

Cities, Preemption, and the Statutory Second Amendment

Joseph Blocher[†]

Although the Second Amendment tends to dominate the discussion about legal limits on gun regulation, nothing has done more to shape the state of urban gun law than state preemption laws, which fully or partially limit cities' ability to regulate guns at the local level. The goals of this short Essay are to shed light on this "Statutory Second Amendment" and to provide a basic framework for evaluating it.

INTRODUCTION

Most people in the United States live in urban areas,¹ and a disproportionate number of gun homicide victims die in them² despite the fact that gun ownership is much less common in cities than in rural areas.³ The balance of gun rights and regulation is thus an issue of particular concern for cities, and it is unsurprising that most gun regulation in the United States is, and has always been, done at the subfederal—and especially local—level.⁴ And yet the past few decades have seen substantial convergence between state and local gun rules. It is unlikely that the explanation for this convergence is purely “political,” because support for

[†] Lanty L. Smith '67 Professor of Law, Duke Law School. Many thanks to Richard Briffault, Jacob Charles, Aziz Huq, Darrell A.H. Miller, Richard Schragger, and Rachel Simon for comments and to participants in this symposium and the State & Local Government Works-in-Progress Conference at Willamette University College of Law.

¹ Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1166 (2018) (“[I]n 2010, 80.7% of the U.S. population was urban.”).

² The victimization rates are disproportionate, even given population concentration. See, e.g., Aliza Aufrichtig, Lois Beckett, Jan Diehm & Jamiles Lartey, *Want to Fix Gun Violence in America? Go Local.*, THE GUARDIAN (Jan. 9, 2017), <https://perma.cc/X52G-4K9A> (finding that half of all gun homicides in 2015 occurred in 125 cities that collectively accounted for less than a quarter of the country's population); Richard Florida, *The Geography of Gun Violence in Cities and Metros*, BLOOMBERG CITYLAB (Dec. 3, 2012), <https://perma.cc/ZEJ5-EA9N> (finding that there were significantly higher rates of gun-related homicides per 100,000 people in cities than in their respective metropolitan areas).

³ Ruth Igielnik, *Rural and Urban Gun Owners Have Different Experiences, Views on Gun Policy*, PEW RSCH. CTR. (July 10, 2017), <https://perma.cc/7DY8-TLEY>.

⁴ See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85, 108 (2013).

gun regulation remains much higher in urban areas.⁵ Cities seem to be regulating guns less stringently than their residents would like. Are there legal explanations for this gap?

The Second Amendment is the most common explanation, but its impact in litigation has, in fact, been relatively muted, even after the Supreme Court's 2008 decision in *District of Columbia v. Heller*⁶ articulated an "individual" right to keep and bear arms for certain private purposes.⁷ That could change, of course, especially as the Supreme Court seems poised to reshape Second Amendment doctrine in significant ways.⁸ But for the moment, the U.S. Constitution is not the insurmountable obstacle feared by some advocates of regulation, nor is it the invincible champion conjured by their opponents.⁹

Yet guns do have significant statutory protections—laws that limit the legal capacities of litigants and legislatures.¹⁰ Some of these laws immunize gun sellers and manufacturers from a wide range of tort claims.¹¹ Others apply to the government itself—for

⁵ PEW RSCH. CTR., IN GUN DEBATE, SEVERAL OPTIONS DRAW MAJORITY SUPPORT 10 (2013), <https://perma.cc/7KLN-CZ8N> (finding that 60% of rural residents said it was more important to protect gun rights than to control gun ownership, while only 37% said it was more important to control ownership; for urban residents the figures were nearly the inverse: 37% prioritized gun rights, and 57% prioritized gun control); CNN & ORC, POLL: MARCH 15 TO 17, 2013, at 41 (2013), <https://perma.cc/3XLK-H666> (finding that 72% of rural residents believed that there should be either "no restrictions" or "minor restrictions" on guns while only 46% of urban residents endorsed those positions).

⁶ 554 U.S. 570 (2008).

⁷ *Id.* at 595.

⁸ See Adam Liptak, *Justices' Questions Suggest New York Gun Control Law Is Unlikely to Survive*, N.Y. TIMES (Nov. 3, 2021), <https://perma.cc/V43G-QDRZ>. The Court is currently considering a case that is likely to extend the right to keep and bear arms outside the home. See *N.Y. State Rifle & Pistol Ass'n v. Corlett*, 141 S. Ct. 2566 (2021) (order granting petition for writ of certiorari on the question of "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

⁹ See JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 10 (2018) (arguing that the Second Amendment can and does reasonably accommodate both rights and regulation).

¹⁰ For a deeper and more comprehensive overview of these laws, see Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 8–36), <https://perma.cc/ST2J-7H83>; David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 123–25 (noting that "the last several decades have seen a litany of statewide legislation designed to protect the right to arms" and providing examples).

¹¹ See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903, 18 U.S.C. §§ 922, 924 (2012)). When the Act was signed into law, National Rifle Association leader Wayne LaPierre called it "the most significant piece of pro-gun legislation in twenty years." *President Bush Signs "Protection of Lawful Commerce in Arms Act" Landmark NRA Victory Now Law*, NRA POL. VICTORY FUND (Oct. 26, 2005), <https://perma.cc/PU4C-4URT>.

example, by limiting recordkeeping¹² and funding for gun-related research.¹³

As a practical matter, though, nothing has done more to shape contemporary gun regulation than state preemption laws, which fully or partially eliminate cities' ability to regulate guns at the local level.¹⁴ Although the claim is admittedly hard to prove, it is likely that these preemption laws—nearly all of which were adopted in the past forty years—have kept more gun regulations off the books in the past two decades than has the Second Amendment in more than two centuries (including in the nearly 1,500 cases filed since *Heller*).¹⁵ In effect, preemption laws restrict gun laws in precisely the places—cities—where they are most viable¹⁶ and provide broader protection for the right to keep and bear arms than the Constitution has ever done.

The goals of this short Essay are to shed light on this “statutory Second Amendment” and to provide a basic framework for evaluating it. The latter does not reduce to a simple argument for or against preemption because different kinds of gun regulation raise different issues regarding local variation. Uniform rules may be necessary for disarming domestic abusers or imposing manufacturing requirements—the costs and benefits of such laws are unlikely to depend much on location, and their enforcement must be done at a broad level in order to be effective. By contrast, there are good reasons to think that restrictions on public

Other anti-gun control laws that apply to individuals include “take your gun to work” laws, which effectively require businesses to permit guns onto their private property. For an explanation of these laws and an argument that they implicate businesses' own Second Amendment rights, see Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 41–45 (2012).

¹² The Tiahrt Amendments limit the ability of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to require dealers to report their inventories. See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009).

¹³ The Dickey Amendment provides that “none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control.” Department of Health and Human Services Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3244 (1996). In practice, it has meant a near-total denial in federal funding for gun-violence-related research. See Jonathan M. Metz, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 866 (2018).

¹⁴ See Rachel Simon, *The Firearm Preemption Phenomenon: Taking Aim at State Restrictions on Local Gun Policy*, 43 CARDOZO L. REV. (forthcoming 2022) (manuscript at 33–43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623529.

¹⁵ See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1471–86 (2018) (providing an empirical overview of the constitutional doctrine and trends).

¹⁶ Monica Davey & Adeel Hassan, *When Cities Try to Limit Guns, State Laws Bar the Way*, N.Y. TIMES (Aug. 15, 2019), <https://perma.cc/63DU-B3L4>.

carrying and high-powered weapons could vary between cities and rural areas. As this Essay was being written, a gunman used an assault weapon to kill ten people in a Boulder, Colorado, grocery store. Such weapons had been forbidden under a local ordinance until just ten days before the massacre, when the ordinance was struck down on preemption grounds.¹⁷ A few months later, Colorado repealed its preemption law, suggesting that there is still room for change.¹⁸ And at oral argument in *New York State Rifle & Pistol Association v. Bruen*¹⁹—the Second Amendment case currently pending before the Supreme Court—many of the Justices seemed sympathetic to the idea of local tailoring, even in the context of a federal constitutional claim. Justice Clarence Thomas asked, “Why can’t you have a . . . tailored approach for [the] Second Amendment based upon if it’s density in New York City, if that’s a problem, the subway, then you have a different set of concerns in upstate New York?”²⁰ Justice Elena Kagan called such an approach “completely intuitive.”²¹

As with any nationwide narrative involving developments in state law, there are important variations. But in this particular case, and in keeping with this Symposium’s theme, Chicago can serve as the story’s protagonist because gun violence is such a visceral reality here and the city has faced significant practical, constitutional, and statutory obstacles in trying to address it.

The opening sentence of a report by the Chicago Police Department puts the matter in stark terms: “Gun violence is Chicago’s most urgent problem.”²² Whatever one thinks of the superlative, it is hard to deny the urgency. One study notes that “in the City of Chicago . . . the homicide rate has averaged from sixteen to eighteen per one hundred thousand people in recent years—about three times the national average.”²³ Notably, “almost all

¹⁷ Joseph Blocher, Opinion, *American Cities Have Always Regulated Guns. Now, Most Can’t.*, WASH. POST (Mar. 25, 2021), <https://perma.cc/NY3W-TZET>.

¹⁸ Zusha Elinson, *Colorado Lets Cities Set Their Own Gun Laws, and Boulder Plans to Move Quickly*, WALL ST. J. (June 19, 2021), <https://www.wsj.com/articles/colorado-lets-cities-set-their-own-gun-laws-and-boulder-plans-to-move-quickly-11624121655>.

¹⁹ No. 20-843 (U.S. filed Dec. 23, 2020).

²⁰ Transcript of Oral Argument at 78, *Bruen*, No. 20-843 (U.S. Nov. 3, 2021).

²¹ *Id.* at 74 (“[I]t seems completely intuitive to me, and I think to many people, . . . that there should be different gun regimes in New York City than in rural counties upstate.”).

²² OFF. OF THE MAYOR & CHI. POLICE DEPT., CITY OF CHI., TRACING THE GUNS: THE IMPACT OF ILLEGAL GUNS ON VIOLENCE IN CHICAGO 1 (2014), <https://perma.cc/CT6J-VCFC> (“In 2012 the Chicago Police Department confiscated 7,624 guns, which is more gun recoveries *per capita* than LA and NYC combined.”).

²³ Philip J. Cook, Richard J. Harris, Jens Ludwig & Harold A. Pollack, *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717, 719 (2015).

murders in Chicago are committed by gun. The percentage in recent years has been in the 80%–85% range, far above the national average of about 68%.”²⁴ And even those citywide statistics do not tell the full story because there are important geographic differences within the city²⁵ and the costs of gun misuse go beyond those who are actually hit with bullets.²⁶

Chicago’s efforts to staunch the bleeding with regulation have run into some constitutional hurdles, giving the city a prominent role in the recent wave of Second Amendment litigation. While *Heller* is deservedly credited (or blamed) for imbuing the right to keep and bear arms with new meaning, the practical scope of that holding expanded significantly when *McDonald v. City of Chicago*²⁷ made it applicable to state and local governments.²⁸ Chicago’s gun laws have been repeatedly challenged—sometimes successfully—in *McDonald* and after.²⁹ A native son of Chicago, Justice John Paul Stevens—who dissented in both *Heller* and *McDonald*—was the most prominent and powerful judicial critic of these doctrinal developments, calling for *Heller* to be overturned and the Second Amendment to be repealed.³⁰ Chicago, in short, has been a central player in the modern Second Amendment debate. In fact, although

²⁴ *Id.* at 731.

²⁵ See *id.* at 719 (noting that Chicago’s citywide homicide rate “masks large and persistent geographic differences”); JOCELYN FONTAINE, NANCY LA VIGNE, DAVID LEITSON, NKECHI ERONDU, CAMERON OKEKE & ANAMIKA DWIVEDI, URB. INST., “WE CARRY GUNS TO STAY SAFE” 1 (2018) (noting that Chicago’s homicides and shootings “are concentrated on the West and South Sides”); Sarah Nagy, *Who’s in the Sights: Fighting the Illegal Effects of Legal Gun Ownership in Chicago*, 21 PUB. INT. L. REP. 35, 37 (2015) (“[T]he rate of legal gun ownership per capita is highest not in the highest-crime areas, but in the lowest-crime areas.” (citing Devin Hughes & Evan Defilippis, *Data Shows Highest Rates of Illinois Concealed Carry Permits in Low-Crime Zip Codes—Not More Dangerous Chicago Neighborhoods*, THE TRACE (July 10, 2015), <https://perma.cc/CRF8-8SKY>)).

²⁶ Marika Iszczyszyn, *Responding to Chicago’s Invisible Gun Violence Victims*, 25 ANNALS HEALTH L. ADVANCE DIRECTIVE 124, 126 (2016) (“In poor, high-crime neighborhoods, such as Chicago’s South and West Sides, gun violence is prevalent and affects children on the sidelines in the devastating form of PTSD.”). For an argument that prevention of these harms—and not just wrongful shootings—is also an important regulatory interest, see Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 160–63 (2021).

²⁷ 561 U.S. 742 (2010).

²⁸ *Id.* at 750.

²⁹ See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 690 (7th Cir. 2011); *Ezell v. City of Chicago*, 846 F.3d. 888, 890 (7th Cir. 2017).

³⁰ See, e.g., John Paul Stevens, *The Supreme Court’s Worst Decision of My Tenure*, THE ATLANTIC (May 14, 2019), <https://perma.cc/JD6U-334A>; John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://perma.cc/PLE5-BFHV>. Justice Stevens probably wrote more about the Second Amendment than any other member of the Court ever has. See Joseph Blocher & Darrell A.H. Miller, *Stevens, J., Dissenting: The Legacy of Heller*, 109 JUDICATURE, Fall 2019, <https://perma.cc/PF34-5RQC>.

it is not a party to *Bruen*, Chicago was a topic of discussion at oral argument. Paul Clement, representing the challengers, pointed to Chicago as a jurisdiction that has taken significant steps to regulate guns despite not having a restriction like the New York law being challenged.³¹ Justice Kagan responded, “I mean, most people think that Chicago is, like, the [] the world’s worst city with respect to gun violence, Mr. Clement.”³² She quickly added, “Chicago doesn’t think that, but everybody else thinks it about Chicago.”³³

But in terms of the legal impact on gun regulation in the United States, the more significant story unfolded decades earlier in Chicago’s suburbs. In June 1981—a year before Chicago passed the handgun restriction that would eventually be struck down in *McDonald*³⁴—the Village of Morton Grove, Illinois, banned the sale and private possession of handguns within municipal limits,³⁵ giving residents until February 1982 to dispose of their guns.³⁶ The backlash was swift, severe, and nationwide, effectively generating the rise of gun preemption laws.

This Essay begins by telling the story of the first wave of preemption laws³⁷ and then turns to the current and more punitive preemption movement.³⁸ The second Part of the Essay then provides some brief thoughts on how to evaluate the distribution of gun regulation authority between states and cities.³⁹

I. MORTON GROVE AND THE SPREAD OF PREEMPTION LAWS

State preemption of local regulation has been the subject of substantial scholarly conversation in recent years.⁴⁰ But, traditionally, firearms-law scholars have not paid as much attention to preemption as they have to the Second Amendment.⁴¹ This is a

³¹ Transcript of Oral Argument, *supra* note 20, at 36.

³² *Id.*

³³ *Id.*

³⁴ See *McDonald*, 561 U.S. at 750–51.

³⁵ Professor Kristin Goss provides the most detailed account that I have found of the Morton Grove ordinance and the response to it. See Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 703–08 (2004).

³⁶ Andrew Kirby, *Law and Disorder: Morton Grove and the Community Control of Handguns*, 11 *URB. GEOGRAPHY* 474, 477 (1990).

³⁷ See *infra* Part I.A.

³⁸ See *infra* Part I.B.

³⁹ See *infra* Part II.

⁴⁰ See, e.g., *infra* notes 80–86 and accompanying text.

⁴¹ This is simply a comparative claim; there are of course interesting and important counterexamples. See, e.g., David Fagundes & Darrell A.H. Miller, *The City’s Second*

missed opportunity, both because firearms-preemption laws were among the vanguard in the larger preemption movement⁴² and because they pose major obstacles to local gun control in many states.⁴³ Such laws arose in two main waves.

A. The First Wave

It is not an overstatement to say that Morton Grove's handgun ban did for preemption what D.C.'s did for the Second Amendment. As one scholar put it, after the preemption movement had gained steam, "Morton Grove' ha[d] become a metaphor for the right of the jurisdiction to pass such ordinances, and a code-word for those who resist gun control, such as the members of the National Rifle Association."⁴⁴ In 1986, a National Rifle Association (NRA) brief noted that further enactment of preemption laws "remains the top legislative priority,"⁴⁵ and an NRA spokesman said that "the debate has shifted from national to State levels where hard-fought campaigns . . . are being waged."⁴⁶

The NRA won nearly all these campaigns. As Professor Richard Schragger notes of preemption laws, "The firearms industry has been particularly successful in large part because the National Rifle Association has acted aggressively at the state level."⁴⁷ Morton Grove's prohibition provided an especially powerful opportunity for the NRA to deploy what has traditionally been one of its most effective arguments—that gun rights advocates must act quickly and decisively to prevent full-scale gun

Amendment, 106 CORNELL L. REV. 677, 728–43 (2021); Simon, *supra* note 14. Rachel Simon's article in particular provides a deep and thorough analysis of preemption laws.

⁴² Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES (July 6, 2017), <https://perma.cc/U83W-SWX9> (tracing current preemption laws involving a broad range of subject matters to the tobacco and firearm laws of the 1980s and 1990s).

⁴³ See Richie Feder & Lewis Rosman, *State Preemption of Local Government: The Philadelphia Story*, 49 ENV'T L. REP. 10772, 10775 (2019) ("The single most dramatic and significant preemption—from Philadelphia's perspective—is the General Assembly's preemption of almost any regulation of the ownership, possession or transfer of firearms."); see also *Firearms Owners Against Crime v. Lower Merion Township*, 151 A.3d 1172, 1179–80 (Pa. Commw. Ct. 2016) (concluding that the township lacked the power to prohibit guns on property owned by the township, such as public parks).

⁴⁴ Kirby, *supra* note 36, at 475.

⁴⁵ Darwin Farrar, *In Defense of Home Rule: California's Preemption of Local Firearms Regulation*, 7 STAN. L. & POL'Y REV. 51, 53–54 (1996) (quoting NAT'L RIFLE ASSOC. OF AM. INST. FOR LEGIS. ACTION, NRA-ILA STATE LEGISLATIVE ISSUE BRIEF (1986)).

⁴⁶ Kirby, *supra* note 36, at 479 (quoting Ted Lattanzio, *Florida Gun Owners and Lawmen Stand Together*, AM. RIFLEMAN, May 1987, at 42, 42–43).

⁴⁷ Schragger, *supra* note 1, at 1170.

prohibition.⁴⁸ As a spokesman put it, “We are focusing our attention on Morton Grove . . . because their actions exemplify what we believe is the first step toward banning all gun possession.”⁴⁹ (Such bans never materialized, even in states with no preemption laws.)

These preemption laws varied in how much legal regulation they prevented: some forbade all regulation (at least nominally), others did the same but with enumerated exceptions, and yet others prohibited only specific types of regulation.⁵⁰ State preemption laws eventually targeted more than specific regulations like those enacted in Morton Grove. In the late 1990s, a series of municipal lawsuits threatened to do to the gun industry what other mass tort claims had done to the tobacco industry.⁵¹ Between 1998 and 2000, twenty-nine cities—including Chicago—sued the gun industry.⁵² Chicago and others adopted a public-nuisance theory, alleging that the industry’s actions “created ‘an unreasonable jeopardy to the public’s health, welfare and safety’ and ‘a disturbance and reasonable apprehension of danger to person and property.’”⁵³

This municipal litigation represented an existential threat to the gun industry, and some states passed laws explicitly preempting it.⁵⁴ These state laws were soon backed up by the federal Protection of Lawful Commerce in Arms Act⁵⁵ (PLCAA), which made it impossible to assert liability against gun sellers

⁴⁸ See OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 149 (Univ. of Iowa Press expanded ed. 1998) (1993) (calling this the “Armageddon Appeal”). For a general account of constitutional rhetoric in the gun debate, see generally Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014).

⁴⁹ Goss, *supra* note 35, at 704–05 (alteration omitted) (quoting Nathaniel Sheppard Jr., *Illinois Town Faces Lawsuit After Limiting Pistol Use*, N.Y. TIMES (July 4, 1981), <https://perma.cc/84T8-KFP4>).

⁵⁰ For a helpful and detailed overview, see Simon, *supra* note 14, at 24–27.

⁵¹ For commentary on this litigation movement, see Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshowes from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1055–56 (2009). See generally SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (Timothy D. Lytton ed., 2005).

⁵² See Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521, 1521 (2000).

⁵³ *Id.* (quoting First Amended Complaint at 67, *Chicago v. Beretta*, No. 98-CH-15596 (Cir. Ct. Cook Cnty. filed Apr. 7, 1999)).

⁵⁴ Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1253 (2018) (“Express preemption was a frequent occurrence in the gun litigation context, where states passed legislation that explicitly preempted city litigation.”); Note, *supra* note 52, at 1523 (noting that, “[a]s of March 2000, only one public nuisance claim had survived a motion to dismiss”).

⁵⁵ Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903).

and manufacturers, even in pending cases,⁵⁶ with limited exceptions for things like design defects or negligent entrustment.⁵⁷ Professor Sarah Swan explains that “the initial state preemption laws, along with the federal Protection of Lawful Commerce in Arms Act, effectively ended municipal gun litigation.”⁵⁸

Despite these substantial obstacles, some municipal and private plaintiffs are still trying new legal theories, albeit with limited success.⁵⁹ Swan notes, for example, that the municipal lawsuit in *City of Gary v. Smith & Wesson Corp.*⁶⁰ survived an initial preemption challenge.⁶¹ The city of Gary, Indiana, asserted claims of public nuisance, negligent distribution of guns, and negligent design—claims that the Indiana Court of Appeals found were not a form of regulation but rather an exercise of the expressly authorized power of cities to seek relief against public nuisances.⁶² The success was short-lived, because the state legislature responded by further tightening its preemption law.⁶³ But as of this writing, the Indiana courts have held that the suit is not preempted, and it is scheduled to proceed to trial.⁶⁴

This has not prevented somewhat similar litigation in and around Chicago. In 2014, a group called the Coalition for Safe Chicago Communities sued three municipalities where the sellers of many of Chicago’s crime guns are located, alleging, inter alia, that their failure to regulate gun dealers violated state civil rights law.⁶⁵ (In Chicago, as in other places, a disproportionate number of

⁵⁶ 15 U.S.C. § 7902.

⁵⁷ 15 U.S.C. § 7903(5)(A)(i)–(vi) (listing exceptions).

⁵⁸ Swan, *supra* note 54, at 1255–56.

⁵⁹ Sayre Weaver, *Strategic Uses of Local Regulation in Firearms Litigation*, in 2 ASSOCIATION OF TRIAL LAWYERS OF AMERICAN ANNUAL CONVENTION REFERENCE MATERIALS 2161 (2001) (“[M]unicipal codes often declare that certain activities and repeated violations of certain code provisions constitute public nuisances *per se*. With an appropriate set of facts, such a code provision might enable a plaintiff to allege a statutory basis for a public nuisance claim against a gun industry defendant.”).

⁶⁰ 801 N.E.2d 1222 (Ind. 2003).

⁶¹ Swan, *supra* note 54, at 1255.

⁶² *Gary*, 801 N.E.2d at 1227. Similarly, when Smith & Wesson argued that Boston’s lawsuit against it was an effort to “regulate through litigation,” the trial judge responded, “Defendants’ argument fails because this is a tort and contract case, not a suit about a local by-law or ordinance.” *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *11 (Mass. Sup. Ct. July 13, 2000).

⁶³ Swan, *supra* note 54, at 1255.

⁶⁴ See Dru Stevenson, *New Decision in a (Very) Old Case: City of Gary v. Smith & Wesson Corp.*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Dec. 13, 2019), <https://perma.cc/7EY4-7M8G>.

⁶⁵ See Complaint at 8–11, *Coal. for Safe Chi. Cmty. v. Village of Riverdale* (Ill. Cir. Ct. Cook Cnty. July 7, 2015) (No. 2015-CH-10390).

crime guns can be traced to a handful of sellers.)⁶⁶ A year later, that lawsuit was dismissed.⁶⁷ But, again, a similar lawsuit is ongoing.⁶⁸

The most notable exception to this trend of dismissals has been *Soto v. Bushmaster Firearms International*,⁶⁹ often referred to as the Sandy Hook lawsuit.⁷⁰ *Soto* does not involve a municipal plaintiff but does involve claims roughly akin to those that cities had earlier pursued, sparking the statutory response.⁷¹ Families of those killed in that massacre sued companies whose AR-15-style rifle had been used in the murders, alleging, among other claims, that the companies violated Connecticut's unfair trade practices law when they "knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies."⁷² (The ad reading "Consider your man card reissued" has been widely noted.)⁷³ The Connecticut Supreme Court ruled that the unfair trade practices claim was not barred by the PLCAA,⁷⁴ and the U.S. Supreme Court denied the petition for a writ of certiorari, so the case is currently scheduled for trial in state court.⁷⁵

Whether such suits are a proper vehicle for addressing the harms of gun violence is beyond the scope of this Essay.⁷⁶ For present purposes, the point is simply that firearms preemption laws spread quickly in the wake of Morton Grove. "In 1979, two states . . . had full preemption, and five states had partial preemption."⁷⁷

⁶⁶ Nagy, *supra* note 25 at 40 (citing OFF. OF THE MAYOR & CHI. POLICE DEP'T, *supra* note 22, at 5) ("Close to twenty percent of guns—that is, one out of every five guns recovered from Chicago crime scenes in 2014—came from only four stores, three of them located right on the borders of Chicago's city limits.").

⁶⁷ Jonathan Bilyk, *Cook County Judge Tosses Lawsuit Brought by Pflieger, Other Activists vs Suburbs over Gun Shop Regulation*, COOK CNTY. REC. (Mar. 2, 2016), <https://perma.cc/9PCB-KLBA>.

⁶⁸ See Dru Stevenson, *New Case: Powell v. State of Illinois*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Oct. 14, 2019), <https://perma.cc/2Y6K-4KSY>.

⁶⁹ 202 A.3d 262 (Conn. 2019), *cert. denied sub nom.* Remington Arms Co. v. Soto, 140 S. Ct. 513 (2019).

⁷⁰ As this Essay was in production, Mexico filed suit against U.S. firearms manufacturers, asserting an exception to PLCAA. Michael C. Dorf, *Mexican Government Lawsuit Against U.S. Gun Makers Tests the Limits of Territoriality*, VERDICT (Sept. 1, 2021), <https://perma.cc/Z76B-DVEH>.

⁷¹ Cf. Swan, *supra* note 54, at 1255–56 (discussing earlier municipal litigation and states' statutory response).

⁷² *Soto*, 202 A.3d at 272.

⁷³ Bill Chappell, *Supreme Court Allows Sandy Hook Families' Case Against Remington Arms to Proceed*, NPR (Nov. 12, 2019), <https://perma.cc/N379-QYLQ>.

⁷⁴ *Soto*, 202 A.3d at 272–73.

⁷⁵ Chappell, *supra* note 73.

⁷⁶ For a recent article about municipal litigation more broadly, see generally Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581 (2019).

⁷⁷ Goss, *supra* note 35, at 706.

By 1989, eighteen states had full preemption, and three had partial preemption.⁷⁸ Today, all but a handful preempt local gun regulation.⁷⁹ This is a legal transformation on par with *Heller* itself.

B. The Second Wave

The past decade “has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action.”⁸⁰ Many of these new preemption laws—sometimes called “hyper preemption,” “preemption plus,” or the “new preemption”—“include lawmakers’ efforts to tack on direct threats, fines, loss of funds, and broad deauthorizations of powers to traditional preemption clauses or provisions.”⁸¹ Professor Erin Scharff writes that this kind of preemption “seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place.”⁸² Local leaders are not likely to test the limits if they face possible fines, defunding, criminal liability, or removal from office as a result.⁸³ As Professor Nestor Davidson explains, “[S]tate oversight is turning punitive. . . . To call this a sea change in state-local relations would be an understatement.”⁸⁴

This second wave of preemption laws has an unmistakably partisan cast,⁸⁵ as “the preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively

⁷⁸ *Id.*

⁷⁹ Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954, 967 (2019) (counting at least forty-four states); Kopel, *supra* note 10, at 123 (counting forty-six); Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, 54 *MUN. LAW.*, Sept./Oct. 2013, at 6, 7 (counting forty-five).

⁸⁰ Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1997 (2018).

⁸¹ James G. Hodge, Jr., Danielle Chronister, Alexandra Hess, Madeline Morcelle, Jennifer Piatt & Sarah A. Wetter, *Public Health Preemption+: Constitutional Affronts to Public Health Innovations*, 79 *OHIO ST. L.J.* 685, 687 (2018); *see also* Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 *COLUM. L. REV.* 2225, 2250–53 (2017) (noting that such laws hold local officials personally liable or make it hard for local governments to contest preemption).

⁸² Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *GEO. L.J.* 1469, 1473 (2018).

⁸³ Swan, *supra* note 54, at 1257 (“When the consequences of overstepping the preemption line are so severe, cities are unlikely to test where it lies.”).

⁸⁴ Davidson, *supra* note 79, at 958.

⁸⁵ Phillips, *supra* note 81, at 2277; Joel Rogers, *Foreword: Federalism Bound*, 10 *HARV. L. & POL’Y REV.* 281, 297 (2016).

progressive local regulations.”⁸⁶ As part of that broader transformation, many firearms preemption laws have become far stricter and more punitive.

Even measured against the baseline of Morton Grove-era laws, the second wave of firearms preemption is striking. Florida provides a prominent, if somewhat extreme, example. Although the state has adopted some new gun regulations in the wake of the Parkland massacre—including a “red flag” law that has been used more often than any other state’s⁸⁷—it also has an unusually stringent preemption law. Local officials found in violation of the preemption law can be fined up to \$5,000 and face damages of up to \$100,000,⁸⁸ and initially faced the prospect of removal from office by the governor.⁸⁹ A state trial court later declared the removal provision unconstitutional—at least as applied to county commissioners, who can be removed only by the state senate⁹⁰—and the reach of other provisions is still being tested. When the state law was passed, Tallahassee, Florida, had various gun laws on the books, which were preempted by the state law but that the city was not enforcing.⁹¹ A gun rights organization nonetheless sued, arguing that the preemption law’s prohibition on “promulgation” of firearms regulations required the city to *repeal* existing ordinances.⁹² The Florida Court of Appeals rejected this statutory claim and did not reach the city’s counterargument that the preemption statute violated the state constitution.⁹³ The litigation continues to this day.⁹⁴

Scharff highlights the experience of Tucson, Arizona, which adopted a policy of destroying handguns “acquired as crime evidence if those weapons failed to serve a law enforcement purpose

⁸⁶ Briffault, *supra* note 80, at 1997–98.

⁸⁷ Terry Spencer, *Florida ‘Red Flag’ Gun Law Used 3,500 Times Since Parkland*, AP NEWS (Feb. 14, 2020), <https://perma.cc/6VVR-S9PL>.

⁸⁸ FLA. STAT. § 790.33(3)(c), (f) (2017). Additionally, local governments cannot use public funds to defend such suits. FLA. STAT. § 790.33(3)(d) (2017); *see also* MISS. CODE ANN. § 45-9-53(5)(c) (2015) (providing for civil liability and similarly prohibiting the use of public funds to defend). Lauren Phillips notes that Kentucky’s preemption law goes even further by making it a misdemeanor to pass any gun regulation, thus “*criminalizing* the passage of local regulations.” Phillips, *supra* note 81, at 2251 (emphasis in original) (citing KY. REV. STAT. ANN. § 65.870 (West 2012)).

⁸⁹ FLA. STAT. § 790.33(3)(e) (2017), *invalidated by* *Marcus v. Scott*, No. 2012-CA-1260, 2014 WL 3797314 (Fla. Cir. Ct. June 2, 2014).

⁹⁰ *Marcus*, 2014 WL 3797314, at *3–4.

⁹¹ *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 456 (Fla. Dist. Ct. App. 2017).

⁹² *Id.* at 464.

⁹³ *Id.* at 464–66.

⁹⁴ For a summary, *see* Simon, *supra* note 14, at 56–57.

and could not be repurposed for police work.”⁹⁵ The state attorney general determined that Tucson’s crime-gun-destruction policy “may violate” state law, a determination that the city has challenged in court—unsuccessfully, thus far.⁹⁶ Under Arizona’s extraordinary (and apparently unique) preemption law, Tucson faces the loss of roughly a quarter of its general revenues.⁹⁷

These preemption laws have an incredibly broad reach—far greater than the Second Amendment itself. Indeed, the statutes are drafted such that it is almost hard to imagine courts applying them literally. As former deputy solicitor general of Nevada Joseph Tartakovsky notes, “To say that a town can’t pass laws ‘relating to’ firearms (as so many municipal ordinances do, directly or incidentally) is to affect a staggeringly broad sweep of regulation.”⁹⁸ Even the most strident advocates of preemption laws or the right to keep and bear arms “would probably agree that a city jail can ban people from entering with weapons or that a board of supervisors can forbid the recreational discharge of guns at 3 a.m. in residential neighborhoods.”⁹⁹

Still, there is good reason to suppose that other local ordinances will either be successfully challenged or never passed in the first place as municipal leaders bow to the deterrent effect.¹⁰⁰ The normative question, which the next Part begins to address, is whether this is a desirable state of affairs.

II. WHICH LEVEL OF GOVERNMENT SHOULD REGULATE GUNS AND IN WHICH WAYS?

The current wave of preemption laws has been the subject of much scholarly discussion in recent years.¹⁰¹ And just as Second

⁹⁵ Scharff, *supra* note 82, at 1509 (citing TUCSON, ARIZ., CODE § 2-142 (2005)).

⁹⁶ State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663, 666 (Ariz. 2017).

⁹⁷ Scharff, *supra* note 82, at 1496; *see also id.* at 1495–97, 1507–10 (describing ARIZ. REV. STAT. ANN. § 41-194.01 (2016), which requires the state attorney general—upon determining that a local regulation is preempted and remains uncured—to direct the state treasurer to withhold state-shared revenue, which in Tucson’s case represents roughly a quarter of the city’s general revenue fund).

⁹⁸ Tartakovsky, *supra* note 79, at 7.

⁹⁹ *Id.* at 8.

¹⁰⁰ Simon, *supra* note 14, at 37–38 (noting that “[o]ther examples from Florida confirm the prediction that punitive preemption would dissuade localities from testing the viability of new gun laws” and, in some instances, would discourage efforts to open public dialogue on firearm issues altogether).

¹⁰¹ *See generally, e.g.*, Briffault, *supra* note 80; Scharff, *supra* note 82. *See also, e.g.*, Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017). Preemption laws are only one part of a broader realignment of power between states and cities. Schragger, *supra* note 1, at 1184. For an earlier treatment of

Amendment debate can no longer be characterized as a simple binary of for or against guns or gun rights, evaluating preemption laws likewise demands a more nuanced normative account. Davidson highlights “the double-edged sword of localism: local empowerment can be used for desirable as well as pernicious ends.”¹⁰² He suggests that, “[w]hile there is no simple way to resolve the dilemma, normative considerations undergirding the vertical allocation of power in the states should be more directly confronted, allowing evaluation of the valence of local power in light of the normative commitments states have made.”¹⁰³

Those normative considerations are unlikely to be transsubstantive. State preemption of speed limits, antidiscrimination rules, and gun regulations all raise different considerations of doctrine, history, politics, and policy.¹⁰⁴ Even within a single category, the answers will vary depending on what kind of regulation is at issue. Prohibitions on classes of weapons, for example, may be of limited utility where the regulating entity shares a porous border with a deregulated jurisdiction.¹⁰⁵ Chicago’s experience certainly suggests as much.¹⁰⁶ But other kinds of regulations can be implemented reasonably effectively at the local level. Permit requirements for public carrying, for example, can be enforced on the spot regardless of what neighboring jurisdictions choose to do. Given that the particular costs and benefits of public carrying are quite different in urban and rural areas, there could be social-welfare reasons for preferring such localized enforcement.

What follows, then, is a limited and provisional canvassing of some broad arguments for and against firearms preemption laws—a framework with which to evaluate them rather than a

similar themes, see generally GERALD FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008).

¹⁰² Davidson, *supra* note 79, at 958.

¹⁰³ *Id.* at 984.

¹⁰⁴ Scharff, *supra* note 82, at 1491–93 (canvassing three general arguments for local control: providing “a divided populace a better chance of maximizing policy preferences,” allowing better responses to “problems that are local in nature,” and offering “additional laboratories of democracy”) (quotation marks omitted). For a general account of the value of local self-government, see RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 18–42 (2016).

¹⁰⁵ German Lopez, *Almost 74% of Guns Used in New York Crimes Come from States with Weaker Gun Laws*, VOX (Oct. 26, 2016), <https://perma.cc/GF4C-W7U5>.

¹⁰⁶ See OFF. OF THE MAYOR & CHI. POLICE DEP’T, *supra* note 22, at 5 (noting that roughly 60% of guns recovered at Chicago crime scenes in 2014 were purchased in states with weaker gun laws, most of them coming from Indiana); Cook et al., *supra* note 23, at 725 (“Most gang guns come from central or southern Illinois, or another state (especially Indiana), even more so than what we see among crime guns found among non-gang members.”).

single argument for or against. The overall message is not agnostic, however: in general, preemption laws go too far in denying local control. While there are strong arguments that some kinds of gun regulation should indeed be done (if at all) at the state or even national level, laws like those that prohibit cities from passing any rules relating to firearms unnecessarily hamper local variation and experimentation, restrict the effective implementation of lifesaving local policies, and threaten constitutional interests even as they are described as a bulwark to protect them.

A. Variation and Experimentation

One standard argument in favor of firearms preemption laws has been that, without them, gun owners would face a hodge-podge of local rules. Although people disagree about the scale of this cost and whether it is offset by benefits, local variation undeniably raises the costs of compliance,¹⁰⁷ increases the burdens of travel, and exposes some gun owners to legal liability. The NRA argues that preemption laws are, therefore, “vital as they prevent localities from enacting an incomprehensible patchwork of local ordinances. Without these measures unsuspecting gun owners would be forced to forego the exercise of their Second Amendment rights or risk running afoul of convoluted and potentially inaccessible local rules.”¹⁰⁸

A version of this argument, having prevailed in many states, has now moved up to the national level, where the NRA’s recent legislative priority has been the passage of national concealed carry reciprocity—federal legislation that would require all states to accept concealed carry licenses issued by any others.¹⁰⁹ Some supporters compare this proposal to the interstate acceptance of driver’s licenses,¹¹⁰ and while that comparison is inapt for many

¹⁰⁷ RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 468 (8th ed. 2016) (noting the cost of compliance argument more generally).

¹⁰⁸ *Strong Firearms Preemption Laws Are More Important than Ever*, NRA INST. FOR LEGIS. ACTION (Nov. 11, 2019), <https://perma.cc/JM9H-PB8H>; see also *Gun Bans: Court Reminds Local Governments They Lack Authority to Restrict Guns*, NRA INST. FOR LEGIS. ACTION (Dec. 23, 2016), <https://perma.cc/KW26-QK2K> (describing Pennsylvania’s preemption law as “enacted to eliminate the inconsistent and confusing regulatory hodge-podge that results when each locality adopts its own ‘customized’ regulations on guns”).

¹⁰⁹ Dan Friedman, *National Concealed-Carry ‘Reciprocity’: The NRA’s Next Big Push Explained*, THE TRACE (Apr. 27, 2017), <https://perma.cc/LM4U-44F5>.

¹¹⁰ Katie Zezima, *Trump Plan Calls for Nationwide Concealed Carry and an End to Gun Bans*, WASH. POST (Sept. 18, 2015), <https://perma.cc/UC3H-R6CR> (“If we can do that for driving—which is a privilege, not a right—then surely we can do that for concealed carry, which is a right, not a privilege.” (quoting then-candidate Donald Trump)).

reasons,¹¹¹ the basic intuition is clear enough: law-abiding citizens should be able to cross jurisdictional lines without fear of accidental lawbreaking. In the words of an NRA op-ed:

[O]therwise law-abiding citizens – including veterans, a single mother, a disaster response worker, a nurse and medical school student, and even a corrections officer – have become accidental criminals and suffered seizure of property, arrest, detention, and even prosecution because they failed to navigate the legal minefield that is the current state reciprocity system.¹¹²

Whether those incidents demonstrate a “legal minefield” is debatable, especially considering the number of concealed carry license holders in the United States, which the same NRA publication pegs at more than fifteen million.¹¹³ As Professor Kristin Goss notes, “before Morton Grove, hundreds of cities and towns had gun control ordinances, many of which were stricter than state and federal laws. Yet the record contains no evidence that these established ordinances were of much ongoing concern to the NRA and its allies.”¹¹⁴

Even if compliance with differing local laws does impose some information costs on gun owners, that, in and of itself, is not so unusual as to justify broad preemption. After all, criminal laws—and even the contours of federal constitutional rights¹¹⁵—often vary across jurisdictions, sometimes within a state. Far from being an exception, firearms laws have traditionally been a prominent example of this variation.¹¹⁶ Throughout U.S. history, guns have been regulated differently in different areas—urban and

¹¹¹ For one thing, driver’s licenses are governed by an interstate compact—an agreement among the states—rather than a federal statute, and, in fact, the compact permits significant differences with regard to age and the like. It is not entirely clear whether Congress even has the enumerated authority to pass a national concealed carry law. See Joseph Blocher, *Constitutional Hurdles for Concealed Carry Reciprocity*, TAKE CARE BLOG (Mar. 16, 2017), <https://perma.cc/KN73-UDU3>. But see Letter from Stephen E. Sachs, Randy Barnett & William Baude to Trey Gowdy, Richard Hudson & Justin Amash (Mar. 23, 2017), <https://perma.cc/88GN-59SM> (arguing that such legislation can be justified on the basis of the Full Faith and Credit Clause).

¹¹² *National Concealed Carry Reciprocity Lies and the Lying Liars Who Tell Them*, NRA INST. FOR LEGIS. ACTION (Jan. 13, 2017), <https://perma.cc/NP82-QK3Q>.

¹¹³ *Id.*

¹¹⁴ Goss, *supra* note 35, at 705.

¹¹⁵ See Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1485; Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855, 870 (2019).

¹¹⁶ Justice Sonia Sotomayor raised this point at oral argument in *Bruen*: “[D]o we have any other constitutional right whose exercise in history has been as varied as gun possession and use?” Transcript of Oral Argument, *supra* note 20, at 77.

rural,¹¹⁷ South and North,¹¹⁸ inside and outside the home,¹¹⁹ and so on.¹²⁰ In one of the first firearms preemption cases, *Galvan v. Superior Court*,¹²¹ the California Supreme Court concluded: “That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.”¹²² Given *Heller*’s approval of “longstanding” forms of gun regulation,¹²³ this baseline of tradition is presumably entitled to some respect, either for its own sake or as a proxy for collective wisdom.¹²⁴

One obvious reason for the traditional variation is that the costs and benefits of guns vary by location.¹²⁵ In crowded urban areas, the externalities of gun use (and misuse) are higher. In rural areas, there are more opportunities for traditionally lawful purposes like recreation and hunting, and police response times tend to be longer, thus arguably increasing the utility of a gun for self-defense. These differentials suggest some room for localized policy solutions. As Darwin Farrar notes, writing about California’s firearms preemption regime, “[S]tate legislation can be a blunt instrument of policy; it is best used to address shared problems that more or less equally impact different regions of the state.”¹²⁶ As the following Section describes in more detail, there is some reason to think that local government regulations can lessen

¹¹⁷ See Blocher, *supra* note 4, at 114–21.

¹¹⁸ See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 125–27 (2015).

¹¹⁹ See *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”); see also Darrell A.H. Miller, *Guns as Smut*, 109 COLUM. L. REV. 1278, 1280 (2009) (arguing that guns in public are subject to near-plenary regulatory authority).

¹²⁰ See David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 264–85 (2018) (discussing the “sensitive places” doctrine under *Heller*).

¹²¹ 452 P.2d 930 (Cal. 1969).

¹²² *Id.* at 938; see also *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (“Another constitutional principle is relevant: the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity. . . . Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim.”). This is in some sense a simple recognition of “effective local self-government[] as an important constituent part of our system of government,” particularly when “the nature of [] problems varies from county to county and city to city.” *State v. Hutchinson*, 624 P.2d 1116, 1120, 1126 (Utah 1980).

¹²³ *Heller*, 554 U.S. at 626–27.

¹²⁴ See Darrell A.H. Miller, *Second Amendment Traditionalism and Desuetude*, 14 GEO. J.L. & PUB. POL’Y 223, 224–26 (2016).

¹²⁵ For a helpful account, see Simon, *supra* note 14, at 9–17.

¹²⁶ Farrar, *supra* note 45, at 53.

localized harms without unnecessarily restricting the ability of rural residents to use guns for traditionally lawful purposes.

But the arguments for local control do not necessarily support *all* kinds of variation when it comes to gun rules. It is hard to make a geographic tailoring argument for prohibitions on gun possession by particular classes of persons—those convicted of domestic violence crime, for example. If a person’s prior conviction makes him or her more dangerous to an intimate partner, that conclusion probably does not depend much on where he or she lives. The calculus may look very different for bans on particular classes of weapons, however. A high-powered rifle has a different risk profile in an urban area where its rounds might penetrate walls and hit bystanders than in a rural area where it might be used to hunt distant game.¹²⁷

The following Section will consider in more detail the local benefits from a policy perspective. But it is also near-obligatory to cite Justice Louis Brandeis’s argument that federalism permits states to serve as laboratories for “novel and social economic experiments without risk to the rest of the country.”¹²⁸ That argument may have even more purchase at the local level, as Professor Richard Briffault has noted: if “the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform.”¹²⁹ Especially in the face of congressional gridlock, the benefits of laboratories of experimentation seem all the more important when it comes to guns.

B. Localized Harms

Another argument in favor of preemption laws—or at least against the argument against them¹³⁰—is that local enforcement of gun laws is ineffective. This is in some ways an interesting converse of the hodgepodge argument: whereas the latter stresses the difficulty that gun owners face in crossing jurisdictional lines,

¹²⁷ I suggest this simply as an illustration; which kinds of firearms actually have increased power to penetrate walls and the like is a disputed empirical proposition. See E. Gregory Wallace, “Assault Weapon” Lethality, 88 TENN. L. REV. 1, 43–45 (2020).

¹²⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹²⁹ Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1151–52 (1980).

¹³⁰ The ineffectiveness argument tends to be emphasized by opponents of localism, not necessarily by advocates of preemption. The reason for this, I assume, is that advocates of preemption laws do not want to emphasize the costs of gun misuse, whereas many advocates of gun regulation want state or federal solutions.

the effectiveness argument emphasizes the ease with which guns and gun-related harms do. And indeed, it is well established that crime guns tend to flow out of states with weaker gun laws; Chicago's experience, as noted above, is typical in that regard.¹³¹

Another related argument in favor of preemption (or against localism) is that cities are simply bad at policy making. Former President Donald Trump's comments about Chicago are representative:

The city of Chicago. What the hell is going on in Chicago? There are those who say that Afghanistan is safer than Chicago, okay? What is going on? You know what's wrong with Chicago? Weak, ineffective politicians. Democrats that don't want to force restrictions and don't, and by the way, Chicago, — for those of you that are gonna say, "Guns, guns" — Chicago has the toughest gun laws in the United States, okay? Just in case you were thinking about it.¹³²

Such anti-urbanism is nothing new in U.S. politics; Schragger notes that "[t]he enduring anti-urban narrative suggests that the city is badly governed, bad for citizens' welfare, and bad for the nation."¹³³

It is far beyond the scope of this short Essay to fully evaluate that narrative. It is undoubtedly true that local rulemaking can be parochial, exclusionary, or otherwise discriminatory.¹³⁴ And it is also hard to evaluate the effectiveness of any gun regulation, local or otherwise, given the relative dearth of reliable empirical data.¹³⁵ Yet, even with those limitations, there is reason to believe that gun restrictions can yield benefits.¹³⁶ For example, evidence

¹³¹ See *supra* notes 105–106 and accompanying text.

¹³² Kori Rumore, "Politicians Ran Chicago into the Ground." *When Trump Talks About Chicago—and the State of Illinois—We Track It.*, CHI. TRIB. (Oct. 28, 2020) (quoting Donald Trump, Remarks at a Rally in Pensacola, Fla. (Dec. 8, 2017)) <https://perma.cc/Y6RR-236B>. See generally *id.* (collecting former president Trump's tweets about Chicago, many of them highlighting the city's crime problems and criticizing city governance).

¹³³ Schragger, *supra* note 1, at 1195.

¹³⁴ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1132–33 (2007); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 46 (2010).

¹³⁵ See NAT'L RSCH. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 2–10 (2005) (noting the inconclusiveness of many studies and need for more research).

¹³⁶ Cf. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1354 (2009) ("[H]ome rule made concrete, and legally salient, the notion that many basic police power functions—including the protection of health, safety, and general welfare—were well within the competence of, and even perhaps best effectuated by, municipal governments.").

has shown that, due in part to stringent local regulations, guns are hard to obtain on the underground gun market in Chicago.¹³⁷ It seems likely that, as is the case in any other area of law, prohibitions can marginally increase the costs of undesirable behavior, which should at the very least deter it.¹³⁸

Moreover, the policy benefits of local regulation are not necessarily limited to those within the adopting jurisdiction: the benefits of experimentation, or simply political proof of concept, can be more broadly shared. The same may be true of the political feasibility of local regulations. As one of the Morton Grove trustees said at the time: “We felt gun control would have to be a grass-roots effort, as with child labor and pollution laws, and wanted to send a message to other villages and towns that they could enact such ordinances.”¹³⁹ Goss explains: “Like their national counterparts, most state gun control leaders placed limited faith in the policy effectiveness of local ordinances. But they did see the political potential, via the snowball effect, of organizing around local projects.”¹⁴⁰

As the story in Part I suggests, this did not happen. As Goss notes, “the gun rights forces appeared to take the political potential of the Chicago-area developments far more seriously than did the gun control side.”¹⁴¹ Although groups like the National Coalition to Ban Handguns would eventually help fund the legal defense of Morton Grove’s law,¹⁴² they lacked local organizational power and focused their lobbying energy on Congress. Similar prohibitions were passed in Evanston and Oak Park, Illinois, but the imagined grassroots movement never took off.¹⁴³ Preemption laws are not just a reflection of that failure, but a cause—by

¹³⁷ Philip J. Cook, Jens Ludwig, Sudhir Venkatesh & Anthony A. Braga, *Underground Gun Markets*, 117 *ECON. J.* F558, F561–68 (2007).

¹³⁸ *Friedman*, 784 F.3d at 412 (“Local crimes are most likely to be committed by local residents, who are less likely to have access to firearms banned by a local ordinance. . . . Plaintiffs’ argument proves far too much: it would imply that no jurisdiction other than the United States as a whole can regulate firearms.”).

¹³⁹ Nathaniel Sheppard Jr., *Illinois Town Faces Lawsuit After Limiting Pistol Use*, N.Y. TIMES (July 4, 1981), <https://perma.cc/84T8-KFP4> (quoted in Goss, *supra* note 35, at 704).

¹⁴⁰ Goss, *supra* note 35, at 707.

¹⁴¹ *Id.* at 704; *see also* Kirby, *supra* note 36, at 478–79 (describing the NRA’s efforts).

¹⁴² *See generally* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (upholding handgun law).

¹⁴³ A year after the Morton Grove ordinance, San Francisco mayor Dianne Feinstein proposed a similar ordinance, which was eventually adopted, even in the face of a written opinion by the California attorney general concluding that it was preempted—a conclusion soon confirmed by the California courts. *Doe v. City & County of San Francisco*, 136 Cal. App. 3d 509, 511 (Ct. App. 1982). *See generally* Don B. Kates & C.D. Michel, *Local Gun Bans in California: A Futile Exercise*, 41 U.S.F. L. REV. 333 (2007).

limiting policy innovation, they limit policy diffusion.¹⁴⁴ Whether that is a good or a bad thing likely depends in part on whether one thinks that local firearms rules are likely to violate constitutional rights or interests—an issue to which the following Section turns.

C. Rights and Rhetoric

Supporters of firearms preemption laws often argue that such laws are needed to protect the right to keep and bear arms. As noted above, the NRA argued that Morton Grove’s regulation was the harbinger of a broader campaign to make gun possession illegal.¹⁴⁵ In the words of one supporter, “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.”¹⁴⁶ Similar rhetoric has been deployed in support of national concealed carry reciprocity,¹⁴⁷ notwithstanding the fact that *Heller* itself indicates that concealed carrying of firearms is not even covered by the Second Amendment.¹⁴⁸ Still, it is true that some of the regulations which have been held to violate the post-*Heller* Second Amendment are local and that stringent preemption laws might have kept them

¹⁴⁴ See generally Jacob Alderdice, Note, *Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL’Y REV. 459 (2013). Goss quotes the former leader of a national gun control organization: “There’s no question that the NRA’s effort to pass preemption laws was a serious setback, and there’s no question that whatever the implications in terms of policy, what you do lose at the local level is the ability to rally people around a local issue.” Goss, *supra* note 35, at 706–07.

¹⁴⁵ See *supra* notes 48–49 and accompanying text; see also Joe Palazzolo, Ashby Jones & Patrick O’Connor, *City Gun Laws Hit Roadblock*, WALL ST. J. (Feb. 5, 2013), <https://www.wsj.com/articles/SB10001424127887324761004578286072929691906> (“At the time, Morton Grove’s ban was the strictest gun-control law in the country, and was viewed as the beginning of a nationwide trend.”).

¹⁴⁶ Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, THE ATLANTIC (Mar. 6, 2014) (quoting Patricia Stoneking, president of the Kansas State Rifle Association), <https://perma.cc/SDE6-PL72>; see also Robert J. Cahall, Note, *Local Gun Control Laws After District of Columbia v. Heller: Silver Bullets or Shooting Blanks? The Case for Strong State Preemption of Local Gun Control Laws*, 7 RUTGERS J.L. & PUB. POL’Y 359, 390 n.98 (2010) (arguing that “the utility of preemption lies in its ability to minimize and avoid violations of the rights protected by the Second Amendment, and not necessarily to preclude any and all possible variations in the law that could result in disparate treatment”).

¹⁴⁷ See, e.g., *House Passes Concealed Carry Reciprocity*, NRA INST. FOR LEGIS. ACTION (Dec. 6, 2017), <https://perma.cc/7TVZ-CTKM>.

¹⁴⁸ *Heller*, 554 U.S. at 626; see Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1518–28 (2014) (arguing that concealed carry is not covered by the Second Amendment but that open carrying is).

off the books in the first place. Chicago's handgun ban is, of course, an obvious example.¹⁴⁹

The fact that such laws have been struck down in court, however, suggests that preemption laws—if justified as a necessary protection for *Heller's* right—are a solution in search of a problem. Of course, some gun rights advocates believe that courts are underprotecting the right, relegating it to “second-class” status¹⁵⁰ or even engaging in “massive resistance” to *Heller*.¹⁵¹ But even if one is sympathetic to this view,¹⁵² it is hard to justify the severity of current punitive preemption laws. Threatening Tucson with a loss of state funding because it destroys crime guns that cannot be repurposed for police work¹⁵³ is not required by any plausible reading of the Second Amendment. Perhaps some local laws go too far in restricting firearms, but—if rights are the justification—preemption laws err in the other direction. They go far beyond any plausible reading of the Second Amendment—for example, by prohibiting local rules “relating to” guns.¹⁵⁴

Of course, one might nonetheless argue that this is the proper balance to be struck: that preemption laws are supererogatory with regard to constitutional values, in much the same way that, say, civil rights statutes properly go above and beyond what equal protection requires. On this view, the use of preemption as a prophylactic might be justifiable in roughly the same way that Congress can use its Section 5 power to prohibit state laws that have not been found to violate the Fourteenth Amendment. (Of course, even then, such remedies must be “congruent and

¹⁴⁹ See *McDonald*, 561 U.S. at 791.

¹⁵⁰ See generally Joseph Blocher & Eric Ruben, “Second-Class” Rhetoric, Ideology, and Doctrinal Change, 110 GEO. L.J. (forthcoming 2022).

¹⁵¹ See, e.g., Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014) (citing Editorial, *Massive Gun Resistance*, WALL ST. J. (Apr. 12, 2013), <https://www.wsj.com/articles/SB10001424127887324600704578402760760473582>) (“In the wake of the Supreme Court's *District of Columbia v. Heller* [] and *McDonald v. Chicago* decisions that clarify, expand, and protect Second Amendment rights, federal and state inferior courts have been engaging in massive resistance.”).

¹⁵² My own review of post-*Heller* caselaw does not suggest to me any such widespread treatment. Ruben & Blocher, *supra* note 15, at 1507–08. See generally Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57 (2018) (concluding that there are plausible alternative explanations for the data other than the “second-class” argument); Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621 (2019) (arguing that the Second Amendment and the First Amendment received comparable protection during their first decades of doctrinal development).

¹⁵³ See *supra* notes 95–97 and accompanying text.

¹⁵⁴ Tartakovsky, *supra* note 79, at 7.

proportional” to an identified constitutional harm,¹⁵⁵ and some firearms preemption laws plainly are not.)

One problem with this argument is that preempting regulation in the name of one constitutional interest—gun rights—can threaten other constitutional interests.¹⁵⁶ Although the gun debate is often portrayed as having the Constitution on just one side—that of gun owners—such a binary is misleading. As in other areas of constitutional law,¹⁵⁷ there are constitutional interests on many sides of the dispute. Advocates of gun regulation, like advocates of gun rights, are increasingly asserting constitutional interests of their own which they say are threatened by unrestricted gun possession: the rights to speak,¹⁵⁸ to peaceably assemble,¹⁵⁹ to receive an education,¹⁶⁰ to responsive government,¹⁶¹ to *not* keep or bear arms,¹⁶² and to safety and life.¹⁶³

Preemption laws represent a government intervention on one side of this political struggle. They are, it should be emphasized, a thumb on the scale in favor of gun owners in a battle that they are already, in many ways, winning. The effects, both direct and indirect, are considerable.

One of the ripple effects of broad preemption laws might be to dampen the use of local law to establish a duty of care. Chicago’s handgun prohibition (the one struck down in *McDonald*) played a role in the public-nuisance litigation brought against industry defendants by individual and government plaintiffs in the 1990s. Specifically, “the plaintiffs allege[d] that [the] defendants market and distribute their handguns to circumvent these local prohibitions, facilitating, and encouraging sales to Chicago residents as

¹⁵⁵ See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

¹⁵⁶ Blocher & Siegel, *supra* note 26, at 33–34.

¹⁵⁷ Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018) (“The paradigmatic rights conflict of the twenty-first century has involved multiple principles that must be jointly maximized or else selectively abandoned. . . . Our rights culture cannot constitute us unless all rights count, and all rights cannot count if all rights are absolute.”).

¹⁵⁸ See Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 55 (2012).

¹⁵⁹ See Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 185–87 (2018).

¹⁶⁰ See Patricia Somers & Nicholas Phelps, *Not Chilly Enough? Texas Campus Carry and Academic Freedom*, 9 J. ACAD. FREEDOM 1, 6–8 (2018).

¹⁶¹ See Blocher & Siegel, *supra* note 26, at 21–25.

¹⁶² See Blocher, *supra* note 11, at 18.

¹⁶³ See Brief for March for Our Lives Action Fund as Amicus Curiae Supporting Respondents, at 29, *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 139 S. Ct. 939 (2019) (No. 18-280); see also Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL’Y 187, 196 (2016).

well as other prohibited purchasers.”¹⁶⁴ Without such local laws to turn to, the standard of reasonableness is likely to continue shifting. Likewise, the limitations on local laws may shift courts’ understanding of what kinds of gun regulations are outliers from a constitutional perspective.¹⁶⁵

In practice, such laws deny cities the ability to protect themselves¹⁶⁶—the very deficiency that gun owners allege in the context of gun regulation. In that sense, preemption laws represent what Schragger has called “selective localism”—states’ tendency to intervene in local affairs when doing so is politically expedient but without taking responsibility for underlying problems.¹⁶⁷

CONCLUSION

In the legal and political debates over guns, the Second Amendment tends to claim center stage. But as a practical matter, state-level preemption laws represent a more significant—and much more recent—legal obstacle to gun regulation. These laws also raise deep questions about how to allocate firearm regulatory authority among federal, state, and local governments. Those questions do not lend themselves to simple answers, which is precisely why rigid preemption laws should be modified or repealed.

¹⁶⁴ Weaver, *supra* note 59, at 4 (first citing *Ceriale v. Smith & Wesson Corp.*, No. 99L5628 (Cir. Ct. Cook Cnty. filed 1999); and then citing *City of Chicago v. Beretta U.S.A. Corp.*, No. 98CH15596 (Cir. Ct. Cook Cnty. filed 1998)).

¹⁶⁵ Kopel, *supra* note 10, at 123.

¹⁶⁶ Fagundes & Miller, *supra* note 41, at 698; Stephen P. Teret, Susan DeFrancesco & Linda A. Bailey, *Gun Deaths and Home Rule: A Case for Local Regulation of a Local Public Health Problem*, 9 AM. J. PREVENTATIVE MED., no. 3, 1993, at 44, 45 (“The urban handgun problem presents a classic situation in which a municipality must be free to exercise its police power to enact its own solution.”).

¹⁶⁷ Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 102–03 (2017).