

## SECOND AMENDMENT SANCTUARIES

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**ABSTRACT**—The term “sanctuary” has long expressed a sympathy for immigrants’ rights and resistance to federal immigration enforcement. Recently, the word has become associated with another divisive political topic, as local governments have begun declaring themselves “Second Amendment Sanctuaries” in defiance of statewide gun-control measures they deem unconstitutional. This gun-rights resistance movement not only flips the political script on the nature of sanctuaries, but also presents important and challenging questions about local–state power sharing, the proper scope of “subfederal commandeering,” and the role of coordinate branches in constitutional decision-making.

This Article provides the first scholarly treatment of Second Amendment Sanctuaries. In doing so, it explores both the unique facets of this new localism and the broader implications for sanctuary movements generally. Most early commentary dismisses Second Amendment Sanctuaries as purely symbolic and presumptively invalid pursuant to state preemption principles and the judicial supremacy model of constitutional interpretation. This Article challenges that narrative and articulates a theory of limited viability for Second Amendment Sanctuaries and other local intrastate resistance movements more broadly.

The theory this Article presents proceeds in three parts, with each part presenting a novel approach to local–state governmental conflict that contributes to the existing literature. First, localities can resist broad state preemption in limited circumstances via the state’s “home rule” provisions when local regulation of a particular issue is rooted in history and has normative policy appeal. Second, localities may passively resist statewide regulation through a form of “subfederal anticommandeering” analogous to the Tenth Amendment’s anticommandeering principles protecting states from federal overreach, so long as the locality takes no affirmative steps to frustrate state enforcement. Third, local enforcement officers may defend their resistance on substantive constitutional grounds when the right at issue is not firmly settled by the judiciary. This “first impression departmentalism” reflects the belief that all coordinate branches of government should play a role in defining the contours of constitutional provisions when emerging doctrine remains in a state of flux. These three principles counsel in favor of the viability of at least some Second Amendment Sanctuaries as currently

constructed, as well as possible future “gun control sanctuaries” resisting statewide firearm deregulation.

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INTRODUCTION

The term “sanctuary” in the immigration context has come to represent both a broad sympathy for undocumented immigrants and a correlative

antipathy for federal immigration enforcement.<sup>1</sup> Self-proclaimed “sanctuary cities”<sup>2</sup> pass resolutions asserting their refusal to assist federal agencies in carrying out federal immigration functions.<sup>3</sup> Churches, schools, and other members of “sanctuary networks” hold themselves out as places of refuge beyond the reach of Immigration and Customs Enforcement (ICE).<sup>4</sup> Depending on one’s political party, these efforts reflect either a desire to protect immigrants from “heartless and ineffective” federal deportation policies or an anarchic attempt to “protect[] criminals who sneak[] into the country illegally.”<sup>5</sup> But while the term “sanctuary” may effectively signal a set of core beliefs about immigration, the “S-word” lacks a clear definition in both law and policy.<sup>6</sup>

Despite this ambiguity, the term has recently appeared in reference to another hotly contested political topic: gun rights. So-called “Second Amendment Sanctuaries”—local jurisdictions passing resolutions “in opposition to gun safety legislation they deem to be an unconstitutional restriction of their rights”—exploded onto the scene in 2019.<sup>7</sup> These

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<sup>1</sup> See Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1709–10 (2018) (summarizing history of the “sanctuary” as a place of “support and integrat[ion]” for undocumented immigrants and a place of “resistance to federal immigration enforcement”); Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 16–17 (2018) (summarizing history of immigrant sanctuaries as places offering “a range of benefits and protections to . . . undocumented immigrants”).

<sup>2</sup> See Lasch et al., *supra* note 1, at 1711.

<sup>3</sup> See Massaro & Milczarek-Desai, *supra* note 1, at 16–17 (“So-called ‘sanctuary jurisdictions’ seek to limit local enforcement of federal and state immigration policies and practices.”).

<sup>4</sup> See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1212–14, 1222 (2019) (describing the “novel forms of sanctuary” that have surfaced in the immigration context, from churches and “self-declared sanctuary campuses to #resistICE [and] workplace sanctuary”).

<sup>5</sup> George Skelton, *What Does ‘Sanctuary State’ Actually Mean? It’s Time for Lawmakers to Figure It Out*, L.A. TIMES (Mar. 16, 2017, 12:05 AM), <https://www.latimes.com/politics/la-pol-sac-skelton-sanctuary-state-compromise-20170316-story.html> [<https://perma.cc/FE2C-JEAD>]; David J. Toscano, *The Gun Sanctuary Movement Is Exploding*, SLATE (Dec. 11, 2019, 4:23 PM), <https://slate.com/news-and-politics/2019/12/second-amendment-gun-sanctuary-movement-constitution.html> [<https://perma.cc/SA9E-93YA>].

<sup>6</sup> See Skelton, *supra* note 5; see also Lasch et al., *supra* note 1, at 1709 (“[T]he term ‘sanctuary’ . . . is deeply contested and lacks a commonly accepted meaning.”); Massaro & Milczarek-Desai, *supra* note 1, at 16 (“‘Sanctuary jurisdiction’ is a non-legal term . . .”); Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 147–50 (2008) (comparing narrow “public sanctuary laws” within a broader context of what it means to be a sanctuary jurisdiction).

<sup>7</sup> Toscano, *supra* note 5; see also Simon Romero & Timothy Williams, *When Sheriffs Say No: Disputes Erupt over Enforcing New Gun Laws*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/us/state-gun-laws.html> [<https://perma.cc/GY8Q-ZMZS>] (“As states have approved dozens of restrictive gun control measures . . . efforts to resist such laws have gathered strength around the nation as rural gun owners say their rights are being violated.”).

resolutions take different forms, but most advocate an absolute right to protect local citizens from any statewide gun-control law by refusing to enforce those laws in their jurisdiction.<sup>8</sup>

Much like immigrant sanctuaries, Second Amendment Sanctuaries, or “gun sanctuaries,” claim immunity from superior government enactments, reopening debates about the proper balance of power between state and local governments, the ability of superior governments to compel compliance from sanctuary jurisdictions, and the substantive contours of the Second Amendment itself. This Article wades into these debates over preemption, commandeering, and constitutional interpretation as applied to the unique case of Second Amendment Sanctuaries.

This latest iteration of local resistance to outside lawmaking has dominated the political landscape in Colorado,<sup>9</sup> Illinois,<sup>10</sup> New Mexico,<sup>11</sup> Virginia,<sup>12</sup> and other states with newly elected democratic legislatures seeking to pass new gun regulations. The regulations most commonly targeted by gun-sanctuary activists include universal background checks, assault weapons bans, and any “extreme risk protection order” (ERPO) regulation that includes a universal background check provision.<sup>13</sup> Extreme

<sup>8</sup> See, e.g., Res. of Carroll Cnty. Bd. of Supervisors (Va. 2019), [http://www.carrollcountyva.gov/document\\_center/Board%20Packets/2019/May/Resolution.pdf](http://www.carrollcountyva.gov/document_center/Board%20Packets/2019/May/Resolution.pdf) [<https://perma.cc/JKP6-KPDP>] (“[T]he Board of Supervisors hereby declares its intent to oppose unconstitutional restrictions on the right to keep and bear arms . . . [and] hereby declares Carroll County, Virginia, as a ‘Second Amendment Sanctuary.’”).

<sup>9</sup> Abigail Beckman, *Counties Declare Second Amendment Sanctuary Status as Legislature Debates Red Flag Bill*, KRCC (Mar. 7, 2019), <https://www.krcc.org/post/counties-declare-second-amendment-sanctuary-status-legislature-debates-red-flag-bill> [<https://perma.cc/M35W-LUFG>] (“A growing number of Colorado counties . . . have said they would not enforce the legislation should it become law.”).

<sup>10</sup> Associated Press, *In Virginia and Elsewhere, 2nd Amendment ‘Sanctuary’ Movement Aims to Defy New Gun Laws*, L.A. TIMES (Dec. 21, 2019, 1:33 PM), <https://www.latimes.com/world-nation/story/2019-12-21/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws> [<https://perma.cc/5PNC-M5QZ>] (explaining that “today, 70 out [of] the 102 counties in Illinois have approved . . . resolutions” to refuse enforcement of gun-control advocates’ proposed legislation, including extreme risk laws and other statewide gun-control measures).

<sup>11</sup> Alicia Nieves, *A Majority of New Mexico Counties Are Now Second Amendment Sanctuaries—and More States Are Following Suit*, NEWS CHANNEL 5 NASHVILLE (Nov. 22, 2019), <https://www.newschannel5.com/news/national-politics/the-race-2020/a-majority-of-new-mexico-counties-are-now-second-amendment-sanctuaries-and-more-states-are-following-suit> [<https://perma.cc/TJ8P-KCJA>] (noting that New Mexico’s Cibola County and “29 of the other 32 counties” have passed Second Amendment Sanctuary resolutions, with over “150 other counties in at least 15 states” following suit).

<sup>12</sup> Robert VerBruggen, *Virginia’s Second Amendment Sanctuaries: An Update*, NAT’L REV. (Dec. 16, 2019, 8:26 AM) (“[T]he sanctuaries have spread dramatically. They’re up to 93 jurisdictions—covering roughly 40 percent of the population . . .”).

<sup>13</sup> See Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. (forthcoming 2020) (manuscript at 8, 12),

risk laws, also called “red flag” laws, authorize courts to temporarily prohibit the possession of a firearm for anyone judicially determined to be a danger to themselves or others.<sup>14</sup>

While the term “sanctuary” has no precise legal meaning, its use in immigration and firearms contexts provides a useful comparison through which to analyze the purpose and viability of new gun sanctuaries. Both immigrant sanctuaries and gun sanctuaries are forms of local resistance to the enforcement of laws passed by a superior governmental entity, be it the federal or state government. These two forms of sanctuaries primarily (though not exclusively) seek to resist outside lawmaking passively by simply refusing to enforce these laws, rather than affirmatively passing contrary legislation or otherwise erecting a substitute regulatory regime.<sup>15</sup>

But there are important limits to the analogy between immigrant and gun sanctuaries. For one, the legal justification for immigrant sanctuaries rests on firmer footing because jurisdictions declining to enforce federal immigration law do so per their right under United States federalism structures and anticommandeering principles of the Tenth Amendment, which together hold that Congress cannot directly compel state political branches to perform regulatory functions on the federal government’s

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<https://papers.ssrn.com/a=3534630> [<https://perma.cc/6N7J-EPE2>] (observing that only two states had so-called “red flag” laws before 2014, but that by 2019, “seventeen states and the District of Columbia had adopted some version of an extreme risk law”); Jennifer Mascia, *Second Amendment Sanctuaries, Explained*, THE TRACE (Jan. 14, 2020), <https://www.thetrace.org/2020/01/second-amendment-sanctuary-movement/> [<https://perma.cc/2CRA-LG5W>] (discussing regulations commonly targeted by Second Amendment Sanctuaries); Leigh Paterson, *Poll: Americans, Including Republicans and Gun Owners, Broadly Support Red Flag Laws*, NPR (Aug. 20, 2019, 5:01 AM), <https://www.npr.org/2019/08/20/752427922/poll-americans-including-republicans-and-gun-owners-broadly-support-red-flag-law> [<https://perma.cc/RJ93-JU9F>] (noting that the federal Extreme Risk Protection Order Act of 2019 had initial bipartisan support, with President Trump “reportedly . . . in talks with senators about . . . assisting states with implementing their own [extreme risk protection orders]”).

<sup>14</sup> See Timothy Williams, *What Are ‘Red Flag’ Gun Laws, and How Do They Work?*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/red-flag-laws.html> [<https://perma.cc/4R87-BWRF>] (“[These laws] authorize courts to issue a special type of protection order, allowing the police to temporarily confiscate firearms from people who are deemed by a judge to be a danger to themselves or to others.”).

<sup>15</sup> See Ming Hsu Chen, *Sanctuary Networks and Integrative Enforcement*, 75 WASH. & LEE L. REV. 1361, 1364 (2018) (examining how sanctuary jurisdictions passively “resist the enlarging enforcement-related goals of the federal government”); Gregory S. Schneider, *In Virginia, and Elsewhere, Gun Supporters Prepare to Defy New Laws*, WASH. POST (Nov. 23, 2019, 7:00 AM), [https://www.washingtonpost.com/local/virginia-politics/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/2019/11/23/4a95fcc2-0c86-11ea-bd9d-c628fd48b3a0\\_story.html](https://www.washingtonpost.com/local/virginia-politics/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/2019/11/23/4a95fcc2-0c86-11ea-bd9d-c628fd48b3a0_story.html) [<https://perma.cc/U3ND-A3CP>] (describing the passive “resistance movement . . . boiling up in Virginia, where Democrats rode a platform on gun control to historic victories in state elections earlier this month”).

behalf.<sup>16</sup> Second Amendment Sanctuaries, by contrast, represent attempts by localities to resist the enforcement of state law where no corollary subfederalism principle exists. As “creatures of state law,” most municipalities act merely as subdivisions of states whose legislation can be preempted by a contrary state enactment.<sup>17</sup>

In this sense, Second Amendment Sanctuary resolutions act more like local ordinances, such as citywide minimum wage hikes or plastic bag bans which are subject to invalidation by state preemption, meaning that even if localities have the power to pass such measures, states can invalidate them. Forty-three states currently have statewide preemption statutes broadly preventing any local firearms regulation, though a majority of these statutes do little to impose an affirmative regulatory scheme.<sup>18</sup> This form of “deregulatory preemption”<sup>19</sup> has proven a useful tool for gun-rights activists, who have successfully invalidated urban gun-control measures in some of the nation’s largest metropolitan areas.<sup>20</sup> The success of this gun-rights-preemption activism has not been lost on gun-control advocates, who are now playing by the same preemption playbook as they pass broad statewide gun-control measures. These new preemption statutes present a significant headwind against Second Amendment Sanctuary viability.

But this analogy has limits as well. Unlike proactive local regulations like fracking bans or antidiscrimination ordinances, Second Amendment Sanctuary resolutions do not affirmatively erect a regulatory regime at odds with an existing or potential state law. Instead, they express a reactive resistance to the state’s power, communicating what I call a “subfederal anticommandeering” claim that state authorities must actively enforce their own laws rather than rely on local compliance.

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<sup>16</sup> See *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (explaining that the federal government cannot “direct[] the functioning of local government [immigration enforcement] in contravention of Tenth Amendment principles,” and holding that Chicago and other sanctuary jurisdictions are free to decline to enforce immigration laws); Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 837 (2019) (“Thus far, localities have mainly prevailed against this federal anti-sanctuary campaign, relying on federalism protections afforded by the Tenth Amendment[. . .].”).

<sup>17</sup> *In re City of Central Falls*, 468 B.R. 36, 75 (Bankr. D.R.I. 2012) (“Municipalities are creatures of state law and subject to the power of the State . . . to create, divide, and even abolish them.”).

<sup>18</sup> *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> [<https://perma.cc/M56C-RJ68>].

<sup>19</sup> Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1182–83 & n.13 (2018) (thanking Richard Briffault “for this insight”).

<sup>20</sup> See *infra* Section II.B; see also Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469, 1472–74 (2018) (situating firearms preemption within a broader movement to strip localities of all governing power).

Second Amendment Sanctuaries possess another characteristic absent from both the immigrant-sanctuary and local-regulation contexts: the interpretation of a substantive constitutional right. Whereas immigrant sanctuaries claim a structural right under the Tenth Amendment to resist, Second Amendment Sanctuaries proclaim an active duty to resist what they see as unconstitutional infringements of their constituents' substantive right to bear arms as defined in *District of Columbia v. Heller*<sup>21</sup> and incorporated against the states in *McDonald v. City of Chicago*.<sup>22</sup> Whether these resolutions assert per se invalidity for all proposed gun regulations or a more nuanced constitutional argument for their (mostly rural) localities remains unclear. But, if it is the latter, a strong "constitutional localism" case can be raised to support Second Amendment Sanctuaries.<sup>23</sup>

Professor Joseph Blocher and others have advanced compelling arguments that the scope of Second Amendment rights should be locally tailored, a view buttressed by this nation's long history of regulating firearms at the local level.<sup>24</sup> But whether recent statewide gun control proposals run afoul of federal constitutional guarantees in any locality remains an open question, particularly given the embryonic state and fluctuating nature of Second Amendment doctrine.<sup>25</sup> Moreover, even if these state regulations present unconstitutional infringements, the proposition that local executive

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<sup>21</sup> 554 U.S. 570 (2008) (recognizing an individual's right to keep and bear arms for self-defense that is unconnected to service in a militia).

<sup>22</sup> 561 U.S. 742 (2010) (incorporating the Second Amendment, making it enforceable against states as well as the federal government).

<sup>23</sup> Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 88–90, 125–26 (2013) (discussing "general virtues of constitutional localism" in tailoring First Amendment rights and contending that these virtues are easily transferable to the Second Amendment); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2022 (2018) (observing that state-constitutional localism operates "by assuring independent lawmaking capacity for th[e] lower level"); Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 531–32 (2009) (acknowledging that "currents of constitutional localism remain quite strong" as a force for local autonomy).

<sup>24</sup> Blocher, *supra* note 23, at 89 ("[M]any of the arguments for Second Amendment localism also suggest that broad preemption laws are an undesirable break from historical practice . . . and should be modified or repealed."); see also Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1144 (1999) (describing reasons for geographical nonuniformity of constitutional rights, including applying a Supreme Court standard "in a highly context-sensitive manner that reflects appreciation of a discrete community's distinctive needs or values"); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

<sup>25</sup> Blocher, *supra* note 23, at 129 ("Precisely defining the range of permissible local variation is impossible, because Second Amendment doctrine itself is still in flux . . ."); Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, 5 AM. CONST. SOC'Y L. & POL'Y 107, 107 (2010) (asserting that the Supreme Court failed to provide adequate guidance to lower courts on how to resolve gun controversies).

actors (like sheriffs and prosecutors) have the authority to make this determination is a controversial one at best.<sup>26</sup>

Given the foregoing, a betting person might conclude that Second Amendment Sanctuaries are doomed to fail and “will never hold up in court.”<sup>27</sup> States can and do exercise broad preemption powers over localities.<sup>28</sup> No local level Tenth Amendment shield protects localities from commandeering by their state governments.<sup>29</sup> And to the extent these gun sanctuaries raise valid constitutional questions, such questions must be resolved by courts rather than municipal “constitutional officers,” like sheriffs and commonwealth attorneys.<sup>30</sup>

This Article challenges those intuitions. While I make no attempt to predict what will happen in the inevitable litigation over these gun sanctuaries, I do provide a normative account of a limited path forward for localities seeking to resist certain state actions. These proposals, while generally applicable to immigration and other similarly situated sanctuary contexts, apply with particular salience to firearms regulation.

First, there is a limited space for applying constitutional home rule to localities when either a federal constitutional interest is implicated or the state’s own constitutional doctrine authorizes autonomy over matters historically of “local concern.”<sup>31</sup> In the first instance, the United States Supreme Court has provided limited local insulation from state preemption when the local ordinance promotes a federal constitutional right at risk by the state enactment.<sup>32</sup> Facially, Second Amendment Sanctuaries make the

<sup>26</sup> See Toscano, *supra* note 5 (arguing that “sheriffs may be ‘constitutional officers,’ but they are not ‘constitutional interpreters’”); Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1498–1500 (2017) (summarizing why political branches no longer assert constitutional interpretation power).

<sup>27</sup> Mary B. McCord, Opinion, *Second Amendment ‘Sanctuaries’ Will Never Hold Up in Court*, WASH. POST (Jan. 8, 2020, 10:24 AM), <https://www.washingtonpost.com/outlook/2020/01/08/second-amendment-sanctuaries-will-never-hold-up-court/> [<https://perma.cc/T39A-YR2S>].

<sup>28</sup> See *infra* Section II.A.

<sup>29</sup> See *infra* Section III.B.

<sup>30</sup> See Toscano, *supra* note 5 (arguing that “sheriffs may be ‘constitutional officers,’ but they are not ‘constitutional interpreters’”).

<sup>31</sup> See, e.g., *Black v. City of Milwaukee*, 882 N.W.2d 333, 346, 356 (Wis. 2016) (citations omitted) (explaining that whether a statewide law violated constitutional home-rule guarantees in the Wisconsin constitution turned on “whether the matter is ‘primarily’ or ‘paramountly’ a matter of statewide or local concern”); *City of Commerce City v. State*, 40 P.3d 1273, 1278–79, 1284 (Colo. 2002) (affirming lower court’s rejection of a constitutional home-rule challenge because photo radar “has not historically been a matter of purely local concern,” because the regulation “is a matter of mixed local and state concern”).

<sup>32</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 623–24, 629 (1996) (protecting antidiscrimination ordinances passed by Colorado municipalities against a state constitutional amendment barring “homosexuals from securing protection against the injuries that [the municipal ordinances] address”).



same claim, though the substantive contours of those constitutional arguments remain fuzzy given the uncertainties surrounding Second Amendment doctrine. In the second instance, the nation’s strong history of firearm localism and the normative preference for adopting flexible regulations in localities of various population densities and “gun cultures” may provide for constitutional localism claims.<sup>33</sup>

Second, while state preemption may invalidate affirmative local regulations, passive local ordinances merely resisting enforcement of superior state law raise different questions. A limited form of subfederal anticommandeering analogous to federal anticommandeering may be appropriate, at least in those limited circumstances where a genuine constitutional claim exists and the local ordinances place no affirmative roadblocks in the way of state officers enforcing state law. Some Second Amendment Sanctuaries would likely fall outside this category, but many would not. Unlike state–federal relations, however, the state’s historical and practical reliance on local subdivisions for funding, resources, and logistical support raise concerns about the workability of such “intrastate federalism.”<sup>34</sup>

Third, the recent departmentalism revival provides at least the theoretical framework for local executive and legislative officials to share constitutional interpretation responsibilities, at least for the sorts of unsettled legal issues presented in many Second Amendment cases.<sup>35</sup> And even under a judicial supremacy model, local gun-sanctuary advocates can advance their cause through constitutional impact litigation, asserting either structural rights to local autonomy in firearms regulations or freedom from substantively unconstitutional state regulations.

The importance of these novel questions posed by Second Amendment Sanctuaries can hardly be overstated. Prior to 2018, Second Amendment

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<sup>33</sup> See Blocher, *supra* note 23, at 104–05 (claiming that locally tailored gun regulation would “preserv[e] the ability of rural areas to maintain their strong gun culture”).

<sup>34</sup> See Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 199–200 (2016) (discussing the promise and peril of a parallel subfederal system of shared power). Of course, this practical reliance runs both ways. *See id.* at 209 (“[L]ocalities are uniquely dependent on state and federal funds.”).

<sup>35</sup> See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 488–90 (2018) (describing the historical appeal of departmentalism and revival of the theory in this populist “time of anxiety about the future of the rule of law”); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 301 n.33 (2016) (“The Second Amendment provides a particularly useful object of study . . . because the individual right it protects was only recently recognized by the Supreme Court . . . . The nascent doctrine is thus largely unburdened by precedent . . .”).

Sanctuaries did not exist.<sup>36</sup> However, following the Democratic “blue wave” in 2018,<sup>37</sup> with liberal lawmakers rising to power on the promise to pass statewide gun-control regulations, local resolutions in opposition to such statewide regulations exploded onto the scene.<sup>38</sup> In 2019 alone, local Second Amendment Sanctuary resolutions were adopted in 37 of 64 Colorado counties,<sup>39</sup> 64 of 102 Illinois counties, and 30 of 33 New Mexico counties.<sup>40</sup> In June 2019, all seventeen sheriffs in Nevada signed a letter of “support” for Second Amendment sanctuaries and in opposition to a gun-control bill signed by Democratic Governor Steve Sisolak, which has been in effect since January 2020 and includes universal background checks.<sup>41</sup> And in Virginia, the state is rapidly becoming ground zero for the Second Amendment Sanctuary battle; an avalanche of Second Amendment sanctuary resolutions

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<sup>36</sup> Christopher Brooks, Opinion, *Historically Speaking: What’s Behind Movement of Second Amendment Sanctuaries?*, MORNING CALL (Aug. 25, 2019, 11:00 AM), <https://www.mcall.com/opinion/mc-opi-second-amendment-sanctuary-counties-states-20190825-xtc4wvm2xfgrbjrbr3sa7vcs4-story.html> [<https://perma.cc/FJ4Z-Y6CG>] (explaining that the first Second Amendment sanctuary resolution appeared in early 2018 in Effingham, Illinois). Between 2010 and 2014, four states passed legislation claiming immunity from certain federal firearms regulations, “essentially” making them “sanctuary state[s] pertaining to national gun regulation,” though the term “sanctuary” was not used. *See, e.g.*, Tim Kalinowski, *The Interpretation of the Second Amendment as a Collective Right Leads to a Federalism Issue*, 43 S. ILL. U. L.J. 107, 113 (2018) (“The Kansas act then essentially declares Kansas a sanctuary state pertaining to national gun regulation . . .”).

<sup>37</sup> Sabrina Siddiqui, *The Democratic Blue Wave Was Real*, GUARDIAN (Nov. 17, 2018), <https://www.theguardian.com/us-news/2018/nov/16/the-democratic-blue-wave-was-real> [<https://perma.cc/9GP9-QVUP>] (“Midterm elections proved that Republicans have only a tenuous hold over the coalition that propelled Trump to the White House in 2016.”).

<sup>38</sup> *See* Schneider, *supra* note 15; Lois Beckett, *Virginia Democrats Won an Election. Gun Owners Are Talking Civil War*, GUARDIAN (Jan. 10, 2020), <https://www.theguardian.com/us-news/2020/jan/09/virginia-gun-control-second-amendment-civil-war> [<https://perma.cc/Y5GQ-AR3X>].

<sup>39</sup> Erin Powell, *These Colorado Counties Have Declared Themselves ‘2nd Amendment Sanctuaries’ in Response to Red Flag Law*, 9 NEWS (Jan. 3, 2020, 5:23 PM), <https://www.9news.com/article/news/local/next/these-colorado-counties-have-declared-themselves-2nd-amendment-sanctuaries-as-red-flag-bill-progresses/73-a23bcb7-63c7-4a50-a26a-9e1e8a2b91ef/> [<https://perma.cc/P984-GVN4>].

<sup>40</sup> Toscano, *supra* note 5; Nieves, *supra* note 11; Katherine Rosenberg-Douglas, *Second Amendment ‘Sanctuary County’ Movement Expands as Organizers Take Aim at New Gun Laws*, CHI. TRIB. (Apr. 17, 2019, 5:00 AM), <https://www.chicagotribune.com/news/breaking/ct-met-second-amendment-sanctuary-county-movement-illinois-20190416-story.html> [<https://perma.cc/R8BJ-A277>].

<sup>41</sup> Jim Hartman, Opinion, *Nevada’s ‘Second Amendment Sanctuaries’*, NEV. APPEAL (Feb. 7, 2020), <https://www.nevadaappeal.com/news/opinion/jim-hartman-nevadas-second-amendment-sanctuaries/> [<https://perma.cc/V7JC-FFGE>]; *see also* Bethany Blankley, *Nevada Sheriffs Express ‘Second Amendment Sanctuary’ Sentiment, Non-Compliance with Gun Registration Law*, CTR. SQUARE (Mar. 18, 2019), [https://www.thecentersquare.com/nevada/nevada-sheriffs-express-second-amendment-sanctuary-sentiment-non-compliance-with-gun-registration-law/article\\_b6c50eee-49ac-11e9-abfd-d39ecc23c07b.html](https://www.thecentersquare.com/nevada/nevada-sheriffs-express-second-amendment-sanctuary-sentiment-non-compliance-with-gun-registration-law/article_b6c50eee-49ac-11e9-abfd-d39ecc23c07b.html) [<https://perma.cc/53GY-VMED>].

punctuated the end of the decade.<sup>42</sup> By way of illustration, on November 7, 2019, Campbell County became only the second Virginia locality to pass a sanctuary resolution; by December 23, 2019, 102 counties, cities, and towns in the state had declared themselves “Second Amendment Sanctuary Jurisdictions.”<sup>43</sup>

The language of these Virginia resolutions—and the responses they generated during the hearings at which they were passed—signals an entrenched commitment to resist any state gun-control measure. For instance, Tazewell County’s Board of Supervisors unanimously passed “A Resolution Promoting the Order of Militia Within Tazewell County, Virginia” at a December 3, 2019 meeting in which the Board claimed its sole right under the Virginia Constitution “to ‘order’ militia to the localities” as justification for refusing to honor any gun-control measure.<sup>44</sup> Similarly, the Culpeper County Sheriff pledged to deputize “thousands of our law-abiding citizens” to skirt state and federal law.<sup>45</sup> And some proponents have resurrected nullification and interposition, which advocates declining to investigate, prosecute, or imprison based on violations of gun-control measures as legitimate resistance tactics to protect what they view as absolute Second Amendment rights.<sup>46</sup> Foreshadowing what is certain to be a protracted legal battle, Virginia Attorney General Mark Herring responded

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<sup>42</sup> *Virginia Has Become an Overnight Tidal Wave of Second Amendment Sanctuaries*, VA. INST. PUB. POL’Y (Dec. 26, 2019), <https://virginia institute.org/virginia-has-become-an-overnight-tidal-wave-of-second-amendment-sanctuaries/> [<https://perma.cc/J5YV-7SZ3>].

<sup>43</sup> *Id.*

<sup>44</sup> Jim Talbert, *Tazewell County Becomes Second Amendment Sanctuary, Adds Militia Ordinance During Widely Attended Meeting*, BRISTOL HERALD COURIER (Dec. 3, 2019), [https://www.heraldcourier.com/news/tazewell-county-becomes-second-amendment-sanctuary-adds-militia-ordinance-during/article\\_6a3d4e37-64f2-5365-9b71-7e4a694602e3.html](https://www.heraldcourier.com/news/tazewell-county-becomes-second-amendment-sanctuary-adds-militia-ordinance-during/article_6a3d4e37-64f2-5365-9b71-7e4a694602e3.html) [<https://perma.cc/L4UK-8SLG>] (quoting county commissioners stating that Tazewell County will call up its local militia “in the event that state or federal laws are passed violating the Second Amendment”); David Tripp, *Tazewell County VA, Board Approves 2nd Amendment Resolution*, SANCTUARY CNTYS. (Dec. 3, 2019) <https://sanctuarycounties.com/2019/12/03/tazewell-county-va-board-approves-2nd-amendment-resolution/> [<https://perma.cc/E9B4-85NR>] (containing text of resolution and minutes from meeting); *see also id.* (“The County Administrator said, ‘The fundamental question was, do you want to say something or do you want to do something?’”).

<sup>45</sup> Associated Press, *Virginia Sheriff: He’ll Deputize Residents if Gun Laws Pass*, WBOC (Dec. 9, 2019, 1:07 PM), <http://www.wboc.com/story/41427096/virginia-sheriff-hell-deputize-residents-if-gun-laws-pass> [<https://perma.cc/A7LR-LUGL>] (“I plan to properly screen and deputize thousands of our law-abiding citizens to protect their constitutional right to own firearms.”).

<sup>46</sup> David “Adam” McKelvey, *A Framework for True 2nd Amendment Sanctuary*, ROANOKE TIMES (Nov. 27, 2019), [https://www.roanoke.com/opinion/commentary/mckelvey-a-framework-for-true-nd-amendment-sanctuary/article\\_700ee127-81a2-50b9-8c7a-234647a3c92e.html](https://www.roanoke.com/opinion/commentary/mckelvey-a-framework-for-true-nd-amendment-sanctuary/article_700ee127-81a2-50b9-8c7a-234647a3c92e.html) [<https://perma.cc/73XL-7NRP>] (“Remember, a resolution, without tangible nullification, is simply a statement of opinion with no teeth.”).

to these resolutions by declaring flatly that “when Virginia passes . . . gun safety laws . . . they will be followed, they will be enforced.”<sup>47</sup> Further, at least one Virginia lawmaker has formally requested an advisory opinion from the state’s attorney general on the specific binding effect of these resolutions.<sup>48</sup>

Unfortunately, no such opinion—advisory or otherwise—would have the benefit of legal scholarship for guidance. To date, no scholar has addressed the issue of Second Amendment Sanctuaries.<sup>49</sup> Numerous scholars have explored the nature of sanctuary cities with respect to immigration policy,<sup>50</sup> others have examined the growing intrastate federalism dominating recent local–state power struggles,<sup>51</sup> and at least one scholar has asserted the propriety of localities retaining gun-regulation power as a matter of policy.<sup>52</sup> With this lack of scholarly discussion in mind, this Article explores the specific, and in many ways unique, legal issues defining the Second Amendment Sanctuary debate in 2020 and beyond.

## I. SECOND AMENDMENT SANCTUARIES: A PRIMER

To understand the legal implications of Second Amendment Sanctuaries, it is important to begin with a basic understanding of why and how they have been adopted and what lessons can be drawn from similar immigrant-sanctuary resistance efforts. This Part therefore provides a brief overview of the policy choices driving the rise of Second Amendment Sanctuaries, the purpose and scope of these various local resolutions, and the

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<sup>47</sup> Cameron Thompson, *Attorney General’s Response to 2nd Amendment Sanctuary Resolutions: “Gun Safety Laws Will Be Followed.”* WTVR (Dec. 6, 2019, 11:18 AM), <https://wtvr.com/2019/12/06/attorney-general-virginia-2nd-amendment-sanctuary-01/> [<https://perma.cc/V8LU-A82J>].

<sup>48</sup> *Id.*

<sup>49</sup> A July 19, 2020 Lexis search for (“second amendment sanctuar!” or “gun sanctuar!”) yielded zero case results and zero secondary materials results. An expanded Lexis search for (“second amendment” w/p “sanctuar!” or “gun” w/p “sanctuar!”) yielded no relevant case results and only two scholarly articles briefly mentioning firearms protectionist legislation. *See* Scharff, *supra* note 20, at 1501 (referencing a 2017 Florida appellate court decision “refus[ing] to reach the question” of whether a state “bar on the ‘promulgation’ of [local] ordinances that violate the state gun control preemption law . . . w[as] valid”); Kalinowski, *supra* note 36, at 113.

<sup>50</sup> *See generally* Lasch et al., *supra* note 1, at 1704 (“[A] collaborative project authored by law professors specializing in the intersection between immigration and criminal law . . . set[ting] forth the central features of the Trump administration’s . . . campaign to ‘crack down’ on sanctuary cities.”).

<sup>51</sup> Su, *supra* note 34, at 199–200; *see also, e.g.*, Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 133 (2017) (exploring the role of federalism in mediating power struggles between urban and rural areas, particularly in states where outsized rural influence and statewide preemption campaigns have left cities with the “uncomfortable realization that they have no right to local democracy”).

<sup>52</sup> Blocher, *supra* note 23, at 85.

questions surrounding their viability as reflected in the immigrant-sanctuary-city context.

### A. *The New Gun-Control Movement*

For the last four decades, firearms legislation has been primarily defined by statewide deregulation, interrupted only by occasional moments of regulation that have not proved to be long-lasting. In 1988, forty states temporarily outlawed or strictly regulated concealed carry of firearms in public spaces; today, all fifty states allow such conduct, and forty-two do so with little restriction.<sup>53</sup> In 1994, the federal assault weapons ban prohibited the possession of nineteen types of military-style semiautomatic weapons nationwide.<sup>54</sup> The ban expired in 2004, with only seven states enacting replacement regulations since then.<sup>55</sup>

During this time, the most significant change to gun regulation has been whether state or local entities control. In 1980, virtually all firearms regulation was local, reflecting a centuries-long tradition of allowing urban and rural areas to tailor firearms laws to reflect their respective needs and cultures.<sup>56</sup> Today, forty-three states have broad statewide preemption laws prohibiting localities from enacting any firearms regulations,<sup>57</sup> due in large part to concerted efforts by the National Rifle Association and other political groups to eliminate gun regulations in large cities.<sup>58</sup>

While this statewide approach to firearms regulation has not changed over the last several decades, the regulations being considered have. Following a recent surge in public support for targeted gun-control measures and the election of Democratic governors in several states, legislation has

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<sup>53</sup> See Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1688–90 (2018) (summarizing nationwide evolution of concealed carry legislation).

<sup>54</sup> Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w), 923(i), 924(c)(1) (2000) (repealed 2004); Harry A. Chernoff, Christopher M. Kelly & John R. Kroger, *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 550–51 (1996) (“[The law] banned the manufacture, sale, or transfer of nineteen kinds of assault weapons.”).

<sup>55</sup> John J. Phelan IV, *The Assault Weapons Ban—Politics, the Second Amendment, and the Country’s Continued Willingness to Sacrifice Innocent Lives for “Freedom,”* 77 ALB. L. REV. 579, 579–80 & n.7 (2013) (“California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York have all enacted some form of an assault weapons ban.”).

<sup>56</sup> See Anthony P. Badaracco, *Firearm Federalism*, 65 N.Y.U. ANN. SURV. AM. L. 761, 762 (2010) (“State and local governments have traditionally enjoyed a great deal of latitude in passing gun control laws . . . .”); *Blocher*, *supra* note 23, at 120–21.

<sup>57</sup> GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 18.

<sup>58</sup> See Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 150 n.423 (1995) (“Any hope of relying on local firearms regulation has become less plausible since the NRA adopted a strategy . . . of convincing state legislatures to pass firearms-preemption laws . . . .”).

been proposed to enact statewide universal background checks, assault weapons bans, and so-called red flag laws authorizing temporary confiscation of firearms from individuals judicially determined to be dangerous.<sup>59</sup> Background checks and “dangerous and unusual”<sup>60</sup> arms bans have been staples of the gun-control movement for decades.<sup>61</sup> That legislation to implement these restrictions has gained broader bipartisan support reflects less about the uniqueness of this regulatory moment than about the long-lens, cyclical nature of gun regulation in this country.

However, “extreme risk” laws are different. The emergence of extreme risk laws, which “permit courts to order that firearms be temporarily removed from individuals who pose an imminent risk to themselves or others,” is “arguably the most important current development in firearms regulation.”<sup>62</sup> These laws allow law enforcement, mental health professionals, or family members to petition the court for an ERPO that would require respondents to surrender their firearms and refrain from acquiring new ones.<sup>63</sup> Much like domestic violence protective orders, petitioners can move for a ten-day ex parte ERPO, and if the court grants the order, petitioners may seek a lengthier temporary ERPO, lasting up to one year.<sup>64</sup>

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<sup>59</sup> See Mel Leonor, *Northam Administration Outlines Gun Control Measures It Backs Including Assault Weapons Ban with Permits for Existing Owners*, RICH. TIMES-DISPATCH (Jan. 9, 2020), [https://richmond.com/news/plus/northam-administration-outlines-gun-control-measures-releases-proposed-definition-of-assault-weapon/article\\_3638cd2d-7f73-5b15-97cf-3ec8d915fc56.html](https://richmond.com/news/plus/northam-administration-outlines-gun-control-measures-releases-proposed-definition-of-assault-weapon/article_3638cd2d-7f73-5b15-97cf-3ec8d915fc56.html) [<https://perma.cc/3JWC-822Z>] (outlining gun-control proposals of new Virginia governor); Joseph Frydenlund, *Colorado’s Proposed “Red Flag” Gun Bill: Extreme Risk Protection Orders*, DENV. L. REV. F. (July 28, 2019), <https://www.denverlawreview.org/dlr-online-article/colorados-proposed-red-flag-gun-bill-extreme-risk-protection-orders> [<https://perma.cc/ADZ3-PGGR>] (describing surge in adoption of “red flag” laws). These proposals enjoy broad support by the democratic candidates for president in 2020. Kevin Uhrmacher & Kevin Schaul, *Where 2020 Democrats Stand on Gun Control*, WASH. POST (Apr. 8, 2020), <https://www.washingtonpost.com/graphics/politics/policy-2020/gun-control/> [<https://perma.cc/PP2X-53L8>] (“The candidates universally support requiring a background check for every gun purchase and a federal ban on assault weapons. Most backed laws that allow courts to take guns from mentally unfit individuals.”).

<sup>60</sup> *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (internal quotation marks omitted).

<sup>61</sup> See, e.g., Allen Rostron, *A New State Ice Age for Gun Policy*, 10 HARV. L. & POL’Y REV. 327, 342–44 (2016) (discussing history of gun-control proposals since enactment of the Brady Act in 1993); Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1515, 1533–34 (2014) (describing the familiar pattern of: a mass shooting, a temporary outcry for gun-control measures, and then successful resistance to such measures).

<sup>62</sup> Blocher & Charles, *supra* note 13, at 1.

<sup>63</sup> See Williams, *supra* note 14; *Redington v. State*, 121 N.E.3d 1053, 1054 (Ind. Ct. App. 2019) (describing the functioning of Indiana’s “red flag” law”).

<sup>64</sup> Bethany Stevens, *Massachusetts Adopts “Red Flag” Law*, 62 BOS. BAR J. 6, 7 (2018) (“[If the judge finds] by a preponderance of the evidence that the respondent poses a risk[,] . . . the judge must issue an order for up to one year.”); see also *Redington*, 121 N.E.3d at 1053–54 (explaining that officers

Extreme risk laws have recently spread at nearly the same pace as the gun sanctuary laws responding to them. Connecticut passed the first such law in 1999,<sup>65</sup> but as of 2017, only five states had adopted anything “that might be described as an extreme risk law.”<sup>66</sup> However, the mass murders at Marjory Stoneman Douglas High School in Parkland, Florida on February 14, 2018, changed the regulatory landscape. Following intense political debate, led largely by the teenage survivors of the Parkland shooting, over a dozen states have adopted extreme risk laws, with eight, along with the District of Columbia’s, being enacted after Parkland.<sup>67</sup> By the end of 2019, as many as seventeen states and the District of Columbia had adopted some version of an extreme risk law, reflecting one of the most tangible results of the Parkland survivors’ advocacy.<sup>68</sup>

These targeted measures enjoy broad support. “[A] March 2019 Quinnipiac poll reported that 93[%] of American voters support a bill that would require ‘background checks for all gun buyers.’”<sup>69</sup> And “[a]n April 2018 poll found that 85[%] of registered voters support” extreme risk laws.<sup>70</sup> While national polls may not be illustrative of local attitudes in a decidedly local debate over gun ownership, at least some recent state polls suggest that strong majorities of voters in gun sanctuary jurisdictions support similar

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returned a “cache of weapons” to a mentally ill man who had killed a police officer upon the expiration of the extreme risk protection order “because they had no legal authority to retain them”).

<sup>65</sup> Jason Hanna & Laura Ly, *After the Parkland Massacre, More States Consider ‘Red Flag’ Gun Bills*, CNN (Mar. 7, 2018, 10:25 AM), <https://www.cnn.com/2018/03/07/us/gun-extreme-risk-protection-orders/index.html> [<https://perma.cc/9YMU-3VTN>].

<sup>66</sup> Blocher & Charles, *supra* note 13, at 8; Jesse Paul, *Colorado’s ‘Red Flag’ Gun Bill Makes Its Debut. Here’s How It Compares to Other States.*, COLO. SUN (Feb. 14, 2019, 9:30 AM), <https://coloradosun.com/2019/02/14/colorado-red-flag-bill-2019/> [<https://perma.cc/UU6J-JAHG>] (summarizing extreme risk legislation by state).

<sup>67</sup> Hanna & Ly, *supra* note 65; Nick Wing & Melissa Jeltsen, *Wave of ‘Red Flag’ Gun Laws Shows Power of the Parkland Effect*, HUFFPOST (June 16, 2018, 8:01 AM), [https://www.huffpost.com/entry/red-flag-laws-parkland-florida-massacre\\_n\\_5b24099fe4b056b22639d8cb](https://www.huffpost.com/entry/red-flag-laws-parkland-florida-massacre_n_5b24099fe4b056b22639d8cb) [<https://perma.cc/L4LJ-YEF8>] (“In the four months since a mass shooting at a Parkland, Florida, high school, the number of states with so-called red flag laws has doubled . . . .”); *see also* Frydenlund, *supra* note 59, at 84 (“States with ‘red flag’ gun laws similar to the [Colorado] [b]ill include: Washington, Oregon, California, Illinois, Indiana, New York, Vermont, Massachusetts, Connecticut, New Jersey, Rhode Island, Delaware, Washington D.C., and Maryland.”).

<sup>68</sup> Grace Segers, *What Are ‘Red Flag’ Laws, and Which States Have Implemented Them?*, CBS NEWS (Aug. 9, 2019, 10:42 AM), <https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them/> [<https://perma.cc/66Y6-TGQK>] (describing the rise of “red flag” laws that have attracted bipartisan support in several states); Williams, *supra* note 14.

<sup>69</sup> Toscano, *supra* note 5.

<sup>70</sup> *Id.*; *see also* Paterson, *supra* note 13 (“77% of Americans surveyed support family-initiated ERPOs[] . . . . There is broad support among Republicans and gun owners for these types of laws . . . .”).

measures.<sup>71</sup> Critics of extreme risk laws echo long-standing criticisms of civil protection order mechanisms more generally: they authorize significant liberty and property deprivations without sufficient due process.<sup>72</sup> While petitioners bear the burden of proof, ranging from “probable cause” to “clear and convincing evidence,”<sup>73</sup> this comparatively lower burden rankles many local officials charged with enforcing ERPOs.<sup>74</sup> Others raise concerns over the justification for the prospective relief offered by ERPOs: that courts can fairly and accurately predict the future “risk” of a respondent.<sup>75</sup> These due

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<sup>71</sup> Toscano, *supra* note 5 (summarizing poll results of Virginians in 2019, 84% of whom “favor universal background checks, and 74[% of whom] support” red flag laws); *see also* Domenico Montanaro, *Americans Largely Support Gun Restrictions to “Do Something” About Gun Violence*, NPR (Aug. 10, 2019, 7:00 AM), <https://www.npr.org/2019/08/10/749792493/americans-largely-support-gun-restrictions-to-do-something-about-gun-violence> [<https://perma.cc/4BEY-NBFM>] (“In Colorado, a Keating Research survey found 81% in favor of red flag laws.”). While statewide polling certainly will not correlate with attitudes in individual localities, such overwhelming support in states like Virginia and Colorado—where virtually every local jurisdiction has passed a form of sanctuary resolution—suggests at least some incongruence with these resolutions and the opinions of the constituents these resolutions purport to protect.

<sup>72</sup> *See* Frydenlund, *supra* note 59, at 85 (“Opponents . . . contend that the[y] violate[] the Respondent’s due process protections.”); *see also* Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 448, 456–57, 470, 479, 484 (summarizing due process concerns in other civil protection order contexts, including domestic violence, civil commitment, and sexual violence).

<sup>73</sup> *See, e.g.*, Jacob Sullum, *Virginia’s Pending ‘Red Flag’ Law Includes Improvements but Still Falls Short of Due Process*, REASON (Jan. 29, 2020, 9:00 AM), <https://reason.com/2020/01/29/virginias-pending-red-flag-law-includes-improvements-but-still-falls-short-of-due-process/> [<https://perma.cc/Q8QU-TTYB>] (noting variance in burdens at the temporary and permanent restraining order stage by state, including “probable cause,” “preponderance of the evidence,” and “clear and convincing evidence” that the respondent “poses a substantial risk . . . in the near future”).

<sup>74</sup> *See* Leah Anaya, *NM Sheriffs Force Lawmakers to Abandon Red Flag Bill: We Refuse to Enforce Unconstitutional Laws*, LAW ENF’T TODAY (Jan. 19, 2020), <https://www.lawenforcementtoday.com/nm-sheriffs-force-lawmakers-to-abandon-red-flag-bill-we-refuse-to-enforce-unconstitutional-laws/> [<https://perma.cc/E99R-EA3T>] (quoting Sheriff Robert Sheppard: “We have a duty to follow the Constitution and this bill violates due process, because there is no hearing before the government confiscates possessions.”); Scott McLean & Sarah Weisfeldt, *This Colorado Sheriff Is Willing to Go to Jail Rather than Enforce a Proposed Gun Law*, CNN (Mar. 31, 2019, 2:11 AM), <https://www.cnn.com/2019/03/31/us/colorado-red-flag-gun-law/index.html> [<https://perma.cc/VBL3-XXNK>] (discussing the “low” preponderance of the evidence standard, and quoting a sheriff with concerns about the law who admitted “he would still never support the bill, even with amendments”).

<sup>75</sup> Jacob Sullum, *Colorado’s New “Red Flag” Law Illustrates the Pitfalls of Disarming People Based on Their Future Behavior*, REASON (Apr. 29, 2019, 2:05 PM), <https://reason.com/2019/04/29/colorados-new-red-flag-law-illustrates-the-pitfalls-of-disarming-people-based-on-their-future-behavior/> [<https://perma.cc/PP56-6QJC>]; *see also* Shawn E. Fields, *Sexual Violence and Future Harm: Lessons from Asylum Law*, 2020 UTAH L. REV. 177, 189, 203 (discussing tension between the need for flexible protection order processes to prevent “grave future harm” and the difficulty in predicting future behavior); *cf.* Lawlor v. Zook, 909 F.3d 614, 628 (4th Cir. 2018) (“Consideration of a defendant’s past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing[] . . .” (internal quotation marks omitted)).



process concerns merit special attention when the proposed remedy involves the deprivation of a fundamental constitutional right.<sup>76</sup>

Gun-rights advocates also oppose these laws on the basis that they violate the Second Amendment as defined in *Heller*.<sup>77</sup> Although litigation remains rare to date, the Appellate Court of Connecticut stated in *Hope v. State*<sup>78</sup> that its state’s extreme risk law “does not implicate the [S]econd [A]mendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes.”<sup>79</sup> Similarly, in *Redington v. State*,<sup>80</sup> the Indiana Court of Appeals found that laws authorizing a temporary seizure of firearms based on clear and convincing evidence that someone presented a “risk of personal injury to [themselves] or [others]” did not “place a material burden on [the] right to bear arms.”<sup>81</sup>

### B. Gun-Rights Localism

While the Second Amendment Sanctuary movement exists in large measure as a response to the perceived Second Amendment violations that extreme risk laws present, the passage of broad statewide gun-control measures also has generated structural criticism by local-government advocates (gun-rights activists included) who decry this latest attack on local autonomy.<sup>82</sup> This return to gun-rights localism harkens back to the first seven decades of the twentieth century, when firearms laws, both regulatory and

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<sup>76</sup> Fields, *supra* note 72, at 488–89 (arguing for a higher burden of proof to authorize an additional protection order remedy if that remedy infringes upon a fundamental constitutional right).

<sup>77</sup> District of Columbia v. Heller, 554 U.S. 570, 626, 630 (2008) (recognizing individual right to keep and bear arms inside one’s home for “core” purpose of self-defense, while recognizing traditional restriction on possession by felons). Second Amendment challenges to extreme risk laws claim that they impose absolute restrictions on this core right on nonfelons. See, e.g., Redington v. State, 121 N.E.3d 1053, 1056 (Ind. Ct. App. 2019) (appellant arguing that, without a conviction, determination that “he was ‘dangerous’ was insufficient to order retention of his firearms”).

<sup>78</sup> 133 A.3d 519 (Conn. App. Ct. 2016).

<sup>79</sup> *Id.* at 524.

<sup>80</sup> 121 N.E.3d 1053.

<sup>81</sup> *Id.* at 1056, 1061.

<sup>82</sup> Editorial, *Could This Bill Banning ‘Red Flag’ Gun Laws Make Kansas a Sanctuary State for Danger?*, KAN. CITY STAR (Dec. 26, 2019, 10:04 AM), <https://www.kansascity.com/opinion/editorials/article238719858.html> [<https://perma.cc/ZPE7-3KZ3>] (discussing a state bill that would ban “the enforcement of any federal ‘red flag’ law”); Scott Pelley, *A Look at Red Flag Laws and the Battle over One in Colorado*, CBS NEWS (Nov. 17, 2019), <https://www.cbsnews.com/news/red-flag-gun-laws-a-standoff-in-colorado-60-minutes-2019-11-17/> [<https://perma.cc/CRY3-UXH9>] (noting that nearly half of Colorado’s counties declared themselves sanctuaries in direct response to introduction of red flag legislation).

deregulatory, were traditionally passed at the local level.<sup>83</sup> This “firearm localism” was gradually replaced in the early 1980s by an NRA-led push for statewide deregulation.<sup>84</sup> That push accelerated following the *Heller* decision in 2008, the election of President Barack Obama, and the proliferation of unfounded conspiracy theories about gun-confiscation programs.<sup>85</sup> The effort to “constitutionalize” gun rights at the state level led to broad legislation removing restrictions on public concealed and open-carry allowances, as well as licensing and registration requirements.<sup>86</sup> These laws had the downward effect of invalidating robust gun-control initiatives passed in major urban areas like Chicago and Philadelphia.<sup>87</sup>

During the Obama Administration, four states also passed defensive upward legislation, declaring certain firearms and accessories exempt from federal regulation under the Ninth and Tenth Amendments and beyond Congress’s interstate commerce power.<sup>88</sup> But the shifting statewide focus on

<sup>83</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 927 (2010) (Breyer, J., dissenting) (“It is . . . unsurprising that States and local communities have historically differed about the need for gun regulation . . . . Nor is it surprising that ‘primarily, and historically,’ the law has treated the exercise of police powers, including gun control, as ‘matter[s] of local concern.’” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (alteration in original))); *see also* Blocher, *supra* note 23, at 112–21 (examining the history of firearms regulation).

<sup>84</sup> *See* Herz, *supra* note 58, at 150; *see also* Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 684 n.134 (Del. 2017) (“The NRA argues preemption laws are necessary because varying local laws create confusion.”); Joe Palazzolo, *Gun Rights Groups Target Local Rules*, WALL ST. J. (Feb. 6, 2013, 9:23 AM), <https://blogs.wsj.com/law/2013/02/06/how-gun-rights-groups-suppressed-local-firearm-regulations/> [<https://perma.cc/XCB4-DN4V>] (noting that the NRA succeeded in its preemption push, increasing the number of states with laws preempting local regulation from seven in 1979 to forty-five in 2005).

<sup>85</sup> Toscano, *supra* note 5 (“During the Obama years, the manufacture and purchase of firearms increased in dramatic numbers in part due to unfounded fears that the government would try to take away guns.”).

<sup>86</sup> *See* Fields, *supra* note 53, at 1688–90.

<sup>87</sup> Dahleen Glanton, *The Truth—and Lies—About Chicago’s Gun Laws*, CHI. TRIB. (Oct. 3, 2017, 3:20 PM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-gun-control-chicago-dahleen-glanton-20171003-story.html> [<https://perma.cc/Z5VX-5MQ9>] (noting that Chicago once “proudly” had the strictest gun-control laws in the country, but the Illinois General Assembly passed laws watering down Chicago ordinances); Tricia L. Nadolny, *Frustrated Philadelphia Mayor Calls for Gun Control. Here’s Why It Hasn’t Happened in His City.*, USA TODAY (Aug. 16, 2019, 3:42 PM), <https://www.usatoday.com/story/news/2019/08/16/philadelphia-mayor-jim-kenney-gun-control-preemption-laws/2031870001/> [<https://perma.cc/DRF7-HASM>] (explaining that Pennsylvania adopted preemption legislation in 1993 following laws banning assault weapons that were passed in Philadelphia and Pittsburgh).

<sup>88</sup> Idaho Federal Firearm, Magazine and Register Ban Enforcement Act, S.B. 1332, 62d Leg., 2d Reg. Sess. (Idaho 2014) (prohibiting most federal regulation of firearms in Idaho); KAN. STAT. ANN. §§ 50-1201 to -1211 (2018) (Second Amendment Protection Act) (specifying certain categories of firearms “exempt” from regulation by the federal government); MONT. CODE ANN. § 30-20-104 (2018) (Montana Firearms Freedom Act) (declaring the manufacture and sale of certain intrastate firearms “not

gun control in 2019, particularly the passage of extreme risk laws, has prompted advocacy for a return to traditional gun-rights localism in the form of gun-sanctuary resolutions.

This shifting statewide focus on gun control and corresponding “Second Amendment sanctuaries explo[sion] onto the national scene” began in “early 2019 after newly elected Democratic Gov[ernor] J.B. Pritzker pledged to pass gun safety measures in Illinois.”<sup>89</sup> David Campbell, vice chairman of the Effingham County Board in Illinois, coined the term “Second Amendment Sanctuary” when he proposed a resolution “opposing the passage of” five gun-control measures pending before the Illinois General Assembly, as well as “any bill where the . . . Assembly desires to restrict the [i]ndividual right of [U.S.] citizens as protected by the Second Amendment of the United States Constitution.”<sup>90</sup> Within months, 64 of the state’s 102 counties passed sanctuary resolutions.<sup>91</sup>

Other state localities soon followed suit. Prior to 2019, Second Amendment Sanctuaries did not exist; as of early 2020, local jurisdictions in at least twenty states had passed resolutions declaring an intent not to enforce statewide gun regulation.<sup>92</sup> For instance, after New Mexico expanded background checks in 2019, thirty of thirty-three counties declared themselves Second Amendment Sanctuaries.<sup>93</sup> The numbers continue to grow, but as of January 14, 2020, over 400 jurisdictions have declared

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subject to federal law”); WYO. STAT. ANN. § 6-8-406 (2018) (claiming “the sole and exclusive right” for Wyoming to regulate its gun laws because such powers were not “expressly delegated to the United States of America”).

<sup>89</sup> Toscano, *supra* note 5.

<sup>90</sup> Res. of the Cnty. Bd. of Cnty. of Effingham, Ill. (Ill. 2018), [https://media.illinoishomepage.net/nxsglobal/illinoishomepage/document\\_dev/2018/04/11/Effingham%20County%20Firearms%20Rights%20Resolution\\_1523484265419\\_39675137\\_ver1.0.pdf](https://media.illinoishomepage.net/nxsglobal/illinoishomepage/document_dev/2018/04/11/Effingham%20County%20Firearms%20Rights%20Resolution_1523484265419_39675137_ver1.0.pdf) [<https://perma.cc/N5VK-MBNU>]; Denise Lavoie, *Gun Owners Seek Second Amendment Sanctuary Status in Local Communities*, S.F. CHRON. (Dec. 21, 2019), <https://www.sfchronicle.com/nation/article/Gun-owners-seek-Second-Amendment-sanctuary-status-14924224.php> [<https://perma.cc/J44D-CWKF>] (“Campbell said he and a local prosecutor chose the word ‘sanctuary’ as a swipe at Democratic leaders who used the word to describe their refusal to cooperate with federal immigration enforcement in the sanctuary cities movement. ‘We thought, ‘Well, if they can do that, why can’t we make Effingham County a sanctuary for legal, law-abiding gun owners?’”).

<sup>91</sup> Toscano, *supra* note 5.

<sup>92</sup> Editorial, *2nd Amendment Sanctuaries Are Acts of Faithlessness in Government*, L.A. TIMES (Jan. 19, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-01-19/2nd-amendment-sanctuaries-richmond-charlottesville-militias> [<https://perma.cc/9UAX-7USC>].

<sup>93</sup> Nieves, *supra* note 11.

themselves gun sanctuaries, including a majority of counties in Colorado, Illinois, Nevada, New Mexico, and Virginia.<sup>94</sup>

Second Amendment Sanctuary resolutions take various forms, ranging from symbolic expressions of discontent to specific declarations of intent to engage in passive or active resistance to statewide gun-control measures. In some states, counties have taken the “purely symbolic” gesture of forwarding a resolution to the state legislature to register disapproval with a pending or passed gun law.<sup>95</sup> This kind of collective protest is “perfectly consistent with our traditions as a democracy.”<sup>96</sup> But contradictory messaging from local officials passing these resolutions calls into question whether these resolutions will become more than symbolic in practice.<sup>97</sup>

Other resolutions actively endorse the type of passive noncooperation seen in immigrant-sanctuary resolutions. For example, in Cumberland County, Virginia, a Second Amendment Sanctuary resolution declares that local officials will neither personally enforce nor use taxpayer funds to enforce certain statewide gun regulations.<sup>98</sup> State agencies are free to enter the locality and enforce state law, but local officials will not participate.<sup>99</sup>

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<sup>94</sup> Jennifer Mascia, *Second Amendment Sanctuaries, Explained*, THE TRACE (Jan. 14, 2020), <https://www.thetrace.org/2020/01/second-amendment-sanctuary-movement/> [<https://perma.cc/2CRA-LG5W>].

<sup>95</sup> Brittany Crocker, *Blount County Becomes ‘Second Amendment Sanctuary,’ Second in Tennessee*, KNOX NEWS (May 17, 2019, 1:28 PM), <https://www.knoxnews.com/story/news/2019/05/17/blount-county-now-tennessee-second-amendment-sanctuary/3704188002/> [<https://perma.cc/YW43-ZMVZ>] (“Blount County ninth district commissioner Steve Mikels, who sponsored the sanctuary county bill, said the resolution is a purely symbolic statement.”); Rob Jennings, *N.J. Town Declares Itself a Sanctuary for 2nd Amendment. ‘We’re Gun-Friendly.’*, NJ.COM (Dec. 13, 2019), <https://www.nj.com/passaic-county/2019/12/were-a-gun-friendly-community-town-declares-itself-a-sanctuary-for-2nd-amendment.html> [<https://perma.cc/3UQX-QKRD>] (describing the “non-binding resolution” as a “provocative designation [that] is purely symbolic”).

<sup>96</sup> Toscano, *supra* note 5 (Virginia legislator, the article’s author, opposing sanctuary jurisdictions but acknowledging that “no one should oppose the rights of citizens and their representatives to speak their minds”).

<sup>97</sup> For example, Washington County, Virginia Board of Supervisors Chairman Saul Hernandez said that his county’s sanctuary resolution was intended as a symbolic message about rural Virginians, but later said the Board would oppose the use of any taxpayer funds to enforce state gun-control measures. Angelique Arintok, *Washington County, Va. Declares Itself as a 2nd Amendment Sanctuary*, WCYB (Nov. 26, 2019), <https://wcyb.com/news/local/washington-county-va-declares-itself-as-a-2nd-amendment-sanctuary> [<https://perma.cc/HV7C-ENHR>].

<sup>98</sup> Alexa Massey, *Sanctuary Resolution Adopted*, FARMVILLE HERALD (Dec. 12, 2019, 5:17 PM), <https://www.farmvilleherald.com/2019/12/sanctuary-resolution-adopted/> [<https://perma.cc/2ATM-4BEF>] (“That the Cumberland Board of Supervisors hereby expresses its intent that public funds of the county not be used to restrict the Second Amendment rights of the citizens of Cumberland County, or to aid federal or state agencies in the restriction of said rights . . .”).

<sup>99</sup> Associated Press, *supra* note 10 (“The counties are saying, ‘This stuff is unconstitutional. We don’t want it, we don’t want to enforce it, and in most cases, we won’t enforce it.’”).

Still other local resolutions explicitly require affirmative actions by the local government to thwart state enactments. Several counties have declared their intent to use public money to mount legal defenses on behalf of local authorities sued or arrested for refusing to enforce state gun laws.<sup>100</sup> And at least two jurisdictions have taken a more confrontational approach, threatening to erect local regulatory schemes designed to affirmatively impede state legislation. In Tazewell County, Virginia, the county administrator defended his such resolution by explaining that he was “‘ordering’ the militia [to the county] by making sure everyone can own a weapon.”<sup>101</sup> In Culpeper County, Virginia, the sheriff claimed that his county’s sanctuary resolution authorized him to deputize “thousands of our law-abiding citizens” so they can own firearms.<sup>102</sup> Such proclamations—backed by promises to uphold the Constitution as “constitutional officers” and to go to jail if necessary—amount to affirmative regulatory schemes at odds with passed or proposed state legislation that arguably preempt such local schemes.<sup>103</sup>

The passion of the local electorate for these resolutions has only matched the strident comments of local officials, as shown in reports of packed county supervisor meetings across the country.<sup>104</sup> Deep skepticism of outside gun-control influence punctuates many county hearings, where

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<sup>100</sup> Kerry Pickett, *Sheriffs May Go to Jail to Protect Second Amendment Sanctuaries*, *Kentucky Congressman Says*, WASH. EXAM’R (Jan. 2, 2020, 12:01 AM), <https://www.washingtonexaminer.com/news/sheriffs-may-go-to-jail-to-protect-second-amendment-sanctuaries-congressman-says> [<https://perma.cc/4R9V-JXJJ>] (discussing Kentucky state representative citing the local government of Weld County, Colorado voting that it would “fund [the sheriff’s] legal fees should he end up in a protracted legal battle” by defying the state’s extreme risk laws).

<sup>101</sup> Toscano, *supra* note 5 (“Article I, Section 13, of the Constitution of Virginia reserves the right to ‘order’ militia to the localities. Therefore, counties, not the state, determine what types of arms may be carried into their territory and by whom.”); *see also* Murry Lee, *Tazewell County Board of Supervisors Passes Resolution to Emphasize Right to Militia*, WJHL (Dec. 10, 2019, 11:12 AM), <https://www.wjhl.com/news/local/tazewell-county-board-of-supervisors-passes-resolution-to-emphasize-right-to-militia/> [<https://perma.cc/EGT8-JDT2>] (noting that “the resolution allocates funding from the county budget for the purpose of funding and maintaining a well-regulated militia”).

<sup>102</sup> *See Virginia Sheriff: He’ll Deputize Residents If Gun Laws Pass*, ASSOC. PRESS (Dec. 9, 2019), <https://apnews.com/08decca65bb78ffcc8ff9a903977b817> [<https://perma.cc/N957-L2QG>] (quoting Sheriff Scott Jenkins’s Facebook post: “Every Sheriff and Commonwealth Attorney in Virginia will see the consequences if our General Assembly passes further unnecessary gun restrictions.”).

<sup>103</sup> *See* Toscano, *supra* note 5 (“[For gun sanctuaries,] the goal is to prevent enforcement of state law that the jurisdiction (not a court) deems unconstitutional.”).

<sup>104</sup> *See, e.g.*, Associated Press, *supra* note 10; Josh Reyes, *Packed City Hall Calls for Newport News to Be Second Amendment Sanctuary*, DAILY PRESS (Dec. 11, 2019, 8:33 AM), <https://www.dailypress.com/government/local/dp-nw-newport-news-second-amendment-sanctuary-city-council-20191211-bd7vykc5nbe6nnyxxldadiwba-story.html> [<https://perma.cc/YL4W-SPMD>] (describing the Newport News City Council chambers as “overflowing . . . with people sporting ‘guns save lives’ stickers and pushing for the council to declare the city a Second Amendment sanctuary”).

resolutions are passed with unanimous support. For instance, in Rockingham County, a rural Virginia county on the West Virginia border, over 3,000 people attended a meeting at which the county Board of Supervisors unanimously declared itself a gun sanctuary jurisdiction.<sup>105</sup> As one county supervisor declared at the meeting, “There are clearly thousands of patriotic citizens in Virginia who are well-armed and well-trained, and will resist in an organised attempt by Washington to violate their Second Amendment rights.”<sup>106</sup> Such passion reflects not just the intensity of the gun debate, but also the increasing fault lines between urban and rural areas.<sup>107</sup> America’s gun culture has always resided in “predominantly rural and small town[s],” which remain skeptical of gun control and view “[their] enemies [as] predominantly urban.”<sup>108</sup> This disproportionately rural gun culture—where 56% of rural residents own a firearm compared to just 29% of urban residents<sup>109</sup>—stems not only from differentiating recreational uses for firearms, but also from “the need for rural citizens to supplement diffuse law enforcement agencies” that are less able to respond promptly to emergencies in sparsely populated areas.<sup>110</sup>

Gun-rights activists’ anti-urban sentiments traverse the country. For instance, after New York State enacted the SAFE Act, a comprehensive gun-control measure that imposed an expanded assault weapons ban and required universal background checks on gun purchases, among other regulations, “sheriffs in upstate [rural] communities revolted, claiming that the law was

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<sup>105</sup> Calvin Pynn, *Rockingham Joins Counties Declaring 2nd Amendment ‘Sanctuary,’* WMRA (Dec. 12, 2019), <https://www.wmra.org/post/rockingham-joins-counties-declaring-2nd-amendment-sanctuary> [<https://perma.cc/2QDE-CTPP>].

<sup>106</sup> *US: Second Amendment Sanctuaries Are Exploding*, FREE W. MEDIA (Dec. 15, 2019, 5:05 AM), <https://freewestmedia.com/2019/12/15/us-second-amendment-sanctuaries-are-exploding/> [<https://perma.cc/ZT26-A85L>].

<sup>107</sup> See, e.g., Stahl, *supra* note 51, at 158 (describing “increasingly uncompromising . . . zero-sum contests in which either urban or rural culture will decisively win out over the other”); Blocher, *supra* note 23, at 103–04 (examining differences in urban and rural gun cultures); Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919, 920–21 (2019) (describing “strong geographic component” in same-sex marriage debate).

<sup>108</sup> See DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 170 (2003).

<sup>109</sup> See Carl T. Bogus, *Gun Control and America’s Cities: Public Policy and Politics*, 1 ALB. GOV’T L. REV. 440, 464 (2008) (citing a 2005 Gallup poll); Ruth Igielnik, *Rural and Urban Gun Owners Have Different Experiences, Views on Gun Policy*, PEW RSCH. CTR. (July 10, 2017), <https://www.pewresearch.org/fact-tank/2017/07/10/rural-and-urban-gun-owners-have-different-experiences-views-on-gun-policy/> [<https://perma.cc/7VWN-8MLE>] (citing 2017 study finding that 58% of rural residents have a gun of their own compared to 29% of urban residents).

<sup>110</sup> Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 78–82 (2002).

motivated by downstate [urban] interests in and around New York City.”<sup>111</sup> But this growing geographical fault line cuts in both directions. When the Pennsylvania state legislature preempted local cities from enacting sweeping gun-control legislation, “local [urban] leaders in Philadelphia and Pittsburgh” immediately attacked rural communities for attempting to legislate for them.<sup>112</sup>

During this wave of gun-control legislation, Virginia has become ground zero for the Second Amendment Sanctuary movement in large part due to its rapidly changing urban–rural demographics. Home to the “headquarters of the National Rifle Association[], lawmakers in both parties have traditionally supported gun rights” in Virginia.<sup>113</sup> But, in recent years, Democrats have backed tighter restrictions on guns as the state’s changing electorate allowed for gun-control legislation to become politically attainable.

Since 1990, this once reliably red state has seen a 38% population growth, the vast majority of it in metropolitan Richmond and the northern Virginia suburbs of Washington, D.C.<sup>114</sup> These “new Virginians,” who are increasingly diverse and predominantly liberal, have wrested statewide control from the once-powerful rural western and southern regions of the state.<sup>115</sup> The state voted for Barack Obama in 2008 and 2012, voted for Hillary Clinton in 2016, has not elected a Republican senator since 2002, and in 2019 returned Democrats to full power in both legislative houses and the

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<sup>111</sup> Su, *supra* note 34, at 204; *see also* Thomas Kaplan, *Cuomo’s Gun Law Plays Well Downstate but Alienates Upstate*, N.Y. TIMES (Oct. 24, 2014), <https://www.nytimes.com/2014/10/25/nyregion/with-gun-act-cuomo-alienates-upstate-new-york-constituency.html> [https://perma.cc/M6X2-GL7K]; Mark Weiner, *SAFE Act Reloaded: NY Decides 8 Gun-Control Laws; Here’s What Could Change*, SYRACUSE.COM (Sept. 26, 2019), <https://www.syracuse.com/news/g661-2019/01/b918a7b951814/safe-act-reloaded-ny-decides-8-guncontrol-laws-heres-what-could-change.html> [https://perma.cc/6EDG-BMNJ] (summarizing 2019 amendments to law).

<sup>112</sup> Su, *supra* note 34, at 204 (quoting LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 4 (2008) (quoting local leader from Philadelphia: “I’m not going to continue to allow some state legislator from Lackawanna County or East Giblep County to tell us what we can do in the City of Philadelphia.” (internal quotation marks omitted))).

<sup>113</sup> Denise Lavoie, *Second Amendment Sanctuary Push Aims to Defy New Gun Laws*, RICH. FREE PRESS (Jan. 2, 2020, 6:00 AM), <http://www.richmondfreepress.com/news/2020/jan/02/second-amendment-sanctuary-push-aims-defy-new-gun-/> [https://perma.cc/QT2H-53K5].

<sup>114</sup> Sabrina Tavernise & Robert Gebeloff, *How Voters Turned Virginia from Deep Red to Solid Blue*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/us/virginia-elections-democrats-republicans.html> [https://perma.cc/JP78-4YFP].

<sup>115</sup> *Id.* (“The influx of immigrants and their U.S.-born children, the spread of high-density suburbia and the growth of higher education all tilt the field toward the Democrats.”).

governorship for the first time since 1993.<sup>116</sup> This Democratic resurgence was tied in large part to a political stalemate on gun-control proposals following a mass shooting at a Virginia Beach municipal building in May 2019 that left twelve people dead.<sup>117</sup> Democratic Governor Ralph Northam called a special legislative session after the mass shooting, in which gun-control advocates proposed “universal background checks, assault weapon bans and red flag laws.”<sup>118</sup> The meeting not only failed to produce legislation but also was shut down by Republicans “after just 90 minutes.”<sup>119</sup> The resulting Democratic “blue wave” in November’s election was widely seen in rural parts of the state as a rebuke to their gun culture.<sup>120</sup>

Across the nation, nearly all sanctuary resolutions drafted in response to the Democratic blue wave declare an absolute right not to enforce any law that “infringe[s] upon the inalienable rights granted by the Second Amendment”—“the Right of the People to keep and bear arms.”<sup>121</sup> But, of course, that assumes the answer to the central question: *Do* universal background checks, assault weapons bans, and extreme risk laws violate the Second Amendment? Although Part IV discusses those questions in more detail, the answers may be irrelevant to the extent that sanctuary resolutions simply decline to enforce superior government legislation, regardless of their legality. The question then becomes: When can subordinate local jurisdictions declare themselves sanctuaries, immune from enforcement responsibilities? To help answer that question, a comparison of immigration and gun sanctuaries is in order.

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<sup>116</sup> *Presidential Elections: 2008–2016*, VA. DEP’T OF ELECTIONS, [https://historical.elections.virginia.gov/elections/search/year\\_from:2008/year\\_to:2016/office\\_id:1](https://historical.elections.virginia.gov/elections/search/year_from:2008/year_to:2016/office_id:1) [<https://perma.cc/SA62-7RV5>]; *U.S. Senate Elections: 2000–2016*, VA. DEP’T OF ELECTIONS, [https://historical.elections.virginia.gov/elections/search/year\\_from:2000/year\\_to:2016/office\\_id:6/stage:General/show\\_details:1/enlarge\\_data\\_visualizations:1](https://historical.elections.virginia.gov/elections/search/year_from:2000/year_to:2016/office_id:6/stage:General/show_details:1/enlarge_data_visualizations:1) [<https://perma.cc/U7RC-P37G>]; see Eric Bradner & Ryan Nobles, *Democrats Will Control Virginia Government for the First Time in More Than Two Decades*, CNN (Nov. 6, 2019, 9:47 AM), <https://www.cnn.com/2019/11/05/politics/virginia-election-democrats-control/index.html> [<https://perma.cc/GV3R-72GG>] (“Democrats will win majorities in Virginia’s House and Senate on Tuesday . . . giving the party full control of the state’s government for the first time in more than two decades.”).

<sup>117</sup> Matt Cohen, *Disarming the NRA: How Guns Flipped Virginia Blue*, MOTHER JONES (Jan./Feb. 2020) <https://www.motherjones.com/politics/2019/11/disarming-the-nra-how-guns-flipped-virginia-blue/> [<https://perma.cc/C4WN-KG5W>] (describing the Virginia Beach shooting as “a tipping point” for mobilizing support for gun-control laws).

<sup>118</sup> Lavoie, *supra* note 113.

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

<sup>120</sup> See, e.g., Joshua Gillem, Opinion, *The Making of a Revolution Is Well Underway*, CONCEALED CARRY.COM (Dec. 11, 2019), <https://www.concealedcarry.com/opinion/making-revolution-well-underway> [<https://perma.cc/5FNU-8267>] (predicting, as a gun-rights activist, a mass uprising in response to “blue wave . . . gun control”).

<sup>121</sup> See, e.g., Res. of the Cnty. Bd. of the Cnty. of Effingham, Ill., *supra* note 90.



### C. Sanctuaries Compared

Debate over federal immigration policies has increasingly focused on the proper role of state and local governments in assisting with federal enforcement.<sup>122</sup> Within the immigration debate, the word “sanctuary” has become a common shorthand for disagreement with and resistance to enforcement of federal immigration laws. But while the term effectively communicates a broad set of beliefs about a polarizing issue, the question scholars have continually asked for over a decade remains relevant: “What precisely is a sanctuary?”<sup>123</sup>

In old English law, a sanctuary was “a consecrated place which had certain privileges annexed to it, and to which offenders were accustomed to resort for refuge, because they could not be arrested there, nor the laws be executed.”<sup>124</sup> This definition found its expression in the United States sanctuary debate during the early sanctuary resistance movement in the 1980s, when American religious leaders challenged the federal government’s refusal to grant asylum to Central American refugees fleeing U.S.-backed civil unrest in El Salvador and Guatemala.<sup>125</sup> Minister John Fife famously told Attorney General William Smith in a letter that “the Southside United Presbyterian Church will publicly violate the Immigration and Nationality Act” and “will not cease to extend the sanctuary of the church to undocumented people from Central America,” ushering in a decades-long era of churches and other “consecrated place[s]” protecting undocumented immigrants from immigration enforcement officials.<sup>126</sup>

Early city sanctuary ordinances appeared in San Francisco and Davis, California in 1985 and 1986.<sup>127</sup> These symbolic resolutions sought to create

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<sup>122</sup> See Allan Colbern, Melanie Amoroso-Pohl & Courtney Gutiérrez, *Contextualizing Sanctuary Policy Development in the United States: Conceptual and Constitutional Underpinnings, 1979 to 2018*, 46 FORDHAM URB. L.J. 489, 490 (2019) (“Sanctuary policies are considered among the most contentious feature of today’s immigration federalism debates . . . the term ‘sanctuary’ is . . . highly contested and nuanced in the academic setting and political arena . . .” (citations omitted)).

<sup>123</sup> See Villazor & Gulasekaram, *supra* note 4, at 134, 150–51.

<sup>124</sup> *Sanctuary*, BLACK’S LAW DICTIONARY (6th ed. 1990).

<sup>125</sup> See Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 904–05, 917 (1995) (exploring the role of religious leaders in the 1980s immigrant civil rights movement). See generally ROBERT TOMSHO, *THE AMERICAN SANCTUARY MOVEMENT* (1987) (providing contemporary historical account).

<sup>126</sup> HILARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE*, at xi (1995); see also *United States v. Aguilar*, 883 F.2d 662, 668–71 (9th Cir. 1989) (describing activities of Fife and others to assist the sanctuary movement).

<sup>127</sup> See Seam Park, Note, *Substantial Barriers in Illegal Immigrant Access to Publicly-Funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L.J. 567, 587 n.136 (2004)

a welcoming city without actually calling for any tangible resistance to immigration enforcement, such as rejecting ICE detainers.<sup>128</sup> The number of cities declaring themselves immigrant sanctuaries thereafter surged during the Bush II and Obama Administrations, as both presidents prioritized removal of undocumented immigrants through increasingly invasive investigative techniques carried out by ICE.<sup>129</sup> Similarly, President Trump's anti-immigrant rhetoric both before and after the 2016 presidential election drove another spike in sanctuary-city resolutions between 2016 and 2019.<sup>130</sup> Today, some estimate that over 560 cities and other municipalities (as well as the entire state of California) have passed some form of immigrant sanctuary resolution.<sup>131</sup>

As with Second Amendment Sanctuaries, “[t]here are various types of [immigrant] sanctuary city policies.”<sup>132</sup> Although many policies are merely symbolic, immigrant sanctuary jurisdictions have increasingly established proactive protocols “to maintain the confidentiality of an individual’s undocumented status and ensure open communication between residents and employees, especially law enforcement officers.”<sup>133</sup> These measures are most often accomplished through “noncooperation policies,” wherein law enforcement agree not to communicate with ICE about an individual’s immigration status.<sup>134</sup> Furthermore, more than 300 county jurisdictions have

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(cataloging nationwide sanctuary ordinances passed between 1984 and 1986); *see also* Villazor & Gulasekaram, *supra* note 4, at 1235, 1281.

<sup>128</sup> *See, e.g.*, Davis City Council Res. No. 5407, Series 1986 (Cal. 1986), <http://documents.cityofdavis.org/Media/Default/Documents/PDF/CMO/Sanctuary-City/Resolution-5407-Establishing-Davis-as-a-Sanctuary-City.pdf> [<https://perma.cc/L5QQ-QV7J>].

<sup>129</sup> Marcia Zug, *The Mirage of Immigration Reform: The Devastating Consequences of Obama’s Immigration Policy*, 63 U. KAN. L. REV. 953, 955 & n.12, 960–61 (2015) (debating whether Bush or Obama more deserve the title “deporter in chief”); *see also* Nora Caplan-Bricker, *Who’s the Real Deporter-in-Chief: Bush or Obama?*, NEW REPUBLIC (Apr. 17, 2014), <https://newrepublic.com/article/117412/deportations-under-obama-vs-bush-who-deported-more-immigrants> [<https://perma.cc/3YCT-VYKM>].

<sup>130</sup> *See* Stephen Dinan, *Half of All Americans Now Live in ‘Sanctuaries’ Protecting Immigrants*, WASH. TIMES (May 10, 2018), <https://www.washingtontimes.com/news/2018/may/10/half-of-americans-now-live-in-sanctuaries/> [<https://perma.cc/A2T6-2774>]; *see also* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 256–57 (2018).

<sup>131</sup> Dinan, *supra* note 130.

<sup>132</sup> Villazor & Gulasekaram, *supra* note 4, at 1236.

<sup>133</sup> *Id.* at 1236; *see also* Chuck Wexler, Opinion, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. TIMES (Mar. 6, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-wexler-sanctuary-cities-immigration-crime-20170306-story.html> [<https://perma.cc/RET3-V2TP>].

<sup>134</sup> Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 489–90 (2018); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO

enacted policies refusing to honor federal immigration detainer requests, which authorize state authorities to temporarily detain suspected undocumented immigrants to allow for federal investigation of their status, arguing that enforcement of federal detainers is the federal government's responsibility and that such detainers violate the Fourth Amendment because they require prolonged detention without probable cause that a crime has been committed.<sup>135</sup>

These passive noncooperation policies echo the passive nonenforcement declarations in Second Amendment Sanctuaries. Much like a state or city law enforcement officer's refusal to communicate with federal agencies like ICE, local sheriffs have committed to not cooperate with state enforcement of state gun laws. Moreover, both types of resolutions claim a constitutional duty to resist superior government action which they regard as violations of individual protections in the Bill of Rights.

The most proactive immigrant sanctuary cities "provide free legal assistance to undocumented immigrants and children in removal hearings."<sup>136</sup> Because noncitizens do not have a constitutional right to government-sponsored counsel at removal hearings, "[a] sanctuary city's provision of legal services provides the necessary form of legal resistance to the power of the federal government to remove a noncitizen," particularly considering that "[t]he mere presence of legal counsel dramatically alters the prospects for noncitizens in removal proceedings."<sup>137</sup> However, even this policy does not seek to proactively "block the law, but simply insist[s] that it should be enforced by those who have the responsibility to do so."<sup>138</sup>

Similarly, Second Amendment Sanctuary resolutions pledging taxpayer money to defend local officials in court<sup>139</sup> represent a willingness to affirmatively denounce state law without actively preventing its enforcement

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ST. L.J. 703, 716, 751 (2013) (suggesting such noncooperation policies do not prevent individual officers from collaborating with ICE).

<sup>135</sup> See *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017) ("Several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests because civil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed." (citing *Morales v. Chadbourne*, 793 F.3d 208, 215–17 (1st Cir. 2015))); Deirdre Shesgreen & Alan Gomez, *Sanctuary Cities for Illegal Immigrants? Here's What You Need to Know*, USA TODAY (Apr. 12, 2019, 3:27 PM), <https://www.usatoday.com/story/news/world/2019/04/12/sanctuary-cities-illegal-immigrants-can-carry-many-definitions/3449063002/> [<https://perma.cc/6WLG-6WU6>].

<sup>136</sup> Villazor & Gulasekaram, *supra* note 4, at 1240 ("[This] provision of legal services may perhaps be a quintessential form of safe haven.").

<sup>137</sup> *Id.* (citing Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2289 (2013)).

<sup>138</sup> Toscano, *supra* note 5.

<sup>139</sup> See Picket, *supra* note 100.

by state officials. However, the resolutions adopted in Virginia that call for the local raising of a militia and the deputizing of thousands of private citizens as an end run around state gun-control regulations arguably represent an affirmative local regulatory scheme at odds with proposed state legislation, as do financial defunding efforts and law enforcement and prosecutorial nullification. Such affirmative action finds no close analog in the immigrant-sanctuary context.

Nonetheless, some common themes emerge from this sanctuary comparison. Both immigrant and gun sanctuaries communicate disagreement with the laws and enforcement priorities of a superior government entity. Most sanctuaries erect passive roadblocks to undesirable legislation by refusing to cooperate, rather than proactively attempting to create a parallel system of immigration or gun regulation.<sup>140</sup> And both types of sanctuaries assert a legal right to resist the undesirable policy, though the legal justifications for each type of sanctuary differ. Immigrant sanctuaries claim a federalism right to resist under the Tenth Amendment,<sup>141</sup> while gun sanctuaries claim a substantive Second Amendment duty to resist.<sup>142</sup>

It is this difference in legal justification between the two types of sanctuaries that poses a great risk to Second Amendment Sanctuary viability. Broadly speaking, immigrant sanctuary cities do not question the legality of federal immigration enforcement priorities, but merely disagree with them as a matter of policy. Moreover, these local jurisdictions have a constitutional right under the anticommandeering principles of the Tenth Amendment not to assist with the enforcement of federal immigration law if they choose not to.<sup>143</sup> In contrast, Second Amendment Sanctuaries do not have the same right to ignore state gun-control measures because, in most states, local municipalities are subservient subdivisions of state governments

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<sup>140</sup> Practically speaking, however, state governments rely on municipal subdivisions to enforce state laws in a way the federal government does not rely on states. Thus, when local sheriffs and prosecutors refuse to enforce new state gun-control laws, they take on a proactive resistance quality not present in traditional federalism contexts. *See infra* Part II.

<sup>141</sup> *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 650, 659 (E.D. Pa. 2017) (enjoining the Attorney General from enforcing against Philadelphia parts of President Trump's executive order withholding funding because Philadelphia is an immigrant sanctuary city, but warning that states cannot "turn the Tenth Amendment's shield against the federal government[] . . . into a sword allowing states and localities to engage in passive resistance that frustrates federal programs" (quoting *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999))).

<sup>142</sup> The substantive contours of the Second Amendment remain in a comparative state of flux, however, given the relative dearth of U.S. Supreme Court jurisprudence. *See infra* Part IV.

<sup>143</sup> *City of Philadelphia*, 280 F. Supp. 3d at 651; *see also* Josh Blackman, *Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 981, 982–85 (2019) (making an anticommandeering case for immigrant sanctuary cities).

and subject to preemption by state law.<sup>144</sup> In other words, there exists no subfederal anticommandeering principle to shield localities from state preemption. But unlike immigrant sanctuaries claiming a well-settled right to resist under the Tenth Amendment, gun-sanctuary advocates claim an unsettled Second Amendment right (and in some cases, a duty) to ignore what they believe are unconstitutional state laws.

Given these legal headwinds, one could be forgiven for seriously questioning the viability of Second Amendment Sanctuaries. In the short history of these resolutions, two primary arguments dismissing them out of hand have emerged. One characterizes them as nothing more than political stunts designed to stoke fear rather than to have legal effect.<sup>145</sup> This argument has currency to the extent that most sanctuary resolutions have been adopted in response to the mere suggestion of gun-control measures, rather than the actual enactment of laws.<sup>146</sup> Laws resisting nonexistent laws have no legal effect. This reality perhaps explains the exponential growth of these resolutions in a matter of weeks; with no real legal risk, purely symbolic resolutions present a low-cost opportunity for politicians to support a vague concept of strong Second Amendment rights.

But even if many of these resolutions are intended to be symbolic, such political expression is richly communicative and predictive of potential future litigation, particularly given the unsettled state of Second Amendment doctrine.<sup>147</sup> Moreover, some resolutions articulate not just a passive dissatisfaction with gun regulation, but an active intention to resist state enforcement through financial defunding of courts and sheriffs' offices that enforce extreme risk laws, law enforcement and prosecutorial nullification, and regulatory militia-raising.<sup>148</sup>

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<sup>144</sup> See generally *infra* Section II.A.

<sup>145</sup> See Thompson, *supra* note 47.

<sup>146</sup> See Claire Hansen, 'Second Amendment Sanctuary' Movement Grows in Virginia as Democrats Ready Gun Control Measures, U.S. NEWS (Dec. 11, 2019), <https://www.usnews.com/news/national-news/articles/2019-12-11/second-amendment-sanctuary-movement-grows-in-virginia-as-democrats-ready-gun-control-measures> [<https://perma.cc/73A4-EUDB>] ("Though the 2020 legislative session has not yet begun," Virginian counties have passed "resolutions in opposition to . . . potential gun control bills.").

<sup>147</sup> See Lars Noah, *Does the U.S. Constitution Constrain State Products Liability Doctrine?*, 92 TEMP. L. REV. 189, 194 (2019) ("[T]he relatively recent interpretation of the Second Amendment remains in a state of flux . . ."); Blocher & Miller, *supra* note 35, at 330 ("[A]s of yet, courts have identified few tools to determine when *incidental* burdens raise Second Amendment concerns.").

<sup>148</sup> See, e.g., Sara Knuth, *Weld County Votes to Become Second Amendment Sanctuary County*, GREELEY TRIB. (Mar. 6, 2019, 12:30 PM), <https://www.greeleytribune.com/2019/03/06/weld-county-votes-to-become-second-amendment-sanctuary-county/> [<https://perma.cc/QK5K-6Z48>] ("Through the resolution, the commissioners said they would not put money toward building a storage facility for weapons seized by law enforcement [as a result of a red flag law] . . . Additionally, the commissioners

These more robust resolutions have inspired the second major argument dismissing Second Amendment sanctuary jurisdictions: that they “will never hold up in court.”<sup>149</sup> Critics ranging from retired Virginia House of Delegates delegate David Toscano<sup>150</sup> and Virginia Attorney General Mark Herring<sup>151</sup> to Georgetown Law Professor Mary McCord<sup>152</sup> have all declared the legal case against Second Amendment Sanctuaries open and shut. Their intuitions are understandable. State law preempts local law, rendering local resolutions null and void. Localities are mere subdivisions of states and can be forced to enforce state law. The Second Amendment does not grant absolute rights, as suggested by the resolutions; and to the extent a constitutional question exists, courts (not local sheriffs) have the final say. But as the balance of this Article illustrates, these legal issues—preemption, commandeering, and constitutional interpretation—are more complex than they may first appear.

## II. SANCTUARIES AND PREEMPTION

A significant threat to Second Amendment Sanctuaries is state preemption. Local governments traditionally have had little independence from their state governments and no structural guarantees of autonomy akin to the states’ Tenth Amendment protections from federal government interference.<sup>153</sup> Moreover, those localities with some form of “home rule,”

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said they will support Sheriff Steve Reams if he decides not to enforce the bill if it becomes a law.”); Res. 52-2019, Bd. of Cnty. Comm’rs of Wash. Cnty. (Colo. 2019) (“Be it further resolved that the Board affirms its support for the Washington County Sheriff in the exercise of his sound discretion to not enforce against any citizen an unconstitutional firearms law . . . . [T]he Board will not appropriate funds . . . for the purpose of enforcing any other law that unconstitutionally infringes upon the right of the People of Washington County to keep and bear arms[, including] . . . H.B. 19-1177 [Colorado’s Extreme Risk Protection Order bill].”).

<sup>149</sup> See, e.g., McCord, *supra* note 27; see also Editorial, *2nd Amendment Sanctuaries Are Acts of Faithlessness in Government*, L.A. TIMES (Jan. 19, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-01-19/2nd-amendment-sanctuaries-richmond-charlottesville-militias> [<https://perma.cc/W6Z7-248V>] (arguing that Second Amendment sanctuary jurisdictions “lack the authority to ignore the state laws[.] . . . [s]o it’s as much political theater as anything else, a baring of the teeth against disliked laws, but rarely one that amounts to much”).

<sup>150</sup> Toscano, *supra* note 5; *About David Toscano*, DAVID TOSCANO, <https://davidtoscano.com/about-david> [<https://perma.cc/8JCH-GL6H>].

<sup>151</sup> Thompson, *supra* note 47; Tim Dodson, *Second Amendment ‘Sanctuary’ Resolutions ‘Have No Legal Effect’ in Virginia, Attorney General Mark Herring Writes in Advisory Opinion*, BRISTOL HERALD COURIER (Dec. 20, 2019), [https://www.heraldcourier.com/news/local/second-amendment-sanctuary-resolutions-have-no-legal-effect-in-virginia/article\\_3f618f70-234b-11ea-9704-ff40e2b891d2.html](https://www.heraldcourier.com/news/local/second-amendment-sanctuary-resolutions-have-no-legal-effect-in-virginia/article_3f618f70-234b-11ea-9704-ff40e2b891d2.html) [<https://perma.cc/XDW5-4HTR>].

<sup>152</sup> McCord, *supra* note 27.

<sup>153</sup> See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding concluding that the Tenth Amendment prevents the federal government from commanding or coercing state and local governments

with limited exceptions, often find their regulations expressly preempted by states anyway, with state sovereignty frequently prevailing over local home rule in court.<sup>154</sup>

But Second Amendment Sanctuary resolutions present unique challenges to this state-dominance paradigm. As previously discussed, many sanctuary resolutions do not erect affirmative ordinances like minimum wage hikes<sup>155</sup> or fracking bans<sup>156</sup> that are subject to preemption, but instead declare an intent to passively resist enforcement of state law. Moreover, some limited precedent exists for allowing a form of constitutional home rule when, as here, the local enforcement of a state law contradicts a history of local regulation and implicates broader constitutional concerns.<sup>157</sup>

To ground the analysis, this Part begins with an overview of state preemption law and its recent partisan weaponization before exploring the normative policy and legal case for local autonomy in the limited field of firearms regulation.

#### A. The Preemption Paradigm

“Under the modern view, local governments are creatures of state law, and the U.S. Constitution provides few, if any, substantive protections for local policymaking.”<sup>158</sup> The Court’s decision in *Hunter v. City of Pittsburgh* remains the touchstone for describing the subservient position of local governments:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State

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to enforce federal law); *cf.* Su, *supra* note 34, at 204–06 (asserting that traditional state–federal power struggles are increasingly represented informally at the intrastate level between state and locality).

<sup>154</sup> Karen Kasler, *State vs. Local: Battle Over Home Rule Rages in Ohio*, WKSU (Oct. 25, 2019), <https://www.wksu.org/post/state-vs-local-battle-over-home-rule-rages-ohio#stream/0> [<https://perma.cc/5WX2-6DE7>] (“In nearly all recent cases where home rule is at issue, the Ohio Supreme Court has sided with state lawmakers.”); Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 30 (1975) (explaining that the “narrow and restrictive judicial interpretation” given to local autonomy has limited localities’ ability to fully utilize constitutional home-rule guarantees); *see also* Briffault, *supra* note 23, at 2022 (noting that home rule does not provide “formal immunity protections from state preemption”).

<sup>155</sup> Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1172–73 (2007) (exploring whether local minimum-wage ordinances should be subject to preemption in home-rule states).

<sup>156</sup> *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 577 (Colo. 2016) (asserting that “the inalienable rights provision of the Colorado Constitution” does not save the local fracking ban from preemption by state law); Scharff, *supra* note 20 at 1472 & n.10 (enumerating the “particularly voluminous literature on local fracking bans”).

<sup>157</sup> *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2362–67 (2003) (proposing expanding constitutional home-rule guarantees in state constitutions).

<sup>158</sup> Scharff, *supra* note 20, at 1475 (citation omitted).

as may be entrusted to them. . . . The State, therefore, at its pleasure may modify or withdraw all such powers, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.<sup>159</sup>

This is not to say that local governments have no power, but that power is traditionally limited to those specifically enumerated in its respective state constitution. Thus, the local–state power structure is reversed from the federal–state power structure. Under traditional federalism principles, the federal government has only those powers specifically granted to it, with the rest reserved for the states and the people.<sup>160</sup> Under the local–state structure, state governments have general police powers and reserve to the local governments only what is specifically granted to them.<sup>161</sup>

These limited powers, available to at least some localities in a majority of states, are often referred to as “home rule” powers.<sup>162</sup> “Under home rule, state law grants localities some authority over local affairs and may limit the

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<sup>159</sup> Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 916 (1994) (“[Federalism] subjects these localities to the plenary control of state government and precludes or limits the ability of the national government to set standards for local politics.”). This view has its strong critics. See *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring) (arguing that local government is an “absolute right” protected from the powers of the legislatures); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1111–13 (1980) (discussing criticisms of the emerging power of the state as the dominant subfederal government entity); Richard Briffault, *Home Rule, Majority Rule, and Dillon’s Rule*, 67 CHI.-KENT L. REV. 1011, 1023–24 (1991) (criticizing Dillon’s Rule as leading to “arbitrary, outcome-oriented judicial intrusion into local autonomy”); Comment, *Dillon’s Rule: The Case for Reform*, 68 VA. L. REV. 693, 703 (1982) (“[B]ecause of the nature of most legislation, the [Dillon’s Rule] doctrine often forces the Court to assume the quasi-legislative role of interpretation by mere speculation.”).

<sup>160</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (describing federalism principles as they relate to the Fifth Amendment’s Double Jeopardy Clause).

<sup>161</sup> See, e.g., *Covel v. Town of Vienna*, 78 Va. Cir. 190, 200 (2009) (“In Virginia . . . [i]t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words [by the state]; second, those . . . incidental to the powers expressly granted . . .” (internal quotation marks omitted)); James S. MacDonald & Jacqueline R. Papez, *Over 100 Years Without True “Home Rule” in Idaho: Time for Change*, 46 IDAHO L. REV. 587, 589, 592 (2010) (lamenting the lack of “local discretionary authority” in Idaho: “[O]ur supreme law recognizes only a dual federalism between national and state governments, not the tripartite reality including local governments.”).

<sup>162</sup> See *Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 43 (1982) (explaining that states can grant “powers of self-government in local and municipal matters” by a “home-rule” provision in the constitution of the state).



state’s ability to interfere in local affairs.”<sup>163</sup> However, local autonomy is limited in a majority of these jurisdictions to structural and personnel decisions, such as how to structure local councils and who to staff on them, while the far more powerful regulatory and fiscal functions are reserved to the states.<sup>164</sup> Moreover, many states, including Virginia, practice “Dillon’s Rule,” which affords no autonomy for local governments and treats them as entirely subservient subdivisions of the government.<sup>165</sup>

As Professor Erin Scharff has stated, “Even when local governments have the authority to act, this authority is almost always subject to state legislative preemption.”<sup>166</sup> Thus, even if a locality has the power to raise the minimum wage or ban the possession of high-capacity magazines, states almost always possess the ability to preempt and invalidate those ordinances. In order to do so, states often pass preemption legislation for the sole purpose of eliminating a local regulation without enacting any replacement scheme in what Professor Richard Briffault has identified as “deregulatory preemption.”<sup>167</sup> Therefore, local resolutions are, generally speaking, subject to displacement by broad state preemption powers.

### B. Partisan Preemption

Scholars have long explored the proper normative balance between state and local government power sharing, regardless of politics. “Nevertheless, in recent years, preemption debates have taken on a decidedly partisan tone.”<sup>168</sup> In particular, increasingly liberal policy innovation has exacerbated the partisan nature of preemption debates.<sup>169</sup>

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<sup>163</sup> Scharff, *supra* note 20, at 1476.

<sup>164</sup> *See id.* at 1475–76 (“[T]his difference between home rule jurisdictions and non-home rule jurisdictions is often of little practical significance. The implied powers of non-home rule jurisdictions can be quite broad. And even in home rule jurisdictions, local government authority is often limited.”).

<sup>165</sup> *See* NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 5 (2017), <https://www.nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf> [<https://perma.cc/SC6W-DNQ9>]; *see also* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 961 n.18 (2019) (discussing the “most state-focused version of local legal identity, known as ‘Dillon’s Rule’”); Scharff, *supra* note 20, at 1476 (“In non-home rule states . . . state delegations of authority must be explicitly granted in statute or implied as necessary corollaries of statutory delegations.”).

<sup>166</sup> Scharff, *supra* note 20, at 1476.

<sup>167</sup> Schragger, *supra* note 19, at 1182.

<sup>168</sup> Scharff, *supra* note 20, at 1481; *see also* Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 136 & n.92 (2016) (referring alternatively to “partisan preemption” and “manufactured preemption”).

<sup>169</sup> Scharff, *supra* note 20, at 1481–82.

Today, heightened political polarization has led to a “geographic political sorting,” wherein “urban residents are more liberal than their . . . rural counterparts.”<sup>170</sup> As a result, many cities have passed first-in-the-nation progressive local reforms like taxes on sugar-sweetened beverages, plastic-bag bans, trans-fat bans, fracking bans, carbon-emissions regulations, \$15.00 minimum-wage hikes, and antidiscrimination measures protecting the LGBTQ+ community.<sup>171</sup> This local liberal policymaking, rather than any principled preference for statewide uniformity, “has invited pushback from Republican-controlled state legislatures.”<sup>172</sup> Often working with the conservative American Legislative Executive Council (ALEC), Republican legislatures have as a result passed reactive preemption laws designed to invalidate these local liberal reforms, often without enacting any replacement statewide policy.<sup>173</sup>

The partisan nature of preemption, thus, in many ways has informed modern gun regulation. Prompted in part by the passage of a handgun ban in Morton Grove, Illinois in 1981, the NRA and other gun-rights organizations began pushing for state-level preemption laws that would forbid local governments from enacting certain kinds of gun control.<sup>174</sup> Although these efforts “broke with the tradition of local governance” the NRA and other conservatives typically espoused, “the[ir] preemption campaign was

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<sup>170</sup> *Id.* (describing how “[m]ayors of large urban areas increasingly cast themselves as policy entrepreneurs” of liberal policies not palatable at the state level, which attracts a certain transplant resident); see also Richard C. Schragger, *The Political Economy of City Power*, 44 *FORDHAM URB. L.J.* 91, 118 (2017) (describing “[t]he city as the locus of transformative reform”); Jessica Bulman-Pozen, *Partisan Federalism*, 127 *HARV. L. REV.* 1077, 1080 (2014) (asserting that arguments about allocations of power are often driven by ideological and partisan interests).

<sup>171</sup> Scharff, *supra* note 20, at 1482–84 (“Mayors of large urban areas increasingly cast themselves as policy entrepreneurs, and local civic leaders across the country have become adept at using local law to push a policy agenda that would have little traction at the state capitol.”); Lydia DePillis, *A \$15 Minimum Wage Started as a Slogan. Now It’s Passed the House*, CNN (July 18, 2019, 12:47 PM), <https://www.cnn.com/2019/07/15/economy/15-dollar-minimum-wage-house-vote/index.html> [<https://perma.cc/PM5V-CTGZ>] (noting that a \$15 minimum wage evolved from a slogan to the law in Seattle, San Francisco, California, and New York).

<sup>172</sup> Scharff, *supra* note 20, at 1483.

<sup>173</sup> See Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016, 5:53 AM), <https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html> [<https://perma.cc/2X39-W9PZ>] (“For progressives, ALEC has become a boogeyman for its role propagating laws supporting a host of corporate and conservative priorities.”).

<sup>174</sup> HARRY L. WILSON, *GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT* 408 (2016) (“[T]he NRA became more active in state politics when it was evident that the national-level pendulum might be swinging toward gun control advocates.”); William S. Harwood, *Gun Control: State Versus Federal Regulation of Firearms*, 11 *ME. POL’Y REV.* 58, 65 (2002) (arguing that the NRA’s preemption push stemmed not from a desire to create “uniformity” for gun owners, but its desire to “avoid having to fight the issue of gun control in thousands of city and town halls across the country”).

incredibly successful.”<sup>175</sup> By 2002, forty-one states had preempted some or all local gun-control measures, a number that rose to forty-five in 2020.<sup>176</sup>

Of these states, ten have adopted absolute preemption of municipal firearm regulations, barring any exceptions and holding state officials civilly or criminally liable for violations.<sup>177</sup> For instance, New Mexico, a home-rule state,<sup>178</sup> implemented this broad preemption measure by amending its state constitution.<sup>179</sup> The Kansas State Rifle Association President proclaimed in support of a proposed law to preempt local Kansas gun control, “There are lots of areas where home rule certainly applies, . . . [b]ut this is not one of them. Not when it comes to an unalienable, natural, God-given right for people to protect themselves.”<sup>180</sup>

Although these preemption statutes vary, each one expressly preempts virtually all aspects of local firearms and ammunition regulation.<sup>181</sup> As a typical example, South Dakota prohibits counties from passing any “ordinance that restricts or prohibits, or imposes any tax, licensure requirement, or licensure fee on the possession, storage, transportation, purchase, sale, transfer, ownership, manufacture, or repair of firearms or ammunition or their components.”<sup>182</sup> In addition to this broad preemption

<sup>175</sup> Blocher, *supra* note 23, at 133; *see also* MacDonald & Papez, *supra* note 161, at 589, 612 (“A basic tenet of political conservatism is belief in local control. . . [, but today] Dillon’s Rule [endorsing complete state preemption] . . . has become a tool used to keep municipalities, often more liberal, in lock-step with state-wide thinking, often more conservative.”); Scharff, *supra* note 20, at 1482–84 (describing liberal municipal policies such as minimum-wage increases and antidiscrimination ordinances preempted by conservative leaders in the statehouse).

<sup>176</sup> Jon S. Vernick & Lisa M. Hepburn, *State and Federal Gun Laws: Trends for 1970–99*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 345, 349 (Jens Ludwig & Philip J. Cook eds., 2003); Trevor Bach, *Cities Grow Bolder on Gun Control Laws*, U.S. NEWS (Jan. 10, 2020, 12:22 PM), <https://www.usnews.com/news/cities/articles/2020-01-10/cities-grow-bolder-on-gun-control-clashing-with-states> [<https://perma.cc/28JA-ZUSV>] (describing state preemption laws in forty-five states and the resulting urban pushback); *see also* Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 706 (2004) (quoting anonymous gun-control activist lamenting “the NRA’s effort to pass preemption laws” as “a serious setback”).

<sup>177</sup> *See* GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 18.

<sup>178</sup> N.M. CONST. art. X, § 6 (1970).

<sup>179</sup> *Id.* art. II, § 6 (amended 1986).

<sup>180</sup> Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, *ATLANTIC* (Mar. 6, 2014), <https://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/> [<https://perma.cc/Z9UV-7SPH>].

<sup>181</sup> GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, *supra* note 18 (stating that forty-three states have statutes restricting in whole or in part local governments’ ability to regulate firearm and ammunition sales and possession); *see also* Bach, *supra* note 176 (“The laws vary by language and degree: In five states . . . local officials found to be in violation can be personally sued.”).

<sup>182</sup> S.D. CODIFIED LAWS § 7-18A-36 (2018) (“Any ordinance prohibited by this section is null and void.”).

language, many states impose civil or criminal penalties on local officials who violate the preemption statute, including holding local officials personally liable by exempting them from qualified immunity, removing elected officials from office, and imposing fines up to \$50,000.<sup>183</sup>

Nevertheless, some local firearms regulations have survived preemption challenges, at least in the states without broad express preemption laws. In California, for example, state law regulates only the registration and licensing of firearms and the licensing and permitting of concealed carry permits.<sup>184</sup> This partial preemption statute gives significant leeway for local regulation. For instance, California courts have upheld local ordinances regulating the location and operation of firearms dealers, as well as the sale and possession of firearms and ammunition on county-owned property.<sup>185</sup>

Moreover, the political opportunism of preemption extends to both major political parties. Liberal gun-control organizations have long hailed the virtues of local gun laws because local gun regulations predominantly have taken the form of strict gun-control measures in urban centers.<sup>186</sup> For instance, the Giffords Law Center to Prevent Gun Violence devotes an entire page on its website to firearm localism advocacy, proclaiming that “[w]hen it comes to gun violence, local laws serve the important purpose of addressing the unique issues and dangers facing each different community.”<sup>187</sup> While the Giffords Center makes salient points about the

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<sup>183</sup> ARIZ. REV. STAT. ANN. § 13-3108(I) (2018) (providing for \$50,000 fine for “knowing[] and willful[] violat[ions]”); FLA. STAT. § 790.33(3)(c) (2019) (providing for \$5,000 fine); IOWA CODE § 29C.25(1), (3)(a) (2019) (permitting personal liability for public officials); KY. REV. STAT. ANN. § 65.870(4), (6) (2018) (same); MISS. CODE ANN. § 45-9-53(5)(c) (2019) (same); *see also* ARIZ. REV. STAT. § 13-3108(J) (2018) (authorizing removal from office for public officials); FLA. STAT. § 790.33(3)(e) (2019) (same); KY. REV. STAT. ANN. § 65.870(6) (2018) (authorizing criminal liability for public officials who violate law).

<sup>184</sup> CAL. GOV’T CODE § 53071 (2019) (preempting “registration or licensing of commercially manufactured firearms”); *id.* § 53071.5 (preempting “regulation of the manufacture, sale, or possession of imitation firearms”); CAL. PENAL CODE § 25605(b) (2019) (prohibiting permit or license with respect to the purchase, ownership, possession, or carrying of a handgun in a residence or place of business).

<sup>185</sup> *See Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425 (Ct. App. 1997) (“That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities.”).

<sup>186</sup> *Cal. Rifle & Pistol Ass’n v. City of West Hollywood*, 78 Cal. Rptr. 2d 591, 594 (Ct. App. 1998) (upholding ordinance banning junk guns); *Suter*, 67 Cal. Rptr. 2d at 425 (upholding ordinance regulating the location and operation of firearms dealers); *Great W. Shows, Inc. v. County of Los Angeles*, 44 P.3d 120, 125 (Cal. 2002) (upholding ordinance banning the sale of firearms and ammunition on county-owned property); *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002) (upholding ordinance banning possession of firearms and ammunition on county-owned property).

<sup>187</sup> *See GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE*, *supra* note 18.

virtues of firearm localism, including the need to recognize local variations in urban and rural communities and the importance of localities' ability to experiment with innovative gun-control solutions,<sup>188</sup> the organization also spent over \$300,000 supporting Virginia Democrats promising to enact statewide gun-control legislation.<sup>189</sup> These efforts spotlight how political opportunism on both sides of the aisle has accounted for the sometimes inconsistent nature of gun-control efforts at both the state and local level.

The rise in Second Amendment Sanctuaries not only fits the issue-specific nature of partisan preemption, but also reflects a reversal of broader priorities for both conservatives and liberals. Conservative policymakers have long “railed” against immigrant sanctuary jurisdictions as anarchic attempts to disregard valid laws with which the jurisdictions simply disagree, but many of those same politicians now support declaring a firearms sanctuary in their towns and counties in violation of locally unpopular gun laws.<sup>190</sup> Similarly, progressive politicians have long decried Dillon’s Rule for vesting states with too much power to preempt local ordinances, seeing such power structures as unfairly stymieing local efforts to broaden civil and political protections for minorities.<sup>191</sup> Now, local ordinances like Second Amendment Sanctuaries have liberals and conservatives alike rethinking how much power should rest with local officials like county administrators and sheriffs.

In short, “[p]references about ‘state’ versus ‘local’ control often do not reflect institutional commitments to a particular division of governmental power.”<sup>192</sup> “Rather, advocates advance their own substantive policy commitments by considering which level of government is most likely to enact their preferences.”<sup>193</sup> In this sense, “[p]reemption arguments . . . [are] susceptible to institutional flip-flops” like the ones playing out in Second

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<sup>188</sup> *Id.* (“Broad state preemption statutes threaten public safety because they: Ignore important local variations . . . between urban and rural communities. . . . [and] [t]hwart local innovation in gun violence prevention strategies which can lay the groundwork for state-level change.”).

<sup>189</sup> Jane Coaston, *The NRA’s Big Loss in Virginia, Explained*, VOX (Nov. 6, 2019, 4:40 PM), <https://www.vox.com/2019/11/6/20951639/nra-virginia-democrats-spending-gun-control> [https://perma.cc/JQ67-7YW4] (noting that Everytown for Gun Safety Action Fund “spent \$2.5 million in Virginia, making the group the biggest outside donor in the race—and Giffords PAC[] . . . spent \$300,000 on a digital ad campaign alone”).

<sup>190</sup> See Toscano, *supra* note 5.

<sup>191</sup> See *id.*; see also Scharff, *supra* note 20, at 1481–82 (summarizing progressive discontent with municipal powerlessness in Dillon’s Rule states); Gulasekaram et al., *supra* note 16, at 856–62 (describing the challenges facing the immigrant-sanctuary movement in Dillon’s Rule states).

<sup>192</sup> Scharff, *supra* note 20, at 1486.

<sup>193</sup> *Id.*

Amendment Sanctuary jurisdictions.<sup>194</sup> But Second Amendment Sanctuaries need not be viewed solely through a partisan lens, as a strong normative case can also be made for embracing firearm localism.

### C. Normative Localism

There are normative reasons for preferring greater local autonomy both in the field of firearm regulation and more generally. Local autonomy advances “the traditional advantages that attend decentralization,” including “more participatory and responsive government” and “more flexibility in responding to changing circumstances.”<sup>195</sup> These advantages are more pronounced either when differences in localities require locally tailored solutions or when “a divided populace [cannot] maximiz[e] policy preferences” on a state or national level.<sup>196</sup> Both factors exist in the context of gun regulation.

To take one example, livestock zoning ordinances are locally tailored in recognition that “[d]ensity creates problems for urban farmers that have little parallel in rural America.”<sup>197</sup> The same is true for firearms. Far more rural residents own and regularly use firearms than urban residents.<sup>198</sup> Rural residents are significantly more likely to use firearms for hunting or for target shooting and other recreational activities that require space not available in urban centers.<sup>199</sup> The types of firearms used in these activities differ from those owned and used in urban areas.<sup>200</sup> And to the extent both urban and

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<sup>194</sup> See *id.* at 1489; see also Gulasekaram et al., *supra* note 16, at 882 (“Neither state-level preemption nor local authority inherently tracks political ideologies or partisan preferences.”).

<sup>195</sup> David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 382 (2001).

<sup>196</sup> Scharff, *supra* note 20, at 1491.

<sup>197</sup> *Id.* at 1492.

<sup>198</sup> Igielnik, *supra* note 109 (“Among adults who live in rural areas, 46% say they own a gun, compared with . . . 19% [] in urban areas . . .”).

<sup>199</sup> See *id.* (“[G]un owners in rural areas are far more likely than urban owners to cite hunting as a major reason they own a gun (48% vs. 27%, respectively.”); see also Michelle Samuels, *New Gun Subculture Is on the Rise in Liberal States with Stricter Gun Laws*, THE BRINK (July 15, 2020), <https://www.bu.edu/articles/2020/new-gun-subculture-on-the-rise-in-liberal-states-stricter-gun-laws/> [<https://perma.cc/FA9M-ZT36>] (noting that the dominant “gun subculture” in many of the least populated areas of the United States, including the Dakotas, the Upper Rocky Mountain West, and Alaska, is “recreational” compared with the “self-defense” or “Second Amendment activism” subculture in more densely populated areas in California, New York, Illinois, and Florida).

<sup>200</sup> See Igielnik, *supra* note 109 (“Three-quarters of those in rural areas (75%) say they own more than one gun, compared with 48% of urban gun owners.”); KIM PARKER, JULIANA HOROWITZ, RUTH IGIELNIK, BAXTER OLIPHANT & ANNA BROWN, PEW RSCH. CTR., AMERICA’S COMPLEX RELATIONSHIP WITH GUNS 22 (2017), <https://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/> [<https://perma.cc/L96T-FYCU>] (“For those with a single gun, handguns are by far the most common type.”).

rural gun owners exercise the “core” Second Amendment right of self-defense,<sup>201</sup> geographical variance informs how these rights will be exercised. In urban areas, many gun owners prefer a single, concealable handgun to provide short-term deterrence until law enforcement can arrive.<sup>202</sup> Gun owners in rural areas, in contrast, need to “supplement” traditional government law enforcement, which is more sparsely distributed in rural areas and cannot respond as quickly or efficiently to fast-moving life-and-death situations, through the use of more substantial weapons like shotguns.<sup>203</sup> Likewise, urban residents face unique challenges that rural residents do not. Rates of gun violence (and crime rates in general) are far higher in high-density urban areas, and the potential for mass casualty events is significantly greater.<sup>204</sup> Given these many differences in needs and purposes of firearms, “[i]t is no surprise . . . that the vast majority of gun

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<sup>201</sup> See Igielnik, *supra* note 109 (“[P]rotection tops the list of reasons for owning a gun among both groups . . . .”); *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (“The core right recognized in *Heller* is ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”).

<sup>202</sup> Vince K. Heitholt, *Meramec River Killing: State v. Crocker and Missouri’s First Foray into the National Debate on Self-Defense*, 59 ST. LOUIS L.J. 1197, 1212 (“Rural individuals are more likely to live in areas isolated from law enforcement, and self-help may present the only option available for preservation of life or property.”); Blocher, *supra* note 23, at 97 (“[I]t is also easy to see how armed self-defense could have particular value to rural residents who cannot count on speedy responses from police.”); Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment “Type of Weapon” Analysis*, 83 TENN. L. REV. 231, 284 n.226 (2015) (“[A] plaintiff challenging a ban on a particular weapon type in a more rural area could argue that a higher degree of firepower is necessary where police response times may be higher.”); Chuck Raasch, *In Gun Debate, It’s Urban vs. Rural*, USA TODAY (Feb. 27, 2013, 12:01 AM), <http://www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479> [<https://perma.cc/X88W-Y883>] (“‘I live 15 miles from the nearest town or police station,’ says [Frank] Jezioro, [West Virginia’s] director of the Division of Natural Resources. ‘My family, my wife, my grandkids are there all the time. A home invasion—what good does it do me to call 911 and wait for someone to come and help me?’”).

<sup>203</sup> See Luna, *supra* note 110, at 82.

<sup>204</sup> See *Gun Violence in the US Kills More Black People and Urban Dwellers*, THE CONVERSATION (Nov. 8, 2017, 6:18 AM), <https://theconversation.com/gun-violence-in-the-us-kills-more-black-people-and-urban-dwellers-86825> [<https://perma.cc/U7G5-8TD9>] (citing studies showing that 20% of all gun-related homicides take place in urban areas with less than 10% of the nation’s population); Henrika McCoy, *Opinion, Gun Violence in Urban Communities Must Get the Same Attention as Suburban School Shootings*, HILL (Apr. 1, 2020, 7:30 PM), <https://thehill.com/opinion/civil-rights/490669-gun-violence-in-urban-communities-must-get-the-same-attention-as-white> [<https://perma.cc/Y8HT-GL9R>] (criticizing lack of coverage for urban gun violence relative to mass shootings in suburban neighborhoods); David Kairys, *Challenging the Normalcy of Handgun Violence*, 156 U. PA. L. REV. PENNUMBRA 194, 196 (2007) (“The large urban areas of the nation [are] where unregulated handgun markets have taken such a terrible toll . . . .”); Blocher, *supra* note 23, at 122 (“[T]he costs of gun violence . . . are generally higher in urban areas than in rural areas.”); *cf.* Claudia Boyd-Barrett, *Gun Violence Increasingly a Rural Problem, Study Finds*, CAL. HEALTH REP. (Apr. 24, 2018), <https://www.calhealthreport.org/2018/04/24/gun-violence-increasingly-rural-problem-study-finds/> [<https://perma.cc/K5XS-96TX>].

control regulations in the United States are local, and are tailored to the particular risks of gun use in densely populated areas.”<sup>205</sup>

While the majority of these local regulations take the form of tighter controls and restrictions on the possession, sale, and use of firearms, the geographical variance described above counsels in favor of allowing rural areas to engage in local deregulatory efforts as they see fit. Thus, although the purpose of Second Amendment Sanctuary resolutions may be to thwart perceived unconstitutional infringements by the state, the effect of these resolutions—fewer restrictions on gun ownership and use in rural areas—may make good policy sense from a normative standpoint.<sup>206</sup>

#### D. Constitutional Home Rule

The historical and normative case for firearm localism also provides strong legal arguments in favor of limited local autonomy via constitutional home rule. This type of autonomy derives from two sources: state constitutions protecting home rule and emerging Second Amendment doctrine under the federal Constitution.

The most direct way for localities to resist state law preemption is through state constitutional home-rule guarantees.<sup>207</sup> While many states do not afford such constitutional protections to localities, “[i]n those few states that do, courts often have to determine whether a municipal ordinance is a matter of ‘local concern’ immune from contrary state enactments.”<sup>208</sup> Admittedly, most courts have defined “local concern” narrowly and deemed even the most intralocal regulation to fall within the state’s broad sovereignty powers.<sup>209</sup> However, even though state courts “are generally wary of broad

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<sup>205</sup> Blocher, *supra* note 23, at 99–100 (citation omitted).

<sup>206</sup> Critics of localism often respond that states are still the “best political unit to make these decisions, and that urban and rural residents should hash out their differences in state legislatures.” *Id.* at 135. A reframing of this argument might ask: how far down do we decentralize? If localism is good for the county, why not the neighborhood, the block, the individual house? This sort of localism going “all the way down” is unworkable insofar as it would create a patchwork of regulations without the sort of defined boundaries of operation provided by municipal boundaries. Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (recasting institutional sovereignty as incorporating individualized “rebellious decisions” where “minorit[ies] rule without sovereignty”).

<sup>207</sup> See Gulasekaram et al., *supra* note 16, at 857 (“[L]ocalities in home-rule states are granted a blanket delegation of power. This often includes the authority to enact local regulations without the need for further state authorization.”); Barron, *supra* note 157, at 2347 (“[Constitutional] [h]ome rule provisions . . . symbolize the degree to which state law seems to reject the preference for local legal powerlessness, a preference rooted in the old state creature conception of local power.”).

<sup>208</sup> Schragger, *supra* note 19, at 1220.

<sup>209</sup> See *Sterling Beef Co. v. City of Fort Morgan*, 810 F.2d 961, 963 (10th Cir. 1987) (finding “Colorado’s constitutional Home Rule Amendment’s guarantee of local autonomy [] too general to” allow local permitting of utilities in contravention of state anticompetitive practices).



grants of local power,”<sup>210</sup> courts and legislatures alike are showing a greater willingness to recognize local home rule and, through it, intrastate federalism.<sup>211</sup>

This intrastate federalism has roots in the “new federalism” movement of the last three decades.<sup>212</sup> For over fifty years, interstate commerce was defined so broadly as to leave little sovereign room at all for states.<sup>213</sup> Beginning with the Rehnquist Court, new federalism set tangible limits to the interstate commerce power, including in firearm regulation.<sup>214</sup> Some state constitutions envision a similar type of “new subfederalism,” at least in theory, if not in practice.

In Colorado, for example, courts considering whether a policy is sufficiently of local concern to fall within the state’s home-rule guarantees examine three factors: whether a need for statewide uniformity exists, whether statewide legislation has a significant impact on individual localities, and whether there is a history and tradition of local regulation.<sup>215</sup> In practice, all three factors favor local firearm autonomy. The geographical and cultural variances of urban and rural localities in many ways require locally tailored solutions to firearms, thus outweighing the need for statewide uniformity. Further, statewide preemption of such tailoring would unnecessarily “flatten these deep differences, potentially to the detriment of

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<sup>210</sup> Schragger, *supra* note 19, at 1220–21; *see also* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1342–43 (2009) (“[Even in states where] constitutional home rule exists, some have state courts that have largely declined to subject state legislation to scrutiny under the rubric of home rule; . . . insofar as the state legislature attempts to preempt local action, the state typically wins and local governments lose.” (internal citations omitted)).

<sup>211</sup> *See* Baker & Rodriguez, *supra* note 210, at 1372 (drawing preliminary descriptive conclusion that “state courts do have a significant role to play in ensuring the local autonomy mandated by constitutional home rule”).

<sup>212</sup> *See* Gulasekaram et al., *supra* note 16, at 856 (“[L]ike the trajectory of federalism, the development of localism in many states has been toward expanding local autonomy and increasing limits on state interference.”); *see also* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1198 (2003) (outlining the contours of the Rehnquist Court’s “New Federalism” approach, which is “a revitalization of federalism principles on many doctrinal fronts, including the Tenth Amendment, the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment”).

<sup>213</sup> *See* Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 135–38 (2004).

<sup>214</sup> *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act of 1990); *see also* Young, *supra* note 213, at 1 (hailing the “Federalist Revival”); Eid, *supra* note 212, at 1210–16 (describing the “New Federalism” under the Rehnquist Court).

<sup>215</sup> *See* Schragger, *supra* note 19, at 1222; Paul A. Diller, *Reorienting Home Rule: Part 2—Remediating the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067–68 (2017) (“[In Colorado,] the extent of immunity for local regulatory enactments depends completely on the distinction between ‘local’ and ‘statewide.’ To articulate this distinction, the Colorado Supreme Court has relied on several criteria. Most prominent among them are tradition, extraterritorial effects, and the need for statewide uniformity.” (citation omitted)).

both” types of localities.<sup>216</sup> And an unmistakable tradition of local firearm regulation existed throughout this country prior to the weaponization of state preemption for partisan purposes in the 1980s.<sup>217</sup>

One compelling response to such a local concern analysis may be that guns (and the people bearing them) can travel from locality to locality in a way that farms and fracking sites cannot. In other words, nothing prevents bad actors from traveling to unregulated rural counties to make a purchase they could not make in more regulated cities. Therefore, firearms are not truly a local concern, but rather a state, regional, or even national concern.<sup>218</sup> But the significant variance in the use of firearms and the rates of gun-related crime in urban and rural areas, as previously discussed, counsels in favor of at least some moderate local tailoring not otherwise allowed by broad preemption laws.

In addition, the federal Constitution may provide space for constitutional home rule as well. The Supreme Court has suggested that other constitutional interests may limit state policymaking control over local governments, particularly when a local ordinance seeks to protect a constitutional right potentially violated by a contrary state enactment.<sup>219</sup> This suggestion would seem to apply with particular force when the constitutional right at issue adapts with the locality, like firearm regulation. Indeed, when considering both the old maxim that incorporated constitutional rights apply identically to all levels of government and the understanding that “geographic nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism,”<sup>220</sup> the Supreme Court’s suggestion of limited local control comes into clearer focus. These statements do not contradict one another but simply reflect that construction

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<sup>216</sup> Blocher, *supra* note 23, at 105 (discussing nationwide preemption, though this applies to statewide preemption as well).

<sup>217</sup> *Id.* at 133; *cf.* Diller, *supra* note 215, at 1068 (“Of the Colorado Supreme Court’s factors, tradition perhaps is the most suspect.”).

<sup>218</sup> See, e.g., Kyle Beachy, *State Says Zimmerman May Have Crossed State Lines to Buy a Gun in Indiana*, HEART OF ILL. ABC (Apr. 24, 2019, 5:45 PM), <https://hoiabc.com/2019/04/24/state-says-zimmerman-may-have-crossed-state-lines-to-buy-a-gun-in-indiana/> [<https://perma.cc/887S-CSG3>] (“[I]n Illinois a person needs a background check, registration, and waiting period before purchasing a gun from another person . . . [T]hose checks and balances don’t exist in Indiana . . . Illinois and Indiana have the second highest gun transfer rate . . . in the country.” (internal quotation marks omitted)).

<sup>219</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 629–31 (1996) (protecting Boulder’s antidiscrimination ordinance against Colorado’s state law which attempted to preempt the ordinance through an unconstitutional law singling out LGBTQ+ members); see also Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167–77 (offering a “localist” reading of *Romer* to justify constitutional home rule).

<sup>220</sup> Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133 (1999).

of constitutional rights through means–end balancing involves consideration of context-specific facts often interwoven with variances by locality. “[A] growing number of scholars have explored and celebrated the role of localism in constitutional law,”<sup>221</sup> noting specifically the locality’s role in the First Amendment’s “time, place, and manner” restrictions.<sup>222</sup> This normative tailoring of rights exists in Second Amendment doctrine as well, where certain restrictions on gun possession in “sensitive places” have been deemed “presumptively lawful.”<sup>223</sup>

The historical–categorical approach adopted by Justice Antonin Scalia in *Heller* provides further support for constitutional localism in Second Amendment doctrine, though lower federal courts have since opted overwhelmingly for the more familiar balancing test articulated in Justice Stephen Breyer’s dissent.<sup>224</sup> Under Justice Scalia’s historical–categorical approach, “the fact that the United States has a deeply rooted tradition of comparatively stringent urban gun control is an argument for treating contemporary urban gun control as, if not ‘presumptively lawful,’ at least meriting special deference.”<sup>225</sup> The same can be said in reverse. Given rural America’s deeply rooted lack of firearm regulation, owing to its historically robust gun culture, local tailoring of firearm restrictions should look different, or at least come from the popularly elected officials in those localities.

This local tailoring does not mean that states would fall victim to an unworkable patchwork of wildly divergent gun laws, with total bans in cities and complete deregulation just beyond the city limits. “[T]ailoring would operate only at the margins” because the Supreme Court has created several

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<sup>221</sup> See Blocher, *supra* note 23, at 88, 129.

<sup>222</sup> *Id.* at 129; see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006).

<sup>223</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008).

<sup>224</sup> See *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (adopting balancing test); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (same); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011) (same); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (same); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (same); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (same); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 715–26 (2007) (analyzing the “reasonable regulation standard” used by state courts). Compare *Heller*, 554 U.S. at 626–27 (Justice Scalia defining categories of permissible firearms regulation based on “historical tradition,” including “longstanding prohibitions on the possession of firearms by felons and the mentally ill” and “prohibit[ions] [on] the carrying of ‘dangerous and unusual weapons’”), with *id.* at 689 (Breyer, J., dissenting) (“I would simply adopt . . . an interest-balancing inquiry explicitly.”).

<sup>225</sup> Blocher, *supra* note 23, at 87 (quoting *Heller*, 554 U.S. at 627 n.26).

bright-line guideposts for permissible regulation.<sup>226</sup> For instance, after *Heller*, citywide handgun bans are likely always unconstitutional, while prohibitions on possession in “sensitive places” likely remain safe from constitutional challenge.<sup>227</sup> But local tailoring would allow for experimentation and adaptation of more nuanced regulations such as background checks or extreme risk laws, at least until the Supreme Court provides clarity on their validity.

In sum, a compelling case can be made for the local tailoring of gun regulations in Second Amendment doctrine. Justice Scalia’s historical approach supports a localism lens for gun laws as a matter of tradition. Justice Breyer’s means–end approach also supports local tailoring, as the “important interests” implicated by “gun-control regulation” require consideration of several factors, of which one should be the unique needs of the local jurisdictions at issue.<sup>228</sup>

Thus, a normative and jurisprudential case exists for the viability of Second Amendment Sanctuary resolutions as a permissible form of local regulation. But even if the recent partisan wave of “hyper preemption” prevents the widespread adoption of constitutional home rule for firearms, the passive nature of these sanctuary resolutions may create a second avenue for viability.<sup>229</sup> Most of these resolutions do not erect conflicting gun-control ordinances, but merely passively resist statewide enactments and require state officials to enforce state law. Thus, regardless of whether a locality has a state or federal constitutional right to home rule, there still exists the question of whether a locality can decline enforcement of superior state law or whether states can commandeer local officials to compel compliance. We turn to that issue now.

### III. SANCTUARIES AND COMMANDEERING

Local resistance to superior governmental authority predictably begins with a consideration of federalism principles. Although these principles “include[] relationships between the national government, state governments, and local governments, the legal frameworks for these

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<sup>226</sup> See *id.* at 129.

<sup>227</sup> See Joseph Blocher, *Bans*, 129 YALE L.J. 308, 356 (2019) (considering future possibilities for “laws that are today subject to per se invalidity, like handgun bans”); *Heller*, 554 U.S. at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of . . . firearms in sensitive places such as schools and government buildings . . .”).

<sup>228</sup> *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

<sup>229</sup> See Scharff, *supra* note 20, at 1476.

relationships differ dramatically.”<sup>230</sup> The United States Constitution grants to the federal government only those powers specifically enumerated to it, and even when the federal government acts within those powers, it may not compel a state or local government to enforce federal law.<sup>231</sup> Thus, although the federal government has the exclusive right to regulate immigration,<sup>232</sup> courts have consistently found that state and local governments have a Tenth Amendment right to be free from federal compulsion to enforce federal immigration law, or, put another way, a right to be free from “commandeering.”<sup>233</sup>

No similar right adheres to local governments to be free from state compulsion to enforce state law. Thus, at first blush, not only are states free to preempt local law, but they also are able to commandeer localities to enforce state or federal law. This commandeering may involve removing enforcement discretion traditionally afforded to local officials like sheriffs and prosecutors, as “anti-sanctuary” states like Texas and North Carolina have attempted in the immigration context.<sup>234</sup>

This Part asserts that a limited form of subfederal anticommandeering should insulate local entities from such state commandeering, at least when the local resistance remains entirely passive in nature and a superior body of law, like a federal statute or the United States Constitution, provides support for the resistance.

#### A. Local–Federal Anticommandeering

In *Printz v. United States*,<sup>235</sup> the Supreme Court recognized a state’s right to be free from federal compulsion under longstanding federalism

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<sup>230</sup> *Id.* at 1475 (footnote omitted); see also Gulasekaram et al., *supra* note 16, at 852.

<sup>231</sup> See Gulasekaram et al., *supra* note 16, at 852 (“[W]hile the Constitution gives the federal government broad authority to preempt state and local laws, especially with respect to immigration, the federalism structure of the United States also prohibits the federal government from commandeering states to implement federal policies.”).

<sup>232</sup> *Arizona v. United States*, 567 U.S. 387, 394–95, 400 (2012); Gulasekaram et al., *supra* note 16, at 851.

<sup>233</sup> See Gulasekaram et al., *supra* note 16, at 852.

<sup>234</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted) (overriding all municipal policies and practices that may limit federal immigration enforcement, including discretionary law enforcement practices); WBTW Web Staff, *Gov. Cooper Vetoes Bill Requiring Sheriffs to Cooperate with ICE*, WBTW (Aug. 20, 2019, 3:55 PM), <https://www.wbtv.com/2019/08/20/nc-house-passes-bill-requiring-sheriffs-cooperate-with-ice-bill-heads-gov-roy-cooper/> [<https://perma.cc/P8P8-FP4Z>] (explaining that North Carolina’s governor vetoed HB370, which would “authorize the removal of a sheriff from office for failing to comply with ICE detainers” because, according to a state sheriff, it would allow “the legislature to take away the authority of each duly elected Sheriff in North Carolina to make discretionary decisions in the best interest of his or her constituents”).

<sup>235</sup> 521 U.S. 898 (1997).

principles articulated in the Tenth Amendment.<sup>236</sup> Justice Scalia announced this anticommandeering principle, stating that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>237</sup> The Court made clear in a subsequent case that such coercion can take the form of threats to withhold federal funding as well as direct commands to act.<sup>238</sup> This “is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.”<sup>239</sup>

*Printz* marked a seminal victory for Tenth Amendment federalists and for the gun-rights movement, as it struck down provisions of the Brady Handgun Violence Prevention Act that required local police officers to conduct federal background checks prior to the sale or transfer of a handgun.<sup>240</sup> Thus, a direct federal command could be resisted on Tenth Amendment grounds by states, municipalities, and even individual local officers. For sanctuary-jurisdiction purposes, “the Court does not distinguish cities [or counties] from states when considering federalism objections to federal lawmaking . . . . [T]he Supreme Court does not draw a distinction between local and state for purposes of its commandeering and coercive spending doctrines,”<sup>241</sup> meaning that the federal government could similarly not commandeer a locality.

Dating as far back as 1996, immigrant sanctuary cities have asserted their Tenth Amendment right to resist federal immigration enforcement.<sup>242</sup>

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<sup>236</sup> *Id.* at 919, 933 (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).

<sup>237</sup> *Id.* at 935.

<sup>238</sup> See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012) (holding that the federal government cannot coerce states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place, “[o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer”).

<sup>239</sup> See *id.* at 578.

<sup>240</sup> *Printz*, 521 U.S. at 927–28 (rejecting the argument that short background checks consuming no “more than one-half hour of an officer’s time” is a permissible “federal intrusion upon state authority”). Since *Printz* and *Heller*, some states have passed legislation claiming a Tenth Amendment right to be exempt from federal firearm regulations, though these statutes more accurately attempt to define intrastate firearm activity beyond the reach of the federal government’s Commerce Clause power. See, e.g., KAN. STAT. ANN. § 50-1202 (2018) (declaring rights under the Second, Ninth, and Tenth Amendments to be free from federal firearm regulations); WYO. STAT. ANN. § 6-8-406(a)(v), (viii) (2018) (declaring that the people of Wyoming “have the sole and exclusive right of governing themselves” in all matters related to firearms unless the people of Wyoming “expressly delegate[] to the United States of America” that right).

<sup>241</sup> Schragger, *supra* note 19, at 1216–17. The petitioners in *Printz* were municipal officers—local sheriffs. 521 U.S. at 931 n.15.

<sup>242</sup> *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (explaining New York City’s contention that Congress is “forbid[ding] state and local government entities from controlling the use of

That year, Congress enacted legislation preventing state and local governments from issuing gag orders to their police officers regarding communication with federal authorities about an individual’s immigration status.<sup>243</sup> New York City challenged the law on Tenth Amendment grounds, but the Second Circuit upheld the law, explaining that “Congress ha[d] not compelled state and local governments to enact or administer any federal regulatory program.”<sup>244</sup> Rather than “affirmatively conscript[ing] states, localities, or their employees into the federal government’s service,” the statute merely prohibited states and cities from disallowing their officers to voluntarily assist with federal immigration functions.<sup>245</sup> Renewed litigation over the constitutionality of this statute is pending in several courts, with some early victories for sanctuary activists.<sup>246</sup>

Other courts have concluded that affirmative requests from federal immigration officials to assist with enforcement functions, whether through the honoring of a detainer request or more broadly through a contractual local–federal cooperation agreement, more commonly known as “287(g) agreements,” “must be deemed requests” because any other interpretation would render them unconstitutional under the Tenth Amendment.<sup>247</sup>

More recently, President Trump’s Executive Order on Immigration threatens sanctuary cities with a loss of federal funds if they do not cooperate with federal immigration officials.<sup>248</sup> The Order was challenged by sanctuary jurisdictions on numerous grounds, including Tenth Amendment

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information regarding the immigration status of individuals obtained in the course of their official business” in violation of the city’s Tenth Amendment rights).

<sup>243</sup> 8 U.S.C. § 1373 (preventing local governments from “in any way restrict[ing] any government entity or official from sending to, or receiving from, the [federal immigration enforcement agency] information regarding the . . . immigration status . . . of any individual”).

<sup>244</sup> *City of New York*, 179 F.3d at 35.

<sup>245</sup> *Id.* (“These sections do not directly compel states or localities to require or prohibit anything.”).

<sup>246</sup> *See, e.g., City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (finding 8 U.S.C. § 1373 unconstitutional under the Tenth Amendment); *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018) (questioning the constitutionality of an executive order enforcing 8 U.S.C. § 1373); *see also* Blackman, *supra* note 143, at 982 (arguing that “Section 1373(a) [i]s [f]acially [u]nconstitutional”).

<sup>247</sup> *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014); *see also* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 644–45 (2017) (noting that “the anti-commandeering principle and related state sovereignty rationales play leading roles in the scholarship defending subfederal sanctuary policies”).

<sup>248</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (asserting that “[s]anctuary jurisdictions . . . willfully violate Federal law in an attempt to shield aliens from removal” and “[e]nsur[ing] that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds”).

anticommandeering grounds.<sup>249</sup> The Ninth Circuit affirmed enjoining the Order in 2018 in *City and County of San Francisco v. Trump*,<sup>250</sup> but did not resolve the Tenth Amendment question.<sup>251</sup> Instead, the court found that such financial coercion through an executive order violated separation of powers because Congress holds “the power of the purse.”<sup>252</sup> Notably, the lower court also voided the Order for vagueness because it merely referenced “sanctuary cities” as targets of the Order without defining the term.<sup>253</sup> While the distinction between impermissible commandeering and permissible federal requests for local assistance has become increasingly blurred in the immigration-sanctuary context, local–federal anticommandeering nevertheless remains a hallmark of the federalism principles articulated in the Tenth Amendment.

### B. *Subfederal Commandeering*

These federalism challenges underlying immigrant sanctuary cities often act as proxies for “an ongoing struggle between state and local governments.”<sup>254</sup> But the protections afforded to “subordinate” governments against federal intervention do not exist at the local–state level.<sup>255</sup> “[W]hen state and municipal officials disagree, the Supreme Court’s doctrine and rhetoric of state sovereignty reinforce state power,” rendering localities vulnerable to state commandeering and intervention.<sup>256</sup> In the immigration-sanctuary context, the question arises as to whether states can commandeer localities to comply with federal immigration law when the federal government itself has no such authority.<sup>257</sup>

Early attempts by states to wield this plenary power over local sanctuary jurisdictions is happening now, as an increasing number of states pass anti-sanctuary legislation requiring local governments to cooperate with federal

<sup>249</sup> See, e.g., *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525 (N.D. Cal. 2017).

<sup>250</sup> 897 F.3d 1225 (9th Cir. 2018).

<sup>251</sup> *Id.* at 1235 n.5.

<sup>252</sup> *Id.* at 1231 (“The United States Constitution exclusively grants the power of the purse to Congress, not the President.”).

<sup>253</sup> *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1217 (N.D. Cal. 2017), *aff’d in part, vacated in part, remanded sub nom.* *City of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

<sup>254</sup> Scharff, *supra* note 20, at 1473 (citation omitted); see also Su, *supra* note 34, at 233.

<sup>255</sup> See generally *supra* notes 224–226 and accompanying text.

<sup>256</sup> Schragger, *supra* note 19, at 1217 (“The constitutional principle of state sovereignty lends itself to the view that municipalities are ‘mere instrumentalities’ of their states . . . . On this view, states can control, commandeer, or entirely eliminate their local governments.” (footnote omitted)).

<sup>257</sup> See *id.* at 1218–19 (arguing that states “cannot force cities to do what the state or federal governments cannot each do separately”).



immigration authorities.<sup>258</sup> In Texas, for example, SB4 “requires local officials to comply with federal immigration law on threat of civil and criminal liability.”<sup>259</sup> Such a law clearly would amount to commandeering if passed by Congress, but can this type of “subfederal commandeering” by state governments circumvent the Tenth Amendment protections from federal interference that run to local governments?

The answer to that question is perhaps. Professor Richard Schragger has argued:

If the protections of the Tenth Amendment run to the state of Texas, then one would assume that the state could waive this protection. However, if the Tenth Amendment runs to the people, then Texas cannot force its cities to do what the state or federal governments cannot each do separately. Local officials, in other words, could assert their own anticommandeering objection . . . .<sup>260</sup>

While subfederal commandeering statutes like SB4 coerce local governments to enforce *federal* law, thereby triggering possible Tenth Amendment challenges, then Second Amendment Sanctuaries, in contrast, seek protection from *state* law. Does a similar subfederal anticommandeering principle exist in the face of a state law command to enforce state law?

### C. Subfederal Anticommandeering?

Subfederal anticommandeering, if embraced by the courts, would represent a “novel” reframing of local–state power sharing.<sup>261</sup> But while “no state court has explicitly adopted a state anticommandeering doctrine in

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<sup>258</sup> See, e.g., Ryan Newton, *Kansas Among Several States Looking to Ban Sanctuary Cities*, KSN.COM (Feb. 2, 2016, 3:19 PM), <http://ksn.com/2016/02/02/kansas-among-several-states-looking-to-ban-sanctuary-cities/> [https://perma.cc/9M3B-UP4H] (discussing multiple proposed laws to either ban sanctuary cities or restrict funding to “cities that don’t cooperate with immigration officials”); H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (restricting funding to local jurisdictions that do not cooperate in enforcing federal immigration laws and providing for removal and prosecution of local government officers); see also Schragger, *supra* note 19, at 1180–81 (“Since November 2016, at least fifteen additional states have proposed legislation to preempt sanctuary cities. Of those states, four do not have any known sanctuary cities: Arkansas, Idaho, Oklahoma, and Tennessee.” (footnotes omitted)).

<sup>259</sup> Schragger, *supra* note 19, at 1218; see also TEX. GOV’T CODE ANN. §§ 752.053, .056 (West 2017) (“A local entity . . . may not: (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws . . . .”); TEX. PENAL CODE ANN. § 39.07 (West 2017) (classifying the failure of a jail administrator to comply with an immigration detainer request as a misdemeanor).

<sup>260</sup> Schragger, *supra* note 19, at 1218–19; see also *Bond v. United States*, 564 U.S. 211, 222 (2011) (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”).

<sup>261</sup> Schragger, *supra* note 19, at 1219 (“[But] the principle is sound if one assumes that the people act most immediately through their local governments.”).

name,” the principle may already exist in certain constitutional home-rule states.<sup>262</sup> Courts in a variety of contexts have held that home-rule states cannot direct local officials to take affirmative actions to implement statewide regulations.

For instance, in *State ex rel. Sprague v. City of St. Joseph*,<sup>263</sup> the Missouri Supreme Court invalidated a state mandate that local officials serve on a state-created board of examiners, finding that the mandate violated the state constitutional bar on the legislature “fixing the powers, duties or compensation of any municipal office.”<sup>264</sup> And in Ohio, where the state constitution broadly prohibits state “influence[] or control[]” over municipalities, the Ohio Supreme Court invalidated state attempts to regulate the organization and function of local police forces.<sup>265</sup> These decisions reflect an effort to give teeth to constitutional home-rule provisions, at least in circumstances where state enactments attempt directly to command actions from local officers.<sup>266</sup> Of course, these decisions setting state commandeering boundaries in home-rule states provide little comfort to Second Amendment Sanctuaries in Dillon’s Rule states.<sup>267</sup> Moreover, state mandates in both home-rule and Dillon’s Rule states requiring local officials to create specific regulatory agencies intrude far more directly on local autonomy than statewide regulations on firearms that do not explicitly command local officials to undertake implementation activities in furtherance of those

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<sup>262</sup> Gulasekaram et al., *supra* note 16, at 860.

<sup>263</sup> 549 S.W.2d 873 (Mo. 1977) (en banc).

<sup>264</sup> *Id.* at 875; *see also* *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791, 794 (Mo. 1968) (striking down state law requiring locality to create an arbitration board).

<sup>265</sup> *Lorain St. R.R. Co. v. Pub. Utils. Comm’n*, 148 N.E. 577, 580 (Ohio 1925) (Marshall, C.J., concurring); OHIO CONST. art. XVIII; *see also* *State ex rel. Lynch v. City of Cleveland*, 132 N.E.2d 118, 121 (Ohio 1956) (holding that a city is not subject to state law in how it selects its police chief); *Harsney v. Allen*, 113 N.E.2d 86, 88 (Ohio 1953) (“The organization and regulation of its police force, as well as its civil service functions, are within a municipality’s powers of local self-government.”).

<sup>266</sup> *But see* *State ex rel. Young v. Robinson*, 112 N.W. 269, 270 (Minn. 1907) (explaining that when state laws operate within a municipality, “the municipality and its officers are . . . subject to the command and control[] of the state government at all times”); *State ex rel. Burns v. Linn*, 153 P. 826, 831 (Okla. 1915) (holding that the State of Oklahoma may impose duties and penalties upon local officers).

<sup>267</sup> The number of states employing some version of Dillon’s Rule statewide varies between thirty-one and thirty-nine, depending on the criteria, while another eight states employ the rule to certain municipalities. Elijah Swiney, *John Forrest Dillon Goes to School: Dillon’s Rule in Tennessee Ten Years After Southern Constructors*, 79 TENN. L. REV. 103, 105–06 (2011); *Home Rule and Dillon’s Rule States*, NAT’L. LEAGUE OF CITIES, [https://db0nus869y26v.cloudfront.net/en/Home\\_rule\\_in\\_the\\_United\\_States](https://db0nus869y26v.cloudfront.net/en/Home_rule_in_the_United_States) [<https://perma.cc/V2GU-8W9Q>]; *see also* Jesse J. Richardson, Jr., Meghan Zimmerman Gough & Robert Puentes, *Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management*, BROOKINGS (Jan. 1, 2003), <https://www.brookings.edu/research/is-home-rule-the-answer-clarifying-the-influence-of-dillons-rule-on-growth-management/> [<https://perma.cc/9UNN-PRCR>] (citing similar statistics).

regulations. For example, enforcement of universal background checks legislation would only require expanding the use of existing agency machinery, and both assault weapons bans and extreme risk laws would only require enforcement through existing police and judicial agencies.<sup>268</sup> This type of expanded use of the existing local government apparatus seems far less intrusive than mandating the creation of a new board of examiners or law enforcement agency. Therefore, courts may not similarly find that these firearm regulations would rise to a similar level of unconstitutional intrusion on local activity.

However, there may be a second avenue for a broader anticommandeering doctrine, at least in circumstances where federal statutory or constitutional law limits state action. Courts have long “recognized that states do not exercise plenary power over their political subdivisions when federal law operates directly on those subdivisions.”<sup>269</sup> For example, the Supreme Court has held that states can neither interfere with federal funds granted to localities<sup>270</sup> nor be compelled to satisfy a federal judgment against a locality.<sup>271</sup> Likewise, localities appear immune from state gun-control regulations that conflict with federal statutes or the United States Constitution. But this immunity would stem not from a state’s improper commandeering of a locality, but rather from the state’s improper enactment of a regulation that conflicts with federal statutory law.

Further, a more nuanced subfederal anticommandeering principle may reside in the Supreme Court’s treatment of localities as independent entities when the interpretation of a constitutional right requires local tailoring. For example, in *Avery v. Midland County*,<sup>272</sup> the Court held that local governments must adhere to the “one person, one vote” principle in implementing constitutional voting protections.<sup>273</sup> And in *Milliken v. Bradley*,<sup>274</sup> the Court held that for federal constitutional purposes, the

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<sup>268</sup> Cf. Tabnie Dozier, *Nevada Sheriffs React to Background Check Act*, KOLO TV (Mar. 14, 2019, 12:45 AM), <https://www.kolotv.com/content/news/Nevada-sheriffs-reacting-to-background-check-act-507130021.html> [<https://perma.cc/7YRE-8C88>] (quoting Douglas County, Nevada sheriff who claimed enforcement of universal background checks laws is too resource intensive: “I would have to create some sort of unit in my department that just does this so you’d have to go out and find someone that attempts to sell and then you’ve caught them.”).

<sup>269</sup> Schragger, *supra* note 19, at 1219 (articulating the existence of a “limited ‘shadow doctrine’ of local-government status that could be invoked to make out a larger anti-commandeering claim” (citation omitted)).

<sup>270</sup> *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257–58 (1985).

<sup>271</sup> *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287–90 (1883).

<sup>272</sup> 390 U.S. 474 (1968).

<sup>273</sup> *See id.* at 480.

<sup>274</sup> 418 U.S. 717 (1974).

relevant boundary lines for desegregation are within local school districts and not the state as a whole.<sup>275</sup>

These cases are instructive for the Second Amendment Sanctuary context. In both *Avery* and *Milliken*, the Court articulated not only that a constitutional right applies uniformly and with equal force across the country, but also that the doctrine through which that right is interpreted requires local tailoring. All states must desegregate schools under the Fourteenth Amendment, but the measurement of adequate desegregation efforts that are necessary must reflect the individual characteristics of local school districts themselves. Likewise, all states and their local subdivisions must adhere to federal “one person, one vote” guarantees by locally tailoring redistricting efforts to prevent dilution. Similarly, certain firearm restrictions may run afoul of the “core” Second Amendment right of self-defense,<sup>276</sup> but only in certain locations or geographies tailored according to their local needs. Much like how Second Amendment doctrine allows firearm prohibitions in “sensitive places,” a broader argument can be made that such context-specific constitutional line-drawing for firearms regulation should similarly reflect the urban–rural divide driving those tailored regulations.<sup>277</sup>

On that logic, localities could make a federal argument for subfederal anticommandeering by claiming that their passive resistance to a state enactment is required by the United States Constitution. While a statewide gun-control measure might not violate the Second Amendment per se, its application to a particular municipality might do so because it fails to be sufficiently tailored to the locality’s needs. Short of affirmatively erecting contrary regulations subject to preemption (as discussed in Part II) or challenging in court the legality of the statewide enactment (subject to standing concerns discussed in Part IV), these localities could assert the passive right to resist as a form of anticommandeering, irrespective of the existence of a state home rule.

Whether such an argument can secure the viability of Second Amendment Sanctuaries depends on the constitutional case for such local tailoring. The next Part explores this constitutional issue as well as the

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<sup>275</sup> *Id.* at 744–45.

<sup>276</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628, 630 (2008) (finding that a regulation requiring “any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable” “makes it impossible for citizens to use [arms] for the core lawful purpose of self-defense and is hence unconstitutional”); *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018) (“While the Amendment’s guarantee of a right to ‘keep’ arms effectuates the core purpose of self-defense within the home, the separate right to ‘bear’ arms protects that core purpose outside the home.”).

<sup>277</sup> *See Blocher*, *supra* note 23, at 83 (“Second Amendment doctrine is largely becoming a line-drawing exercise, as courts try to determine which ‘Arms’ are constitutionally protected, which ‘people’ are permitted to keep and bear them, and in which ways those arms and people can be regulated.”).

question of which branch of government has the authority to decide how to tailor to local needs.

#### IV. SANCTUARIES AND CONSTITUTIONAL INTERPRETATION

Unlike immigrant-sanctuary resolutions that resist federal policy, or local environmental ordinances that provide alternatives to state or federal policy, Second Amendment Sanctuary resolutions claim special justification to resist state law that violates fundamental *rights*. Many Second Amendment Sanctuary resolutions reference *Heller* and *McDonald* as justifications for their resistance, proclaiming that any statewide restriction on gun ownership violates the rulings in these cases.<sup>278</sup>

As a consequence, many of these gun sanctuary jurisdictions claim a right, if not a duty, to ignore gun-control measures they deem unconstitutional.<sup>279</sup> In Virginia, for example, several county resolutions expressly state that “constitutional officers,” such as the commonwealth’s attorneys and police officers, must take an oath to uphold the U.S. Constitution and not enforce laws contrary to it.<sup>280</sup> In New Mexico, more than two dozen local sheriffs signed a letter defending their county’s sanctuary resolutions as mandated by the oath they took when ascending to their respective offices to uphold only constitutional laws.<sup>281</sup>

These resolutions, many of which “oppose any infringement on the right of law-abiding citizens to keep and bear arms,” suggest a near absolutist position on the Second Amendment belied by *Heller* itself.<sup>282</sup> At a minimum,

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<sup>278</sup> See, e.g., Res. of the Cumberland Cnty. Bd. of Supervisors Declaring Cumberland Cnty. as a “Second Amendment Sanctuary” (Va. 2019), [https://cumberlandcounty.virginia.gov/sites/default/files/2019-12/121019.BOS\\_Addendum.packet\\_complete.pdf](https://cumberlandcounty.virginia.gov/sites/default/files/2019-12/121019.BOS_Addendum.packet_complete.pdf) [<https://perma.cc/T7HS-Y7HW>].

<sup>279</sup> See, e.g., *id.* (reserving right “to direct the law enforcement and employees . . . to not enforce any unconstitutional” gun regulation); Gregory Gwyn-Williams, Jr., *340 Sheriffs Refuse to Enforce Unconstitutional Gun Control Laws*, CNS NEWS (Mar. 19, 2013, 9:57 AM), <https://www.cnsnews.com/blog/gregory-gwyn-williams-jr/340-sheriffs-refuse-enforce-unconstitutional-gun-control-laws> [<https://perma.cc/RC6J-4JDR>].

<sup>280</sup> See Toscano, *supra* note 5.

<sup>281</sup> *Defiant: Dozens of New Mexico Sheriffs Take Stance Against State’s New Gun Control Legislation*, NAT’L SENTINEL (Feb. 10, 2019), <https://thenationalsentinel.com/2019/02/10/defiant-dozens-of-new-mexico-sheriffs-take-stance-against-states-new-gun-control-legislation/> [<https://perma.cc/AG57-9ETX>] (quoting Lea County Sheriff Corey Helton, who explained, “I’m proud to say I’m a constitutional sheriff and I’m just not going to enforce an unconstitutional law . . . . My oath prevents me from doing that.” (internal quotation marks omitted)).

<sup>282</sup> See, e.g., Res. of the Cumberland Cnty. Bd. of Supervisors, *supra* note 278; see also *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”).

they appear to assume that background checks, assault weapons bans, and extreme risk laws violate the Second Amendment, when those legal issues are in reality far from settled.

The constitutional dimension of these resolutions raises two important questions: are the proposed regulations unconstitutional, and who has the authority to make that determination?

#### A. *The Second Amendment in “Flux”*

While it is beyond the scope of this Article to settle the constitutional validity or invalidity of background checks, extreme risk laws, and assault weapons bans, it is important to note that Second Amendment doctrine remains “in a state of flux,” relatively unconstrained by Supreme Court precedent.<sup>283</sup> This comparative blank slate in Second Amendment doctrine leaves much room for debate over regulations operating at the margins of core Second Amendment guarantees, like the disagreements giving rise to the current Second Amendment Sanctuary movement.

Underlying this state of flux is the relative newness of Second Amendment doctrine, as *Heller* is only twelve years old. “Although Second Amendment doctrine is beginning to solidify in the lower courts, it remains open to a range of descriptive and normative accounts and is the subject of intense disagreement.”<sup>284</sup> Given the complexity of the *Heller* decision itself, courts have since disagreed over foundational questions of Second Amendment interpretation, such as what doctrinal test to apply,<sup>285</sup> whether and to what extent history is relevant,<sup>286</sup> whether a local dimension exists in

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<sup>283</sup> Noah, *supra* note 147, at 189, 193; *see also* Blocher, *supra* note 23, at 129; Blocher & Miller, *supra* note 35, at 324 (“[I]n part because it is so new, . . . the right to keep and bear arms presents a unique opportunity to explore . . . broad constitutional issues.”).

<sup>284</sup> Blocher, *supra* note 227, at 341–42 (footnotes omitted).

<sup>285</sup> *See, e.g.*, *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1273, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (contrasting *Heller*’s “text, history, and tradition” test with the alternative intermediate and strict scrutiny balancing tests preferred by the *Heller* dissent and most lower courts).

<sup>286</sup> *See Heller*, 554 U.S. at 605 (defending use of eighteenth- and early-nineteenth-century sources in considering the scope of the Second Amendment); *United States v. Rene E.*, 583 F.3d 8, 14–15 (1st Cir. 2009) (considering evidence from a more recent timeframe); *see also* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 7–11 (2012) (cataloguing conflicting historical accounts of the right to bear arms, dating back to the Norman Conquest, and the use of these accounts in court).

Second Amendment rights ordering,<sup>287</sup> and whether “bans” on certain classes of arms can ever survive constitutional scrutiny.<sup>288</sup>

Virtually all courts since *Heller* considering Second Amendment challenges have examined whether to employ Justice Scalia’s historical–categorical approach, as explicated in his majority opinion, or Justice Breyer’s balancing test, as articulated in his dissent.<sup>289</sup> Most scholars and lower courts have adopted Justice Breyer’s balancing test approach, which is akin to the standards of scrutiny found in other areas of constitutional law, namely the familiar “coverage-protection” two-step analysis.<sup>290</sup> “Coverage refers to the threshold question of whether a particular person, activity, or thing triggers constitutional analysis at all.”<sup>291</sup> If constitutional analysis is triggered, the court then engages in a “protection” means–end analysis to determine if the end purpose of a particular government action is sufficiently important and is accomplished through sufficiently narrow means.<sup>292</sup> In the Second Amendment context, this protection test has resembled intermediate scrutiny in function, if not in name.<sup>293</sup> But even when the court can agree on invocation of this test, significant disagreement arises over how much to

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<sup>287</sup> See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650, 669 (D.C. Cir. 2017) (“Regulations restricting public carrying are all the more compelling in a geographically small but heavily populated urban area like the District.”).

<sup>288</sup> See *Heller II*, 670 F.3d at 1260 (upholding bans on semiautomatic rifles as a constitutional ban on “dangerous and unusual weapons,” as opposed to weapons “typically possessed by law-abiding citizens for lawful purposes”); *id.* at 1285 (Kavanaugh, J., dissenting) (arguing that applying intermediate scrutiny “to a ban on a class of arms” is inappropriate because a “ban on a class of arms is not an ‘incidental’ regulation[,] . . . [but] is equivalent to a ban on a category of speech”); Blocher, *supra* note 227, at 313 (observing that then-Judge Kavanaugh’s argument would render bans on firearms per se invalid “even if they would satisfy strict scrutiny, presenting the inverse of the more common claim that certain weapons are entirely unprotected by the Second Amendment”).

<sup>289</sup> 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, 1455, 1490–92 (2018) (collecting data on nearly 1,000 post-*Heller* cases and noting how courts often discuss the historical versus means–end tests).

<sup>290</sup> *Id.* at 1491 tbl.12, 1492 tbl.13 (finding that nearly half of all post-*Heller* opinions explicitly employ the means–ends test, while 16% discuss historical sources).

<sup>291</sup> Blocher, *supra* note 227, at 319–20.

<sup>292</sup> See, e.g., *United States v. Hosford*, 82 F. Supp. 3d 660, 664 (D. Md. 2015) (“If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.” (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010))).

<sup>293</sup> See *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 691, 692 & n.12 (6th Cir. 2016) (concluding that intermediate scrutiny applied to a federal firearm prohibition directed at an involuntarily committed individual, but noting that strict scrutiny might be appropriate in some circumstances); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (“[W]e conclude that the appropriate level of traditional means-end scrutiny to apply would be intermediate scrutiny.”); *Bauer v. Becerra*, 858 F.3d 1216, 1230 (9th Cir. 2017) (noting that the court has “repeatedly applied intermediate scrutiny in cases where we have reached this step”—step two of the two-part test).

defer to history or tradition, how to define the boundaries of the rights implicated, and whether this means–end analysis can ever justify a “ban” on an entire class of arms.<sup>294</sup> Moreover, a substantial minority of courts contend that this balancing test is inappropriate, given that the majority opinion in *Heller* used a historical–categorical analysis.<sup>295</sup>

While “assault weapons” bans, generally referring to prohibitions against the purchase or sale of semiautomatic rifles,<sup>296</sup> have generated the greatest fault line in this embryonic doctrinal landscape, background checks and extreme risk laws have also prompted intense constitutional debate in a relative precedential vacuum. Compelling arguments can be made on either side under either doctrinal test. As *Heller* made clear, the history and tradition of the Second Amendment excluded convicted felons from the class of “persons” with a right to keep and bear arms, and lower courts employing a means–end test have almost uniformly found prohibitions on felons possessing firearms to survive intermediate scrutiny.<sup>297</sup> But both background checks and extreme risk laws contemplate denying firearm possession to at least some individuals who are not criminal offenders.<sup>298</sup> Thus, the history and tradition of denying felons gun-possession rights does not definitively save these laws. Yet, a court employing a means–end analysis certainly could

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<sup>294</sup> See, e.g., *Binderup v. Att’y Gen.*, 836 F.3d 336, 363 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments) (finding that when a regulation “*entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate once it has been determined that the challenger’s circumstances distinguish him from the historical justifications supporting the regulation”).

<sup>295</sup> While Professors Ruben and Blocher characterize this percentage as insubstantial, I have a different view. The fact that one of every six lower court opinions applying *Heller*—out of nearly 1,000 opinions—expressly reject traditional means–end scrutiny suggests a larger nationwide judicial disagreement over Second Amendment jurisprudence not resolved by *Heller* and *McDonald*. See Ruben & Blocher, *supra* note 289, at 1492 (noting that as many as 16% of lower courts apply the historical–categorical approach); see also *United States v. McGinnis*, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, J., concurring) (“While our opinion today dutifully applies our court’s two-step framework for post-*Heller* Second Amendment challenges . . . we should retire this framework in favor of an approach focused on the Second Amendment’s text and history.”); *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 338 (5th Cir. 2013) (Jones, J., dissenting) (“[W]e should presuppose [based on *Heller*’s analogy to First Amendment rights] that the fundamental right to keep and bear arms is not itself subject to interest balancing.”).

<sup>296</sup> E. Gregory Wallace, “*Assault Weapon*” Myths, 43 S. ILL. U. L.J. 193, 193–94 (2018) (defining assault weapons bans as those laws that “typically criminalize possession or transfer of semiautomatic rifles with detachable magazines and at least one specified feature,” but noting the lack of a “generally agreed-upon definition of ‘assault weapon,’” and the faulty reasoning used by some legislators in defining weapons by “looks”).

<sup>297</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); Ruben & Blocher, *supra* note 289, at 1481 (cataloguing “273 challenges to felon-in-possession statutes,” which “were rejected 99 percent of [the] time and enjoyed no success at the federal appellate level during [the] study period”).

<sup>298</sup> See *supra* notes 59–79 and accompanying text.



conclude that these laws are narrowly tailored enough to satisfy the important governmental interest of keeping lethal weapons out of the hands of spousal abusers or the mentally ill.<sup>299</sup> Accordingly, the constitutional answer to what the Second Amendment allows and disallows, and even the test used to arrive at that answer, is far from settled.

This incredibly truncated discussion of the current Second Amendment landscape is not designed to answer any of these questions, but merely to highlight how new and unsettled the constitutional landscape remains. It is within this context that county administrators, sheriffs, and local prosecutors have announced a refusal to enforce laws they deem violate the Second Amendment. But are these municipal officers, rather than courts, the appropriate entities to be tasked with determining such difficult and unsettled legal questions?

### B. *First Impression Departmentalism*

So, who is up to the task? Many sanctuary jurisdictions claim that locally elected “constitutional officers” like sheriffs and prosecutors have both the authority and duty to assume this constitutional interpretation responsibility.<sup>300</sup> Critics respond that courts have the sole and final say over “what the law is,”<sup>301</sup> articulating the dominant view of judicial supremacy that “the Supreme Court simply is the one and only boss of the country when it comes to deciding the content and bearing of constitutional law.”<sup>302</sup> This principle, forcefully advanced by the Warren Court and arguably present in *Marbury v. Madison*,<sup>303</sup> views the “federal judiciary [as] supreme in the exposition of the law of the Constitution,” making its decisions the incontrovertible “supreme law of the land.”<sup>304</sup>

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<sup>299</sup> See, e.g., *Hope v. State*, 133 A.3d 519, 524 (Conn. App. Ct. 2016) (finding Connecticut ERPO statute regulating mentally ill gun possession did not implicate the Second Amendment); *Comstock v. Comstock*, 780 S.E.2d 183, 184 (N.C. App. Ct. 2015) (upholding issuance of domestic violence protection order remedy “prohibit[ing] Defendant from possessing or purchasing a firearm”).

<sup>300</sup> See *Toscano*, *supra* note 5.

<sup>301</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>302</sup> Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 600 (2003); see also Kenji Yoshino, *Restrained Ambition in Constitutional Interpretation*, 45 WILLAMETTE L. REV. 557, 557, 562 (2009) (“The question of who may interpret the Constitution is a question of separation of powers.”).

<sup>303</sup> 5 U.S. (1 Cranch) at 177.

<sup>304</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 868 (1992) (plurality opinion) (“[The American people’s] belief in themselves [as] a Nation of people who aspire to live according to the rule of law . . . is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”).

Judicial supremacy has normative appeal. As Professors Larry Alexander and Frederick Schauer have explained, law “provides the benefits of authoritative settlement” and coordination of social behavior.<sup>305</sup> These advantages “provide reasons for following laws even when one disagrees with the content of those laws.”<sup>306</sup> Further, stare decisis provides a convenient vehicle through which to coordinate behavior around a settled view, thereby preventing an indeterminate state of legal order.<sup>307</sup>

Early critics of Second Amendment Sanctuaries claim they violate this well-settled principle of judicial supremacy in favor of the competing approach of departmentalism.<sup>308</sup> The theory of departmentalism comes in many forms.<sup>309</sup> But the “Lincoln-Meese” model—the model most commonly advanced as an alternative to judicial supremacy and most closely aligned with the text of gun-sanctuary resolutions—posits that nonjudicial officials in other branches of government (everyone from the Attorney General of the United States to a city comptroller) “are not bound by Supreme Court opinions themselves, and these officials do not violate their oath to the Constitution by following the Constitution as they see it rather than the Constitution as the Court sees it.”<sup>310</sup>

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<sup>305</sup> Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–72 (1997) [hereinafter *Constitutional Interpretation*]; see also Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455, 466 (2000).

<sup>306</sup> Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1719 (2017) (citing Alexander & Schauer, *Constitutional Interpretation*, *supra* note 305, at 1371–72).

<sup>307</sup> See Alexander & Schauer, *Constitutional Interpretation*, *supra* note 305, at 1373–74 (asserting that the value of precedent within the judiciary translates to respect for precedent outside it).

<sup>308</sup> Fallon, *supra* note 35, at 490 (observing that “departmentalism not only strikes many of us as terrifying, but also contravenes intuitions about the requirements of the rule of law”); see also Toscano, *supra* note 5.

<sup>309</sup> See Walsh, *supra* note 306, at 1721 & n.44, 1722 (advancing a theory of “judicial departmentalism,” separate from the theories of divided departmentalism and overlapping departmentalism). “Divided departmentalism” allows each branch of government to interpret the constitutional provisions governing that branch. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1610 (2005) (book review) (“For example . . . the judicial branch has interpretive authority over Article III . . . the legislative branch has interpretive authority over Article I . . . and the executive branch has interpretive authority over Article II . . .”). “Overlapping departmentalism,” also known as Lincoln-Meese departmentalism, grants each branch “final interpretive authority over all constitutional questions decided *within the branch*.” *Id.* at 1613. Second Amendment Sanctuaries functionally adopt overlapping departmentalism, claiming a right for the local executive branch to decline enforcement of laws it believes are unconstitutional.

<sup>310</sup> Walsh, *supra* note 306, at 1721; see also Alexander & Schauer, *Constitutional Interpretation*, *supra* note 305, at 1381 n.90 (arguing that “there is nothing more anti-textual about expecting nonjudicial officials to show the same deference” to Supreme Court judgments as lower court judges do).

Departmentalism of this stripe is having a bit of a scholarly resurgence.<sup>311</sup> Judicial supremacists view this resurgence as “terrifying” because it has a destabilizing effect avoided by judicial supremacy.<sup>312</sup> If a Supreme Court holding interprets the Constitution in a way that the other branches disagree with, “Congress might continue passing laws of the type that the Court has held unconstitutional.”<sup>313</sup> The antidote to this destabilizing effect may be vindication through a lawsuit, but “it is child’s play to get almost all constitutional questions about which there is interbranch disagreement into the form of a lawsuit fit for judicial resolution.”<sup>314</sup> Not only do judicial limiting doctrines like standing and ripeness stand in the way of individual challenges to potentially unconstitutional laws, but the transaction costs of litigation simply prove too much for many otherwise worthy litigants. Moreover, to what end would such litigation be aimed when Congress could simply respond to its loss in court with identical renewed legislation?

These normative arguments favoring judicial supremacy, while compelling, are misplaced at this stage of the Second Amendment Sanctuary saga. Judicial supremacy can only have a settlement and coordination function if a clear judicial pronouncement has in fact settled the issue. *Heller* settled the issue of whether individuals have a Second Amendment right to keep and bear arms for personal use unconnected to a militia,<sup>315</sup> and *McDonald* settled the issue of whether that right applies against the states.<sup>316</sup> These decisions also presumptively settled other broad Second Amendment

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<sup>311</sup> See Fallon, *supra* note 35, at 493 (advancing a mixed form of judicial supremacy and “popular constitutionalism” that provides greater flexibility for nonjudicial officials); Matthew Steilen, *Collaborative Departmentalism*, 61 BUFF. L. REV. 345, 350–52 (2013) (arguing for “moderate departmentalism”); Walsh, *supra* note 306, at 1715. More recently, Judge Frank Easterbrook of the Seventh Circuit Court of Appeals appeared to implicitly endorse departmentalism in *Baez-Sanchez v. Barr*: “A judicial decision does not require the Executive Branch to abandon its views about what the law provides . . . . The Attorney General . . . [is] free to maintain, in some other case, that our decision is mistaken . . . .” 947 F.3d 1033, 1036 (7th Cir. 2020); see also Howard Wasserman, *Judge Easterbrook Does Judicial Departmentalism*, PRAWFS BLAWG (Jan. 25, 2020, 10:31 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/01/judge-easterbrook-does-judicial-departmentalism.html> [<https://perma.cc/6TW4-3KWU>] (discussing Judge Easterbrook’s commentary on judicial departmentalism in the recent Seventh Circuit decision, *Baez-Sanchez v. Barr*).

<sup>312</sup> Fallon, *supra* note 35, at 490.

<sup>313</sup> Walsh, *supra* note 306, at 1721 (quoting Alexander & Solum, *supra* note 309, at 1614).

<sup>314</sup> Alexander & Solum, *supra* note 309, at 1614; see also Yoshino, *supra* note 302, at 557 (cautioning against the “unrestrained ambition” model where the political branches try to stake out “as much interpretive power as possible,” when the judicial branch follows the “restrained ambition” model with doctrines such as standing, ripeness, mootness, and the case-or-controversy requirement).

<sup>315</sup> *District of Columbia v. Heller*, 554 U.S. 570, 631–32 (2008) (recognizing a historical argument for the Second Amendment right “to keep and bear arms for defense of the home”).

<sup>316</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

questions, including the unconstitutionality of absolute bans on handgun possession<sup>317</sup> and the constitutionality of bans on firearm possession for felons.<sup>318</sup> But these principles set only the broadest outlines of the scope of Second Amendment doctrine, leaving significant constitutional issues unresolved by the judiciary.

This lack of clarity is unsurprising. Few Second Amendment cases came to the Court prior to 2008, and only two have come to the Court since that time.<sup>319</sup> Thus, any instability created by interbranch disagreement over the scope of Second Amendment rights comes not from rogue departmentalist executives ignoring the supreme commands of courts, but rather from coordinate branches interpreting the Constitution in a vacuum created by judicial silence. To be fair, nearly 1,000 lower court decisions since *Heller* are slowly developing the contours of Second Amendment doctrine.<sup>320</sup> But virtually no judicial guidance on extreme risk laws exist to guide legislators or executives rightfully concerned with their constitutional duties.<sup>321</sup>

The result is what I call “first impression departmentalism,” of which sanctuary resolutions are an example. Various state legislatures passing or proposing extreme risk laws presumably believe in their resolutions’ constitutional soundness. However, other constitutional officers, including local sheriffs, view the constitutional issue differently. Neither constitutional interpretation can trump the other as a matter of constitutional law, at least until the issue is clearly resolved by the judiciary. Until then, the coequal political branches share the power and duty to define the contours of constitutional doctrine. The question then returns to whether one branch or level of government can trump the other as a matter of legislative or enforcement power, returning the issue to one of intrastate federalism.

Local constitutional officers retain another advantage in their quest to interpret the contours of Second Amendment doctrine: discretion. Prosecutors and sheriffs wield enormous discretion in carrying out their

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<sup>317</sup> *Heller*, 554 U.S. at 628 (invalidating the District of Columbia’s handgun ban as an impermissible “prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose” of self-defense).

<sup>318</sup> *Id.* at 626.

<sup>319</sup> *McDonald*, 561 U.S. 742 (2010); *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (asking whether ban on transportation of handguns outside New York City limits violates the Second Amendment and finding the question mooted by the city’s amended licensing scheme).

<sup>320</sup> See generally Ruben & Blocher, *supra* note 289 (reporting results and content of more than 1,000 post-*Heller* Second Amendment challenges).

<sup>321</sup> See *supra* sources cited note 74.

duties, and some may use that discretion to decline to arrest or prosecute in the name of the Constitution.<sup>322</sup> In defending his jurisdiction's Second Amendment Sanctuary resolution, Powhatan County, Virginia, Sheriff Brad Nunnally acknowledged that he does not "decide on the law. But . . . discretion is the hallmark of law enforcement[,] . . . [including the] discretion I have to resist any Second Amendment changes that are apparently unconstitutional on their face."<sup>323</sup> Whether such local discretion can be preempted by the state depends on the contours of subfederal anticommandeering doctrine, which local officials may wish to weaponize should they bring an impact-litigation claim.

### C. Impact-Litigation Localism

As an alternative to engaging in passive constitutional resistance through local enforcement discretion, "local authority can be exercised in the form of constitutional litigation itself."<sup>324</sup> Local jurisdictions can "represent their constituents' constitutional interests directly" through litigation "or assert the [locality's] own constitutional authority to protect."<sup>325</sup> This type of impact-litigation localism allows localities to seek judicial guidance on either the substantive constitutional contours of undesirable superior government regulation or the structural ability of localities to resist.

The first type of litigation seeks to protect the federal constitutional rights of local citizens against statewide action. Most prominently, the City Attorney of San Francisco brought several legal challenges on federal equal protection grounds challenging Proposition 8, a statewide referendum redefining marriage under the California constitution as between one man and one woman.<sup>326</sup> One could envision a similar action brought by a locality

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<sup>322</sup> See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 407–08 (1992) ("The prosecutor carries out his charging function independent from the judiciary. A prosecutor cannot be compelled to bring charges, or to terminate them." (footnotes omitted)).

<sup>323</sup> Laura McFarland, *Constitutional Officers Address Logistics of Second Amendment Sanctuary Designation*, RICH. TIMES-DISPATCH (Jan. 6, 2020), [https://www.richmond.com/news/local/central-virginia/powhatan/powhatan-todaytoday/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article\\_bfedeb2a-30a7-11ea-bfde-3b66878ad625.html](https://www.richmond.com/news/local/central-virginia/powhatan/powhatan-todaytoday/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article_bfedeb2a-30a7-11ea-bfde-3b66878ad625.html) [<https://perma.cc/ZBC2-K6Y6>] ("If the attorney (general's) office or the governor's office thinks they are going to remove discretion from my job, it is a mistake. This is how the system works.").

<sup>324</sup> Schragger, *supra* note 19, at 1222.

<sup>325</sup> *Id.*

<sup>326</sup> For a background of the impact litigation around Proposition 8, see generally Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010). See also Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012) (San Francisco Deputy City and County Attorney arguing for greater local involvement in constitutional impact litigation); cf. *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (authorizing official proponents of

on behalf of its citizens to protect their Second Amendment rights against a purportedly unconstitutional statewide law.

But these types of representative actions suffer from standing issues in most states. The San Francisco City Attorney's efforts in support of same-sex marriage were easier to maintain because California grants cities "standing to bring a wide range of actions on behalf of their residents."<sup>327</sup> Most states and the federal government deny cities "associational standing," standing granted to states and associations to assert claims in federal court on behalf of their constituents, to assert representative claims.<sup>328</sup> This denial ignores that many metropolitan areas exert far greater protective control, influence, and innovative capacity than many states, who have unquestioned standing to sue on behalf of their residents.<sup>329</sup> Denial of standing in this context also becomes more difficult to justify doctrinally, as courts grant "area-focused nonprofit corporations" associational standing when cities arguably could protect the representative interests of their citizens more effectively.<sup>330</sup> Nevertheless, such proactive litigation faces an uphill battle due to standing issues.

Alternatively, localities can bring structural litigation. These claims assert that the "withdrawal of local authority is itself a structural component

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Proposition 8 to defend the voter initiative against postelection challenge when state and local government officials declined to do so).

<sup>327</sup> Morris, *supra* note 326; *see also id.* at 33 & n.196 (2012).

<sup>328</sup> *See* Kaitin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 62 (2014) ("Without standing to litigate on residents' behalf, many cities strain to identify harm to their own interests in order to bring a suit, only to find their efforts blocked by claims that the offensive conduct is too remote from the city's injury and the connection between the two is too tenuous."); *see also* Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 389–90 (2006) (describing the "quagmire" of trying to determine city standing in state and federal courts).

<sup>329</sup> *See* Caruso, *supra* note 328, at 63 (explaining that city residents "have many of the 'indicia of membership'" justifying standing for states and private associations, and that "cities as natural information aggregators may be uniquely suited to effectively press" constitutional claims); *see also* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1253 (2018) (observing that cities, unlike states, do not have recognized "parens patriae" standing to bring "mass-tort style, public interest litigation," although "[t]o many observers and scholars, it seems like cities should *of course* have" such powers); Barron, *supra* note 222, at 2243 ("Cities . . . plainly have a 'quasi-sovereign' interest in protecting the well-being of their residents."); Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1537 (2019) (noting that the largest twenty metropolitan regions "account for almost fifty-two percent of total U.S. GDP").

<sup>330</sup> *See* Caruso, *supra* note 328, at 63, 78, 79, 89 (noting several benefits to local government standing over nonprofit corporation standing, including great constituent "sway" over an elected city attorney, the ability of city suits to "make a greater local 'media splash,'" and local governments' "unique expertise and . . . broader perspective than more narrowly focused private associations").

of the constitutional injury.”<sup>331</sup> The most prominent examples of this litigation include equal protection challenges to statewide preemption of local antidiscrimination ordinances<sup>332</sup> and challenges to local minimum-wage raises in majority-Black cities by a majority-white legislature in a majority-white state.<sup>333</sup> Localities in those cases did not argue that the state had no authority to preempt local law, but rather that it did so for unconstitutional, animus-driven reasons.<sup>334</sup> It appears unlikely that such an argument would work in defense of Second Amendment Sanctuaries. While gun-rights activists regularly claim discrimination from “anti-gun” politicians and decry the Second Amendment’s “second-class treatment,”<sup>335</sup> “firearm owners” is not a constitutionally protected class triggering heightened scrutiny of gun regulations.<sup>336</sup> Nor do any of the disfavored gun

<sup>331</sup> Schragger, *supra* note 19, at 1223.

<sup>332</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 623–24, 635–36 (1996) (invalidating an amendment to Colorado’s state constitution prohibiting localities from passing antidiscrimination ordinances to protect gay, lesbian, and bisexual members because it singled out a disfavored group for no rational reason); cf. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 625–27, 644–45, 654 (M.D.N.C. 2016) (denying injunctive relief on equal protection grounds against North Carolina’s “bathroom bill,” which preempted Charlotte’s antidiscrimination ordinance protecting transgendered persons, in part because the statute did not specifically target pro-LGBTQ+ ordinances for repeal, but granting injunctive relief for the individual plaintiffs on Title IX grounds).

<sup>333</sup> See *Federal Court Reinstates Suit over Alabama’s Racially Discriminatory Wage Law*, EQUAL JUST. INITIATIVE (Aug. 6, 2018), <https://eji.org/news/federal-court-reinstates-alabama-suit-racially-discriminatory-wage-law/> [<https://perma.cc/Y63V-6KRF>] (summarizing litigation resulting from an Alabama state law establishing uniform minimum wage, which was proposed in direct response to the majority-Black city of Birmingham’s minimum-wage hike and passed along racial lines).

<sup>334</sup> See, e.g., *Romer*, 517 U.S. at 632 (noting that “the amendment seems inexplicable by anything but animus toward the class it affects” because of its “peculiar property of imposing a broad and undifferentiated disability on a single named group”).

<sup>335</sup> Activists often borrow the memorable phrasing of Justice Clarence Thomas from *Silvester v. Becerra* that the Second Amendment is not a “second-class right.” See Ilya Shapiro & Matthew Larosiere, Opinion, *The Supreme Court Is Too Gun-Shy on the Second Amendment*, WALL ST. J. (Jan. 2, 2019, 6:54 PM), <https://www.wsj.com/articles/the-supreme-court-is-too-gun-shy-on-the-second-amendment-11546473290> [<https://perma.cc/2EGH-LAA4>] (claiming the Court’s reluctance to take up firearms cases relegates the Second Amendment to second-class status); see also *Divided Court Demotes Second Amendment to Second Class Status, Upholds Postal Property Ban*, NAT’L RIFLE ASS’N (July 1, 2015), <https://www.nra.org/articles/20150701/divided-court-demotes-second-amendment-to-second-class-status-upholds-postal-property-ban#:~:text=Divided%20Court%20Demotes%20Second%20Amendment%20to%20Second%20Class,the%20Tenth%20Circuit%20reversed%20a%20lower%20court%20> [<https://perma.cc/2WUA-L8F2>]; David B. Kopel, *Heller’s Precarious Situation*, NAT’L REV. (Sept. 12, 2019, 12:25 PM), <https://www.nationalreview.com/magazine/2019/09/30/hellers-precious-situation%E2%80%88/> [<https://perma.cc/53KN-NWTY>]; cf. Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 624 (2019) (“[N]othing about the Supreme Court’s post-*Heller* treatment of the Second Amendment suggested its ‘second-class’ status.”).

<sup>336</sup> *Compare Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) (explaining that strict scrutiny applies to equal protection claims when a government action “employs distinctions based on certain suspect classifications, such as race or national origin”), with *Scocca v. Smith*, No. C-11-1318

regulations stem from the kind of explicit bare animus against gun owners necessary to invalidate them under rational basis review.<sup>337</sup>

Instead, the “structural” challenges most likely to prevail are the ones outlined regarding the structural power balance between states and localities: constitutional home rule and subfederal anticommandeering. For example, a local government could bring suit claiming that a particular statewide enactment infringes on an area of local autonomy pursuant to the state constitution’s home-rule provisions. Alternatively, the locality could challenge the state’s authority to directly command action in furtherance of an objective the locality both finds unconstitutional and seeks passively to resist. A locality undoubtedly would have standing to bring these types of structural claims, as the illegal usurping of local government power is a harm uniquely felt by the locality. Whether the locality sought proactively to engage in such impact-litigation localism or passively to resist on constitutional grounds, this Article sets forth the normative and legal bases for either course of action.

#### CONCLUSION

The Second Amendment Sanctuary movement erupted without warning. It represents a new twist on an old and intractable national debate about guns, gun rights, and gun safety. But it also offers new opportunities to explore ongoing and evolving doctrinal debates over the proper balance of power between state and local government and the proper role of constitutional interpretation between coordinate branches of government. These vertical and horizontal separation of powers questions resonate in the sanctuary context, but finding principled answers will have an impact far beyond the sanctuary or firearms contexts.

Indeed, while the proposals offered herein articulate a limited path forward for Second Amendment Sanctuary viability, they apply with equal resonance to local gun-control efforts. A limited constitutional home rule supported by the history of local gun regulation and normative wisdom of

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EMC, 2012 WL 2375203, at \*6 (N.D. Cal. June 22, 2012) (explaining defendant’s argument is essentially that “gun owners are not a protected class”). *See also* *Washington v. Davis*, 426 U.S. 229, 246–48 (1976) (stating that a discriminatory purpose must be a motivating factor in the state action).

<sup>337</sup> *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the government has no legitimate interest in exploiting “mere negative attitudes, or fear” toward a disfavored group). Indeed, some commentators suggest that the political power of gun owners prevents politicians from even mildly rebuking this would-be protected class. *See, e.g.*, Jeff Stein, *The NRA Is a Powerful Political Force—But Not Because of Its Money*, VOX (Oct. 5, 2017, 1:40 PM), <https://www.vox.com/policy-and-politics/2017/10/5/16430684/nra-congress-money-no> [<https://perma.cc/S8CS-C2JX>] (claiming that the ability of the NRA to “mobilize and excite huge numbers of voters” threatens politicians who speak out in favor of gun control).



local tailoring counsels in favor of tighter firearms restrictions where the locality so desires. A subfederal anticommandeering claim against invasive statewide gun deregulation may be harder to make out when the absence of regulation neither commands action nor implicates constitutional protections. But passive resistance in the form of local refusals to issue state concealed carry licenses may find currency in both the passive immigration and gun-sanctuary movements. Ultimately, constitutional officers in all branches, at all levels of government, and on both sides of the gun debate have important roles to play in helping define the many contours of still-emerging Second Amendment doctrine.

