alien lawfully admitted for permanent residence in the United States” “is “deemed disqualified from obtaining a permit” for carrying a concealed handgun. The analysis above concludes that a court would likely find § 18.2-308(E)(10) unconstitutional if strict scrutiny were applied.

However, the reasonable regulation test is more deferential to the government than the strict scrutiny analysis. Accordingly, if Virginia’s concealed carrying law “vest[ed] uncontrolled discretion in government officials to grant or deny [concealed carry] permits[,] [this law] would be presumptively invalid.” However, Virginia’s law does not allow officials to have absolute discretion; instead, the law specifically provides what an applicant must provide and what

---

249 Winkler, supra note 163, at 707, 708.
250 Id. at 717.
252 See Gulasekaram, “The People,” supra note 13, at 1577. After all, “[n]oncitizens with gun are no more dangerous than citizens with guns.” Volokh, supra note 13, at 1513.
253 VA. CODE ANN. § 18.2-308(E)(10) (Supp. 2010).
254 See supra notes 233-38 and accompanying text.
255 Winkler, supra note 163, at 686-87.
256 Massey, Guns, supra note 11, at 1129 (alterations in original).
officials must check when an individual applies for a concealed carrying permit. Therefore, because Virginia’s concealed carrying law only regulates the right to possess firearms and does not completely eliminate it for non-citizens, a court applying the reasonable regulation test to § 18.2-308(E)(10) would likely determine that this provision is constitutional.

Similarly, New York law appears to disqualify all non-citizens from applying for concealed carry licenses because non-citizens in New York are currently banned from possessing “any dangerous or deadly weapon.” However, like Virginia’s concealed carry law, New York’s statute does not “vest uncontrolled discretion in government officials” because it sets forth the procedure that applicants and officials must follow. Therefore, because New York’s concealed carry law regulates the right to possess firearms, a court applying the reasonable regulation test to § 400.00 would likely determine that this provision is constitutional.

However, a court applying the reasonable regulation test to § 400.00 could plausibly determine

---

257 See VA. CODE ANN. § 18.2-308(D) (Supp. 2010) (setting forth the procedure followed by government officials when an individual applies for a concealed carry permit).
258 Cf. Winkler, supra note 163, at 717 (“Ordinary forms of gun control such as licensing laws, bans on concealed carry, and prohibitions on certain types of weapons are, by contrast, attempts to regulate the right rather than eliminate it and are routinely upheld.”); Anderson, supra note 219, at 588 (discussing how almost all firearms regulations are influenced by a governmental interest in some type of public safety, such as preventing violence or reducing crime).
260 Massey, Guns, supra note 11, at 1129.
262 Cf. Winkler, supra note 163, at 717 (“Ordinary forms of gun control such as licensing laws, bans on concealed carry, and prohibitions on certain types of weapons are, by contrast, attempts to regulate the right rather than eliminate it and are routinely upheld.”); Anderson, supra note 219, at 588 (discussing how almost all firearms regulations are influenced by a governmental interest in some type of public safety, such as preventing violence or reducing crime).
that this provision is unconstitutional because non-citizens in New York are already prohibited from possessing firearms for self-defense.\footnote{See N.Y. PENAL LAW § 265.01(4) (Consol. 2000 & Cum. Supp. 2011) (prohibiting non-citizens from possessing “any dangerous or deadly weapon[s]”); \textit{id.} § 265.20(4) (allowing non-citizens to possess “rifle[s], shotgun[s], or longbow[s] for use while hunting, trapping, or fishing”); \textit{see also} Volokh, \textit{supra} note 13, at 1520 (“[P]eople should be free to have the tools they need for self-defense until there is sold evidence that possession of these tools will indeed cause serious harm.”).}

2. \textit{Undocumented Aliens}

The Supreme Court has never held undocumented aliens to be part of a suspect class.\footnote{Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982). \textit{Plyler} involved a challenge to a Texas law that withheld from local school districts any state funds used for educating children who were not “‘legally admitted’” into the country. \textit{Id.} at 204.} Many classifications recognized by the Court as suspect are involuntary; entry into the class of undocumented aliens is a voluntary act and the act itself constitutes a crime.\footnote{\textit{Id.}} However, “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”\footnote{\textit{Id.} at 210 (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).} Therefore, it appears the Court used intermediate scrutiny to find the Texas law violated the Equal Protection Clause because the law did not further a substantial state interest by denying free public education to the children of undocumented aliens.\footnote{\textit{Id.} at 230.}

From \textit{Plyler}, one could assume that the Court would set intermediate scrutiny as the standard of review for state laws limiting the rights of undocumented aliens to possess firearms if the Second Amendment is incorporated under the Due Process Clause. As of now, this is a moot point. Congress has already statutorily prohibited those aliens who are illegally in the United States or who have been issued a nonimmigrant visa from possessing any firearms or
ammunition.\textsuperscript{268} Also, while states are allowed to co-regulate possession and use of firearms with Congress, individual state laws must not conflict or be irreconcilable with federal law.\textsuperscript{269} Virginia law currently prohibits “any person who is not a citizen of the United States and who is not lawfully present in the United States to knowingly and intentionally possess . . . any firearm or to knowingly and intentionally carry about his person, hidden from common observation, any firearm.”\textsuperscript{270} This law does not conflict with federal law prohibiting illegal aliens from possessing firearms, and so it is not currently necessary to determine the standard of review applicable to determine the constitutionality of this provision.

Therefore, while the courts could use intermediate scrutiny to review the constitutionality of both federal and state laws prohibiting the possession of firearms by undocumented aliens, the issue appears unlikely to arise in the near future. If it does, and courts do apply intermediate scrutiny, these laws will most likely be upheld because of the substantial governmental interest in public safety and ensuring that firearms and other weapons are not in the hands of those who have illegally entered the country.\textsuperscript{271}

V. CONCLUSION

“[T]he rights of aliens and U.S. citizens are closely linked, given the relationships and associations that aliens form with the United States throughout the duration of their stay in the country.”\textsuperscript{272} Therefore, because of these close associations, there is no provision in the Constitution providing a basis for “radical distinctions between citizens and noncitizens in the

\textsuperscript{270} V.A. CODE ANN. § 18.2-308.2:01(B) (Repl. Vol. 2009).
\textsuperscript{271} Cf. Anderson, supra note 219, at 588 (discussing how almost all firearms regulations are influenced by a governmental interest in some type of public safety, such as preventing violence or reducing crime).
\textsuperscript{272} Miyamoto, supra note 53, at 220. Because of these close connections, the government’s power to extend rights to aliens often indirectly affects citizens. See id.
protection of individual rights."\textsuperscript{273} The Court has already stated the Second Amendment protects an \textbf{individual} right to possess firearms.\textsuperscript{274} More importantly, the \textit{McDonald} Court expressly held that the Second Amendment protects an individual “right that is fundamental from an American perspective.”\textsuperscript{275}

Granted, there could be sensible reasons for creating classifications based on alienage in certain circumstances; however, these reasons alone should not “render the fact of exclusion [from a fundamental right] immune from strict scrutiny.”\textsuperscript{276} After all, “[w]e know from \textit{Heller} that … deferential standards of review are not applicable to the Second Amendment.”\textsuperscript{277} However, it is equally plausible that a court could apply the reasonable regulation test when

\begin{footnote}
\textsuperscript{273} \textit{Id.} at 221.
\textsuperscript{275} McDonald v. City of Chicago, 561 U.S. \_\_\_, 130 S. Ct. 3020, 3050 (2010) (plurality opinion).
\textsuperscript{276} Gulasekaram, \textit{Aliens with Guns}, supra note 13, at 954 (alteration in original).
\textsuperscript{277} Kopel & Cramer, \textit{supra} note 171; see also \textit{id.} at 1219 (“The most plausible methodology for how to interpret the Second Amendment . . . is the same manner in which the courts apply the rest of the Bill of Rights. In every case, the legislature carries the burden to justify denial of an individual right . . . To treat the Second Amendment as deserving a standard of review inferior to the rest of the Bill of Rights is inappropriate.”). In fact, some have suggested that strict scrutiny must be applied to laws discriminating against aliens. \textit{See, e.g.,} Volokh, \textit{supra} note 13, at 1515 (“Finally, I should note that it’s possible that state laws that discriminate against noncitizens when it comes to gun possession or gun carrying might violate the Equal Protection Clause, which has been interpreted as requiring strict scrutiny of some (but not all) state discrimination against noncitizens.”); \textit{cf.} Gulasekaram, \textit{Aliens with Guns}, \textit{supra} note 13, at 947 (“\[E\]qual protection is a more normatively appropriate doctrine to apply when courts confront alien gun statutes . . . because it recognizes non-citizens’ contributions to American society and it sends a preferable symbolic message about an egalitarian America.”); Miyamoto, \textit{supra} note 53, at 217 (“There is no justification for different levels of constitutional protection for aliens who are lawfully residing in the United States or subject to its jurisdiction, nor is it justifiable to abridge constitutionally guaranteed fundamental rights; however, it may be justifiable to accord aliens different levels of benefits based on their increased membership, as in equal protection and alienage cases.”); \textit{id.} at 186 (noting that choosing to use “the same level of scrutiny in First Amendment cases involving aliens as in those involving citizens would establish a unified and nondiscriminatory Bill of Rights for all persons in the United States.”).\end{footnote}
considering the constitutionality of a state gun control regulation—after all, every state to consider the standard of review issue has applied this deferential standard.\footnote{Winkler, \textit{supra} note 163, at 683; \textit{see} Blocker, \textit{supra} note 67, at 423 (“[I]t seems likely that reasonableness review—the form of scrutiny universally applied by state courts considering their own state constitutions’ gun provisions—will become the Second Amendment equivalent of First Amendment intermediate scrutiny, the ‘Test That Ate Everything’ in free speech doctrine.”).}

Because neither the \textit{Heller} Court nor the \textit{McDonald} Court set forth the standard of review for courts to apply when reviewing federal, state, and local gun control measures, the constitutionality of Virginia’s and New York’s laws restricting firearm possession and concealed carrying remains uncertain. A court applying strict scrutiny to consider the constitutionality of Virginia’s law prohibiting aliens who are not permanent residents from possessing assault firearms would likely find this law constitutional,\footnote{\textit{See supra} notes 213-23 and accompanying text.} but the same court considering the law prohibiting the same non-citizens from applying for concealed carry permits would likely strike it down as unconstitutional because it substantially burdens aliens’ right to self-defense\footnote{\textit{See supra} notes 231-38 and accompanying text.}—the individual right that \textit{Heller} intended to constitutionalize.\footnote{\textit{See Blocker, \textit{supra} note 67, at 424.}} Conversely, the same court applying the more deferential reasonable regulation test would still find the law restricting firearm possession constitutional but would also find the concealed carry law constitutional because it does not completely eliminate the right of self-defense for aliens who have not been admitted as permanent residents.\footnote{\textit{See} notes 243-45 and accompanying text; notes 253-58 and accompanying text.}

If the \textit{Heller} Court intended to constitutionalize the individual right to self-defense, then the analysis above shows that the majority of Virginia’s laws regulating the possession and carrying of firearms based on alienage, as compared to New York’s laws regulating the same areas, are likely to survive no matter what standard of review is ultimately determined to control
firearm regulations. After all, New York regulates the possession of firearms based on alienage more harshly than does Virginia—New York residents who aren’t citizens of the United States can’t even possess “any dangerous or deadly weapon.”

What is clear, however, is that the Heller Court “offered little guidance concerning the decision rules that serve to identify when right is infringed.” The uncertainty surrounding not only Virginia’s, but also New York’s, firearms regulations based on alienage stands as a stark example of how the Supreme Court will ultimately need to set a uniform standard of review to apply to all federal, state, and local gun control laws. The standardless Second Amendment individual right to possess firearms for self-defense invites litigation as non-citizens may try to challenge Virginia’s existing laws—after all, “[r]arely are entire categories of people barred from asserting a constitutional right.” As seen in the analysis above, the choice of a standard of review is key to whether many non-citizens will enjoy this Second Amendment right, and the time to determine that standard is now.

283 Compare notes 213-23 and accompanying text (determining that Virginia law prohibiting aliens who are not permanent residents from possessing assault firearms would be constitutional using strict scrutiny), and notes 243-45 and accompanying text (determining that the same Virginia law would be constitutional under the reasonable regulation test), with notes 224-30 and accompanying text (determining that New York law prohibiting all non-citizens from owning weapons except for sport purposes would be unconstitutional under strict scrutiny), and notes 246-52 and accompanying text (determining that the same New York law could either be constitutional or unconstitutional under the reasonable regulation test); notes 231-38 and accompanying text (determining that Virginia law prohibiting aliens who are not permanent residents from applying for concealed carry licenses would be unconstitutional under strict scrutiny), and notes 253-58 and accompanying text (determining that the same Virginia law would be constitutional under the reasonable regulation test), with notes 239-42 and accompanying text (determining that New York law forbidding non-citizens from applying for concealed carry permits to be unconstitutional under strict scrutiny), and notes 259-63 and accompanying text (determining that the same New York law would either be constitutional or unconstitutional under the reasonable regulation test).


285 Massey, Second Amendment, supra note 50, at 1431.

286 Id. at 1432.