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## Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution

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

*Jacob D. Charles\**

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

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

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## TABLE OF CONTENTS

INTRODUCTION.....	582
I. EXPLORING THE VAST GUN-RIGHTS EXPANSE.....	589
A. <i>The Gap Between Policy and Public Opinion</i> .....	589
B. <i>Filling the Gap: Gun Rights Outside the Constitution</i> .....	591
1. The First Wave: Extending the Libertarian Framework...592	
2. The Second Wave: A Turn to Aggressive Intervention...600	
II. UNPACKING STATUTORY GUN RIGHTS.....	614
A. <i>Rhetoric, Social Movements, and Constitutional Culture</i> ....	614
B. <i>Redistributive Rights and Redistributive Effects</i> .....	621
III. ASSESSING THE DOCTRINAL EFFECTS OF BROAD GUN RIGHTS ..	629
A. <i>The Second Amendment</i> .....	630
1. Status .....	630
2. Methodology .....	632
3. Protected Weapons .....	633
4. Unkeeping Arms.....	634
B. <i>Other Constitutional Implications</i> .....	635
1. The First Amendment.....	635
2. The Fourth Amendment.....	637
3. The Fourteenth Amendment .....	638
CONCLUSION.....	640

## INTRODUCTION

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

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1. See, e.g., Nelson Lund, Essay, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81 (2021) (cleaned up) (praising gun rights after the events of 2020).

2. See Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-at-Home Order*, NPR (May 14, 2020, 10:01 AM), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [perma.cc/E3MG-P5DD] (describing how armed protests disrupted the Michigan legislature, leaving lawmakers feeling threatened); CAROLINE E. LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA’S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* 1–2 (2017) (underscoring the historical roots of an American tendency to justify lethal violence).

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

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

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

4. See Kareem Shaya, *Gun Rights Are Winning and Nobody Has Realized It*, OPEN SOURCE DEF. (May 27, 2019), <https://opensourcedefense.org/blog/gun-rights-are-winning-and-nobody-has-realized-it> [perma.cc/98NB-AZ4G] (“Gun rights are quietly winning on the ground in the vast majority of the US.”).

5. See Darrell A.H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), <https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights> [perma.cc/6DA6-T35A] (“Advocates for gun rights feel oppressed.”); MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION*, at xii–xiii (2019) (describing gun-rights fundamentalism as engaging in “victim-claiming . . . [,] a reversal technique that puts the powerful in the space of the vulnerable, the abuser in the space of the abused”).

6. 554 U.S. 570, 626 (2008).

7. *Heller*, 554 U.S. at 626.

8. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012).

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

10. See Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 986–89 (2017) (arguing that the Second Amendment imposes few limits on tort liability for gun manufacturers).

11. See *infra* Section I.B; see also FRANKS, *supra* note 5, at 74 (“[The Supreme Court’s] rulings do not . . . require . . . that American[] civilians with no weapons or firearms safety training be allowed to carry loaded weapons into malls, churches, bars, and daycare centers; or encourage men to attend crowded protests with assault rifles strapped to their backs; or allow armed vigilantes to shoot unarmed black teenagers walking home in the rain.”); David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 123.

Many of these laws were passed before the Supreme Court breathed new life into the Second Amendment.<sup>12</sup> The first prominent wave of state laws, largely a libertarian initiative, took off in the 1980s with relaxed concealed-carry laws and comprehensive preemption laws barring localities from enacting gun regulations.<sup>13</sup> A second wave, picking up momentum in the early 2000s, became more intrusive and aggressive. This second wave includes laws requiring that private businesses allow guns in their parking lots, granting broad stand-your-ground immunity, and mandating that colleges permit guns on campus.<sup>14</sup> These two waves track two key movements in the history of gun-rights advocacy. The laws beginning to spread in the 1980s dovetail with the rise of a more bellicose wing of the National Rifle Association (NRA), which, along with like-minded gun-rights organizations,<sup>15</sup> commenced the concerted push toward constitutional protection for gun rights in the courts.<sup>16</sup> The wave in the early 2000s coincides with the advocacy leading up to the Supreme Court's decision in *Heller* itself.<sup>17</sup>

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

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12. See Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 341–45 (2021) (describing how *Heller* created a new right).

13. See *infra* Section I.B.1.

14. See *infra* Section I.B.2.

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

16. Reva Siegel tells the definitive story of the gun-rights interest-group mobilization from the 1970s onward that advocated for broad gun rights and eventually culminated in *Heller*. See Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207–26 (2008) (exploring the origins of this movement). It is also worth underscoring that one main front in the battle to convince the courts was legal scholarship. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 367–68 (2000) (tracing the rise in the number of law-review articles devoted to the individual-rights interpretation). This is not to suggest, however, that the NRA or the gun-rights movement was nonexistent or ineffectual until then. Patrick Charles, Matthew Lacombe, and other scholars have demonstrated the ways that the NRA and like-minded gun-rights activists successfully fought back strict gun regulation and worked to pass “pro-gun” legislation throughout much of the twentieth century. See PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 306–09 (2018) (describing this trajectory); MATTHEW J. LACOMBE, *FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE* 3 (2021) (noting how the NRA was mobilizing to defeat legislation “as early as the 1930s”). This Article’s description of the two key waves marks moments when the movement began gaining widespread success.

17. In 2001, the first federal appeals court adopted the individual-rights reading of the Second Amendment. *United States v. Emerson*, 270 F.3d 203, 204 (5th Cir. 2001). That same year, George W. Bush’s Department of Justice put the executive branch behind that reading. See JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 65 (2018) (reporting a letter from Attorney General John Ashcroft to the NRA informing the organization of the Department of Justice’s view).

firearms.<sup>18</sup> These laws are not mandated by the Constitution, which would allow localities to regulate guns just as much as the state and federal governments.<sup>19</sup> Without these laws, the predominantly urban areas that experience the most gun violence, and at the same time support the most gun regulation,<sup>20</sup> would no doubt have stricter gun laws than they currently do.<sup>21</sup> It is no exaggeration to say that widespread preemption laws likely prevent more gun regulation than the Second Amendment.<sup>22</sup>

Turning to the aggressive second wave, the movement sought state intervention on behalf of gun rights. It succeeded in passing a host of state laws that expand gun rights beyond what the Constitution would require against unwilling public officials and even private entities. For example, several states require that public universities and colleges allow students, employees, and visitors to carry loaded firearms on campus, regardless of whether the administration or student body objects.<sup>23</sup> Other states have taken aim at private enterprise.<sup>24</sup> Florida's Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008 provides that even a private employer cannot stop an employee "from possessing any legally owned firearm when

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18. Nestor M. Davidson, Essay, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 967 (2019) (describing widespread firearm-law preemption).

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

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

21. See, e.g., Austin Cannon, *Des Moines City Council Backs Off Proposed Restrictions on High-Capacity Magazines, Bump-Stocks*, DES MOINES REG. (July 16, 2019, 3:01 PM), <https://www.desmoinesregister.com/story/news/local/des-moines/2019/07/15/gun-restrictions-high-capacity-magazines-bump-stocks-des-moines-city-council-ordinance/1740753001> [perma.cc/T8HS-ATLF] (citing concerns about state-law preemption as part of the reason for the city's decision not to pass gun regulations).

22. Cf. Jennifer L. Pomeranz, Diana Silver & Sarah A. Lieff, *State Gun-Control, Gun-Rights, and Preemptive Firearm-Related Laws Across 50 US States for 2009-2018*, 111 AM. J. PUB. HEALTH 1273, 1278 (2021) (describing how the majority of states as of 2018 had "preemptive measures over almost all gun-control policy topics without enacting substantive gun-control measures").

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

24. See, e.g., J. Blake Patton, Note, *Pro-gun Property Regulation: How the State of Oklahoma Controls the Property Rights of Employers Through Firearm Legislation*, 64 OKLA. L. REV. 81, 82 (2011) ("In response to these gun-free policies [passed in the wake of workplace shootings], the Oklahoma legislature amended existing firearms laws to outlaw any workplace policy that prohibited employees from keeping guns in their cars while parked on workplace property."); Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 477 (2009) (describing parking-lot laws).

such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot.”<sup>25</sup>

Through this large set of exemptions, exceptions, and accommodations, lawmakers have created a powerful right to keep and bear arms outside the Constitution. Nothing about the *fact* of this expansion suggests these legislative protections are anomalous or problematic. Protecting constitutionally informed values is a commonplace legislative goal, from local antidiscrimination ordinances to employee rights and benefits. But as discretionary policy choices, the consequences of this expansionism cannot be blamed on the dead hand of the past; the Constitution does not bind legislators to ignore the effects of these laws. And the evidence suggests that this expansion is not costless. These alternately deregulatory and interventionist laws can impose harms on disadvantaged members of the community, such as gun-violence victims who find the courthouse doors closed because of laws giving industry actors broad immunity or domestic-violence shelters that cannot bar firearms from their property because of parking-lot laws.<sup>26</sup> Rights, especially gun rights, do not always apply equally to Black Americans and other marginalized groups.<sup>27</sup> And the culture these laws foster—one that perceives a threat behind every corner—can lead to tragic outcomes in a society in which threat perception is so thoroughly racialized. One can, of course, disagree with this Article’s normative appraisal of these laws and still recognize that the broader gun-rights expansionism detailed here is an important factor in assessing today’s debates over gun rights and regulation.

In fact, the broad protective barrier these laws provide has led some scholars to argue that the formal Second Amendment—only judicially viable since 2008—is already becoming obsolete.<sup>28</sup> Many of these laws, after all, perform the same function as the individual-rights guarantee in the Constitution: carving out a sphere of private action in which the state cannot regulate.<sup>29</sup> Yet some of these statutes are not just shields safeguarding gun rights but also swords thrusting them into places and spaces the formal Constitution would

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25. FLA. STAT. § 790.251 (2021). The parts of the law that forbid employers from banning customers from doing so were ruled unconstitutional. *Fla. Retail Fed’n, Inc. v. Att’y Gen. of Fla.*, 576 F. Supp. 2d 1301, 1303 (N.D. Fla. 2008).

26. See *infra* Section II.B.

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

28. See, e.g., Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 257–58 (2018) (questioning whether what Winkler calls the “Judicial Second Amendment” is becoming obsolete in a society with more robust protection for guns).

29. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 423 (2007) (“Rights perform a key constitutive function by setting the bounds of government power and constraining the exercise of government discretion.”).

never grant them access.<sup>30</sup> And the rights guaranteed by these legal rules may be more practically important for millions of Americans than the bare Second Amendment right vindicated in *Heller*.<sup>31</sup>

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

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

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30. See Cody J. Jacobs, *Guns in the Private Square*, 2020 U. ILL. L. REV. 1097, 1109 ("Even the most aggressive reading of the Second Amendment would not force businesses to allow guns on their property.").

31. See Young, *supra* note 29, at 424–25 (describing the importance and fundamentality of many extracanonical rights).

32. See, e.g., Blocher, *supra* note 19, at 133–36 (preemption laws); Royal, *supra* note 24, at 477 (parking-lot laws); LIGHT, *supra* note 2, at 133–54 (stand-your-ground laws).

33. Joseph V. Sakran & Igor Volsky, Opinion, *Americans Want Tighter Gun Control: Will Biden and Harris Come Through?*, BALTIMORE SUN (Dec. 8, 2020, 12:34 PM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-1209-gun-mandate-20201208-jpj7ublzpran7nwpqho6enufee-story.html> [perma.cc/8BXF-EL85].

34. Carrie Johnson, *Gun Control Groups Voice 'Grave Concerns' About Supreme Court Nominee's Record*, NPR (Oct. 9, 2020, 8:00 AM), <https://www.npr.org/2020/10/09/921713631/gun-control-groups-voice-grave-concerns-about-supreme-court-nominee-s-record> [perma.cc/AF2H-2GXP]; Martin Savidge & Maria Cartaya, *Americans Bought Guns in Record Numbers in 2020 During a Year of Unrest—and the Surge is Continuing*, CNN (Mar. 14, 2021, 1:35 PM), <https://www.cnn.com/2021/03/14/us/us-gun-sales-record/index.html> [perma.cc/PNJ3-AB3].

35. Grace Hauck, *'They're Not Forgotten': America's Other Epidemic Killed 41,000 People This Year*, USA TODAY (Dec. 18, 2020, 2:07 PM), <https://www.usatoday.com/story/news/nation/2020/12/18/gun-violence-deaths-americans-2020/3906428001> [perma.cc/E8NH-63BR] (describing gun deaths during 2020); Dionne Searcey & Richard A. Oppel Jr., *A Divided Nation Agrees on One Thing: Many People Want a Gun*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/10/27/us/guns-2020-election.html> [perma.cc/LA6E-FK7H] (reporting that Americans are buying more guns than ever before).



Clause.<sup>36</sup> These projects add to what Richard Primus terms “small c” constitutional theory,<sup>37</sup> a corpus of scholarship recognizing the constitutional significance of legal arrangements outside the “big-C Constitution.”<sup>38</sup>

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

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

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

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

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

38. *E.g.*, Primus, *supra* note 37, at 1082–84; WILLIAM N. ESKRIDGE JR. & JOHN FEREOHON, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 34 (2010) (discussing how “Large ‘C’ Constitutionalism interacts—and ought to interact—with the small ‘c’ constitutionalism of superstatutes and their implementation”); *see also* Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1842–43 (observing that many nonconstitutional legal structures perform similar functions as the Constitution while insisting that they do not thereby gain constitutional status).

## I. EXPLORING THE VAST GUN-RIGHTS EXPANSE

The United States has relatively few restrictions on firearms compared to similarly situated developed nations<sup>39</sup>—and fewer too than most Americans say they would like to see. This Part first explores this phenomenon, then describes how the collection of broad nonconstitutional gun rights helps to explain it.

A. *The Gap Between Policy and Public Opinion*

Polls suggest that strong majorities of the American public support both the Second Amendment and reasonable regulations on firearm possession and use.<sup>40</sup> Even polling showing a decline in support for gun laws from 2019 to 2020 reports that nearly 60 percent of Americans support stricter gun laws and fewer than 10 percent want more relaxed ones.<sup>41</sup> Given this amount of public support—which increases to higher levels for certain types of laws,<sup>42</sup> even among gun owners<sup>43</sup>—why does the United States have far fewer gun regulations than other developed nations?

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

39. LACOMBE, *supra* note 16, at 8–9.

40. See Megan Brennan, *Support for Stricter U.S. Gun Laws at Lowest Level Since 2016*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/325004/support-stricter-gun-laws-lowest-level-2016.aspx> [perma.cc/BKV4-A525].

41. *Id.*

42. Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns> [perma.cc/2NKD-VDTU].

43. Michael B. Siegel & Claire C. Boine, *The Meaning of Guns to Gun Owners in the U.S.: The 2019 National Lawful Use of Guns Survey*, 59 AM. J. PREVENTIVE MED. 678, 683 (2020) (reporting more than 75 percent support from gun owners for background checks on concealed-carry permits, extreme-risk protection orders, handgun-purchase permits, and universal background checks, among others).

44. Nicholas J. Johnson, David B. Kopel, George A. Moscaro & E. Gregory Wallace, *Comparative Law*, in FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 179, 181–82 (2d ed. Supp. 2020), [http://firearmsregulation.org/www/WK\\_FRRP\\_2E\\_2020.pdf](http://firearmsregulation.org/www/WK_FRRP_2E_2020.pdf) [perma.cc/F648-DR7X].

45. *Id.* at 182 (reporting that Mexico’s right is subject to regulation and that Haiti’s “is not honored at present”).

46. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

amendment as an effective bulwark against all forms of “gun control,” whatever their scope, design, or justification.<sup>47</sup> And even many gun-regulation advocates agree that the Second Amendment stands in the way of truly effective regulation.<sup>48</sup>

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

Nor does the alternative political explanation cover all the remaining ground. Surely one (major) reason that few gun laws have been enacted despite broad public support is that legislators are less supportive of gun regulation than the public at large. The NRA has long been a potent force in American politics, shaping the cultural debate as much through advertising,

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47. E.g., Byron Berger, *Why Every (Yes, Every) Gun Control Law Is Unconstitutional*, OFF THE GRID NEWS, <https://www.offthegridnews.com/self-defense/why-every-yes-every-gun-control-law-is-unconstitutional> [perma.cc/NW2W-697W].

48. See, e.g., John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html> [perma.cc/3GE6-Q7HY] (arguing that a repeal of the Second Amendment would end protections for gun sellers and “make our schoolchildren safer”). As discussed *infra* Section I.B, the laws that Justice Stevens refers to are statutory rights that are neither commanded by the Constitution nor dependent on it. Repealing the constitutional guarantee would do nothing about the other legal rules he appears concerned with, such as PLCAA and campus-carry laws.

49. See James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U.L. REV. 849, 891 (2014) (noting that courts would likely uphold more regulation and that “the largest obstacle may be actually passing the measures in the first place”).

50. BLOCHER & MILLER, *supra* note 17, at 192 (“The history of gun rights and regulation in the United States demonstrates that the two can coexist and always have.”).

51. *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., <https://firearmslaw.duke.edu/repository> [perma.cc/DGQ4-Y687].

52. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1473 (2018) (reporting low success rates for Second Amendment challenges).

53. The Supreme Court has suggested that concealed carry is not protected at all, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (noting that most nineteenth-century state courts that reviewed concealed-carry laws upheld them), and the Ninth Circuit has directly held as much, *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). Background checks have also not been thought to raise constitutional challenges. See Press Release, Statement of Professors of Constitutional Law: The Right to Keep and Bear Arms and the Constitutionality of Expanded Background Checks (Mar. 22, 2021), <https://law.duke.edu/news/pdf/Statement-of-Profs-of-Constitutional-Law.pdf> [perma.cc/8GQK-M2F2].

mobilization, and rhetoric as through donations to particular politicians.<sup>54</sup> It has nurtured and capitalized on the “engagement gap,” the difference in the intensity with which gun-regulation opponents hold their views compared to regulation proponents.<sup>55</sup> But that is not the entire picture either. Even when there is political will to enact regulations, say at the local level in urban enclaves of otherwise-conservative states, near-insurmountable hurdles still stand in the way.<sup>56</sup>

The upshot, then, is that neither the Constitution nor partisan politics fully explains the gap between public support for gun regulation and current policies. What is largely absent from the study of the “missing movement for gun control in America,”<sup>57</sup> or more precisely the missing policies that would more strictly regulate guns, is any systematic study of the nonconstitutional *legal* barriers to change. The expansive statutory gun rights explored in this Article help explain the relative dearth of gun regulations in the United States.<sup>58</sup>

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

### B. *Filling the Gap: Gun Rights Outside the Constitution*

Nonconstitutional gun rights help explain the wide chasm between public opinion and public policy. They include a myriad of statutory, regulatory, and administrative roadblocks designed to stop gun regulations. They also supercharge gun rights in a way that exempts and accommodates right holders from

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54. See, e.g., Matthew J. Lacombe, *The Political Weaponization of Gun Owners: The National Rifle Association’s Cultivation, Dissemination, and Use of a Group Social Identity*, 81 J. POL. 1342 (2019); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 460–61 (1999) (ascribing the lack of progress on gun laws to the differential preference intensity among gun owners and gun controllers and the cultural identity bound up with gun ownership).

55. LACOMBE, *supra* note 16, at 6.

56. See, e.g., *GeorgiaCarry.Org, Inc. v. Coweta County*, 655 S.E.2d 346, 347 (Ga. Ct. App. 2007) (holding that county ordinance forbidding firearms on county property was preempted by state law).

57. See generally KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* (2006) (cleaned up).

58. This fact does not mean expansive statutory rights are the *entire* story. There are no doubt other factors involved as well, such as increased polarization, partisan gerrymandering, and massive amounts of interest-group funding for organizations like the American Legislative Exchange Council that lobby on behalf of conservative interests. See, e.g., FRANKS, *supra* note 5, at 93–94 (discussing ALEC’s role in pushing for stand-your-ground laws).

otherwise permissible and applicable rules, like those of private employers or university administrators.<sup>59</sup> This Section traces these laws through two waves: a first, libertarian wave that extends the deregulatory pressure of the formal Second Amendment guarantee, and an aggressive and interventionist second wave that seeks to break down not only legislative barriers to gun owners, but private and social ones as well.

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

### 1. The First Wave: Extending the Libertarian Framework

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

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

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

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

62. ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 212–13 (2001) (describing Reagan’s pro-gun rhetoric and activities and the NRA’s endorsement).

nearly two-hundred-page report arguing that the Second Amendment protects an individual right unconnected to militia service.<sup>63</sup> In the wake of these developments, and without any change in the judicial construction of the Second Amendment as a collective and not individual right,<sup>64</sup> gun-rights supporters successfully rallied to remove regulations restricting firearms. The goal in this first wave was largely deregulatory, breaking down governmental obstacles to gun use and possession.

*Preemption.* The organized movement to preempt local firearms control began in earnest in the early 1980s.<sup>65</sup> In 1982, the Seventh Circuit upheld a small Chicago suburb's handgun ban against a Second Amendment challenge in *Quilici v. Village of Morton Grove*.<sup>66</sup> In doing so, the appeals court reinforced the received judicial wisdom that the Second Amendment does not apply to state and local governments and protects a right tied to militia service rather than an individual right to use firearms for private purposes.<sup>67</sup> Worried that this judicial blessing would prompt similar ordinances to sweep the country, the NRA and other pro-gun organizations mobilized into action.<sup>68</sup> Those efforts proved wildly successful.<sup>69</sup> Preemption laws spread to almost every state in the quarter century after Morton Grove enacted its handgun ban.<sup>70</sup>

Preemption, of course, occurs in many different subject areas,<sup>71</sup> but its prevalence in the field of firearms regulation is pronounced. Today, nearly every state preempts some or all local regulations concerning guns.<sup>72</sup> Texas's

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63. SUBCOMM. ON THE CONST. OF THE S. COMM. ON THE JUDICIARY, 97TH CONG., REP. ON THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

64. See Siegel, *supra* note 16, at 210 (“At a time when the legally literate read the text of the Second Amendment as plainly allowing gun regulation, Reagan read its text as—potentially—plainly prohibiting gun regulation.” (footnote omitted)).

65. The National Shooting Sports Foundation created model preemption laws in the late 1960s and early 1970s, but these laws “were initially slow to gain acceptance” until Morton Grove and the Seventh Circuit’s decision in *Quilici*. CHARLES, *supra* note 16, at 307–08.

66. 695 F.2d 261 (7th Cir. 1982); see also Blocher, *supra* note 19, at 120–21 (observing that the Morton Grove ordinance “inspired a political backlash that helped lead to the passage of preemption laws in dozens of states”).

67. *Quilici*, 695 F.2d at 270.

68. CHARLES, *supra* note 16, at 307–08; see also Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170 (2018) (“The firearms industry has been particularly successful in large part because the National Rifle Association has acted aggressively at the state level.”).

69. Sheila Simon, *On Target? Assessing Gun Sanctuary Ordinances That Conflict with State Law*, 122 W. VA. L. REV. 817, 833 (2020) (noting that the NRA, “which had previously supported local control, chose to change strategies” after the Morton Grove ban, with its advocacy resulting in “the majority of states adopting laws that preempted local handgun bans”).

70. Rachel Simon, *State Preemption of Local Gun Regulations: Taking Aim at Barriers to Change in Firearm Policy*, 43 CARDOZO L. REV. (forthcoming 2022) (manuscript at 21–22), <https://doi.org/10.2139/ssrn.3623529> [perma.cc/F5Z4-KVMJ].

71. Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2001–02 (2018) (describing state laws preempting local antidiscrimination laws, environmental laws, wage-and-hour laws, ridesharing regulations, rent-control ordinances, and others).

72. Davidson, *supra* note 18, at 967.

preemption statute is typical. It bars localities from adopting regulations “relating to” a host of firearm-related activities, including “the transfer, possession, wearing, carrying, ownership, storage, transportation, licensing, or registration of firearms,” as well as “commerce in firearms,” and firearm discharge at a shooting range.<sup>73</sup> Firearm-preemption statutes, despite their ubiquity, are not part of a long-standing tradition of “firearm federalism”<sup>74</sup> but are a recent innovation that moves away from traditional local control over gun regulation.<sup>75</sup> On top of their novelty, they are not compelled by the Constitution. The Second Amendment cannot reasonably be read to require states to override local decisionmaking on traditionally local matters.

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

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

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73. TEX. LOC. GOV’T CODE ANN. § 229.001(a)(1)–(3) (West Supp. 2020).

74. Cf. Michael P. O’Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359, 362 (2014).

75. E.g., Blocher, *supra* note 19, at 133.

76. Briffault, *supra* note 71, at 1997.

77. *Id.*; see also Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1243 (2018) (“[T]hese new preemption laws dramatically differ from the old ones in both quantity and quality.”).

78. Briffault, *supra* note 71, at 1997.

79. Scharff, *supra* note 20, at 1473.

80. Briffault, *supra* note 71, at 1997.

81. Act of Apr. 11, 2012, ch. 117, 2012 Ky. Acts 958 (codified at KY. REV. STAT. ANN. § 65.870 (LexisNexis 2014)).

82. *Id.*; see also KY. REV. STAT. ANN. §§ 522.020–.030 (LexisNexis 2014).

83. Briffault, *supra* note 71, at 2003.

states reinforce firearms preemption by threatening local officials with fines, civil liability, or removal from office for enacting or enforcing firearms measures.”<sup>84</sup>

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

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

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

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84. *Id.* at 2002–03.

85. 53 PA. STAT. AND CONS. STAT. ANN. § 2962(g) (West 2016).

86. Ariel Worthy, *Pittsburgh Restricts Use of Assault-Style Weapons, Setting Up Court Fight*, NPR (Apr. 9, 2019, 2:05 PM), <https://www.npr.org/2019/04/09/711401894/pittsburgh-restricts-use-of-assault-style-weapons-setting-up-court-fight> [perma.cc/7DCF-JR53].

87. *Firearm Owners Against Crime v. City of Pittsburgh*, No. GD 19-005330 (Pa. Ct. Com. Pl. Allegheny Cnty. Oct. 29, 2019).

88. See, e.g., Lisa J. Huriash, *These 10 Cities Want to Regulate Guns. They Sued Florida over It.*, SUN SENTINEL (Apr. 2, 2018, 4:45 PM), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-reg-cities-sue-for-gun-laws-20180402-story.html> [perma.cc/33G8-L8YV]; Sari Horwitz, *Friendship Heights Targets Big Government with Handgun Law*, WASH. POST (May 26, 1986), <https://www.washingtonpost.com/archive/local/1986/05/26/friendship-heights-targets-big-government-with-handgun-law/c5c246b1-e8de-447d-b519-f8fd50b911c8> [perma.cc/D7E5-FPV4] (reporting that the Friendship Heights, Maryland, community was inspired by Morton Grove to pass its own handgun ordinance after earlier efforts were deterred because officials told the community “that state law prohibited localities from regulating handguns”).

89. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 749 (2005); see also *Young v. Hawaii*, 992 F.3d 765, 784–813 (9th Cir. 2021) (en banc) (tracing restrictions on publicly carrying firearms from medieval England through twentieth-century America), *petition for cert. filed*, No. 20-1639 (U.S. May 11, 2021).

90. Act of Feb. 3, 1813, ch. 89, 1812–1813 Ky. Acts 1st Sess. 100, 100–01 (prohibiting persons from wearing concealed arms); Act of Mar. 25, 1813, 1812–1813 La. Acts 2d Sess. 172, 172–74 (same).

91. Act of Jan. 14, 1820, ch. 23, 1819 Ind. Acts 39 (prohibiting wearing of concealed weapons).



states in the ensuing years likewise outlawed the practice.<sup>92</sup> Strict regulation remained the norm for a century and a half.<sup>93</sup> By 1980, more than a dozen states still banned concealed carry outright, and only a small handful generally allowed any qualified adult to carry a concealed weapon.<sup>94</sup> Most other states had strict licensing laws that required applicants to show “proper cause”<sup>95</sup> or “justifiable need”<sup>96</sup> to carry a concealed weapon.<sup>97</sup> Because these laws vest discretion in licensing officials to determine whether the standard is met, these strict laws are often called “may issue” laws; they do not guarantee that anyone who wants to carry a concealed firearm can do so.<sup>98</sup>

This paradigm began to erode dramatically in the 1980s.<sup>99</sup> In 1987, Florida adopted a permissive, “shall issue” permitting system that requires officials to issue a permit so long as an applicant satisfies certain objective criteria (training requirements, background checks, etc.) without having to show any special cause or need for carrying.<sup>100</sup> These laws exploded across the country after 1987.<sup>101</sup> When Florida enacted its shall-issue law, sixteen states generally

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92. Robert Leider, *Our Non-originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1599–1600 (2014) (describing the trend in early state laws); see also *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (noting that the majority of nineteenth-century courts that reviewed prohibitions on concealed carry found them to be lawful).

93. CHARLES, *supra* note 16, at 308 (tracing the change in concealed-carry laws and the NRA’s effort to expand the right to carry).

94. Kopel, *supra* note 11, at 125–26; Trent Steidley, *Sharing the Monopoly on Violence? Shall-Issue Concealed Handgun License Laws and Responsibilization*, 62 SOCIO. PERSPS. 929, 930 (2019).

95. *Kachalsky v. County of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) (upholding New York’s may-issue law).

96. *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (upholding New Jersey’s may-issue law).

97. Johnson, *supra* note 89, at 748 & n.186 (discussing “may issue” states, whose schemes give them “basically plenary discretion to deny a permit”); WILLIAM J. KROUSE, CONG. RSCH. SERV., IN10852, GUN CONTROL: CONCEALED CARRY LEGISLATION IN THE 115TH CONGRESS (2018) (identifying twenty-six states that had “may issue” laws in 1987). Open carry was less restricted but not entirely unregulated. See *Young v. Hawaii*, 992 F.3d 765, 821 (9th Cir. 2021) (en banc) (concluding based on an historical review of the evidence that “[t]here is no right to carry arms openly in public”).

98. See *Concealed Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry> [perma.cc/Z2LK-6SM8] (explaining that may-issue laws give officials discretion to deny a license “[e]ven if the general requirements [of the statutory scheme] are met”). Two laws that are categorized as “may issue”—those of Connecticut and Washington, D.C.—do not require a showing of good cause but grant officials discretion to deny permits based on a person’s characteristics or background (such as a reason to believe the person would pose a danger to themselves or others). See *id.*

99. CHARLES, *supra* note 16, at 308; Clayton E. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 685 (1995) (“Since 1987, states have increasingly adopted a new breed of concealed handgun permit laws . . .”).

100. CHARLES, *supra* note 16, at 308.

101. Steidley, *supra* note 94, at 931; Johnson, *supra* note 89, at 751, 753; Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960–2001*, 26 CONTEMP. ECON. POL’Y 198, 199 (2008) (describing the shift from may-issue to shall-issue laws as “dramatic”).

banned concealed carry, and the plurality—twenty-six—had discretionary may-issue regimes.<sup>102</sup> Today, not a single state forbids concealed carry, and only a handful retain strict may-issue laws.<sup>103</sup>

But states have not stopped at loosening their carry laws to require that permits be issued on a mandatory basis with no showing of need. They have shifted to increasingly more permissive regimes in several stages of deregulation.<sup>104</sup> Many now forgo any licensing requirement at all. These “permitless carry” laws allow individuals to carry concealed firearms without any state involvement or oversight. Known in gun-rights circles as “constitutional carry,” these laws have been surging in popularity.<sup>105</sup> At the end of 2020, sixteen states allowed carrying concealed weapons in public with no permit, meaning no mandatory training requirement or background check.<sup>106</sup> In other words, the paradigm reversed: in 1987 sixteen states banned concealed carry and only one allowed the practice with no license or permit; at the close of 2020, no state banned concealed carry and sixteen allowed concealed carry with no permit or license. And the trend toward loosened laws has continued, with a handful of governors and state legislatures advocating their state’s transition to permitless carry<sup>107</sup> and several more states adopting these laws in 2021.<sup>108</sup>

These state laws displace local efforts to regulate gun carrying,<sup>109</sup> but this downward deregulatory pressure also coexists with an upward push. Buoyed by their public-carry success at the state level, gun-rights supporters have sought national public-carry legislation to further entrench these statutory rights in federal law. In recent years, the NRA’s “top legislative priority” has been passing a federal law granting concealed-carry reciprocity nationwide.<sup>110</sup> The proposal—introduced in Congress in 2017 and passed through the

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102. KROUSE, *supra* note 97.

103. *Id.*

104. *Id.*

105. See Adam Weinstein, *Understanding ‘Constitutional Carry,’ the Gun-Rights Movement Sweeping the Country*, TRACE (Feb. 28, 2017), <https://www.thetrace.org/2017/02/constitutional-carry-gun-rights-movement-explained> [perma.cc/WQD8-VBVF] (“Over the past seven years, 10 states have rolled back longstanding licensing, training, and registration requirements for carriers of concealed weapons under a novel legislative philosophy called ‘constitutional carry.’”).

106. *Constitutional Carry/Unrestricted/Permitless Carry*, U.S. CONCEALED CARRY ASS’N, <https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensure-permitting-policies/unrestricted> [perma.cc/B3KV-4Q4F].

107. Lindsay Whitehurst, *States Eye Allowing Concealed Carry of Guns Without a Permit*, AP NEWS (Jan. 24, 2021), <https://apnews.com/article/us-news-utah-coronavirus-pandemic-tennessee-gun-politics-1b7a7bde0c1dfe87f4a24b2d10b0203a> [perma.cc/2YBL-A32E] (reporting these state-level developments).

108. See Act of Feb. 18, 2021, ch. 3, 2021 Mont. Laws 7; Conceal Carry Firearms Amendments, ch. 12 (Feb. 15, 2021) (Utah).

109. Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 17 (2015).

110. Nicole Gaudiano, *House Committee Approves NRA-Backed Concealed Carry Bill, as Other Gun Measures Stall*, USA TODAY (Nov. 29, 2017, 5:51 PM), <https://www.usatoday.com/story/news/politics/2017/11/29/house-committee-takes-up-nra-backed-concealed-carry-bill/903001001> [perma.cc/4EYA-JL3C].

House—would require states to recognize a concealed-carry permit issued in any other state, even if the permitting standards differed widely.<sup>111</sup> Critics have raised federalism concerns about the legislation.<sup>112</sup>

Like other parts of the statutory gun-rights bundle, relaxed concealed-carry laws come rhetorically justified in Second Amendment garb. But, it bears emphasizing that, like the broad adoption of preemption laws, this movement runs almost entirely independent of formal Second Amendment doctrine. *Heller* strongly suggests that the Constitution allows states to ban concealed carry altogether.<sup>113</sup> These contemporary laws turn in the opposite direction, protecting broader and fuller concealed-carry rights. And, despite this disconnect, the appeal to the formal Second Amendment continues.<sup>114</sup> Congressman Bob Goodlatte, for instance, said the national reciprocity legislation was “about the simple proposition that law-abiding Americans should be able to exercise their right to self defense, even when they cross out of their state’s borders” because, he added, “[t]hat is their Constitutional right.”<sup>115</sup>

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

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

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

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

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

114. Shearer, *supra* note 112, at 430.

115. Gaudiano, *supra* note 110.

116. Lars Noah, *Time to Bite the Bullet? How an Emboldened FDA Could Take Aim at the Firearms Industry*, 53 CONN. L. REV. (forthcoming 2022) (manuscript at 14), <https://doi.org/10.2139/ssrn.4111111>

cannot regulate guns or ammunition under the Toxic Substances Control Act, leaving other agencies acting under different authority “to address concerns about environmental contamination from lead shot on a piecemeal basis.”<sup>117</sup> Neither action alone, or even in combination, proves that Congress meant to show special solicitude for guns. Perhaps legislators just wanted these decisions to be made by the people’s representatives, not by federal agencies. But, in the context of the broader protective web outlined here, these two decisions should not be seen merely as isolated agency restrictions.

In 1986, Congress passed the Firearm Owners’ Protection Act, which protects both gun owners and dealers in a number of ways that the Second Amendment does not require.<sup>118</sup> The Act restricts the rulemaking authority of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), including by limiting regulations to only those necessary to carry out the law (in place of the prior authority authorizing the responsible agency head to issue regulations *she* deemed *reasonably* necessary).<sup>119</sup> It also narrowly defines what it means to qualify as a firearms dealer in a way that frees casual sellers from the requirement to get a license and perform background checks.<sup>120</sup> In addition, the Act bans a national gun registry, ensuring that the federal government cannot connect weapons to their owners.<sup>121</sup> Finally, the Act supersedes state and local law on firearms transportation, allowing a lawful gun owner to transport an unloaded firearm interstate despite a local jurisdiction’s laws.<sup>122</sup>

Over the last several decades, Congress has also passed other protective measures not mandated by the Constitution to shield gun rights from governmental regulation. Through the Dickey Amendment, it restricted the ability of the CDC to fund research on gun violence in a way that has historically

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.org/10.2139/ssrn.3726680 [perma.cc/G6Y2-XT5R]; Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (codified at 15 U.S.C. § 2080 note) (providing that the agency “shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition”). Dave Kopel notes how even after the NRA defeated an amendment to the legislation establishing the CPSC that would have allowed it to regulate firearms, lawmakers deemed further action necessary after the CPSC concluded it still had authority to regulate ammunition. David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 *FORDHAM URB. L.J.* 1527, 1553 (2012).

117. Noah, *supra* note 116 (manuscript at 14 n.57).

118. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. §§ 921–929). The congressional findings in the legislation state that constitutional provisions, including the Second Amendment, “require additional legislation to correct existing firearms statutes and enforcement policies.” *Id.* § 1(b). The legislation, though framed in terms of gun owners, also significantly shielded gun dealers. See Charles & Garrett, *supra* note 60 (manuscript at 25–26).

119. Firearm Owners’ Protection Act § 106(2)–(3); see also David T. Hardy, *The Firearm Owners’ Protection Act: A Historical and Legal Perspective*, 17 *CUMB. L. REV.* 585, 655 n.380 (1986–1987) (describing these changes).

120. Firearm Owners’ Protection Act § 101(6).

121. *Id.* § 106(4).

122. *Id.* § 107(a).

chilled broader federal funding for research concerning guns.<sup>123</sup> Through the Tiahrt Amendment, Congress prohibited ATF from releasing firearms-tracing data to any non-law enforcement agency, making those data unavailable to academic researchers and civil litigants.<sup>124</sup>

Like the federal government, states have provided miscellaneous protections and exemptions for gun rights over the past several decades. Shooting ranges are often shielded from liability for noise pollution<sup>125</sup> or exempted from local noise ordinances.<sup>126</sup> Some gun-rights proponents have even pushed back on local attempts to include gun discharge (outside shooting ranges) in their noise ordinances.<sup>127</sup> One North Carolina gun-rights organization called on citizens to oppose a city's mention of gunfire in its proposed ordinance, decrying "so-called nuisance ordinances directed against firearms" as "infringement[s] of the peoples' right to keep and bear arms."<sup>128</sup>

## 2. The Second Wave: A Turn to Aggressive Intervention

The first wave of gun-rights legislation served to, in the words of historian Patrick Charles, "usher in today's gun-rights golden age."<sup>129</sup> These laws largely aimed to limit the government's role and were, in that sense, traditionally conservative. The next wave became more aggressive, intervening in private decisionmaking and dictating the policy choices of previously empowered administrators. In 2001, for the first time in American history, a federal appeals court held that the Second Amendment protects an individual right to

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123. See Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 865–66 (2018).

124. *Why Data on Tracing Guns Is So Difficult to Find*, WBUR (Apr. 3, 2018), <https://www.wbur.org/hereandnow/2018/04/03/gun-research-trace-data> [perma.cc/YQ7H-WFU9].

125. See, e.g., ALA. CODE § 6-5-341 (b)(1)–(3) (LexisNexis 2014); ALASKA STAT. § 34.75.010(a) (2020); N.D. CENT. CODE § 42-01-01.1 (2010).

126. E.g., MONT. CODE ANN. § 76-9-102 (2021) ("Standards adopted by a state agency or unit of local government to limit levels of noise that may occur in the outdoor atmosphere may not apply to shooting ranges.").

127. See Adhiti Bandlamudi, *On the Edge of Suburbia: Where Noise Pollution and Gun Rights Collide*, GUNS & AM. (June 20, 2019), <https://gunsandamerica.org/story/19/06/20/on-the-edge-of-suburbia-where-noise-pollution-and-gun-rights-collide> [perma.cc/636J-7CWR].

128. *GRNC Alert: County Ordinance Would Shut Down Gun Ranges*, GRASS ROOTS N.C. (Apr. 15, 2019), <https://www.grnc.org/defend-your-rights/recent-grnc-alerts/1051-grnc-alert-county-ordinance-would-shut-down-gun-ranges> [perma.cc/5SEM-KMJP].

129. CHARLES, *supra* note 16, at 309.

have guns for private purposes rather than a collective or militia-oriented right.<sup>130</sup> The tides were turning in elite legal opinion too.<sup>131</sup>

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

*Parking-Lot Laws.* In response to a series of workplace shootings in the 1990s, employers across the country began enacting company policies expressly prohibiting firearms on company grounds.<sup>132</sup> In 2002, an aggrieved employee sued his company for wrongful discharge after he was fired for violating a no-firearms policy.<sup>133</sup> He claimed that the Oklahoma statute allowing companies to ban firearms on their property violated his state constitutional right to keep and transport firearms.<sup>134</sup> The challenged statute allowed “any person, property owner, tenant, employer, or business entity to control the possession of weapons on any property owned or controlled by the person or business entity.”<sup>135</sup> In *Bastible v. Weyerhaeuser Co.*, the Tenth Circuit upheld the statute, ruling that the state constitutional right is subject to reasonable regulations, such as the law reserving to private entities the authority to regulate their own property.<sup>136</sup>

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130. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001); *see also* Memorandum from Atty Gen. John Ashcroft to All U.S. Atty’s (Nov. 9, 2001), <https://www.justice.gov/archives/ag/attorney-general-memorandum-regarding-5th-circuit-united-states-court-appeals-decision-united> [perma.cc/Y7Y3-JECH] (stating the Attorney General’s view that *Emerson* generally reflects the correct interpretation of the Second Amendment as an individual right).

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

132. *E.g.*, Garry Mathiason & Andrea R. Milano, “Bring Your Gun to Work” Laws and Workplace Violence Prevention, *FED. LAW.*, June 2013, at 62, 64–65.

133. *Weyerhaeuser Co. v. Wyatt*, No. 06-cv-00268, 2006 WL 8459184, at \*1 (E.D. Okla. Aug. 16, 2006), *rev’d*, 505 F.3d 1104 (10th Cir. 2007).

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

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

136. *Id.* at 1006; *see also* *Hansen v. Am. Online, Inc.*, 96 P.3d 950, 955 (Utah 2004) (holding that state constitutional and statutory protections for gun rights did not trump private employee policy banning guns from the property).

*Bastible* set off a wave reaction.<sup>137</sup> After the lawsuit was filed, Oklahoma changed its own law in 2004.<sup>138</sup> Instead of the prior broad reservation of powers to private entities, the amended provision established the exact opposite rule: “No person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.”<sup>139</sup> In the next five years, ten more states would join Oklahoma in broadly restricting employers, and sometimes business owners generally, from prohibiting guns on their property.<sup>140</sup> From 2010 to 2018, more than a dozen additional states would join the chorus.<sup>141</sup>

137. See Patton, *supra* note 24, at 291–92 (describing the trajectory); Mathiason & Milano, *supra* note 132, at 63.

138. *Bastible*, 437 F.3d at 1005.

139. *Id.* at 1005 (quoting OKLA. STAT. ANN. tit. 21, § 1290.22(B) (Supp. 2006)).

140. See Act of Apr. 28, 2003, ch. 28, §§ 22–23, 2003 Minn. Laws 265, 284–85 (codified at MINN. STAT. § 624.714 (2020)); Act of July 21, 2005, 2005 Alaska Sess. Laws ch. 82, § 1 (codified at ALASKA STAT. § 18.65.800 (2020)); Act of Mar. 23, 2006, ch. 450, § 2, 2006 Miss. Laws 814, 815 (codified at MISS. CODE ANN. § 45-9-55 (2015)); Act of Apr. 22, 2006, ch. 240, § 8, 2006 Ky. Acts 990, 1002 (codified at KY. REV. STAT. ANN. § 237.106 (2019)); Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008, ch. 7, 2008 Fla. Laws 559 (codified at FLA. STAT. § 790.251 (2021)); Act of July 2, 2008, ch. 684, 2008 La. Acts 2687 (codified at LA. STAT. ANN. § 32:292.1 (Supp. 2021)); Act of May 1, 2009, ch. 265, 2009 Idaho Sess. Laws 802 (codified at IDAHO CODE § 5-341 (2010)); Act of May 12, 2009, ch. 379, 2009 Utah Laws 2085 (codified at UTAH CODE ANN. § 34-45-101 to -107 (LexisNexis 2019)); Act of May 19, 2009, No. 430, § 12, 2009 Neb. Laws 799, 808 (codified at NEB. REV. STAT. § 69-2441(3) (2021)); Act of July 13, 2009, ch. 177, 2009 Ariz. Sess. Laws 1478 (codified at ARIZ. REV. STAT. ANN. § 12-781 (2016)). Idaho’s law differs from the rest; instead of outlawing employer bans, it grants them immunity for harm that results from policies of allowing guns on grounds. See IDAHO CODE § 5-341 (2010).

141. See Act of May 17, 2010, ch. 140, § 9, 2010 Kan. Sess. Laws 1650, 1661–63 (codified as amended at KAN. STAT. ANN. § 75-7c10 (2019)); Act of Apr. 15, 2011, ch. 503, 2011 N.D. Laws 1613 (codified at N.D. CENT. CODE § 62.1-02-13 (2020)); Act of July 13, 2011, No. 35, § 38, 2011 Wis. Sess. Laws 668, 673–80 (codified at WIS. STAT. § 175.60 (2019–2020)); Act of Sept. 1, 2011, ch. 1058, § 1, 2011 Tex. Gen. Laws 2723, 2723–25 (codified at TEX. LAB. CODE ANN. §§ 52.061–.064 (West 2021)); Act effective Sept. 28, 2011, ch. 393, 2011 Me. Laws 954 (codified at ME. REV. STAT. ANN. tit. 26, § 600 (Supp. 2021)); Act of Mar. 19, 2012, Pub. L. No. 114-2012, § 66, 2012 Ind. Acts 1707, 1763–64 (codified as amended at IND. CODE § 34-28-7-2 (2021)); Act of Apr. 18, 2012, ch. 757, 2012 Va. Acts 1618 (codified as amended at VA. CODE ANN. § 15.2-915 (Supp. 2020)); S. 142, 108th Gen. Assemb., § 1 (Tenn. 2013), <https://publications.tnsosfiles.com/acts/108/pub/pc0016.pdf> (codified as amended at TENN. CODE ANN. § 39-17-1313 (Supp. 2020)); Act of May 21, 2013, No. 2013-283, §§ 4–5, 2013 Ala. Laws 938, 946–50 (codified as amended at ALA. CODE §§ 13A-11-90 to -91 (LexisNexis 2015)); Act of May 31, 2013, No. 98-63, § 65, 2013 Ill. Laws 1780, 1792–96 (codified at 430 ILL. COMP. STAT. 66/65 (2020)); S. 1058, 109th Gen. Assemb., § 1 (Tenn. 2015), <https://publications.tnsosfiles.com/acts/109/pub/pc0080.pdf> (codified at TENN. CODE ANN. § 50-1-312 (Supp. 2020)); Act of May 6, 2015, No. 100, § 7, 2015 Ga. Laws 805, 810 (codified as amended at GA. CODE ANN. § 16-11-135 (2018)); S. 199, 131st Gen. Assemb., § 1 (Ohio 2016), <https://publicfiles.ohiosos.gov/free/publications/SessionLaws/131/131-SB-199.pdf> (codified at OHIO REV. CODE ANN. § 2923.1210 (LexisNexis 2020)); Act of Apr. 6, 2017, No. 1071, § 3, 2017 Ark. Acts 5877 (codified at ARK. CODE ANN. § 5-73-326 (Supp. 2021));

Parking-lot laws, also called guns-at-work laws, co-opt private decisionmaking on private property.<sup>142</sup> As of 2020, twenty-four states have some form of parking-lot law. Half of these laws, like Oklahoma's, apply broadly to all property owners.<sup>143</sup> The remaining apply selectively to employers, local governments, or business owners.<sup>144</sup> As with the other expansive gun rights discussed above, the Second Amendment does not mandate gun access to private property.<sup>145</sup> As the Eleventh Circuit succinctly put it, "An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land."<sup>146</sup>

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

Act of Apr. 8, 2017, ch. 82, 2017 W. Va. Acts 548, 554–55 (codified as amended at W. VA. CODE ANN. § 61-7-14 (LexisNexis 2020)).

142. Malerie Leigh Bulot, Comment, "Bring Your Gun to Work" and You're Fired: Terminated Employees' Potential Rights for Violations of Parking Lot Laws, 78 LA. L. REV. 989, 993 (2018) (remarking how the laws "elevate an employee's rights to keep and bear arms and to defend himself above the private property rights of his employer"); see also Dru Stevenson, *Workplace Violence, Firearm Prohibitions, and the New Gun Rights*, 55 U.S.F. L. REV. 179, 189–93 (2020–2021) (tracing the rise of parking-lot laws).

143. See ALASKA STAT. § 18.65.800 (2020); ARIZ. REV. STAT. ANN. § 12-781 (2016); 430 ILL. COMP. STAT. 66/65 (2020); IND. CODE § 34-28-7-2 (2021); KY. REV. STAT. ANN. § 237.106 (LexisNexis 2019); LA. STAT. ANN. § 32:292.1 (Supp. 2021); NEB. REV. STAT. § 69-2441 (2021); OHIO REV. CODE ANN. § 2923.1210 (LexisNexis 2020); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22 (2021); TENN. CODE ANN. §§ 39-17-1313, 50-1-312 (Supp. 2020); UTAH CODE ANN. §§ 34-45-101 to -107 (LexisNexis 2019); W. VA. CODE ANN. § 61-7-14 (LexisNexis 2020).

144. See ALA. CODE § 13A-11-90 to -91 (LexisNexis 2015); ARK. CODE ANN. § 5-73-326 (Supp. 2021); FLA. STAT. § 790.251 (2021); GA. CODE ANN. § 16-11-135 (2021); KAN. STAT. ANN. § 75-7c10 (2019); ME. REV. STAT. ANN. tit. 26, § 600 (Supp. 2021); MINN. STAT. § 624.714 (2020); MISS. CODE ANN. § 45-9-55 (2015); N.D. CENT. CODE § 62.1-02-13 (2020); TEX. LAB. CODE ANN. § 52.061–.064 (West 2021); VA. CODE ANN. § 15.2-915 (Supp. 2020); WIS. STAT. § 175.60 (2019–2020).

145. For an argument that states should restrict private parties' ability to limit gun carrying in places held open to the public, see Ethan T. Stowell, Note, *Top Gun: The Second Amendment, Self-Defense, and Private Property Exclusion*, 26 REGENT U. L. REV. 521 (2013–2014).

146. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012).

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

148. Monica Madden, *Iowa Lawmakers Advance Bills to Allow Firearms in More Places*, WHO 13 (Jan. 23, 2020, 11:03 PM), <https://who13.com/news/iowa-lawmakers-advance-bills-to-allow-firearms-in-more-places> [perma.cc/88PP-7LML].



right.”<sup>149</sup> These laws are a part of the broader movement to elevate the concerns of gun carriers above both public and private countervailing interests.<sup>150</sup>

*Protection of Lawful Commerce in Arms Act.* In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA) to protect the firearms industry from civil litigation.<sup>151</sup> The law provides that no person can sue gun sellers or manufacturers for injuries “resulting from the criminal or unlawful misuse of a [gun] by the person or a third party,” except in certain narrow circumstances.<sup>152</sup> Although the lawsuits PLCAA aimed to displace were by and large unsuccessful on the merits, Congress feared that defending those lawsuits threatened to bankrupt the gun industry.<sup>153</sup> Indeed, one major impetus for PLCAA was a slate of municipality-led lawsuits in the late 1990s that were modeled on the successful litigation against the tobacco industry.<sup>154</sup> “By 2000 gun litigation was regularly front-page news, and manufacturers faced potentially bankrupting industrywide liability exposure as a result of suits by dozens of individual victims, over thirty cities, and the State of New York.”<sup>155</sup> One case is illustrative here—*City of New York v. Beretta U.S.A. Corp.*<sup>156</sup>

In June 2000, New York City sued a variety of firearm manufacturers and sellers, claiming that these defendants’ distribution practices violated the New York public-nuisance statute.<sup>157</sup> The city alleged that the defendants “market[ed] guns to legitimate buyers with the knowledge that those guns will be diverted through various mechanisms into illegal markets” and “fail[ed] to

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149. *Id.*

150. See Susannah Griffee, *Guns, Everywhere*, NEW YORKER (Apr. 20, 2012), <https://www.newyorker.com/news/news-desk/guns-everywhere> [perma.cc/8H8N-EJ2K] (detailing a host of places where states have authorized gun carrying, including bars, churches, college campuses, and parking lots); see also Christine M. Quinn, Note, *Reforming State Laws on How Businesses Can Ban Guns: “No Guns” Signs, Property Rights, and the First Amendment*, 50 U. MICH. J.L. REFORM 955 (2017) (exploring the onerous signage and other restrictions that some states place on businesses that desire to keep guns out of their stores). In 2019, Texas changed its laws to forbid landlords renting out their own private dwellings or units from barring renters’ firearm possession. David Tarrant & María Méndez, *What Are the Gun Laws in Texas, and What’s Changing Sept. 1?*, DALL. MORNING NEWS (Aug. 9, 2019, 1:00 PM), <https://www.dallasnews.com/news/2019/08/09/what-are-the-gun-laws-in-texas-and-what-s-changing-sept-1> [perma.cc/Y7F5-3DB6].

151. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(b)(1), 119 Stat. 2095, 2096 (codified at 15 U.S.C. § 7901).

152. 15 U.S.C. § 7903(5)(A).

153. See *id.* § 7901(a)(6)–(7).

154. See Timothy D. Lytton, *Introduction: An Overview of Lawsuits Against the Gun Industry*, in *SUING THE GUN INDUSTRY* 1, 3–4 (Timothy D. Lytton ed., 2005) (detailing the rise of this type of litigation in the 1990s and early 2000s); Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY*, *supra*, at 129, 129 (describing the coalition of attorneys who represented cities in gun litigation as a group “who forged an alliance a decade ago for the sole purpose of suing the tobacco industry”).

155. Lytton, *supra* note 154, at 3.

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

157. *Beretta*, 524 F.3d at 389.

take reasonable steps to inhibit the flow of firearms into illegal markets.”<sup>158</sup> Congress enacted PLCAA while the case was pending, and the defendants sought to dismiss it on that ground. The Second Circuit observed that PLCAA’s House and Senate sponsors had identified this very case as one that PLCAA would bar.<sup>159</sup> Yet the city claimed that the case fit into PLCAA’s exception allowing lawsuits when the firearm manufacturer or seller “knowingly violated a State or Federal statute applicable to the sale or marketing of the product.”<sup>160</sup> The court rejected that argument, ruling that PLCAA barred the city’s suit because the public-nuisance statute on which the claims were grounded was not the kind to which PLCAA’s exception applied.<sup>161</sup>

The congressional findings that accompany PLCAA hail the legislation as necessary to protect the right to keep and bear arms. Congress found, in that pre-*Heller* world, that “[t]he Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.”<sup>162</sup> Lawsuits against gun sellers and manufacturers who operated lawfully, Congress declared, threatened to diminish that right.<sup>163</sup> But, as before, the Second Amendment does not demand this broad liability shield.<sup>164</sup> Even if the Constitution did require certain standards of proof or types of evidence or protect gun manufacturers or sellers against some varieties of claims,<sup>165</sup> the broad and comprehensive barrier in PLCAA would not be required.

PLCAA is unique in that it does not displace traditional tort actions with an alternative remedy for those harmed by firearm misuse. Congress knows how to do so; it did that when it limited lawsuits against vaccine manufacturers and set up a no-fault compensation system.<sup>166</sup> In 1986, it created the National Vaccine Injury Compensation Program to balance the need for compensation arising from rare vaccine-related injuries with the specter of personal-injury lawsuits that could bankrupt a necessary industry.<sup>167</sup>

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158. *Id.*

159. *Id.* at 403.

160. 15 U.S.C. § 7903(5)(A)(iii).

161. *Beretta*, 524 F.3d at 404.

162. 15 U.S.C. § 7901(a)(2).

163. *Id.* § 7901(a)(6)–(7).

164. *But see* David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 737 (1995) (“[T]he right to keep and bear arms is, like the right to freedom of the press, entitled to judicial protection from abusive common law tort suits which threaten the exercise of our Second Amendment right.”); *c.f.* Brannon P. Denning, *Gun Litigation & the Constitution*, in *SUING THE GUN INDUSTRY*, *supra* note 154, at 315 (arguing that the Dormant Commerce Clause may limit certain municipal lawsuits against gun manufacturers).

165. *See* Kopel & Gardner, *supra* note 164, at 773–75.

166. *See* Wendy K. Mariner, *Legislative Report: The National Vaccine Injury Compensation Program*, HEALTH AFFS., Spring 1992, at 255, 255.

167. *Id.* at 255–56.

Congress could have similarly created a way to require those who make and sell weapons to internalize at least some costs of firearm violence. Christian Turner and Justin Van Orsdol, for example, propose “a regulatory system in which gun manufacturers would be strictly liable to a federal fund for deaths caused by their guns, paired with a subsidy that will serve to ensure the availability of guns sufficient to meet the rights the Supreme Court has found in the Second Amendment.”<sup>168</sup> This would operate much like the system in place for vaccines, balancing the need for compensation with the desire to protect an industry from bankruptcy.<sup>169</sup> So far, these and other solutions for victim compensation have not gained much attention in Congress.

It is impossible to know precisely how big a role PLCAA plays in the regulatory landscape. But it is fair to assume the role is not negligible. The law has blocked suits arising from stolen guns used in violent crimes,<sup>170</sup> distribution practices that allow diversion into illegal markets,<sup>171</sup> and marketing practices that allegedly influence killers to use specific firearms in mass shootings.<sup>172</sup> Many states have their own similar tort shields.<sup>173</sup> PLCAA, in combination with these state-law analogues, “effectively ended municipal gun litigation.”<sup>174</sup> And without PLCAA, one scholar argues, gun manufacturers would have “stronger incentives for the exercise of greater care in gun distribution” and “would likely respond [to the threat of liability] with organizational, contractual, and technological strategies to limit diversion at the dealer level.”<sup>175</sup>

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

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168. Christian Turner & Justin C. Van Orsdol, *The Gun Subsidy*, 68 *BUFF. L. REV.* 1117, 1117 (2020).

169. *Id.* at 1122–24.

170. *E.g.*, *Gilland v. Sportsmen’s Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011).

171. *E.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

172. Melissa Chan, *Just About Everyone but the Gun Maker Gets Sued After a Mass Shooting*, *TIME* (Aug. 20, 2019, 10:13 AM), <https://time.com/5653066/mass-shooting-lawsuits> [perma.cc/NCD4-WZ6C] (explaining that while at least one marketing-based case has proceeded, the barriers are so steep that the PLCAA discourages most plaintiffs from even filing suits against gun makers in this context).

173. See David Kopel, *The Protection of Lawful Commerce in Arms Act: Facts and Policy*, REASON: VOLOKH CONSPIRACY (May 24, 2016, 7:52 PM), <https://reason.com/volokh/2016/05/24/the-protection-of-lawful-comme> [perma.cc/L434-U8NE] (observing that thirty-four states had similar legislation at the time PLCAA was enacted).

174. Swan, *supra* note 77, at 1255–56.

175. Richard R.W. Brooks, *Gun Manufacturers in the Crossfire Between Litigating Liability and Legislating Immunity*, 22 *J. POL’Y ANALYSIS & MGMT.* 467, 469 (2003).

safety that traditionally centers the voices of administrators, faculty, and students.<sup>176</sup> University and college officials usually maintain broad discretion to set campus policy in the best interests of their academic environments, with the degree of independence depending on the details of state constitutional and legal arrangements.<sup>177</sup>

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

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

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176. Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 237 (2011) (“[I]mplicit in the concept of the academic freedom doctrine is the notion that colleges and universities require autonomy and should have the power to dictate policy choices on their campuses.”).

177. See Laura Houser Oblinger, Note, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University’s Holster*, 53 WASHBURN L.J. 87, 107 (2013) (describing how universities typically are not managed through direct legislative or executive supervision). Indeed, Shaundra Lewis argues that this kind of autonomous decisionmaking authority should be seen as part of the nature of a protected interest in academic freedom. Lewis, *supra* note 23, at 2118–20; see also Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1, 4 (2011) (making a similar argument).

178. Cameron W. Arnold, *Standing in the Line of Fire: Compulsory Campus Carry Laws and Hostile Speech Environments*, 49 SETON HALL L. REV. 807, 812 (2019).

179. *Id.* at 812–13; see also Lewis, *supra* note 23, at 2113 (“[T]here appears to be a burgeoning movement toward forcing higher education institutions to permit firearms.”).

180. David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 522 (2009); David Burnett, *How Many States Allow Campus Carry?*, STUDENTS FOR CONCEALED CARRY (July 26, 2020), <https://concealedcampus.org/2020/02/how-many-states-allow-campus-carry> [perma.cc/SH9B-J5M3] (“Students for Concealed Carry has taken an active role in coordination, lobbying, public discourse and where appropriate, legal action to affirm and extend to colleges the rights of self-defense to responsible citizens dually [sic] authorized to carry concealed by state agencies.”).

181. Kopel, *supra* note 180, at 523–24.

182. *Guns on Campus: Overview*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 1, 2019), <https://www.ncsl.org/research/education/guns-on-campus-overview.aspx> [perma.cc/YBE8-CWH6]; Lewis, *supra* note 23, at 2113–14.

ten years ago, twenty-nine states banned guns from higher-education institutions, today only sixteen do.<sup>183</sup> The arc of the trend line, reversing the prior dominant paradigm, mirrors that of the concealed-carry expansion outlined earlier.<sup>184</sup>

The debate in Texas over the state's compulsory campus-carry law shows the concern such laws can generate. That law, which went into effect in August 2016, allows a handgun license holder to carry a concealed handgun while on a public college or university campus.<sup>185</sup> Although the law affords campus administrators some discretion to set rules and regulations around that carrying,<sup>186</sup> the Texas attorney general has construed the law to prohibit universities from banning firearms in a large number of classrooms or allowing individual faculty members to exclude guns from their classes.<sup>187</sup> The Fifth Circuit rejected a challenge to the law by three University of Texas at Austin professors.<sup>188</sup>

That lawsuit did not and could not address the fact that the policy was being instituted over the concerns and against the stated wishes of the majority of students, faculty, and administrators,<sup>189</sup> as well as voters of color.<sup>190</sup> Similar concerns have been raised by relevant constituencies in other states.<sup>191</sup> Although these laws were passed to empower concealed carriers to thwart

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183. Lewis, *supra* note 23, at 2115 (reporting twenty-nine states banned guns before 2011); Arnold, *supra* note 178, at 812 (reporting that sixteen states ban guns as of 2019).

184. See *supra* notes 99–103 and accompanying text.

185. Arnold, *supra* note 178, at 813–14.

186. *Id.* at 814.

187. Ken Paxton, Att'y Gen., Opinion No. KP-0051, Letter on Authority of an Institution of Higher Education to Establish Certain Rules Regarding the Carrying of Handguns on Campus (Dec. 21, 2015), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0051.pdf> [perma.cc/9NEG-KH86].

188. Glass v. Paxton, 900 F.3d 233, 236 (5th Cir. 2018).

189. Reeve Hamilton, *McRaven: Campus Carry Would Create "Less Safe" Environment*, TEX. TRIB. (Jan. 29, 2015, 3:00 PM), <https://www.texastribune.org/2015/01/29/mcraven-campus-carry-would-create-less-safe-enviro> [perma.cc/3HTP-NAWV].

190. *Minority Voter Groups Oppose Concealed Carry on Campuses, UT Poll Finds*, UT NEWS (Apr. 27, 2016), <https://news.utexas.edu/2016/04/27/poll-minority-voters-oppose-concealed-carry-on-campus> [perma.cc/9YK4-SW4A] (reporting that close to four out of every five Black voters and two out of every three Latino voters opposed campus carry compared with 47 percent of white voters in opposition).

191. EMILY REIMAL, SINO ESTHAPPAN, PAIGE S. THOMPSON & JAHNAVI JAGANNATH, URB. INST., GUNS ON COLLEGE CAMPUSES: STUDENTS' AND UNIVERSITY OFFICIALS' PERCEPTIONS OF CAMPUS CARRY LEGISLATION IN KANSAS 2 (2019), [https://www.urban.org/sites/default/files/publication/100963/guns\\_on\\_college\\_campuses\\_1.pdf](https://www.urban.org/sites/default/files/publication/100963/guns_on_college_campuses_1.pdf) [perma.cc/5NNG-AWUW] ("An abundance of research documents the predominantly negative attitudes of students, faculty, and staff toward laws permitting guns on college campuses."); Michael R. Cavanaugh, Jeffrey A. Bouffard, William Wells & Matt R. Nobles, *Student Attitudes Toward Concealed Handguns on Campus at 2 Universities*, 102 AM. J. PUB. HEALTH 2245, 2246 (2012) (reporting survey results showing that students at universities in Texas and Washington were "relatively uncomfortable with allowing the carrying of concealed handguns on campus").

mass carnage, that does not appear to have happened.<sup>192</sup> Yet neither have the direst predictions of increased gun violence on campuses where carry has expanded.<sup>193</sup> Instead, the deleterious effects of the law appear subtler, with instructors modifying curricular choices or classroom policies and some going so far as “holding office hours in bars or churches where guns are prohibited, rather than meet[ing] with armed students in their offices.”<sup>194</sup>

*Stand-Your-Ground Rights.* Not only are gun rights protected through an interconnected and extended constellation of civil accommodations, they also enjoy the benefit of special criminal protections.<sup>195</sup> This Section focuses on stand-your-ground laws. Though these laws are not expressly tied to firearms, there is ample reason for treating them as part of a protective gun-rights web.<sup>196</sup> One of the biggest and most important reasons for that treatment is that the laws’ supporters frame them that way.<sup>197</sup> Stand-your-ground laws’ greatest boosters in state legislatures across the country have been the NRA and other gun-rights organizations.<sup>198</sup> When the Ohio state legislature passed a stand-your-ground law in December 2020, its backers described it as a gun measure and attached it to a gun-rights expansion bill.<sup>199</sup>

The first modern stand-your-ground law was passed in Florida in 2005,<sup>200</sup> driven in large part by NRA lobbying efforts.<sup>201</sup> The legislative movement quickly accelerated afterward; as of early 2020, thirty-four states had stand-your-ground laws or laws that expand the places one can use force without

192. Matt Valentine, *The Growing Crisis of Guns on Campus*, NEW REPUBLIC (Mar. 22, 2019), <https://newrepublic.com/article/153356/growing-crisis-guns-campus> [perma.cc/3ZXE-EZ3P].

193. *Id.*

194. *Id.*

195. Although guns sometimes generate special calls for exception from the criminal law, as with the stand-your-ground immunity discussed here, they also occasionally generate harsher treatment in the criminal law when found in the hands of the “bad guys.” See Jacob D. Charles, *Guns, Violence, and Criminal Justice Reform* (May 13, 2021) (unpublished manuscript) (on file with the *Michigan Law Review*).

196. See CHARLES, *supra* note 16, at 35 (noting the way that supporters connected stand-your-ground laws to their understanding of the Second Amendment); JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* 6–7 (2015) (describing how stand-your-ground laws fit into the cultural narrative of the gun-rights movement).

197. See Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 260 (2008) (describing the NRA’s role in passing these laws); FRANKS, *supra* note 5, at 93; Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961, 971 (2014).

198. See Ann O’Neill, *NRA’s Marion Hammer Stands Her Ground*, CNN (Apr. 15, 2012, 9:20 AM), <https://www.cnn.com/2012/04/15/us/marion-hammer-profile/index.html> [perma.cc/FV3H-QAGZ]; LIGHT, *supra* note 2, at 157–59.

199. Jake Zuckerman, *Ohio ‘Stand Your Ground’ Bill, Expanding Right to Shoot to Kill in Self-Defense, Heads to DeWine’s Desk*, WTOL 11 (Dec. 18, 2020, 5:41 PM), <https://www.wtol.com/article/news/politics/state-politics/ohio-stand-your-ground-bill-passes-house/512-a1770cc4-88a0-4fe1-8cc6-680b3da17fb3> [perma.cc/6JRT-9JVS].

200. LIGHT, *supra* note 2, at 155.

201. *Id.* at 157–59.

retreating beyond the home.<sup>202</sup> Notably, twenty-five states after Florida have adopted these laws by statute and not judicial decision, showing the legislature leading the way in expanding rights to use guns in self-defense.<sup>203</sup> Although these laws vary by state, their key features can be summarized under two headings.<sup>204</sup>

First, and most obviously, they abrogate the traditional duty to retreat before using deadly force when one can retreat in complete safety.<sup>205</sup> This common law duty, as Blackstone described it, required a person to retreat “as far as he conveniently or safely can . . . before he turns upon his assailant.”<sup>206</sup> The retreat requirement never applied inside the home—a man’s proverbial “castle”<sup>207</sup>—but stand-your-ground laws typically extend a person’s right to refuse to flee from any “place where he or she has a right to be.”<sup>208</sup> Stand-your-ground laws are not completely novel in eliminating the retreat requirement. In the latter half of the nineteenth century, the requirement was already fading in America.<sup>209</sup> Though the no-retreat position was ascendant before stand-your-ground laws swept the country, the new wave in the wake of Florida’s 2005 law was a change driven by legislatures and not the result of a gradual accretion of common law jurisprudence.<sup>210</sup>

202. *The Effects of Stand-Your-Ground Laws*, RAND CORP., <https://www.rand.org/research/gun-policy/analysis/stand-your-ground.html> [perma.cc/6Y6E-YL5W] (last updated Apr. 22, 2020).

203. Alexa R. Yakubovich et al., *Effects of Laws Expanding Civilian Rights to Use Deadly Force in Self-Defense on Violence and Crime: A Systematic Review*, 111 AM. J. PUB. HEALTH e1, e2 (2021), <https://doi.org/10.2105/AJPH.2020.306101>.

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

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

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

207. LIGHT, *supra* note 2, at 155.

208. E.g., FLA. STAT. § 776.012(2).

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

210. FRANKS, *supra* note 5, at 93 (noting that Florida’s law was not the result of popular public pressure but the result of NRA and other interest-group lobbying); Yakubovich et al., *supra* note 203, at e2 (highlighting the legislative role in passing these laws).

Second, stand-your-ground laws like Florida's provide not just a broader affirmative defense that can be raised at trial but a pretrial immunity from arrest, detention, charge, and prosecution.<sup>211</sup> A person who presents a plausible case of self-defense to the officers on the scene can ensure his freedom;<sup>212</sup> if he is later arrested, the law provides a special pretrial immunity hearing at which the person bears a minimal burden before the prosecution must disprove the defense by clear and convincing evidence.<sup>213</sup> These are not a normal part of criminal procedure but instead mark real "procedural departures from traditional self-defense law."<sup>214</sup> As Cynthia Ward writes, "[T]his statutory immunity hearing is a curious beast indeed."<sup>215</sup> The procedural innovations give one who kills ample opportunity to avoid resolution by a jury of their peers, the traditional fact-finder charged with discerning the need for taking human life.<sup>216</sup>

Stand-your-ground laws are important not just for the change in legal rights they provide but also for the broader symbolic effect of the immunity.<sup>217</sup> They have the capacity to influence human behavior even if the defense is never invoked in court.<sup>218</sup> In that respect, "[i]t is quite clear that many people believe that stand-your-ground laws give them the right to use deadly force in a wide variety of situations and act accordingly."<sup>219</sup>

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

In 2011, Florida enacted the Firearm Owners' Protection Act, a law that placed various restrictions on physicians in the name of gun-owner privacy.<sup>220</sup> The statute limits how physicians can keep records about a patient's firearm ownership, restricts inquiries about gun ownership, prohibits a physician from "harassing" a patient about firearm ownership, and bars discrimination against a patient based on gun ownership.<sup>221</sup> The Eleventh Circuit struck

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211. FLA. STAT. § 776.032(1).

212. Cynthia V. Ward, Essay, *Three Questions About "Stand Your Ground" Laws*, 95 NOTRE DAME L. REV. REFLECTION 119, 137 (2020).

213. *Id.* at 134.

214. Ruben, *supra* note 204, at 83 n.138.

215. Ward, *supra* note 212, at 134.

216. Ruben, *supra* note 204, at 83 n.138 (describing this unsettling of traditional self-defense doctrine); Franks, *supra* note 204, at 1107.

217. LIGHT, *supra* note 2, at 155 ("In addition to their powerful legal implications, the laws have had a profound effect on the nation's culture, reinforcing the belief that a good, law-abiding citizen is an armed citizen.").

218. FRANKS, *supra* note 5, at 98.

219. *Id.*; see also Ward, *supra* note 212, at 132–33.

220. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1302 (11th Cir. 2017) (en banc); see also Marla Spector Bowman, Note, *Docs v. Glocks: Speech, Guns, Discrimination, and Privacy—Is Anyone Winning?*, 67 FLA. L. REV. 1455 (2015) (describing the legislative and litigation history and assessing the law's impact).

221. *Wollschlaeger*, 848 F.3d at 1302–03.



down several of these provisions as violations of the First Amendment, but it upheld the nondiscrimination provision by construing it to exclude a physician's expressive conduct.<sup>222</sup>

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

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

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222. *Id.* at 1311, 1318.

223. Act of Apr. 19, 2013, ch. 231, 2013 Mont. Laws 809 (codified at MONT. CODE ANN. § 50-16-108(1)(a) (2021)).

224. Stephen Gutowski, *New Loeffler Bill Would Give Gun Owners More Privacy Protections*, WASH. FREE BEACON (June 23, 2020, 6:15 PM), <https://freebeacon.com/2020-election/loeffler-introduces-gun-rights-bill-in-senate> [perma.cc/BW9Q-MSPJ].

225. *Id.*

226. In 2016, Maine passed a law forbidding landlords renting federally subsidized housing from imposing restrictions on lawful gun possession or use in the unit. ME. REV. STAT. ANN. tit. 14, § 6030-F (Supp. 2021); see also *Firearms Industry Nondiscrimination Act (FIND Act)*, CONG. SPORTSMEN'S FOUND., <https://congressionalsportsmen.org/policies/state/firearms-industry-nondiscrimination-act-find-act> [perma.cc/4C83-QBAX].

227. Chip Brownlee, *Last-Gasp Trump Rule May Force Banks to Lend to Gun Companies*, TRACE (Dec. 14, 2020), <https://www.thetrace.org/2020/12/trump-administration-occ-treasury-bank-cannot-deny-service> [perma.cc/7RML-6886].

228. *Id.*

229. Fair Access to Financial Services, 85 Fed. Reg. 75,261, 75,264 (proposed Nov. 25, 2020).

2021,<sup>230</sup> but the Biden Administration promptly put a hold on the change.<sup>231</sup> Yet states have taken action against these banks, such as Louisiana's move to keep Bank of America and Citigroup from participating as underwriters on state bonds.<sup>232</sup> The state treasurer justified the action on the grounds that, in his view, "the policies of these banks are an infringement on the rights of Louisiana citizens."<sup>233</sup>

One final set of laws bears mention: state constitutional amendments protecting the right to arms. These provisions can obviously limit the policy choices of state officials, but one reason they have not merited treatment here is that they have historically erected a rather trivial barrier to gun laws.<sup>234</sup> In a comprehensive study of court decisions applying these provisions, Adam Winkler found that courts historically applied a very deferential standard of review to gun regulations.<sup>235</sup> As a result, only six laws were struck down between World War II and 2007 in the forty-two states with constitutional arms protection.<sup>236</sup> But one recent trend, exemplifying the directional expansion of non-Second Amendment gun rights, is state laws or state constitutional amendments mandating that courts apply strict scrutiny to challenges under these provisions. A handful of states have adopted these measures in the last decade, but the extent to which they will change the landscape is not yet clear.<sup>237</sup> There is reason to believe they may not be as protective of gun rights as advocates hope. For example, even after the state required strict scrutiny for challenges arising under the state constitutional right to arms, the Missouri Supreme Court upheld the ban on firearm possession for even nonviolent felons.<sup>238</sup>

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230. OCC Finalizes Rule Requiring Large Banks to Provide Fair Access to Bank Services, Capital, and Credit, OFF. OF THE COMPTROLLER OF THE CURRENCY (Jan. 14, 2021), <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html> [perma.cc/JH23-FXFX].

231. Danny Nelson, *OCC Halts Fair Access Banking Rule*, YAHOO! NEWS (Jan. 28, 2021), <https://www.yahoo.com/news/occ-halts-fair-access-banking-175052359.html> [perma.cc/HXM8-CN5S].

232. Zacks Equity Research, *BofA, Citi Witness Ban from Louisiana Deal over Gun Policies*, YAHOO! SPORTS (Aug. 20, 2018), <https://www.yahoo.com/news/bofa-citi-witness-ban-louisiana-134301108.html> [perma.cc/C6FY-2G63].

233. *Id.*

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

235. Winkler, *supra* note 234, at 686.

236. *Id.* at 688.

237. Todd E. Pettys, Essay, *The N.R.A.'s Strict Scrutiny Amendments*, 104 IOWA L. REV. 1455, 1465 (2019) (describing the NRA's efforts to institute these changes).

238. *State v. Clay*, 481 S.W.3d 531, 532 (Mo. 2016) (en banc); Abigail E. Williams, Note, *Missed the Mark: The Supreme Court of Missouri's Faulty Application of Strict Scrutiny to the Right to Bear Arms*, 82 MO. L. REV. 595 (2017) (criticizing *Clay* and related cases).

## II. UNPACKING STATUTORY GUN RIGHTS

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

A. *Rhetoric, Social Movements, and Constitutional Culture*

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

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239. Cf. MARK TUSHNET, *ADVANCED INTRODUCTION TO FREEDOM OF EXPRESSION* 72–74 (2018).

240. See Joseph Blocher, *Cities, Preemption, and the Statutory Second Amendment*, 88 U. CHI. L. REV. (forthcoming 2022) (on file with the *Michigan Law Review*).

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

242. See *Zacks Equity Research*, *supra* note 232; *Madden*, *supra* note 148.

the Court has rejected.<sup>243</sup> The collection of statutory laws both draws its symbolic and expressive power from the constitutional guarantee and, at the same time, seeks to influence that doctrine.<sup>244</sup>

In one respect, it is tempting to argue that gun-rights proponents are simply misinterpreting constitutional doctrine and misapplying constitutional language when they argue that laws like permitless concealed carry, stand-your-ground laws, or parking-lot laws are demanded by the Second Amendment.<sup>245</sup> One might, for instance, respond to the claim that parking-lot laws are constitutionally required the same way many have responded to the arguments that Twitter violates the First Amendment when it blocks users or removes tweets: that is not how constitutional law works.<sup>246</sup> On this view, gun-rights advocates are just using the cloak of the Second Amendment as an organizing tool to advance and justify discretionary policy choices.<sup>247</sup> This kind of “gun rights talk,” the critic might say, only distorts the state of actual constitutional law.<sup>248</sup> Adam Winkler, for example, describes the distinction between what he calls the “Judicial Second Amendment” and the “Aspirational Second Amendment.”<sup>249</sup> The former is the set of court decisions announcing the laws that the Second Amendment permits or prohibits; the latter is the version deployed in political debates and consists of what gun-rights advocates want the Constitution to cover.<sup>250</sup> Ironically, Winkler notes, the social movement that led to the Supreme Court’s decision in *Heller* has made the Judicial Second Amendment increasingly irrelevant as a growing number

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

244. See Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1436 (“Americans today usually talk about rights as a creature of constitutional law.”); William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879, 888 (2014) (noting that one reason for a decline in support for stricter gun regulation is that “all American political narratives are rights-based”).

245. BLOCHER & MILLER, *supra* note 17, at 192.

246. See Adam Liptak, *Can Twitter Legally Bar Trump? The First Amendment Says Yes*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/first-amendment-free-speech.html> [perma.cc/8Q88-BHFP] (“It is certainly possible to violate the values embodied in the First Amendment without violating the First Amendment itself. But the basic legal question could hardly be more straightforward . . .”).

247. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 485 (2004); see also Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 814 (2014).

248. See Blocher, *supra* note 247, at 820.

249. Winkler, *supra* note 28, at 253.

250. *Id.*

of Americans live under an aspirational version that provides greater protection than the formal document.<sup>251</sup>

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

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

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251. *Id.* at 253–54.

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

253. BLOCHER & MILLER, *supra* note 17, at 13.

254. *Id.* (noting *Heller*’s disclaimer of invention).

255. Siegel, *supra* note 16, at 210.

256. *See* *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1155 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016).

257. West, *supra* note 252, at 1481 (footnotes omitted). West may be overly dismissive of the resistance to the new paradigm. Academic historians, to give one example, strongly resisted the turn to the “Standard Model” interpretation of the Second Amendment that read it as an individual right disconnected from its militia origins. *See* CHARLES, *supra* note 16, at 285–93.

Supreme Court even entered the scene.<sup>258</sup> Given these developments, Americans prior to *Heller* had what we could call a de facto Second Amendment right to keep and bear arms.<sup>259</sup> The courts might not have countenanced constitutional challenges to gun regulations prior to 2008, but gun rights were well and flourishing before then.<sup>260</sup> And, as enforceable legal entitlements, they likely blocked more regulation than the formal constitutional guarantee has in the years since the Court decided *Heller*.<sup>261</sup>

In this sense, gun-rights advocacy bucked the dominant trend in the second half of the twentieth century toward embracing judicial supremacy—the view that the Supreme Court is the ultimate interpreter of the Constitution. As Larry Kramer has ably shown, the Founding generation envisioned a special role for “the people” in interpreting and applying the Constitution, one that rejected the modern orthodoxy entrusting the final say in rights disputes to a judicial elite.<sup>262</sup> But that vision faded over time, and Kramer marks an especially large rupture during the last half century or so.<sup>263</sup> Gun-rights activists were not part of this rupture, for they long rejected the notion that judges were supreme in construing the Second Amendment.<sup>264</sup> From at least the time of a developed gun-rights movement in the early 1900s, “gun-rights advocates, groups, and supporters were virtually unwavering in their belief that the Second Amendment guaranteed an individual’s right to own and use firearms for lawful purposes.”<sup>265</sup> Never mind that judges and scholars—“the nation’s historical and legal elite”<sup>266</sup>—were convinced otherwise throughout much of that time.<sup>267</sup> In fact, at around the same time the country at large and elite institutions were increasingly accepting judicial supremacy, the gun-rights movement was beginning a crusade to provide intellectual support for the constitutional view it had previously accepted on faith.<sup>268</sup> In the 1970s and

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258. See Young, *supra* note 29, at 456 (describing how extracanonical change occurs).

259. Cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323–24 (2006) (arguing that social movement conflict and mobilization resulted in a constitutional understanding tantamount to a “de facto ERA”).

260. Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 270 (2008) (“For the last decades, and perhaps for much longer, a robust individual right to use guns has become an entrenched part of American culture.”).

261. See Winkler, *supra* note 28, at 258.

262. KRAMER, *supra* note 252, at 208–13.

263. See *id.* at 228.

264. CHARLES, *supra* note 16, at 279.

265. *Id.*

266. *Id.*

267. *Id.* The anti-elitism here finds echoes in Martin Van Buren’s invective against the ills of “judicial oligarchy.” KRAMER, *supra* note 252, at 233–34.

268. Patrick Charles traces the contours of this intellectual movement, which occurred mostly in the pages of law journals—including, prominently, this one. See CHARLES, *supra* note 16, at 279–94; see also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the*

1980s, movement actors published scores of scholarly articles and commentary on the right to keep and bear arms.<sup>269</sup>

The co-occurrence of these two developments—a popular turn toward embracing judicial supremacy and the gun-rights movement’s turn toward shoring up scholarly support for its view—is probably not coincidence. As the judiciary’s views became more important in citizens’ understanding of the Constitution and what it means in practice, it makes sense that the gun-rights movement would find greater desire to intellectually justify its foundational beliefs about the scope of the Second Amendment. As the courts became practically supreme, their views did too. Thus, whatever the strength of gun rights in a pre-*Heller* world, advocates wanted the protection that formal judicial recognition of constitutional status provides. In Reva Siegel’s comprehensive account, “*Heller*’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”<sup>270</sup> The same movement that fought for preemption, PLCAA, stand your ground, right to carry, and the litany of other laws discussed in Part I also sought to have its constitutional understanding enshrined in law as the meaning of the formal Second Amendment.<sup>271</sup> *Heller*, in many ways, is the instantiation of the living constitutionalism that Justice Scalia so often derided.<sup>272</sup>

The broad expansion of statutory gun rights, then, is an important part of the story of social-movement conflict and mobilization that led to *Heller*.<sup>273</sup> Yet *Heller* was a narrow decision that did not constitutionalize disputes over stand-your-ground immunities, campus-carry laws, or even concealed-carry licensing. The continued expansion of gun rights today should be seen as part of the continuing effort to influence constitutional meaning.<sup>274</sup> This popular

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

269. CHARLES, *supra* note 16, at 279–94; Spitzer, *supra* note 16, at 367–68.

270. Siegel, *supra* note 16, at 192.

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

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

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

274. Siegel, *supra* note 16, at 239–40 (outlining the role of movement advocates in shaping the constitutional vision vindicated in *Heller*).

constitutionalism challenges judicial hegemony in constitutional interpretation, but it is just as clear that advocates want to continue influencing that formal doctrine.<sup>275</sup>

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

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

276. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 27 (2005) (observing, despite judicial claims to the contrary, that “constitutional law does change in response to social movement protest”).

277. *Id.* at 30–36.

278. *Id.* at 28.

279. Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?*, 23 WM. & MARY BILL RTS. J. 1143, 1158 (2015) (“[T]he evidence suggests that Republican and conservative politics have become uniquely aligned with gun rights advocacy . . .”). In his four years as president, Donald Trump appointed three new justices to the U.S. Supreme Court, each of whom received the NRA’s ringing endorsement. See *NRA Applauds Neil Gorsuch’s Nomination to the U.S. Supreme Court*, NRA INST. FOR LEGIS. ACTION (Jan. 31, 2017), <https://www.nraaila.org/articles/20170131/nra-applauds-neil-gorsuchs-nomination-to-the-us-supreme-court> [perma.cc/RRH9-PHFF]; *NRA Applauds Senate Confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court*, NRA INST. FOR LEGIS. ACTION (Oct. 6, 2018), <https://www.nraaila.org/articles/20181006/nra-applauds-senate-confirmation-of-judge-brett-kavanaugh-to-the-us-supreme-court> [perma.cc/N57P-D5HU]; *NRA Applauds Nomination of Judge Amy Coney Barrett to the Supreme Court*, NRA INST. FOR LEGIS. ACTION (Sept. 26, 2020), <https://www.nraaila.org/articles/20200926/nra-applauds-nomination-of-judge-amy-coney-barrett-to-the-supreme-court> [perma.cc/3DR5-762R].

280. See, e.g., Press Release, Governor’s Off., *Governor Gianforte Signs Constitutional Carry Bill into Law* (Feb. 19, 2021), <https://news.mt.gov/governor-gianforte-signs-constitutional-carry>



connections, and the avenues they leave open, may result in further changes to the Judicial Second Amendment.<sup>281</sup>

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

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

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bill-into-law [perma.cc/E2B3-AHN3] (describing signing a law allowing permitless concealed carry as "protect[ing] Montanans' Second Amendment rights"); Press Release, Att'y Gen. Eric Schmitt, Attorney General Schmitt Files Brief Defending Missourians' Second Amendment Rights (July 20, 2020, 6:19 PM), <https://ago.mo.gov/home/news/2020/07/20/attorney-general-schmitt-files-brief-defending-missourians-second-amendment-rights> [perma.cc/7MPS-ZCB6] (writing, in a brief arguing for charges to be dismissed against a couple charged with threatening displays of weapons, "[o]n behalf of all Missourians who wish to exercise their right to keep and bear arms in self-defense of their persons, homes, families, and property").

281. See *supra* text accompanying notes 249–251.

282. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1037 (2004).

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

284. *Id.* at 454.

285. Primus, *supra* note 37, at 1084.

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

287. Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 54–55 (2018); Robin West, *Rights, Harms, and Duties: A Response to Justice*

### B. Redistributive Rights and Redistributive Effects

The expansive gun rights chronicled in Part I speak in a constitutional register, but they differ from the right inscribed in the Second Amendment in a number of important respects.<sup>288</sup> One of the most salient is the nature and degree of protection for arms-related activity. The formal Second Amendment, as advocated by many interest groups and interpreted by the Supreme Court, is a libertarian right.<sup>289</sup> It is grounded in a mistrust of government.<sup>290</sup> This is the style of the right that the movement sought to codify in Supreme Court doctrine.<sup>291</sup> And it is the version that *Heller* most clearly adopts.<sup>292</sup>

The first wave of gun laws largely matches this libertarian focus. In this wave, Ronald Reagan's aphorism rings clear: "[G]overnment is not the solution to our problem; government is the problem."<sup>293</sup> The movement sought to protect gun owners and users from meddlesome government regulation at both the state (relaxing concealed-carry restrictions) and the local level (preempting local regulations). In the second wave, by contrast, Reagan's adage is reversed. Government becomes the solution to new problems confronting the movement: perceived anti-gun stances by businesses, campus administrators, urban leaders, and impact litigators. In this phase, while government remains an ever-present concern, another problem joins the fears of legislative policymaking: the private employers, campus administrators, litigious advocates, healthcare workers, and other entities outside the legislative framework that threaten the normative commitment to a gun-friendly society. Government becomes, in this phase, a tool of the gun-rights movement to expand gun owners' prerogatives.

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

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

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

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

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

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

292. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 330 (2017) (arguing that *Heller* and *McDonald* replicate the "libertarian bias" against government regulation that *Lochner* epitomized).

293. Ronald Reagan, Inaugural Address (Jan. 20, 1981), <https://www.reaganfoundation.org/media/128614/inaguration.pdf> [perma.cc/2CCD-J6LR].

distinction between negative rights and positive rights. Distilling broader debates about rights, Emily Zackin describes the key distinction between these types of rights along two axes—whether the state is the source of the threat from which protection is sought, and whether the claim is to government forbearance or intervention.<sup>294</sup> In her summary, “a negative right protects its bearers from governmental threats by serving as the basis for a demand that government restrain itself.”<sup>295</sup> On the other hand, “a positive right protects its bearers even from non-governmental threats by serving as the basis for a demand that government intervene to protect and/or aid the threatened rights-bearer.”<sup>296</sup> Rights in the second wave pledge government intervention to protect against largely nongovernmental threats.

Because of this feature of second-wave rights, they are decidedly less libertarian.<sup>297</sup> Here, there is no Second Amendment Lochnerism.<sup>298</sup> The laws paternalistically redistribute power, authority, and—in some cases—violence itself.<sup>299</sup> In place of the familiar mistrust of government authorities, government power is instead co-opted to advance the movement’s desired ends. The state forbids private employers from restricting guns on their own property; tells university and college staff, administrators, and faculty that they do not know what is best for their campuses; and cuts off certain private lawsuits alleging harm from gun misuse.

For second-wave advocates, the market is not a neutral or natural force to preserve but an imperfect mechanism to be managed with affirmative government intervention.<sup>300</sup> The “marketplace of violence,”<sup>301</sup> in other words, is not a laissez-faire one in which the invisible hand produces optimal outcomes<sup>302</sup>

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294. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 50–51 (2013).

295. *Id.* at 51.

296. *Id.*

297. See William N. Eskridge, Jr. & John Ferejohn, *Response to Daniel Carpenter’s Review of A Republic of Statutes: The New American Constitution*, 10 *PERSPS. ON POL.* 796, 796 (2012) (describing the way statutes can protect rights more broadly than the Court’s interpretation of the Constitution and often grant “positive liberties . . . and affirmative rights”).

298. Cf. Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *COLUM. L. REV.* 1453, 1455 (2015) (describing how First Amendment free-exercise jurisprudence is taking a Lochnerian turn focused on protecting private ordering and resisting redistribution); see also Imoukhuede, *supra* note 292, at 330.

299. Cf. JULIAN LE GRAND & BILL NEW, *GOVERNMENT PATERNALISM* 23 (2015) (“[M]any proposed and actual paternalistic interventions have as their rationale substituting the government’s perception of the good for the individual’s perception.”).

300. See Madden, *supra* note 148 (reporting one legislator’s support for a parking-lot law based on his desire to take his gun to church in the morning before work and how “[n]ot being able to carry my weapon in my car in the proper way would create an inconvenience for me to go home to get my weapon to go to work where I can carry my weapon”).

301. BLOCHER & MILLER, *supra* note 17, at 155.

302. Indeed, as I have argued elsewhere, the market left to its own devices is very likely to lead to dangerous norm cascades. See Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell

but a market that bears the imprint of heavy government intervention. Private ordering is displaced by government mandates that require open access and skew incentives. When the market fails to deliver,<sup>303</sup> “campaigns for ‘gun welfare’ promise to democratize participation in the effort to keep terrorists and criminals at bay” by providing financial incentives for gun ownership and training.<sup>304</sup> The extent and nature of the intervention is much different under these statutory rights than under the libertarian, leave-us-alone formal constitutional guarantee.

As well as paternalistically imposing the state’s view of the value of guns—over and against not only countervailing private preferences but also local government, private enterprise, and higher education—the broad nonconstitutional gun-rights apparatus radically redistributes violence and the potentially harmful fallout from allowing guns everywhere.<sup>305</sup> In her treatment of the non-First Amendment freedom of speech, Genevieve Lakier describes a similar binary in the free-speech context: “a primarily libertarian strand of free speech law that gains its authority from the constitutional text” is contrasted with “a nonconstitutional strand that is much less libertarian, and much more redistributive, in what it understands freedom of speech to mean and to require.”<sup>306</sup>

These laws’ distributive effects can be seen in several places. Stand-your-ground laws, for example, “may decrease the risks of violence to some persons but increase the risks that others—persons likely to be perceived as threatening—will suffer harm.”<sup>307</sup> If more guns make us safer, as gun-rights advocates claim,<sup>308</sup> the crucial question is who gets classified as one of “us.” The data are

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

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

304. LIGHT, *supra* note 2, at 168.

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

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

307. Ristroph, *supra* note 305, at 1189.

308. See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* (3d ed. 2010). Lott is, to understate the matter, an extremely controversial researcher, but his works have had an immense influence on the gun-rights movement. See Josh Gerstein, *Controversial Gun Advocate Hired by Justice*

not promising. As discussed in more detail below, the most historically disadvantaged groups are often the hardest hit. In a 2020 study, researchers concluded that enactment of Florida's stand-your-ground law led to marked increases in adolescent firearm homicide and mirrored other research findings "showing that Florida's [stand-your-ground] law is associated with a quantifiable racial bias that aligns with racial stereotypes of threat."<sup>309</sup>

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

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*Department Last Month*, POLITICO (Nov. 25, 2020, 12:02 AM), <https://www.politico.com/news/2020/11/24/controversial-gun-advocate-justice-department-440251> [perma.cc/BC7K-GM6R].

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

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

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

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

313. See, e.g., CHARLES E. COBB JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE 121–46 (2014); NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014).

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

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

314. *Heller* itself vindicated one particular view of the value of guns. The imagined home defender—the proverbial “good guy with a gun”—is nearly always a man. See Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 *POLITY* 207, 237 (2021) (“*Heller*’s selective originalism endorses a patriarchal theory of individual self-defense in the home that ignores self-defense against people within the home.”).

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

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

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

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

Annette Gordon-Reed, *The Problem of Police Powers for People Living While Black*, N.Y. REV. BOOKS (June 13, 2020), <https://www.nybooks.com/daily/2020/06/13/the-problem-of-police-powers-for-people-living-while-black> [perma.cc/Y8DM-TWZM]. Consider another case: Bresha Meadows, a Black girl, was only fourteen when she shot and killed her abusive father. She did not get the benefit of the doubt and was tried and sentenced as a juvenile. See Melissa Jeltsen, *Bresha Meadows Thought You'd Understand*, HUFFPOST (Mar. 29, 2021), [https://www.huffpost.com/entry/bresha-meadows-thought-you-d-understand\\_n\\_5da48081e4b087efd9bb23973](https://www.huffpost.com/entry/bresha-meadows-thought-you-d-understand_n_5da48081e4b087efd9bb23973) [perma.cc/L828-4HF7]. Girls and women subjected to domestic violence often do not get the luxury of defending their castles. See Suk, *supra* note 197, at 251 (“[A]nxiety about extending the logic of the castle doctrine, in which a man has permission to exercise deadly force, to familial kitchens, was coded as anxiety about women’s violence—specifically wives killing husbands.”).

318. See ANDERSON, *supra* note 27, at 127.

his statutory right to carry a concealed weapon in public.<sup>319</sup> He was killed for it, because a police officer saw him—a Black man—as a threat. Marissa Alexander did not get the benefit of exercising her statutory right to stand her ground.<sup>320</sup> Alexander—a Black woman—was arrested for firing a warning shot after her estranged, abusive husband refused to let her leave the house and threatened to kill her.<sup>321</sup> Alexander was denied stand-your-ground immunity and sentenced to prison.<sup>322</sup> These stories and many others like them suggest that America is still, in the words of Margareth Etienne and Suja Thomas, “a country where Black civilians are not permitted to ‘use’ guns without endangering their lives.”<sup>323</sup>

When these rights do get exercised, the harms they impose often fall hardest on historically marginalized groups. In the context of stand-your-ground laws, for example, a large meta-analysis of prior empirical studies concluded that, at least in Florida, white victims garner more convictions than Black ones.<sup>324</sup> The analysis of Florida data also showed overall “robust increases (24%–45%) in firearm and total homicide rates” after the law went into effect.<sup>325</sup> Sometimes stand-your-ground laws even serve to encourage vigilante policing and create after-the-fact obstacles to accountability for gun harms.<sup>326</sup> Ahmaud Arbery’s death demonstrates the catastrophic consequences that can arise in this context. Arbery, a Black man, was shot and killed by white private policers trying to enforce their vision of law and order.<sup>327</sup> In February 2020, Arbery was out for a jog through a Georgia neighborhood when several local residents spotted him.<sup>328</sup> Thinking Arbery was responsible for burglaries that

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319. Jennifer Carlson, *Legally Armed but Presumed Dangerous: An Intersectional Analysis of Gun Carry Licensing as a Racial/Gender Degradation Ceremony*, 32 GENDER & SOC’Y 204, 205 (2018).

320. Franks, *supra* note 204, at 1118–19.

321. *Id.*

322. *Id.* at 1119.

323. Margareth Etienne & Suja Thomas, *How Second Amendment Gun Rights Fall Short for African Americans*, CHI. SUN-TIMES (Jan. 26, 2021, 4:30 PM), <https://chicago.suntimes.com/2021/1/26/22248836/how-second-amendment-gun-rights-fall-short-for-african-americans> [perma.cc/MX49-FZCZ] (recounting several other attempts by Black Americans to exercise their gun rights that ended in tragedy).

324. Yakubovich et al., *supra* note 203, at e7.

325. *Id.* at e11.

326. See ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 230 (2019) (“When coupled with the resulting stand-your-ground laws, *Heller* essentially grants a right to privatize the policing function of the civil state.”).

327. See Joseph Margulies, *How the Law Killed Ahmaud Arbery*, BOS. REV. (July 7, 2020), <https://bostonreview.net/race-law-justice/joseph-margulies-how-law-killed-ahmaud-arbery> [perma.cc/E5X3-DEBW] (arguing that a legal regime that “combines citizen’s arrest with permissive gun laws and ‘stand your ground’ self-defense laws” not only leads to but “sanctions the predictable murder of innocent black men, so long as the community judges it reasonable”).

328. Morgan Winsor, Christina Carrega & Sabina Ghebremedhin, *Father and Son Charged with Murder of Unarmed Black Man Ahmaud Arbery in Georgia*, ABC NEWS (May 8, 2020, 10:20

had recently taken place in the neighborhood, they grabbed their guns, chased him down, and shot him dead.<sup>329</sup>

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

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AM), <https://abcnews.go.com/US/mother-unarmed-black-man-killed-georgia-speaks-ahmaud/story?id=70552216> [perma.cc/JYK6-K4SY].

329. *Id.*

330. Letter from Dist. Att'y George E. Barnhill to Captain Tom Jump, Glynn Cnty. Police Dep't [hereinafter Barnhill Letter], <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf> [perma.cc/39QP-KTUN] (explaining that the McMichaels "had firearms being carried in an open fashion" in a car owned by one of them and that under Georgia law "th[at] is legal open carry").

331. See Winsor et al., *supra* note 328.

332. Ross Barkan, *High-Profile Killings of Unarmed Black People Spark Calls for Reform*, A.B.A. J. (Aug. 1, 2020, 1:10 AM), <https://www.abajournal.com/magazine/article/high-profile-killings-of-unarmed-black-people-spark-calls-for-reform> [perma.cc/RE3Z-7EGV].

333. Barnhill Letter, *supra* note 330, at 3.

334. See Winsor et al., *supra* note 328.

335. See Lolita Buckner Inniss, *Response, Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. F. 213, 215 (2020) ("Arbery's killing was a reminder of the distinctly racialized, spatialized, and surveillance legacy of jogging").

336. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 125–126, at 351 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 242 (2000) ("[I]t is precisely the unrestrained use of force that makes the state of nature intolerable."); Susan Liebell, *Retreat from the Rule of Law: Locke and the Perils of Stand Your Ground*, 82 J. POL. 955, 958 (2020) ("Locke emphatically rejects individual policing and punishing in favor of collectively written standing laws administered by the state."). The same concerns Locke had, Hobbes had before him. See Rafi Reznik, *The Political Imperative to Self-Defend*, DUKE CTR. FOR FIREARMS L. (Aug. 6, 2020), <https://firearmslaw.duke.edu/2020/08/the-political-imperative-to-self-defend> [perma.cc/C77G-59LE]; see also Rafi Reznik, *Hobbes v. Heller* (unpublished manuscript) (manuscript at 35) (on file with the *Michigan Law Review*) ("The basic difference between Hobbes and *Heller* is that in Hobbes, self-defense serves to bring about a social contract, whereas in *Heller*, self-defense serves to break one up.").



Instead of acknowledging these concerns, some scholars claim that when police refuse to do their jobs amid rioting and looting, “private citizens who enforce these laws have a better claim to be exercising the state’s monopoly of force than the police, who are engaged [in] nonfeasance.”<sup>337</sup> This is a remarkable claim given what we know about stereotype threat,<sup>338</sup> racialized images of crime,<sup>339</sup> and the many tragic episodes strewn throughout U.S. history, including in Arbery’s Georgia, that involve private citizens enforcing their own conception of law and social order. The point here is not that gun prerogatives embodied in the expansive gun-rights apparatus will always be abused. Of course they will not. And they will no doubt even be used on occasion in socially beneficial ways to ward off attackers and protect third parties.<sup>340</sup> But these rights can come at substantial cost, not just to identifiable victims like Arbery but to the social compact writ large.

Beyond stand-your-ground laws, other facets of expansive gun rights also redistribute harms to less powerful Americans. Locations that have good reason to keep guns off their property, like domestic-violence shelters, find themselves unable to do so because of parking-lot laws;<sup>341</sup> gun-violence survivors and other advocates find their speech stifled, canceling their own rallies because of large pro-gun protests by those carrying firearms;<sup>342</sup> students feel inhibited from robust discussion when they know guns are forced onto campus and into the classroom;<sup>343</sup> urban areas that skew more diverse and that favor gun regulation are disabled from legislating by preemption laws;<sup>344</sup> communities of color that seek collective protection from gun harms are barred from

337. Robert Leider, Essay, *The State’s Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 71 (2021).

338. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCH. 590, 595–97 (1976); see also Blocher et al., *supra* note 302, at 107–08 (explaining the ways that guns and perceptions of criminality are racialized).

339. Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 HEALTH & SOC. WORK 241, 242, 245–46 (2019).

340. See, e.g., Jake Bleiberg & Jamie Stengle, *Firearms Instructor Took Out Gunman at Texas Church Service*, AP NEWS (Dec. 31, 2019), <https://apnews.com/article/de8a2aebc6d95b9131a08975a5d881f9> [perma.cc/B5WG-V6EK].

341. E.g., Erin Beck, *West Virginia Domestic Violence Coalition Sues over Gun Law*, REG.-HERALD (June 10, 2019), [https://www.register-herald.com/news/state\\_region/west-virginia-domestic-violence-coalition-sues-over-gun-law/article\\_e1b4254a-072c-5741-988c-94c7f34f9f73.html](https://www.register-herald.com/news/state_region/west-virginia-domestic-violence-coalition-sues-over-gun-law/article_e1b4254a-072c-5741-988c-94c7f34f9f73.html) [perma.cc/C2YB-ZD4F] (“The lawsuit also states that local agencies work to keep firearms off their property not only to keep their clients and their clients’ children physically safe, but also to reassure them that they are in a safe environment. Firearms are frequently used as a mechanism of control in abusive relationships, the lawsuit notes.”).

342. Talia Lavin, *That Pro-gun Rally in Virginia Wasn’t Exactly “Peaceful,”* GQ (Jan. 22, 2020), <https://www.gq.com/story/pro-gun-rally-threat> [perma.cc/U8NJ-QSLB].

343. Lewis, *supra* note 23, at 2127 (“The presence of guns inhibits students from freely exchanging ideas with each other.”).

344. KIM PARKER ET AL., PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 17 (2018), <https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities> [perma.cc/WYH8-

obtaining redress from gun manufacturers by PLCAA;<sup>345</sup> and those most likely to be threatened with guns in public tend to be Black Americans.<sup>346</sup>

The redistributive manner of statutory gun rights is not a neutral one, especially those second-wave laws that seek guns everywhere. The laws give the most empowered group in America more power and authority. They also redistribute the harms from the exercise of those rights, laying the burden most heavily on already marginalized groups.

\* \* \*

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

### III. ASSESSING THE DOCTRINAL EFFECTS OF BROAD GUN RIGHTS

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

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M2KC] (“Whites have become a minority of the population in most urban counties since 2000, while remaining the majority in 90% of suburban and small metro counties and 89% of rural ones.”); see also *supra* Section I.A.

345. *E.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

346. EUGENIO WEIGEND VARGAS & RUKMANI BHATIA, CTR. FOR AM. PROGRESS, NO SHOTS FIRED: EXAMINING THE IMPACT AND TRAUMA LINKED TO THE THREAT OF GUNFIRE WITHIN THE U.S. 3 (2020), <https://cdn.americanprogress.org/content/uploads/2020/10/19125806/NoShotsFired-brief1.pdf> [perma.cc/SC4E-2Y9G] (“Like gun deaths, the burden of gun-related robberies and aggravated assaults falls disproportionately on communities of color, men, and young people.”).

### A. *The Second Amendment*

Expansive statutory gun rights can influence formal Second Amendment doctrine in a number of ways, including with respect to the methodology for assessing Second Amendment challenges, the weapons protected, and the right to decline weapons. But they also undermine one of the key claims for those seeking to expand the judicial interpretation of the Second Amendment: that the right to keep and bear arms is a lowly “constitutional orphan” without respect.<sup>347</sup> This Section starts there and then turns to assessing the interactions between this statutory regime and current doctrine.

#### 1. Status

The prior Parts demonstrate how American gun rights are valorized and vaunted above countervailing concerns—even more than the formal Second Amendment, which *Heller* said “elevates above *all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>348</sup> This fact is all the more striking in light of the claims arising from gun-rights quarters.

Gun-rights advocates, scholars, and—increasingly—judges have been claiming since *Heller* was decided that the Second Amendment is being treated as a “second-class right.”<sup>349</sup> Critics have variously charged that the Second Amendment is treated as “peripheral,” “fringe,” “anachronistic,” “second rate,” and “second-class.”<sup>350</sup> In support of these charges, these critics often point to the federal courts’ treatment of constitutional challenges to gun laws.<sup>351</sup> It is true that the overwhelming majority of Second Amendment challenges fail.<sup>352</sup> But that statistic alone says nothing about whether such rulings undervalue the right without attention to the strength of the claims asserted.<sup>353</sup>

More importantly, however, is the fact that these complaints ignore the vast and expansive non-Second Amendment right to keep and bear arms. If observers want to assess the strength of gun rights in the United States today,

347. *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

348. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added).

349. Ruben & Blocher, *supra* note 52, at 1447 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)).

350. Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 621 (2019) (quoting *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willet, J., dissenting from denial of rehearing en banc)); see also Miller, *supra* note 5.

351. See Winkler, *supra* note 28, at 256 (“Although the jurisprudential results of a reinvigorated Second Amendment were predictably similar to the outcomes seen for decades in state court right-to-bear-arms decisions, there have been complaints that the courts have neutered *Heller*.”).

352. Ruben & Blocher, *supra* note 52, at 1496, 1507.

353. *Id.* at 1507. In fact, 24 percent of the challenges in the dataset were brought by convicted felons whom *Heller* suggested may be permissibly disarmed, with a majority of those challenges arising in cases in which defense counsel would be expected to raise any nonsanctionable defense. *Id.*

they cannot confine the inquiry to the formal constitutional guarantee and how state and federal courts apply doctrine under that provision.<sup>354</sup> The expansive protections outside the Constitution form a crucial part of the picture.<sup>355</sup> As Part I documented, state and federal lawmakers have extended gun rights into a variety of settings—public, private, educational, governmental, commercial, and more. Rights conferred under these pieces of ordinary legislation are no doubt more practically important to many gun owners and advocates than the formal constitutional guarantee.<sup>356</sup> Far from being treated as second class, gun rights are undeniably first-class entitlements in America.

This recognition ought to temper the vehemence of the cries of judicial abdication. As this robust nonconstitutional apparatus suggests, one reason that court oversight might play a smaller role in the Second Amendment than in the context of other constitutional rights is that there is simply less need for it.<sup>357</sup> The right to keep and bear arms is a majoritarian right, and its protection outside the Court and beyond the bounds of the Constitution appears both secure and strengthening. As John Hart Ely might underscore, the political channels are open and flourishing.<sup>358</sup> The lack of Supreme Court attention and a line of cases striking laws down on Second Amendment grounds is thus not as insidious as some members of the Court would make it seem.<sup>359</sup>

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

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

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

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

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

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

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

## 2. Methodology

These broad statutory rights can also influence formal doctrine, such as the way that courts decide Second Amendment challenges. The Supreme Court has provided lower courts little direction on how to conduct this inquiry. Its only two substantive cases examining the right to keep and bear arms, *District of Columbia v. Heller*<sup>360</sup> and *McDonald v. City of Chicago*,<sup>361</sup> simply struck down the laws at issue without more guidance on methodological questions. In that absence, a two-part framework has emerged among the federal courts of appeals.<sup>362</sup> Under that framework, courts first ask whether the challenged law burdens conduct protected by the Second Amendment; if it does, the courts then apply a form of means-end scrutiny dependent on the degree of the burden and the closeness of the protected conduct to the “core” Second Amendment interest in self-defense.<sup>363</sup>

But there is a competing doctrinal test favored by Justice Kavanaugh (and perhaps by other conservative justices).<sup>364</sup> That test uses text, history, and tradition as the sole touchstones for constitutionality.<sup>365</sup> Modern laws must have a historical analogue to pass constitutional muster; novel or innovative regulations that respond to contemporary problems are unconstitutional unless the state can convince a judge that historical practice supports the law. As Judge Jennifer Walker Elrod suggested in a dissenting opinion, “*Heller* and *McDonald* dictate that the scope of the Second Amendment be defined solely by reference to its text, history, and tradition.”<sup>366</sup> Other judges, always in dissent (so far), have echoed these claims.<sup>367</sup>

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

361. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

362. Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS., no. 3, 2020, at 53, 56–57.

363. *Id.*

364. Charles, *supra* note 12, at 348 (describing framework); *see also* *Heller v. District of Columbia*, 670 F.3d 1244, 1280–81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (announcing this methodology). Some observers see Justice Alito’s recent dissent in *New York State Rifle & Pistol Ass’n v. City of New York*, joined by Justices Thomas and Gorsuch, to also endorse this kind of test. 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting). I do not read that opinion to provide a clear view on Justice Alito’s preferred methodological approach. *See id.* at 1541–42 (suggesting that history alone dooms the city’s regulation, but also highlighting that the city proffered no evidence to suggest the law served public-safety goals).

365. Charles, *supra* note 12, at 348.

366. *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting).

367. *E.g.*, *Mai v. United States*, 974 F.3d 1082, 1087 (9th Cir. 2020) (Bumatay, J., dissenting from denial of reh’g en banc) (“If operating on a clean slate, I would hew to *Heller*’s and *McDonald*’s fidelity to the Second Amendment’s history, tradition, and text.”).

But at least in some cases the regulatory tradition may be unhelpful, and not merely woefully inconclusive,<sup>368</sup> because of the legal barriers erected by the type of broadened statutory gun rights outlined here. Consider that one reason *Heller* struck down the District of Columbia's handgun ban is that it was an outlier law without equal in many parts of the nation or precedent in history.<sup>369</sup> But preemption laws are at least *part* of the reason that so few localities instituted these laws.<sup>370</sup> If localities retained their traditional authority to regulate, then perhaps many more would have enacted handgun bans and the District would not have seemed to be such an outlier. The broader point is that these legal barriers alter the historical record; the absence of gun laws on a certain topic may have nothing to do with constitutionality and everything to do with legal barriers outside the Second Amendment. To be sure, many aspects of the broadened gun-rights expanse are recent, but to the extent that the text, history, and tradition test looks to contemporary consensus to confirm history or tradition, it will be viewing an altered landscape.

### 3. Protected Weapons

In addition to their connection with these overarching methodological questions, expansive statutory gun rights interact with narrower methodological questions about the “arms” the Second Amendment protects. *Heller* suggested that the Second Amendment applies to weapons that are in common use by law-abiding citizens for lawful purposes.<sup>371</sup> Some lower courts have considered this a “simple test” that operates as an on-off switch for full constitutional protection; if a weapon is in common use, say these courts, then a state cannot ban it.<sup>372</sup> Other lower courts view the common-use test as a step-one coverage inquiry, answering only the initial question of whether or not the Second Amendment applies to a certain type of weapon, not the further question of how and whether the government can regulate it.<sup>373</sup>

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

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368. Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL'Y 171, 174 (2020) (critiquing Justice Kavanaugh's approach on these grounds).

369. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.”).

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

371. *Heller*, 554 U.S. at 625.

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

373. E.g., *Duncan v. Becerra*, 970 F.3d 1133, 1143 & n.6 (9th Cir. 2020) (stating that the “simple test” conflicts with circuit precedent applying the two-part framework and analyzing the commonality of magazines under step one).

often the reason a weapon is not in common use. “Yet,” as Judge Frank Easterbrook described the problem, “it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned.”<sup>374</sup> The test also fails to provide clarity because it does not explain how to measure commonality, what geographic boundaries or historical timeframes matter, or which uses qualify.<sup>375</sup>

This Article reveals another critique of the common-use test. While it is true that regulations often *limit* gun availability and can therefore skew consumer choice and weapon commonality in the way Judge Easterbrook observed, statutory rights and privileges can also *expand* availability and influence consumer choice. Consider, in this light, the immunity conferred by PLCAA. Wholly different weapons might be available if lawsuits could proceed after gun harm occurs, including the possibilities of smart or personalized guns.<sup>376</sup> The popularity of particular guns would likely be different if marketing and advertising were subject to litigation in the same way that, say, automobile and medical-device marketing are.<sup>377</sup> In other words, courts should not assume that the guns bought and possessed are a reflection of pure market forces unaffected by the broad and expansive gun-rights regime.

#### 4. Unkeeping Arms

Finally, aggressive gun rights take away private and local control in ways that may actually raise their own constitutional questions. Under these laws, local governments cannot decide when, where, and how to limit guns; many businesses cannot decide to be gun-free workplaces; and universities and colleges do not have the right to dictate their own weapons policies. Even expansive concealed-carry rights “make it more difficult for private parties to keep guns out of their homes and off their property.”<sup>378</sup>

In commanding these choices, broad statutory gun rights abut another powerful tradition exemplified in the right *not* to keep and bear arms. And that decision is arguably constitutionally protected. Joseph Blocher argues that just as the Constitution recognizes rights not to engage in other forms of constitutional activity, the Second Amendment should include the freedom not to keep and bear guns.<sup>379</sup> So, for example, laws that require a property owner to allow others to bring guns onto the owner’s property are infringing the interest the owner has in exercising her right *not to* keep and bear arms.<sup>380</sup>

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374. *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“A law’s existence can’t be the source of its own constitutional validity.”).

375. BLOCHER & MILLER, *supra* note 17, at 89 (describing and critiquing the test).

376. Lytton, *supra* note 154, at 7–8 (describing pre-PLCAA theories of liability based on the absence of safety features).

377. *Id.* at 8–11 (describing pre-PLCAA theories of liability based on negligent marketing).

378. Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 46 (2012).

379. *Id.* at 4.

380. *Id.* at 41–45.

Businesses might also possess this right.<sup>381</sup> So, too, argue Dave Fagundes and Darrell Miller, should local governments.<sup>382</sup> In a recent article, they argue that cities can hold rights, even against their states, and that one such right is the Second Amendment right to decide gun policies on their own.<sup>383</sup> For example, on a strong view of their theory, a city would be allowed to keep concealed-carry permit holders out of its public library even if state law would otherwise grant access there.<sup>384</sup> The trajectory of the broadened statutory gun rights outlined in Part I shows just why these constitutional interactions are becoming increasingly fraught.

### B. Other Constitutional Implications

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

#### 1. The First Amendment

Broadened gun rights, and especially public carry rights, have the potential to reorient First Amendment doctrine. There are scores of stories over the past several years about activists protesting with guns. In Charlottesville in 2017, white nationalists marched with openly displayed firearms to protest removal of a Confederate statute.<sup>385</sup> In Michigan in 2020, armed protestors stormed the state capitol to protest COVID-related closure orders.<sup>386</sup> The frequency of these appearances seems to be increasing. “In the United States,” writes Timothy Zick, “public protests, demonstrations, rallies, and marches have become armed events.”<sup>387</sup> These changes cannot be fully understood apart from the gun-rights expansionism occurring over the last several decades and documented in Part I.<sup>388</sup> Laws expanding the right to carry in public

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

382. Dave Fagundes & Darrell A.H. Miller, *The City’s Second Amendment*, 106 CORNELL L. REV. 677 (2021).

383. *Id.* at 728.

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

385. Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 176 (2018) (opening with this incident); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 224–25 (2018) (same).

386. Michael C. Dorf, Essay, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. REV. 111 (2021) (opening with a description of these events).

387. Zick, *supra* note 385, at 224.

388. To be sure, many of the concerns over guns at protests stem from *open* carry, not *concealed*. But the rise of an open-carry movement is itself related to and an important part of



into an ever-larger number of arenas have led to calls from gun-rights proponents to protect the right to armed assembly.<sup>389</sup>

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

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

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the expansive gun-rights movement. See *What You Need to Know About Open Carry in America*, TRACE (Sept. 9, 2020), <https://www.thetrace.org/2016/07/rise-of-open-carry-explained> [perma.cc/5A7T-ELTT]; Royce de R. Barondes, *Automatic Authorization of Frisks in Terry Stops for Suspicion of Firearms Possession*, 43 S. ILL. U. L.J. 1, 2 (2018) (remarking on the increase in open carry).

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

390. See *supra* notes 385–386; Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L.Q. 333, 334 (2018); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISCOURSE 172, 174 (2018).

391. Joseph Goldstein, *After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestles with Its Role*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html> [perma.cc/6FWK-DTJL].

392. *Id.*

393. Louise Melling & David Cole, *What Does the ACLU Say About the Right to March While Armed?*, ACLU (Jan. 15, 2021), <https://www.aclu.org/news/free-speech/what-does-the-aclu-say-about-the-right-to-march-while-armed> [perma.cc/53P6-6NWS] ("[A] ban on guns is a reasonable time, place, and manner restriction on a protest—provided that it is applied uniformly to all protests and all protesters.").

394. Dorf, *supra* note 386, at 22.

395. *Id.*

396. Zick, *supra* note 385, at 228.

play.<sup>397</sup> This debate illustrates the ways that the right to carry in public interacts with and influences constitutional doctrine.<sup>398</sup> Debates about the expressive act of gun carrying are now relevant in ways they would not have been in a world without extensive statutory gun rights.<sup>399</sup>

## 2. The Fourth Amendment

Another area where broad carry rights unsettle legal doctrine is in the context of the Fourth Amendment.<sup>400</sup> With the broad, but not constitutionally mandated, deregulation of public carry laws and the push for guns in more locations, law enforcement practices and constitutional doctrine have had to adjust.<sup>401</sup> Under *Terry v. Ohio*<sup>402</sup> and its progeny, police can stop a person upon reasonable suspicion that she was or is about to be involved in criminal activity and frisk her if they believe she is armed and dangerous.<sup>403</sup> Broad gun rights require recalibration of both the stop and the frisk elements. Whereas mere public possession of a firearm used to be sufficient to satisfy the low bar for suspicion of a crime to justify a stop, the changing legal landscape of the past several decades cuts off that inferential leap.<sup>404</sup> As a result of increasingly common legal public carry, more than the presence of a firearm is now required to justify a *Terry* stop.<sup>405</sup> For example, in a 2018 case, in an opinion by then-Judge Amy Coney Barrett, the Seventh Circuit held that a call reporting boys “playing with guns” did not give officers reasonable suspicion to justify a stop: “[T]he caller’s report in this case about the presence of guns did not create a reasonable suspicion of an ongoing crime, because carrying a firearm in public is permitted with a license in Indiana.”<sup>406</sup>

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397. *Id.* at 241–42.

398. See Brad Brooks, *Free Speech, Gun Rights on Collision Course in United States, Some Legal Experts Say*, REUTERS (Sept. 11, 2020, 8:43 AM), <https://www.reuters.com/article/us-global-race-usa-guns-analysis/free-speech-gun-rights-on-collision-course-in-united-states-some-legal-experts-say-idUSKBN2621TX> [perma.cc/A8K5-V6S8].

399. Claire Boine et al., *What Is Gun Culture? Cultural Variations and Trends Across the United States*, 7 HUMANS. & SOC. SCIS. COMM’NS art. 21, at 10 (2020), <https://doi.org/10.1057/s41599-020-0520-6> (identifying a strain of gun culture that is distinct from both recreational gun culture and self-defense gun culture and that “appears to represent a symbolic attachment to firearms as fundamental to individual freedom”).

400. See generally J. Richard Broughton, *Danger at the Intersection of Second and Fourth*, 54 IDAHO L. REV. 379 (2018).

401. Bellin, *supra* note 109, at 3–4 (“The sweeping changes to America’s substantive gun laws reverberate throughout American policing.”).

402. 392 U.S. 1 (1968).

403. Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1677 (2018).

404. *Id.* at 1694–95.

405. Bellin, *supra* note 109, at 25–26; Royce de R. Barondes, *Conditioning Exercise of Firearms Rights on Unlimited Terry Stops*, 54 IDAHO L. REV. 297, 304–05 (2018).

406. *United States v. Watson*, 900 F.3d 892, 895 (7th Cir. 2018); accord *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015) (“While open-carry laws may put

Courts have also had to grapple anew with the second half of *Terry*: even if a stop is warranted, what satisfies the *Terry* frisk standard that the officer believe a suspect to be “armed and dangerous”?<sup>407</sup> Courts have disagreed over whether the standard permits an inference that an armed person is for that reason dangerous. For the Fourth Circuit, being armed is enough, because “the risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed.”<sup>408</sup> But not all jurists agree. In a dissent from that en banc decision, Judge Pamela Harris noted the difficulty that loosened gun laws cause for Fourth Amendment doctrine.<sup>409</sup> After noting how gun-carry laws have relaxed rapidly over the decades, she argued that “as behavior once the province of law-breakers becomes commonplace and a matter of legal right, we no longer may take for granted the same correlation between ‘armed’ and ‘dangerous.’”<sup>410</sup>

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

### 3. The Fourteenth Amendment

Finally, another doctrinal implication concerns the Fourteenth Amendment’s promise of equal protection of the laws. Current Supreme Court doctrine excuses the state from an obligation to provide police protection to specific individuals (via the public duty doctrine)<sup>411</sup> and from requiring the government to answer for the harms of private parties (via the state action doctrine).<sup>412</sup> But these doctrines have received sustained scholarly criticism,

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police officers (and some motorcyclists) in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every ‘gunman’ who lawfully possesses a firearm.” (citation omitted)).

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

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

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

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

411. *See, e.g.,* *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

412. *See, e.g.,* *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that a private mob taking away people’s guns does not violate the Second Amendment); *The Civil Rights Cases*, 109

and the expansive laws in this Article may provide another reason to rethink them.<sup>413</sup>

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

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

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

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U.S. 3 (1883); Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893 (1984).

413. See Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

414. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 3-4 (2021).

415. *Id.* at 47.

416. *Id.* at 51-52.

417. See Chad Kautzer, *Good Guys with Guns: From Popular Sovereignty to Self-Defensive Subjectivity*, 26 LAW & CRITIQUE 173, 174 (2015) ("The rapid liberalization of open- and concealed-carry laws, the proliferation of guns in public spaces and institutions, the reinterpretation of the Second Amendment of the US Constitution, and the abstraction and individuation of the Castle Doctrine in Stand Your Ground laws all contribute to the legalization of nonstate violence to defend extra-legal relations of domination.")

418. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 69 (1997).

leave cause for concern. And in either of these scenarios—whether the state owes a duty to diligently safeguard private gun bearing to allow citizens to fight back private violence or owes a duty to restrain private gun bearing to decrease harm—a Fourteenth Amendment duty to prevent private violence might come into the picture.

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

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

#### CONCLUSION

What Americans have the right to do with guns today flows less from the text or judicial interpretation of the Second Amendment than from the wide-ranging set of entitlements codified in federal, state, and local statutes and regulations. This set of statutory gun rights is often rhetorically justified in the language of constitutional rights, but it differs profoundly from the protections the Constitution provides. It grants affirmative privileges and broadly serves to redistribute the risks of violence in society.

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419. Ana Ceballos & David Ovalle, *DeSantis Pushes Expansion of Stand Your Ground Law as Part of 'Anti-Mob' Crackdown*, MIA. HERALD (Nov. 10, 2020), <https://www.miamiherald.com/news/politics-government/state-politics/article247094007.html> [perma.cc/L2HY-69Y9].

420. Erik Ortiz, *'Stand Your Ground' in Florida Could Be Expanded Under DeSantis' 'Anti-Mob' Proposal*, NBC NEWS (Nov. 12, 2020, 6:31 PM), <https://www.nbcnews.com/news/us-news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555> [perma.cc/JR9U-7ZA3].

This Article is the first to comprehensively explore the nature, evolution, and impact of this expansive set of laws. These laws began to pick up mounting support in the 1980s as a new and energetic gun-rights movement gained political power. That initial advocacy sought to distance gun owners from government. It pushed for preemption laws that would take regulatory power away from local governments and relaxed concealed-carry laws that unfettered gun owners to carry in public. The next, more aggressive, phase took off in the early 2000s. Movement advocates did not seek distance from government but its support. Government became a tool to bludgeon the businesses, lawyers, universities, physicians, and others who intruded on gun owners' prerogatives.

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

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

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421. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 169 (2014); *see also* Joe Coscarelli, *NRA Reminds Gun-Loving Voters to Be Afraid of Everything, Including ISIS, Mexicans, and Obama*, NEW YORK (Oct. 30, 2014), <https://nymag.com/intelligencer/2014/10/nra-reminds-gun-loving-voters-to-fear-everything.html> [perma.cc/B43U-4NXQ] (describing NRA rhetoric, including an election issue of the NRA's flagship magazine titled “Chaos at Our Door? A Dangerous World Is Closing In”).

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

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

424. *See* Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 905 (2014).

425. *See id.* at 893; Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728–29 (2011) (highlighting these harms with the *Heller*-infused right).

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

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

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

427. Blocher & Siegel, *supra* note 426, at 141.

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

429. See generally Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL’Y 951 (2011) (exploring the social costs and benefits of exercising Second Amendment rights and their jurisprudential significance for constitutional doctrine).