

# THE CITY'S SECOND AMENDMENT

*Cities are increasingly common sites of contestation over the scope and meaning of the Second Amendment. Some municipalities have announced their opposition to firearm restrictions by declaring themselves Second Amendment sanctuaries. Others have sought to curtail gun violence by passing restrictive local regulations. Still others have responded to police violence by moving to demilitarize, disarm, or even disband their police forces. The burgeoning post-Heller legal literature, though, has largely overlooked the relationship between cities, collective arms bearing, and the Second Amendment. In sum, to what extent do cities themselves have a right to keep and bear arms? This Article tackles that question. The Article contests the proposition that cities are bereft of constitutional rights in general, or against their states in particular. The Article challenges this notion by showing that the constitutional invisibility of municipal corporations is rooted in an outdated notion of the city as an artificial entity. The Article then turns to the Second Amendment, questioning the conventional wisdom that it provides solely a libertarian, individual bulwark against state restriction. The Article shows that in fact the right to keep and bear arms has an important collective dimension that promotes safety, and that the city is historically and institutionally situated to advance this Second Amendment feature. Finally, the Article examines how these two insights operate in practice, first by outlining the substantive contours of the city's Second Amendment, and then by applying the model to contemporary controversies in firearm regulation such as guns in schools, concealed carry, Second Amendment sanctuaries, and the federal Law Enforcement Officers Safety Act. In addition to advancing the novel claim that cities themselves may assert rights to keep*

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and bear arms, the Article also adds to the growing literature on municipal constitutional rights and the institutional framing of the Second Amendment in a post-Heller world.

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INTRODUCTION

Second Amendment cases and commentary alike focus almost exclusively on individual arms bearing. Yet in an increasing number of contemporary contexts, local governments have used legislation and policy statements to assert their own, independent interest in the right to keep and bear arms. In New Hampshire, after the governor vetoed a statewide gun-free school bill, one local district banned all firearm possession in school buildings and on buses by anyone other than the police.<sup>1</sup> In Seattle, Washington, city police officers sued the city, claiming it had infringed upon their Second Amendment rights to keep and bear (government-issued) arms by entering into a

<sup>1</sup> Rick Ganley & Mary McIntyre, *N.H. School District Bans Guns from Buildings and Buses*, NHPR (Oct. 29, 2019), <https://www.nhpr.org/post/nh-school-district-bans-guns-buildings-and-buses#stream/0> [<https://perma.cc/W54V-7RN2>].

consent decree governing use of force.<sup>2</sup> And amidst the racial reckoning sweeping America after the killing of George Floyd, some cities have considered (or reconsidered) demilitarizing, disarming, or disbanding their police.<sup>3</sup>

The implications of a city's right to keep and bear arms do not always fall on the side of gun regulation. Local governments, especially smaller towns and rural counties in blue states, may want to be more gun-friendly despite state restrictions. Some school districts have sought to arm their teachers.<sup>4</sup> Some localities have declared themselves "Second Amendment sanctuaries" and passed resolutions vowing to resist state laws they think curb gun rights.<sup>5</sup> Some local govern-

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<sup>2</sup> Mahoney v. Sessions, 871 F.3d 873, 876–77 (9th Cir. 2017).

<sup>3</sup> See, e.g., Amy Forliti & Steve Karnowski, *Minneapolis City Council Unanimously Approves Proposal to Disband Police*, TIME (June 26, 2020, 12:02 PM) <https://time.com/5860172/minneapolis-city-council-eliminate-police-george-floyd/> [https://perma.cc/DUZ4-HE8T] (reporting that the Minneapolis City Council voted to allow dismantling of police force); see also Mélissa Godin, *What the U.S. Can Learn from Countries Where Cops Don't Carry Guns*, TIME (June 19, 2020, 6:18 AM), <https://time.com/5854986/police-reform-defund-unarmed-guns/> [https://perma.cc/QX7Q-39WA] (same); Max Marcilla, *Charlottesville City Council Passes Police Demilitarization Measure, Discusses Other Reforms*, NBC 29 (July 20, 2020, 10:38 PM) <https://www.nbc29.com/2020/07/20/charlottesville-city-council-passes-police-demilitarization-measure-discusses-other-reforms/> [https://perma.cc/K47L-Z4PL] (reporting that the Charlottesville City Council passed a resolution prohibiting the police department from receiving military weapons or training from the military); *Minneapolis Mayoral Candidate Raymond Dehn Proposes Disarming Police of Guns*, FOX 9 (July 25, 2017), <http://www.fox9.com/news/minneapolis-mayoral-candidate-raymond-dehn-proposes-disarming-police-of-guns> [https://perma.cc/6VPF-BRD8] (describing a mayoral candidate's calls for disarming police). For academic commentary on this point, see Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. (forthcoming 2021).

<sup>4</sup> See, e.g., Mead Gruver, *Wyoming District Allows Armed Staff in Area Cited by DeVos*, ASSOCIATED PRESS (Apr. 18, 2018), <https://apnews.com/cbdb18dd45994ad2b8175f47dbc50a32/Wyoming-district-allows-armed-staff-in-area-cited-by-DeVos> [https://perma.cc/XKK6-C52S] (reporting that the Park County School District voted to carry concealed guns in schools); Elizabeth Hernandez, *At Least 30 Colorado School Districts and Charter Schools Allow Teachers to Carry Guns, but No Statewide Training Standards Regulate Them*, DENVER POST (July 9, 2018, 5:57 AM), <https://www.denverpost.com/2018/07/08/colorado-teacher-guns-schools-classroom/> [https://perma.cc/LE44-W7R2] ("Based on Colorado law, school boards could designate teachers and staff as school security officers permitted to carry a concealed weapon on campus without ensuring training."); Jason Thomson, *Colorado School District to Equip Security Workers with Semiautomatic Rifles*, CHRISTIAN SCI. MONITOR (Apr. 19, 2016), <https://www.csmonitor.com/USA/2016/0419/Colorado-school-district-to-equip-security-workers-with-semi-automatic-rifles> [https://perma.cc/EA7G-J9TW] ("Teachers in Utah are free to arm themselves, and during the state's October break from school, the Utah Shooting Sports Council offered free concealed weapons classes to 20 teachers.").

<sup>5</sup> See, e.g., John M. Glionna, *In Needles, A Sanctuary for Gun Owners—and 'a Little Jab in the Eyes' for California*, S.F. CHRON. (July 31, 2019, 4:36 PM), <https://www.sfchronicle.com/news/article/In-Needles-a-sanctuary-for-gun>

ments have even toyed with the idea of deputizing private citizens in their jurisdiction.<sup>6</sup>

These local gun policies—whether expansive or restrictive—often run afoul of state law. New York state law preempts local authority to arm teachers.<sup>7</sup> Georgia legislation prevents city police from questioning armed individuals about their gun licenses.<sup>8</sup> More than half of the states require municipalities to permit individuals to carry firearms within city limits, even when those individuals have little to no training on how to use them.<sup>9</sup> Still other states prevent cities from banning personal

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owners-and-14271396.php [https://perma.cc/L333-9Y8L](stating that Needles, California declared itself a “Second Amendment Sanctuary City”); Jennifer Mascia, *Second Amendment Sanctuaries, Explained*, TRACE (Jan 14, 2020), <https://www.thetrace.org/2020/01/second-amendment-sanctuary-movement/> [https://perma.cc/MJ9F-5C4F] (“More than 400 municipalities in 20 states have now passed resolutions opposing the enforcement of certain gun laws passed by state or federal lawmakers.”); Kieran Nicholson, *City Council in Commerce City Approves Resolution as Second Amendment Sanctuary City*, DENVER POST (June 4, 2019, 5:26 PM), <https://www.denverpost.com/2019/06/04/commerce-city-second-amendment-sanctuary-city/> [https://perma.cc/VW5B-GBR6] (reporting that the Commerce City Council passed a resolution declaring itself a Second Amendment sanctuary city); Noah Shepardson, *America’s Second Amendment Sanctuary Movement Is Alive and Well*, REASON (Nov. 11, 2019, 4:00 PM), <https://reason.com/2019/11/21/americas-second-amendment-sanctuary-movement-is-alive-and-well/> [https://perma.cc/G9WR-6FW7] (“[G]enerally, Second Amendment sanctuaries refuse to dedicate resources to enforcing things like ‘red flag’ laws and bans on certain weapons.”). For a sustained academic discussion of this topic, see generally Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437 (2020).

<sup>6</sup> See Caleb Stewart, *Virginia Sheriff Vows to Deputize Citizens If Gun Laws Pass*, WHSV (Dec. 9, 2019 2:18 PM), <https://www.wHSV.com/content/news/Virginia-sheriff-vows-to-deputize-citizens-if-gun-laws-pass-565981991.html> [https://perma.cc/66DM-WEQK]; see also Christina Maxouris, *A Florida Sheriff Said He Will Deputize Lawful Gun Owners If Protests Turn Violent*, CNN (July 2, 2020, 3:10 PM), <https://www.cnn.com/2020/07/02/us/florida-sheriff-deputize-gun-owners-trnd/index.html> [https://perma.cc/GTJ2-KFSJ] (reporting that a Florida sheriff said he would deputize lawful gun owners if there were violent protests in his county).

<sup>7</sup> See, e.g., Michael Gold, *Teachers Barred from Carrying Guns in New York Schools*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/nyregion/guns-schools-ban-teachers-ny.html> [https://perma.cc/VCX6-J3ZY] (reporting that New York passed a bill banning school districts from allowing teachers to carry guns in schools).

<sup>8</sup> See GA. CODE. ANN. § 16-11-137(b) (2020) (“A person carrying a weapon shall not be subject to detention for the sole purpose of investigating whether such person has a weapons carry license.”).

<sup>9</sup> Jennifer Mascia, *26 States Will Let You Carry a Concealed Gun Without Making Sure You Know How to Shoot One*, TRACE (Apr. 17, 2017, 11:37 AM), <https://www.thetrace.org/2016/02/live-fire-training-not-mandatory-concealed-carry-permits/> [https://perma.cc/D92M-N7WS] (“Just 24 states and the District of Columbia include mandatory range time as part of their permitting process, while the remaining 26 have no such requirement in place.”).

firearms in government buildings, council meetings and even police stations.<sup>10</sup>

In each of these cases, the state preempts the local government's interest in its own, or its citizens' collective, arms bearing. If these municipalities were private corporations, and the state government had dictated that the corporation arm or disarm its agents, a court would need to address some threshold questions. Does this corporate entity have constitutional rights? Does the right to keep and bear arms extend to the corporate entity?<sup>11</sup> What kind of burdens can be placed on them if so? One of us has explored private corporate arms in a prior work.<sup>12</sup> We now address the issue when the corporation is not private, but municipal.

The city's distinct role in setting weapons policy has been a feature of the law for over seven centuries.<sup>13</sup> Still, disputes over arms bearing within the city are typically assessed along one dimension, with individual rights on one side of the ledger and a general police power on the other. Cities often lose these fights, either because the city's regulation runs afoul of federal or state rights to keep and bear arms, or, more often, because the state preempts the local law. Either way, the city's interest in arms bearing is typically considered incidental to its more general power to protect health and safety. We challenge that conventional framing and address the city's interest in *its own*

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<sup>10</sup> See *Location Restrictions*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/location-restrictions/#buildings> [<https://perma.cc/LJ9C-V73S>]; Amy B. Wang, *Open-Carry Advocates Walked into a Police Station with a Loaded Rifle. Officers Were Not Amused.*, WASH. POST (Feb. 7, 2017, 4:21 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/02/07/open-carry-advocates-walked-into-a-police-station-with-a-loaded-rifle-officers-were-not-amused/> [<https://perma.cc/RHC2-JECA>].

<sup>11</sup> In *Second Amendment Arms v. City of Chicago*, the U.S. District Court for the Northern District of Illinois assumed business corporations have Second Amendment rights. 135 F. Supp. 3d 743, 761 (N.D. Ill. 2015). Judge Dow wrote, "Absent any clear or precedential guidance on the issue, the Court is persuaded by the longstanding line of cases recognizing the rights afforded to corporations in the First and Fourth Amendment contexts. Based on that ever-growing body of law, it seems inevitable that the same principles will hold true in the Second Amendment context." *Id.* But see *Leo Combat, LLC v. U.S. Dep't of State*, No. 15-cv-02323-NYW, 2016 WL 6436653, at \*10 (D. Colo. Aug. 29, 2016) ("[A]ny rights extended to a corporation under the Second Amendment are dependent upon the entity's ability to assert *individual* rights of third-parties on their behalf.").

<sup>12</sup> See generally Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011).

<sup>13</sup> See 2 Edw. c. 3 § 320 (1328) (Eng.) (giving power to "Mayors and Bailiffs of Cities and Borough[s]" to stop people from carrying weapons in "Fairs [and] Markets, [or] in the presence of the Justices or other Ministers, [or] . . . elsewhere"); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 84–85 (2013).

arms bearing. More provocatively, we explore how a city can assert a constitutional right to keep and bear arms.

Beyond its core claim that the city has Second Amendment rights, this Article contributes to the literature on municipalities and public law in two ways. First, it adds to the scholarship on municipal constitutional rights. Municipalities and local governments regularly participate in the legal system as both plaintiffs and defendants, but the law has not yet developed a coherent theory of their legal status. Rather, local governments fade in and out of doctrine depending on the rhetorical or institutional demands of the particular court in the particular case. We use the Second Amendment rights of cities as a launching point to highlight the need for a coherent common law of municipal legal personality and to outline some options for what such a doctrine may look like. Second, this Article contributes to post-*District of Columbia v. Heller* theorizing about the Second Amendment by discussing the right to keep and bear arms within an institutional framework. *Heller* unsettled the one corporate body—the organized militia—that had structured the right to keep and bear arms for centuries. This Article advances a model of the city as a collective governance structure whose purpose is self-protection. This purpose, in turn, provides institutional context for the city’s right to keep and bear arms in a post-*Heller* world.

Part I situates municipalities as rights-bearing entities. We challenge the conventional wisdom that municipalities can claim no constitutional rights, and certainly none against their states, because they are mere “arms” or “agents” of the state. This artificial entity theory of the city does not reflect the sociological reality of the modern municipal corporation or command consistent treatment in constitutional adjudication. Part II approaches the question of the city’s right to keep and bear arms, not from the perspective of the entity, but from the perspective of the right. It questions the commonly held notion that the Second Amendment right to keep and bear arms for self-defense is solely personal. It explores the nature of the right to keep and bear arms and shows that the right—before and after *Heller*—contemplates some kinds of collective behavior. This Part explains why it is necessary to re-frame the Second Amendment’s core value as safety, not self-defense simpliciter, and relates that purpose to the historical role of the city as supplier of armed internal security. It conceives the city’s function—perhaps its primary function—as an institution designed for public safety and collective self-preservation.

Part III turns to the practical implications of this approach, examining how modern controversies about firearm regulation would look if seen through the prism of the city's Second Amendment.

## I

### CITIES AS RIGHTS BEARERS

Courts and commentators alike regularly assert that municipal governments can claim no constitutional rights against their states, including any rooted in the Second Amendment. Courts often unreflectively treat municipal corporations as mere agents of state government, to be created or discarded at the whim of the legislature, unless the state curbs its own power through legislation or state constitutional amendment. Certainly, if cities cannot assert any constitutional protections against their states, it would render the claim that they can invoke the right to keep and bear arms a non-starter. In this Part, we challenge this long-accepted view of cities as constitutional nonpersons. We critique this notion by exploring the flawed foundations of modern jurisprudence about the constitutional status of the municipal corporation as a rights bearer. This analysis shows that cities should play a central, rather than a peripheral, role in constitutional discourse, and invites further scholarly discussion about the legal personhood of municipal entities.

#### A. *Hunter* and Cities as Artificial Entities

The notion that municipalities have no rights against their states—conventionally called the *Hunter* doctrine (after the 1907 Supreme Court case *Hunter v. City of Pittsburgh*<sup>14</sup>) is a familiar fixture of American public law. In *Hunter*, the Court articulated a doctrine of plenary state power over municipal corporations: “The State . . . at its pleasure, may modify or withdraw all . . . powers [from the city], may take without compensation [the city’s] property, hold it itself, or vest it in other agencies, expand or contract the [city’s] territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.”<sup>15</sup> And, lest there be any doubt of the scope of this authority, *Hunter* decreed that all these acts could be done without conditions, no matter what the consequences, and heedless of the protest of the city, or

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<sup>14</sup> 207 U.S. 161 (1907).

<sup>15</sup> *Id.* at 178–79.

any of its inhabitants.<sup>16</sup> When it comes to municipal corporations “the State is supreme” and the federal Constitution is absent.<sup>17</sup>

States regularly invoke *Hunter* to quash any claim a municipal government may have against a state regulation. Courts tend to cite this principle reflexively, without questioning the doctrine’s descriptive accuracy or its legal justification. In this subpart, we do just that, and show that the *Hunter* doctrine relies on an outdated account of the role cities play in the scheme of government and the lives of their residents, both as a sociological matter and as a doctrinal one. Once *Hunter*’s legal scaffolding falls away, the plausibility of a rights-bearing municipal corporation becomes apparent.

The roots of the *Hunter* doctrine extend down to the Court’s earliest decisions on corporations. Initially, courts did not distinguish between private and municipal corporations.<sup>18</sup> The law regarded the two as more alike than different, and courts typically proceeded on the assumption that the same rules of law governed both.<sup>19</sup> That basic notion tended to be extremely restrictive. This approach, which modern scholars term the artificial entity theory, posited that all corporations were no more than creatures of the state, and owed their entire existence to the charters that created them. According to Justice Marshall in *Trustees of Dartmouth College v. Woodward*, a corporation is an “artificial being, invisible, intangible, and existing only in contemplation of law. . . . [The corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very

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<sup>16</sup> *Id.* at 179.

<sup>17</sup> *Id.*

<sup>18</sup> HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 185 (1983). The distinction that concerned courts in the early American republic was between chartered entities (cities and corporations) and unincorporated ones (towns and counties). Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 399 (2013).

<sup>19</sup> See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1095 (1980) (“Since the important English cities were corporations indistinguishable as a legal matter from any other commercial corporation, English law naturally treated the question of the power of cities as being synonymous with that of the power of corporations.”). That is not to say that courts and scholars were not aware of the formal differences between different corporations, only that they did not regard them as having the same implications that they have today. James Kent, for example, articulated in his early treatise on American law a number of distinctions between different kinds of corporations: lay and ecclesiastical; eleemosynary and civil; and public and private. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 221–22 (1827).



existence.”<sup>20</sup> So conceived, a corporation had no cognizable legal status, and certainly no rights, other than what its charter explicitly granted.

The artificial entity theory regarded all corporations as “creatures of sovereign dispensation.”<sup>21</sup> States extended the privilege of a charter only in exchange for some social benefit. Typically, they required corporations to undertake some public-regarding service or maintain some kind of common resource.<sup>22</sup> For chartered cities, the public purpose was plain enough: the state used the municipality to order its internal affairs. The artificial entity theory for all corporations, municipal and private, presumed a quid pro quo: Because corporations existed at the pleasure of the state, the state could impose conditions on, exact demands of, and reserve power from them.<sup>23</sup>

The legal status of private and public corporations began to diverge early in the nineteenth century. In *Terrett v. Taylor*,<sup>24</sup> the Supreme Court affirmed that even though private corporations were artificial entities, states could not divest them of property “without the consent or default of the corporators.”<sup>25</sup> The Court stressed, though, that these same protections did not extend to municipal corporations. Rather, state legislatures remained free to “change, modify, enlarge or restrain” such public corporations, so long as they did not interfere with any individual’s private property.<sup>26</sup>

In *Dartmouth College*, the Court went a step further. *Dartmouth College* considered whether the Contracts Clause barred the state of New Hampshire from reorganizing a chartered corporation, Dartmouth College, and transferring its property to a newly formed board of trustees.<sup>27</sup> The Court upheld the challenge to the state’s action, and central to its holding was its conclusion that the College had been chartered as a private, not a public institution. The Contracts Clause, the Court held, restrained state legislatures from impairing “contracts respecting property, under which some individual could

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<sup>20</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>21</sup> *Miller*, *supra* note 12, at 916.

<sup>22</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 132 (3d ed. 2005).

<sup>23</sup> *Trs. of Dartmouth Coll.*, 17 U.S. at 708 (Story, J., concurring) (discussing ability of the state to reserve corporations’ power to contract through chartering); see Larry Ribstein, *Why Corporations?*, 1 *BERKELEY BUS. J.* 183, 209 (2004).

<sup>24</sup> 13 U.S. (9 Cranch) 43 (1815).

<sup>25</sup> *Id.* at 52.

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

<sup>27</sup> *Trs. of Dartmouth Coll.*, 17 U.S. at 628–30.

claim a right to something beneficial to himself.”<sup>28</sup> However, the Clause “did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government.”<sup>29</sup> The Court did not limit its holding to the Contracts Clause, though. Rather, it stated that because municipalities are “employed in the administration of government . . . the legislature of the State may act according to its own judgment, unrestrained by any limitation of power imposed by the constitution of the United States.”<sup>30</sup>

The artificial entity theory in *Terrett* and *Dartmouth College* burdened all corporations but weighed most heavily on municipal ones. Private companies still enjoyed some limited freedom to organize their own affairs and to have their property constitutionally protected from state interference.<sup>31</sup> But municipalities were artificial entities in a purer sense: They were solely creations of the state that could be limited and reorganized however the state deemed desirable to suit its ends. For a century after these cases, local governments raised constitutional challenges to state interference with local control—ranging from taxation to boundary disputes to the elimination of entire cities—on the grounds that such moves violated variously the Contracts Clause, the Due Process Clause, or the Takings Clause. Courts invariably rejected these claims, invoking the constraints of the artificial entity theory outlined in *Terrett*, *Dartmouth College* and the like, and effectively making any state delegation of governance prerogatives revocable.<sup>32</sup>

By 1868 the principle appeared so entrenched that Chief Justice John Dillon of the Supreme Court of Iowa in *Merriam v. Moody’s Executors* summarized the indisputable “settled law” of municipal corporations:

[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily inci-

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<sup>28</sup> *Id.* at 628.

<sup>29</sup> *Id.* at 629.

<sup>30</sup> *Id.* at 629–30. Justice Bushrod Washington added in concurrence that because a corporation “is the mere creature of [a] public institution. . . [it] may be controlled, and its constitution altered and amended by the government, in such manner as public interest may require.” *Id.* at 660–61 (Washington, J., concurring).

<sup>31</sup> Frug identifies the split between city powerlessness and constitutional protection for private corporations as the result of an ideological choice, not one driven by any real notion of different capacities between the two. See Frug, *supra* note 19, at 1073.

<sup>32</sup> See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (compiling cases).

dent to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.<sup>33</sup>

Dillon's Rule, as it came to be called, represented the dominant view of municipal corporations throughout the latter nineteenth and early twentieth century, and still anchors disputes about municipal power today.<sup>34</sup>

*Hunter v. City of Pittsburgh* represents the logical extension of *Terrett*, *Dartmouth College*, and Dillon's Rule. In *Hunter*, the Court considered whether residents of the City of Allegheny could raise a constitutional challenge to the state's decision to merge their municipality with neighboring Pittsburgh.<sup>35</sup> Pennsylvania had enacted a plan in which a majority of all votes of the citizens of both Pittsburgh and Allegheny would determine whether the cities would consolidate. Unsurprisingly, Allegheny, the smaller municipality, lost the combined vote despite a majority of its citizens rejecting the consolidation. The residents alleged the merger violated the Contracts Clause and took their property without due process of law. The Court rejected their claims: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,"<sup>36</sup> Justice William Moody wrote for the majority. With respect to any power a municipality has or any property it may hold "the State is supreme, and its legislative body . . . may do as it will, unrestrained by any provision of the Constitution of the United States."<sup>37</sup>

*Hunter* represents the Court's most extensive articulation of the artificial entity theory of municipal corporations, rooted in the notion that municipalities exist solely at states' discretion and for the sole purpose of effectuating state ends. In this view, municipalities are not sociological or political phenomena as much as creatures of state administration. The state exists

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<sup>33</sup> *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868).

<sup>34</sup> Dillon reiterated his concept of municipal corporations in an influential treatise. 1 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 55, at 173 (2d ed. 1873). For a rich historical and theoretical challenge to Dillon's Rule through the assembly clause, see generally Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 *YALE L.J.* (forthcoming 2021), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=3676811](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3676811) [<https://perma.cc/A44F-9FLY>].

<sup>35</sup> *Hunter*, 207 U.S. at 177.

<sup>36</sup> *Id.* at 178.

<sup>37</sup> *Id.* at 179.

prior to law, but the city does not.<sup>38</sup> *Hunter's* framing of the city in this way then justified the Court's holding in two ways. One rationale was a simple greater-includes-the-lesser notion: If states could create and dissolve local entities at will, then it would be incoherent to regard those entities as having any capacity to assert constitutional rights against those states.<sup>39</sup> The other was that if the sole purpose of local governments is to facilitate the work of state governments, allowing municipalities to interpose federal constitutional guarantees would frustrate rather than further their core function.<sup>40</sup> Hence, states were free to do anything they wanted to do to local governments, "conditionally or unconditionally, with or without the consent of citizens, or even against their protest."<sup>41</sup> Finally, the Court put an exclamation point on this holding, encouraging the lower federal courts to apply this rule "wherever . . . applicable."<sup>42</sup>

*Hunter* established a broad "federal rule of local powerlessness."<sup>43</sup> The artificial entity theory of the municipal corporation it endorses persists today.<sup>44</sup> For example, courts have denied municipal corporations equal protection on *Hunter* grounds.<sup>45</sup> They have denied privileges and immunities rights for similar reasons.<sup>46</sup> Other courts have denied municipalities

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<sup>38</sup> Cf. Daniel Weinstock, *Cities and Federalism*, in 55 NOMOS: FEDERALISM & SUBSIDIARITY 259, 267 (James. E. Fleming & Jacob T. Levy eds., 2014) (discussing way in which nations are assumed to be prepolitical, while cities are legally constructed).

<sup>39</sup> *Hunter*, 207 U.S. at 178 ("The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

<sup>40</sup> Cf. *id.* at 178 (noting that municipal corporations are "convenient agencies" for exercising "governmental powers of the State").

<sup>41</sup> *Id.* at 179.

<sup>42</sup> *Id.* at 178.

<sup>43</sup> Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 15 (2012).

<sup>44</sup> See, e.g., *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (noting a state may "may withdraw any part of that [power] which has been delegated"); 2 EUGENE MCQUILLIN, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 4:3 (3d ed.) ("Legislative authority over municipal corporations and their civil, political and governmental powers exists, except as limited by the federal and state constitutions, and such legislative power is often referred to as plenary, supreme, absolute, complete, or unlimited.").

<sup>45</sup> E.g., *Newark v. New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State."); *S. Maccomb Disposal Auth. v. Twp. of Wash.*, 790 F.2d 500, 505 (6th Cir. 1986) ("[A] political subdivision of a state cannot challenge the constitutionality of another political subdivision's ordinance on due process and equal protection grounds.").

<sup>46</sup> *City of Marshfield v. Towns of Cameron*, 127 N.W. 2d 809, 813 (Wis. 1964) ("It is also well established that municipalities may not invoke privileges and immunities under the federal constitution in opposition to the will of the state.").

First Amendment rights.<sup>47</sup> Occasionally the *Hunter*-like pronouncements have been broad and categorical, asserting a city is bereft of any federal constitutional right against its state.<sup>48</sup>

As recently as 2009, the Supreme Court invoked the *Hunter* principle as a major premise of its holding in *Ysursa v. Pocatello Education Ass'n*.<sup>49</sup> In *Ysursa*, the plaintiffs argued that Idaho's ban on payroll deductions for "political activities" was invalid as applied to local governments because the state was preventing municipalities and their employees from engaging in constitutionally protected speech. The Court, which had already held the restriction valid as applied to state governments, rejected the plaintiffs' attempt to distinguish local governments, using the same artificial entity reasoning that the Court did through the 1800s. "Political subdivisions of States," it held, are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."<sup>50</sup> And because municipalities are "merely" subdivisions of the state, "the State may withhold, grant or withdraw powers and privileges as it sees fit."<sup>51</sup>

Courts' casual invocations of this framework to diminish municipal corporations stands in marked contrast to their evolving treatment of private corporations.<sup>52</sup> The private corporation underwent massive changes over the course of the nineteenth century. General incorporation statutes made formation much easier. Mergers and combinations resulted in a

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<sup>47</sup> In *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (Former 5th Cir. 1982) the court stated that "Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression." But it hastened to add, "[T]here is nothing to suggest that, absent such limitation, government is restrained from speaking any more than are the citizens." *Id.*

<sup>48</sup> See, e.g., *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *City of San Juan Capistrano v. Cal. Pub. Utils. Comm'n*, 937 F.3d 1278, 1280 (9th Cir. 2019) ("[W]e have consistently held that political subdivisions lack standing to challenge state law on constitutional grounds in federal court.").

<sup>49</sup> 555 U.S. 353 (2009).

<sup>50</sup> *Id.* at 362 (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)).

<sup>51</sup> *Id.* at 362 (quoting *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)). Justice John Paul Stevens dissented, observing that the blanket citation to the *Hunter* doctrine ignores that "[r]elationships between state and local governments are more varied, and the consequences of that variation are more significant, than the majority's analysis admits." *Id.* at 375 (Stevens, J., dissenting).

<sup>52</sup> For an entertaining and illuminating discussion, see generally ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

few large entities dominating disproportionate shares of major industries, especially railroads.<sup>53</sup> And, as the number of corporations in America increased from approximately thirty-five in the 1790s to 270,000 by the first decade of the 1900s,<sup>54</sup> law responded to the transformation—and omnipresence—of the private corporation by gradually theorizing about them differently than municipal corporations.

Alternatives to the artificial entity theory—the aggregation and real entity theories—sought to match the changing social reality of the corporate form.<sup>55</sup> Theorists of private corporations began to conceive of them, not as mere instruments of state government to better administer some public good, but as aggregations of individual constitutional rights holders; or, alternatively, as sociological phenomena akin to families or schools, greater than the sum of their parts.<sup>56</sup> This doctrinal and theoretical dynamism did not materially alter courts' unreflective conception of municipalities' legal status, though, which to this day remains tethered to *Hunter*.<sup>57</sup>

## B. Against *Hunter*

Courts repeatedly echo the *Hunter* principle that cities lack any rights because they are mere government instruments to be created, limited, or destroyed as their states see fit. To the extent the *Hunter* doctrine rests on an empirical proposition about cities—that their identity and function in our democracy is no more distinctive than the state bureau of motor vehicles—that is easily disproven. The *Hunter* doctrine also fails to grasp the nuance in doctrine that has developed with respect to municipal constitutional rights. Notwithstanding *Hunter*, the constitutional claims of municipal governments, even against their states, have been respected, albeit sub silentio. Finally, *Hunter* cannot be justified normatively, as important constitutional values and essential aspects of our constitutional culture re-

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<sup>53</sup> See, e.g., SUSANNA KIM RIPKEN, *CORPORATE PERSONHOOD* 26 (2019); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181, 190 (1985) (discussing “free incorporation”).

<sup>54</sup> Richard Sylla, *How the American Corporation Evolved Over Two Centuries*, 158 PROC. AM. PHIL. SOC'Y 354, 355 (2014).

<sup>55</sup> RIPKEN, *supra* note 53, at 29, 35.

<sup>56</sup> See, e.g., Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257–62 (1911) (discussing conceptions of corporations).

<sup>57</sup> Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 67 (2018) (“Almost a generation ago, legal scholars Gerald Frug and Hendrik Hartog described how the municipal corporation lost its corporate privileges and became an arm of the state, while the private business corporation attained property and constitutional rights.”).

quire municipal participation and protection from state interference. It is time to rethink the broad and unconsidered application of *Hunter* and recognize that municipalities can and should be able to assert some constitutional rights.

At the time *Dartmouth College* was decided, it may have been plausible to treat the city as nothing more than a state functionary.<sup>58</sup> But in the century after these cases were decided, the role of local government in American political life has changed. Demographic transformations mean that the nation's population has become larger and more urban, so that a greater and ever-increasing proportion of Americans call cities home and sometimes identify with their city as much or more than their state.<sup>59</sup>

*Hunter* also rested on the premise that local governments exist solely to serve the ends of the states that created them. This notion of municipalities as mere instrumentalities of the state, too, fails to accurately describe the role of the modern American city, if it ever did. Far from being agents of the state consigned to merely carrying out ministerial functions, contemporary cities exercise significant autonomy. Some states have expressly abandoned Dillon's Rule as a framework for municipal government power.<sup>60</sup> Home rule movements of the 1800s and early 1900s have wrested power away from state

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<sup>58</sup> Even that though is a hotly contested proposition. See Frug, *supra* note 19, at 1083 ("The medieval town was not an artificial entity separate from its inhabitants; it was a group of people seeking protection against outsiders for the interest of the group as a whole."); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 395 (1985) ("After the Declaration of Independence, the Corporation of the City of New York lost no time in ensuring that its charter rights, which were originally granted by the English king, would continue to be protected from intrusions by its new sovereign.").

<sup>59</sup> Cf. WENDY GRISWOLD, REGIONALISM AND THE READING CLASS 11–17 (2008) ("The people within a region are seen as having something in common. This common ground, which is typically geographic, political, and/or economic, gives rise to shared forms of cultural expression."); Victoria C. Plaut, Hazel Rose Markus, Jodi R. Treadway & Alyssa S. Fu, *The Cultural Construction of Self and Well-Being: A Tale of Two Cities*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1644, 1645 (2012) ("[E]veryday life is organized by local ideas and practices and [this research] suggest[s] that fulfilling the task of becoming an independent individual—and therefore self and well-being—will necessarily take regionally specific forms.").

<sup>60</sup> *E.g.*, *Blanchard v. Berrios*, 72 N.E.3d 309, 321 n.2 (Ill. 2016) (recognizing abandonment of Dillon's rule); *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980) ("The Dillon Rule of strict construction is antithetical to effective and efficient local and state government."); see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (stating "[Dillon's] Rule has been formally abandoned by many states").

authorities and reposed it in local subdivisions.<sup>61</sup> Today, forty states have provisions that extend home rule to qualifying local governments.<sup>62</sup> While home rule does not guarantee cities complete autonomy from their states, it does establish a degree of self-determination for municipalities that go far beyond *Hunter's* cramped conception of them.<sup>63</sup> Even absent home rule, most municipalities exhibit democratic attributes, popularly selected executives and legislatures, court systems, and administrative structures.<sup>64</sup> Cities hold elections, levy taxes, provide for the security of residents, and engage in a host of other activities independently of states. In light of these regular exercises of traditional governmental functions, cities are today—and to an extent always have been—a major site of self-governance.

Neither does *Hunter* reflect the fact that cities have become important economic players—rivaling nations in some cases.<sup>65</sup> As Richard Schragger has documented, the ten largest metropolitan regions globally account for over one-fifth of the economic activity of the entire world.<sup>66</sup> New York, Los Angeles, Chicago, the District of Columbia, Dallas, and Philadelphia fall within the top thirty economies worldwide.<sup>67</sup> For some densely populated cities, like Phoenix, Arizona, the city accounts for seven out of every ten jobs in the state.<sup>68</sup>

*Hunter* as a shorthand for the constitutional invisibility of the city also fails to accurately describe constitutional doctrine.

<sup>61</sup> See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2278 (2003) (noting that states “beg[ai]n to enact constitutional and statutory measures that explicitly identified towns and cities as legally independent entities” around the end of the nineteenth century).

<sup>62</sup> See JON D. RUSSELL & AARON BOSTROM, AM. CITY CTY. EXCH., FEDERALISM, DILLON RULE AND HOME RULE 6 (2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/XJ7K-QZD2>]. Qualifications for home rule vary, as do the mechanics of recognition. See *id.*

<sup>63</sup> See Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. (forthcoming 2020) (manuscript at 33–40), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3461745&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461745&download=yes) [<https://perma.cc/8HDJ-NJQX>].

<sup>64</sup> See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 569 (2017).

<sup>65</sup> Local governments generated over \$1.6 billion in revenue in 2012, just \$300 million shy of the amount generated by states in the same period, and spent just about as much. JEFFREY L. BARNETT, CINDY L. SHECKELLS, SCOTT PETERSON & ELIZABETH M. TYDINGS, 2012 CENSUS OF GOVERNMENTS: FINANCE—STATE AND LOCAL GOVERNMENT SUMMARY REPORT 7–8 (2014).

<sup>66</sup> RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 28 (2016).

<sup>67</sup> *Id.* at 28–29.

<sup>68</sup> *Id.* at 28.



While the principle is often carelessly invoked where courts seek to downplay municipal autonomy, other cases have limited its reach, as the Court itself has acknowledged.<sup>69</sup> Schragger, in noting how courts inconsistently invoke the *Hunter* rule, has referred to the numerous departures and qualifications as a “shadow doctrine” that treats municipalities as possessing at least some constitutional personality.<sup>70</sup>

One early manifestation of this shadow doctrine arose in 1960 in a case called *Gomillion v. Lightfoot*.<sup>71</sup> In *Gomillion*, the state of Alabama had redrawn the municipal boundaries of the City of Tuskegee so as to cut the African American population of the city from 400 to about five without reducing the white population.<sup>72</sup> The state of Alabama resisted a Fourteenth and Fifteenth Amendment challenge to its new map on the theory that *Hunter* entitled state governments to reorganize cities without limit. The Court rejected this argument, stressing that *Hunter* was not a *carte blanche* for states to treat cities however they wanted, and emphasized that states were subject to at least some constitutional limitations on their control of municipalities.<sup>73</sup> *Gomillion* was perhaps the most transparent statement of constitutional limits on plenary state authority over local government; but it is not the only one. In *City of Philadelphia v. New Jersey*, Philadelphia, along with other municipal governments and private entities, sued New Jersey and succeeded in preventing it from enforcing a discriminatory waste management statute in violation of the Commerce Clause.<sup>74</sup>

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<sup>69</sup> *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (applying *Hunter* but noting that “the broad statements as to state control over municipal corporations contained in *Hunter* have undoubtedly been qualified by the holdings of later cases”).

<sup>70</sup> Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 *BUFF. L. REV.* 393, 407–09 (2002) (describing this “shadow doctrine”).

<sup>71</sup> 364 U.S. 339 (1960).

<sup>72</sup> *Id.* at 341.

<sup>73</sup> *Id.* at 344–45 (“[T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”). It bears noting though that the plaintiffs in *Gomillion* were individual residents of Tuskegee, not the City of Tuskegee itself. So while that case can be read for the proposition that “The City of Tuskegee” was simply a party by dint of the aggregate interests of the African American residents who had been racially excluded from the redrawn municipal boundaries—a kind of derivative or aggregate claim—it is still cited as a limitation on the authority of states against the municipality. See *Morris*, *supra* note 43, at 4 n.7.

<sup>74</sup> 437 U.S. 617, 629 (1978).

One could argue that *Gomillion* and *City of Philadelphia* do little to undermine *Hunter* because they demonstrate only that individual city residents possess constitutional rights, or that a city may assert constitutional rights against other states, but not the city's own state. But other cases undermine that reasoning. In *Washington v. Seattle School District No. 1*, the Court recognized that a city school district could sue the state for an equal protection violation when the state passed a ballot measure prohibiting the district from implementing a school integration program.<sup>75</sup> In *Romer v. Evans*, the named plaintiffs included the City of Aspen, the City of Boulder, and the City and County of Denver.<sup>76</sup> These municipalities had passed ordinances protecting gays and lesbians from discrimination, which were then invalidated by a statewide Colorado ballot measure.<sup>77</sup> The *Romer* Court affirmed the cities' claims that the measure violated their constituents' constitutional rights.<sup>78</sup> In both cases, in keeping with the tacit nature of this "shadow doctrine," the Court simply assumed that municipal corporations had the capacity to sue their own state governments on theories of constitutional rights shared by private corporations and natural persons.

Sometimes, much as with private corporations or non-profit associations, it appears the municipal corporation asserts the aggregated rights of its constituents. For example, according to one commentator, a local school district could state a claim against its state because it "ha[d] standing . . . to vindicate the constitutional rights of its students to attend desegregated schools" in addition to "its own constitutional duty to redress the effects of school system segregation."<sup>79</sup> Some-

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<sup>75</sup> 458 U.S. 457, 459, 487 (1982). The Court remarked that the school district was "largely coterminous with the city of Seattle." *Id.* The lower court had expressly identified the school district plaintiffs as "lawfully organized and functioning municipal corporation[s]." *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 473 F. Supp. 996, 998 (W.D. Wash. 1979).

<sup>76</sup> *Romer v. Evans*, 517 U.S. 620, 625 (1996) ("Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so."); Copy of Complaint Filed in *Romer v. Evans*, QUEER RESOURCES DIRECTORY <http://www.qrd.org/qrd/usa/legal/colorado/Evans-v-Romer.BRIEF> [<https://perma.cc/E6SE-2724>].

<sup>77</sup> *Romer*, 517 U.S. at 625.

<sup>78</sup> *Id.* at 635-36.

<sup>79</sup> 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 3:8 (2020); see also *Exeter-West Greenwich Reg'l Sch. Dist. v. Pontarelli*, 788 F.2d 47, 48, 54 (1st Cir. 1986) (awarding attorney fees to school district in establishment clause challenge against state officers).

thing of this reasoning may be behind Denver and Aspen's standing to sue Colorado on behalf of its gay and lesbian citizens in *Romer v. Evans*. Kathleen Morris's discussion of San Francisco's litigation against California's ban on same sex marriage follows a similar path.<sup>80</sup> The right to marry is obviously an individual right. San Francisco's standing to bring suit on behalf of its citizens seems to derive from the rights of those citizens who wanted to marry their same sex partners. Without some referent in its residents' individual right to marry, the city would have little ability to assert a violation on its own behalf.<sup>81</sup>

A variant of this thinking is that municipalities may sue when the right they vindicate itself contains an aggregate feature. Just as *Citizens United* stated that private corporations can engage in political speech, because they aggregate the speech rights of their shareholders,<sup>82</sup> Judge Posner speculated in *Creek v. Village of Westhaven* that municipalities may assert First Amendment speech rights on similar grounds.<sup>83</sup> "To the extent . . . that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible," he stated, "a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents."<sup>84</sup>

Sometimes, though, courts seem to recognize municipal constitutional rights that appear reposed in the person of the city itself or related to its unique function as a municipal government. It was the city's Commerce Clause injury vindicated in *City of Philadelphia v. New Jersey*.<sup>85</sup> In *United States v. 50 Acres of Land*, the Court held that the city of Duncanville, Texas, could state a Takings claim in its own right against the

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<sup>80</sup> Morris, *supra* note 43, at 10–11.

<sup>81</sup> *See id.*

<sup>82</sup> *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *see also id.* at 392 (Scalia, J., concurring) (stating that corporate speech is protected because it is "the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf").

<sup>83</sup> 80 F.3d 186, 192 (7th Cir. 1996) ("Nor is it out of the question that a municipality could have First Amendment rights."). This speculation was in the face of fairly consistent holdings that municipalities do not have First Amendment rights. *See id.* at 192–93 (compiling cases).

<sup>84</sup> *Id.* at 193. The Tenth Circuit suggested the *Hunter* principle stands "only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights." *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998).

<sup>85</sup> *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

federal government even though the Just Compensation Clause of the Fifth Amendment refers only to “private property.”<sup>86</sup> Municipal corporations can raise Tenth Amendment claims if commandeered by the federal government to enforce federal law,<sup>87</sup> whether or not the state consents to the commandeering.<sup>88</sup> And then there’s the panoply of procedural constitutional rights that cities assert as a matter of course, without much fuss or reflection, such as Seventh Amendment rights to trial by jury<sup>89</sup> and some aspects of due process.<sup>90</sup>

For purposes of challenging *Hunter*, it does not matter whether the municipality is thought to be a conduit for the rights of its residents—a kind of aggregate theory of the municipal corporation—or claiming rights of its own—a variety of the real entity theory. The frequent departures from the *Hunter* doctrine suggest that the courts have some role in “limiting state attempts to interfere with local affairs in certain constitutional contexts,” particularly those where local governments

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<sup>86</sup> *United States v. 50 Acres of Land*, 469 U.S. 24, 30–31 (1984) (“[I]t is most reasonable to construe the reference to ‘private property’ in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.”).

<sup>87</sup> *Printz v. United States*, 521 U.S. 898, 898, 904, 935 (1997) (involving a suit against the federal government by a sheriff in Montana); see also *City of Philadelphia v. Att’y Gen. of U.S.*, 916 F.3d 276, 279 (3d Cir. 2019) (holding the U.S. Attorney General lacked constitutional authority to impose new immigration-related conditions on federal funding for local law enforcement); *City of S.F. v. Trump*, 897 F.3d 1225, 1231–35 (9th Cir. 2018) (“We conclude that, under the principle of Separation of Powers and in consideration of the Spending Clause, which vests exclusive power to Congress to impose conditions on federal grants, the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization.”).

<sup>88</sup> *New York v. United States*, 505 U.S. 144, 182 (1992) (“Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”); *Bd. of Nat. Res. of Wash. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993) (“[A]llowing the Counties to assert the State’s Tenth Amendment claim . . . will serve . . . principles of federalism if the State had no plans to challenge the Act.”).

<sup>89</sup> *Bowers v. City of Philadelphia*, No. 06–3229, 2008 WL 5234357, at \*5 (E.D. Pa. Dec. 12, 2008) (“Nevertheless, the City has a constitutional right under the Seventh Amendment of the United States Constitution to a jury trial.”); *Doctor John’s, Inc. v. City of Sioux City* 467 F. Supp. 2d 925, 939 (N.D. Iowa 2006) (“The court will determine ‘constitutionality’ issues that fall within its province, but consistent with the parties’ Seventh Amendment rights to jury trial, the court has preserved for jury determination ‘applicability’ and ‘damages’ issues.”).

<sup>90</sup> *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 291 (4th Cir. 2013) (“[B]ecause of the ready availability of preliminary injunctive relief, there simply is no need to abridge the City’s due process rights in favor of the Center’s free speech guarantee.”); *DiMaggio, LLC. v. City of S.F.*, 187 F. Supp. 2d 1359, 1371 (S.D. Fla. 2000) (finding that City had insufficient contacts with forum to satisfy Fourteenth Amendment due process requirements for personal jurisdiction).

are important in “securing federal constitutional norms” not readily enforceable by court adjudication.<sup>91</sup>

Nor does it seem principled to maintain that municipal corporations may assert a host of rights in disputes with private parties, the federal government, and each other, but not with their own state. Courts assemble the corpus of constitutional doctrine through case-by-case, common law-like decision making. As has happened with private corporations, a municipality’s assertion of rights in one case anchors its ability to assert them in another—or demands some justification why it cannot.<sup>92</sup> Too often courts use *Hunter* and its ilk to avoid offering any justification at all.<sup>93</sup> Perhaps the most compelling reason to abandon the *Hunter* rule is what it costs us. Municipal invisibility robs us of the perspective of municipal entities on the major constitutional issues that affect them. In an era when urban versus rural is the increasingly dominant cleavage in American political life,<sup>94</sup> and as more of the country’s population trends toward cities,<sup>95</sup> local governments represent polities with distinctive perspectives backed by substantial populaces. Contemporary cities thus promise a rich input to federal constitutional questions that is, to a large extent, lost by rendering them constitutionally invisible. Just as states’ separateness from the federal government promises the development of different policies and preferences, so too can cities serve as loci of constitutional interpretation by advancing dif-

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<sup>91</sup> David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 568 (1999).

<sup>92</sup> See *infra* subpart I.C; see also Miller, *supra* note 12, at 915 (“Once a corporation is deemed a person for one right, reason demands an explanation why it is not a person for another.”).

<sup>93</sup> See *State v. City of Birmingham*, No. 1180342, 2019 WL 6337424, at \*9–10 (Ala. Nov. 27, 2019) (relying on the *Hunter* principle to deny Birmingham federal and state speech rights regarding display of a Confederate monument).

<sup>94</sup> See, e.g., JONATHAN RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 10–12 (2019) (describing urban-rural polarization and its “especially consequential” effect on American elections); Emily Badger, *How the Rural-Urban Divide Became America’s Political Fault Line*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/upshot/america-political-divide-urban-rural.html> [<https://perma.cc/RHA4-Y5W7>] (“[U]rban-rural polarization has become particularly acute in America: particularly entrenched, particularly hostile, particularly lopsided in its consequences.”).

<sup>95</sup> See UNIV. MICH. CTR. FOR SUSTAINABLE SYS., U.S. CITIES (2019) [http://css.umich.edu/sites/default/files/US%20Cities\\_CSS09-06\\_e2019.pdf](http://css.umich.edu/sites/default/files/US%20Cities_CSS09-06_e2019.pdf) [<https://perma.cc/9G6T-ZAYM>] (“Approximately 84% of the U.S. population lives in urban areas, up from 64% in 1950. By 2050, 89% of the U.S. population and 68% of the world population is projected to live in urban areas.”).

ferent policy and litigation positions.<sup>96</sup> Local governments may actually serve as more effective laboratories of constitutional experimentation than states because they are more numerous, feature a greater variety of perspectives, and have more direct contact with their residents. Different municipal governments may object to their state's gun laws on different theories, crafting subtly different regulatory regimes in each of these localities.

As David Barron has written, “[C]ities are often the institutions that are most directly responsible for structuring political struggles over the most contentious of public questions”—which certainly includes firearm policy—and are “often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions.”<sup>97</sup> Federal constitutional protection may be necessary to ensure that local governments can bring their “special institutional capacities to bear” in these disputes.<sup>98</sup>

The loss caused by municipal invisibility is not solely informational. It is also participatory and intermediating. In terms of participation, Heather Gerken has written how, in those areas where policies have a federal, state, and local character, municipal governments may want not only exit, they may want voice as well. As she describes it, federalism and localism are not just about giving a subdivision of the national government a chance to legislate in some discrete local “sphere.”<sup>99</sup> It’s also about allowing them to work within “nested governing structures” that operate in a vertical manner much as the separation of powers operates horizontally.<sup>100</sup> In that model, the “checks and balances” of local government “depends not on separation and independence, but on integration and interdependence.”<sup>101</sup> In this model, recognizing the constitutional dignity of local governments—at least with respect to some kinds of rights claims—is akin to branches of government

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<sup>96</sup> See Barron, *supra* note 91, at 568. See generally Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232 (2018) (discussing affirmative litigation by municipalities as a form of institutional validation and “state building”).

<sup>97</sup> Barron, *supra* note 91, at 491.

<sup>98</sup> *Id.*

<sup>99</sup> See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 26–27 (2010).

<sup>100</sup> *Id.* at 25.

<sup>101</sup> *Id.* at 34.

working out over time, in iterated events, what kinds of powers each of them have and under what circumstances.<sup>102</sup>

In this manner, local governments, along with other kinds of institutions, like churches, universities, and other associations, also perform a vital intermediating role.<sup>103</sup> In saying this, we understand the city's mediating role in the way Meir Dan-Cohen wrote about it.<sup>104</sup> Municipal governments mediate in the negative sense—acting as a buffer between national or state government and the citizen.<sup>105</sup> For example, local governments organized resistance to the Alien and Sedition Acts in the eighteenth century,<sup>106</sup> the institution of slavery in the nineteenth,<sup>107</sup> state anti-gay legislation in the twentieth,<sup>108</sup> and federal deportation practices in the twenty first.<sup>109</sup> To protect individual dissent “the Constitution goes out of its way to create, and protect, institutions where individuals who may not be able to act by themselves can come together with others to associate, organize and have their voices be heard.”<sup>110</sup>

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<sup>102</sup> See Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 30–32 (2014) (describing how constitutional meaning can become fixed by historical practice); see also Weinstock, *supra* note 38, at 264 (“Self-determining groups are analogous to rights-bearing individuals”).

<sup>103</sup> See JACOB T. LEVY, RATIONALISM, PLURALISM & FREEDOM 93 (2015).

<sup>104</sup> See Meir Dan-Cohen, *Between Selves and Collectives: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1213–14 (1994) (identifying the positional and functional role of intermediary institutions).

<sup>105</sup> See Weinstock, *supra* note 38, at 270.

<sup>106</sup> See Douglas Bradburn, *A Clamor in the Public Mind: Opposition to the Alien and Sedition Acts*, 65 WM. & MARY Q. 565, 566 (2008) (“The Virginia and Kentucky Resolutions, the most visible opposition to the Alien and Sedition Acts, have never been placed in their true context: as part of a broader movement of petitioning and remonstrance, the concerted effort of numerous local communities not only in Virginia and Kentucky but also in Pennsylvania, New Jersey, New York, Vermont, and elsewhere.”).

<sup>107</sup> See, e.g., H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR* 53 (2006) (describing the collaboration of a local vigilance committees with local officials to prevent a slave rendition in Boston).

<sup>108</sup> See, e.g., *Herrera Joined by Los Angeles, Santa Clara Counterparts in Suing to Invalidate Prop 8*, CITY ATT'Y OF S.F. (Nov. 5, 2008), <https://www.sfcityattorney.org/2008/11/05/herrera-joined-by-los-angeles-santa-clara-counterparts-in-suing-to-invalidate-prop-8/> [<https://perma.cc/82PV-6WFP>] (describing California cities' constitutional challenge to Prop 8's ban on same-sex marriage).

<sup>109</sup> See SARAH HERMAN PECK, CONG. RESEARCH SERV., R44795, “SANCTUARY” JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION 19–32 (2019), <https://fas.org/sgp/crs/homsec/R44795.pdf> [<https://perma.cc/Q2HB-E2ER>] (outlining recent litigation about local and state resistance to federal immigration policy enforcement).

<sup>110</sup> Vikram David Amar, *Is It Appropriate, Under the Constitution, for State and Local Governments to Weigh in on the War on Terror and a Possible War with Iraq?*, FINDLAW (Mar. 7, 2003), <https://supreme.findlaw.com/legal-commentary/is-it>

But municipal governments also mediate in the positive sense of “creat[ing] habitats within which individuals can flourish.”<sup>111</sup> Citizens often find localities the primary situs of government through which they can express their preferences, and cities provide a form of democracy that is particularly salient because of its proximity to the people. Indeed, Americans increasingly relocate to cities so that they can find a place where their preferences are at least respected and perhaps also more widely shared with others. *Hunter* saps municipal governments of the tools necessary to efficiently develop the kind of suite of goods and services that makes meaningful choice possible.<sup>112</sup> Without the fetters of *Hunter*, cities become free to respond to these preferences, to produce goods that provide choice, and better enable self-selection by citizens, who can more readily sort themselves among different localities than different states. If Anaheim, California and Reno, Nevada have similarly gun-friendly laws, a Los Angeles resident who prefers lighter firearm regulation will find it much easier to relocate to the former than the latter.<sup>113</sup>

But we do not think that the authority to participate in a market is the only way the city intermediates in this positive sense.<sup>114</sup> In participating in this form of community, and in particular this form of *government*, the individual comes to learn how and what it means to be a free citizen in a well-ordered society.<sup>115</sup> Simply, the flourishing Dan-Cohen identifies requires a physical proximity with others who are also free to express, deliberate, and act. Hannah Arendt remarked that this type of freedom—one different from mere liberation—is a freedom that requires a “politically guaranteed public realm,” a

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appropriate-under-the-constitution-for-state-and-local-governments-to-weigh-in-on-the-war-on-terror-and-a-possible-war-with-iraq.html [https://perma.cc/B3CB-PBFZ].

<sup>111</sup> Meir Dan-Cohen, *supra* note 104, at 1214.

<sup>112</sup> Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1591 (2010) (“By locating the institutions to produce public goods at the lowest possible level, the creation of sub-governments reduces the monitoring problem and thus mitigates agency problems.”).

<sup>113</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–18 (1956).

<sup>114</sup> The market participant model of local government is thoroughly investigated in SCHRAGGER, *supra* note 66 and accompanying text.

<sup>115</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 512–13 ((J.P. Mayer ed., George Lawrence trans., Harper Perennial Modern Classics 2006) (1835) (“By dint of working for the good of his fellow citizens, he in the end acquires the habit and taste for serving them.”); cf. Weinstock, *supra* note 38, at 273 (noting the epistemic advantages of cities where the inhabitants have “direct access to facts about how to realize desirable public policy ends in the particular spatial contexts that cities represent”).



“worldly space to make its appearance.”<sup>116</sup> Independent of its participation in a decentralized market, the city’s value is in its ability to provide this public, political concept of freedom.<sup>117</sup>

Both the negative and the positive mediating function of the city rely on at least some measure of freedom to decide how and in what way to cooperate with or resist federal and state policies.<sup>118</sup> In the negative mediating sense, a city needs some measure of autonomy to position itself between the individual and the state. In the positive sense, it needs to have the power to produce those kinds of public goods that makes flourishing possible. The city’s intermediating role in either of these senses is not possible when the city is routinely eclipsed in our constitutional order by the state. As Tocqueville cautioned, the liberty generated by local government is the most vulnerable to outside encroachments, and also the most necessary, for local governments are the true “laboratories of democracy” where people learn how to use and enjoy freedom.<sup>119</sup>

### C. Toward a Common Law of Municipal Personhood

Status is one of the most important, yet least visible, notions at play in common law legal systems. To say that a human or an entity has legal status is to say that they have enforceable rights under a jurisdiction’s law, and that they may appear before courts and be recognized in efforts to enforce those rights.<sup>120</sup> In the United States, legal status is mediated by the doctrine of legal personhood. Legal persons are recognized as valid subjects of the law. In most instances, status is uncontroversial because most litigants are humans, and natural persons may assert any legal right they possess in state or federal courts. Less obviously, law also extends personhood to some entities that are not human individuals. Private corporations, for instance, have legal personhood for many (though by no means all) purposes, even including many constitutional rights.<sup>121</sup> Yet this legal fiction is not a simple equation by

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<sup>116</sup> Hannah Arendt, *Freedom and Politics: A Lecture*, 14 CHI. REV. 28, 30 (1960).

<sup>117</sup> See SCHRAGGER, *supra* note 66, at 77.

<sup>118</sup> See Gerken, *supra* note 99, at 34.

<sup>119</sup> TOCQUEVILLE, *supra* note 115, at 63 (“Local institutions are to liberty what primary schools are to science . . . they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.”).

<sup>120</sup> RIPKEN, *supra* note 53, at 48 (“The legal language of personhood has symbolic, expressive, and constitutive functions . . .”).

<sup>121</sup> See, e.g., 1 U.S.C. § 1 (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .”).

which law regards non-human entities as equivalent to natural persons. Much controversy accompanies what constitutional rights corporations should bear, as the ongoing controversy over the Supreme Court's extension of Speech Clause rights to corporations illustrates.<sup>122</sup>

The legal status of municipal corporations raises similar difficult issues. Answering this question is a necessary task that extends far beyond whether cities can assert Second Amendment rights. How cities stand before the law affects how and whether they can sue and be sued and what rights they may and may not assert. And, as noted above, in our common law system of adjudication, how the court administers one set of constitutional rights for municipal corporations becomes precedential for how it may administer another set. But, as the foregoing discussion illustrates, courts have an account of the legal status of municipal corporations that is perhaps even more fractured than it is for private corporations. *Hunter* denies municipal corporations legal status completely, holding that they are, constitutionally at least, invisible nonpersons, most acutely when bringing claims against their states, but also more generally. The persistence of *Hunter* may derive from the ease with which it erases the question of municipal personhood, allowing courts to avoid grappling with this challenging issue. Yet at the same time, cities are municipal corporations, and corporations are the archetypal artificial person to which law grants robust (though not unlimited) legal status.<sup>123</sup> Given this, as well as the increasing vitality of the city in modern life, it has become harder for courts to simply

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<sup>122</sup> Compare *Citizens United v. FEC*, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring) (stating that individuals working through corporate form have First Amendment protection), and Bradley A. Smith, *Celebrate the Citizens United Decade*, WALL ST. J. (Jan. 20, 2020), <https://www.wsj.com/articles/celebrate-the-citizens-united-decade-11579553962> [<https://perma.cc/UDV9-87C5>] (“*Citizens United* unleashed rapid political diversification.”), with *Citizens United*, 558 U.S. at 426–29 (Stevens, J., dissenting) (stating that corporations would not have been understood as within scope of First Amendment protections), and Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/Q96C-KME4>] (“While wealthy donors, corporations, and special interest groups have long had an outsized influence in elections, that sway has dramatically expanded since the *Citizens United* decision, with negative repercussions for American democracy and the fight against political corruption.”).

<sup>123</sup> See, e.g., *First Nat'l Bank of Bos. v. Belotti*, 435 U.S. 765, 795 (1978) (discussing the corporate right to political speech); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (finding a corporate right against warrantless inspections by workplace safety regulators); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 249–51 (1936) (holding that a press corporation is a person entitled to the protection of the First and Fourteenth Amendments).

dismiss municipalities' legal status. As we have shown in this Part, cities sue and are sued, and courts permit them to assert some rights but not others. The practical reality of a robust, if patchwork, legal status persists alongside *Hunter*—the “shadow doctrine” of local government law. As Schragger has argued, courts leverage the inconsistent doctrine of municipal corporations' legal status to make cities “disappear and reappear at will.”<sup>124</sup>

The need for a coherent law of municipal corporations' legal status is evident, but also so large an issue it lies beyond the scope of this paper. Instead, our ambitions are more modest. We seek to supply a rough sketch of ways that courts might conceptualize the legal status of the city, one which may, in turn, supply a vocabulary for the larger theoretical question of the role of the city in our legal order.

One such approach would be to embrace the broadest version of the *Hunter* doctrine and declare cities mere artificial entities that have zero legal status. While some courts continue to embrace this approach, we have explained above why it fails descriptively and normatively.<sup>125</sup>

Another model would be to regard the city as having legal status derived from its citizens. The notion that collective entities have legal status as aggregations of their members has emerged as the leading theory of, for example, corporate legal personhood.<sup>126</sup> This model tracks intuitively from private corporations to local governments. Just as one could conceive of corporate rights as derived from the rights of its members, so could one conceive of municipal rights as derived from those of its residents.

Operationalizing this derivative notion of city status presents some challenges. One challenge, common to all kinds of associations, is how to determine whose rights to aggregate. Even small cities have heterogeneous populations representing different opinions on policy matters. One approach would be to treat the opinion of the majority of residents as the aggregate will of the city. For constitutional tort liability, for instance, municipalities can be responsible for the customs or practices of its agents, even if not formally codified as city policy.<sup>127</sup> Alternatively, a control group, such as the mayor or city coun-

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<sup>124</sup> Richard C. Schragger, *supra* note 70, at 416.

<sup>125</sup> See *supra* subpart I.B.

<sup>126</sup> See, e.g., RIPKEN, *supra* note 53, at 29–39; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 223–25 (discussing the aggregation conception).

<sup>127</sup> See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

cil, may serve as a proxy for citizens' preferences. (Municipalities are typically liable for unconstitutional policies enacted by their political leadership, irrespective of the support of a majority of the city's constituents.<sup>128</sup>) And focus on a "control group" is how law often treats issues of right and culpability for private corporations.<sup>129</sup> Yet both of these possible solutions elide rather than solve what Abram Chayes has termed the "representation of interest problem."<sup>130</sup> In either case, the city is not acting as an aggregation of all its members, but rather as an aggregation of just some of them.

Another problem with aggregating the rights of the city's citizens under this model relates to the nature of rights a city could assert. A proxy approach equates the capacity of local governments to make rights-based claims with its citizens' capacity to assert those rights. Of course, not all rights are conducive to this approach. Some kinds of rights may not be intelligible when considered in the aggregate.<sup>131</sup> Some kinds of rights may aggregate but generate challenges because of the governmental nature of the municipal corporation.<sup>132</sup> Still, putting these challenges aside, a court could recognize a city's ability to claim speech or voting rights (even though a city cannot speak or vote) to the extent that the city's residents' speech or voting rights had been infringed. This would allow cities to vindicate the derivative rights of some or all of its constituents; yet it still may fail to capture those kinds of rights that make sense only in their aggregate sense. For example, the harm to a congregation in a Free Exercise case (for example, a state selecting the church's minister) isn't necessarily reflected in the aggregation of an individual constitutional indignity; it's the harm to the congregation *as a congregation*.<sup>133</sup> Since the aggregation model locates rights in entities only to

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<sup>128</sup> See *id.* at 694.

<sup>129</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07 (2014) (ascribing religious conscience of closely held private corporation to its shareholders and managers); *id.* at 754 (Ginsburg, J., dissenting) ("Workers who sustain the operations of [for-profit] corporations commonly are not drawn from one religious community."); *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (relying on "corporate democracy" to manage agents in intra-corporate disputes over speech (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978))).

<sup>130</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310 (1976).

<sup>131</sup> See *infra* Part II.

<sup>132</sup> See *id.*

<sup>133</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the

the extent that they derive from individuals, though, it is not clear what room this creates for the city to assert rights on its own behalf that are, in a sense, more than the sum of the rights of its residents.

As an alternative, law could theorize cities as having legal status in their own right, independently of their citizens. This approach would regard the city as more than just the sum of its residents, and instead consider the city as a distinct entity capable of asserting legal personhood on its own behalf. This notion, too, has intuitive appeal. We often think of cities as possessing identities independent of their residents, rooted in their geographies, histories, and cultures.<sup>134</sup> Just as with other institutions like churches or social clubs, a city's identity transcends its membership at any given moment.<sup>135</sup>

Yet as with the aggregation theory, how to translate this notion into a legally functional account presents a harder case. What thing "is" the city?<sup>136</sup> One option would again be to choose a control group—mayor, city council—to treat as equivalent to the municipality. Under this approach, though, the control group would be disengaged from the notion of citizens' preferences; law would regard it as the city even if it acted contrary to the will of the citizenry.<sup>137</sup> But what substantive rights would such a control group be able to assert? In some cases, state action limits a city's ability to govern its own affairs, such as reallocating its geography or removing discretion over subject matter, such as education, that is a core subject matter traditionally dedicated to local control.<sup>138</sup> If we theorize

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church, depriving the church of control over the selection of those who will personify its beliefs.”).

<sup>134</sup> Cf. Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. Rev. 2011, 2026 (2019) (discussing the psychological challenges of associating a corporation with a single, stable identity).

<sup>135</sup> See Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REG. 1, 31 (2019) (“Corporations, with their generally hierarchical structure and goal-directed operation, are archetypical entitive groups. As a result, people perceive corporations as being capable of intentional action and as deserving punishment when they act badly.”); see also Donald T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates of Persons as Social Entities*, 3 BEHAV. SCI. 14, 17–18 & n.2 (1958) (defining “entitativity” and describing the characteristics that make “discrete elements” more likely to be “perceived as parts of a whole organization”).

<sup>136</sup> Cf. Weinstock, *supra* note 38, at 267 (observing that there is a “folk usage of the term ‘city’ . . . at odds with legal positivism about cities”).

<sup>137</sup> Cf. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (holding that municipalities are liable for the official policies of their leaders).

<sup>138</sup> *E.g.*, *City of New York v. State*, 655 N.E.2d 649, 651 (N.Y. 1995) (holding that New York City did not have standing to sue the state of New York when the state limited the city’s management of its own education system).

the city's legal personhood as inhering in the municipality itself, cities could challenge these actions because they represent harms to the city itself—its geography, its scope of authority, its capacity to effectively govern its constituents.<sup>139</sup> By contrast, and unlike the aggregation theory, this approach would not enable municipal corporations to act on behalf of its denizens. If the city's personhood is distinct from and untethered to its residents, absent some notion of third-party standing, this undermines the city's ability to seek redress for infringements of those residents' right to vote or their freedom to marry that the city as a city does not possess.<sup>140</sup>

One final option would be to think of a city's constitutional rights less in relation to a binary—person or not—and more according to the kinds of rights municipal corporations are best situated to advance.<sup>141</sup> Such an approach would take into consideration both the institutional features of the particular constitutional right as well as the corporate—and governmental—nature of the city. Scholars have advanced this approach with respect to private corporate rights,<sup>142</sup> and it seems promising when considering municipal corporate rights as well.<sup>143</sup>

These brief outlines of how we might model the city's personhood do not exhaust all possible options.<sup>144</sup> Nor does space permit elaboration of a common law of municipal legal personality. Rather, we highlight an issue that was immanent throughout this Part, and that has been an undercurrent of

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<sup>139</sup> See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2223 (2006) (“[C]ities are better viewed as sites for small-scale political contestation and problem-solving on matters that are within their capacity to resolve through the exercise of their own policymaking authority.”).

<sup>140</sup> For instance, a private corporation lacks Fifth Amendment self-incrimination rights and cannot advance them on behalf of its human agents. See *Wilson v. United States*, 221 U.S. 361, 383–84 (1911).

<sup>141</sup> See *infra* Part II.

<sup>142</sup> See, e.g., RIPKEN, *supra* note 53, at 54 (“An adequate account of the corporation requires us to view the entity broadly, focusing on its varied roles and multiple purposes.”); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630 (arguing that “corporate personhood should be understood as merely recognizing the corporation’s ability to hold rights in order to protect the people involved”).

<sup>143</sup> See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 383 (2019) (applying this conception to municipal speech rights); Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 600 (2020) (“[M]unicipal corporate rights are valuable if granting rights to the municipality would further the purpose of the right.”).

<sup>144</sup> See, e.g., RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 73–187(8th ed. 2016) (providing three models of local government: “agent of the state”; “autonomous, democratic polity”; and “quasi-proprietary firm”).

American local government law for two centuries. Legal status is a prior issue to any assertion of rights, whether by a natural person, private corporation, or municipal entity.<sup>145</sup> That courts have not overtly addressed this issue does not mean that there is no law governing cities' legal status, only that the law is fractured and unpredictable. Ultimately, questions of legal status are inevitable, whether we address them in the context of a private corporation, or a municipal one.<sup>146</sup> The balance of this Article addresses some mechanisms that can structure the inquiry when the right is the one to keep and bear arms, but our observation may be broader, and help begin a conversation about a more transparent, thorough, and coherent doctrine of municipal personality going forward.

## II

### THE SECOND AMENDMENT AND THE CITY

Part I of this Article explained why the conventional wisdom of the city as constitutionally powerless is neither descriptively accurate nor normatively desirable. Cities do and should be able to claim some constitutional rights. However, to say that a city has some claim to constitutional rights is not to say that it has or should have the full panoply of rights available to human beings, or to say that it can exercise federal constitutional rights on the exact same terms as other rights-bearing entities. For example, it would be incoherent to say that a city has a right to habeas corpus.<sup>147</sup> It could create serious conflicts with other rights to say that a city can freely practice religion.<sup>148</sup> And, though a city may have some derivative claim to equal protection,<sup>149</sup> the full extent of equal protection jurisprudence seems ill-suited to address the kinds of discrimination a city—as a city—may face.<sup>150</sup>

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<sup>145</sup> See VISA A.J. KURKI, *A THEORY OF LEGAL PERSONHOOD* 3–4 (2019).

<sup>146</sup> See Miller, *supra* note 12, at 927 (“[T]he Court’s modern tendency is to concentrate on the scope of the constitutional right, rather than on corporate personality. However, focusing on the right rather than the litigant trends toward a ‘real entity by default’ theory of the corporation.”).

<sup>147</sup> See *id.* at 955.

<sup>148</sup> See *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 576 (1989) (stating that government “may not coerce anyone to support or participate in any religion or its exercise”). *But cf. Town of Greece v. Galloway*, 572 U.S. 565, 591–92 (2014) (holding that a municipality does not violate the First Amendment Establishment Clause by having a sectarian prayer to open meetings).

<sup>149</sup> See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 (1982).

<sup>150</sup> Ascribing different rights in different measures to different persons is not unusual in constitutional law. Children do not enjoy the same types or degree of constitutional rights as adults; prisoners have different types and degrees of rights compared to free people; non-citizens do not enjoy the same rights as

The issue of corporate constitutional rights has flummoxed courts and commentators for decades,<sup>151</sup> and the governmental nature of the municipal corporation only heightens the complications.<sup>152</sup> But, as an entry point to the problem, Justice Lewis Powell Jr.'s opinion in *First National Bank of Boston v. Bellotti*<sup>153</sup> provides a clue. *Bellotti* involved a Massachusetts law that prohibited private corporate expenditures in support or opposition to public referenda, unless such referenda materially affected "the property, business or assets of the corporation."<sup>154</sup> The Court struck down the regulation as a First Amendment violation. In doing so, it rejected a blanket application of the artificial entity theory for private corporations: "Corporate identity has been determinative in several decisions denying corporations certain constitutional rights."<sup>155</sup> But states do not have unfettered authority to deny their "creatures" all protections of the Constitution.<sup>156</sup> Instead, the Court reasoned, "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."<sup>157</sup>

*Bellotti*'s footnote provides some limited guidance on how to analyze the corporate constitutional rights of any corporate entity.<sup>158</sup> Although some scholars—including one of the pre-

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citizens. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .'" (second alteration in original) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))).

<sup>151</sup> Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) (calling constitutional decisions in this area "ad hoc" and "arbitrary").

<sup>152</sup> See generally Bendor, *supra* note 18, at 390–93 (discussing the difficulty in applying *Hunter*).

<sup>153</sup> 435 U.S. 765 (1978).

<sup>154</sup> *Id.* at 768 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

<sup>155</sup> *Id.* at 779 n.14.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (citation omitted). The mirror of this distinction for municipal corporations, at least according to one court, seems to be the idea that political subdivisions of states cannot assert "individual" rights (like speech) but can assert "structural" or "collective" ones (like the Supremacy Clause). *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998). As we discuss below, the right to carry weapons for the purpose of safety has a structural and collective feature, in addition to the individual component.

<sup>158</sup> See *Fleck & Assocs., Inc. v. City of Phx.*, 471 F.3d 1100, 1104 (9th Cir. 2006) (applying *Bellotti* to company that showed live sex acts); *Primera Iglesia*



sent authors—have criticized *Bellotti's* utility,<sup>159</sup> it still amounts to the only trans-substantive pronouncement by the Court on how to analyze constitutional claims by corporations.<sup>160</sup> Assuming *Bellotti* asks the right question, there are good reasons to think that the history, purpose, and nature of the Second Amendment is not “purely personal” and, consequently, corporations—and especially municipal corporations—have some claim to a right to keep and bear arms.

If that's the case, then the next question is whether and to what extent a municipal corporation should be able to exercise that right. One way to approach a municipal right to keep and bear arms is similar to how one of us has approached a municipal right to speak. First, the constitutionally implicated activity must be “central to the identity and purpose of the public entity” such that allowing another sovereign to override its decision “undermine[s] the reason for allocating institutional discretion” to that entity in the first place.<sup>161</sup> Second, the public entity asserting the right must “have the effect of furthering the

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Bautista Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1305 (11th Cir. 2006) (citing *Bellotti* regarding corporate free exercise). *But cf.* Leo Combat, LLC v. U.S. Dep't of State, No. 15-cv-02323-NYW, 2016 WL 6436653, at \*10 (D. Colo. Aug. 29, 2016) (“In the absence of any binding authority holding otherwise. . . . [A]ny rights extended to a corporation under the Second Amendment are dependent upon the entity's ability to assert *individual* rights of third-parties on their behalf.”); Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328, 1338 (M.D. Fla. 2013) (stating that the “Supreme Court has never resolved” the extent of corporate constitutional rights).

<sup>159</sup> See Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 798 n.19 (1996) (“There is no obvious means of determining how a right rises to the level of being ‘purely’ personal, or only qualifying as somewhat personal, short of the Court announcing a test for what constitutes an individual, non-corporate right. That, however, is the very point of calling a right ‘purely personal.’”); Miller, *supra* note 12, at 912–13 (criticizing *Bellotti*); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1464–65 (1992) (same).

<sup>160</sup> In a post *Bellotti* case, the Massachusetts Supreme Judicial Court refused to decide whether Boston “had” First Amendment rights to speak and decided the case on other grounds. *Anderson v. City of Boston*, 380 N.E.2d 628, 637 (Mass. 1978) (“Even if we were to assume that the appropriation of funds by a municipal corporation to engage in robust, partisan speech is expression that the First Amendment was meant to protect, there are demonstrated, compelling interests of the Commonwealth which justify the ‘restraint’ which the Commonwealth has placed on the city.”). The majority in *Ysursa* dismissed *Bellotti* as a way to address municipal free speech rights. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009). But, to the extent it justified its decision based on a categorical rule of municipal powerlessness and constitutional invisibility, we think *Ysursa* is wrong for all the reasons stated in Part I.

<sup>161</sup> David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1676–77 (2006).

values” that particular constitutional right is designed to advance.<sup>162</sup>

The following subparts address these issues. Subpart II.A shows how the Second Amendment right to keep and bear arms is not purely personal but retains a collective aspect that may be exercised in corporate form.<sup>163</sup> Then subpart II.B explains how, post-*Heller*, the municipal corporation both facilitates and constrains the collective aspect of the right to keep and bear arms. Or, to match the theoretical framework for municipal speech: the city is an institution that presupposes some level of decisional autonomy on how to secure safety through the public use of arms, and exercising that right through the municipal corporate form advances the goal the right to keep and bear arms is supposed to achieve.

#### A. The History, Purpose, and Nature of the Second Amendment

The Second Amendment to the United States Constitution reads: “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.”<sup>164</sup> For over two hundred years, the debate over the Second Amendment—to the extent there was a debate at all—revolved around whether these words contemplated an “individual” or a “collective” right.<sup>165</sup> Or, more accurately, whether the Second Amendment protected a right to keep and bear arms for personal purposes, or whether it only protected the right in relationship to the organized militia. For most of those two centuries, the organized militia supplied the institutional structure that answered all the key questions of Second Amendment doctrine: what kinds of weapons were protected,<sup>166</sup> where and how they could be carried,<sup>167</sup> and what

<sup>162</sup> *Id.* at 1677; see also Wiseman, *supra* note 143, at 655–56.

<sup>163</sup> Some of the evidence in this section about the purely personal right first appeared in *Guns, Inc.* but has been updated with new examples and arguments and tailored to address the unique issue of municipal rights that *Guns, Inc.* did not explore. See generally Miller, *supra* note 12.

<sup>164</sup> U.S. CONST. amend. II.

<sup>165</sup> These terms are somewhat inapt. As Justice Stevens noted in *Heller*, the right to keep and bear arms could still be “individual” and yet only exercisable through a collective body, like a militia. See *District of Columbia v. Heller*, 554 U.S. 570, 645 (2008) (Stevens, J., dissenting). Similarly, there is an “individual” right for someone to petition, or to assemble, but the right is expressed through collective activity. See *id.*

<sup>166</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding a short-barreled shotgun not protected by the Second Amendment).

<sup>167</sup> *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (holding that there is no right to form a private armed parade).

kinds of persons could carry them.<sup>168</sup> Not a single federal case in those two centuries struck down a regulation on Second Amendment grounds.

The 2008 Supreme Court decision *District of Columbia v. Heller*<sup>169</sup> upended that understanding. *Heller* involved a District of Columbia regulation that effectively kept individuals from keeping functional handguns in their homes for self-defense.<sup>170</sup> Dick Heller, a gun-rights advocate and special officer in the Federal Judicial Center, challenged the District's regulation on handguns in the home as a violation of his Second Amendment right. By a five to four majority, authored by Justice Antonin Scalia, the Court held that individuals had a right to keep and bear arms for personal purposes, including self-defense.<sup>171</sup>

*Heller* emphasized that the “central component” or “core” of the Second Amendment right is individual self-defense, and that the right to keep and bear arms did not depend on an individual being part of an organized militia.<sup>172</sup> Although the Court downplayed the reading of the right as related to community and collective defense, it did not state that the community or collective aspects of the right are thereby irrelevant. The right may be for personal purposes, but “simply because the right is personal does not mean it is *purely* personal.”<sup>173</sup> Neither *Heller*, nor the text, history, or purpose of the Second Amendment foreclose some kind of collective understanding of the right *in addition to* a personal right.<sup>174</sup>

First, *Heller* itself seems to contemplate some residual understanding of the right in a collective sense. *Heller* denigrates the institutional functions of the organized militia, but refers repeatedly that the right to keep and bear arms as facilitating

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168 *Id.*

169 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

170 *See id.* at 573–76.

171 *Id.* at 636. The Second Amendment right subsequently was incorporated to apply to states and localities in *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

172 *Heller*, 554 U.S. at 599–600, 630 (emphasis omitted).

173 *See Miller*, *supra* note 12, at 932.

174 Courts have similarly analyzed the First Amendment's Speech Clause—a provision often used as a model for understanding the Second Amendment—in terms of protecting both individual speakers as well as speech itself. *See First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (“The proper question therefore is not whether corporations ‘have’ First Amendment rights . . . . Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect.”).

an “unorganized” or “citizens” militia.<sup>175</sup> This “unorganized” or “citizens” militia of private arms-bearers is still subject to discipline and training,<sup>176</sup> although the source of that training and discipline is no longer as strongly tied to either the plenary authority of Congress, nor to the leadership of the State.<sup>177</sup> Further, the opinion, cryptically, says the right is to secure against “private” or “public” violence.<sup>178</sup>

Textually, the right is reposed in the “people.” “Persons” in the Constitution tends to denote individuals and individual rights bearers, but “the people” refers to collective agents or institutional actors.<sup>179</sup> The Second Amendment speaks of “the people” and of a “militia”; and both connote collective or associative behavior, as distinguished from the Fifth Amendment<sup>180</sup> right against self-incrimination, for example, which speaks of a “person” and the singular “himself.”<sup>181</sup>

Historical sources contemporary to the Amendment’s ratification support some collective use of arms as well. English monarchs bestowed upon the merchant companies who colonized America power to keep and bear arms to defend the colony.<sup>182</sup> Blackstone’s conception of the right to bear arms was

<sup>175</sup> See *Heller*, 554 U.S. at 596 (“Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.”); *id.* (the term “militia” connotes “a body already in existence”); *id.* at 598 (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”); *id.* at 600 (“[I]f . . . the *organized* militia is the sole institutional beneficiary of the Second Amendment’s guarantee—it does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny.”).

<sup>176</sup> *Id.* at 597 (“[T]he adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.”).

<sup>177</sup> See U.S. CONST. art. I, § 8; *id.* art. II, § 2.

<sup>178</sup> *Heller*, 554 U.S. at 594 (“Thus, the right secured in 1689 . . . was by the time of the founding understood to be an individual right protecting against both public and private violence.”).

<sup>179</sup> Akhil Reed Amar, *Foreword: Document and the Doctrine*, 114 HARV. L. REV. 26, 127 (2000).

<sup>180</sup> U.S. CONST. amend. V.

<sup>181</sup> See, e.g., *Heller*, 554 U.S. at 600 (discussing protection of Second Amendment rights for “people’s” or “citizens” militia, as opposed to organized militia).

<sup>182</sup> See THE CHARTER OF NEW ENGLAND (1620), reprinted in 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1835 (1909) [hereinafter COLONIAL CHARTERS]; see also THE FIRST CHARTER OF VIRGINIA (1606), reprinted in 7 COLONIAL CHARTERS, *supra* at 3783, 3787 (allowing company to “transport the goods, chattels, armor, munition, and furniture, plentiful to be used by them, for . . . defense, or otherwise in respect of the said plantations” (spelling modernized)); Miller, *supra* note 12, at 934 (“Historically, private collectives and early corporations possessed some ability to keep and bear arms.”).

“political.”<sup>183</sup> Under English common law, a man could gather persons to defend his house, although if they ventured off the property on their own initiative they risked being charged with unlawful assembly or riot.<sup>184</sup> Contemporary state constitutional provisions that protected a right to keep and bear arms often spoke of it as necessary for protection of the self *and* the political community.<sup>185</sup> For example, the 1780 Constitution of Massachusetts stated, “The people have a right to keep and to bear arms for the common defence”;<sup>186</sup> the 1796 constitution of Tennessee used similar phrasing: “[F]reemen of this State have a right to keep and to bear arms for their common defence.”<sup>187</sup> In fact, as discussed in more detail below, community law enforcement was understood as a duty in an era without a professionalized force specifically designated to maintain order.

The purpose of the right is not purely personal either. Self-defense may be the “central component” of the Second Amendment, but that common law core does not preclude some kind of collective understanding for the right. First, it bears repeating that self-defense alone is an inadequate operating theory of the Second Amendment.<sup>188</sup> Self-defense is both too broad and too narrow.<sup>189</sup> It is too broad because persons, like the mentally ill and felons, have moral and legal rights to self-defense, but they have no corresponding right to keep and bear arms, as *Heller* itself states.<sup>190</sup> If the Second Amendment were co-exten-

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<sup>183</sup> Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 166 (2002).

<sup>184</sup> Compare 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 516 (John Curwood ed., 8th ed. 1824) (1716) (“[A]n assembly of a man’s friends in his own house, for the defence of the possession thereof . . . is indulged by law . . .”), with *Queen v. Soley* (1707) 88 Eng. Rep. 935, 937; 11 Mod. 114, 116–17 (“Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.”).

<sup>185</sup> See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 198–99, 205–07, 216 (2006) (compiling and characterizing state constitutional provisions).

<sup>186</sup> *Id.* at 208.

<sup>187</sup> *Id.* at 209.

<sup>188</sup> JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION AND THE FUTURE OF *Heller* 152–53 (2018); cf. *Calderone v. City of Chicago*, No. 18 C 7866, 2019 WL 4450496, at \*4 (N.D. Ill. Sept. 17, 2019) (“The Court is unaware of any authority indicating that the Second Amendment is relevant to the question of under what circumstances violent action is legally justified as self-defense.”).

<sup>189</sup> BLOCHER & MILLER, *supra* note 188, at 152–53.

<sup>190</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (stating that prohibitions on firearms in the hands of felons and the mentally ill are presumptively constitutional).

sive with self-defense, this exclusion would make no sense. Self-defense is also too narrow, because self-defense at common law has traditionally been justified only where the violence was necessary, the harm was imminent, and the force proportional to the threat.<sup>191</sup> But the right to keep and bear arms does not neatly map onto these requirements. One is entitled to possess a firearm (as distinct from using it) no matter how remote or innocuous the threat and no matter how disproportionate the force to that threat.<sup>192</sup>

Self-defense is also inadequate because it's not scalable. Self-defense covers individuals, yes, but it also covers groups, states,<sup>193</sup> and nations.<sup>194</sup> Further, any one of these entities can pose a threat to any of the others.<sup>195</sup> It cannot be that the right is completely undifferentiated, either with respect to the nature of the self-defense claims of these different actors, or to the arms they can use to advance those claims. It seems implausible that precisely the same rules for self-defense apply whether we are speaking of an individual or a nation; and it certainly cannot be that the weapons effective to defend one are equally suitable for any of the others. *Heller* says as much, forbidding the private ownership of "dangerous and unusual weapons" (like land mines or guided missiles or armor piercing rounds) despite their undeniable utility for national self-defense, and their arguable utility for private self-defense.<sup>196</sup>

Even the "central component" of the Second Amendment—self-defense—is not nearly as personal as conventionally thought.<sup>197</sup> To the extent *Heller* adopts an English common

<sup>191</sup> MODEL PENAL CODE § 3.04(2)(b) (AM. LAW INST. 1985).

<sup>192</sup> See BLOCHER & MILLER, *supra* note 188, at 152–54. For a discussion of the relationship between Second Amendment doctrine and self-defense, see generally Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020) (exploring challenges to self-defense as the "core" of the Second Amendment).

<sup>193</sup> Cf. U.S. CONST. art. I, § 10 (stating that no state may "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay").

<sup>194</sup> See, e.g., U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.").

<sup>195</sup> See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1454 n.358 ("The Framers . . . saw community defense against a criminal government as simply one end of a continuum that began with personal defense against a lone criminal . . .").

<sup>196</sup> *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (internal quotation marks omitted).

<sup>197</sup> For a further elaboration of this point, see generally Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 L. & CONTEMP. PROBS. 85 (2017) (noting how the state has a heavy role in shaping the right to self-defense) [herein-

law baseline for the core of the right, rather than some transnational or transcendent principle of natural law,<sup>198</sup> that baseline historically has contained a public, collective component. As the Supreme Court recognized, at English common law, all homicides for personal purposes were culpable acts. “[O]nly those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful and were punished by death.”<sup>199</sup> The one exception was homicide in self-defense in the home, the so-called “castle doctrine.”<sup>200</sup>

Homicide in public places, even to save one’s life, was not considered blameless. As Lord Coke wrote, “[A]lthough a man kills another in his defence . . . without any intent, yet it is felony . . . for the great regard which the law has to a man’s life.”<sup>201</sup> Those who killed in self-defense had to petition the sovereign for a pardon, and even then were subject to civil actions by the family of the deceased.<sup>202</sup> Although pardons became routine by the time of Henry VIII,<sup>203</sup> the distinctions between the two types of homicide remained in criminal law treatises well into the nineteenth century,<sup>204</sup> and Parliament did not abolish the formal distinction between excusable homicide in self-defense, and justifiable homicide in furtherance of law enforcement until 1828.<sup>205</sup>

In contrast to purely personal self-defense, which only excused a homicide, a justified homicide required that the slayer

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after Miller, *Self-Defense*]. The next three paragraphs rely in part on this prior research.

<sup>198</sup> It is possible, of course, that Justice Scalia in *Heller* did not adopt a positive common law baseline discernable from history, but instead appealed to timeless principles of natural law. Cf. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136 (D.D.C. 2016) (stating that because the Second Amendment codified a pre-existing right, the “first step in the historical inquiry is examining the right we inherited from English and natural law”). But that understanding would run counter to Justice Scalia’s instincts in other areas of constitutional doctrine. See ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 248 (Christopher J. Scalia & Edward Whelan eds., 2017) (“Do you really want judges—fallible judges—going about enforcing their vision of natural law, contrary to the dictates of democratically enacted positive law? Lord, no.”).

<sup>199</sup> *Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975).

<sup>200</sup> *Semayne’s Case* (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b.

<sup>201</sup> *Id.*

<sup>202</sup> 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 482 (2d ed. 1898).

<sup>203</sup> *Killing a Thief Act of 1532*, 24 Hen. 8, c. 5 (Eng.).

<sup>204</sup> See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 637 (1996).

<sup>205</sup> See *The Offences Against the Person Act of 1828*, 9 Geo. 4, c. 31, § 10 (providing that “no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony” (capitalization modernized)).

act on behalf of the sovereign, either directly or in the course of public law enforcement.<sup>206</sup> Initially, these justifiable homicides were very few, and had features closer to the execution of a death sentence than self-preservation.<sup>207</sup> But eventually justifiable homicide expanded at common law to include killing to prevent forcible felonies including robbery, burglary, and arson, and to prevent the escape of a felon.<sup>208</sup> Moreover, these kinds of enforcement actions were described as a duty incumbent upon all law-abiding citizens.<sup>209</sup> Although some eighteenth-century treatise writers recognized that self-preservation and the duty to enforce the law against felons could serve the same ends, the convergence was coincidental.<sup>210</sup> Not until 1806, in the case of *Commonwealth v. Selfridge*, did an American court “use the term ‘self defense’ to describe what up until that point in legal history [had been] characterized as a justifiable prevention of felony.”<sup>211</sup>

In other words, the history of Anglo-American self-defense law—the core of the right to keep and bear arms according to *Heller*—has traditionally maintained a conceptual distinction between excusable, but socially suspect homicides on behalf of the self, and justifiable homicides executed in maintenance of crime control and public order.<sup>212</sup> Malcolm Thorburn has provided a crisp jurisprudential account of this history, stating that private citizens have such authority “only insofar as they are performing a public function . . . and accordingly, they are bound by similar normative constraints when deciding what

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<sup>206</sup> Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133, 142 (1954); Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010) (“The only justifiable homicide . . . was one committed under the auspices of the state, or at least in clear furtherance of the state’s interests.”).

<sup>207</sup> See generally Bernard Brown, *Self-Defence in Homicide: From Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583 (tracing the history of self-defense).

<sup>208</sup> Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 436–48 (1976); see also Miller, *supra* note 197, at 92–93 (discussing the distinction between justifiable homicide and excusable homicide).

<sup>209</sup> WM. L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 137 (1894) (“It is not only every person’s right, but it is his legal duty, to prevent a felony, even if he has to go to the extreme of taking the life of the person attempting to commit it.”).

<sup>210</sup> MICHAEL FOSTER, *CROWN CASES* 274 (2d ed. 1791).

<sup>211</sup> Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. REV. 459, 477 (1987) (footnote omitted).

<sup>212</sup> Green, *supra* note 208, at 436–48; see also Miller, *supra* note 197, at 85 (discussing the historical development of self-defense as a right in Anglo-American law).



conduct is justified as public officials would be in the same situation.”<sup>213</sup>

Because self-defense simpliciter is doctrinally, functionally, and historically inadequate as the sole organizing principle for the Second Amendment, something more nuanced—like safety—is required to understand the right.<sup>214</sup> That is, the right to keep and bear arms is a right for people to keep and carry arms for self-defense in such a manner and under such circumstances as they contribute to safety.<sup>215</sup> This safety goal has both a personal and public aspect.<sup>216</sup> A right to carry a firearm extends only so far as it contributes to personal safety; and the right aggregated over groups is justified only to the extent it advances safety of the public at large.<sup>217</sup> Such a reconceptualization of the right to keep and bear arms would be more consonant with founding-era notions of individual rights, as Jud Campbell has documented.<sup>218</sup> With the exception of certain kind of truly “inalienable rights”—like freedom of conscience—natural rights were about producing a common good.<sup>219</sup> Nor is such a reconceptualization of the right around public goods alien to our administration of other kinds of constitutional rights. Speech is protected most robustly when it empowers political participation and when it contributes to the ability of a democratic society to govern itself.<sup>220</sup> For this reason, the Supreme Court has emphasized that the First Amendment protects not only speakers, but speech itself, and that

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<sup>213</sup> Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1076 (2008).

<sup>214</sup> BLOCHER & MILLER, *supra* note 188, at 154–59.

<sup>215</sup> Safety does not have to be the only rationale. The right to keep and bear arms could also be about autonomy or tyranny prevention. *See id.* at 159–69.

<sup>216</sup> Joseph Blocher & Darrell A.H. Miller, *What is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 352–54 (2016) (discussing the safety rationale for the Second Amendment).

<sup>217</sup> As one of us has written elsewhere, the Second Amendment may contemplate something like a “marketplace of violence” regarding the individual use of violence and threats of violence that leaves everyone better off. BLOCHER & MILLER, *supra* note 188, at 155–56. Of course, there’s no reason to think that an unregulated “marketplace of violence” is ideal, or that regulation has no place in preventing or resolving market failures. *Id.*

<sup>218</sup> Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86 (2017) (explaining that founding-era notions of natural rights were about “creat[ing] a representative government that best served the public good”).

<sup>219</sup> *Id.* at 112 (“Founding-Era natural rights were not really ‘rights’ at all, in the modern sense. They were the philosophical pillars of republican government.”).

<sup>220</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (“Speech is an essential mechanism of democracy . . .”).

more generally the “Constitution often protects interests broader than those of the party seeking their vindication.”<sup>221</sup>

Reconceptualizing the right to keep and bear arms as designed to achieve safety would also address a frequent critique of American constitutional rights discourse—its excessive focus on individuals and its inattention to expressive or institutional features of rights.<sup>222</sup> Rights are often conceived of as trumps—the rights holder plays this one card and vanquishes all other utilitarian considerations.<sup>223</sup> But as a number of scholars have observed, trumps are not the only way to conceive of rights, and is an incomplete description of American constitutional practice.<sup>224</sup> Instead, rights are often designed to counter certain kinds of illegitimate reasons the government offers for its rules.<sup>225</sup> Rights protect individuals so that governments cannot eliminate the kind of public good the right is supposed to supply. As Richard Pildes says: “An intended and justifying consequence of rights is that through protecting the interests of specific plaintiffs, rights also realize the interests of others, including the construction of a political culture with a specific kind of character.”<sup>226</sup> In the context of arms, the implication is that an individual’s right to bear arms is protected to the extent it contributes to the public good of security. And the political culture captured by the right to keep and bear arms is that it carries with it an attendant set of public responsibilities.<sup>227</sup> People authorized by law to carry arms and to threaten, or even execute, lethal force on others are doing so not only on their own behalf, but on behalf of the public as well.

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221 First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

222 See generally Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (criticizing the Supreme Court for focusing on absolute rights as opposed to balancing them with institutional concerns).

223 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184–205 (1977).

224 See generally Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998) (criticizing rights being framed as trumps and advocating for framing rights as structural). We take no position on whether Pildes characterizes Dworkin’s account correctly. See generally Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301 (2000) (criticizing Pildes’s characterization of Dworkin’s trumps). Our casual observation is that the “rights as trumps” approach in practice is not applied with the subtlety that Dworkin may have conceived it.

225 Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 2 (1998); see also Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 87–91 (2016) (discussing how institutional analysis can inform reasons for firearm rights and regulation).

226 Pildes, *supra* note 224, at 731.

227 See Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1116–17 (2011).

If the Second Amendment's fundamental purpose is safety, rather than an undifferentiated notion of individual self-preservation, then some kind of collective right to bear arms would seem to follow. Individuals can certainly defend themselves, but associations magnify that ability. As one of us has written elsewhere:

Just as individuals can better exercise their First Amendment rights by associating together, individuals can better exercise their Second Amendment rights by association. After all, a person shouting from a soapbox is far less effective at communicating than are ten thousand persons in a parade. Similarly, a lone gunman is far less able to defend himself than is an armed gang. Just as the right "peaceably to assemble" is an individual right that is exercised collectively, one can imagine the Second Amendment right to keep and bear arms as an individual right that can be exercised collectively, albeit perhaps, in a more tightly circumscribed manner.<sup>228</sup>

Assuming this is the correct framing for the right to keep and bear arms, one must necessarily modify the libertarian conception of the right. The right to keep and bear arms is not an individual trump so much as a way of ensuring the production of a certain kind of public good—safety. Personal activities with firearms that do not contribute to safety either fall completely outside the scope of the right or are not protected by it; government regulations on the keeping and bearing of arms that frustrate that goal are unconstitutional; regulations that advance this public good are lawful.

To rethink the Second Amendment along these lines is not to gainsay *Heller* or its core conclusion that the right is personal. Nor does it require a National Guard to be the sole institution designated to administer the collective aspects of this public good. But it does require attention to other kinds of institutions that, post-*Heller*, give content and meaning to the public aspects of the right to keep and bear arms, separate (if not independently) from individuals. Other constitutional

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<sup>228</sup> Miller, *supra* note 12, at 938–39 (footnotes omitted). It is possible that no collective entity manages the public aspects of the right to keep and bear arms, and the Second Amendment contemplates a largely unregulated "marketplace of violence" where the market will effortlessly ensure an optimal distribution of "good guys with guns" to counter all the "bad guys with guns." See BLOCHER & MILLER, *supra* note 188, at 155–57. But that proposition seems needlessly dystopian and is not warranted by the existing doctrine, *see id.*, or supported by indisputable empirical evidence. Ian Ayres & John J. Donohue III, *The Latest Misfires in Support of the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1371, 1374 (2003).

rights, often thought of as being “personal,” are facilitated and shaped by institutions. Churches, universities, political parties, and schools all empower and constrain the First Amendment.<sup>229</sup> Rights in these domains are part of the “working Constitution” that Karl Llewellyn described as “in good part utterly extra-Documentary.”<sup>230</sup> Rights conceived as working through institutions dissolves the convenient, but false, division between constitutional rights and constitutional structure<sup>231</sup> and alter what often appears a simple binary question—is there a right or not—into something more descriptively accurate and analytically useful.

In sum, nothing about the text, history, tradition, purpose, or nature of the Second Amendment right to keep and bear arms precludes a collective understanding of the right in addition to a personal one. But, since *Heller* toppled the organized militia as the collective entity that administers this public or collective aspect of the right, the next task is to identify the kinds of collectives that now fill the breach.<sup>232</sup>

## B. The City as a Self-Defense Institution

One institution that constrains and facilitates the collective aspects of bearing arms must be the city. The city, among other things, is a self-defense institution.<sup>233</sup> “[D]efense and security” have been, according to Matthew Waxman, “[a] driving force behind the evolution and development of cities.”<sup>234</sup> Cities as a political body far predate more sophisticated communities like states or nations,<sup>235</sup> and a chief motivation for their creation was safety.

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<sup>229</sup> See generally PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 107–260 (2013) (providing examples of First Amendment institutions and discussing how they interact with the First Amendment); see also Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA L. REV.* 1747, 1757 (2007) (stating that “there are numerous areas of constitutional law in which institution-specific categories of doctrine might usefully play a larger role than they do now”).

<sup>230</sup> K. N. Llewellyn, *The Constitution as an Institution*, 34 *COLUM. L. REV.* 1, 15 (1934).

<sup>231</sup> Ozan O. Varol, *Structural Rights*, 105 *GEO. L.J.* 1001, 1030 (2017).

<sup>232</sup> For more on this point, see generally Miller, *supra* note 225, at 95–106 (analyzing various institutions that facilitate and constrain the Second Amendment).

<sup>233</sup> JOEL KOTKIN, *THE CITY: A GLOBAL HISTORY* 11 (2005); LEWIS MUMFORD, *THE CITY IN HISTORY* 51 (1961).

<sup>234</sup> Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 *VA. J. INT’L L.* 353, 354 (1999).

<sup>235</sup> 1 EUGENE MCQUILLIN, *A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* § 5 (1911) (“Compact aggregations of people ante-date the formation of states or general governments.”).

Neolithic humans constructed knots of dwellings, arranged in a circle, the better to defend themselves from raiders.<sup>236</sup> Eventually, these early communities found natural features—hills, rivers, cliffs—provided even better protection and what was a place of refuge in times of crisis became, over time, a destination for settlement.<sup>237</sup> In the medieval age, walled cities replaced scattered and vulnerable villages.<sup>238</sup> In fact, the ability to maintain its own security may have been one qualification for municipal corporate status in England.<sup>239</sup> Once these walls were built, to provide freedom from external threats, the walls could be used to “maintain freedom within.”<sup>240</sup> Walled towns became the site for markets, for labor specialization, and, eventually for some measure of democratic participation and autonomy.<sup>241</sup> Adam Smith, in his *Wealth of Nations*, remarked on how “[t]he inhabitants of cities . . . considered as single individuals, had no power to defend themselves; but by entering into a league of mutual defence with their neighbours, they were capable of making no contemptible resistance.”<sup>242</sup> These medieval cities had their own militias and came to enjoy a certain amount of autonomy and political representation. Max Weber, who famously described the state as the monopolist of legitimate violence,<sup>243</sup> identified the urban community as a settlement possessing the following features: “(1) a fortification; (2) a market; (3) a court of its own and at least partially autonomous law; (4) a related form of association; and (5) at least partial autonomy [administered by elected officials].”<sup>244</sup>

In England, the King recognized these features in the City of London from as far back as the Norman Conquest.<sup>245</sup> When William the Conqueror invaded England in 1066, he issued a charter to the City of London recognizing its ancient privileges

236 See LUDWIG HILBERSEIMER, *THE NATURE OF CITIES: ORIGIN, GROWTH, AND DECLINE* 18 (1955).

237 *Id.* at 18, 20; see also Waxman, *supra* note 234, at 358 (“[C]ities provided defensive infrastructure” going back to the third century).

238 MUMFORD, *supra* note 233, at 250.

239 *Id.* at 251.

240 *Id.*

241 *Id.* at 251–52.

242 ADAM SMITH, *THE WEALTH OF NATIONS* 355 (Alfred A. Knopf, Inc. 1991) (1776).

243 Max Weber, *Politics as a Vocation*, in *THE VOCATION LECTURES* 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone, trans., 2004) (“[T]he state is the form of human community that . . . lays claim to the monopoly of legitimate physical violence. . . .” (emphasis omitted)).

244 Max Weber, *The Nature of the City*, in *CLASSIC ESSAYS ON THE CULTURE OF CITIES* 23, 38 (Richard Sennett ed., 1969).

245 See CHRISTOPHER N.L. BROOKE, *LONDON 800–1216: THE SHAPING OF A CITY* 29 (1975).

and guaranteeing that all of the city's "laws and customs be preserved as they were in King Edward's day."<sup>246</sup> Among the customs honored by subsequent sovereigns was the right of the City to elect its own sheriff, aldermen and related ministers.<sup>247</sup> The aldermen of London were entrusted with "assuring that everyone in his ward had weapons and a horse for the purposes of defense."<sup>248</sup> These rights and privileges, as well as those of other cities and towns, were reaffirmed in Magna Carta by King John in 1215.<sup>249</sup>

As cities became more populated, internal coordination issues became more complicated. Cities needed security forces to protect residents from the depredations of outsiders; but they also needed security to protect residents from their neighbors.<sup>250</sup> Before the rise of the professionalized police force around the nineteenth century, policing was a social obligation, pursued by members of the community. The "King's peace" had to be preserved and crimes against the peace were affronts to the sovereign.<sup>251</sup> Maintaining the peace was the duty of certain ministers but was also enforced by the citizens themselves. The 1181 Assize of Arms "provided that 'all townsmen and all communes of free men' were to bear certain kinds of arms—thereby making all citizens soldiers and all cit-

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<sup>246</sup> *Id.*

<sup>247</sup> A species of this persists in the concept of the "freedom of the city" requiring military officials to be granted permission to parade in the city. See David Baxter, *Local Military Honoured in Freedom of the City Ceremony*, GLOBAL NEWS (Sept. 12, 2015, 8:07 PM) <https://globalnews.ca/news/2217646/local-military-honoured-in-freedom-of-the-city-ceremony/> [<https://perma.cc/2Y9B-5GRC>].

<sup>248</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 382 (1983).

<sup>249</sup> Magna Carta, cl. 13 (1215), reprinted in *Magna Carta Translation*, BRIT. LIBR., <https://www.bl.uk/collection-items/magna-carta-1215> [<https://perma.cc/74DN-95UG>] (last visited Nov. 15, 2020) ("The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.").

<sup>250</sup> Nicole Stelle Garnett, *The Order-Maintenance Agenda as Land Use Policy*, 24 NOTRE DAME J.L. ETHICS & PUB. POLY 131, 132 (2010) ("While protecting inhabitants from invading outsiders is no longer a primary function of cities, local governments must continue to guarantee their residents' security by adopting and enforcing the rules necessary to protect them from deviant insiders."); see also Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1637 (2015) ("[A]s cities developed, dispute resolution was one of the basic functions of government; indeed, some argue the formation of cities in Medieval times stemmed from the need to deal with conflicts so as to facilitate commerce and provide a modicum of peace and security.").

<sup>251</sup> Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1231 (2016).

ies military units.”<sup>252</sup> Systems like the hue and cry empowered the citizens of the town to pursue malefactors and imposed a corresponding duty along with that power.<sup>253</sup> An Ordinance of 1195 ordered “all men to arrest outlaws, robbers, thieves and the harborers of such.”<sup>254</sup> An edict in 1233 created a night-watch and instructed them to “arrest those who enter[ed the] vills at night and go about armed.”<sup>255</sup> The citizenry were obliged by law to equip themselves for such public service, depending on their means, and included such items as a “Hauberke [a Breastplate] of Iron, a Sword, a Knife, and a Horse.”<sup>256</sup> And, indicated above, distinctions between excusable homicide in self-defense, and justifiable homicide in furtherance of law enforcement provided the legal features that distinguished purely private violence from public violence.<sup>257</sup>

Even as a professional class of municipal defenders gradually developed between the eighteenth and nineteenth centuries,<sup>258</sup> this notion of a public duty persisted. In 1780, speaking on violence during the sectarian Gordon Riots, London’s principal lawyer described the “hybrid right/obligation”<sup>259</sup> to bear arms like this:

It seems, indeed, to be considered, by the ancient laws of this kingdom, not only a right, but as a duty; for all subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in

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<sup>252</sup> BERMAN, *supra* note 248, at 360 (footnotes omitted).

<sup>253</sup> David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1195–1200 (1999); see also EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 116 (E. & R. Brooke 1797) (1644) (“[T]he duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender . . . .”) (spelling modernized); Donohue, *supra* note 251, at 1231 (“All persons between the ages of fifteen and sixty who heard the hue and cry were obliged to assist.”).

<sup>254</sup> Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 547 (1924).

<sup>255</sup> *Id.*

<sup>256</sup> *Babington v. Yellow Taxi Corp.*, 164 N.E. 726, 727 (N.Y. 1928) (alteration in original) (citing POLLOCK & MAITLAND, *supra* note 202, at 577; 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 294 (3d. ed. 1922)).

<sup>257</sup> See discussion *supra* notes 201–211 and accompanying text.

<sup>258</sup> Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest*, 25 CORNELL J.L. & PUB. POL’Y 557, 563–64 (2016) (“As population density increased and greater urbanization took hold, the citizen’s arrest doctrine adapted to place less power in the hands of private citizens and more power in the hands of professional law enforcement.”).

<sup>259</sup> Saul Cornell, *Limits on Armed Travel Under Anglo-American Law: Change and Continuity over the Constitutional Longue Durée, 1688–1868*, in *A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 72, 76 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019).

the execution of the laws and the preservation of the public peace.<sup>260</sup>

This tradition of localized security travelled from the United Kingdom across the Atlantic. Early towns and cities in America exercised significant autonomy in policing, typically adopting a constable and watchman system.<sup>261</sup> City leaders designated these officials to keep the peace, and those officials in turn enlisted the aid of “onlookers or local residents” to make arrests.<sup>262</sup> Tocqueville remarked in the 1830s that on his tour of America he’d “seen the inhabitants of a county . . . forming committees with the object of catching the criminal and handing him over to the courts.”<sup>263</sup> This is because everyone in the local community “thinks he has an interest in . . . arresting the guilty man.”<sup>264</sup> In a tort suit in 1923 in New York, where a policeman instructed a cab driver to pursue a criminal, then-New York Chief Justice Benjamin Cardozo wrote:

The duty goes back to the days of the hue and cry. ‘The main rule we think to be this,’ say the historians of our early law, ‘that felons ought to be summarily arrested and put in gaol. All true men ought to take part in this work and are punishable if they neglect it.’<sup>265</sup>

Increased demands on security generated all the problems associated with delegating authority for that benefit. Volunteers to maintain security became scarce. Watchmen would shirk.<sup>266</sup> Unscrupulous private policing services—like “thief catchers”—collected bounties for thwarting crimes they conspired to commit.<sup>267</sup> In America, private law enforcement took on an especially grotesque character. Slave patrols, lynch mobs, and white supremacist organizations all claimed the mantle of community protectors and keepers of the peace: persons acting—collectively—to pursue their natural right of self-

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260 *Id.* (quoting WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE, WITH ESSAYS ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS 59–60 (1785)).

261 JONATHAN OBERT, THE SIX-SHOOTER STATE: PUBLIC AND PRIVATE VIOLENCE IN AMERICAN POLITICS 52 (2018).

262 *Id.*

263 TOCQUEVILLE, *supra* note 113, at 96.

264 *Id.* This may have been a rosy-colored view of the role of community law enforcement at the time. See RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES IN AMERICAN VIOLENCE AND VIGILANTISM 23 (1975) (discussing how private law enforcement sometimes lead to lawlessness and anarchy).

265 *Babington v. Yellow Taxi Corp.*, 164 N.E. 726, 727 (N.Y. 1928) (Cardozo, C. J.) (internal citations omitted).

266 Sklansky, *supra* note 250, at 1197–98.

267 *Id.* at 1199.



defense.<sup>268</sup> Pinkerton guards, hired as a private militia by plutocrats, violently suppressed labor during the latter years of the nineteenth century.<sup>269</sup>

Initially, especially in America, the police did not offer much more effective or more public minded service.<sup>270</sup> Professionalization helped ameliorate some of these issues. The move to professionalize law enforcement began in London in the early eighteenth century and picked up speed in the United States a generation later. Specialization of law enforcement, as well as training and accountability methods, became hallmarks of a new model for policing.<sup>271</sup> Training in weapons was of particular importance. In 1919, New York City Police Commissioner Arthur Woods disparaged those jurisdictions that had appointed officers and “turned [them] out on the street . . . armed with loaded revolvers, and yet with no training in the care or use of the weapon.”<sup>272</sup> The result was that “if an officer took a shot at anyone on the street, about the only safe individual within range of his gun was the criminal he was shooting at.”<sup>273</sup>

The city’s privileged role in securing safety in the form of policing has been a flashpoint for federalism and localism disputes for hundreds of years. A driver for home rule protections for cities, for example, was state legislative attempts to transfer matters of local authority and concern to state entities. One of the most notorious acts of state “ripper” legislation (as it was

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<sup>268</sup> As former Confederate General John B. Gordon testified, the Klan “was simply this . . . an organization, a brotherhood of the property-holders, the peaceable, law-abiding citizens of the State, for self-protection.” *Affairs in Insurrectionary States: Hearing Before the J. Comm. to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42d Cong. 308 (1871) (statement of John B. Gordon). It was, he said, “a police organization to keep the peace.” *Id.* at 309. Klan defendants argued through counsel that they were simply exercising a natural right to “[b]and . . . together as a defense against any such threats as were apprehended.” PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871, at 425–26 (Benn Pitman & Louis Freeland Post eds., 1872); see also Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043, 1063 (2010) (discussing the Klan’s self-defense argument raised during the South Carolina Ku Klux Klan trials).

<sup>269</sup> See Sklansky, *supra* note 253, at 1213.

<sup>270</sup> Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 623–24.

<sup>271</sup> See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2003–06 (2017) (overviewing the professionalization of police).

<sup>272</sup> ARTHUR WOODS, POLICEMAN AND PUBLIC 159 (1919), reprinted in 1 HARRY L. WILSON, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 108–09 (2016).

<sup>273</sup> *Id.*

called) was New York State's transfer of authority over municipal law enforcement to state organs.<sup>274</sup> The act provoked backlash so intense it led to rioting.<sup>275</sup> The history of these home rule movements has to do with preserving local authority over what many regarded as a fundamentally local institution—the police department. Municipal litigation over the scope of home rule authority has frequently involved questions over who is authorized to police the community, with the trend toward viewing “matters of police personnel . . . of basically local concern.”<sup>276</sup>

The centrality of public security to local concerns is not just limited to home rule however. *Printz v. United States*, for example, a central case in the anti-commandeering canon, had to do with the requirement of a local sheriff's office in Montana to enforce the Brady Handgun Act.<sup>277</sup> The premise of the holding appears to be that “localities may decide whether to allow . . . participation [in federal law enforcement efforts] based on their own views of whether those enforcement efforts transgress constitutional norms.”<sup>278</sup> One of the most important cases in civil rights litigation, *City of Los Angeles v. Lyons*, addresses the constitutional limits of federal courts to address misconduct by local police departments through the exercise of equity jurisdiction.<sup>279</sup>

To be sure, the Warren Court revolution in criminal procedure<sup>280</sup> and the rise of section 1983 as a federal check on local police power<sup>281</sup> have been significant. These kinds of changes have altered what was otherwise a wholly local phenomenon.

<sup>274</sup> Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1126 (2012).

<sup>275</sup> Colin Gordon, *Patchwork Metropolis: Fragmented Governance and Urban Decline in Greater St. Louis*, 34 ST. LOUIS U. PUB. L. REV. 51, 57 n.51 (2014).

<sup>276</sup> OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 6.4 (5th ed. 2019).

<sup>277</sup> 521 U.S. 898, 904 (1997).

<sup>278</sup> Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1289 (2004) (emphasis omitted).

<sup>279</sup> 461 U.S. 95, 105–07 (1983); see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 6 (1984) (“Even if Lyons’s standing were upheld, the Court ruled that principles of comity and deference to state law enforcement agencies would require dismissal under the doctrine of equitable restraint.”).

<sup>280</sup> See generally Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (outlining the major criminal procedure developments the Warren Court made).

<sup>281</sup> See generally, MICHAEL G. COLLINS, SECTION 1983 LITIGATION: IN A NUTSHELL §§ 1–14 (5th ed. 2016) (describing how the Court’s application of section 1983 changed to provide a check on local governments and their agents).

That said, the police power, as it pertains literally to policing, has and remains a largely local enterprise. Law enforcement today remains localized: the Department of Justice estimates there are over 15,300 “general purpose” state and local law enforcement agencies, of which more than 12,300 are municipal government police.<sup>282</sup> Crime prevention strategies also tend to be more efficient when made by local decision-making authorities.<sup>283</sup> And this lends some context to how courts may address use of firearms for the provision of public safety.

Given the longstanding tradition of deference to local decision making with respect to who and how the city arms its agents for public security, it is somewhat anomalous that when municipal governments attempt to regulate public firearms, some state legislatures have been aggressive to the point of punitive. A supermajority of states preempt municipal regulation on guns,<sup>284</sup> with some states going so far as to threaten fines, removal from office, or personal civil liability for city leaders who “enact[ ] or enforc[e]” local regulations on firearms.<sup>285</sup> Attention to the firearms rights of the city would restore some of the local expertise and local governance that these kinds of preemptive regulations disparage.

In sum, the argument we have supplied is fairly simple to track: municipal corporations are not categorically prohibited from asserting constitutional rights; the Second Amendment right to keep and bear arms is not purely personal, but has a corporate, public component; the municipal corporation is an institution that historically, traditionally, and functionally empowers and constrains the constitutional right of collective

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<sup>282</sup> Walker, *supra* note 270, at 619.

<sup>283</sup> See John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 691 (1999) (“[N]othing about the local crime problem suggests that centralization of power in federal law enforcement can be more efficient than local organization of law enforcement.”); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1245 (1996) (noting need for flexibility); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1419–20 (2001) (“That crime control should evolve in this self-consciously localized manner should come as no surprise, given that the human consequences and articulated explanations of crime are largely local in nature, as are police enforcement efforts.” (footnotes omitted)).

<sup>284</sup> Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999 (2018) (“As of 2013 . . . forty-five states preempted local firearms regulation.”).

<sup>285</sup> *Id.* at 2002–03; see also Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1182 (2018) (discussing Arizona’s preemption statute which permits investigation of local laws and withholding funding to the local government if it remains out of compliance after thirty days) (citing ARIZ. REV. STAT. § 41-194.01 (2017)).

arms bearing for self-defense. Hence municipal corporations should have some claim to Second Amendment rights in a post-*Heller* world.

### III

#### THE CITY'S SECOND AMENDMENT

We have addressed two major objections to the city as a bearer of Second Amendment rights. First is that cities cannot assert constitutional rights, especially against the will of their incorporating states. We explained how this notion rests on an account of municipal corporations that bears little resemblance to the sociological reality of the modern American city, is not uniformly applied as a matter of constitutional doctrine, and is normatively undesirable. Second is that the right to keep and bear arms is purely personal and cannot be understood in any collective or aggregate sense. We showed that the Second Amendment retains, even post-*Heller*, a collective element designed to further public safety. We then showed how the city is situated traditionally and functionally as an institution organized to administer that collective right.

In this last section, we sketch out the affirmative version of the city's Second Amendment. First, we supply a general framework for how cities may assert rights to keep and bear arms. Then we apply that framework to some of the specific challenges of gun rights and policy we identified in the introduction.

#### A. The Substantive Contours of the City's Second Amendment

##### 1. *Government Arms*

As a general matter, our argument means courts should recognize the unique arms-bearing interests of the city in litigation over the scope and protections of the Second Amendment.<sup>286</sup> This interest is more specific than a general concern with safety or an undifferentiated police power. It is an interest in the city as an arms-bearing entity itself, and as an institution that manages collective arms bearing for public security.

The city's interests in rights in this collective sense is not unique to the bearing of arms. Borrowing from the First

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<sup>286</sup> Second Amendment issues, like First Amendment issues, and most other constitutional rights have coverage issues and scope issues. The existing two-part framework for Second Amendment cases tends to follow these two lines of analysis. For more on this, see BLOCHER & MILLER, *supra* note 188, at 102–14.

Amendment (as is frequently done in Second Amendment cases<sup>287</sup>), free speech litigation has wrought a doctrine to address the government's role as a speaker—the government speech doctrine. This doctrine has two valences. One determines whether the speech should be attributed to the government.<sup>288</sup> Expression that is determined to emanate from the state is not subject to the typical requirement that the government must be content—and viewpoint—neutral with respect to speech.<sup>289</sup> Hence the federal government can express its views that cigarette smoking is deadly even though that is clearly a message with a strong critical perspective against some American citizens and industries.<sup>290</sup> The second determines what limitations, if any, the Constitution imposes on that speech.<sup>291</sup> While the First Amendment's Speech Clause may not limit the state from expressing its opinions, other constitutional clauses may. When the government's speech takes the form of prayer in public schools, for example, it may be barred as a violation of the Establishment Clause, at least where it is regarded as coercive to nonbelievers.<sup>292</sup>

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<sup>287</sup> *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms . . .”) (citation omitted); *id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”); *United States v. Marzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010) (stating that “for guidance in evaluating Second Amendment challenges” the First Amendment right to speech “is the natural choice”).

<sup>288</sup> *E.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542–43 (2001) (speech of lawyers working for state-funded Legal Services Corporation was constitutionally protected individual speech, not government speech); see generally HELEN NORTON, *THE GOVERNMENT'S SPEECH AND THE CONSTITUTION* 27–67 (2019) (exploring when speech of state actors and employees may be attributed to the government).

<sup>289</sup> See *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (“When the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”). The Court explained in *Walker* that when the government speaks, it is regarded as a participant in, rather than a regulator of, the marketplace of ideas. *Id.* at 2245–46.

<sup>290</sup> See NORTON, *supra* note 288, at 28 (discussing this and other examples of opinionated government expression).

<sup>291</sup> *E.g.*, *Rust v. Sullivan*, 500 U.S. 173, 198–99 (1991) (holding that speech of doctors in context of a government-funded health program was the speech of the government, and thus not subject to scrutiny as viewpoint-discriminatory).

<sup>292</sup> See, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (holding that required prayer at a school graduation ceremony was coercive in violation of the Establishment Clause where the school “compelled attendance and participation” in the ceremony); see generally also NORTON, *supra* note 288, at 68–92 (discussing government speech in tension with the Establishment and Free Exercise Clauses).

Just as the local government can be situated as an actor who speaks for First Amendment purposes,<sup>293</sup> so may it be situated as an actor who bears arms for Second Amendment purposes. The question whether the government bears arms should prove easier than determining when the government speaks, largely because it is far more straightforward to determine when someone bears arms than when they are engaging in constitutionally protected expression.<sup>294</sup> The government bears arms when it requires one of its agents to do so as part of the agent's official duties. So, a public-school security guard, whether paid or a volunteer, who carries a gun when on duty does so on behalf of the government.

A government arms doctrine is akin to the government speech doctrine insofar as both need to identify when the state is engaging in conduct in its own right. A government arms doctrine would be different, and more expansive, than the government speech doctrine, however, in how it casts the state as a rights bearer. While the Speech Clause does not constrain the state when it speaks, neither does it offer constitutional protection (conventionally understood) to government speech.<sup>295</sup> By contrast, the government arms doctrine as we define it would supply municipal governments with both a shield *and* a sword.<sup>296</sup> The shield would be that just as the city

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<sup>293</sup> In making this claim, we recognize how government speech as an exception to the First Amendment and government speech as a category of First Amendment speech is still being worked out. See Blank, *supra* note 143, at 439; see also *City of El Cenizo v. State*, 264 F. Supp. 3d 744, 776 (W.D. Tex. 2017) (local officials had First Amendment right not to be gagged in their speech as government officials by the state); *Cty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (“A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”), *aff'd*, 907 F.2d 1295 (2d Cir. 1990). Richard Briffault suggests the *El Cenizo* decision shows that “going beyond substantive preemption to penalize local expressive activity may trigger judicially enforceable free speech concerns.” Briffault, *supra* note 284, at 2011. *But see* *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 102 F.3d 869, 871 (7th Cir. 1996) (“The Executive Branch of the federal government does not have rights under the first amendment . . .”).

<sup>294</sup> Just about any act has some expressive overtone, requiring courts to ask hard questions about what counts as “speech.” Compare, *e.g.*, *S. Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984) (holding nude sunbathing not constitutionally protected speech), *with, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (holding nude dancing constitutionally protected speech).

<sup>295</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that state action that can be viewed as government speech “is not subject to the Free Speech Clause”).

<sup>296</sup> In this way the government arms doctrine would go beyond the current government speech doctrine, which tends to regard the speech of a city as a shield against private suits, but only rarely as a sword against preemptive regulation by

can privilege its own viewpoint when it speaks, a city can privilege its own arms and the arms of its agents over the arms of others. The sword would be that the city, as a rights-bearing entity, can assert its own Second Amendment rights in cases where the state or federal government attempts to preempt its function as the coordinator of collective arms bearing and as the provider of public security with arms.<sup>297</sup> That the city can wield that right as a sword, however, does not say how sharp it is. The strong version of the city's Second Amendment would negate contrary judgments by state or federal officials about arms bearing, for instance, within the jurisdictional limits of the city. A weaker form would act as a weight to the city's side, requiring federal or state authorities to offer additional justifications or proof why their policy choices about arms within municipal boundaries should prevail over the choices of the city.<sup>298</sup>

Introducing such a government arms doctrine would change how judges think about the Second Amendment in many cases involving cities and states. The typical framing in these cases pits an individual who wishes to carry some weapon against a state or local ordinance forbidding it. Conceiving of the city as a rights-bearing entity, and not just as a regulator, changes the dynamic. No longer is the conflict just an individual rights holder versus a government restraint; it is now a conflict between two rights holders.

## 2. *The City as Collective Security Decision Maker*

The second and related implication of this analysis is that the city, as the institution best situated to make decisions about its collective armed security, would enjoy deference to its choices. The analogy is to a private firm that merits some deference with respect to how it manages its internal security

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the state. *But see* Blank, *supra* note 143, at 373–75 (arguing for a more proactive right of municipal government).

<sup>297</sup> In this manner, our proposed model departs from an undifferentiated government speech model, which allows the city to speak, but does not clearly prevent the city from being gagged. *See id.* at 429 (“[O]nce we look more closely at local entities, courts are much more ambivalent, even sympathetic, to the idea of recognizing local entities as First Amendment speakers.”).

<sup>298</sup> Either the strong or weak form could be related to Shawn Fields’s description of a subfederal anticommandeering doctrine. *See* Fields, *supra* note 5, at 487 (“[A] more nuanced subfederal anticommandeering principle may reside in the Supreme Court’s treatment of localities as independent entities when the interpretation of a constitutional right requires local tailoring.”).

operations.<sup>299</sup> Thus far, few courts have expressly articulated a corporate Second Amendment right;<sup>300</sup> but, assuming such a right, it seems that the private decision of which agent to empower to provide security is a core feature of this kind of corporate claim to Second Amendment rights.

If this corporate actor believes that the best security plan is to designate two security guards armed with semiautomatic pistols, then this decision should prevail over the individual who wishes to carry an AR-15 onto corporate property. Indeed, the security guards, exercising the Second Amendment rights of the private company, would have a coordinate authority to disarm such a person, on the ground that the rifle wielding individual is not an authorized agent.<sup>301</sup> Private Second Amendment rights would thus contain both a positive component (the right to have two armed security guards on site) and a negative one (the right not to have others interfere with this plan).<sup>302</sup>

By the same token, at least in public places or areas controlled by the city, in the strong version of this model, the city's decisions about collective security should prevail over assertions of Second Amendment rights to the contrary. Consider, for example, the Houston Public Library. An individual who wanted to carry a gun into the library could argue that she was entitled to do so, due to Texas's relaxed gun laws, which allow concealed carry holders to carry their weapons into many public buildings, including libraries.<sup>303</sup> On our theory, though,

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299 Cf. *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 761 (N.D. Ill. 2015) (assuming private firearm businesses can claim Second Amendment rights).

300 *But see id.* ("Defendants have not presented the Court with any persuasive authority as to why Second Amendment protections should not extend to businesses.").

301 Cf. *United States v. Richards*, 937 F.2d 1287, 1292 (7th Cir. 1991) (disarming others is a manifestation of self-defense); *State v. Smith*, 150 S.E.2d 194, 198 (N.C. 1966) ("[I]f one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery."); *Moran v. Martinson*, 146 N.W. 841, 842 (Iowa 1914) (judging instructions correct to state that man had right to disarm woman with revolver in self-defense).

302 Note that this justification is different than just a general power to exclude under property law. See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) (discussing Second Amendment law written on a "background" of common law that permits individuals to exclude others from their property). The implication is that "parking lot" laws and other kinds of "forced entry" regulations impact the Second Amendment rights of corporate entities. See Miller, *supra* note 12, at 907.

303 *FAQ: Handguns in Texas Libraries*, TEX. ST. LIBR. & ARCHIVES COMMISSION, <https://www.tsl.texas.gov/ld/pubs/opencarry.html> [<https://perma.cc/FKTS-EWXY>] (last visited Nov. 15, 2020).



Houston is the constitutionally appropriate decision maker on the collective security of the library and its patrons. So, if the city asserted that it wanted only its armed guards to carry weapons in the library, we argue that that assertion should prevail over individuals' claims to the contrary, whether rooted in state law or the federal Constitution.<sup>304</sup>

### 3. *Limits*

Situating the city as a bearer of collective firearm rights introduces a number of difficult issues into the conversation about the Second Amendment. Perhaps the hardest of these is how to negotiate the conflicts between the city's collective right to promote safety, its decisional priority on that issue, and individual rights, including personal rights to bear arms for self-defense.

When these come into conflict, the answer cannot simply be that the city's prerogative as the final decision maker on collective security with guns prevails over all individual rights. For example, we do not think a Second Amendment right of a city means that it can discriminate on the basis of race or gender when it licenses persons to carry firearms. Nor do we think that a city's Second Amendment interest in public security sweeps away all the limits of Fourth Amendment excessive force or reasonable search jurisprudence.

More difficult is how to think about how the city's Second Amendment claims interact with an individual right to keep and bear arms for personal self-defense. One way to mediate this conflict is through the division of physical space. On the one hand, the right to keep and bear arms for self-defense has always been at its apogee in the home.<sup>305</sup> A city's Second Amendment choices do not necessarily prevail when it comes to regulations concerning firearms there.<sup>306</sup> Another is the notion of "sensitive places" identified in the *Heller* opinion.<sup>307</sup> There could be a sliding scale of priority of municipal interest in protecting "sensitive places." They may include schools and

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<sup>304</sup> There may be other constitutional issues as well, such as free speech rights and the institutional posture of the library as a site of free expression, but that is a matter of other scholarship. See Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 485 (2019).

<sup>305</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (describing the home as "where the need for defense of self, family, and property is most acute").

<sup>306</sup> See, e.g., Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1299-1301 (2009) (discussing restrictions that could apply to the Second Amendment).

<sup>307</sup> *Heller*, 554 U.S. at 626-27.

government buildings, but also public property where the city's duty and right to provide collective security, such as streets or parks, are at its greatest. Again, the instinct is the city has more than just a "proprietary" interest in those spaces; it has an arms for self-defense interest in these places as well. Hybrid public/private spaces, such as government-funded entities like city-run day care, medical clinics, or government housing present harder cases.

Nor do we think the city's right to determine its own collective security necessarily allows municipalities to coerce individuals into firearm ownership or to carry firearms against their will. One might imagine that a city, particularly a sparsely populated one where police response was necessarily limited, might argue that an armed citizenry would prevent crime by enabling citizens to supplement public order with their own self-defensive conduct.<sup>308</sup> This is not as fanciful an example as it may seem. At the dawn of the American republic, many cities required certain categories of residents to own guns (subject, though, to strict regulations in terms of use and storage).<sup>309</sup> And the city of Kennesaw, Georgia, passed an ordinance requiring that "every head of household residing in the city limits is required to maintain a firearm."<sup>310</sup> Here too, the individual right to bear arms (or more accurately, the right *not* to bear arms<sup>311</sup>) would overbear any municipal right rooted in the Second Amendment. In the same sense that we argue the Second Amendment gives cities the prerogative to make public decisions about collective security, so would it give individuals the right to make private decisions about their own individual safety, and if they felt that carrying a firearm on their person or having one in their home was not in their interest, the city's concern for public safety cannot countermand that choice.

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<sup>308</sup> One county in financial distress essentially told all its residents to arm themselves. Associated Press, "Lock Your Doors, Load Your Gun," *Kentucky Sheriff Warns in Stopping Law Enforcement*, ABC15 (Feb. 12, 2019, 6:32 PM), <https://www.abc15.com/national/lock-your-doors-load-your-gun-kentucky-sheriff-warns-in-stopping-law-enforcement> [<https://perma.cc/N2T5-BDHB>].

<sup>309</sup> *E.g.*, An Act for Regulating of the Militia, ch. 3, §§ 1, 5, 1694 Mass. Acts 128; An Act for the Regulating, Training and Arraying of the Militia, ch. 21, § 11, 1778 N.J. Laws 45.

<sup>310</sup> Omar Jimenez, *In This American Town, Guns Are Required by Law*, CNN (Mar. 7, 2018 2:22 PM) (internal quotation marks omitted), <https://www.cnn.com/2018/03/06/us/kennesaw-georgia-gun-ownership/index.html> [<https://perma.cc/7GBL-AUDX>].

<sup>311</sup> See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 6 (2012).

Finally, the city could not simply invoke the Second Amendment any time that it sought to regulate firearms, and then claim that its status as the ultimate decision maker on these issues concluded the matter. Rather, the city's right to keep and bear arms would apply only where it makes plausible, good faith attempts to organize collective security. Just as with other constitutional doctrines, courts could review city claims to bear arms under some degree of scrutiny.<sup>312</sup> At the very least, if the city's defense of some firearm-related action or regulation under the Second Amendment was not reasonably related to its interest in advancing public safety, its assertion of the right would fail.

## B. The Theory in Practice

### 1. *Concealed Carry Licensing*

An obvious application of the government arms doctrine would be in the area of concealed carry licensing. Today, no state in the union categorically prohibits a person from ever carrying a firearm out of their homes. Instead, the major unresolved issue in Second Amendment jurisprudence is the constitutionality of "shall-issue" versus "may-issue" regimes for carrying firearms. Fifteen states require no license to carry a firearm at all; approximately thirteen "shall-issue" states require a license, but do not permit any discretion on the part of the licensing official if the applicant meets certain minimum requirements (typically related to firearm prohibitors such as a felony conviction); another fourteen "shall issue" states provide limited discretion; and eight states have "may issue" licensing laws that require the applicant to demonstrate good cause.<sup>313</sup> Some states require training on when and how to use firearms; half of the states don't require any training at all.<sup>314</sup>

Treating the city as a Second Amendment rights bearer would transform the way law regards regulation of concealed carry. A person carrying a firearm publicly, even if not using it, is not acting on only behalf of himself alone but is carrying for

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<sup>312</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791–803 (1989) (outlining a test for the constitutionality of time, place, or manner speech regulations); see also *Kovacs v. Cooper*, 336 U.S. 77, 87–89 (1949) (regulating sound trucks based on reasonable time, place, and manner regulation on speech).

<sup>313</sup> See *Concealed Carry*, GIFFORDS L. CTR. (Nov. 8, 2019), <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [<https://perma.cc/8KKN-573H>].

<sup>314</sup> Mascia, *supra* note 9 ("Just 24 states and the District of Columbia include mandatory range time as part of their permitting process, while the remaining 26 have no such requirement in place.").

the protection of himself and others. Individual concealed carry significantly affects collective security, so that the city clearly has an interest in who is providing this public benefit. The strongest version of a government arms claims would mean the city could refuse to permit any person to publicly carry firearms except for the city's own designated agents. This may seem draconian, but it is similar conceptually to a corporation banning weapons possession in its headquarters on the theory that it alone can determine the deployment of arms in the interest of its internal security. A middle position may allow individuals to carry weapons, but not of the same lethality as those of the designated security agents. This outcome would allow individuals some ability to engage in self-defense and defense of others but would preclude local authorities from being outgunned as they were during the 2017 Charlottesville riot.<sup>315</sup> These are only two ways to mediate between the city's and individuals' gun rights. Regardless of how this line is drawn, the city should not be constitutionally cut out of the process of deciding who will be its guardians, how those guardians will be trained, and what weapons they will use to produce this public good.<sup>316</sup>

## 2. *Police Officers Versus the City*

Several members of the Seattle Police Department recently sued the City of Seattle on the theory that the city's revised use of force policy violated their individual Second Amendment rights.<sup>317</sup> The plaintiffs argued that the policy, which prevented them from using their firearms unless such use was "objectively reasonable," unconstitutionally constrained their

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<sup>315</sup> Sheryl Gay Stolberg, *Hurt and Angry, Charlottesville Tries to Regroup from Violence*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-white-nationalists.html> [<https://perma.cc/6R4A-HH7Q>]. Governor McAuliffe observed that the protestors "had better equipment than [s]tate [p]olice had." *Id.* (internal quotation marks omitted).

<sup>316</sup> *Cf. Concealed Carry State by State*, GIFFORDS L. CTR. (Nov. 8, 2019), <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/concealed-carry-state-by-state/> [<https://perma.cc/8KKN-573H>] (noting that until December 1, 2015, Michigan's handgun permitting scheme required authorities to notify any "city, village, or township that has a police department . . . to determine if it has any information relevant to the applicant's eligibility under state law to receive a license to carry a concealed handgun.").

<sup>317</sup> See Olivia Beavers, *Appeals Court Rules Against Seattle Cops Who Sued Over Use of Force Policy*, HILL (Sept. 19, 2017, 4:11 PM), <https://thehill.com/blogs/blog-briefing-room/news/351401-appeals-court-rules-against-seattle-cops-who-sued-over-use-of> [<https://perma.cc/95XK-D4GN>].

ability to use their firearms for self-defense.<sup>318</sup> The Ninth Circuit affirmed the District Court's dismissal of the claim on the theory that the use of force policy survived intermediate scrutiny and did not violate the officers' Second Amendment rights.<sup>319</sup>

Missing from this opinion was any notion that Seattle also had Second Amendment interests that should enter into the analysis.<sup>320</sup> Our framework would invite those considerations, and would likely yield a strikingly different analytical approach, albeit one that ultimately reached the same outcome. Here, the police were not seeking to use force on their own behalf, but rather in their roles as agents and employees of Seattle. So just as law regards government employees who issue statements in the scope of their employment as engaging in government, rather than individual, speech,<sup>321</sup> here the police should be regarded as bearing arms on behalf of the Seattle. This move alone would change the posture of the case. Instead of engaging in an analysis of whether the use of force rules restricted the police officers' individual Second Amendment rights, the government arms doctrine would highlight that the police's use of arms in their work as peace officers does not constitute an exercise of individual rights in the first instance.<sup>322</sup> So because the plaintiffs would not bear any Second Amendment rights under a government-arms approach, the court's substantive analysis would be unnecessary.

### 3. *Teachers with Guns*

The school shootings that have afflicted America in recent years<sup>323</sup> have divided policy makers. One reaction is to have

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<sup>318</sup> Mahoney v. Sessions, 871 F.3d 873, 877 (9th Cir. 2017) (internal quotation marks omitted).

<sup>319</sup> *Id.* at 883.

<sup>320</sup> The lower court adopted what may be thought of as a kind of government arms theory at step one of the Second Amendment analysis, stating the claim did not even raise a Second Amendment question because the use of force regulation "represents an effort by an employer, the Seattle Police Department, to regulate the use not only of (employer-issued) weapons but of the force its employees are specially sanctioned to wield *on behalf of the city government.*" Mahoney v. Holder, 62 F. Supp. 3d 1215, 1222 (W.D. Wash. 2014) (emphasis added), *aff'd sub nom.* Mahoney v. Sessions, 871 F.3d 873 (9th Cir. 2017).

<sup>321</sup> Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

<sup>322</sup> See Mahoney v. Holder, 62 F. Supp. 3d 1215, 1222 (W.D. Wash. 2014).

<sup>323</sup> See Elizabeth Wolfe & Christina Walker, *In 46 Weeks This Year, There Have Been 45 School Shootings*, CNN (Nov. 19, 2019, 4:13 AM), <https://www.cnn.com/>

more guns in schools, including arming teachers.<sup>324</sup> The other is to limit guns in schools, including preventing teachers from bringing arms into the classroom. Madison County, Ohio epitomizes the first response; in April of 2018 the school board voted overwhelmingly to arm teachers.<sup>325</sup> The State of New York epitomizes the second; in July 2019, Governor Andrew Cuomo signed legislation barring local school districts from arming teachers.<sup>326</sup> The guns in school issue raises two possible iterations of the city's Second Amendment.<sup>327</sup>

First, consider a municipal school district that passed an ordinance similar to the New York state law, preventing individual teachers from bearing arms within public schools because it believes that this will make schools safer. This example is similar to the previous one: A municipal entity is dictating how its employees may bear arms in an attempt to enhance internal security. The example is different, though, in other respects. A municipal police department is typically the primary method by which a city organizes arms bearing for internal security. School boards have not traditionally served that function, though schools are another public place where security is especially desirable. Bearing arms on behalf of the city and in the city's interest is a core function of police; it is not (at least has not historically been) a core duty of teachers in the scope of their employment. Finally, the municipal entity here is different: in the Seattle case the city itself we imagine asserting a Second Amendment right; here, it is a school district.

For all those reasons, this is a harder case. As in *Mahoney*, the teachers whose firearm use is regulated are municipal employees, and the regulation affects them only in the scope of their employment. One could thus argue that the government arms doctrine would work similarly. This is an instance in

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2019/11/15/us/2019-us-school-shootings-trnd/index.html#:~:text=in%2046%20weeks%20this%20year%2C%20there%20have%20been%2045%20school%20shootings&text=on%20college%20and%20university%20campuses,serving%20Kindergarten%20through%2012th%20grade [https://perma.cc/9HQG-E7QD].

<sup>324</sup> Matt Richmond, *With No National Standards, Policies for Arming Teachers Are Often Left to Local School Districts*, NPR (Apr. 2, 2019), <https://wamu.org/story/19/04/02/with-no-national-standards-policies-for-arming-teachers-are-often-left-to-local-school-districts/> [https://perma.cc/N3C4-8DDX].

<sup>325</sup> Breaking News Staff, *Madison Local Schools Board Votes to Allow Arming of Teachers, Staff*, WHIO TV7 (Apr. 25, 2018, 11:19 AM), <https://www.whio.com/news/local/madison-local-schools-board-votes-allow-arming-teachers-staff/jBDB39Y97Ml3jrGcaxvTEN/> [https://perma.cc/T6EK-HUPD].

<sup>326</sup> Gold, *supra* note 7.

<sup>327</sup> The issue of arming teachers also raises significant First Amendment issues which we do not address here. See Miller, *supra* note 304, at 470–72.

which a municipality is acting to advance the cause of its citizens' safety, which would amount to a core exercise of the city's Second Amendment as we have outlined it. So, one could simply assert that the teachers have no individual right to keep and bear arms in this case; their arms-bearing on-the-job conduct is subsumed by and an extension of the municipality's Second Amendment rights. On the other hand, one could argue that schoolteachers are not police, and since they are not traditionally charged with peacekeeping functions, the presumption of regulating in a constitutionally empowered space is not as strong.

This is likely a distinction without a difference. For one thing, the aim of the school district's policy is directly related to safety and in particular to reduce firearm-related violence. Moreover, the Court highlighted in *Heller* that in certain "sensitive places"—including "schools and government buildings"—individual Second Amendment rights needed to give way to states' and cities' interest in peacekeeping and safety.<sup>328</sup> Nor should it matter that the state actor here is a school district rather than the city itself; the fact that the district has delegated responsibility over education matters (including safety) does not change the interests at play or the constitutional-rights calculus. On the contrary, the Court's shadow doctrine respecting rights seems to extend to other kinds of municipal subdivisions as well as cities. So long as the subdivision has a separate corporate identity, whether it is a general municipal government or a special purpose government should not matter.

Consider a second valence of this issue: What if a state passed a law like New York's that prevented school districts from arming teachers and a gun-friendly county argued that the state law infringed its Second Amendment rights? Here, the problem is not possible tension between city and individual rights to keep and bear arms, but rather the conflict between firearm decision making between states and municipalities, and how the Second Amendment mediates such conflicts.

Here, the county could resist the state law on a pair of theories. One theory would be that the county has authority to decide for itself the best method of securing schools. While the above discussion suggests that local assertions of authority over firearm regulation in schools predominates over the personal firearm interests of municipal employees, the same may

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<sup>328</sup> District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

not be true for state laws regulating municipal employees. Cities and counties could argue that they have longstanding historical authority to regulate public safety, and that in their discretion they prefer to have individual teachers bear arms in school because they regard it as a safety-enhancing practice.

We do not think a collective Second Amendment justification for this kind of decision necessarily allows the local government to immunize armed teachers from liability for constitutional torts, any more than self-defense claims by police officers immunize them from Fourth Amendment suits.<sup>329</sup> Nor do we think this analysis relieves the local government of the constitutional obligation to adequately train armed teachers on the limits of lethal force. The archetypical “failure to train case” after all, is to empower government agents to employ deadly weapons and not to train them on their use.<sup>330</sup> However, even with these limitations, the implication of a local government’s authority to enforce its own constitutional rights to keep and bear arms—even in the face of contrary state priorities—is that local governments can experiment with firearm deregulation as much as regulation.

#### 4. *Second Amendment Sanctuaries*

Next, consider Second Amendment sanctuaries. These are counties and cities that have passed legislative resolutions declaring that they will not enforce certain laws that they deem violative of the right to keep and bear arms.<sup>331</sup> The resolutions protest a variety of measures ranging from background checks to laws enabling authorities to temporarily take weapons from dangerous or unstable persons. The effect of these declarations is hard to monitor. To the extent that city officials implement the resolutions, that means only that they refuse to enforce the law—a negative proposition that can be difficult to identify or quantify. Perhaps notably, as of yet there has not

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<sup>329</sup> *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (“[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, where, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable.”); *Richardson v. McGriff*, 762 A.2d 48, 90 (Md. 2000) (Harrell, J., concurring in part and dissenting in part) (“Unlike the purely objective standard [for use of force] required by [the Fourth Amendment] the self-defense doctrine contains both subjective and objective elements.”).

<sup>330</sup> See *City of Canton v. Harris*, 489 U.S. 378, 396 (1989).

<sup>331</sup> See Kelly Mena, *Virginia Counties Move to Become ‘Second Amendment Sanctuaries’*, CNN (Dec. 6, 2019, 6:14 PM), <https://www.cnn.com/2019/12/06/politics/virginia-counties-second-amendment/index.html> [https://perma.cc/FF2H-X9WX].



been an incident where a citizen sought enforcement of gun regulation and found local officials to be actively non-compliant.

Imagine, though, that the failure of a municipal official to take action led to litigation. For example: California requires firearm dealers to perform background checks before issuing weapons to purchasers. The City of Needles is a California desert town just west of the Arizona border that recently declared itself a Second Amendment sanctuary.<sup>332</sup> Suppose that firearms dealers in Needles began issuing weapons without performing background checks, and that city officials did not enforce this violation of state law. If the State of California sued the City of Needles for an injunction requiring them to enforce the background-check law, could Needles invoke the Second Amendment to resist the injunction?

The answer to this question may depend on how courts conceptualized Needles' status as a constitutional actor. If it argued that it was declining to enforce the state law because it believed that the law violated its residents' rights to keep and bear arms, it would not raise the question whether the city qua city bore those rights because it would be acting on behalf of residents in some derivative fashion. Asserting itself as an aggregation of its residents' individual Second Amendment liberties avoids the hard question whether the city itself bears those rights, but here too it runs headlong into other objections. If Needles prevailed on the argument that the state law violated the individual right to keep and bear arms, that would generate a general holding that would invalidate the law statewide. Some scholars have argued that the breadth of such an outcome would be concerning because, as in this example, a minority of California's 482 cities that passed a Second Amendment sanctuary resolution would replace and restrain the judgment of the remaining localities. David Barron, for example, has argued against city policymaking that binds all other localities to follow the same course because it removes the decision-making discretion of the other cities.<sup>333</sup>

Alternatively, Needles could defend nonenforcement of the background-check law on the theory that the California law

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<sup>332</sup> Glionna, *supra* note 5.

<sup>333</sup> David J. Barron, *supra* note 139, at 2222 ("When a city's constitutional claim . . . would not expand local policymaking discretion but instead bind every locality to follow a single course, then its interpretive independence from the state should be, as Justice Jackson wrote in a related context, 'at its lowest ebb.' . . . Cities have no sufficient interest in pressing these constitutional claims . . . and thus generally should be barred from doing so.").

violates the city's own Second Amendment rights. Here, the claim would presume that the city—apart from its aggregated members—may assert such rights and would invoke the collective component of the right to keep and bear arms. One aspect of this assertion is the institutional point that cities, not states, should serve as the primary lawmakers with respect to firearm policy because of their historic authority over and expertise in managing public safety.<sup>334</sup> That said, though, Needles would have to prove that their nonenforcement of the law advances its public safety decisions in some meaningful way. Here, the substantive argument is much harder to make than, say, in the case of guns in schools where there is at least a colorable argument that the regulation enhances school safety. What public-safety objective would noncompliance with background checks further? Needles could argue, for example, that its underfunded police department would benefit from having citizens engaging in self-defense and defense of others, so that having guns more freely circulating in the community would further public safety. But this argument seems to recommend rather than detract from the benefits of background checks. If a city wants to recruit private citizens into the service of internal security, it will presumably want and need to know that the citizens who are armed are responsible and competent gun owners and screen out dangerous and unstable individuals. This example illustrates that conceptualizing the right to keep and bear arms as one borne by cities would not necessarily give cities *carte blanche* to turn themselves into libertarian gun-regulation-free zones but would be disciplined by the principles that animate the collective component of the Second Amendment in the first instance.

##### 5. *The Law Enforcement Officer Safety Act*

Thus far we have cabined our analysis to instances where state weapons regulations come into conflict with city policymaking. Before concluding, though, we touch briefly on how the city's Second Amendment rights would fare when they come into conflict with federal law. A 2004 law, the Law Enforcement Officer Safety Act<sup>335</sup> (LEOSA) furnishes an opportunity to explore this issue. LEOSA allows qualified current law

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<sup>334</sup> See Fields, *supra* note 5, at 488 (“While a statewide gun-control measure might not violate the Second Amendment per se, its application to a particular municipality might do so because it fails to be sufficiently tailored to the locality’s needs.”).

<sup>335</sup> 18 U.S.C. § 926C (2018).

and retired law enforcement officers to carry concealed firearms in any jurisdiction of the United States, regardless of state or local laws.

Our claim is that the Second Amendment confers on cities the right to regulate their own collective security. While LEOSA does not restrict a city's right to hire peace officers or make certain firearms available to citizens, it does dilute a city's ability to select the particular arms bearers that will promote its collective security. To be sure, a city may welcome LEOSA as a means of providing additional trained law enforcement officers within its boundaries to supplement its collective security. But to the extent that a city may not want individuals other than its selected police force responsible for its security, LEOSA overrides cities' freedom to make this choice. LEOSA's derogation of cities' Second Amendment prerogatives is particularly pronounced because the law effectively requires cities to accept the decisions of other jurisdictions about who is allowed to bear arms in its jurisdiction regardless of the city's own standards or judgment with respect to who counts as a qualified law enforcement officer. To the extent that LEOSA forces cities (and states) to accept the federal government's judgment about who is qualified to bear arms within their jurisdiction, the law may also run afoul of the Tenth Amendment's anti-commandeering principle.<sup>336</sup>

Our argument that a federal law could fail to pass constitutional muster as against a city's policy to the contrary will seem surprising at first glance. After all, the Supremacy Clause guarantees that federal laws prevail over conflicting state regulations, and Courts have extended the reach of the Clause to local laws as well. Yet if we are to take the city's Second Amendment seriously, rooted as it is in the empirical claim that cities are best situated to determine the shape of their internal security policies, then LEOSA has to give way to the city's constitutional right.

#### CONCLUSION

How courts address the constitutional rights of private corporations and the constitutional rights of municipal corporations diverged long ago. The possibility that this divergence will continue with regard to one of the most consequential set of questions—who should be empowered by constitutional right

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<sup>336</sup> See *Burban v. City of Neptune Beach*, 920 F.3d 1274, 1281–82 (11th Cir. 2019) (rejecting a construction of LEOSA that would “raise serious anticommandeering concerns”).

to threaten and deploy lethal force—should cause us to rethink the entire manner in which we conceive of local governments and their place in our constitutional structure.

This Article is an effort to begin that discussion. The municipal corporation is an institution that for historical and functional reasons has managed the collective aspects of the Second Amendment. And yet, it suffers from the lack of any consistent or reasoned placement within our constitutional order. In a post-*Heller* era, when the militia has been weakened, if not entirely eliminated, from our right to keep and bear arms jurisprudence, we should think more deliberately about what public institutions facilitate and constrain this most public of issues. The city is a good place to start.