SECURING GUN RIGHTS BY STATUTE:
THE RIGHT TO KEEP AND BEAR ARMS OUTSIDE
THE CONSTITUTION

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In popular and professional discourse, debate about the right to keep and bear arms most often revolves around the Second Amendment. But that narrow reference ignores a vast and expansive nonconstitutional legal regime privileging guns and their owners. This collection of nonconstitutional gun rights confers broad powers and immunities on gun owners that go far beyond those required by the Constitution, like rights to bring guns on private property against an owner’s wishes and to carry a concealed firearm in public with no training or background check. This Article catalogues this set of expansive laws and critically assesses them. Unlike the formal constitutional guarantee, this broad collection is not solely libertarian, concerned only with guaranteeing noninterference with a negative right. Instead, it is also aggressively interventionist, countermanding contrary policy judgments by employers, universities, property owners, and local government officials, conferring robust rights and privileges, and shifting the distribution of violence in society.

This Article underscores the rhetorical and legal connection between this gun-rights expansionism and the formal Second Amendment guarantee. These laws do not derive from a judicial interpretation of the scope of the Constitution, but they are expressed and advocated for in constitutional terms. The Article also highlights how broad gun rights can create unique harm to the body politic and to marginalized groups by fostering fear and mistrust and empowering sometimes-problematic private actors to proactively police their own communities. Finally, the Article shows how gun-rights expansionism influences constitutional doctrine in the context of the Second Amendment, as well as of the First, Fourth, and Fourteenth Amendments.

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INTRODUCTION

For some observers, the period of American history punctuated by the COVID-19 pandemic, economic uncertainty, and antiracism protests clarified the need for guns in a time of “lawless violence.”1 For others, it made just as clear the harms that guns can cause in a society that accepts and excuses a quick resort to lethal violence.2 The Second Amendment looms large in this

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debate.3 But focusing too narrowly on those twenty-seven words of constitutional text neglects the vast and expansive nonconstitutional protections for gun rights in contemporary America. Gun rights have been expanding in legislative halls and city councils for decades, and this statutory framework significantly structures the nature of gun rights today.4 This Article tells the story of this powerful gun-rights regime outside the Constitution. That story demonstrates that, despite the frequent claims of vilification and unfair treatment,5 guns are one of the most protected commodities under American law and gun owners are some of the law’s most favored citizens.

In 2008, in District of Columbia v. Heller, the Supreme Court first established that the Second Amendment protects an individual right to keep and bear arms.6 That right is not, the Court underscored, “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”7 Nor does the Second Amendment impose limits on the authority of private parties to restrict firearms on their own property,8 the power of local governments to reasonably regulate the secondary effects of firearms-related activity,9 or the typical remedies available to private plaintiffs in civil lawsuits arising from firearms-related harm.10 Yet a collection of state and federal laws establish these rules and more.11

3. See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.”).


9. McDonald v. City of Chicago, 561 U.S. 742, 784–85 (2010) (plurality opinion) (stating that the Second Amendment, like other fundamental rights, “is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values”); see also id. at 785 (confirming that localities can continue to experiment with gun laws after incorporation).


11. See infra Section I.B; see also FRANKS, supra note 5, at 74 (“[The Supreme Court’s] rulings do not . . . require . . . that American[] civilians with no weapons or firearms safety training be allowed to carry loaded weapons into malls, churches, bars, and daycare centers; or encourage men to attend crowded protests with assault rifles strapped to their backs; or allow armed vigilantes to shoot unarmed black teenagers walking home in the rain.”); David B. Kopel, The Right to Arms in the Living Constitution, 2010 CARDOZO L. REV. DE NOVO 99, 123.
Many of these laws were passed before the Supreme Court breathed new life into the Second Amendment. The first prominent wave of state laws, largely a libertarian initiative, took off in the 1980s with relaxed concealed-carry laws and comprehensive preemption laws barring localities from enacting gun regulations. A second wave, picking up momentum in the early 2000s, became more intrusive and aggressive. This second wave includes laws requiring that private businesses allow guns in their parking lots, granting broad stand-your-ground immunity, and mandating that colleges permit guns on campus. These two waves track two key movements in the history of gun-rights advocacy. The laws beginning to spread in the 1980s dovetail with the rise of a more bellicose wing of the National Rifle Association (NRA), which, along with like-minded gun-rights organizations, commenced the concerted push toward constitutional protection for gun rights in the courts. The wave in the early 2000s coincides with the advocacy leading up to the Supreme Court’s decision in *Heller* itself.

In the libertarian first wave, the movement sought to limit governmental intervention. It overwhelmingly succeeded. For example, almost every state today has robust preemption laws that bar local governments from regulating

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13. See infra Section I.B.1.

14. See infra Section I.B.2.

15. The Gun Owners of America, an organization that bills itself as the “no compromise” alternative to the NRA, was founded in 1976. *About Gun Owners of America*, GUN OWNERS OF AM., https://www.gunowners.org/about-goa [perma.cc/LHY7-E6WB].

16. Reva Siegel tells the definitive story of the gun-rights interest-group mobilization from the 1970s onward that advocated for broad gun rights and eventually culminated in *Heller*. See Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism as Popular Constitutionalism in *Heller*,* 122 HARV. L. REV. 191, 207–26 (2008) (exploring the origins of this movement). It is also worth underscoring that one main front in the battle to convince the courts was legal scholarship. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 367–68 (2000) (tracing the rise in the number of law-review articles devoted to the individual-rights interpretation). This is not to suggest, however, that the NRA or the gun-rights movement was nonexistent or ineffectual until then. Patrick Charles, Matthew Lacombe, and other scholars have demonstrated the ways that the NRA and like-minded gun-rights activists successfully fought back strict gun regulation and worked to pass “pro-gun” legislation throughout much of the twentieth century. See Patrick J. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry 306–09* (2018) (describing this trajectory); Matthew J. Lacombe, *Firepower: How the NRA Turned Gun Owners into a Political Force 3* (2021) (noting how the NRA was mobilizing to defeat legislation “as early as the 1930s”). This Article’s description of the two key waves marks moments when the movement began gaining widespread success.

firearms. These laws are not mandated by the Constitution, which would allow localities to regulate guns just as much as the state and federal governments. Without these laws, the predominantly urban areas that experience the most gun violence, and at the same time support the most gun regulation, would no doubt have stricter gun laws than they currently do. It is no exaggeration to say that widespread preemption laws likely prevent more gun regulation than the Second Amendment.

Turning to the aggressive second wave, the movement sought state intervention on behalf of gun rights. It succeeded in passing a host of state laws that expand gun rights beyond what the Constitution would require against unwilling public officials and even private entities. For example, several states require that public universities and colleges allow students, employees, and visitors to carry loaded firearms on campus, regardless of whether the administration or student body objects. Other states have taken aim at private enterprise. Florida’s Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008 provides that even a private employer cannot stop an employee “from possessing any legally owned firearm when

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19. Local governments might even have a stronger claim on regulatory authority. See Joseph Blocher, Firearm Localism, 123 YALE L.J. 82, 133 (2013) (describing how localities were historically the main fount of gun regulation).

20. Erin Adele Scharff, Hyper Preemption: A Reordering of the State–Local Relationship?, 106 GEO. L.J. 1469, 1492 (2018) (noting that urban residents tend to support gun regulations in large part because “[t]hose living in urban areas are . . . significantly more likely [than rural residents] to be victims of gun violence”).


23. Shaundra K. Lewis, Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide, 102 IOWA L. REV. 2109, 2111 (2017); see also IDAHO CODE § 18-3309 (Supp. 2020) (forbidding state colleges and universities from “regulating or prohibiting the otherwise lawful possession, carrying or transporting of firearms or ammunition by persons licensed” under state law, except in limited circumstances).

such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot.”

Through this large set of exemptions, exceptions, and accommodations, lawmakers have created a powerful right to keep and bear arms outside the Constitution. Nothing about the fact of this expansion suggests these legislative protections are anomalous or problematic. Protecting constitutionally informed values is a commonplace legislative goal, from local antidiscrimination ordinances to employee rights and benefits. But as discretionary policy choices, the consequences of this expansionism cannot be blamed on the dead hand of the past; the Constitution does not bind legislators to ignore the effects of these laws. And the evidence suggests that this expansion is not costless. These alternatingly deregulatory and interventionist laws can impose harms on disadvantaged members of the community, such as gun-violence victims who find the courthouse doors closed because of laws giving industry actors broad immunity or domestic-violence shelters that cannot bar firearms from their property because of parking-lot laws. Rights, especially gun rights, do not always apply equally to Black Americans and other marginalized groups. And the culture these laws foster—one that perceives a threat behind every corner—can lead to tragic outcomes in a society in which threat perception is so thoroughly racialized. One can, of course, disagree with this Article’s normative appraisal of these laws and still recognize that the broader gun-rights expansionism detailed here is an important factor in assessing today’s debates over gun rights and regulation.

In fact, the broad protective barrier these laws provide has led some scholars to argue that the formal Second Amendment—only judicially viable since 2008—is already becoming obsolete. Many of these laws, after all, perform the same function as the individual-rights guarantee in the Constitution: carving out a sphere of private action in which the state cannot regulate. Yet some of these statutes are not just shields safeguarding gun rights but also swords thrusting them into places and spaces the formal Constitution would

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26. See infra Section II.B.

27. See generally CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021) (describing how gun rights have applied differently among racial groups throughout American history).


never grant them access.\textsuperscript{30} And the rights guaranteed by these legal rules may be more practically important for millions of Americans than the bare Second Amendment right vindicated in \textit{Heller}.\textsuperscript{31}

This Article is the first to systematically identify and assess these nonconstitutional gun rights as an integrated fabric. Although several scholars have addressed some of these laws in isolation,\textsuperscript{32} none have surveyed and evaluated the collection as a whole. This task takes on heightened importance in an atmosphere of increasingly urgent debate over gun rights and regulation. With Joseph Biden’s election to the presidency, an administration took office in 2021 championing "the most ambitious agenda for reducing gun deaths in presidential history."\textsuperscript{33} The October 2020 confirmation of a Supreme Court justice with a skeptical view of gun regulations has shifted the balance of the Court rightward.\textsuperscript{34} And daily headlines proclaim both the monumental toll of gun violence in the United States and the staggering spike in gun sales throughout 2020 and into 2021.\textsuperscript{35}

This Article also joins a larger discussion in legal scholarship about the ways ordinary statutes and regulatory action function to protect constitutionally infused values. Federal constitutional-rights provisions set a minimum standard, and legislators are free to—and often do—extend greater protection above that floor. Genevieve Lakier, for example, has recently chronicled a parallel phenomenon with respect to free speech, describing "the non—First Amendment law of freedom of speech" that provides practical protection for speech rights far outstripping that provided by the Constitution’s Free Speech

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\bibitem{Jacobs2020} See Cody J. Jacobs, \textit{Guns in the Private Square}, 2020 U. ILL. L. REV. 1097, 1109 ("Even the most aggressive reading of the Second Amendment would not force businesses to allow guns on their property.").
\bibitem{Young2014} See \textit{Young}, supra note 29, at 424–25 (describing the importance and fundamentality of many extracanonical rights).
\bibitem{Blocher1999} See, e.g., Blocher, \textit{supra} note 19, at 133–36 (preemption laws); Royal, \textit{supra} note 24, at 477 (parking-lot laws); \textit{Licht}, \textit{supra} note 2, at 133–54 (stand-your-ground laws).
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Clause.36 These projects add to what Richard Primus terms “small c” constitutional theory,37 a corpus of scholarship recognizing the constitutional significance of legal arrangements outside the “big-C Constitution.”38

The Article proceeds in three parts. Part I explores the breadth and scope of this set of laws. After showing how these laws help explain the gap between public policy and popular preferences, this Part traces the contours of the rights they grant through two key phases of activism and legislation. It details the various ways Congress and the states have extended the right to keep and bear arms far beyond the bounds of the Second Amendment, not only through civil exceptions and accommodations but through criminal immunities as well.

Part II critically unpacks these laws. First, it identifies the rhetorical and social-movement relationship between these rights and the formal Second Amendment. Then, it breaks down how these rights are more redistributive and interventionist than the libertarian Second Amendment right announced in Heller. This Part suggests that lawmakers should be especially cognizant of the distributive effects of these laws on the community, especially on the groups most likely to be threatened, coerced, or killed by guns.

Finally, Part III evaluates the influence of this collection of gun rights on constitutional law. It assesses how these rights reshape Second Amendment doctrine and theory, invigorate First Amendment arguments over the relationship between gun rights and expressive freedom, recalibrate Fourth Amendment standards for stops and frisks, and make salient the debate over the Fourteenth Amendment’s promise of protection from private violence.

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36. Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021) (cleaned up) (“[M]any local, state, and federal laws . . . work to protect the same interests that the Free Speech and Press Clauses of the First Amendment protect. These laws do so . . . by granting rights and imposing duties that the First Amendment does not require . . . .”).

37. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013). I do not want to push this point too far, however. My purpose in this Article is not to argue that these statutes have claims to constitutional status on some understanding of that phrase. Instead, I highlight the ways that these laws operate similarly—as “fundamental and trumping like constitutional law,” William N. Eskridge, Jr. & John Ferejohn, *Essay, Super-Statutes*, 50 DUKE L.J. 1215, 1217 (2001)—and how advocates invoke them as part and parcel of the constitutional right to keep and bear arms. I do not mean either to insist that they are in some way constitutional law or to strenuously defend a clear line separating constitutional from nonconstitutional law in this context.

I. EXPLORING THE VAST GUN-RIGHTS EXPANSE

The United States has relatively few restrictions on firearms compared to similarly situated developed nations—and fewer too than most Americans say they would like to see. This Part first explores this phenomenon, then describes how the collection of broad nonconstitutional gun rights helps to explain it.

A. The Gap Between Policy and Public Opinion

Polls suggest that strong majorities of the American public support both the Second Amendment and reasonable regulations on firearm possession and use.40 Even polling showing a decline in support for gun laws from 2019 to 2020 reports that nearly 60 percent of Americans support stricter gun laws and fewer than 10 percent want more relaxed ones.41 Given this amount of public support—which increases to higher levels for certain types of laws,42 even among gun owners43—why does the United States have far fewer gun regulations than other developed nations?

One important and obvious reason is the Second Amendment. After all, only three other countries in the world protect a right to firearms in their national constitutions: Haiti, Guatemala, and Mexico.44 But even the guarantees provided by those constitutions range from limited to essentially extinct.45 By contrast, the Second Amendment surely does, as Justice Scalia said, take “certain policy choices off the table.”46 Yet some gun-rights advocates see the

41. Id.
45. Id. at 182 (reporting that Mexico’s right is subject to regulation and that Haiti’s “is not honored at present”).
amendment as an effective bulwark against all forms of "gun control," whatever their scope, design, or justification.\textsuperscript{47} And even many gun-regulation advocates agree that the Second Amendment stands in the way of truly effective regulation.\textsuperscript{48}

Both sides are largely mistaken in ascribing an outsized role to the Constitution.\textsuperscript{49} The Second Amendment, as history shows and courts have confirmed, allows much greater regulation than the United States currently has.\textsuperscript{50} Historically, firearms regulations were widespread and pervasive.\textsuperscript{51} And lower courts are striking down very few laws on Second Amendment grounds, so judges are not finding the Constitution an insuperable barrier to the laws that exist.\textsuperscript{52} For example, there are very few arguments under existing constitutional doctrine that would call into question universal background checks or concealed-carry licensing.\textsuperscript{53} Something more than the Constitution is at work in dictating the policy landscape.

Nor does the alternative political explanation cover all the remaining ground. Surely one (major) reason that few gun laws have been enacted despite broad public support is that legislators are less supportive of gun regulation than the public at large. The NRA has long been a potent force in American politics, shaping the cultural debate as much through advertising,
mobilization, and rhetoric as through donations to particular politicians. It has nurtured and capitalized on the “engagement gap,” the difference in the intensity with which gun-regulation opponents hold their views compared to regulation proponents. But that is not the entire picture either. Even when there is political will to enact regulations, say at the local level in urban enclaves of otherwise-conservative states, near-insurmountable hurdles still stand in the way.

The upshot, then, is that neither the Constitution nor partisan politics fully explains the gap between public support for gun regulation and current policies. What is largely absent from the study of the “missing movement for gun control in America,” or more precisely the missing policies that would more strictly regulate guns, is any systematic study of the nonconstitutional legal barriers to change. The expansive statutory gun rights explored in this Article help explain the relative dearth of gun regulations in the United States.

These barriers mean that even when policy advocates overcome powerful interest-group lobbying, a democratic majority cannot simply enact a law to regulate firearms more robustly. Where preemption laws stand, for example, not even an unanimous group of local legislators can regulate on the issue. Nor can private employers, university administrators, or many others act on their policy views to govern their respective jurisdictions. One effect of broad gun rights is to alter the possible field for policy change. These laws serve not only as a shield for gun owners but also as a sword. They ensure not just the absence of restrictions but aggressively interventionist rights that the formal Constitution does not mandate. The next Section describes these laws in more detail.

B. Filling the Gap: Gun Rights Outside the Constitution

Nonconstitutional gun rights help explain the wide chasm between public opinion and public policy. They include a myriad of statutory, regulatory, and administrative roadblocks designed to stop gun regulations. They also supercharge gun rights in a way that exempts and accommodates right holders from...
otherwise permissible and applicable rules, like those of private employers or university administrators.\textsuperscript{59} This Section traces these laws through two waves: a first, libertarian wave that extends the deregulatory pressure of the formal Second Amendment guarantee, and an aggressive and interventionist second wave that seeks to break down not only legislative barriers to gun owners, but private and social ones as well.

To be clear, describing these laws as part of two separate “waves” is more a useful heuristic than a description of purely separate temporal or conceptual categories. Legislators are continuing to debate and pass many types of first-wave laws today, even alongside consideration of second-wave laws. Breaking these laws down into phases highlights how the movement became more aggressive over time, from working primarily to break down legislative barriers to gun rights in the first wave to unshackling gun rights from private and other nonlegislative burdens in the second.

1. The First Wave: Extending the Libertarian Framework

After passage of the Gun Control Act of 1968, the first major federal gun law of the modern era, a powerful gun-rights movement began to coalesce around a libertarian vision of the right to keep and bear arms.\textsuperscript{60} The rise of this wing of the movement led to a takeover of the NRA in 1977 by hardliners opposed to almost any form of regulation.\textsuperscript{61} Just a few years later, President Reagan—a self-proclaimed protector of the Second Amendment—became the first president to be endorsed by the NRA.\textsuperscript{62} A year after he was sworn in, the Senate Judiciary Committee’s Subcommittee on the Constitution published a

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\textsuperscript{59} See \textit{id.} at 60 (describing how Second Amendment fundamentalists demonstrate “an outsized focus on an absolute ‘superright’ believed to be both essential and superior to all other rights”).

\textsuperscript{60} Siegel, \textit{supra} note 16, at 207 (“The political maelstrom from which the 1968 Act emerged would shape the debates over gun control that exploded in its wake.”). This is not to say that the gun-rights movement did not exist prior the 1960s. In fact, the NRA has been a powerful force in shaping—and defeating—legislation regulating guns since the early 1900s. See Charles, \textit{supra} note 16, at 189–91 (describing the history and rise of the early gun-rights movement); Jacob D. Charles & Brandon L. Garrett, \textit{The Trajectory of Federal Gun Crimes}, 170 U. Pa. L. Rev. (forthcoming) (manuscript at 9–11), https://doi.org/10.2139/ssrn.3685910 [perma.cc/DC3F-KFBX] (describing the NRA’s role in weakening federal gun laws in the 1930s). Even though gun-rights advocates were successful in these early years, it was not until after the 1960s battles over gun regulation that the movement became the potent political force it is today. One reason for that is the lack of federal interest in gun regulation between the 1930s and 1960s. \textit{Id.} (manuscript at 14).

\textsuperscript{61} Siegel, \textit{supra} note 16, at 210–11; Blocher & Miller, \textit{supra} note 17, at 56 (describing this shift). Neither the NRA’s rank-and-file members nor its leaders have always been opposed to all regulation. But the development of a mobilized “no compromise” gun-rights movement occurred around the same time as the NRA revolt. See \textit{supra} note 15.

nearly two-hundred-page report arguing that the Second Amendment protects an individual right unconnected to militia service. In the wake of these developments, and without any change in the judicial construction of the Second Amendment as a collective and not individual right, gun-rights supporters successfully rallied to remove regulations restricting firearms. The goal in this first wave was largely deregulatory, breaking down governmental obstacles to gun use and possession.

Preemption. The organized movement to preempt local firearms control began in earnest in the early 1980s. In 1982, the Seventh Circuit upheld a small Chicago suburb’s handgun ban against a Second Amendment challenge in *Quilici v. Village of Morton Grove*. In doing so, the appeals court reinforced the received judicial wisdom that the Second Amendment does not apply to state and local governments and protects a right tied to militia service rather than an individual right to use firearms for private purposes. Worried that this judicial blessing would prompt similar ordinances to sweep the country, the NRA and other pro-gun organizations mobilized into action. Those efforts proved wildly successful. Preemption laws spread to almost every state in the quarter century after Morton Grove enacted its handgun ban.

Preemption, of course, occurs in many different subject areas, but its prevalence in the field of firearms regulation is pronounced. Today, nearly every state preempts some or all local regulations concerning guns.
preemption statute is typical. It bars localities from adopting regulations “re-
late to” a host of firearm-related activities, including “the transfer, possess-
ion, wearing, carrying, ownership, storage, transportation, licensing, or
registration of firearms,” as well as “commerce in firearms,” and firearm dis-
charge at a shooting range.73 Firearm-preemption statutes, despite their ubiq-
uity, are not part of a long-standing tradition of “firearm federalism”74 but are
a recent innovation that moves away from traditional local control over gun
regulation.75 On top of their novelty, they are not compelled by the Constitu-
tion. The Second Amendment cannot reasonably be read to require states to
override local decisionmaking on traditionally local matters.

The increase in such laws is not the only noteworthy feature of modern
firearm preemption. Historically, preemption occurred when a local law con-
flicted with state law or when the state expressed its intent to occupy an entire
regulatory field to ensure uniformity.76 The result would be that state law dis-
placed local law and governed the matter. That understanding, however, has
recently changed with the “emergence and rapid spread of a new and aggres-
sive form of state preemption.”77 Scholars have called this innovation “the new
preemption”78 or “hyper preemption.”79 It consists of “sweeping state laws
that clearly, intentionally, extensively, and at times punitively bar local efforts
to address a host of local problems.”80 In this new atmosphere, state preemp-
tion often deregulates the space rather than filling it with uniform regulations.
Some firearm-preemption laws punish even the attempt to regulate at the
margins.

Consider, for example, one of the most punitive state laws. In 2012, Ken-
tucky modified its preemption law to impose criminal penalties on local offi-
cials who “violate[ ]” the very broad preemption statute.81 The law makes a
violation official misconduct, a misdemeanor offense.82 Like many of the new
preemption statutes, Kentucky’s law also creates a private right of action for
aggrieved parties and awards attorneys’ fees to successful plaintiffs.83 Al-
though Kentucky is an outlier with respect to criminal liability, “[a] half-dozen

73. TEX. LOC. GOV’T CODE ANN. § 229.001(a)(1)–(3) (West Supp. 2020).
ONLINE 359, 362 (2014).
75. E.g., Blocher, supra note 19, at 133.
77. Id.; see also Sarah L. Swan, Preempting Plaintiff Cities, 45 FORDHAM URB. L.J. 1241,
1243 (2018) (“[T]hese new preemption laws dramatically differ from the old ones in both quan-
tity and quality.”).
79. Scharff, supra note 20, at 1473.
§ 65.870 (LexisNexis 2014)).
82. Id.; see also KY. REV. STAT. ANN. §§ 522.020–.030 (LexisNexis 2014).
states reinforce firearms preemption by threatening local officials with fines, civil liability, or removal from office for enacting or enforcing firearms measures.84

Some local governments have tried creative ways to work around preemption laws. Consider Pittsburgh’s recent attempt. Pennsylvania’s preemption statute bars any local ordinance regulating “the transfer, ownership, transportation or possession of firearms.”85 Seeking to sidestep that broad prohibition, the Pittsburgh City Council passed an ordinance banning the “use” of assault weapons and large-capacity magazines in any public place within city limits, on the theory that “use” regulations are not preempted.86 A trial court struck down those ordinances because the law made clear the state intended to preempt the entire field of firearms regulations.87

There is no way to assess the precise effect of preemption laws. The number of regulations such laws have prevented is not only unknown but unknowable. Legislators deterred by threats of fines and liability may not even try to pass regulations that come close to the preemption line. But there are enough examples of local frustration at the bulwark preemption poses to safely assume that many Americans would live in more restrictive jurisdictions today were it not for these laws.88

Unrestricting Concealed Carry. From early in the nation’s history, states strictly limited carrying concealed firearms in public, often to the point of complete prohibition.89 Kentucky and Louisiana, for example, banned concealed carry as early as 1813,90 Indiana followed in 1820,91 and many other

84. Id. at 2002–03.
85. 53 PA. STAT. AND CONS. STAT. ANN. § 2962(g) (West 2016).
88. See, e.g., Lisa J. Huriash, These 10 Cities Want to Regulate Guns. They Sued Florida over It., SUN SENTINEL (Apr. 2, 2018, 4:45 PM), https://www.sun-sentinel.com/local/broward/parkland/Florida-school-shooting/10-reg-cities-sue-for-gun-laws-20180402-story.html [perma.cc/33G8-L8YV]; Sari Horwitz, Friendship Heights Targets Big Government with Handgun Law, WASH. POST (May 26, 1986), https://www.washingtonpost.com/archive/local/1986/05/26/friendship-heights-targets-big-government-with-handgun-law/c5c246b1-e8de-447d-b519-f8fd50b911c8 [perma.cc/D7E5-FPV4] (reporting that the Friendship Heights, Maryland, community was inspired by Morton Grove to pass its own handgun ordinance after earlier efforts were deterred because officials told the community “that state law prohibited localities from regulating handguns”).
states in the ensuing years likewise outlawed the practice. 92 Strict regulation remained the norm for a century and a half. 93 By 1980, more than a dozen states still banned concealed carry outright, and only a small handful generally allowed any qualified adult to carry a concealed weapon. 94 Most other states had strict licensing laws that required applicants to show "proper cause"95 or "justifiable need"96 to carry a concealed weapon.97 Because these laws vest discretion in licensing officials to determine whether the standard is met, these strict laws are often called "may issue" laws; they do not guarantee that anyone who wants to carry a concealed firearm can do so.98

This paradigm began to erode dramatically in the 1980s.99 In 1987, Florida adopted a permissive, "shall issue" permitting system that requires officials to issue a permit so long as an applicant satisfies certain objective criteria (training requirements, background checks, etc.) without having to show any special cause or need for carrying.100 These laws exploded across the country after 1987.101 When Florida enacted its shall-issue law, sixteen states generally
banned concealed carry, and the plurality—twenty-six—had discretionary may-issue regimes. Today, not a single state forbids concealed carry, and only a handful retain strict may-issue laws.

But states have not stopped at loosening their carry laws to require that permits be issued on a mandatory basis with no showing of need. They have shifted to increasingly more permissive regimes in several stages of deregulation. Many now forgo any licensing requirement at all. These “permitless carry” laws allow individuals to carry concealed firearms without any state involvement or oversight. Known in gun-rights circles as “constitutional carry,” these laws have been surging in popularity. At the end of 2020, sixteen states allowed carrying concealed weapons in public with no permit, meaning no mandatory training requirement or background check. In other words, the paradigm reversed: in 1987 sixteen states banned concealed carry and only one allowed the practice with no license or permit; at the close of 2020, no state banned concealed carry and sixteen allowed concealed carry with no permit or license. And the trend toward loosened laws has continued, with a handful of governors and state legislatures advocating their state’s transition to permitless carry and several more states adopting these laws in 2021.

These state laws displace local efforts to regulate gun carrying, but this downward deregulatory pressure also coexists with an upward push. Buoyed by their public-carry success at the state level, gun-rights supporters have sought national public-carry legislation to further entrench these statutory rights in federal law. In recent years, the NRA’s “top legislative priority” has been passing a federal law granting concealed-carry reciprocity nationwide. The proposal—introduced in Congress in 2017 and passed through the

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102. KROUSE, supra note 97.
103. Id.
104. Id.
105. See Adam Weinstein, Understanding ‘Constitutional Carry,’ the Gun-Rights Movement Sweeping the Country, TRACE (Feb. 28, 2017), https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-movement [perma.cc/WQD8-VBV] (“Over the past seven years, 10 states have rolled back longstanding licensing, training, and registration requirements for carriers of concealed weapons under a novel legislative philosophy called ‘constitutional carry.’”).
House—would require states to recognize a concealed-carry permit issued in any other state, even if the permitting standards differed widely. Critics have raised federalism concerns about the legislation.111

Like other parts of the statutory gun-rights bundle, relaxed concealed-carry laws come rhetorically justified in Second Amendment garb. But, it bears emphasizing that, like the broad adoption of preemption laws, this movement runs almost entirely independent of formal Second Amendment doctrine. *Heller* strongly suggests that the Constitution allows states to ban concealed carry altogether.113 These contemporary laws turn in the opposite direction, protecting broader and fuller concealed-carry rights. And, despite this disconnect, the appeal to the formal Second Amendment continues.114

**Other First-Wave Carve-Outs.** Layered on top of these broad efforts to remove legal barriers for gun owners and carriers, gun rights also receive special protection in a variety of other situations. Like preemption laws and broad public-carry rights, the focus of these laws is on leaving guns and gun rights less encumbered by government regulation than they would otherwise be. This Section briefly reviews first some additional federal protections, then state and local ones. Not all of these laws fall into the timeframes between other first- and second-wave developments. Some were passed later, even recently, but they qualify as first-wave laws for purposes of this categorization because they are conceptually similar in how they protect gun rights.

In 1976, Congress clarified that firearms and ammunition were off-limits to several regulatory agencies. It prohibited the Consumer Product Safety Commission, an agency with otherwise broad authority to regulate consumer products, from taking any actions that would restrict access to guns or ammunition.116 Congress also made clear that the Environmental Protection Agency

111. *Id.*; Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. (as passed by House, Dec. 6, 2017).

112. See, e.g., Hannah E. Shearer, Essay, Jeopardizing “Their Communities, Their Safety, and Their Lives”: Forced Concealed Carry Reciprocity’s Threat to Federalism, 45 HASTINGS CONST. L.Q. 429, 435–42 (2018); see also Cramer & Kopel, supra note 99, at 744 (suggesting that federalism principles may mean that changes to carry laws should be up to each state, but recognizing the benefits of uniform federal law).

113. District of Columbia v. *Heller*, 554 U.S. 570, 626 (2008) (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”); see also Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897) (dictum) (“[T]he right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons.”).


cannot regulate guns or ammunition under the Toxic Substances Control Act, leaving other agencies acting under different authority "to address concerns about environmental contamination from lead shot on a piecemeal basis." Neither action alone, or even in combination, proves that Congress meant to show special solicitude for guns. Perhaps legislators just wanted these decisions to be made by the people’s representatives, not by federal agencies. But, in the context of the broader protective web outlined here, these two decisions should not be seen merely as isolated agency restrictions.

In 1986, Congress passed the Firearm Owners’ Protection Act, which protects both gun owners and dealers in a number of ways that the Second Amendment does not require. The Act restricts the rulemaking authority of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), including by limiting regulations to only those necessary to carry out the law (in place of the prior authority authorizing the responsible agency head to issue regulations she deemed reasonably necessary). It also narrowly defines what it means to qualify as a firearms dealer in a way that frees casual sellers from the requirement to get a license and perform background checks. In addition, the Act bans a national gun registry, ensuring that the federal government cannot connect weapons to their owners. Finally, the Act supersedes state and local law on firearms transportation, allowing a lawful gun owner to transport an unloaded firearm interstate despite a local jurisdiction’s laws.

Over the last several decades, Congress has also passed other protective measures not mandated by the Constitution to shield gun rights from government regulation. Through the Dickey Amendment, it restricted the ability of the CDC to fund research on gun violence in a way that has historically
chilled broader federal funding for research concerning guns. Through the Tiahrt Amendment, Congress prohibited ATF from releasing firearms-tracing data to any non-law enforcement agency, making those data unavailable to academic researchers and civil litigants.

Like the federal government, states have provided miscellaneous protections and exemptions for gun rights over the past several decades. Shooting ranges are often shielded from liability for noise pollution or exempted from local noise ordinances. Some gun-rights proponents have even pushed back on local attempts to include gun discharge (outside shooting ranges) in their noise ordinances. One North Carolina gun-rights organization called on citizens to oppose a city’s mention of gunfire in its proposed ordinance, decrying “so-called nuisance ordinances directed against firearms” as “infringement[s] of the peoples’ right to keep and bear arms.”

2. The Second Wave: A Turn to Aggressive Intervention

The first wave of gun-rights legislation served to, in the words of historian Patrick Charles, “usher in today’s gun-rights golden age.” These laws largely aimed to limit the government’s role and were, in that sense, traditionally conservative. The next wave became more aggressive, intervening in private decisionmaking and dictating the policy choices of previously empowered administrators. In 2001, for the first time in American history, a federal appeals court held that the Second Amendment protects an individual right to

125. See, e.g., ALA. CODE § 6-5-341 (b)(1)–(3) (LexisNexis 2014); ALASKA STAT. § 34.75.010(a) (2020); N.D. CENT. CODE § 42-01-01.1 (2010).
126. E.g., MONT. CODE ANN. § 76-9-102 (2021) (“Standards adopted by a state agency or unit of local government to limit levels of noise that may occur in the outdoor atmosphere may not apply to shooting ranges.”).
129. CHARLES, supra note 16, at 309.
have guns for private purposes rather than a collective or militia-oriented right. The tides were turning in elite legal opinion too.

In this atmosphere, an aggressive wave of gun-rights laws beginning in the early 2000s was passed at both the state and federal level, sometimes with concerted national lobbying support and sometimes through local grassroots organizing. What these laws have in common is a mission that expanded from breaking down legislative barriers to breaking down nonlegislative ones, including roadblocks in private, administrative, and civil-liability contexts. The second wave forcefully intruded into areas traditionally left to private, administrative, and judicial regulatory forces.

Parking-Lot Laws. In response to a series of workplace shootings in the 1990s, employers across the country began enacting company policies expressly prohibiting firearms on company grounds. In 2002, an aggrieved employee sued his company for wrongful discharge after he was fired for violating a no-arms policy. He claimed that the Oklahoma statute allowing companies to ban firearms on their property violated his state constitutional right to keep and transport firearms. The challenged statute allowed “any person, property owner, tenant, employer, or business entity to control the possession of weapons on any property owned or controlled by the person or business entity.” In Bastible v. Weyerhaeuser Co., the Tenth Circuit upheld the statute, ruling that the state constitutional right is subject to reasonable regulations, such as the law reserving to private entities the authority to regulate their own property.

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131. See BLOCHER & MILLER, supra note 17, at 65. There is a vast and ongoing historical debate about whether Heller simply recovered the understanding of the Second Amendment that existed around the time of the Founding or imposed the views of twenty-first-century Americans on the constitutional text. I do not mean to wade into these debates other than to say that whatever the truth as a historical matter, there can be little doubt that Heller came about at the time that it did because of the gun-rights movement’s political, academic, and public-opinion successes.


134. Bastible v. Weyerhaeuser Co., 437 F.3d 999, 1004 (10th Cir. 2006).

135. Id. (quoting OKLA. STAT. ANN. tit. 21, § 1290.22 (2002)).

136. Id. at 1006; see also Hansen v. Am. Online, Inc., 96 P.3d 950, 955 (Utah 2004) (holding that state constitutional and statutory protections for gun rights did not trump private employee policy banning guns from the property).
Bastible set off a wave reaction. After the lawsuit was filed, Oklahoma changed its own law in 2004. Instead of the prior broad reservation of powers to private entities, the amended provision established the exact opposite rule: "No person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle." In the next five years, ten more states would join Oklahoma in broadly restricting employers, and sometimes business owners generally, from prohibiting guns on their property. From 2010 to 2018, more than a dozen additional states would join the chorus.

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137. See Patton, supra note 24, at 291–92 (describing the trajectory); Mathiason & Milano, supra note 132, at 83.
138. Bastible, 437 F.3d at 1005.
139. Id. at 1005 (quoting OKLA. STAT. ANN. tit. 21, § 1290.22(B) (Supp. 2006)).
Parking-lot laws, also called guns-at-work laws, co-opt private decisionmaking on private property.\textsuperscript{142} As of 2020, twenty-four states have some form of parking-lot law. Half of these laws, like Oklahoma’s, apply broadly to all property owners.\textsuperscript{143} The remaining apply selectively to employers, local governments, or business owners.\textsuperscript{144} As with the other expansive gun rights discussed above, the Second Amendment does not mandate gun access to private property.\textsuperscript{145} As the Eleventh Circuit succinctly put it, “An individual’s right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land.”\textsuperscript{146}

Yet proponents continue to argue for guns-at-work laws not simply on the grounds that they constitute good public policy or provide social benefits to gun owners and society but also on the ground that they secure constitutional rights.\textsuperscript{147} As one Iowa legislator said, these laws protect citizens’ rights to “keep and bear arms during their daily routine throughout the day.”\textsuperscript{148} Without this law, he bemoaned, “[w]e have hundreds of thousands of Iowans, law-abiding good Iowans with conceal carry permits who wake up and get children ready for school [but] cannot exercise their second amendment

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\textsuperscript{144} For an argument that states should restrict private parties’ ability to limit gun carrying in places held open to the public, see Ethan T. Stowell, Note, Top Gun: The Second Amendment, Self-Defense, and Private Property Exclusion, 26 Regent U. L. Rev. 521 (2013–2014).

\textsuperscript{145} GeorgiaCARRY.ORG, Inc. v. Georgia, 687 F.3d 1244, 1265 (11th Cir. 2012).

\textsuperscript{146} See Fla. Stat. § 790.251(3) (2021) (“[C]itizens . . . have a constitutional right to possess and keep legally owned firearms within their motor vehicles for self-defense and other lawful purposes, and . . . these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity.”); Stowell, supra note 145, at 541.

These laws are a part of the broader movement to elevate the concerns of gun carriers above both public and private countervailing interests.

**Protection of Lawful Commerce in Arms Act.** In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA) to protect the firearms industry from civil litigation. The law provides that no person can sue gun sellers or manufacturers for injuries “resulting from the criminal or unlawful misuse of a [gun] by the person or a third party,” except in certain narrow circumstances. Although the lawsuits PLCAA aimed to displace were by and large unsuccessful on the merits, Congress feared that defending those lawsuits threatened to bankrupt the gun industry. Indeed, one major impetus for PLCAA was a slate of municipality-led lawsuits in the late 1990s that were modeled on the successful litigation against the tobacco industry.

By 2000 gun litigation was regularly front-page news, and manufacturers faced potentially bankrupting industrywide liability exposure as a result of suits by dozens of individual victims, over thirty cities, and the State of New York. One case is illustrative here—*City of New York v. Beretta U.S.A. Corp.*

In June 2000, New York City sued a variety of firearm manufacturers and sellers, claiming that these defendants’ distribution practices violated the New York public-nuisance statute. The city alleged that the defendants “market[ed] guns to legitimate buyers with the knowledge that those guns will be diverted through various mechanisms into illegal markets” and “fail[ed] to

149. *Id.*


153. See id. § 7901(a)(6)–(7).


155. Lytton, supra note 154, at 3.

156. 524 F.3d 384 (2d Cir. 2008).

take reasonable steps to inhibit the flow of firearms into illegal markets.”

Congress enacted PLCAA while the case was pending, and the defendants sought to dismiss it on that ground. The Second Circuit observed that PLCAA’s House and Senate sponsors had identified this very case as one that PLCAA would bar. Yet the city claimed that the case fit into PLCAA’s exception allowing lawsuits when the firearm manufacturer or seller “knowingly violated a State or Federal statute applicable to the sale or marketing of the product.” The court rejected that argument, ruling that PLCAA barred the city’s suit because the public-nuisance statute on which the claims were grounded was not the kind to which PLCAA’s exception applied.

The congressional findings that accompany PLCAA hail the legislation as necessary to protect the right to keep and bear arms. Congress found, in that pre-\textit{Heller} world, that “[t]he Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.” Lawsuits against gun sellers and manufacturers who operated lawfully, Congress declared, threatened to diminish that right. But, as before, the Second Amendment does not demand this broad liability shield. Even if the Constitution did require certain standards of proof or types of evidence or protect gun manufacturers or sellers against some varieties of claims, the broad and comprehensive barrier in PLCAA would not be required.

PLCAA is unique in that it does not displace traditional tort actions with an alternative remedy for those harmed by firearm misuse. Congress knows how to do so; it did that when it limited lawsuits against vaccine manufacturers and set up a no-fault compensation system. In 1986, it created the National Vaccine Injury Compensation Program to balance the need for compensation arising from rare vaccine-related injuries with the specter of personal-injury lawsuits that could bankrupt a necessary industry.

\begin{itemize}
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id. at 403.}
\item \textsuperscript{160} 15 U.S.C. § 7903(5)(A)(iii).
\item \textsuperscript{161} \textit{Beretta}, 524 F.3d at 404.
\item \textsuperscript{162} 15 U.S.C. § 7901(a)(2).
\item \textsuperscript{163} Id. § 7901(a)(6)–(7).
\item \textsuperscript{164} \textit{But see} David B. Kopel & Richard E. Gardner, \textit{The Sullivan Principles: Protecting the Second Amendment from Civil Abuse}, 19 SETON HALL LEGIS. J. 737, 737 (1995) (“[T]he right to keep and bear arms is, like the right to freedom of the press, entitled to judicial protection from abusive common law tort suits which threaten the exercise of our Second Amendment right.”); \textit{c.f.} Brannon P. Denning, \textit{Gun Litigation & the Constitution}, in SUING THE GUN INDUSTRY, supra note 154, at 315 (arguing that the Dormant Commerce Clause may limit certain municipal lawsuits against gun manufacturers).
\item \textsuperscript{165} See Kopel & Gardner, supra note 164, at 773–75.
\item \textsuperscript{167} \textit{Id.} at 255–56.
\end{itemize}
Congress could have similarly created a way to require those who make and sell weapons to internalize at least some costs of firearm violence. Christian Turner and Justin Van Orsdol, for example, propose “a regulatory system in which gun manufacturers would be strictly liable to a federal fund for deaths caused by their guns, paired with a subsidy that will serve to ensure the availability of guns sufficient to meet the rights the Supreme Court has found in the Second Amendment.”

This would operate much like the system in place for vaccines, balancing the need for compensation with the desire to protect an industry from bankruptcy. So far, these and other solutions for victim compensation have not gained much attention in Congress.

It is impossible to know precisely how big a role PLCAA plays in the regulatory landscape. But it is fair to assume the role is not negligible. The law has blocked suits arising from stolen guns used in violent crimes, distribution practices that allow diversion into illegal markets, and marketing practices that allegedly influence killers to use specific firearms in mass shootings. Many states have their own similar tort shields, PLCAA, in combination with these state-law analogues, “effectively ended municipal gun litigation.”

And without PLCAA, one scholar argues, gun manufacturers would have “stronger incentives for the exercise of greater care in gun distribution” and “would likely respond [to the threat of liability] with organizational, contractual, and technological strategies to limit diversion at the dealer level.”

Campus-Carry Laws. Parking-lot laws and PLCAA illustrate gun-rights advocates using the power of the state to guard not primarily against governmental restrictions on the right to keep and bear arms but against private and other nonlegislative ones. Campus-carry laws represent a similar phenomenon. Although these laws are typically aimed at public universities and colleges, they encroach on a sphere of campus decisionmaking about public

169. Id. at 1122–24.
172. Melissa Chan, Just About Everyone but the Gun Maker Gets Sued After a Mass Shooting, TIME (Aug. 20, 2019, 10:13 AM), https://time.com/5653066/mass-shooting-lawsuits [perma.cc/NCD4-WZ6C] (explaining that while at least one marketing-based case has proceeded, the barriers are so steep that the PLCAA discourages most plaintiffs from even filing suits against gun makers in this context).
safety that traditionally centers the voices of administrators, faculty, and students.\footnote{176} University and college officials usually maintain broad discretion to set campus policy in the best interests of their academic environments, with the degree of independence depending on the details of state constitutional and legal arrangements.\footnote{177}

Compulsory campus-carry laws take that authority away. They “require institutions of higher education to allow on their premises the carrying of firearms by, at the very least, students and faculty members.”\footnote{178} While about half the states allow universities and colleges to make campus firearms policy for themselves—meaning the local institutions can decide to permit or forbid concealed carry—a growing number of states limit this discretion and mandate that these institutions allow at least some concealed carrying on campus grounds.\footnote{179}

The momentum for this push came largely from grassroots advocacy in the wake of the 2007 Virginia Tech shooting.\footnote{180} In that year, compulsory campus-carry bills were introduced in six state legislatures, and in ten more the following year.\footnote{181} As of 2019, ten states “have provisions allowing the carrying of concealed weapons on public postsecondary campuses.”\footnote{182}

Whereas just

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\footnote{176. Joan H. Miller, Comment, The Second Amendment Goes to College, 35 SEATTLE U. L. REV. 235, 237 (2011) (“[I]mplicit in the concept of the academic freedom doctrine is the notion that colleges and universities require autonomy and should have the power to dictate policy choices on their campuses.”).}
\footnote{177. See Laura Houser Oblinger, Note, The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University’s Holster, 53 WASHBURN L.J. 87, 107 (2013) (describing how universities typically are not managed through direct legislative or executive supervision). Indeed, Shaundra Lewis argues that this kind of autonomous decisionmaking authority should be seen as part of the nature of a protected interest in academic freedom. Lewis, supra note 23, at 2118–20; see also Shaundra K. Lewis, Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns, 48 IDAHO L. REV. 1, 4 (2011) (making a similar argument).}
\footnote{178. Cameron W. Arnold, Standing in the Line of Fire: Compulsory Campus Carry Laws and Hostile Speech Environments, 49 SETON HALL L. REV. 807, 812 (2019).}
\footnote{179. Id. at 812–13; see also Lewis, supra note 23, at 2113 (“[T]here appears to be a burgeoning movement toward forcing higher education institutions to permit firearms.”).}
\footnote{181. Kopel, supra note 180, at 523–24.}
\end{footnotes}
ten years ago, twenty-nine states banned guns from higher-education institutions, today only sixteen do. The arc of the trend line, reversing the prior dominant paradigm, mirrors that of the concealed-carry expansion outlined earlier.

The debate in Texas over the state’s compulsory campus-carry law shows the concern such laws can generate. That law, which went into effect in August 2016, allows a handgun license holder to carry a concealed handgun while on a public college or university campus. Although the law affords campus administrators some discretion to set rules and regulations around that carrying, the Texas attorney general has construed the law to prohibit universities from banning firearms in a large number of classrooms or allowing individual faculty members to exclude guns from their classes. The Fifth Circuit rejected a challenge to the law by three University of Texas at Austin professors.

That lawsuit did not and could not address the fact that the policy was being instituted over the concerns and against the stated wishes of the majority of students, faculty, and administrators, as well as voters of color. Similar concerns have been raised by relevant constituencies in other states. Although these laws were passed to empower concealed carriers to thwart

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183. Lewis, supra note 23, at 2115 (reporting twenty-nine states banned guns before 2011); Arnold, supra note 178, at 812 (reporting that sixteen states ban guns as of 2019).
184. See supra notes 99–103 and accompanying text.
186. Id. at 814.
188. Glass v. Paxton, 900 F.3d 233, 236 (5th Cir. 2018).
mass carnage, that does not appear to have happened. Yet neither have the direst predictions of increased gun violence on campuses where carry has expanded. Instead, the deleterious effects of the law appear subtler, with instructors modifying curricular choices or classroom policies and some going so far as “holding office hours in bars or churches where guns are prohibited, rather than meet[ing] with armed students in their offices.”

Stand-Your-Ground Rights. Not only are gun rights protected through an interconnected and extended constellation of civil accommodations, they also enjoy the benefit of special criminal protections. This Section focuses on stand-your-ground laws. Though these laws are not expressly tied to firearms, there is ample reason for treating them as part of a protective gun-rights web. One of the biggest and most important reasons for that treatment is that the laws’ supporters frame them that way. Stand-your-ground laws’ greatest boosters in state legislatures across the country have been the NRA and other gun-rights organizations. When the Ohio state legislature passed a stand-your-ground law in December 2020, its backers described it as a gun measure and attached it to a gun-rights expansion bill.

The first modern stand-your-ground law was passed in Florida in 2005, driven in large part by NRA lobbying efforts. The legislative movement quickly accelerated afterward; as of early 2020, thirty-four states had stand-your-ground laws or laws that expand the places one can use force without

193. Id.
194. Id.
195. Although guns sometimes generate special calls for exception from the criminal law, as with the stand-your-ground immunity discussed here, they also occasionally generate harsher treatment in the criminal law when found in the hands of the “bad guys.” See Jacob D. Charles, Guns, Violence, and Criminal Justice Reform (May 13, 2021) (unpublished manuscript) (on file with the Michigan Law Review).
196. See CHARLES, supra note 16, at 35 (noting the way that supporters connected stand-your-ground laws to their understanding of the Second Amendment); JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 6–7 (2015) (describing how stand-your-ground laws fit into the cultural narrative of the gun-rights movement).
200. LIGHT, supra note 2, at 155.
201. Id. at 157–59.
Notably, twenty-five states after Florida have adopted these laws by statute and not judicial decision, showing the legislature leading the way in expanding rights to use guns in self-defense. Although these laws vary by state, their key features can be summarized under two headings.

First, and most obviously, they abrogate the traditional duty to retreat before using deadly force when one can retreat in complete safety. This common law duty, as Blackstone described it, required a person to retreat “as far as he conveniently or safely can . . . before he turns upon his assailant.” The retreat requirement never applied inside the home—a man’s proverbial “castle”—but stand-your-ground laws typically extend a person’s right to refuse to flee from any “place where he or she has a right to be.” Stand-your-ground laws are not completely novel in eliminating the retreat requirement. In the latter half of the nineteenth century, the requirement was already fading in America. Though the no-retreat position was ascendant before stand-your-ground laws swept the country, the new wave in the wake of Florida’s 2005 law was a change driven by legislatures and not the result of a gradual accretion of common law jurisprudence.

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204. In addition to the changes I discuss, some of the new stand-your-ground laws, like Florida’s, permit a person to use deadly force not just in response to an attack that threatens death or great bodily harm, but also to prevent property crimes. FLA. STAT. § 776.031(2) (2021). That authority, when coupled with the no-retreat-in-public rule, vastly expands one’s right to use lethal force. It marks “a significant departure from the long-held belief that the use of deadly force should not be used to protect mere property.” Mary Anne Franks, Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege, 68 U. MIA. L. REV. 1099 (2014). The reason for that customary rule is simple: traditional self-defense law is designed to minimize the loss of human life. Eric Ruben, An Unstable Core: Self-Defense and the Second Amendment, 108 CALIF. L. REV. 63, 83 (2020).

205. See, e.g., MODEL PENAL CODE § 3.04(2)(b)(ii) (AM. L. INST. 1985) (stating that deadly force is not justifiable if “the actor knows that he can avoid the necessity of using such force with complete safety by retreating”).

206. 4 WILLIAM BLACKSTONE, COMMENTARIES *184–85.

207. LIGHT, supra note 2, at 155.

208. E.g., FLA. STAT. § 776.012(2).

209. Cynthia V. Ward, “Stand Your Ground” and Self-Defense, 42 AM. J. CRIM. L. 89, 99–100 (2015) (“[T]he American approach changed as homegrown legal commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine, which became a widely adopted basis for self-defense in this country.” (footnote omitted)).

210. FRANKS, supra note 5, at 93 (noting that Florida’s law was not the result of popular public pressure but the result of NRA and other interest-group lobbying); Yakubovich et al., supra note 203, at e2 (highlighting the legislative role in passing these laws).
Second, stand-your-ground laws like Florida’s provide not just a broader affirmative defense that can be raised at trial but a pretrial immunity from arrest, detention, charge, and prosecution. A person who presents a plausible case of self-defense to the officers on the scene can ensure his freedom; if he is later arrested, the law provides a special pretrial immunity hearing at which the person bears a minimal burden before the prosecution must disprove the defense by clear and convincing evidence. These are not a normal part of criminal procedure but instead mark real “procedural departures from traditional self-defense law.” As Cynthia Ward writes, “[T]his statutory immunity hearing is a curious beast indeed.” The procedural innovations give one who kills ample opportunity to avoid resolution by a jury of their peers, the traditional fact-finder charged with discerning the need for taking human life.

Stand-your-ground laws are important not just for the change in legal rights they provide but also for the broader symbolic effect of the immunity. They have the capacity to influence human behavior even if the defense is never invoked in court. In that respect, “[i]t is quite clear that many people believe that stand-your-ground laws give them the right to use deadly force in a wide variety of situations and act accordingly.”

Other Second-Wave Privileges. In addition to these major statutes—parking-lot laws, PLCAA, campus-carry laws, and stand-your-ground laws—the second wave also ushered in a series of miscellaneous aggressive protections. This Section provides a snapshot of these other similar efforts.

In 2011, Florida enacted the Firearm Owners’ Protection Act, a law that placed various restrictions on physicians in the name of gun-owner privacy. The statute limits how physicians can keep records about a patient’s firearm ownership, restricts inquiries about gun ownership, prohibits a physician from “harassing” a patient about firearm ownership, and bars discrimination against a patient based on gun ownership. The Eleventh Circuit struck

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211. FLA. STAT. § 776.032(1).
213. Id. at 134.
214. Ruben, supra note 204, at 83 n.138.
216. Ruben, supra note 204, at 83 n.138 (describing this unsettling of traditional self-defense doctrine); Franks, supra note 204, at 1107.
217. LIGHT, supra note 2, at 155 (“In addition to their powerful legal implications, the laws have had a profound effect on the nation’s culture, reinforcing the belief that a good, law-abiding citizen is an armed citizen.”).
218. FRANKS, supra note 5, at 98.
219. Id.; see also Ward, supra note 212, at 132–33.
221. Wollschlaeger, 848 F.3d at 1302–03.
down several of these provisions as violations of the First Amendment, but it upheld the nondiscrimination provision by construing it to exclude a physician’s expressive conduct.\textsuperscript{222}

The desire to restrict access to gun-owner information survived this partial loss in court. Just a few years after Florida’s law, Montana created a law barring health-care professionals from refusing “to provide health care to a person because the person declines to answer any questions concerning the person’s ownership, possession, or use of firearms.”\textsuperscript{223} And in June 2020, then-Senator Kelly Loeffler introduced legislation described as “a Second Amendment rights bill that would safeguard the privacy of gun owners.”\textsuperscript{224} The Gun Owner Privacy Act would have barred using federal funds to store any personal information connected with background checks performed as part of gun purchases from federal firearms dealers and have given gun owners a right to sue for violations.\textsuperscript{225} Similar laws protecting the rights of gun owners and manufacturers to be free from private censure have cropped up in other laws and proposals.\textsuperscript{226}

Most recently, in November 2020 the Office of the Comptroller of the Currency gave notice in the Federal Register that it intended to promulgate a rule barring large banks from evaluating companies based on social or political criteria, instead of purely financial ones.\textsuperscript{227} One goal of the regulation was to ensure that gunmakers and sellers have continued access to commercial-banking operations, in response to institutions such as Bank of America, JPMorgan Chase, and Citibank pulling financial support or imposing restrictions on the firearms industry.\textsuperscript{228} The notice described as cause for concern that “[m]akers of shotguns and hunting rifles have reportedly been debanked in recent years.”\textsuperscript{229} The agency finalized the rule on January 14,

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 1311, 1318.
  \item Id.
  \item In 2016, Maine passed a law forbidding landlords renting federally subsidized housing from imposing restrictions on lawful gun possession or use in the unit. ME. REV. STAT. ANN. tit. 14, § 6030-F (Supp. 2021); see also Firearms Industry Nondiscrimination Act (FIND Act), CONG. SPORTSMEN’S FOUND., https://congressionalsportsmen.org/policies/state/firearms-industry-nondiscrimination-act-find-act [perma.cc/4C83-QBAX].
  \item Id.
\end{enumerate}
\end{footnotesize}
2021, but the Biden Administration promptly put a hold on the change. Yet states have taken action against these banks, such as Louisiana’s move to keep Bank of America and Citigroup from participating as underwriters on state bonds. The state treasurer justified the action on the grounds that, in his view, “the policies of these banks are an infringement on the rights of Louisiana citizens.”

One final set of laws bears mention: state constitutional amendments protecting the right to arms. These provisions can obviously limit the policy choices of state officials, but one reason they have not merited treatment here is that they have historically erected a rather trivial barrier to gun laws. In a comprehensive study of court decisions applying these provisions, Adam Winkler found that courts historically applied a very deferential standard of review to gun regulations. As a result, only six laws were struck down between World War II and 2007 in the forty-two states with constitutional arms protection. But one recent trend, exemplifying the directional expansion of non–Second Amendment gun rights, is state laws or state constitutional amendments mandating that courts apply strict scrutiny to challenges under these provisions. A handful of states have adopted these measures in the last decade, but the extent to which they will change the landscape is not yet clear. There is reason to believe they may not be as protective of gun rights as advocates hope. For example, even after the state required strict scrutiny for challenges arising under the state constitutional right to arms, the Missouri Supreme Court upheld the ban on firearm possession for even nonviolent felons.


233. Id.

234. See Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 686 (2007); see also Leider, supra note 92, at 1606 (arguing that the understanding of what a state constitutional right protects varied throughout most of American history with how robustly the public viewed gun rights in each era).

235. Id. at 688.


237. State v. Clay, 481 S.W.3d 531, 532 (Mo. 2016) (en banc); Abigail E. Williams, Note, Missed the Mark: The Supreme Court of Missouri’s Faulty Application of Strict Scrutiny to the Right to Bear Arms, 82 Mo. L. Rev. 595 (2017) (criticizing Clay and related cases).
II. UNPACKING STATUTORY GUN RIGHTS

Part I chronicled a wide range of nonconstitutional laws that protect the right to keep and bear arms. This Part unpacks two observations from this body of laws and raises some concerns about their impact. First, while none of these laws are compelled by the Constitution, they are rhetorically connected by their supporters to the Second Amendment’s core protection for law-abiding citizens to exercise self-defense. In this way, the statutory and constitutional entitlements fuel and synergistically build off one another. Second, these statutory gun rights, especially those in the second wave, take a more intrusive and less libertarian path than the formal Second Amendment right. The resulting redistribution not only protects the right in certain hands; it also relocates gun harms, often endangering the most historically marginalized groups.

A. Rhetoric, Social Movements, and Constitutional Culture

The laws catalogued in Part I create constitutionally inflected statutory rights.239 The laws serve the same values that advocates discern in the Second Amendment.240 Indeed, the extent to which these laws are expressly proposed, passed, and interpreted as “preserving,” “protecting” or “guaranteeing” the constitutional right to keep and bear arms is remarkable.241 Even private action like keeping guns off one’s property or choosing to conduct business with only certain entities has been assailed as infringing on citizens’ Second Amendment rights.242 The gun-rights movement makes claims on the Constitution that the Supreme Court has not endorsed—and even makes claims


241. See, e.g., 15 U.S.C. § 7901(b) (describing PLCAA as intended “[t]o guarantee a citizen’s rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution”); Travieso v. Glock Inc., 526 F/ Supp. 3d 533, 538 (D. Ariz. Mar. 10, 2021) (“The PLCAA was partly passed to safeguard the Second Amendment from efforts to indirectly assault the right to bear arms. . . . The PLCAA guards against infringement of Second Amendment rights by ensuring a citizen’s continued ability to ‘acquire arms.’ ” (citations omitted)).

242. See Zacks Equity Research, supra note 232; Madden, supra note 148.
the Court has rejected. The collection of statutory laws both draws its symbolic and expressive power from the constitutional guarantee and, at the same time, seeks to influence that doctrine.

In one respect, it is tempting to argue that gun-rights proponents are simply misinterpreting constitutional doctrine and misapplying constitutional language when they argue that laws like permitless concealed carry, stand-your-ground laws, or parking-lot laws are demanded by the Second Amendment. One might, for instance, respond to the claim that parking-lot laws are constitutionally required the same way many have responded to the arguments that Twitter violates the First Amendment when it blocks users or removes tweets: that is not how constitutional law works. On this view, gun-rights advocates are just using the cloak of the Second Amendment as an organizing tool to advance and justify discretionary policy choices. This kind of “gun rights talk,” the critic might say, only distorts the state of actual constitutional law. Adam Winkler, for example, describes the distinction between what he calls the “Judicial Second Amendment” and the “Aspirational Second Amendment.” The former is the set of court decisions announcing the laws that the Second Amendment permits or prohibits; the latter is the version deployed in political debates and consists of what gun-rights advocates want the Constitution to cover. Ironically, Winkler notes, the social movement that led to the Supreme Court’s decision in *Heller* has made the Judicial Second Amendment increasingly irrelevant as a growing number

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243. Concealed carry is the biggest disjuncture. See *supra* note 113. Stand-your-ground laws are another example. As Patrick Charles notes, the retreat rule governed at the time the Second Amendment was adopted, yet stand-your-ground supporters still ahistorically champion the laws as a “a return to the Founding Fathers’ conception of the Second Amendment.” CHARLES, *supra* note 16, at 40; cf. Leider, *supra* note 92, at 1647 (critiquing Justice Scalia’s elevation of the self-defense rationale in *Heller* and noting that lethal self-defense against criminals was generally illegal and necessitated a royal pardon in early England).


245. *Blocher & Miller, supra* note 17, at 192.


250. *Id.*
of Americans live under an aspirational version that provides greater protection than the formal document.251

Yet gun-rights proponents seem to be doing something more than just using Second Amendment rhetoric to pass their preferred policies. Indeed, two somewhat conflicting themes emerge: a rejection of judicial supremacy grounded in anti-elitism alongside a concomitant desire for judicial blessing and protection of gun rights. In the first respect, gun-rights proponents are engaging in popular constitutionalism, challenging (and rejecting) “the monopoly the Court has over constitutional interpretation.”252 Those championing the laws surveyed in Part I advance a vision of positive constitutional law. They might be wrong about what a court would do, but the same could be said for those seeking to overturn handgun bans prior to Heller. After all, “[b]efore 2008, there was no enforceable federal constitutional right to keep and bear arms for private purposes. After 2008, there was.”253 The Heller Court nonetheless said it was just announcing what had always been the case, not crafting a new right.254 In other words, Heller vindicated the constitutional rhetoric of the early activists who had rejected what the “legally literate”255 construed the Second Amendment to mean.256

Many of the laws broadly protecting gun rights, and using constitutional rhetoric to do so, were passed prior to the Supreme Court’s recognition of an individual right in Heller. Beginning in the 1970s, picking up steam in the 1980s, and supercharging through the 1990s and early 2000s, a popular movement mobilized to advocate for expansive gun rights. Writing before Heller, Robin West noted that gun-rights activists “fashioned the Second Amendment right to bear arms with little or no help from courts, no significant resistance from liberals, and astounding success in public opinion and the legislature.”257 They created a robust right to keep and bear arms before the

251. Id. at 253–54.
252. Robin West, Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel, 94 CALIF. L. REV. 1465, 1483 (2006); see also LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”). To paraphrase Robert Cover, we might say that although we all share the same Second Amendment text, “we do not share an authoritative narrative regarding its significance.” Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 17 (1983).

253. BLOCHER & MILLER, supra note 17, at 13.
254. Id. (noting Heller’s disclaimer of invention).
256. See Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1155 (9th Cir. 2014), rev’d en banc, 824 F.3d 919 (9th Cir. 2016).
257. West, supra note 252, at 1481 (footnotes omitted). West may be overly dismissive of the resistance to the new paradigm. Academic historians, to give one example, strongly resisted the turn to the “Standard Model” interpretation of the Second Amendment that read it as an individual right disconnected from its militia origins. See CHARLES, supra note 16, at 285–93.
Supreme Court even entered the scene. Given these developments, Americans prior to *Heller* had what we could call a de facto Second Amendment right to keep and bear arms. The courts might not have countenanced constitutional challenges to gun regulations prior to 2008, but gun rights were well and flourishing before then. And, as enforceable legal entitlements, they likely blocked more regulation than the formal constitutional guarantee has in the years since the Court decided *Heller*.

In this sense, gun-rights advocacy bucked the dominant trend in the second half of the twentieth century toward embracing judicial supremacy—the view that the Supreme Court is the ultimate interpreter of the Constitution. As Larry Kramer has ably shown, the Founding generation envisioned a special role for “the people” in interpreting and applying the Constitution, one that rejected the modern orthodoxy entrusting the final say in rights disputes to a judicial elite. But that vision faded over time, and Kramer marks an especially large rupture during the last half century or so. Gun-rights activists were not part of this rupture, for they long rejected the notion that judges were supreme in construing the Second Amendment. From at least the time of a developed gun-rights movement in the early 1900s, “gun-rights advocates, groups, and supporters were virtually unwavering in their belief that the Second Amendment guaranteed an individual’s right to own and use firearms for lawful purposes.” Never mind that judges and scholars—“the nation’s historical and legal elite”—were convinced otherwise throughout much of that time. In fact, at around the same time the country at large and elite institutions were increasingly accepting judicial supremacy, the gun-rights movement was beginning a crusade to provide intellectual support for the constitutional view it had previously accepted on faith.

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258. *See Young, supra* note 29, at 456 (describing how extracanonical change occurs).
261. *See Winkler, supra* note 28, at 258.
263. *See id. at 228.
265. *Id.*
266. *Id.*
267. *Id.* The anti-elitism here finds echoes in Martin Van Buren’s invective against the ills of “judicial oligarchy.” *KRAMER, supra* note 252, at 233–34.
268. Patrick Charles traces the contours of this intellectual movement, which occurred mostly in the pages of law journals—including, prominently, this one. *See CHARLES, supra* note 16, at 279–94; *see also* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the*
1980s, movement actors published scores of scholarly articles and commentary on the right to keep and bear arms.269

The co-occurrence of these two developments—a popular turn toward embracing judicial supremacy and the gun-rights movement’s turn toward shoring up scholarly support for its view—is probably not coincidence. As the judiciary’s views became more important in citizens’ understanding of the Constitution and what it means in practice, it makes sense that the gun-rights movement would find greater desire to intellectually justify its foundational beliefs about the scope of the Second Amendment. As the courts became practically supreme, their views did too. Thus, whatever the strength of gun rights in a pre-

Heller world, advocates wanted the protection that formal judicial recognition of constitutional status provides. In Reva Siegel’s comprehensive account, “Heller’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”270 The same movement that fought for preemption, PLCAA, stand your ground, right to carry, and the litany of other laws discussed in Part I also sought to have its constitutional understanding enshrined in law as the meaning of the formal Second Amendment.271

Heller, in many ways, is the instantiation of the living constitutionalism that Justice Scalia so often derided.272

The broad expansion of statutory gun rights, then, is an important part of the story of social-movement conflict and mobilization that led to

Heller.273 Yet

Heller was a narrow decision that did not constitutionalize disputes over stand-your-ground immunities, campus-carry laws, or even concealed-carry licensing. The continued expansion of gun rights today should be seen as part of the continuing effort to influence constitutional meaning.274 This popular

Second Amendment, 82 MICH. L. REV. 204 (1983) (arguing, after acknowledging the weight of current legal opinion arrayed against the view, that the Second Amendment protects an individual right unconnected to militia service).


270. Siegel, supra note 16, at 192.

271. See id. at 193 (describing “how contest over the Constitution’s meaning can endow courts with authority to change the way they interpret its provisions”); Sunstein, supra note 260, at 252.

272. Reva B. Siegel, Heller & Originalism’s Dead Hand—in Theory and Practice, 56 UCLA L. REV. 1399, 1402 (2009) (“W[hat]ever its vices, Heller does not impose the decisions of the dead on the living.”); see also Sunstein, supra note 260, at 248, 257 (“Heller is plausibly taken as a great triumph less for historical recovery than for a social movement determined to create a robust individual right to have guns.”).

273. EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM 182 (2020) (“[Heller] did not return the Constitution to any original understanding but adopted the late twentieth-century formulation promoted by the militant gun-rights movement.”); Leider, supra note 92, at 1650 (rejecting classification of Heller as originalist and arguing that instead the opinion “remade the Second Amendment around its current popular understanding”).

274. Siegel, supra note 16, at 239–40 (outlining the role of movement advocates in shaping the constitutional vision vindicated in Heller).
constitutionalism challenges judicial hegemony in constitutional interpretation, but it is just as clear that advocates want to continue influencing that formal doctrine.275

One question that arises from this discussion is how movement actors brought about the change in constitutional interpretation in Heller and what that means for the future of gun-rights statutes that have not yet seen vindication in court rulings. Although a full treatment of the mechanisms for constitutional change is far beyond the scope of this Article, several factors stand out. As Jack Balkin explains, social movements throughout history have influenced constitutional interpretation.276 He identifies two primary routes through which these movements have affected doctrine: (1) aligning with political parties and using political power to change the judges who hear constitutional challenges, and (2) influencing elite opinion and so, over time, influencing the views of the existing judges.277 The gun-rights movement has successfully engaged each route as it coalesced around deregulatory and other pro-gun legislative strategies, thereby “changing the background expectations and understandings of the public at large and of judges and lawyers.”278 Gun rights are now strongly associated with the Republican Party,279 and elite public opinion, at least as expressed in state legislative and executive pronouncements, identifies broad statutory protection for gun rights as part of a constitutional commitment to the Second Amendment.280 These continued

275. As Reva Siegel argues, the line between constitutional law and politics can be narrow, contested, and not altogether stable. Siegel, supra note 259, at 1327 (describing how constitutional culture allows individuals to influence constitutional decisionmakers and how that culture “preserves and perpetually destabilizes the distinction between politics and law”); see also West, supra note 252 at 1479 (“The Constitution as expounded by the Court is not the only Constitution that governs us.”).


277. Id. at 30–36.

278. Id. at 28.


280. See, e.g., Press Release, Governor’s Off., Governor Gianforte Signs Constitutional Carry Bill into Law (Feb. 19, 2021), https://news.mt.gov/governor-gianforte-signs-constitutional-carry-
connections, and the avenues they leave open, may result in further changes to the Judicial Second Amendment.281

But even if advocates’ understanding of the Second Amendment is denied judicial imprimatur, the statutory expansions on their own are constitutionally noteworthy. For starters, as Part III discusses, they exert an undeniable influence on formal constitutional doctrine. But these laws might also, at least in some sense, be considered “constitutional.” Broader and more emphatic preemption laws, for example, continue to “circumscribe the domain of collective self-governance,” just as other judicially enforceable constitutional rights do.282 As scholars have noted, paying attention to the function of legal arrangements underscores the broader swath of laws that perform constitutional roles in our system of government.283 Thus, “decoupling”284 or “unbundling”285 the characteristics of deeply held legal norms—like disaggregating a law’s protection for a valued right from whether it is entrenched against majoritarian change—reveals a much broader range of laws that are in some ways constitutive of American society. From a functionalist perspective, the United States has many constitutional values, traditions, and legal norms that are not found in the Constitution or the Supreme Court’s exposition of that document. The laws widely expanding gun rights are part of this broader framework, and in that respect the United States has a pluralistic tradition of protecting the right to keep and bear arms.286

Rights language suffuses debates over new gun legislation and protection. But this rights discourse brings its own concerns. When debates are framed in terms of rights, the interests on the other side of the ledger often get discounted as insignificant.287 The next section looks at how these expansive statutory gun rights can redistribute both privileges and harms.


281. See supra text accompanying notes 249–251.


283. Young, supra note 29, at 426 (“If conferring rights on individuals against government action is a basic function of constitutions, then all of these sources of rights are ‘constitutional’ in nature. One need not disparage canonical rights to say that they form a mere subset of those rights that individuals value and depend upon in our legal system.”); see id. at 411–12.

284. Id. at 454.

285. Primus, supra note 37, at 1084.

286. Cf. Lakier, supra note 36, at 35 (describing the “pluralistic free speech tradition”).

B. Redistributive Rights and Redistributive Effects

The expansive gun rights chronicled in Part I speak in a constitutional register, but they differ from the right inscribed in the Second Amendment in a number of important respects. One of the most salient is the nature and degree of protection for arms-related activity. The formal Second Amendment, as advocated by many interest groups and interpreted by the Supreme Court, is a libertarian right. It is grounded in a mistrust of government. This is the style of the right that the movement sought to codify in Supreme Court doctrine. And it is the version that Heller most clearly adopts.

The first wave of gun laws largely matches this libertarian focus. In this wave, Ronald Reagan’s aphorism rings clear: “[G]overnment is not the solution to our problem; government is the problem.” The movement sought to protect gun owners and users from meddlesome government regulation at both the state (relaxing concealed-carry restrictions) and the local level (preempting local regulations). In the second wave, by contrast, Reagan’s adage is reversed. Government becomes the solution to new problems confronting the movement: perceived anti-gun stances by businesses, campus administrators, urban leaders, and impact litigators. In this phase, while government remains an ever-present concern, another problem joins the fears of legislative policymaking: the private employers, campus administrators, litigious advocates, healthcare workers, and other entities outside the legislative framework that threaten the normative commitment to a gun-friendly society. Government becomes, in this phase, a tool of the gun-rights movement to expand gun owners’ prerogatives.

Without getting hung up on terminological distinctions, one way to think about the difference between first- and second-wave laws is to leverage the

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for Hedgehogs, 90 B.U. L. REV. 819, 821 (2010) ("[W]hen we think of rights as trumps we rhetorically airbrush from consciousness, and eventually from any reckoning, the harms that may be done to both individuals and the collective by the individual activity protected by the right.").

288. See ESKRIDGE & FEREJOHN, supra note 38, at 4–5 (describing how statutes can both play constitutional roles and expand protections beyond those in the formal document).

289. It is similar to most constitutional protections in this respect. See id. at 30 ("[The standard account of constitutional protections] is libertarian and negative rather than affirmative and demanding as to state responsibility for injustices.").

290. Siegel, supra note 16, at 209 ([T]he gun rights claim [arising in the decades leading to Heller] voiced a libertarian spirit that was increasingly hostile to the government in any guise."); see id. at 207.

291. See David Yassky, The Second Amendment: Structure, History, and Constitutional Change, 99 MICH. L. REV. 588, 615 (2000) ("[This libertarian version] sees the right to keep and bear arms as akin to the First Amendment rights of free speech and conscience—a fundamental aspect of individual autonomy the infringement of which is per se tyrannical.").


distinction between negative rights and positive rights. Distilling broader debates about rights, Emily Zackin describes the key distinction between these types of rights along two axes—whether the state is the source of the threat from which protection is sought, and whether the claim is to government forbearance or intervention. In her summary, “a negative right protects its bearers from governmental threats by serving as the basis for a demand that government restrain itself.” On the other hand, “a positive right protects its bearers even from non-governmental threats by serving as the basis for a demand that government intervene to protect and/or aid the threatened rights-bearer.” Rights in the second wave pledge government intervention to protect against largely nongovernmental threats.

Because of this feature of second-wave rights, they are decidedly less libertarian. Here, there is no Second Amendment Lochnerism. The laws paternalistically redistribute power, authority, and—in some cases—violence itself. In place of the familiar mistrust of government authorities, government power is instead co-opted to advance the movement’s desired ends. The state forbids private employers from restricting guns on their own property; tells university and college staff, administrators, and faculty that they do not know what is best for their campuses; and cuts off certain private lawsuits alleging harm from gun misuse.

For second-wave advocates, the market is not a neutral or natural force to preserve but an imperfect mechanism to be managed with affirmative government intervention. The “marketplace of violence,” in other words, is not a laissez-faire one in which the invisible hand produces optimal outcomes.
but a market that bears the imprint of heavy government intervention. Private ordering is displaced by government mandates that require open access and skew incentives. When the market fails to deliver, campaigns for ‘gun welfare’ promise to democratize participation in the effort to keep terrorists and criminals at bay by providing financial incentives for gun ownership and training. The extent and nature of the intervention is much different under these statutory rights than under the libertarian, leave-us-alone formal constitutional guarantee.

As well as paternalistically imposing the state’s view of the value of guns—over and against not only countervailing private preferences but also local government, private enterprise, and higher education—the broad nonconstitutional gun-rights apparatus radically redistributes violence and the potentially harmful fallout from allowing guns everywhere. In her treatment of the non–First Amendment freedom of speech, Genevieve Lakier describes a similar binary in the free-speech context: "a primarily libertarian strand of free speech law that gains its authority from the constitutional text" is contrasted with “a nonconstitutional strand that is much less libertarian, and much more redistributive, in what it understands freedom of speech to mean and to require.”

These laws’ distributive effects can be seen in several places. Stand-your-ground laws, for example, "may decrease the risks of violence to some persons but increase the risks that others—persons likely to be perceived as threatening—will suffer harm." If more guns make us safer, as gun-rights advocates claim, the crucial question is who gets classified as one of “us.” The data are

A.H. Miller, Essay, Pointing Guns, 99 Tex. L. Rev. 1173, 1179–81, 1190 (2021) (identifying the ways in which increased gun carrying in public is likely to result in greater harm to people of color).

303. BLOCHER & MILLER, supra note 17, at 157 (discussing “market failures” in the context of the marketplace of violence).

304. LIGHT, supra note 2, at 168.

305. See Alice Ristroph, The Constitution of Police Violence, 64 UCLA L. Rev. 1182, 1189 (2017) (describing how laws that regulate violence do not eliminate violence, but only “distribute or redistribute the risks of being subjected to violence”). Of course, the formal Second Amendment does too, but the statutory rights are supercharged.

306. Lakier, supra note 36, at 2356. To some extent, this dual personality makes sense when statutory rights vindicate deeply held values, as William Eskridge and John Ferejohn detail. ESKRIDGE & FEREJOHN, supra note 38, at 5 (describing how many important statutes “transcend[] the libertarian bias in Large ‘C’ Constitutional rights” and instead “commonly provide positive rights to people”); see also Joshua A. Douglas, The Right to Vote Under Local Law, 85 Geo. Wash. L. Rev. 1039, 1042–43 (2017) (explaining how local governments have expanded the right to vote beyond what the Constitution requires). The Equal Protection Clause, for example, forbids government from arbitrarily discriminating, but it does not mandate the affirmative right to certain types of medical leave, like the Family and Medical Leave Act of 1993 does in vindicating equal protection–animated values. ESKRIDGE & FEREJOHN, supra note 38, at 33–34.

307. Ristroph, supra note 305, at 1189.

308. See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (3d ed. 2010). Lott is, to understate the matter, an extremely controversial researcher, but his works have had an immense influence on the gun-rights movement. See Josh Gerstein, Controversial Gun Advocate Hired by Justice
not promising. As discussed in more detail below, the most historically disadvantaged groups are often the hardest hit. In a 2020 study, researchers concluded that enactment of Florida’s stand-your-ground law led to marked increases in adolescent firearm homicide and mirrored other research findings “showing that Florida’s [stand-your-ground] law is associated with a quantifiable racial bias that aligns with racial stereotypes of threat.”309

To be sure, there is no impenetrable line between first- and second-wave laws in terms of distributive effects or even necessarily between these nonconstitutional rights and the formal Second Amendment. Any law that provides rights to keep or carry deadly weapons allocates risk. But that allocation, in the context of the laws chronicled here, is problematic: these capacious gun rights can serve to exacerbate the acute racial and gender hierarchies entrenched in our gun-wielding society.310 For starters, gun rights largely protect the most privileged group in America—white men, who are among the least likely to experience violence and the most likely to receive the state’s protection.311 And the laws impose the greatest harms on women and nonwhite men, and often those groups most historically disadvantaged.312 Recognizing these facts does not require denying that guns have been used by women and racial minorities as tools of self-defense and liberation at points in U.S. history, as when Black Americans during the civil rights era used firearms to fend off white supremacist violence in the face of state abandonment or acquiescence.313 Nor that some women and people of color today choose to arm themselves for


309. Michelle Degli Esposti, Douglas J. Wiebe, Jason Gravel & David K. Humphreys, Increasing Adolescent Firearm Homicides and Racial Disparities Following Florida’s ‘Stand Your Ground’ Self-Defence Law, 26 INJ. PREVENTION 187, 190 (2020); see also Victoria Bell, Note, The “White” to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to an Unequal Application of the Law for Black Gun Owners, 46 FORDHAM URB. L.J. 902 (2019) (arguing that racial bias and stereotypes infect law enforcement’s decision about whether a shooter is “reasonable” and therefore immune from arrest under stand-your-ground laws).

310. Nirej Sekhon remarks on this phenomenon with respect to Heller and McDonald. See Nirej Sekhon, The Second Amendment in the Street, 112 NW. U. L. REV. ONLINE 271 (2018). Although those rulings vindicated a race-neutral constitutional right, the Second Amendment is unlikely to help communities of color erect a bulwark against police practices justified under lax Fourth Amendment doctrine. Id. at 273 (arguing that “the Fourth Amendment affords police many opportunities” to avoid a collision with the Second Amendment, particularly in poor communities of color).

311. FRANKS, supra note 5, at 100 (“The average American has statistically very little reason to fear crime, and those at the top of the current social hierarchy have even less. Wealthy white men have never been the primary targets of violent crime, and yet it is their interests and their view of the world that now dominate not only the legal but the social understanding of self-defense. The right to self-defense has been hijacked by the gun rights movement, which in turn has been hijacked by the most privileged members of our society.”).

312. See infra notes 341–346 and accompanying text.

self-defense. But neither should those exceptional stories overshadow the social, political, and legal realities of expansive gun rights today.314

White men are the demographic group most likely to own and carry guns.315 They are also most likely to get the benefits of expanded gun rights.316 When people of color try to exercise the rights granted by these expansive laws, they often discover the tragic truth that their rights’ exercise is less protected.317 As historian Carol Anderson describes the situation during the civil rights era, “Laws protecting Second Amendment rights, such as stand your ground, open carry, and even the ‘castle doctrine’... just crumpled under the weight of anti-Blackness.”318 Contemporary events show the continued validity of this critique. Philando Castile did not get the benefit of exercising


315. In a 2019 national survey of gun owners, researchers found that more than two-thirds were men and that more than three-quarters were white. Gun owners also skewed older, politically conservative, and regionally Southern. Siegel & Boine, supra note 43, at 680; see also Philip J. Cook & Kristin A. Goss, The Gun Debate 4 (2d ed. 2020) (“Gun owners are not a representative sample of the American public.”).

316. One decidedly negative side effect of high gun ownership among white men, however, is that older white men are especially likely to use a firearm in a suicide attempt. The fatality rates when firearms are used in suicide attempts are exceedingly high. Bindu Kalesan, Laura Ann Sampson, Yi Zuo & Sandro Galea, Sex and Age Modify the Relationship Between Life Circumstances and Use of a Firearm in Suicide Deaths Across 17 U.S. States, 236 J. Affective Disorders 105 (2018); see also Matthew Miller, Steven J. Lippmann, Deborah Azrael & David Hemenway, Household Firearms Ownership and Rates of Suicide Across the 50 United States, 62 J. Trauma Inj. Infect. & Critical Care 1029 (2007) (concluding that individuals are more likely to die by suicide when they live in areas that have higher rates of household firearm ownership).

317. Annette Gordon-Reed puts the point well in describing 2020 summer protests over COVID-related restrictions:

We have recently seen white men... exercise their first-class citizenship by carrying assault rifles into the Michigan statehouse while the governor and legislature were in session, feeling safe enough in their power to get in the faces of law enforcement officers and yell. Black people do not have that kind of citizenship.

Annette Gordon-Reed, The Problem of Police Powers for People Living While Black, N.Y. Rev. Books (June 13, 2020), https://www.nybooks.com/daily/2020/06/13/the-problem-of-police-powers-for-people-living-while-black [perma.cc/Y8DM-TWZM]. Consider another case: Bresha Meadows, a Black girl, was only fourteen when she shot and killed her abusive father. She did not get the benefit of the doubt and was tried and sentenced as a juvenile. See Melissa Jeltsen, Bresha Meadows Thought You’d Understand, HuffPost (Mar. 29, 2021), https://www.huffpost.com/entry/bresha-meadows-thought-youd-understand_n_5da48081e4b087edbb23973 [perma.cc/L828-4HF7]. Girls and women subjected to domestic violence often do not get the luxury of defending their castles. See Suk, supra note 197, at 251 (“[A]xiety about extending the logic of the castle doctrine, in which a man has permission to exercise deadly force, to familial kitchens, was coded as anxiety about women’s violence—specifically wives killing husbands.”).

318. See Anderson, supra note 27, at 127.
his statutory right to carry a concealed weapon in public. He was killed for it, because a police officer saw him—a Black man—as a threat. Marissa Alexander did not get the benefit of exercising her statutory right to stand her ground. Alexander—a Black woman—was arrested for firing a warning shot after her estranged, abusive husband refused to let her leave the house and threatened to kill her. These stories and many others like them suggest that America is still, in the words of Margareth Etienne and Suja Thomas, “a country where Black civilians are not permitted to ‘use’ guns without endangering their lives.”

When these rights do get exercised, the harms they impose often fall hardest on historically marginalized groups. In the context of stand-your-ground laws, for example, a large meta-analysis of prior empirical studies concluded that, at least in Florida, white victims garner more convictions than Black ones. The analysis of Florida data also showed overall “robust increases (24%–45%) in firearm and total homicide rates” after the law went into effect. Sometimes stand-your-ground laws even serve to encourage vigilante policing and create after-the-fact obstacles to accountability for gun harms. Ahmaud Arbery’s death demonstrates the catastrophic consequences that can arise in this context. Arbery, a Black man, was shot and killed by white private policers trying to enforce their vision of law and order. In February 2020, Arbery was out for a jog through a Georgia neighborhood when several local residents spotted him. Thinking Arbery was responsible for burglaries that

320. Franks, supra note 204, at 1118–19.
321. Id.
322. Id. at 1119.
324. Yakubovich et al., supra note 203, at e7.
325. Id. at e11.
326. See ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 230 (2019) (“When coupled with the resulting stand-your-ground laws, Heller essentially grants a right to privatize the policing function of the civil state.”).
327. See Joseph Margulies, How the Law Killed Ahmaud Arbery, BOS. REV. (July 7, 2020), https://bostonreview.net/race-law-justice/joseph-margulies-how-law-killed-ahmaud-arbery [perma.cc/ESX3-DEBW] (arguing that a legal regime that “combines citizen’s arrest with permissive gun laws and ‘stand your ground’ self-defense laws” not only leads to but “sanctions the predictable murder of innocent black men, so long as the community judges it reasonable”).
328. Morgan Winsor, Christina Carrega & Sabina Ghebremedhin, Father and Son Charged with Murder of Unarmed Black Man Ahmaud Arbery in Georgia, ABC NEWS (May 8, 2020, 10:20
had recently taken place in the neighborhood, they grabbed their guns, chased him down, and shot him dead.329

Arbery’s killers, an initial prosecutor assured investigators, were lawfully carrying their loaded firearms as they went on the hunt.330 And they escaped charges for two months because local law enforcement accepted their self-serving version of the incident.331 Indeed, one of the initial prosecutors to review the case wrote an extensive memorandum justifying the shooting as lawful “self-defense” under Georgia’s stand-your-ground law.332 He described Arbery as the initial aggressor and speculated that Arbery’s “mental health records & prior convictions help explain his apparent aggressive nature and his possible thought pattern to attack an armed man.”333 Only when cell phone video of the incident became public did police arrest and charge the men.334 This kind of story should be absolutely central to a modern discussion about the privatized policing that expansive gun rights encourage and incentivize.335 It illustrates all the hallmarks of the Lockean state of nature from which citizens entering the social compact sought to escape—private judgments about rights violations (who committed a burglary) and how those violations should be punished (with guns and a death sentence) generating tragic outcomes.336

329. Id.
331. See Winsor et al., supra note 328.
334. See Winsor et al., supra note 328.
Instead of acknowledging these concerns, some scholars claim that when police refuse to do their jobs amid rioting and looting, “private citizens who enforce these laws have a better claim to be exercising the state’s monopoly of force than the police, who are engaged [in] nonfeasance.” This is a remarkable claim given what we know about stereotype threat, racialized images of crime, and the many tragic episodes strewn throughout U.S. history, including in Arbery’s Georgia, that involve private citizens enforcing their own conception of law and social order. The point here is not that gun prerogatives embodied in the expansive gun-rights apparatus will always be abused. Of course they will not. And they will no doubt even be used on occasion in socially beneficial ways to ward off attackers and protect third parties. But these rights can come at substantial cost, not just to identifiable victims like Arbery but to the social compact writ large.

Beyond stand-your-ground laws, other facets of expansive gun rights also redistribute harms to less powerful Americans. Locations that have good reason to keep guns off their property, like domestic-violence shelters, find themselves unable to do so because of parking-lot laws; gun-violence survivors and other advocates find their speech stifled, canceling their own rallies because of large pro-gun protests by those carrying firearms; students feel inhibited from robust discussion when they know guns are forced onto campus and into the classroom; urban areas that skew more diverse and that favor gun regulation are disabled from legislating by preemption laws; communities of color that seek collective protection from gun harms are barred from

338. Birt L. Duncan, Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks, 34 J. PERSONALITY & SOC. PSYCH. 590, 595–97 (1976); see also Blocher et al., supra note 302, at 107–08 (explaining the ways that guns and perceptions of criminality are racialized).
341. E.g., Erin Beck, West Virginia Domestic Violence Coalition Sues over Gun Law, REG.-HERALD (June 10, 2019), https://www.register-herald.com/news/state_region/west-virginia-domestic-violence-coalition-sues-over-gun-law/article_elb4254a-072c-5741-98c94c7f49973.html [perma.cc/C2YB-ZD4F] (“The lawsuit also states that local agencies work to keep firearms off their property not only to keep their clients and their clients’ children physically safe, but also to reassure them that they are in a safe environment. Firearms are frequently used as a mechanism of control in abusive relationships, the lawsuit notes.”).
343. Lewis, supra note 23, at 2127 (“The presence of guns inhibits students from freely exchanging ideas with each other.”).
obtaining redress from gun manufacturers by PLCAA, and those most likely to be threatened with guns in public tend to be Black Americans. The redistributive manner of statutory gun rights is not a neutral one, especially those second-wave laws that seek guns everywhere. The laws give the most empowered group in America more power and authority. They also redistribute the harms from the exercise of those rights, laying the burden most heavily on already marginalized groups.

* * *

Gun-rights activists leverage the powerful persuasive appeal of constitutional rights in seeking protection for guns in ways that current doctrine does not support. But these advocates are doing more than just employing this rhetoric for its effect; they are seeking to change and influence doctrine in the process. They succeeded in changing doctrine in Heller, but the second wave of activism pushed laws that even a broad reading of Heller does not require, such as those overriding private property rights and desiccating civil lawsuits. The rights funneled power and privilege to already powerful and privileged groups, and they simultaneously imposed quite steep harms on many groups that already lacked power and privilege. The final Part addresses some constitutional implications from this body of nonconstitutional laws.

III. ASSESSING THE DOCTRINAL EFFECTS OF BROAD GUN RIGHTS

While the primary goal of this Article is to unravel and unpack underappreciated gun rights, this final Part suggests some ways these nonconstitutional rights influence constitutional law. Perhaps surprisingly, although they are mere statutory rights, these laws have ripple effects on constitutional doctrine in several different settings. This Part first addresses how these statutory gun laws generate new contexts for understanding formal Second Amendment doctrine. It then assesses the ways that gun-rights expansionism influences, and in other ways might influence, First, Fourth, and Fourteenth Amendment doctrine.


A. The Second Amendment

Expansive statutory gun rights can influence formal Second Amendment doctrine in a number of ways, including with respect to the methodology for assessing Second Amendment challenges, the weapons protected, and the right to decline weapons. But they also undermine one of the key claims for those seeking to expand the judicial interpretation of the Second Amendment: that the right to keep and bear arms is a lowly “constitutional orphan” without respect. This Section starts there and then turns to assessing the interactions between this statutory regime and current doctrine.

1. Status

The prior Parts demonstrate how American gun rights are valorized and vaunted above countervailing concerns—even more than the formal Second Amendment, which Heller said “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” This fact is all the more striking in light of the claims arising from gun-rights quarters.

Gun-rights advocates, scholars, and—increasingly—judges have been claiming since Heller was decided that the Second Amendment is being treated as a “second-class right.” Critics have variously charged that the Second Amendment is treated as “peripheral,” “fringe,” “anachronistic,” “second rate,” and “second-class.” In support of these charges, these critics often point to the federal courts’ treatment of constitutional challenges to gun laws. It is true that the overwhelming majority of Second Amendment challenges fail. But that statistic alone says nothing about whether such rulings undervalue the right without attention to the strength of the claims asserted.

More importantly, however, is the fact that these complaints ignore the vast and expansive non–Second Amendment right to keep and bear arms. If observers want to assess the strength of gun rights in the United States today,
they cannot confine the inquiry to the formal constitutional guarantee and how state and federal courts apply doctrine under that provision. The expansive protections outside the Constitution form a crucial part of the picture. As Part I documented, state and federal lawmakers have extended gun rights into a variety of settings—public, private, educational, governmental, commercial, and more. Rights conferred under these pieces of ordinary legislation are no doubt more practically important to many gun owners and advocates than the formal constitutional guarantee. Far from being treated as second class, gun rights are undeniably first-class entitlements in America.

This recognition ought to temper the vehemence of the cries of judicial abdication. As this robust nonconstitutional apparatus suggests, one reason that court oversight might play a smaller role in the Second Amendment than in the context of other constitutional rights is that there is simply less need for it. The right to keep and bear arms is a majoritarian right, and its protection outside the Court and beyond the bounds of the Constitution appears both secure and strengthening. As John Hart Ely might underscore, the political channels are open and flourishing. The lack of Supreme Court attention and a line of cases striking laws down on Second Amendment grounds is thus not as insidious as some members of the Court would make it seem.

To be sure, the states vary in how broadly they protect gun rights, and by no means do all states adopt the most expansive provisions outlined here. And, of course, there are some states that have chosen to more strictly regulate firearms. Nearly all states, however, have adopted firm preemption regimes, none forbid concealed carry, and all are of course bound by the federal bar laid down in PLCAA. But more than the exact number of states with this or that particular law is the point that what sets the United States apart from the world in our lax treatment of private firearms is not, or at least not just, the Second Amendment; it is the wide-ranging nonconstitutional protection established across so much of the nation.

354. See EKRIDGE & FEREJOHN, supra note 38, at 2 (“As a legal matter, small ‘c’ constitutional norms and structures are realities that need to be considered when people and businesses make their plans, administrators implement laws, and judges interpret ordinary statutes and even the Constitution.”).

355. Cf. Lakier, supra note 36, at 37 (arguing that we cannot understand free speech without looking to the vast statutory protections for free-speech interests and values).

356. See Kopel, supra note 11, at 126 (“Most Americans now live in places where, every time they go to a shopping mall, a fast food restaurant, a park, or almost any other public place, they are in a location where there is a good chance that some people are lawfully carrying firearms.”).

357. Winkler, supra note 28, at 254 (“State law is embracing such a robust, anti-regulatory view of the right to keep and bear arms that the Judicial Second Amendment, at least as currently construed, seems likely to have less and less to say about the shape of America’s gun laws.”).

358. See JOHN HART ELY, DEMOCRACY AND DISTRUST 87–103 (1980) (defending a theory of judicial review that focuses on the Court’s role in policing the channels of the political process).

359. See, e.g., Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) (“If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.”).
2. Methodology

These broad statutory rights can also influence formal doctrine, such as the way that courts decide Second Amendment challenges. The Supreme Court has provided lower courts little direction on how to conduct this inquiry. Its only two substantive cases examining the right to keep and bear arms, District of Columbia v. Heller and McDonald v. City of Chicago, simply struck down the laws at issue without more guidance on methodological questions. In that absence, a two-part framework has emerged among the federal courts of appeals. Under that framework, courts first ask whether the challenged law burdens conduct protected by the Second Amendment; if it does, the courts then apply a form of means-end scrutiny dependent on the degree of the burden and the closeness of the protected conduct to the “core” Second Amendment interest in self-defense.

But there is a competing doctrinal test favored by Justice Kavanaugh (and perhaps by other conservative justices). That test uses text, history, and tradition as the sole touchstones for constitutionality. Modern laws must have a historical analogue to pass constitutional muster; novel or innovative regulations that respond to contemporary problems are unconstitutional unless the state can convince a judge that historical practice supports the law. As Judge Jennifer Walker Elrod suggested in a dissenting opinion, “Heller and McDonald dictate that the scope of the Second Amendment be defined solely by reference to its text, history, and tradition.” Other judges, always in dissent (so far), have echoed these claims.

363. Id.
364. Charles, supra note 12, at 348 (describing framework); see also Heller v. District of Columbia, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (announcing this methodology). Some observers see Justice Alito’s recent dissent in New York State Rifle & Pistol Ass’n v. City of New York, joined by Justices Thomas and Gorsuch, to also endorse this kind of test. 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting). I do not read that opinion to provide a clear view on Justice Alito’s preferred methodological approach. See id. at 1541–42 (suggesting that history alone dooms the city’s regulation, but also highlighting that the city proffered no evidence to suggest the law served public-safety goals).
367. E.g., Mai v. United States, 974 F.3d 1082, 1087 (9th Cir. 2020) (Bumatay, J., dissenting from denial of reh’g en banc) (“If operating on a clean slate, I would hew to Heller’s and McDonald’s fidelity to the Second Amendment’s history, tradition, and text.”).
But at least in some cases the regulatory tradition may be unhelpful, and not merely woefully inconclusive, because of the legal barriers erected by the type of broadened statutory gun rights outlined here. Consider that one reason *Heller* struck down the District of Columbia’s handgun ban is that it was an outlier law without equal in many parts of the nation or precedent in history. But preemption laws are at least part of the reason that so few localities instituted these laws. If localities retained their traditional authority to regulate, then perhaps many more would have enacted handgun bans and the District would not have seemed to be such an outlier. The broader point is that these legal barriers alter the historical record; the absence of gun laws on a certain topic may have nothing to do with constitutionality and everything to do with legal barriers outside the Second Amendment. To be sure, many aspects of the broadened gun-rights expanse are recent, but to the extent that the text, history, and tradition test looks to contemporary consensus to confirm history or tradition, it will be viewing an altered landscape.

3. Protected Weapons

In addition to their connection with these overarching methodological questions, expansive statutory gun rights interact with narrower methodological questions about the “arms” the Second Amendment protects. *Heller* suggested that the Second Amendment applies to weapons that are in common use by law-abiding citizens for lawful purposes. Some lower courts have considered this a “simple test” that operates as an on-off switch for full constitutional protection; if a weapon is in common use, say these courts, then a state cannot ban it. Other lower courts view the common-use test as a step-one coverage inquiry, answering only the initial question of whether or not the Second Amendment applies to a certain type of weapon, not the further question of how and whether the government can regulate it.

Courts and commentators have criticized the circularity and lack of clarity inherent in such a test. The test is circular because legal prohibitions are


370. *See, e.g.*, Fiscal v. City & County of San Francisco, 70 Cal. Rptr. 3d. 324, 326–27 (Ct. App. 2008) (striking down San Francisco’s handgun ban on the grounds that it was preempted by California law).


372. *E.g.*, Duncan v. Becerra, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019), aff’d, 970 F.3d 1133 (9th Cir. 2020) (finding that a ban on large-capacity magazines fails the *Heller* test “because they are not unusual and are commonly used by responsible, law-abiding citizens for lawful purposes such as self-defense”).

373. *E.g.*, Duncan v. Becerra, 970 F.3d 1133, 1143 & n.6 (9th Cir. 2020) (stating that the “simple test” conflicts with circuit precedent applying the two-part framework and analyzing the commonality of magazines under step one).
often the reason a weapon is not in common use. “Yet,” as Judge Frank Easterbrook described the problem, “it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned.” The test also fails to provide clarity because it does not explain how to measure commonality, what geographic boundaries or historical timeframes matter, or which uses qualify.

This Article reveals another critique of the common-use test. While it is true that regulations often limit gun availability and can therefore skew consumer choice and weapon commonality in the way Judge Easterbrook observed, statutory rights and privileges can also expand availability and influence consumer choice. Consider, in this light, the immunity conferred by PLCAA. Wholly different weapons might be available if lawsuits could proceed after gun harm occurs, including the possibilities of smart or personalized guns. The popularity of particular guns would likely be different if marketing and advertising were subject to litigation in the same way that, say, automobile and medical-device marketing are. In other words, courts should not assume that the guns bought and possessed are a reflection of pure market forces unaffected by the broad and expansive gun-rights regime.

4. Unkeeping Arms

Finally, aggressive gun rights take away private and local control in ways that may actually raise their own constitutional questions. Under these laws, local governments cannot decide when, where, and how to limit guns; many businesses cannot decide to be gun-free workplaces; and universities and colleges do not have the right to dictate their own weapons policies. Even expansive concealed-carry rights “make it more difficult for private parties to keep guns out of their homes and off their property.”

In commanding these choices, broad statutory gun rights abut another powerful tradition exemplified in the right not to keep and bear arms. And that decision is arguably constitutionally protected. Joseph Blocher argues that just as the Constitution recognizes rights not to engage in other forms of constitutional activity, the Second Amendment should include the freedom not to keep and bear guns. So, for example, laws that require a property owner to allow others to bring guns onto the owner’s property are infringing the interest the owner has in exercising her right not to keep and bear arms.

374. Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) (“A law’s existence can’t be the source of its own constitutional validity.”).
375. Blocher & Miller, supra note 17, at 89 (describing and critiquing the test).
376. Lytton, supra note 154, at 7–8 (describing pre-PLCAA theories of liability based on the absence of safety features).
377. Id. at 8–11 (describing pre-PLCAA theories of liability based on negligent marketing).
379. Id. at 4.
380. Id. at 41–45.
Businesses might also possess this right. So, too, argue Dave Fagundes and Darrell Miller, should local governments. In a recent article, they argue that cities can hold rights, even against their states, and that one such right is the Second Amendment right to decide gun policies on their own. For example, on a strong view of their theory, a city would be allowed to keep concealed-carry permit holders out of its public library even if state law would otherwise grant access there. The trajectory of the broadened statutory gun rights outlined in Part I shows just why these constitutional interactions are becoming increasingly fraught.

B. Other Constitutional Implications

These sprawling gun laws complicate not just Second Amendment doctrine, which is not wholly surprising, but also First, Fourth, and Fourteenth Amendment doctrine as well.

1. The First Amendment

Broadened gun rights, and especially public carry rights, have the potential to reorient First Amendment doctrine. There are scores of stories over the past several years about activists protesting with guns. In Charlottesville in 2017, white nationalists marched with openly displayed firearms to protest removal of a Confederate statue. In Michigan in 2020, armed protestors stormed the state capitol to protest COVID-related closure orders. The frequency of these appearances seems to be increasing. "In the United States," writes Timothy Zick, "public protests, demonstrations, rallies, and marches have become armed events." These changes cannot be fully understood apart from the gun-rights expansionism occurring over the last several decades and documented in Part I. Laws expanding the right to carry in public

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381. Id. (discussing business rights to resist parking-lot laws); see also Darrell A.H. Miller, Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights, 86 N.Y.U. L. REV. 887, 931–46 (2011) (outlining the arguments over corporate Second Amendment rights).


383. Id. at 728.

384. Id. at 732–33 (discussing a hypothetical decision by Houston, Texas, to maintain public safety in this way).


387. Zick, supra note 385, at 224.

388. To be sure, many of the concerns over guns at protests stem from open carry, not concealed. But the rise of an open-carry movement is itself related to and an important part of
into an ever-larger number of arenas have led to calls from gun-rights proponents to protect the right to armed assembly.389

A number of scholars have recently begun to assess the claims that the First Amendment protects some form of armed protest.390 The mere existence of this scholarship shows how broadened statutory gun rights influence the development of constitutional doctrine. Today, the relationship between gun rights and free speech cannot be ignored. After the ACLU represented white nationalists in securing their spot for the Charlottesville rally, the organization came under fire for the day’s tragic events.391 It announced that, in the future, it “would consider the potential for violence at the event and whether protesters were going to be carrying firearms” in determining prospective representation.392 The ACLU now argues that the First Amendment does not restrict a neutral, evenly applied rule barring guns from protests.393

Some scholars agree. Michael Dorf, for example, argues that the First Amendment does not protect armed gatherings, and neither does a hybrid synergy between the First and Second Amendments.394 A right to publicly bear arms and a right to peaceably assemble do not combine to create a right to gather with guns.395 Other scholars, however, suggest that “in very narrow circumstances, the act of carrying a firearm, as well as the act of assembling with others for that purpose, might be an act of expression protected by the First Amendment.”396 That does not, of course, mean that the right prevails against government regulation, but it does mean the Constitution comes into

389. Zick, supra note 385, at 226 ("[Recent gun-related] legislative trends, along with an open carry movement that urges its members to display firearms in public places, lie at the center of the phenomenon of arming public protests.").


392. Id.


394. Dorf, supra note 386, at 22.

395. Id.

396. Zick, supra note 385, at 228.
play. This debate illustrates the ways that the right to carry in public interacts with and influences constitutional doctrine. Debates about the expressive act of gun carrying are now relevant in ways they would not have been in a world without extensive statutory gun rights.

2. The Fourth Amendment

Another area where broad carry rights unsettle legal doctrine is in the context of the Fourth Amendment. With the broad, but not constitutionally mandated, deregulation of public carry laws and the push for guns in more locations, law enforcement practices and constitutional doctrine have had to adjust. Under Terry v. Ohio and its progeny, police can stop a person upon reasonable suspicion that she was or is about to be involved in criminal activity and frisk her if they believe she is armed and dangerous. Broad gun rights require recalibration of both the stop and the frisk elements. Whereas mere public possession of a firearm used to be sufficient to satisfy the low bar for suspicion of a crime to justify a stop, the changing legal landscape of the past several decades cuts off that inferential leap. As a result of increasingly common legal public carry, more than the presence of a firearm is now required to justify a Terry stop. For example, in a 2018 case, in an opinion by then-Judge Amy Coney Barrett, the Seventh Circuit held that a call reporting boys "playing with guns" did not give officers reasonable suspicion to justify a stop: "[T]he caller’s report in this case about the presence of guns did not create a reasonable suspicion of an ongoing crime, because carrying a firearm in public is permitted with a license in Indiana."
Courts have also had to grapple anew with the second half of *Terry*: even if a stop is warranted, what satisfies the *Terry* frisk standard that the officer believe a suspect to be “armed and dangerous”? Courts have disagreed over whether the standard permits an inference that an armed person is for that reason dangerous. For the Fourth Circuit, being armed is enough, because “the risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed.” But not all jurists agree. In a dissent from that en banc decision, Judge Pamela Harris noted the difficulty that loosened gun laws cause for Fourth Amendment doctrine. After noting how gun-carry laws have relaxed rapidly over the decades, she argued that “as behavior once the province of law-breakers becomes commonplace and a matter of legal right, we no longer may take for granted the same correlation between ‘armed’ and ‘dangerous.’”

How one evaluates these developments depends on one’s underlying views about law enforcement authority, the role of guns, and the Fourth Amendment’s protections. But the point for this Article is that as gun rights have expanded, constitutional doctrine has had to adapt.

3. The Fourteenth Amendment

Finally, another doctrinal implication concerns the Fourteenth Amendment’s promise of equal protection of the laws. Current Supreme Court doctrine excuses the state from an obligation to provide police protection to specific individuals (via the public duty doctrine) and from requiring the government to answer for the harms of private parties (via the state action doctrine). But these doctrines have received sustained scholarly criticism, police officers (and some motorcyclists) in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every ‘gunman’ who lawfully possesses a firearm.”

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407. Broughton, *supra* note 400, at 382 (describing and exploring the complications that liberalized gun law cause for *Terry* frisks).

408. United States v. Robinson, 846 F.3d 694, 701 (4th Cir. 2017) (en banc) (holding that officers who had lawfully initiated a stop could conduct a frisk based on the mere suspicion the suspect was armed without a separate inquiry into dangerousness); see also United States v. Pope, 910 F.3d 413, 416–17 (8th Cir. 2018) (agreeing with Robinson and rejecting an argument to ignore Supreme Court cases allowing weapons frisks on the grounds that “the Court decided them in an era in which criminals were the primary carriers of guns and thus almost always dangerous”).

409. Robinson, 846 F.3d at 707 (Harris, J., dissenting).

410. Id.; see also Barondes, *supra* note 388, at 3 (arguing that a *Terry* frisk is not authorized based on the mere presence of a weapon).


412. See, e.g., United States v. Cruikshank, 92 U.S. 542 (1876) (holding that a private mob taking away people’s guns does not violate the Second Amendment); The Civil Rights Cases, 109
and the expansive laws in this Article may provide another reason to rethink them.413

Evan Bernick, for example, has recently argued that the original public meaning of the Fourteenth Amendment includes a privately enforceable right to government protection from private violence.414 Even when the government is merely passive, Bernick contends, the government violates the Fourteenth Amendment’s promise of equal protection where its failure results in citizens’ lack of safety or security.415 “The broad language of the Clause and discourse surrounding it evinces a spirit that condemns all state and non-state conduct that enables some to control the lives, bodies, and possessions of others . . . .”416 Thus, even in the absence of what we would commonly identify as affirmative government discrimination, the state’s failure to stop one person or group from dominating another violates the state’s obligation to provide the law’s protection.

Expansive gun rights do not just fail to restrain private violence but can actively abet the subjugation that Bernick contends the Fourteenth Amendment’s framers were most concerned with. Enlarging the bundle of gun rights allows some to subjugate others, often the most marginalized groups.417 Despite the Fourteenth Amendment’s promise, writes Randall Kennedy, “governments have failed, often by design, to protect blacks from racially motivated violence by whites” and “failed, often by design, to protect blacks from ‘ordinary’ criminality, much of it perpetrated by blacks.”418 The Equal Protection Clause has often not generated much help for people of color victimized by private violence.

Gun-rights proponents might respond that permitting broad gun rights is how the state encourages and enables private citizens to protect themselves from private violence. Allowing a person to arm herself in any place is the way to combat victimization, the argument would run. Though settling the empirical question over the social utility of gun rights is beyond the scope of this Article, the examples and data about some of the more permissive gun regimes

415. Id. at 47.
416. Id. at 51-52.
417. See Chad Kautzer, Good Guys with Guns: From Popular Sovereignty to Self-Defensive Subjectivity, 26 LAW & CRITIQUE 173, 174 (2015) (“The rapid liberalization of open- and concealed-carry laws, the proliferation of guns in public spaces and institutions, the reinterpretation of the Second Amendment of the US Constitution, and the abstraction and individuation of the Castle Doctrine in Stand Your Ground laws all contribute to the legalization of nonstate violence to defend extra-legal relations of domination.”).
leave cause for concern. And in either of these scenarios—whether the state owes a duty to diligently safeguard private gun bearing to allow citizens to fight back private violence or owes a duty to restrain private gun bearing to decrease harm—a Fourteenth Amendment duty to prevent private violence might come into the picture.

One especially troublesome development in this regard is a proposal that Florida governor Ron DeSantis made to expand the state’s stand-your-ground law in the midst of 2020’s antiracism protests. DeSantis proposed, as part of a slate of what he called “anti-mob legislation,” to expand the list of felonies that a citizen could, while standing her ground, use deadly force to prevent.419 He proposed adding a right to kill to prevent “looting, criminal mischief[,] and arson ‘that results in the interruption or impairment of a business operation.’ “420 If the scholars on the Fourteenth Amendment’s right to government protection are correct, then the Constitution should not be silent when the government allows subjugation or where, as here, the state encourages it. The widening net of gun rights makes this question all the more urgent.

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Although the laws chronicled in this Article rely for their rhetorical force on their connection with the Second Amendment’s formal guarantee, they are statutory rights subject to ordinary majoritarian decisionmaking. Despite that status, gun laws influence constitutional doctrine in several spheres. They distort Second Amendment doctrines, direct attention to new theories of First Amendment expression, disrupt Fourth Amendment case law governing police-citizen interactions, and demand that Fourteenth Amendment promises to equal protection be taken seriously. This Part only scratches the surface of these doctrinal connections, but these areas are ripe for future study, especially given the trend in gun-rights expansionism.

CONCLUSION

What Americans have the right to do with guns today flows less from the text or judicial interpretation of the Second Amendment than from the wide-ranging set of entitlements codified in federal, state, and local statutes and regulations. This set of statutory gun rights is often rhetorically justified in the language of constitutional rights, but it differs profoundly from the protections the Constitution provides. It grants affirmative privileges and broadly serves to redistribute the risks of violence in society.
This Article is the first to comprehensively explore the nature, evolution, and impact of this expansive set of laws. These laws began to pick up mounting support in the 1980s as a new and energetic gun-rights movement gained political power. That initial advocacy sought to distance gun owners from government. It pushed for preemption laws that would take regulatory power away from local governments and relaxed concealed-carry laws that unfettered gun owners to carry in public. The next, more aggressive, phase took off in the early 2000s. Movement advocates did not seek distance from government but its support. Government became a tool to bludgeon the businesses, lawyers, universities, physicians, and others who intruded on gun owners’ prerogatives.

These extensive rights bring potential for a unique kind of harm beyond gun injuries and death. The rights to transport and carry guns into an ever-expanding arena, to threaten and use force even when retreat can be had with complete safety, to disregard the views of university colleagues or professional coworkers—these rights can be toxic to civic health. They tutor us to respond to every situation as a threat. Menacing rhetoric by gun-rights proponents “paint[] what many regard as a grim and dystopian world of mutual, armed suspicion.”421 Individuals are led to believe that threats exist everywhere, and thus that guns are needed everywhere; fellow citizens are reduced to potential aggressors.422 In the language of the gun-rights movement, everyone is either a wolf, a sheepdog, or a sheep—a threat, a protector, or someone who needs protecting.423 This is not a recipe for a thriving society based on fundamental notions of equal respect and concern.424

The broadened gun-rights regime has the potential to minimize or erase the distinct harms that guns can cause.425 Guns can threaten and intimidate in contexts in which a trigger is never pulled, from open-carry activists chilling speech or voting rights to guns used as a tool of coercive control in abusive


422. See Gruber, supra note 197, at 985 (observing that stand-your-ground laws “can also be critiqued as stemming from the risk ideology that we are all besieged by an omnipresent criminal force”).

423. See CARLSON, supra note 196, at 66 (“Parsing people into the heroic, the cowardly, and the wicked, many gun carriers explicitly identified themselves as ‘sheepdogs’ who protect the ‘sheep’ from the ‘wolves.’ “). An alternative vision is to see people as multifaceted and complex individuals. Sometimes we harm others, and sometimes we are harmed. Sometimes we protect others, and sometimes we need protecting. Creating siloed dispositional buckets in which to deposit sets of people oversimplifies human personality.


relationships.\textsuperscript{426} Laws regulating firearms have traditionally served not just to protect physical safety but to “protect people’s freedom and confidence to participate in every domain of our shared life, whether to attend school, to shop, to listen to a concert, to gather for prayer, to vote, to assemble in peaceable debate, to count electoral votes or to participate in the inauguration of a President.”\textsuperscript{427} This understanding is increasingly important in contemporary America, where at least an order of magnitude more people are threatened with guns each year than killed with one.\textsuperscript{428}

Expansive gun rights are a choice. Whatever might be said about the right \textit{Heller} announced, these statutory privileges are not frozen in constitutional amber. They reflect not the Founders’ cost-benefit analysis, but our own.\textsuperscript{429} And because these laws are not grounded in constitutional text, the Founders cannot be blamed for the harms they cause.

\textsuperscript{426} Joseph Blocher & Reva B. Siegel, Essay, \textit{When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller}, 116 NW. U. L. REV. 139 (2021). Talia Lavin describes how pro-gun rallies, like those in Richmond, Virginia in January 2020 are often described as “peaceful” if no one is shot. But that framing belies the other types of harms that massive amounts of weaponry in the midst of a protest can have: “There is a difference between peace that consists of calm and security, and the false peace of being held under threat. One may be silent when held at gunpoint, but it is not the silence of contentment; it is the silence of mortal terror.” Lavin, supra note 342.

\textsuperscript{427} Blocher & Siegel, supra note 426, at 141.

\textsuperscript{428} See VARGAS & BHATIA, supra note 346, at 2 (“[I]n addition to the 103 victims killed and the 210 victims injured with a gun every day, at least another 1,100 victims are threatened with a gun during a violent crime.”).