

# CONSTITUTIONAL CONFLICT AND SENSITIVE PLACES

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## INTRODUCTION

In 2008, with the *District of Columbia v. Heller* decision, the Supreme Court of the United States held for the first time that the Second Amendment protects an individual's right to keep and bear arms for personal purposes like self-defense in the home.<sup>1</sup> One of the most opaque portions of that decision stated that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in *sensitive places* such as schools and government buildings.”<sup>2</sup>

The “sensitive places” doctrine is still being refined. Courts have held that university facilities are sensitive places, as are university events,<sup>3</sup> along with national parks (even when closed),<sup>4</sup> and the parking lots of rural post offices.<sup>5</sup> Churches and other houses of worship also appear to qualify<sup>6</sup> as do—perhaps—libraries, museums, day-care facilities, and hospitals.<sup>7</sup> However, other courts have struck down, on

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<sup>1</sup> 554 U.S. 570, 629, 636 (2008).

<sup>2</sup> *Id.* at 626 (emphasis added).

<sup>3</sup> *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011).

<sup>4</sup> *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011).

<sup>5</sup> *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015).

<sup>6</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) (“[T]he pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes.”).

<sup>7</sup> *Ezell v. City of Chicago*, 70 F. Supp. 3d 871, 885 (N.D. Ill. 2014), *aff'd in part, rev'd in part*, 846 F.3d 888 (7th Cir. 2017) (“Therefore, the City's regulation requiring ranges to be located at least 500 feet away from residential zoning districts, schools, day-care facilities, places of worship, premises licensed for the retail sale of liquor, children's activities facilities, libraries, museums, or hospitals is constitutional.”). *Ezell* did not strike down the finding of sensitive places as much as suggest that the designation of sensitive places could not reduce the available acreage for firing ranges to 2.2% of city's total acreage out of 10.6% available for business, commercial, and manufacturing. *Ezell*, 846 F.3d at 894.

Second Amendment grounds, regulations that prohibit guns in the vicinity of bars,<sup>8</sup> hydro-electric dams,<sup>9</sup> and city parks.<sup>10</sup>

Recently, the matter of sensitive places arrived—almost literally—at the doorstep of the United States Supreme Court. In *United States v. Class*, the United States Court of Appeals for the D.C. Circuit addressed whether a parking lot near Congress qualifies as a sensitive place. Rodney Class parked in a lot north of the Botanical Gardens, “approximately 1,000 feet from the entrance to the Capitol [Building] itself,” with two pistols and a rifle in his car.<sup>11</sup> Federal prosecutors charged Class with violating the federal statute prohibiting firearms on Capitol Building grounds.<sup>12</sup> Class claimed the Second Amendment guaranteed him a right to take his firearms into the parking lot.<sup>13</sup> After some procedural maneuvering, including a trip to the Supreme Court on an unrelated issue,<sup>14</sup> the case returned to the D.C. Circuit.<sup>15</sup>

The Circuit upheld the conviction.<sup>16</sup> While granting that the right to keep and bear arms extends beyond the home, the court reiterated that the right is not limitless.<sup>17</sup> One of those limitations is the sensitive places doctrine.<sup>18</sup> And “there are few, if any, government buildings more ‘sensitive’ than the ‘national legislature at the very seat of its operations.’”<sup>19</sup> The opinion noted the particular safety needs of government workers going to and from the Capitol and the government’s right as a property owner—same as any private property owner—to exclude firearms.<sup>20</sup> These rationales—safety and the government as proprietor—are fairly conventional justifications for the sensitive places doctrine.<sup>21</sup>

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<sup>8</sup> Some of these cases pertain to “buffer-zones” and some to prohibitions on firearms in parking lots. *See, e.g.,* *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (holding that the parking lot outside the United States Capitol building was “sufficiently integrated with the Capitol for *Heller*’s sensitive place exception to apply”); *Ezell*, 846 F.3d at 895–96 (holding that “limiting shooting ranges to manufacturing districts and distancing them from the multiple and various uses listed in the buffer-zone rule” is unconstitutional).

<sup>9</sup> *Morris v. U.S. Army Corps of Eng’rs*, 60 F. Supp. 3d 1120, 1125 (D. Idaho 2014).

<sup>10</sup> *People v. Chairez*, 104 N.E.3d 1158, 1177 (Ill. 2018) (striking down prohibition on “possessing a firearm within 1000 feet of a public park”).

<sup>11</sup> *Class*, 930 F.3d at 462 (D.C. Cir. 2019); *United States v. Class*, 38 F. Supp. 3d 19, 22 (D.D.C. 2014).

<sup>12</sup> 40 U.S.C. § 5104(e)(1) (2012).

<sup>13</sup> *Class*, 930 F.3d at 462–63.

<sup>14</sup> *See Class v. United States*, 138 S. Ct. 798, 801–02 (2018).

<sup>15</sup> *Class*, 930 F.3d at 460.

<sup>16</sup> *Id.* at 462.

<sup>17</sup> *Id.* at 463 (citing, inter alia, *Wrenn v. District of Columbia*, 864 F.3d 650, 657–58 (D.C. Cir. 2017)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing *Jeannette Rankin Brigade v. Chief of Capitol Police*, 421 F.2d 1090, 1093 n.3 (D.C. Cir. 1969)).

<sup>20</sup> *Id.* at 464.

<sup>21</sup> *See Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An*

Class went further though. Echoing many gun-rights advocates, he argued a place cannot be sensitive if the government (or some other person) has abandoned the role of providing security therein.<sup>22</sup> “[U]nlike inside Capitol buildings, which have extensive security barriers and armed guards at the entrances,” Class argued, there was no security in the parking lot.<sup>23</sup> That lack of security makes the parking lot a magnet for gun-toting criminals, and hence a “prototypical location where one would most likely need to exercise a right to self-defense.”<sup>24</sup>

The court rejected this definition, which would have effectively limited sensitive places to only those sites that provide adequate security.<sup>25</sup> “[W]e do not look to the ‘level of threat’ posed in a sensitive place,” the court noted, observing that schools and government buildings, like post offices, are open to the public and often lack special security measures.<sup>26</sup> What makes a place sensitive is “the people found there” or the “activities that take place there.”<sup>27</sup>

The *Class* court confirmed a deep truth of the emerging sensitive places doctrine—ensuring safety is a sufficient, but not a necessary, reason to prohibit firearms in some places.<sup>28</sup> The balance of this Article will explore what it means for a place to be sensitive, not out of a concern for safety, but because of “the people found there” or the “activities that take place there.”<sup>29</sup> Ultimately, I conclude that one way to make sense of that portion of the sensitive places doctrine is to recognize that some places are sensitive because they are sites of conflict between constitutional values.

In order to understand this model of sensitive places, one must accept two related aspects of rights. First, rights are not always trumps.<sup>30</sup> They frequently are tools to foster and maintain institutions that facilitate a distinctive socio-political culture.<sup>31</sup> Second, rights are not absolute; they can conflict.<sup>32</sup> Sensitive places are,

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*Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1446–47, 1461, 1473 (2009).

<sup>22</sup> *Class*, 930 F.3d at 464–65.

<sup>23</sup> Supplemental Opening Brief of Appellant at 24, 930 F.3d 460 (D.C. Cir. 2019) (No. 15-3015), 2018 WL 3007944, at \*24; *see also* Supplemental Reply Brief of Appellant at 4, *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019) (No. 15-3015), 2018 WL 3609036, at \*4 (“[T]he Maryland Avenue parking lot—far from being a place where gun regulations are presumptively lawful—is an area where Second Amendment rights are at their zenith.”).

<sup>24</sup> *Id.* (citing *Volokh*, *supra* note 21, at 1527).

<sup>25</sup> *Class*, 930 F.3d at 464–65.

<sup>26</sup> *Id.* at 465.

<sup>27</sup> *Id.* (quoting *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011), *aff’d*, 687 F.3d 1244 (11th Cir. 2012)).

<sup>28</sup> *See id.* at 464–65.

<sup>29</sup> *GeorgiaCarry.Org*, 764 F. Supp. 2d at 1319.

<sup>30</sup> *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meaning, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731–32 (1998).

<sup>31</sup> *See generally id.* (describing how courts can use these too).

<sup>32</sup> *See* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?*, *McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015).

among other things, sites where these rights-enabled and enabling institutions collide.<sup>33</sup> For purposes of this Article, I will focus on conflicts between the right to keep and bear arms and the rights to free exercise of religion, freedom of speech in the educational context, the fundamental right to vote, and to assemble peaceably in the public square. However, this list is not definitive: one can imagine a number of other constitutional rights—like parental rights or the right to privacy—that may come into play as well.

This Article builds on my prior work, which has explored an institutional approach to Second Amendment questions, but has not elaborated on the topic of constitutional conflict.<sup>34</sup> Part I explains the ways in which rights are not trumps, but instead produce institutions that facilitate and constrain certain kinds of rights-enabled behavior.<sup>35</sup> Part II explores how rights can come into conflict with each other in three areas of concern: free exercise of religion as it relates to places of worship; freedom of speech as it relates to schools, universities and the academy; the fundamental right to vote; and freedom of speech, assembly and petition as it relates to the public square.<sup>36</sup> Part III sketches how courts can adjudicate the sensitive places doctrine using this model.<sup>37</sup>

## I. THE INSTITUTIONAL AND STRUCTURAL APPROACH TO RIGHTS

Over twenty years ago, Richard Pildes observed that the “rights as trumps” framework was not descriptively accurate of American constitutional practice.<sup>38</sup> Rights are frequently conceived as a trump card, a way for individuals to prevail over majoritarian preferences or other utilitarian considerations.<sup>39</sup> But that’s only half-true. Rights, he said, “are better understood as means of realizing certain collective interests” and the content of rights are, in turn, “defined with reference to those interests.”<sup>40</sup> Rights do protect individuals, but that is not all they do. They also “realize the interests of others, including the construction of a political culture with a specific kind of character.”<sup>41</sup>

Pildes suggested that we protect rights to produce certain “public goods” necessary for a functioning liberal democracy.<sup>42</sup> Conceiving of them as “trumps” against

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<sup>33</sup> See discussion *infra* Part II.

<sup>34</sup> For more on this topic, see generally JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018); Darrell A. H. Miller, *The Expressive Second Amendment*, in *GUNS IN LAW* 48 (Austin Sarat et al. eds., 2019); Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 *DUKE L. J.* 69 (2016) [hereinafter Miller, *Institutions*].

<sup>35</sup> *Infra* Part I.

<sup>36</sup> *Infra* Part II.

<sup>37</sup> *Infra* Part III.

<sup>38</sup> Pildes, *supra* note 30, at 725, 729.

<sup>39</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81, 85 (1977).

<sup>40</sup> Pildes, *supra* note 30, at 731.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (citing JOSEPH RAZ, *Rights and Individual Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 37–38 (1994)).

any assertion of a government justification is not an accurate description of our constitutional practice, and, according to Pildes, not normatively desirable either.<sup>43</sup> Instead, rights constrain the kinds of justifications that count in adjudication.<sup>44</sup> Justifications that work against the public good the right is supposed to produce are illegitimate; justifications that work to assist the production of the public good are presumably constitutional.<sup>45</sup> For instance, a regulation on speech that frustrates a central goal of speech—the communication of political information—is typically thought to be illegitimate.<sup>46</sup> Similarly, regulations on firearms that frustrate a central goal of the right to keep and bear arms—safety—are also illegitimate.<sup>47</sup>

The public goods that rights provide, in turn, may foster various social institutions, and rights in this context can be best understood as “surrogates for defining an institutional space with a particular character.”<sup>48</sup> Those institutions have various degrees of thickness.<sup>49</sup> We may think of some kinds of institutions—those that are specified by the constitutional text, or necessarily implied by it—as one specific kind of institution.<sup>50</sup> For example, Congress and the Presidency are institutions textually specified by the Constitution, but contain all kinds of sub-constitutional laws, conventions, rules, and norms that permit them to function and to resolve differences.<sup>51</sup>

Of course, not all constitutional institutions are necessarily governmental. Restrictions on the power to coin money presume a monetary system.<sup>52</sup> The freedom of religious expression implies recognition of religious organizations.<sup>53</sup> These kinds of institutions are recognizable for how they distribute authority or resources, how they provide rules, decision-making structures, and norms for behavior, and how they recognize and discipline leaders, members, and outsiders.<sup>54</sup> Other, thinner institutions may arise from social practices that have become so unquestioned and habitual that their justification appears almost invisible.<sup>55</sup> Thicker institutions with

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<sup>43</sup> *Id.* at 729–31.

<sup>44</sup> *Id.* at 729; see also TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE* 19 (2018) (discussing alternatives to rights-as-trumps).

<sup>45</sup> Pildes, *supra* note 30, at 734 (“Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize, but when government infringes rights for reasons inconsistent with these common goods, it violates individual rights.”).

<sup>46</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

<sup>47</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 629, 636 (2008).

<sup>48</sup> Pildes, *supra* note 30, at 739.

<sup>49</sup> See Miller, *Institutions*, *supra* note 34, at 91.

<sup>50</sup> See *id.*

<sup>51</sup> See Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 1–2 (2014); see also *NLRB v. Noel Canning*, 573 U.S. 513, 518, 522–23 (2014).

<sup>52</sup> See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 35 (1995).

<sup>53</sup> See Miller, *Institutions*, *supra* note 34, at 101–02.

<sup>54</sup> See *id.* at 88.

<sup>55</sup> See *id.* at 91–92.

a private or quasi-private character, can also empower citizens, contribute to representative government and act as a check on state-dominated institutions.<sup>56</sup>

Institutions do not remain isolated, but often form what Douglass North called an “interdependent web of an institutional matrix” that can be reinforcing, so that “the individual right becomes more structure-like.”<sup>57</sup> Alternatively, rights bearing and constraining institutions can become antagonistic, which then demands other decision-making structures, organizations, and protocols to administer those rights.<sup>58</sup> For example, the Fifth and Fourteenth Amendments’ guarantees of procedural due process demand some kind of apparatus to provide some type of hearing, including the personnel, rules, norms, and protocols to provide that process.<sup>59</sup> These due process institutions may themselves come into conflict with other rights-enabled and enabling institutions—like the press or judicial campaigns—that in turn demand another set of decision-making structures to resolve.

Scholars have spent the last two decades elaborating on the ways that rights do not operate as trumps, but instead are interpreted to enable a certain kind of political society.<sup>60</sup> Jud Campbell has remarked that this kind of well-ordered liberty, in which rights are not atomistic self-referential trumps, would have been extremely familiar to the Framers of the original constitution.<sup>61</sup> As he says, the entire Enlightenment notion of natural rights presupposed that they were retained to make government function better; they were individual yes—but subject to collective definition and control.<sup>62</sup> Matt Adler has noted that rights are not trumps, but instead are better conceived as tools to make governments supply the right kinds of reasons for their regulations.<sup>63</sup> They are, in his terms, rights against certain kinds of rules.<sup>64</sup> Jeremy Waldron has discussed that rights can generate a multiplicity of duties that have both a negative and positive character.<sup>65</sup> And Jamal Greene has endorsed the idea of adjusting the rights-as-trumps frame due to its inability to deal with conflict, and its tendency to “favor rhetoric over judgement, simplicity over context, homogeneity over diversity.”<sup>66</sup>

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<sup>56</sup> See Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1034 (2017).

<sup>57</sup> *Id.* at 1030 (quoting DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 95 (1990)).

<sup>58</sup> *Id.* at 1032–33.

<sup>59</sup> This is a slightly modified example from Varol. See *id.* at 1026–27.

<sup>60</sup> See *infra* notes 61–66 and accompanying text.

<sup>61</sup> See Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86–87 (2017).

<sup>62</sup> *Id.*

<sup>63</sup> See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 15 (1998).

<sup>64</sup> *Id.* at 13–14 (“What violates X’s constitutional right, what she has a constitutional right against, is . . . a rule with the wrong predicate or history.”).

<sup>65</sup> Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 511 (1989) (“A duty to refrain from interfering with someone’s freedom is likely to be accompanied by a ‘positive’ . . . duty on other agents to protect people from such interference.”).

<sup>66</sup> Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).

Scholars interested in the development of specific constitutional institutions have built on the rights-are-not-trumps intuition. For example, Paul Horwitz has identified First Amendment institutions—like universities—that facilitate and effectuate First Amendment values.<sup>67</sup> Other scholars have noted how the Press Clause of the First Amendment contemplates something other than a right to speech or access to a particular technology; it assumes maintenance of an institution called *the Press* that performs functions and enjoys privileges distinct from other categories of speakers.<sup>68</sup> Richard Garnett and Douglas Laycock among others have discussed the same with respect to religious institutions.<sup>69</sup>

Timothy Zick has discussed how First Amendment doctrine designates certain kinds of public spaces—sidewalks, public streets, and parks—essential First Amendment institutions that facilitate the communication of ideas.<sup>70</sup>

Joseph Blocher and I have written how the Second Amendment right to keep and bear arms may be understood within an institutional framework as well—even after *Heller* subordinated the militia as an organizing principle for the right.<sup>71</sup> In that context, the Second Amendment is not concerned with self-defense simpliciter, but the maintenance of public safety, and the institutions designed to provide and manage that kind of public good.<sup>72</sup>

## II. SENSITIVE PLACES AND CONSTITUTIONAL CONFLICT

Accepting that rights do not always function as trumps helps to make sense of the puzzling passage in *Heller* that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>73</sup> This notion of a “sensitive place” is still largely undefined. What precisely makes a place sensitive? It cannot be solely a matter of congestion in the school. Presumably it is as legal to prohibit a gun in a class of five people as a class of five hundred. Nor is it necessarily

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<sup>67</sup> See Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500–01, 1503–04 (2007).

<sup>68</sup> See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 493 (1983); Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 127 (2018) (“While the Court has been reluctant to embrace distinct constitutional rights and protections for the press, it has, nonetheless, frequently recognized and celebrated the unique role the press play in our constitutional democracy.”).

<sup>69</sup> See Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837–39 (2009); Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 504–05 (2006).

<sup>70</sup> Timothy Zick, *Property as/and Constitutional Settlement*, 104 NW. U. L. REV. 1361, 1427 (2010) (“The public forum doctrine provides that existing public streets, parks, and sidewalks are held in trust for purposes of expressive activities.”).

<sup>71</sup> BLOCHER & MILLER, *supra* note 34, at 3.

<sup>72</sup> See *id.*

<sup>73</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

that the school is on government property: a private school is just as much a school as a public one. Further, as the *Class* case confirms, safety alone does not completely justify carving out these sensitive places.<sup>74</sup> Indeed, it is an article of faith among many gun rights advocates that those places where guns are forbidden are the places where they are most necessary.<sup>75</sup>

A part of the answer must be that these places are sensitive because they are the locus of the production of other kinds of public goods protected by other kinds of constitutional rights, and that the protection of the character of these types of institutions justifies limits on private firearms. It is not that the “‘the people found there’ or the ‘activities that take place there’”<sup>76</sup> are less deserving or needing of protection, nor is it that the people in these places or the activities that occur there are not at risk of violence. Instead, as between the safety private gun ownership is supposed to provide and other constitutional values in our constitutional system, these places should be gun-restricted for them to effectively produce the public goods and political culture we also consider valuable.

So, what kind of institutions may qualify as a sensitive place under this kind of model? Religious institutions, educational institutions, political institutions, and the public square all come to mind: although this model of sensitive places may include other kinds of institutions that advance other kinds of constitutional rights.<sup>77</sup> I reiterate, though, that this model of sensitive places explains how a place can be sensitive *despite* the issue of safety not *because* of it. The inside of a commercial airliner can still be a sensitive place without a supporting theory of the constitutional right to travel.

### A. Religious Institutions

Religious institutions are one kind of sensitive place, although *Heller* does not identify them as such.<sup>78</sup> The First Amendment guarantees freedom of religious expression,<sup>79</sup> and in many traditions religious expression happens in groups. Religious organizations and institutions enhance—even make possible—the kind of religious expression a person’s faith tradition may demand.<sup>80</sup> In addition, religious institutions are sites of idea generation, social and individual development, learning,

<sup>74</sup> United States v. *Class*, 930 F.3d 460, 464 (D.C. Cir. 2019).

<sup>75</sup> See Miller, *Institutions*, *supra* note 34, at 82 & n.76.

<sup>76</sup> *Class*, 930 F.3d at 465 (quoting *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011), *aff’d*, 687 F.3d 1244 (11th Cir. 2012)).

<sup>77</sup> For example, to the extent that matters of privacy and substantive due process are concentrated in medical facilities, we may think of hospitals and other medical treatment facilities as constitutional rights-enabled and enabling institutions.

<sup>78</sup> See generally *Heller*, 554 U.S. 570.

<sup>79</sup> U.S. CONST. amend. I.

<sup>80</sup> Cf. *Matthew* 18:20 (King James) (“For where two or three are gathered together in my name, there I am in the midst of them.”); *Quran* 62:9 (Yusuf Ali) (“O you who believe! When the call is proclaimed to prayer on Friday (the Day of Assembly), hasten earnestly to the Remembrance of Allah, and leave off business (and traffic): That is best for you if you but knew!”).

the transmission of tradition, and the development of commitment.<sup>81</sup> Churches and their related activities receive an amount of deference and autonomy that is unusual in other contexts.<sup>82</sup> As Paul Horwitz has written, “If any institution is a candidate for treatment as a First Amendment institution, it is the church.”<sup>83</sup>

Many, but not all, of these traditions presume that free exercise and physical threat are incompatible.<sup>84</sup> Consequently, many of the regulations surrounding religious facilities have tried to maintain their character as places of refuge, tranquility and repose, and as havens from violence.<sup>85</sup>

For example, religious institutions as places of sanctuary predate the modern era and is as deeply rooted as any other tradition in Western culture.<sup>86</sup> In fact, the idea of sanctuary arose out of the need to maintain public order and to protect individuals from private violence, typically at the hands of a victim’s family or clan.<sup>87</sup> The sanctuary of the church was so significant in pre-conquest England that early codes punished breach of church peace more heavily than breach of the King’s peace.<sup>88</sup>

Lawmakers throughout Western history have attempted to preserve the special institutional features of places of worship by banning weapons from them and their vicinity.<sup>89</sup> In Nordic countries, those entering a church were to leave their weapons in a stone vestibule known as the *vapenhus*.<sup>90</sup> Both Henry IV and Henry VIII issued

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<sup>81</sup> See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 192 (2013).

<sup>82</sup> For example, courts use a different yardstick when determining whether a church official is a “minister” than it may use for an official of a labor union. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (noting that the First Amendment “gives special solicitude to the rights of religious organizations” and observing that freedom of religion guarantees a right for a religious organization to “select its own ministers”).

<sup>83</sup> HORWITZ, *supra* note 81, at 192.

<sup>84</sup> *But cf.* *Tagore v. United States*, 735 F.3d 324, 329–30, 332 (5th Cir. 2013) (discussing the ceremonial knives known as “Kirpans” worn by Sikhs).

<sup>85</sup> See Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79, 93 (1986) (noting that the idea of sanctuary within a city or religious building “appeared as a mitigating response to the rather harsh rule of blood vengeance” in operation in ancient times); see also *Deyton v. Keller*, 682 F.3d 340, 347 (4th Cir. 2012) (“[T]his crime would be equally offensive at a synagogue, mosque, or any other house of worship. . . . [H]ouses of worship must be refuges for those seeking guidance, peace, comfort, and religious fellowship without fear of criminal intimidation.”); *Hart v. State*, 15 S.E. 684, 685 (Ga. 1892) (“The manifest purpose of [prohibiting sale of intoxicating liquor near churches] is to secure peace, tranquility and good order at and around these places devoted to divine worship.”).

<sup>86</sup> See Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CIN. L. REV. 747, 759 (1986).

<sup>87</sup> *Id.* at 756 (noting that sanctuary laws “were primarily concerned with the problem of feud and the maintenance of public order”).

<sup>88</sup> *Id.* at 753.

<sup>89</sup> See *infra* notes 90–93 and accompanying text.

<sup>90</sup> STEPHEN A. MITCHELL, *WITCHCRAFT AND MAGIC IN THE NORDIC MIDDLE AGES* 185 (2011).

laws that prohibited arms in churches.<sup>91</sup> And under roughly contemporaneous regulations, those seeking sanctuary in churches had to shed themselves of weapons.<sup>92</sup> The famous case of *Rex v. Knight* involved a Protestant zealot who was charged with taking his weapons into a church.<sup>93</sup>

This is not to say the historical sources are unmixed on the issue. Some colonial governments for a time required male adults to take firearms to church.<sup>94</sup> However, these kinds of requirements were geared toward a society still beset by sometimes hostile indigenous people or during periods of war.<sup>95</sup> Overall, it is fair to say that the instinct to protect houses of worship from weapons—rather than with weapons—is long and well-established.<sup>96</sup> This instinct certainly seems to have become the predominant form of legislation in the middle of the nineteenth century.<sup>97</sup>

<sup>91</sup> 4 Hen. 4, c. 29 (1402) (“It is ordained and established, That from henceforth no [Man] be armed nor bear defensible Armour to [. . . Churches nor Congregations,] ( ) in the same”); 26 Hen. 8, c. 6, § 3 (1534) (“[N]o psonne or psonnes . . . shall bringe or beare or cause to be brought or borne . . . to any . . . church . . . any bill, longebowe, crosbowe, handgon, swerde, staffe, daggare, halberde, morespik, speare, or any other maner of weapon.”) (addressing arms bearing in Wales).

<sup>92</sup> See THOMAS JOHN DE’ MAZZINGHI, *SANCTUARIES* 15 (Stafford, J. Halden & Son, 1887) (those seeking sanctuary “were not to carry any sword or other weapon, except their meat knives, and those only at their meals”).

<sup>93</sup> Sir John Knight’s Case (1686) 87 Eng. Rep. 75, 76 (KB). The significance of Knight’s acquittal by a jury is subject to some scholarly debate. Compare JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 104–05 (1994), with Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, in *A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 23 (Jennifer Tucker et al. eds., 2019), and Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing “Standard Model” Moving Forward*, 39 *FORDHAM URB. L.J.* 1727, 1831–33 (2012).

<sup>94</sup> See, e.g., Act of Feb. 27, 1770, sec. 1, 1800 Ga. Laws 157 (“Every male white inhabitant of this province . . . who is or shall be liable to bear arms in the militia . . . and resorting, on any Sunday or other times, to any church, or other place of divine worship within the parish . . . shall carry with him a gun, or pair of pistols.”); see also Act XLI, 1642–43 Va. Acts, in 1 *HENING’S STATUTES AT LARGE* 263 (Hening ed., New York, R. & W. & G. Bartow 1823) (“[I]t is enacted and confirmed that masters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott vpon penalty of ten pound of tobacco for every master of a family so offending . . .”). This Virginia provision appears to be more in the style of a militia regulation than a specific requirement to come to church armed.

<sup>95</sup> *AD 1622: Powhatan Chiefdom Resists English Settlement in Virginia*, <https://www.nlm.nih.gov/nativevoices/timeline/203.html> [<https://perma.cc/F6FP-JUZ8>] (last visited Dec. 4, 2019); see also *Treaty of Augusta*, GA. ARCHIVES, <https://vault.georgiaarchives.org/digital/collection/adhoc/id/1590>.

<sup>96</sup> See *supra* notes 86–89 and accompanying text.

<sup>97</sup> Georgia, for example, abrogated its prior requirement to carry weapons to church and forbade it in 1870. Act of Oct. 18, 1870, 1870 Ga. Laws 421 (“[N]o person in the State of

In 1877, Virginia prohibited any person from “carrying any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place, or without good and sufficient cause therefor” and forbade anyone from carrying “any such weapon on Sunday at any place other than his own premises” or pay a minimum twenty-dollar fine.<sup>98</sup> Texas and the then-territory of Oklahoma also prohibited the carrying of weapons “into any church or religious assembly.”<sup>99</sup> Missouri did as well,<sup>100</sup> albeit, perhaps, with an exception for police officers on duty.<sup>101</sup>

To the Georgia Supreme Court in 1874, the idea of carrying firearms into a house of worship was socially incomprehensible, and certainly not within the original understanding of any right to keep and bear arms:

The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.<sup>102</sup>

Four years later, in an otherwise gun-friendly opinion, the Arkansas Supreme Court echoed the sentiment: “No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections.”<sup>103</sup>

In the District of Columbia, Chief Judge Cranch, riding circuit in 1834, while reviewing an indictment of a man charged with disturbing a congregation by force of arms, noted that the principle was ecumenical: “Every religious sect is equally protected by our laws. Every congregation assembled for the public social worship

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Georgia be permitted or allowed to carry about his or her person any dirk, bowieknife, pistol or revolver, or any kind of deadly weapon, to . . . any place of public worship . . .”).

<sup>98</sup> Ch. 6, sec. 21, 1877 Va. Acts 305.

<sup>99</sup> Act of Aug. 12, 1870, ch. 46, 1870 Tex. Crim. Stat. 1322; *see also* Terr. Okla. Stat. ch. 25, art. 47, § 7 (1890) (prohibiting “any person, except a peace officer” from bearing any offensive or defensive weapon in “any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes”).

<sup>100</sup> Act of Mar. 26, 1874, 1879 Mo. Laws 224 (carrying deadly weapons, etc.).

<sup>101</sup> *Id.*; Huntsville, Mo., Ordinance in Relation to Carrying Deadly Weapons (July 12, 1844) (prohibiting any person, except police officers or those with good cause, to go armed “into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes”); *see also* Joplin, Mo. Code § 1201 (1917) (prohibiting any person from bringing “a dangerous or deadly weapon” into a church, school, or into public assembly place).

<sup>102</sup> Hill v. State, 53 Ga. 472, 475 (1874).

<sup>103</sup> Wilson v. State, 33 Ark. 557, 560 (1878).

of God is, at least, a lawful meeting, and as much under the protection of the law as a political meeting for the exercise of the right of election.”<sup>104</sup>

This notion of all houses of worship as places free from violence and threats of violence was reiterated in the Fourth Circuit just this decade.<sup>105</sup> In reviewing a habeas petition by armed robbers of a church congregation, the state trial court remarked that:

[I]f there’s one place in the whole world that you ought to have the right to feel like . . . for just a few minutes you can put the dangers of the world away and that you can step to some degree of peace and solitude and serenity with some degree of safety it would be in a church.<sup>106</sup>

The Fourth Circuit agreed, observing that this desire is not confined to a certain creed: “Religious services are particularly intimate moments regardless of the faith being observed. . . . [T]his crime would be equally offensive at a synagogue, mosque, or any other house of worship.”<sup>107</sup> That the arms are those of a private party are not necessarily dispositive: “[A]lthough the Constitution explicitly protects the right to the free exercise of religion from state interference, the government has long taken a role in protecting citizens from private deprivations of their constitutional rights as well.”<sup>108</sup>

Although the law has changed in reaction to church shootings, a number of states still forbid firearms in places of public worship.<sup>109</sup> This sense that places of worship should be free from weapons and violence is reflected in modern polling.<sup>110</sup> Overwhelming majorities of people object to private firearms in churches and other sites of religious expression.<sup>111</sup>

### *B. Educational Institutions*

Schools and universities are also First Amendment institutions, tasked with training children and young adults how to become responsible public citizens. Schools are something more than a concentration of young people, or a place where

<sup>104</sup> United States v. Brooks, 24 F. Cas. 1244, 1245 (C.C.D.D.C. 1834).

<sup>105</sup> Deyton v. Keller, 682 F.3d 340, 348 (4th Cir. 2012).

<sup>106</sup> *Id.* at 342 (quoting sentencing remarks of N.C. Superior Court Judge James L. Baker, Jr.).

<sup>107</sup> *Id.* at 347.

<sup>108</sup> *Id.* at 346–47 (citing Griffin v. Breckenridge, 403 U.S. 88, 91 (1971)).

<sup>109</sup> See, e.g., MICH. COMP. LAWS ANN. § 750.234d(1)(b) (West 2019) (prohibiting firearms from houses of worship, but permitting it where the presiding official or officials allow it); UTAH CODE ANN. § 76-10-530 (West 2019).

<sup>110</sup> Julia A. Wolfson et al., *U.S. Public Opinion on Carrying Firearms in Public Places*, 107 AM. J. PUB. HEALTH 929, 929–30, 932 (2017).

<sup>111</sup> *Id.*; see also Matthew Brown, *Poll: Americans United Against Guns in Churches*, DESERET NEWS (Aug. 15, 2012), <https://www.deseret.com/2012/8/15/20505566/poll-americans-united-against-guns-in-churches> [https://perma.cc/7VZ7-KCUE] (last visited Dec. 4, 2019).

students are lodged—they are a place where all kinds of conventions, rules, and norms give the idea of school social meaning.<sup>112</sup>

The speech environment that schools foster also has a purpose. As the Court emphasized, “[P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>113</sup> To that end, vigilant protection of First Amendment freedoms in school and university settings is essential because “[t]he classroom is peculiarly the ‘marketplace of ideas.’”<sup>114</sup> Nothing less than “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . .”<sup>115</sup>

Educational institutions are places where a free exchange of ideas in an orderly and civil manner is essential. Paul Horwitz has written extensively how schools and universities are “training grounds for public discourse” and the place “where ideas begin.”<sup>116</sup> It is why students possess protections for their speech in school and why universities and other institutions of higher education can engage in the kind of content and viewpoint discrimination that would be unacceptable by any other government entity.<sup>117</sup> The justification for the doctrine is that educational institutions are also “unique speech institutions with their own marketplace [of ideas]-enhancing internal norms.”<sup>118</sup> Where school and university regulations “improve, not limit, the free flow of information and ideas” then institutional deference is warranted.<sup>119</sup>

To effectuate that goal there is a long history of forbidding firearms in educational institutions. Harvard University banned students from having guns on campus sometime around 1655.<sup>120</sup> The University of Virginia’s 1825 student rule book forbade students from having firearms.<sup>121</sup> Mississippi prohibited students from carrying

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<sup>112</sup> See Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273–74, 285 (2008); Pildes, *supra* note 30, at 740–41.

<sup>113</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

<sup>114</sup> *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>115</sup> *Id.*

<sup>116</sup> HORWITZ, *supra* note 81, at 107.

<sup>117</sup> For example, public universities do not have to accept young-earth creationists in their biology departments or Holocaust deniers into their history departments. See *Oller v. Roussel*, No. 6:11-CV-002207, 2014 WL 4204836, at \*6–7 (W.D. La. Aug. 22, 2014) (holding there was no violation of tenured professor’s free speech right when he was reassigned because of his promotion of creationism and vaccine-autism link).

<sup>118</sup> Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 877 (2008).

<sup>119</sup> *Id.* at 880.

<sup>120</sup> Allen Rostron, *The Second Amendment on Campus*, 14 GEO. J.L. & PUB. POL’Y 245, 255 (2016) (“[N]oe students shall be suffered to have [a g]un in his or their chambers or studies, or keeping for their use anywhere else in the town.”) (quoting a copy of the LAWS OF HARVARD COLLEGE 1655, at 10 (1876)).

<sup>121</sup> *Id.* at 257 (“No student shall, within the precincts of the University, introduce, keep, or use any spirituous or vinous liquors, keep or use weapons or arms of any kind or gun-powder.”)

concealed weapons, and required administrators to punish students who violated the law.<sup>122</sup> Missouri, Texas, and the Oklahoma territory all prohibited firearms in school rooms and places where persons assemble for “educational, literary, or social purposes.”<sup>123</sup> The Virginia Supreme Court has recognized the special place of the university as an educational institution in upholding restrictions on firearms on its state university campuses.<sup>124</sup>

Private weapons can undermine this essential role of the school as a First Amendment institution. There is some evidence that highly policed schools suffer worse learning outcomes, decreased participation by the community in school affairs, and lack the trust of teachers and administrators.<sup>125</sup> Fear of violence may lead to absenteeism or “self-help” techniques, like students bringing private firearms to school, that can exacerbate problems with fulfilling academic tasks.<sup>126</sup> In another study of university students, researchers found that both non-gun owners and gun owners, including those who possess guns for purposes of safety believed that allowing guns on campus would have a harmful effect on classroom debate and the learning environment.<sup>127</sup> And, as with religious institutions, there tends to be lopsided opposition to carrying firearms into schools and universities among the public.<sup>128</sup>

### C. Political Institutions

Political parties, and the associated structures (elections, polling places, and voting) are Fifth, Fourteenth, and Fifteenth Amendment institutions, and perhaps, also First

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(quoting ENACTMENTS BY THE RECTOR & VISITORS OF THE UNIVERSITY OF VIRGINIA FOR CONSTITUTING, GOVERNING AND CONDUCTING THAT INSTITUTION 9 (1825)).

<sup>122</sup> David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 251 n.166 (2018).

<sup>123</sup> Act of Mar. 26, 1879, 1879 Mo. Laws 224 (carrying deadly weapons, etc.); Terr. Okla. Stat. ch 25, art. 47, § 7 (1890) (public buildings and gatherings) (prohibiting “any person, except a peace officer” from bearing any offensive or defensive weapon in “any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes”); Act of Aug. 12, 1870, ch. 46, 1870 Tex. Gen. Laws 68.

<sup>124</sup> *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 365, 370 (Va. 2011) (“[T]he statutory structure establishing [George Mason University] is indicative of the General Assembly’s recognition that it is a sensitive place, and it is also consistent with the traditional understanding of a university.”).

<sup>125</sup> Bryan R. Warnick & Ryan Kapa, *Protecting Students from Gun Violence*, 19 EDUCATIONNEXT, 23, 26–27 (2019). However, it is possible that this is merely a correlation and there’s no causation.

<sup>126</sup> See SHANNON WOMER PHANEUF, SECURITY IN SCHOOLS: ITS EFFECT ON STUDENTS 61–64 (2009).

<sup>127</sup> James A. Shepperd et al., *The Anticipated Consequences of Legalizing Guns on College Campuses*, 5 J. THREAT ASSESSMENT & MGMT. 21, 29 (2018).

<sup>128</sup> See Wolfson et al., *supra* note 110, at 929, 932, 935.

Amendment institutions.<sup>129</sup> The Court has noted that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>130</sup> Part of that history of keeping order is curtailing weapons in polling places and during elections.

The tradition goes back to the founding of the nation. Delaware’s Constitution of 1776 specifically forbade any private person from coming armed to an election, prohibited militias from drilling during elections, and outlawed any “battalion or company” coming within a mile of a polling place for twenty-four hours before or after the election.<sup>131</sup> The purpose of the restriction was plainly stated: “To prevent any violence or force being used at the said elections . . . .”<sup>132</sup> In 1776, Maryland delegates passed a substantially similar resolution, for similar reasons—to ensure fair elections on forming a new government after independence.<sup>133</sup> New York enacted a law in 1787 that provided that “all elections shall be free and that no person by force of arms nor by malice or menacing or otherwise presume to disturb or hinder any citizen of this State to make free election upon pain of fine and imprisonment and treble damages to the party grieved.”<sup>134</sup>

These kinds of regulations were common in the nineteenth century as well. Tennessee prohibited all deadly weapons from the site of elections.<sup>135</sup> In 1870, Louisiana made it unlawful to carry any “dangerous weapon, concealed or unconcealed, on any day of election during the hours the polls are open, or on any day of registration or revision of registration, within a distance of one-half mile of any place of registration or revision of registration.”<sup>136</sup> Maryland had a similar provision,<sup>137</sup> as

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<sup>129</sup> *But cf.* HORWITZ, *supra* note 81, at 254 (“I am not persuaded election law *should* be considered a First Amendment institution.”).

<sup>130</sup> *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see also* *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at \*5 (D.N.D. Oct. 21, 2010) (“[T]here simply is no more essential duty of a democratic government than to provide open, fair elections that are accessible to all eligible voters.”).

<sup>131</sup> DEL. CONST. art. 28 (1776), *in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 277 (2d ed. 2001).

<sup>132</sup> *Id.*

<sup>133</sup> PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, & 1776 185 (1836) (“And to prevent any violence or force being used at the said elections, no person shall come armed to any of them, and that no muster of the militia be made on the day on which any of the said elections shall be held . . . nor shall any soldiers in the pay of this province be suffered to collect at the time and place of holding any of the said elections, so as in any manner to impede the freely and convenient carrying on such elections.”).

<sup>134</sup> Act of Jan. 26, 1787, ch. 1, 1787 N.Y. Laws 345 (elections to be free).

<sup>135</sup> Act of Dec. 1, 1869, ch. 22, sec. 2, 1869 Tenn. Pub. Acts 108 (prohibiting dangerous weapons at elections).

<sup>136</sup> Act of Mar. 16, 1870, sec. 73, 1870 La. Acts 159.

<sup>137</sup> Act of Apr. 16, 1874, ch. 250, 1874 Md. Laws 336 (“[I]t shall not be lawful for any person

did Texas and Georgia.<sup>138</sup> The Oklahoma territory prohibited the taking of firearms into “any political convention.”<sup>139</sup> The Missouri Supreme Court said that its regulation prohibiting weapons at polling places was “in perfect harmony with the constitution.”<sup>140</sup> And, as specified before, the Georgia Supreme Court considered bringing firearms to sites of elections particularly obnoxious.<sup>141</sup>

Efforts to protect political institutions are not confined to the nineteenth century. In 1911, special legislation for Knoxville, Tennessee, prohibited any “officer of Election or Commissioner of Election” to be “in, at, or near any ballot box or voting precinct during any election or the canvassing of the returns armed with pistol, gun, or other deadly weapon.”<sup>142</sup>

In the pre-Voting Rights Act era, the Court was particularly concerned with protecting political institutions, including political parties, from private action, particularly racial discrimination.<sup>143</sup> In *The White Primary Cases*,<sup>144</sup> the Court found that the private discrimination of white party members was sanctionable through the Fourteenth and Fifteenth Amendments.<sup>145</sup> With passage of the Voting Rights Act of 1965, Congress utilized the Fourteenth and Fifteenth Amendment enforcement power to protect voters from intimidation.<sup>146</sup> For example, this Act was used to force the Republican National Committee to enter into a consent decree in the 1980s for

in Kent, Queen Anne’s or Montgomery counties to carry, on the days of election, secretly or otherwise, any gun, pistol, dirk, dirk-knife, razor, billy, or bludgeon . . .”).

<sup>138</sup> Ga. Code § 4528 (1873) (“No person in this State is permitted or allowed to carry about his or her person any dirk, Bowie-knife, pistol or revolver, or any kind of deadly weapon, to . . . any election ground . . .”); 1895 Tex. Crim. Stat. 93 (carrying arms about elections) (“If any person . . . shall carry any gun, pistol, bowieknife or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished . . .”).

<sup>139</sup> Terr. Okla. Stat. ch. 25, art. 47, § 7 (1890).

<sup>140</sup> *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

<sup>141</sup> *See Hill v. State*, 53 Ga. 472, 475 (1874); *see also Wilson v. State*, 33 Ark. 557, 560 (1878).

<sup>142</sup> Act of July 1, 1911, ch. 498, sec. 45, 1911 Tenn. Priv. Acts 1431 (Records of Election Commissioner).

<sup>143</sup> *See Martin L. Levy, The Texas White Primary Cases*, 33 T. MARSHALL L. REV. 223, 224–25 (2007).

<sup>144</sup> 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 729 (3d ed. 1999) (citing, *inter alia*, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927)).

<sup>145</sup> *Id.* (“In this sequence of cases the Supreme Court steadily loosened the constitutional requirements of state action in order to protect the effectiveness of the voting franchise.”).

<sup>146</sup> 52 U.S.C. § 10101(b) (2012 & Supp.V 2018) (“No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose.”).

allegedly intimidating minority voters on election day through “ballot security measures” involving armed off-duty sheriffs and police officers posted in predominately minority precincts.<sup>147</sup>

Certainly, there were periods in American history where armed parties descended onto polling places or marched during election. Sometimes to thwart the franchise—typically when the ballot was in the hands of an African American<sup>148</sup>—and sometimes to protect it.<sup>149</sup> That said, these kinds of private threats during elections are more often understood as manifestations of a political pathology rather than vindications of a constitutional right.<sup>150</sup> The overwhelming legal response in United States’ history has been to reduce the opportunity for coercion during elections, rather than enable it.<sup>151</sup>

#### *D. The Public Square*

The public square is a kind of First Amendment institution; designed for the people to be better able to exercise related rights to assemble “to speak” and to petition the government.<sup>152</sup> The idea of a right to peaceably assemble presumes two things: first, that there is an actual space for such an assembly to occur,<sup>153</sup> and second, that such assemblages must be peaceable, as opposed to disorderly.<sup>154</sup>

As to the first presumption, the Court has repeatedly emphasized that there are certain places like public streets and public parks that have “‘immemorially’ been open to the public for the purpose of communicating and assembling.”<sup>155</sup> And, although the Court has not directly held that governments are required to provide places for people to assemble for purposes of speech,<sup>156</sup> it has indicated that if all

<sup>147</sup> *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 619, 622–23 (D.N.J. 2009), *aff’d*, 673 F.3d 192 (3d Cir. 2012).

<sup>148</sup> *See, e.g.*, JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 1–2 (1994) (relating story of Medgar Evers and his brother who were turned away by an armed crowd at the polling place).

<sup>149</sup> *See, e.g., id.*; MICHAEL W. FITZGERALD, *THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH* 2 (1989).

<sup>150</sup> *See* Kate Keller, *Why Are There Laws That Restrict What People Can Wear to the Polls?*, SMITHSONIAN (June 15, 2018), <https://www.smithsonianmag.com/history/why-are-there-laws-restrict-what-people-can-wear-polls-180969381> [<https://perma.cc/3MCT-UW7K>].

<sup>151</sup> *Id.*

<sup>152</sup> I am aware that these rights have generally merged into one indistinct right of free expression, with all the resulting conceptual problems that it generates. *See* ZICK, *supra* note 44, at 77.

<sup>153</sup> *See id.* at 19.

<sup>154</sup> U.S. CONST. amend. I.

<sup>155</sup> ZICK, *supra* note 44, at 122 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)); *see also* *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (“[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.”).

<sup>156</sup> *But cf.* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the

public spaces are abolished, private places may take on a public character so as to perform that function. For example, in *Marsh v. Alabama*, the Supreme Court held that a company town that had assumed most of the functions of public government with respect to traditional public forum had to permit a woman to distribute religious literature on its property.<sup>157</sup> It could not take refuge in the idea that it was simply a private company.<sup>158</sup> “Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”<sup>159</sup>

Second, those assemblages that do occur must be peaceable and lawful, as opposed to riotous and unlawful.<sup>160</sup> Efforts to deter unlawful assemblies have a long history in Anglo-American jurisprudence. During the Tudor era, for example, Henry VII began to specify the crime of unlawful assembly to counter “the practice for the gentry, who were on bad terms with each other, to go to market at the head of bands of armed retainers.”<sup>161</sup> Lord Coke’s famous *Semayne’s Case*, which articulated the “castle doctrine” in English Law, also noted that a man cannot assemble his friends and neighbors to accompany him armed to the market to prevent violence.<sup>162</sup> And Chief Justice Holt in 1707 remarked that three armed men coming out of an ale-house was sufficient to constitute a riot.<sup>163</sup>

These kinds of regulations to secure the public peace are bolstered by general prohibitions on armaments in places like fairs and markets—places one would think part of the “immemorial” custom of public forums. For example, the 1328 Statute of Northampton forbade riding armed “nor to go nor ride armed by night nor by day, in fairs, markets.”<sup>164</sup> During the reign of Henry IV, there existed a decree that “no [Man] be armed nor bear defensible Armour to [Merchant Towns Churches nor Congregations], in the same, nor in the Highways, in Affray of the Peace or the King’s Liege People.”<sup>165</sup> The need to prevent armed individuals in public spaces continued into the eighteenth century. William Hawkins in *Pleas of the Crown* included among the

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public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

<sup>157</sup> 326 U.S. 501, 502, 505–07 (1946).

<sup>158</sup> *Id.* at 502–03.

<sup>159</sup> *Id.* at 507.

<sup>160</sup> See Keller, *supra* note 150.

<sup>161</sup> 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 385 n.9 (London, R. Clay, Sons, & Taylor 1883) (“It is obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight and certainly make peaceable people fear they would fight.”).

<sup>162</sup> *Semayne’s Case* (1604) 77 Eng. Rep. 194, 195 (KB).

<sup>163</sup> See Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. ILL. U.L.J. 61, 79 (2018) (“If three come out of an ale house and go armed, it is a riot.” (quoting *Queen v. Soley* (1707) 88 Eng. Rep. 935, 937 (QB)).

<sup>164</sup> Statute of Northampton 1328, 2 Edw. 3 c.3 (Eng.).

<sup>165</sup> 4 Hen. 4, c. 29 (1403).

things that are likely to strike terror in the people (and thereby disturb the peace) “the Shew of Armour.”<sup>166</sup>

General Sickles is famous in gun rights circles for his General Order 1, which provided that “[t]he constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed.”<sup>167</sup> But he’s also the author of General Order 7, which prohibited any “[o]rganizations of white or colored persons bearing arms, or intend[ing] to be armed” from assembling, parading, patrolling, or making arrests.<sup>168</sup> The case of *Presser v. Illinois* upheld a law that prohibited private groups from openly parading with firearms, aside from the organized militia.<sup>169</sup> Modern doctrines concerning the public square uphold regulations that require protestors remain with their signs to avoid them being “turned into weapons or used to conceal dangerous items.”<sup>170</sup> It seems hard to imagine that regulations to prevent signs from being turned into weapons couldn’t be applicable to actual weapons.<sup>171</sup>

Of course, there’s no general due process right to state protection from private violence.<sup>172</sup> That said, the public square seems unique. First, as discussed already, the idea of a right to peaceably assemble presumes both a space to gather and a certain level of order at that gathering.<sup>173</sup> The “heckler’s veto” doctrine prohibits governments from punishing the speaker because of the threatened disorder of the audience.<sup>174</sup> Nor can the speaker be charged security and police costs that are indexed to the anticipated violent reaction of the audience.<sup>175</sup> It appears the speaker cannot be forced to internalize the costs of threatened disorder either directly (by arresting the speaker) or indirectly (by charging the speaker higher fees).<sup>176</sup>

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<sup>166</sup> Frassetto, *supra* note 163, at 79 (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 157 (1716)).

<sup>167</sup> 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 208 (1906).

<sup>168</sup> *Id.* at 211.

<sup>169</sup> 116 U.S. 252, 253–54 (1886); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (“[The Second Amendment] does not prevent the prohibition of private paramilitary organizations.”).

<sup>170</sup> *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1534 (D.C. Cir. 1984) (concluding the regulations “clearly satisfy this element of the time, place and manner test”).

<sup>171</sup> Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISCOURSE 172, 189 (2018) (“[E]lected officials have wide latitude within the First and Second Amendments to prohibit and punish the open carry of weapons where such conduct is likely to intimidate, alarm, or terrify the public, or cause civil disorder.”).

<sup>172</sup> *See DeShaney v. Winnebago Cty. Dep’t Soc. Servs.*, 489 U.S. 189, 195 (1989) (“But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private actors.”).

<sup>173</sup> *See supra* notes 152–54 and accompanying text.

<sup>174</sup> *See Cox v. Louisiana*, 379 U.S. 536, 542–44 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 229–34 (1963).

<sup>175</sup> *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 125–27, 136–37 (1992).

<sup>176</sup> *See id.* at 123; *Cox*, 379 U.S. at 536; *Edwards*, 372 U.S. at 229.

It is possible that the speaker could be forced to bear the security costs. The government could abandon the speaker to the threats of a hostile audience or force him to provide his own security.<sup>177</sup> But that could have a chilling effect on speech. That the source of the chill is private (the audience) is not necessarily dispositive. Monica Youn has articulated a “[c]hilling effect doctrine . . . [that] expands the category of constitutionally cognizable injuries to encompass claims of deterrence, whether that deterrence results from governmental or private actions, from legal or illegal retaliation.”<sup>178</sup> She recognizes that there is not a fully worked out theory of positive First Amendment rights.<sup>179</sup> But to the extent there is an inchoate one in First Amendment doctrine, the right of peaceable assembly appears to be a good place to begin refining it.<sup>180</sup> It involves both an affirmative right to have a space and, when married to the heckler’s veto cases, a right to have a space of a certain social character. Other nations with provisions comparable to the right to peaceably assemble understand that it comes with some affirmative right to protection from private violence.<sup>181</sup> American doctrine on the issue could edge in the same direction.

To say there is a positive First Amendment right in the public square is not to concede that the justification is solely about the safety of either the speaker or of the audience. The doctrine operates whether or not having more firearms in the public square makes everyone safer and whether the assemblage of persons is three or thirty thousand. The doctrine of sensitive places in the public square is not concerned so much with whether the individuals that attend such gatherings are safer or less safe, it is concerned with whether the costs on other margins—the opportunity to participate in public life, to engage others in public spaces with your ideas, to express unpopular opinions—are undermined by the presence of private firearms in that space.

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<sup>177</sup> See Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1683 (2019) (discussing these and other questions as gaps in the doctrine).

<sup>178</sup> Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1475 (2013).

<sup>179</sup> See Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 253 (2018) (stating that because allowing firearms into the public square falls within the state’s police power, and the private behavior is permitted, “[t]his sort of expressive ‘chill’ argument is not cognizable”).

<sup>180</sup> See Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1285 (2005) (“The public forum doctrine is the only significant exception to the consistent view that the Amendment does not give citizens affirmative claims to government’s resources.”).

<sup>181</sup> See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 137 (2003) (“The right to freedom of assembly [in Europe] may also require positive measures to ensure that others do not interfere with the exercise of the right to freedom of assembly.”); see also Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 454 (2008) (noting that the European Court of Human Rights “has also held that freedom of assembly requires positive action, including effective police protection, to ensure the right may be exercised”).

## III. RESOLVING CONSTITUTIONAL CONFLICT IN SENSITIVE PLACES DOCTRINE

Thus far I have identified four places that can credibly be deemed sensitive for reasons unrelated to safety. These places are sensitive because they are traditionally or culturally the site for exercise of rights associated with religion, speech, or political engagement. As such, they can conflict with other kinds of constitutional rights, and their institutions that facilitate those rights, including the right to keep and bear arms.

But identifying a point of constitutional conflict does not say how that conflict should be resolved. A person may want to take her firearm into a school or church because of a legitimate fear of ambush there. At the same time, students or worshipers may find their ability to effectively learn or worship hampered—perhaps even negated—by the presence of the firearm.<sup>182</sup> A group may want to assemble armed at a polling precinct because of a reasonable fear that they will be confronted by armed members of another party or by racist terrorists. Simultaneously, voters may forego their right to vote because they feel intimidated by the presence of firearms near the polling booth.

A regulation on firearms in these places can conceivably stymie one constitutional value—the Second Amendment’s value of safety<sup>183</sup>—and elevate another—the free exercise of religion, the development of knowledge, the mechanics of representative government, or the free exchange of ideas. Any candid assessment of the sensitive places doctrine must recognize this possibility.

The sensitive place designation potentially trades safety for something else. It is, in the language of John Graham and Jonathan Wiener, a “risk versus risk” scenario.<sup>184</sup> Banning firearms in these sensitive places generates one kind of risk; allowing them generates another.<sup>185</sup> The current approach to firearms and the Second Amendment is frequently afflicted with a “pathological perspective” that seeks to prevent the worst outcomes of any firearm regulation<sup>186</sup> and typically takes into account only

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<sup>182</sup> Cf. Matthew C. Ward, *Guns, Violence and Identity on the Trans-Appalachian American Frontier*, in *A CULTURAL HISTORY OF FIREARMS IN THE AGE OF EMPIRE* 17, 19 (Karen Jones et al. eds., 2013) (describing gun use by Quakers or Mennonites as “anathema”).

<sup>183</sup> This Article assumes as true the highly disputed empirical proposition that the private carrying of firearms in a certain place leads to better safety for the individual and for the society, a proposition that is not at all self-evident.

<sup>184</sup> John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in *RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* 1, 3 (John D. Graham & Jonathan Baert Wiener eds., 1995).

<sup>185</sup> Cf. *id.*

<sup>186</sup> This can range from fear that an individual will not have a weapon necessary for self-defense when she needs it, to fear of total government-ordered confiscation of private weapons. For more on this approach in other areas, see ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 41 (2014) (discussing Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985)).

one dimension of risk—personal safety.<sup>187</sup> This myopic view blinds policymakers and judges to other kinds of risks.<sup>188</sup>

A more comprehensive view of gun regulation would understand that there are risks in all directions. Allowing firearms in schools not only affects safety, it also affects the First Amendment function that schools have come to perform. The same thing could be said for guns in churches, polling places, and the public square. Of course, decisions have to be made, and accounting for all risks would be nearly impossible. However, to the extent that constitutional law performs a risk-managing function, the kinds of risks the Constitution itself contemplates seems deserving of particular consideration.

This next section briefly lays out a taxonomy of constitutional conflicts. It then discusses methods that courts can resolve them within the sensitive places doctrine.

### *A. A Taxonomy of Conflicts*

When I speak of the constitutional conflict I mean to include both what we may think of as “the big-C constitution” and the “small-c constitution.” The big-C constitution is the written document—the text we think of when someone says “the Constitution.”<sup>189</sup> It’s devilishly hard to formally amend; its 7,591 words (or, more accurately, a fraction of that) is the stuff of Supreme Court cases, elite litigation, and intense media interest.<sup>190</sup> I include in the big-C constitution all the various Supreme Court interpretations and constructions of constitutional text that we call “doctrine,” understanding that not everyone agrees that such sources qualify.<sup>191</sup>

The small-c constitution are the statutes, regulations, norms, customs and other kinds of institutions that “constitute” the political community in some sense.<sup>192</sup> What makes them “constitutional” is their entrenched nature and their capacity to reflect “sociopolitical commitment[s].”<sup>193</sup> Although scholars differ on specific examples of the small-c constitution, there tends to be agreement that legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965 (at least portions of it) reflect fundamental social and political commitments that, while not requiring two-thirds

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<sup>187</sup> See *id.* at 11.

<sup>188</sup> *Id.*; see also Darrell A.H. Miller, *Fear and Firearms*, 52 TULSA L. REV. 553, 564–65 (2017).

<sup>189</sup> See Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 595 (2018) (discussing WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010)).

<sup>190</sup> See *id.* (The big-C constitution “is the document whose interpretation is at issue in cases we identify as presenting formal claims of constitutional law.”).

<sup>191</sup> See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413 (2007).

<sup>192</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 28–30 (1934).

<sup>193</sup> See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 701 (2011).

of both houses of Congress and three-fourths of the states to change, would require an enormous amount of political effort to alter or abolish.<sup>194</sup>

For purposes of this Article, I also regard the legislative products of constitutional politics part of the small-c constitution as well. These small-c constitutional statutes are efforts of legislators to enact policy in a self-consciously constitutional register. For example, although the non-discrimination provisions of the Civil Rights Act of 1964 are authorized by the Commerce Clause, it sounds in the constitutional values of non-subordination and equal protection of the Thirteenth and Fourteenth Amendments.<sup>195</sup> Similarly, although nothing in the Second Amendment or *Heller* requires concealed carry, numerous concealed carry proposals are expressed and understood as sounding in the right to keep and bear arms.<sup>196</sup> Some of these legislative products are not as entrenched or as socially accepted as others, but to the extent they seek the status of the Civil Rights Act of 1964, we may think of them as constitutionally aspirational.

Because the barriers for changing the small-c constitution are comparatively low, it is often the target of norm entrepreneurs—policymakers, social activists, and legislators—interested in constitutional change. Eventually, some of these small-c constitutional changes become doctrinal changes to the big-C constitution. For example, the equal protection principles in the Civil Rights Act of 1866 eventually influenced the interpretation of the Fourteenth Amendment.<sup>197</sup> Experiments with direct election of United States Senators eventually ripened into the Seventeenth Amendment.<sup>198</sup> The same kind of process appears current efforts to recognize sexual orientation protections in employment,<sup>199</sup> and, relevant to this discussion, efforts to anchor all kind of gun rights protections into the Constitution.<sup>200</sup>

The first kind of conflict we may call big-C constitutional conflicts. Big-C constitutional conflicts occur where both sides have a textual or doctrinal hook for

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<sup>194</sup> See *id.*; Young, *supra* note 191, at 427 (considering the entrenchment of the Social Security Act). Of course, current events cast doubt on how deeply entrenched many of these small-c statutes, not to mention constitutional norms and customs actually are.

<sup>195</sup> See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 276 (1964) (Black, J., concurring) (“In view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. In view of the Thirteenth, Fourteenth and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from discrimination is also a legitimate end.”).

<sup>196</sup> See U.S. CONST. amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 574–77 (2008).

<sup>197</sup> GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 70 (2013).

<sup>198</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1496–98 (2001).

<sup>199</sup> Cf. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566–67 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 2049 (2019); *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017).

<sup>200</sup> Reva B. Siegel, Comment, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 201–02 (2008).

their rights claim, and the courts must decide which claim takes priority.<sup>201</sup> Free Exercise and Establishment Clause conflicts tend to have this kind of feature.<sup>202</sup> For purposes of “sensitive places” doctrine, an example of a big-C constitutional conflict would be something like a prohibition on firearms at the polling station. A place to cast ballots free from coercion is necessarily implied by the fundamental right to vote and some kind of right to carry firearms may be presumed by the Second Amendment. A voter may feel that inviting private firearms in the polling station infringes on her fundamental right to vote; a firearm carrier may feel that prohibiting a private firearm in a polling station violates her fundamental right to bear arms for self-defense.

The second kind of conflict we may call big-C versus small-c constitutional conflicts. These are conflicts where governments have issued regulations that speak in a constitutional register, but are not themselves directly required by Supreme Court doctrine. The numerous “pro-gun/anti-gun control” laws passed in state legislatures as well as proposed federal legislation (like concealed-carry reciprocity) fall within this category.<sup>203</sup> For example, a number of states have provisions that require employers to permit firearms onto their property, typically parking lots, and some forbid employers to inquire about the firearm ownership of their employees.<sup>204</sup> These kinds of regulations implicate both takings jurisprudence under the Fifth Amendment,<sup>205</sup> rights of speech<sup>206</sup> or religious expression<sup>207</sup> under the First Amendment, and, perhaps, Second Amendment rights for associations to designate who may be armed, or a corollary right not to keep and bear arms.<sup>208</sup>

<sup>201</sup> It is also possible that a right can be self-limiting in that one kind of exercise of the right may defeat another. To the extent the Second Amendment is concerned with aggregate safety, for example, decisions that lower aggregate safety may be thought of as examples of conflicts internal to one right.

<sup>202</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 672–73 (1984) (emphasizing that the Establishment and Free Exercise Clauses are in constant balance—the state cannot establish religion, but total separation may lead to free exercise concerns).

<sup>203</sup> See, e.g., Sanya Mansoor, *Texas Enacts 9 Pro-Gun Laws Just 1 Day After Odessa Mass Shooting*, TIME (Sept. 9, 2019, 10:24 AM), <http://www.time.com/5645637/texas-gun-laws-el-paso-shooting/> [<https://perma.cc/3TQA-AP5F>]; Laura Santhanam, *How States Have Moved to Make Gun Laws While Congress Is Deadlocked*, PBS NEWS HOUR (Aug. 8, 2019, 9:28 PM), <https://www.pbs.org/newshour/health/how-states-have-moved-to-make-gun-laws-while-congress-is-deadlocked> [<https://perma.cc/22KW-WKQ8>].

<sup>204</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-781 (2019); COLO. REV. STAT. § 18-12-214 (2019); VA. CODE ANN. § 15.2-915 (2019).

<sup>205</sup> *Fla. Retail Fed’n, Inc. v. Att’y Gen. Fla.*, 576 F. Supp. 2d 1281, 1289 (N.D. Fla. 2008) (rejecting a takings claim).

<sup>206</sup> See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1300–02 (11th Cir. 2017) (striking down parts of a regulation that prohibited physicians from asking their patients about firearms in the home).

<sup>207</sup> See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012).

<sup>208</sup> See generally Joseph Blocher, *The Right Not To Keep and Bear Arms*, 64 STAN. L. REV. 1 (2012).

The third kind of conflict represents small-c constitutional conflicts. These are conflicts in which the constitutional valence of the legislation is apparent or implied, but no court has concluded that the policy is required by the big-C constitution. For example, many states have religious freedom restoration acts (RFRAs) that protect religious organizations from neutral rules of general applicability.<sup>209</sup> The legislature must show that the generally applicable rule is narrowly tailored to serve a compelling government interest.<sup>210</sup> Some of the states that have state-level RFRAs also tend to have extremely liberal pro-gun legislation.<sup>211</sup> To the extent these kinds of conflicts are solely statutory, it may be that one can resort to ordinary principles of statutory harmonization to resolve them.<sup>212</sup>

### *B. Resolving Conflicts and Sensitive Places*

When rights conflict judges must decide how to address them. What kind of tools can a judge use to address these conflicts? One tool would be to approach the matter categorically, perhaps using something like text, history, and tradition to supply the answer. Another tool may be more prudential, incorporating what we may think of as a sliding scale of constitutionality, adjusted for the constitutional interests at issue and their related effects. Although this Article cannot address all the permutations of constitutional conflicts, I will discuss these options with a few examples.

#### 1. A Categorical Approach

A court could aim to resolve these conflicts in some kind of categorical fashion, perhaps relying on analogies from text, history, and tradition or on some kind of longstanding practice. In *McDonald v. City of Chicago*, Justice Scalia in his concurrence specified that the scope of the right is determined by the kinds of regulations

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<sup>209</sup> See, e.g., *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/24U7-3JBP>] (compiling a list of the 21 states that enacted state RFRAs).

<sup>210</sup> Virginia's statute, for example, states that "[n]o government entity shall substantially burden a person's free exercise of religion even if the burden results from a general rule of applicability . . ." VA. CODE ANN. § 57-2.02(B) (2019). The way the state can avoid this is by showing "the application of the burden . . . is (i) essential to further a compelling government interest and (ii) the least restrictive means at furthering that interest." *Id.* (emphasis added).

<sup>211</sup> *Compare Gun Laws in the U.S., State by State—Interactive*, GUARDIAN (Jan. 16, 2013), <https://www.theguardian.com/world/interactive/2013/jan/15/gun-laws-united-states> [<https://perma.cc/GAL3-YS4F>] (comparing all 50 state gun laws), with *State Religious Freedom Restoration Acts*, *supra* note 209.

<sup>212</sup> See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

that exist traditionally; the constitutionality of a regulation is dependent upon its pedigree.<sup>213</sup> In this model, a court's designation that a place is sensitive is to conclude there's no right to keep and bear arms in that place.<sup>214</sup>

If that's the case then the institutions I've discussed—houses of worship, universities, polling places, and the public square—have long been places of firearm regulation.<sup>215</sup> The implication is that any balancing between safety and risks along other constitutionally inflected margins—like speech or the fundamental right to vote—have been made already in defining the exception. One need not determine if prohibiting firearms from the inside of churches *really* makes them safer, or even if the religious expression in the church is *really* harmed by the presence of firearms. All that is necessary is to determine the factual predicates for the category—whether we are dealing with a church or a school, or some other category of sensitive place. This categorical approach is one courts frequently use to address constitutional conflicts.<sup>216</sup> They define the right in such a way as to avoid the conflict altogether.<sup>217</sup>

The constitutional character of the sensitive place then provides a rule of relevance for analogical reasoning for places and activities that do not strictly count as a school or church or polling station. That is, the relevant consideration of whether something is “like” a school, or church, or other sensitive place is not whether it is made of bricks or wood, it is whether the place is understood sociologically and legally as an institution charged with producing a similar type of constitutional good.

For example, consider guns at a public lecture hall or at a tent-revival meeting in a park. If, as I've argued here, a school or a house of worship is a sensitive place because of its First Amendment character, then the question is whether the function of these other places and activities is sufficiently similar to fall within the category. A public lecture hall may not technically be a “school” but its role as a place where people congregate to exchange ideas, to debate and to engage in the transmission of learning, may be sufficient to qualify it as a sensitive place. Similarly, although a revival meeting in a tent may not technically qualify as a “church,” there may be First Amendment activity related to worship that makes such a site sensitive in a relevant constitutional sense.<sup>218</sup>

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<sup>213</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring) (“The traditional restrictions go to show the scope of the right.”).

<sup>214</sup> Granting, as always, that there's exceptions for necessity in any set of rules.

<sup>215</sup> See discussion *supra* Part II.

<sup>216</sup> See, e.g., Greene, *supra* note 66, at 74.

<sup>217</sup> *Id.* at 73 (noting that the modern Court's approach to rights conflicts is to assume them away); see also Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387, 1401–02 (2013) (discussing this maneuver in American constitutional jurisprudence).

<sup>218</sup> I want to reiterate, again, that such places could be sensitive for purposes of physical safety as well, but this analysis presumes that even if the physical safety issue was irrelevant, some other factor could still make a place sensitive.

A second, more difficult issue, is what happens when one of these institutions attempts to assert First Amendment rights against a small-c constitutional claim to keep and bear arms.

Some states, for instance, recognize that there's no federal Second Amendment right to enter into a library with a firearm, but pass legislation or interpret state law to permit firearms in libraries notwithstanding.<sup>219</sup> The same thing has happened with other sensitive places like polling stations and churches.<sup>220</sup>

In these cases, it is possible the rights of the library as a First Amendment institution would operate not only as a shield but as a sword. In that circumstance, the special function of the library as a First Amendment institution would permit it to raise a claim against such legislation, similar perhaps, to the way state universities or municipal corporations have occasionally asserted First Amendment rights on behalf of their members or themselves.<sup>221</sup>

## 2. The Prudential Approach

Courts can also opt to address these conflicts in a more prudential manner. In this model, one may decide that a place is sensitive, but for reasons that are more contextual and consequential than categorical. In other words, the arguments for or against the designation may be more in determining the actual effect of the exercise of the right on other kinds of rights, rather than determining whether the facts fit within a particular preset category of sensitive places.<sup>222</sup>

In this model of deciding rights versus rights claims, someone claiming a Second Amendment right to carry a firearm to a public protest, for instance, would not need to show how traditional that activity was; nor would the defendants seeking

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<sup>219</sup> See, e.g., *Gun Laws in the U.S., State by State—Interactive*, *supra* note 211; see also *Capital Area Dist. Library v. Michigan Open Carry, Inc.*, 826 N.W.2d 736, 747 (Mich. Ct. App. 2012) (“The [Michigan] Legislature . . . has expressly prohibited local government regulation of firearms and ammunition generally in cities, villages, townships, and counties, including in their libraries.”).

<sup>220</sup> See, e.g., GA. CODE ANN. § 16-11-127 (2019).

<sup>221</sup> See *Cty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (“A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *Nadel v. Regents of Univ. of Cal.*, 34 Cal. Rptr. 2d 188, 197 (1994) (“[R]egarding the point that extension of First Amendment protection to government is inconsistent with the notion that the constitution protects citizens from government rather than government from citizens, our best answer is that if the unfettered interchange of ideas is a central concern of the First Amendment, then application of the First Amendment to government speech [in this context] . . . promotes government’s contribution to the marketplace of ideas.”); *cf.* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (suggesting there’s a First Amendment academic “freedom of a university to make its own judgments as to education”).

<sup>222</sup> For more on the distinctions between these kinds of approaches, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

to enjoin such behavior need to show how traditional it was to prohibit firearms from the public square.

Instead, the briefing may center on the impact of a time, place, and manner regulation on the person's claim of safety; the defendant would then brief the impact of allowing firearms on the willingness of persons to assemble, to voice unpopular opinions, or to express themselves in a place where private firearms are permitted.<sup>223</sup> They may also discuss how permitting firearms by one group leads to the necessity of another group to think about arming themselves, and the overall affect of that prisoners' dilemma on the speech interests of the parties, and the rights of the public to receive the communication.

The brute, and unsatisfying, analysis for this kind of interright conflict would be simply to ascribe some kind of quantitative value to the conflicting rights and resolve them accordingly.<sup>224</sup> A more refined version may prioritize court-enforced rights in the big-C constitution as superior to a small-c constitutional right, so that a core application of First Amendment rights would outweigh any product of constitutional politics. A still-more refined version may be to understand that some kinds of rights-denominated small-c constitutional products are designed to "count" more than what we may otherwise think as a non-rights consideration. So we may say that a regulation promoted self-consciously to protect the First Amendment institutional interests of the public square, or schools, for example, may count for more than a non-rights based general police power interest in the weighing calculus.<sup>225</sup>

However, the problem with that kind of approach, is that, as Jeremy Waldron has noted, rights tend to generate duties, or "waves of duty."<sup>226</sup> In his example, if an individual's free speech rights are sufficient to impose a duty on government not to censor the speaker, "it is likely also to be sufficiently important to generate other duties: a duty to protect those who make speeches in public from the wrath of those disturbed by what they say," or a duty to allocate time, place, and manner restrictions that ensure that everyone has a chance to appeal to the same audience.<sup>227</sup> Does it make sense to talk about a right to free exercise of religion without talking about churches or mosques; or a right to peaceably assemble without a public place where such

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<sup>223</sup> See Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 213 (2018) ("If the Second Amendment cannot categorically exclude guns from places where truth-seeking debate reaches its peak intensity, then the First and Second Amendments are fundamentally incompatible.").

<sup>224</sup> Waldron, *supra* note 65, at 515 (imagining a hypothetical where "we allow a right to life to be worth five rights to free speech, or whatever").

<sup>225</sup> This idea shares some relationship to Fred Schauer's notion of rights as a devaluer of non-rights considerations; except in this case, a right-based justification for a regulation enhances its value. See Frederick Schauer, *Proportionality and the Question of Weight*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, AND REASONING 177 n.18 (Grant Huscroft et al. eds., 2014).

<sup>226</sup> Waldron, *supra* note 65, at 509.

<sup>227</sup> *Id.* at 510.

assembly can take place? A simple quantitative accounting of one right versus another cannot account for all the duties that one right generates which may also conflict with other duties. Neither is it a solution to consign these duties to a subordinate role in the small-c constitution, because, as I've discussed previously, rights in the big-C constitution may of necessity create the duties and institutions that make them possible.

A more refined version of the prudential approach, then, may be to discern what Waldron calls the "internal relation" between two conflicting rights and to resolve them by reference to that relation.<sup>228</sup> So, for example, to the extent that gun owners may want to carry guns to protests to protect their right to speak on unpopular topics, and others may want to ban guns at protests because of their threat to those taking unpopular positions; the internal relation prioritizes that right that best effectuates the ability to speak on unpopular topics.<sup>229</sup>

#### CONCLUSION

Justice Breyer in his *Heller* dissent pounced on the majority's declaration that guns could be limited in sensitive places, like schools. "Why these?," he wrote.<sup>230</sup> This Article is an attempt to answer that question. Places are sensitive, not necessarily because of physical safety alone, but because sensitive places are where gun rights come into conflict with other public goods generated by other institutions enabled by other kinds of constitutional rights. As the doctrine after *Heller* develops, and as legislators expand all the places and manners in which guns can be carried, we are certain to discover that there will be more and more areas where the basic conflict won't be rights versus regulation, but rights versus rights.

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<sup>228</sup> *Id.*

<sup>229</sup> *See id.* at 518.

<sup>230</sup> *District of Columbia v. Heller*, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).