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Second Amendment Sanctuaries

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SECOND AMENDMENT SANCTUARIES

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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 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 on Second Amendment Sanctuaries dismisses them 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 these and other local intrastate resistance movements.

The theory 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 settled firmly by the judiciary. This "first impression departmentalism" reflects the proper role all coordinate branches of government have in defining the contours of constitutional provisions when emerging doctrine remains in a state of flux. These principles counsel in favor of the viability of at least some Second Amendment Sanctuaries as currently constructed, as well as sanctuaries resisting firearm deregulation and other statewide policy initiatives.

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INTRODUCTION

The term "sanctuary" has come to represent a broad sympathy for undocumented immigrants and a correlative antipathy for federal immigration enforcement.[1] Self-proclaimed "sanctuary cities" pass resolutions asserting their refusal to assist federal agencies in carrying out federal immigration functions.[2] Churches, schools, and other members of "sanctuary networks" hold themselves out as places of refuge beyond the reach of Immigration and Customs Enforcement (ICE).[3] These efforts reflect either a desire to protect immigrants from federal policies viewed as "heartless and ineffective," or an anarchic attempt to "protect[]

[1] *See* Christopher Lasch et al., *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. HUMAN RIGHTS L. REV. 1, 16 (2018) (summarizing history of immigrant sanctuaries as places offering "a range of benefits and protections to . . . undocumented immigrants").

[2] Massaro & Milczarek-Desai, *supra* note 1 at 16 ("So-called 'sanctuary jurisdictions' seek to limit local enforcement of federal and state immigration policies and practices.").

[3] Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1212-13 (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").

criminals who sneaked into the country illegally," depending on one's perspective.[4] 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.[5]

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.[6] These resolutions take different forms, but most claim an absolute right to protect local citizens from any statewide gun control law by refusing to enforce those laws in their jurisdiction.[7]

Much like immigrant sanctuaries, Second Amendment Sanctuaries claim refuge 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.

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[4] George Skelton, *What does 'sanctuary state' actually mean? It's time for lawmakers to figure it out*, L.A. TIMES (Mar. 16, 2017), https://www.latimes.com/politics/la-pol-sac-skelton-sanctuary-state-compromise-20170316-story.html.

[5] *Id.*; *see also* Lasch, *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 18 ("'Sanctuary jurisdiction' is a non-legal term . . ."); Rose Cuison Villazor, *What is a "Sanctuary"*, 61 SMU L. REV. 133, 148, 150 (2008) (comparing narrow and broad definitions of what it means to be a "sanctuary jurisdiction").

[6] David J. Toscano, *The Gun Sanctuary Movement is Exploding*, SLATE (Dec. 11, 2019), https://slate.com/news-and-politics/2019/12/second-amendment-gun-sanctuary-movement-constitution.html.; *see also* Simon Romero & Timothy Williams, *When Sheriffs Say No: Disputes Erupt Over Enforcing New Gun Laws*, N.Y. TIMES (Mar. 11, 2019) ("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.").

[7] *See, e.g.,* Res. of Carroll Cnty. (Virginia) Bd. of Supervisors, (May 10, 2019), http://www.carrollcountyva.gov/document_center/Board%20Packets/2019/May/Resolution.pdf ("[T]he Board of Supervisors hereby expresses 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.'").

This latest iteration of local resistance to outside lawmaking has dominated the political landscape in Colorado,[8] Illinois,[9] New Mexico,[10] Virginia,[11] and other states with newly elected democratic legislatures seeking to pass new gun regulations. The regulations most commonly targeted by sanctuary activists include two old proposals – universal background checks and so-called "assault weapons" bans – and a third, "extreme risk protection orders," that have swept through statehouses with the same speed as sanctuary resolutions.[12] These so-called "red flag" laws authorize courts to temporarily prohibit the possession of a firearm for anyone adjudicated to be a danger to themselves or others.[13]

While the term "sanctuary" has no legal meaning, its use in both the immigration and firearms contexts provides a useful comparison through which to analyze the purpose and viability of these new "gun sanctuaries." Both immigrant sanctuaries and gun sanctuaries seek to resist at the local level the enforcement of laws passed by a superior governmental entity, be it the federal or state government.

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[8] 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 ("A growing number of Colorado counties . . . have said they would not enforce the legislation should it become law.").

[9] Associated Press, *In Virginia and elsewhere, 2nd Amendment 'sanctuary' movement aims to defy new gun laws*, L.A. TIMES (Dec. 21, 2019), https://www.latimes.com/world-nation/story/2019-12-21/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws ("[T]oday, 70 out of the 102 counties in Illinois have approved resolutions" to refuse enforcement of extreme risk laws and other statewide gun control measures).

[10] Alicia Nieves, *A majority of New Mexico counties are now Second Amendment Sanctuaries – and more states are following suit*, NEWSCHANNEL5 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.

[11] Robert Verbruggen, *Virginia's Second Amendment Sanctuaries: An Update*, NAT'L. REV. (Dec. 16, 2019) ("[T]he sanctuaries have spread dramatically. They're up to 93 jurisdictions – covering roughly 40 percent of the population.").

[12] *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, (work-in-progress on file with Duke Center for Firearms Law) (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"); Leigh Paterson, *Poll: Americans, Including Republicans and Gun Owners, Broadly Support Red Flag Laws*, NPR (Aug. 20, 2019), https://www.npr.org/2019/08/20/752427922/poll-americans-including-republicans-and-gun-owners-broadly-support-red-flag-law (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 ERPOs").

[13] *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 (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 others.").

And both primarily (though not exclusively) do so passively, by simply refusing to expend money enforcing these laws rather than affirmatively passing contrary legislation or otherwise erecting a substitute regulatory regime.[14]

But there are important limits to the analogy. For one, the legal justification for immigrant sanctuaries rests on more solid footing because these jurisdictions decline to enforce federal law per their right under United States federalism structures and the anticommandeering principles of the Tenth Amendment.[15] 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 local municipalities act merely as subdivisions of states whose legislation can be preempted by a contrary state enactment.[16]

In this sense, Second Amendment Sanctuary resolutions may act more like local ordinances such as citywide minimum wage hikes or plastic bag bans subject to invalidation by state preemption. 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.[17] This "deregulatory preemption"[18] has proven a useful tool for gun rights activists, who successfully invalidated urban gun control measures in some of the nation's largest metropolitan areas.[19] These preemption statutes present the greatest headwind against Second Amendment Sanctuary viability.

But this analogy has limits as well. Unlike proactive local regulations like

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[14] *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*, MSN NEWS (Nov. 23, 2019), https://www.msn.com/en-us/news/us/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/ar-BBXdIYd (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").

[15] *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 et al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839 (2019) ("Thus far, localities have mainly prevailed against this federal anti-sanctuary campaign, relying on federalism protections afforded by the Tenth Amendment.").

[16] *In re City of Cent. Falls*, 468 B.R. 36, 41 (D.R.I. 2012) ("Municipalities are creatures of state law subject to the power of the state . . . to create, divide, and even abolish them.").

[17] Preemption of Local Laws, L. Ctr. to Prevent Gun Violence, (last visited Jan. 28, 2020), http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/.

[18] Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1182-83 (2018) (quoting Richard Briffault, Presentation at Fordham Law School (June 2017)).

[19] *See infra* Section II. B.; *see also* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018) (situating firearms preemption within a broader movement to strip localities of all governing power).

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 a novel sort of "subfederal anticommandering" claim that state authorities must enforce their own laws.

Second Amendment Sanctuaries possess another characteristic absent in both the immigrant sanctuary and local regulation context: the interpretation of a constitutional right. Second Amendment Sanctuaries proclaim an active duty to resist what they see as unconstitutional violations of an individual's right to bear arms as defined in *District of Columbia v. Heller*[20] and incorporated against the states in *McDonald v. City of Chicago.*[21] Whether these resolutions assert a *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 to support this approach.[22]

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.[23] 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.[24] Moreover, even if these regulations present unconstitutional infringements, the proposition that local executive actors like sheriffs and prosecutors have the authority to make this determination is a controversial one at best.[25]

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[20] 554 U.S. 570 (2008).

[21] 561 U.S. 742 (2010).

[22] Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 88-89 (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. 1997, 2022 (2018) (observing that state-constitutional localism operates "by assuring independent lawmaking capacity for the lower level"); Timothy Zick, *Constitutional Displacement*, 86 WASH U. L. REV. 515, 532 (2009) (acknowledging that "currents of constitutional localism remain quite strong" as a force for local autonomy).

[23] Blocher, *supra* note 22 at 85 ("[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."); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid Community*, 77 TEX. L. REV. 1129, 1133 (1999); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

[24] Blocher, *supra* note 22 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*, AM. CONST. SOC'Y. L. & POL'Y. 1 (2010) (asserting that the Supreme Court failed to provide adequate guidance to lower courts on how to resolve gun controversies).

[25] *See* Toscano, *supra* note 6 (arguing that "sheriffs may be 'constitutional officers,'

Given the foregoing, a betting person might conclude that Second Amendment Sanctuaries are doomed to fail and "will never hold up in court."[26] States can and do exercise broad preemption powers over localities.[27] No local-level Tenth Amendment shield protects localities from commandeering by their state governments.[28] And to the extent these sanctuaries raise valid constitutional questions, such questions must be resolved by courts rather than municipal "constitutional officers."

This Article challenges those intuitions. While I make no attempt to predict what will happen in the inevitable litigation over these 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 other similarly situated sanctuary contexts, apply with particular salience to firearms regulation.

First, a limited space for constitutional home rule providing localities autonomy from state reach should exist when either a federal constitutional interest is implicated or the state's own constitutional doctrine authorizes autonomy over matters historically of "local concern."[29] In the first instance, the United States Supreme Court has provided at least limited local insulation from state preemption when the local ordinance promotes a federal constitutional right at risk by the state enactment.[30] Facially, Second Amendment Sanctuaries make the same claim, though the substantive contours of those constitutional arguments remain fuzzy. 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.[31]

Second, while state preemption may invalidate affirmative local regulations, passive local ordinances merely resisting enforcement of superior state law raises different questions. A limited form of "subfederal anticommandeering" analogous to federal anticommandeering may be appropriate, at least when a genuine

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but they are not 'constitutional interpreters'"); Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1498-99 (2017) (summarizing why political branches no longer assert constitutional interpretation power).

[26] Mary B. McCord, *Second Amendment 'sanctuaries' will never hold up in court*, WASH. POST (Jan. 8, 2020), https://www.washingtonpost.com/outlook/2020/01/08/second-amendment-sanctuaries-will-never-hold-up-court/.

[27] *See infra* Section II. A.

[28] *See infra* Section III. B.

[29] *See, e.g., Black v. City of Milwaukee*, 2016 WI 47, 58 (2016) (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, 1280 (Colo. 2002) (rejecting constitutional home rule challenge because photo radar "has not historically been a matter of purely local concern").

[30] *See, e.g., Romer v. Evans*, 517 U.S. 620, 629 (1996) (protecting Boulder, Colorado's anti-discrimination ordinance against state law barring "homosexuals from securing protection against the injuries that [Boulder's ordinance] addresses").

[31] *See* Blocher, *supra* note 22 at 121 (claiming that locally tailored gun regulation would "preserv[e] the ability of rural areas to maintain their strong gun culture").

constitutional claim exists, and the local ordinance places no affirmative roadblocks in the way of state officers enforcing state law. Some Second Amendment Sanctuaries would likely fall outside this limitation, 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."[32]

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.[33] And even under a judicial supremacy model, local 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 issues can hardly be overstated. Prior to 2019, Second Amendment Sanctuaries did not exist.[34] However, following the democratic "blue wave" in 2018,[35] with liberal lawmakers rising to power on the promise to pass statewide gun control regulations, local resolutions declaring themselves immune from such regulations exploded.[36] In 2019 alone, resolutions were adopted in 38 of 64 Colorado counties, 70 of 102 Illinois counties, 10 of 16 Nevada counties, and 30 of 33 New Mexico counties.[37] In Virginia, the state rapidly becoming ground zero

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[32] Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 200 (2016) (discussing the promise and peril of a parallel subfederal system of shared power).

[33] Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489-90 (2018) (describing 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.13 (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 . . .").

[34] 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. 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).

[35] Sabrina Siddiqui, *The Democratic blue wave was real*, THE GUARDIAN (Nov. 17, 2018), https://www.theguardian.com/us-news/2018/nov/16/the-democratic-blue-wave-was-real ("Midterm elections proved that Republicans have only a tenuous hold over the coalition that propelled Trump to the White House in 2016.").

[36] *See* Schneider, *supra* note 14; Lois Beckett, *Virginia Democrats won an election. Gun owners are talking civil war*, THE GUARDIAN (Jan. 10, 2020), https://www.theguardian.com/us-news/2020/jan/09/virginia-gun-control-second-amendment-civil-war.

[37] Toscano, *supra* note 6; Nieves, *supra* note 10; Katherine Rosenberg-Douglas, *Second Amendment 'sanctuary county' movement expands as organizers take aim at new gun laws*,

for the Second Amendment Sanctuary battle, "an overnight tidal wave of Second Amendment Sanctuaries" punctuated the end of the decade.[38] 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."[39]

The language of these Virginia resolutions – and the hearings at which they were passed – signals an entrenched commitment to resist any state gun control measure. Tazewell County's Board of Supervisors claimed its sole right under the Virginia Constitution to "order militia to the localities" as justification for refusing to honor any gun control measure.[40] The Culpepper County Sheriff pledged to deputize "thousands of our law-abiding citizens" to skirt state and federal law.[41] And some proponents have resurrected nullification and interposition as legitimate resistance tactics to protect what they view as absolute Second Amendment rights.[42] Foreshadowing what is certain to be a protracted legal battle, Virginia Attorney General Mark Herring responded to these resolutions by declaring flatly that "when Virginia passes . . . gun safety laws . . . they will be followed, they will be enforced."[43] And at least one Virginia lawmaker has formally requested an advisory opinion on the specific binding effect of these resolutions.[44]

Unfortunately, no such opinion – advisory or otherwise – would have the benefit of legal scholarship for guidance. To date, no scholar has addressed the issue

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CHICAGO TRIBUNE (Apr. 17, 2019), https://www.chicagotribune.com/news/breaking/ct-met-second-amendment-sanctuary-county-movement-illinois-20190416-story.html.

[38] Va. Inst. Pub. Pol'y., *Virginia Has Become An Overnight Tidal Wave Of Second Amendment Sanctuaries*, Dec. 26, 2019, https://virginiainstitute.org/virginia-has-become-an-overnight-tidal-wave-of-second-amendment-sanctuaries/.

[39] *Id.*

[40] 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 (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").

[41] WBOC, *Virginia Sheriff: He'll Deputize Residents if Gun Laws Pass* (Dec. 9, 2019), http://www.wboc.com/story/41427096/virginia-sheriff-hell-deputize-residents-if-gun-laws-pass ("'I plan to properly screen and deputize thousands of our law-abiding citizens to protect their constitutional right to own firearms.'").

[42] David "Adam" McKelvey, *A framework for true 2nd Amendment Sanctuary*, THE 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 ("Remember, a resolution, without tangible nullification, is simply a statement of opinion with no teeth.").

[43] Cameron Thompson, *Attorney General's response to 2nd Amendment sanctuary resolutions: "Gun safety laws will be followed"*, WTVR (Dec. 6, 2019), https://wtvr.com/2019/12/06/attorney-general-virginia-2nd-amendment-sanctuary-01/.

[44] *Id.*

of Second Amendment Sanctuaries.[45] Numerous scholars have explored the nature of "sanctuary cities" with respect to immigration policy,[46] others have examined the growing "intrastate federalism" punctuating recent local-state power struggles,[47] and at least one scholar has asserted the propriety of localities to retain gun regulation power as a matter of policy.[48] 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 "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 questions surrounding their viability as reflected in the immigrant sanctuary city experience.

A. The New Gun Control Movement

For four decades, firearms legislation has been defined by statewide deregulation. In 1988, forty states outlawed or strictly regulated the public concealed carry of firearms; today, all fifty states allow such conduct with little restriction.[49] In 1994, the federal "assault weapons ban" prohibited the possession of nineteen types of military style semiautomatic weapons nationwide.[50] The ban expired in 2004, with only seven states enacting replacement regulations since then.[51]

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[45] A January 27, 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 19 at 1501 (referencing a 2017 Florida appellate court decision considering without deciding whether a state bar on "the 'promulgation' of [local] ordinances that violate the state gun control preemption law . . . w[as] valid"); Kalinowski, *supra* note 34 at 113.

[46] *See generally supra* note 1.

[47] Su, *supra* note 32 at 200; *see also, e.g.,* Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 138 (2017).

[48] Blocher, *supra note* 22 at 94.

[49] *See* Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1676, 1688-90 (2018) (summarizing nationwide evolution of concealed carry legislation).

[50] 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 et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 551 (1996) (The law "banned the manufacture, sale, or transfer of nineteen kinds of assault weapons.").

[51] John J. Phelan IV, *The Assault Weapons Ban – Politics, The Second Amendment, and*

But perhaps the most significant shift in gun regulation during this time is not what has been passed, but by which government entity. 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.[52] Today, forty-three states have broad statewide preemption laws prohibiting localities from enacting any firearms regulations,[53] due in large part to actions by the National Rifle Association and other political groups to eliminate gun regulations in large cities.[54]

While this statewide approach to firearms regulation has not changed, the regulations being considered have. Following a surge in public support for targeted gun control measures and the election of democratic governors in several states, legislation has been proposed to enact statewide universal background checks, assault weapons bans, and so-called "red flag" laws authorizing temporary confiscation of firearms from judicially-determined dangerous individuals.[55] Background checks and "dangerous and unusual" arms bans have been staples of the gun control movement for decades.[56] 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.

"Extreme risk" laws are different. These laws, which "permit courts to order

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the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom", 77 ALB. L. REV. 579, 582 n.7 ("California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York have all enacted some form of an assault weapons ban.").

[52] *See* Anthony Badaracco, *Firearm Federalism*, 65 N.Y.U. ANN. SURV. AM. L. 761, 789 (2010) ("State and local governments have traditionally enjoyed a great deal of latitude in passing gun control laws . . .").

[53] Giffords L. Ctr. to Prevent Gun Violence, *supra* note 17.

[54] Andrew D. Herz, *Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 151 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 . . .").

[55] Mel Leonor, *Northam administration outlines gun control measures it backs including assault weapons ban with permits for existing owners*, RICHMOND TIMES-DISPATCH (Jan. 9, 2020) (outlining proposals of new Virginia governor); Joseph Frydenlund, *Colorado's Proposed "Red Flag" Gun Bill: Extreme Risk Protection Orders*, 97 DENV. L. REV. ONLINE 82, 82 (2019) (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 (updated Jan. 18, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/gun-control/ ("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.").

[56] *See, e.g.,* Allen Rostron, *A New State Ice Age for Gun Policy*, 10 HARV. L. & POL'Y REV. 327, 343 (2017) (discussing history of gun control proposals since enactment of Brady Act in 1981); Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1515-20 (2014) (describing familiar pattern of a mass shooting, a temporary outcry for gun control measures, and then successful resistance to such measures).

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."[57] These laws allow law enforcement, mental health professionals, or family members to petition the court for an extreme risk protection order ("ERPO") that would require respondents to surrender their firearms and refrain from acquiring new ones.[58] Much like domestic violence protective orders, petitioners can move for a temporary *ex parte* ERPO, and if the court grants the order petitioners may seek a lengthier, but still temporary, ERPO.[59]

Extreme risk laws have spread with nearly the same pace as the sanctuary laws responding to them. Connecticut passed the first such law in 1999,[60] but as late as 2017 only five states had adopted anything "that might be described as an extreme risk law."[61] But the mass murders at Marjory Stoneman Douglas High School in Parkland, Florida, on February 14, 2018, changed the landscape. Following intense political debate, led largely by the teenage survivors of the Parkland shooting, over a dozen states adopted extreme risk laws.[62] By the end of 2019, 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.[63]

These targeted measures enjoy broad support. "[A] March 2019 Quinnipiac poll reported that 93 percent of American voters support a bill that would require

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[57] Blocher & Charles, *supra* note 12 at 8.

[58] *See* Williams, *supra* note 13; *Redington v. State*, 121 N.E.3d 1053, 1055 (Ind. Ct. App. 2019) (describing functioning of Indiana's "'red flag' law").

[59] *Redington*, 121 N.E.3d at 1054 (explaining that officers 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"); Bethany Stevens, *Massachusetts Adopts "Red Flag" Law*, 62 B.B.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.").

[60] Jason Hanna & Laura Ly, *After the Parkland massacre, more states consider 'red flag' gun bills*, CNN (Mar. 7, 2018), https://www.cnn.com/2018/03/07/us/gun-extreme-risk-protection-orders/index.html.

[61] Blocher & Charles, *supra* note 12 at 9; Jesse Paul, *Colorado's "red flag" gun bill makes its debut. Here's how it compares to other states,* COLO. SUN (Feb. 14, 2019), https://coloradosun.com/2019/02/14/colorado-red-flag-bill-2019/ (summarizing extreme risk legislation by state).

[62] Hanna & Ly, *supra* note 60; Nick Wang & Melissa Jeltsen, *Wave of "Red Flag" Gun Laws Shows Power of the Parkland Effect*, HUFF. POST (Jun. 16, 2018) ("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 . . ."); Frydenlund, *supra* note 55 at 84 ("States with 'red flag' gun laws similar to the [Colorado] bill include Washington, Oregon, California, Illinois, Indiana, New York, Vermont, Massachusetts, Connecticut, New Jersey, Rhode Island, Delaware, Washington D.C., and Maryland.").

[63] Williams, *supra* note 13; Grace Segers, *What are "Red Flag" Laws, and Which States Have Implemented Them?*, CBS NEWS (Aug. 9, 2019), https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them/.

'background checks for all buyers.'"[64] And an "April 2018 poll found that 85 percent of registered voters support" extreme risk laws.[65] While national polls may not be illustrative of local attitudes in a decidedly local debate over gun ownership, at least some recent polling suggests that strong majorities of voters in gun sanctuary jurisdictions support similar measures.[66]

Critics of extreme risk laws echo longstanding criticism of civil protection order mechanisms generally: they authorize significant liberty and property deprivations without sufficient due process.[67] While petitioners bear the burden of proof (ranging from "good cause" to "clear and convincing evidence"), this comparatively lower burden rankles many local officials charged with enforcing ERPOs.[68] 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.[69] These due process concerns merit special attention when the

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[64] Toscano, *supra* note 6.

[65] *Id.*; *see also* Paterson, *supra* note 12 ("77% of Americans surveyed support family-initiated ERPOs, . . . There is broad support among Republicans and gun owners for these types of laws . . .").

[66] Toscano, *supra* note 6 (summarizing poll results of Virginians in 2019, 84 percent of whom "favor universal background checks, and 74 percent support" red flag laws)."

[67] *See* Frydenlund, *supra* note 55 at 84 ("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, 484 (summarizing due process concerns in other civil protection order contexts, including domestic violence, civil commitment, and sexual violence).

[68] *See* Scott McLean & Sarah Weisdfelt, *This Colorado sheriff is willing to go to jail rather than enforce a proposed gun law,* CNN (Mar. 31, 2019), https://www.cnn.com/2019/03/31/us/colorado-red-flag-gun-law/index.html (quoting sheriff with concerns about the "low" preponderance of the evidence standard, though the sheriff later admitted "he would still never support the bill" even if the standard changed); Leah Anaya, *NM sheriffs force lawmakers to abandon red flag bill: We refuse to enforce unconstitutional laws*, LAW ENFORCEMENT TODAY (Jan. 19, 2020), https://www.lawenforcementtoday.com/nm-sheriffs-force-lawmakers-to-abandon-red-flag-bill-we-refuse-to-enforce-unconstitutional-laws/ (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.").

[69] Jacob Sullum, *Colorado's New "Red Flag" Law Illustrates the Pitfalls of Disarming People Based on Their Future Behavior*, REASON (Apr. 29, 2019), https://reason.com/2019/04/29/colorados-new-red-flag-law-illustrates-the-pitfalls-of-disarming-people-based-on-their-future-behavior/; *see also* Shawn E. Fields, *Sexual Violence and Future Harm: Lessons From Asylum Law*, 2020 UTAH L. REV. __ (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3380319 (discussing tension between need for flexible protection order processes to prevent "grave future harm" and 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[.]").

proposed remedy involves the deprivation of a fundamental constitutional right.[70]

Of course, gun rights advocates also oppose these laws on the basis that they violate the Second Amendment. Litigation remains rare to date, but the Connecticut Supreme Court held in *Hope v. State*[71] that its state extreme risk law "does not implicate the Second Amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes."[72] Similarly, in *Redington v. State*,[73] 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 materially burden the "core" Second Amendment right articulated in *Heller.*[74]

B. Gun Rights Localism

Despite this failure to defeat extreme risk laws on Second Amendment grounds, the Second Amendment Sanctuary movement exists in large measure as a response to the perceived Second Amendment violations these laws present.[75] This return to gun rights localism harkens back to the first seven decades of the twentieth century, when firearms laws, both regulatory and deregulatory, were traditionally passed at the local level.[76] This "firearm localism" was gradually replaced in the early 1980's by an NRA-led push for statewide deregulation.[77] That push accelerated following

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[70] Fields, *supra* note 67 at 485 (arguing for a higher burden of proof to authorize an additional protection order remedy infringing on a fundamental constitutional right).

[71] 163 Conn. App. 36 (2016).

[72] *Id.* at 42.

[73] 121 N.E.3d 1053.

[74] *Id.* at 1057.

[75] 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/ (noting that half of Colorado's counties declared themselves sanctuaries in direct response to introduction of red flag legislation); Kansas City Star Editorial Board, *Could this bill banning 'red flag' gun laws make Kansas a sanctuary state for danger?*, KANSAS CITY STAR (Dec. 26, 2019), https://www.kansascity.com/opinion/editorials/article238719858.html (discussing state bill that would ban "the enforcement of any federal 'red flag' law").

[76] Blocher, *supra* note 22 at 98 (examining history of firearms regulation); *McDonald*, 561 U.S. at 927 (Stevens, 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)).

[77] Herz, *supra* note 54 at 1349; *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) (noting that the NRA succeeded in its preemption push, increasing the number of states with laws preempting local regulation from seven to forty-three).

the *Heller* decision in 2008, coupled with the election of Barack Obama and proliferation of unfounded conspiracy theories about gun confiscation programs.[78] The effort to "constitutionalize" gun rights at the state level led to broad legislation removing restrictions on public concealed and open carry, licensing and registration requirements, and dealer licensing and operation.[79] These laws had the direct downward effect of invalidating robust gun control initiatives passed in major urban areas like Chicago and Philadelphia.[80]

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 as beyond Congress's interstate commerce power.[81] But the shifting statewide focus on gun control in 2019, particularly the passage of extreme risk laws, has prompted a return to traditional gun rights localism in the form of sanctuary resolutions.

Second Amendment Sanctuaries "exploded onto the national scene" in early 2019 after newly elected Democratic Gov. J.B. Pritzker pledged to pass gun safety measures in Illinois.[82] 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 Individual right of U.S. citizens as protected by the Second Amendment of the United States Constitution."[83] Within months, 70 of the state's

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[78] Toscano, *supra* note 6 ("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 their guns.").

[79] *See* Fields, *supra* note 44 at 1690.

[80] 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), https://www.usatoday.com/story/news/2019/08/16/philadelphia-mayor-jim-kenney-gun-control-preemption-laws/2031870001/ (explaining that Pennsylvania adopted preemption legislation in 1993 following assault weapons ban laws passed in Philadelphia and Pittsburgh); Dahleen Glanton, *The truth – and lies – about Chicago's gun laws*, CHICAGO TRIBUNE (Oct. 3, 2017), https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-gun-control-chicago-dahleen-glanton-20171003-story.html (noting that Chicago once "proudly" had the strictest gun control laws in the country, but the Illinois General Assembly passed partial preemption laws "watering down" Chicago ordinances).

[81] KAN. STAT. ANN. § 50-1201 (2018) (Second Amendment Protection Act) (specifying certain categories of firearms "exempt from regulation by the federal government"); WYO. STAT. ANN. § 6-8-406 (2018) (claiming "the sole and exclusive right" for Wyoming to regulate its gun laws because such powers are not "expressly delegated to the United States of America"); MONT. CODE ANN. 30-20-104 (2018) (Montana Firearms Freedom Act) (declaring certain intrastate firearms manufacture and sale "not subject to federal law"); 2014 Ida. SB 1332 ("Idaho Federal Firearm, Magazine, and Register Ban Enforcement Act") (prohibiting most federal regulation of firearms in Idaho).

[82] Toscano, *supra* note 6.

[83] Res. of the Cnty. Bd. of the Cnty. of Effingham, Illinois,

102 counties passed sanctuary resolutions.[84]

Other state localities soon followed suit. After New Mexico expanded background checks in 2019, 30 of 33 counties declared themselves Second Amendment Sanctuaries.[85] Prior to 2019, Second Amendment Sanctuaries did not exist; as of early 2020, local jurisdictions in at least twenty-one states had passed resolutions declaring an intent not to enforce a statewide gun regulation.[86] The numbers change almost daily, but as of January 28, 2020, 441 jurisdictions declared themselves gun sanctuaries, including a majority of counties in Colorado, Illinois, Nevada, New Mexico, and Virginia.[87]

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 these state laws. 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.[88] This kind of collective protest is "perfectly consistent with our traditions as a democracy."[89] But contradictory messaging from local officials passing these resolutions calls into

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https://media.illinoishomepage.net/nxsglobal/illinoishomepage/document_dev/2018/04/11/Effingham%20County%20Firearms%20Rights%20Resolution_1523484265419_39675137_ver1.0.pdf ; Denise Lavoie, *Gun owners seek Second Amendment Sanctuary status in local communities*, SF CHRONICLE (Dec. 21, 2019), https://www.sfchronicle.com/nation/article/Gun-owners-seek-Second-Amendment-sanctuary-status-14924224.php ("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?'").

[84] Toscano, *supra* note 6.

[85] Nieves, *supra* note 10.

[86] The Times Editorial Board, *2nd Amendment sanctuaries are acts of faithlessness in government*, L.A. TIMES (Jan. 19, 2020), https://www.latimes.com/opinion/story/2020-01-19/2nd-amendment-sanctuaries-richmond-charlottesville-militias.

[87] Jennifer Mascia, *Second Amendment Sanctuaries, Explained*, THE TRACE (Jan. 14, 2020), https://www.thetrace.org/2020/01/second-amendment-sanctuary-movement/.

[88] Brittany Crocker, *Blount County becomes 'Second Amendment Sanctuary,' second in Tennessee*, KNOXVILLE NEWS SENTINEL (May 17, 2019), https://www.knoxnews.com/story/news/2019/05/17/blount-county-now-tennessee-second-amendment-sanctuary/3704188002/ ("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 (describing the "non-binding resolution" that is "provocative . . . but purely symbolic.").

[89] Toscano, *supra* note 6 (Virginia legislator opposing sanctuary jurisdictions but acknowledging that "no one should oppose the rights of citizens and their representatives to speak their minds.").

question how symbolic they may be in practice.[90]

Other resolutions actively endorse the type of passive noncooperation seen in immigrant sanctuary resolutions. For example, in Cumberland County, Virginia, the resolution declares that local officials will neither personally enforce nor use taxpayer funds to enforce certain statewide gun regulations.[91] State agencies are free to enter the locality and enforce state law, but local officials will not participate.[92]

Still other resolutions explicitly require affirmative actions by the local government to thwart state enactments. Some 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 these laws.[93] And at least two jurisdictions have taken a more confrontational approach, threatening to erect local regulatory schemes designed affirmatively to impede state legislation. In Tazewell County, Virginia, the county administrator defending his recently-passed resolution explained that he was "'ordering' the militia [to the county] by making sure everyone can own a weapon.[94] In Culpepper 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.[95] Such proclamations – backed by promises to "uphold the Constitution" as "constitutional officers" and "go to jail if necessary" – amount to an affirmative regulatory scheme at odds with passed or proposed legislation that

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[90] 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. Joe Tennis, *Supervisors unanimously pass "Second Amendment" resolution*, BRISTOL HERALD COURIER (Nov. 26, 2019), https://www.heraldcourier.com/news/supervisors-unanimously-pass-second-amendment-resolution/article_9ada994d-6847-5355-abcf-d3d6f94ed4ee.html.

[91] Alexa Massey, *Sanctuary resolution adopted*, FARMVILLE HERALD (Dec. 12, 2019), https://www.farmvilleherald.com/2019/12/sanctuary-resolution-adopted/

[92] Associated Press, *supra* note 9 ("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.").

[93] Kerry Picket, *Sheriffs may go to jail to protect Second Amendment Sanctuaries, Kentucky congressman says*, WASHINGTON EXAMINER (Jan. 2, 2020), https://www.washingtonexaminer.com/news/sheriffs-may-go-to-jail-to-protect-second-amendment-sanctuaries-congressman-says (citing Weld County, Colorado, council statement 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).

[94] Toscano, *supra* note 6 ("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), https://www.wjhl.com/news/local/tazewell-county-board-of-supervisors-passes-resolution-to-emphasize-right-to-militia/.

[95] Associated Press, *Virginia Sheriff: He'll deputize residents if gun laws pass*, WASH. TIMES (Dec. 9, 2019) (quoting Sheriff Scott Jenkins' Facebook post: "Every Sheriff and Commonwealth Attorney in Virginia will see the consequences if our General Assembly passes further unnecessary gun restrictions.").

arguably preempt such schemes.[96]

The passion of the local electorate for these resolutions has matched the strident comments of local officials, with reports of packed county supervisor meetings across the country.[97] This passion reflects not just the intensity of the gun debate, but the increasing fault lines between urban and rural areas.[98] America's gun culture has always resided in "predominantly rural and small town[s]," which remain skeptical of gun control and view "its enemies as predominantly urban."[99] This gun culture – where 56% of rural residents own a firearm compared to just 29% of urban residents[100] – stems from differentiating recreation uses for firearms, but also from "the need for rural citizens to supplement diffuse law enforcement agencies" less able to respond promptly to emergencies in sparsely populated areas.[101]

Deep skepticism of outside gun control influence punctuates many county hearings, where resolutions are passed with unanimous support. 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.[102] As one county supervisor declared at the meeting, "[t]here are clearly thousands of patriotic citizens in Virginia who are well-armed and well-trained, and will resist in an organized attempt by Washington to violate their Second Amendment rights."[103] These anti-urban sentiments traverse the country. When New York State enacted the SAFE Act, a gun control measure, sheriffs in upstate communities revolted, claiming that the law was motivated by downstate interests in and around New York City.[104]

This growing geographical fault line cuts in both directions. When the Pennsylvania state legislature prohibited local governments from enacting gun control legislation, local leaders in Philadelphia and Pittsburgh immediately attacked

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[96] Toscano, *supra* note 6 ("For gun sanctuaries, 'the goal is to prevent enforcement of state law that the jurisdiction (not a court) deems unconstitutional.'").

[97] *See, e.g.,* Associated Press note 9; Josh Reyes, *Packed city hall calls for Newport News to be Second Amendment Sanctuary*, DAILY PRESS (Dec. 11, 2019), https://www.dailypress.com/government/local/dp-nw-newport-news-second-amendment-sanctuary-city-council-20191211-bd7vykc5nbe6nnxyxxldadiwba-story.html.

[98] *See, e.g.,* Stahl, *supra* note 47 at 144 (describing "increasingly uncompromising . . . zero-sum contests in which either urban or rural culture will decisively win out over the other"); Blocher, *supra* note 22 at 104 (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 geographical component" in same-sex marriage debate).

[99] David C. Williams, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 170 (2003).

[100] Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 464 (2008).

[101] Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 79-81 (2002).

[102] 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#stream/0.

[103] Toscano, *supra* note 6.

[104] Su, *supra* note 32 at 204.

rural communities.[105]

Virginia has become ground zero for the Second Amendment Sanctuary movement in large part due to its rapidly changing urban-rural demographics. "[H]ome to the National Rifle Association's headquarters, lawmakers in both parties have traditionally supported gun rights" in Virginia.[106] 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 38% population growth, the vast majority of it in metropolitan Richmond and the northern Virginia suburbs of Washington, D.C.[107] These "new Virginians," increasingly diverse and predominantly liberal, have wrested statewide control from the once-powerful rural western and southern regions of the state.[108] The state twice voted for Barack Obama, voted for Hillary Clinton, has not elected a Republican senator since 2002, and in 2019 returned democrats to full power in both legislative houses and the governorship for the first time since 1993.[109] 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.[110] Democratic Governor Ralph Northam called a special legislative session after the mass shooting, in which he advocated for "universal background checks, assault weapon bans, and red flag laws."[111] The meeting not only failed to produce legislation, but was shut down by Republicans "after just 90 minutes."[112] The resulting "blue wave" in November's election was widely seen in rural parts of the state as a rebuke to their gun culture.[113]

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[105] *Id.* (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 Giblip County to tell us what we can do in the City of Philadelphia.").

[106] Denise Lavoie, *Second Amendment Sanctuary Push Aims to Defy New Gun Laws*, RICHMOND FREE PRESS (Jan. 2, 2020), richmondfreepress.com/news/2020/jan/02/second-amendment-sanctuary-push-aims-defy-new-gun-/.

[107] 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.

[108] *Id.*

[109] Virginia Dept. of Elections, *Presidential Elections: 2008-2016*, https://historical.elections.virginia.gov/elections/search/year_from:2008/year_to:2016/office_id:1; *Virginia election results*, WASH. POST (Nov. 6, 2019), https://www.washingtonpost.com/elections/election-results/virginia/ ("Democrats will have full control of Virginia's government for the first time in 26 years.").

[110] Matt Cohen, *Disarming the NRA: How Guns Flipped Virginia Blue*, MOTHER JONES, (Jan/Feb 2020 issue) https://www.motherjones.com/politics/2019/11/disarming-the-nra-how-guns-flipped-virginia-blue/.

[111] Lavoie, *supra* note 106.

[112] *Id*.

[113] *See* Joshua Gillem, *(Opinion) The Making of a Revolution is Well Underway*,

Nearly all sanctuary resolutions drafted in response to this "blue wave" declare an absolute right not to enforce any law that "infringes upon the Second Amendment rights of law-abiding citizens to keep and bear arms."[114] 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? Part IV discusses those questions in more detail. But the answers may not be relevant to the extent sanctuary resolutions simply decline to enforce superior government legislation regardless of their legality. The question then becomes: when can subordinate jurisdictions declare themselves "sanctuaries" immune from enforcement responsibilities?

C. "Sanctuaries" Compared

Debate over federal immigration enforcement policy has increasingly focused on the proper role of state and local governments in assisting with that enforcement.[115] Within that debate, the word "sanctuary" became a common shorthand for disagreement with and resistance to enforcement of immigration laws. But while the term effectively communicates a broad set of beliefs about a polarizing issue, the question scholars have asked for over a decade remains relevant: "What precisely is a sanctuary?"[116]

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 from refuge, because they could not be arrested there, nor the laws be executed."[117] This definition found expression in the early sanctuary resistance movement in the 1980s, when 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.[118] Minister John Fife famously told Attorney General William Smith in a letter that "the South-Side United Presbyterian Church will publicly violate the Immigration and Nationality Act by allowing sanctuary in its church for those from Central America," ushering in a decades-long era of churches and other "consecrated

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CONCEALED CARRY.COM (Dec. 11, 2019), https://www.concealedcarry.com/opinion/making-revolution-well-underway/# (gun rights activist predicting mass uprising in response to "blue wave gun control").

[114] *See* Res. of the Cnty. Bd. of the Cnty. of Effingham, Illinois, *supra* note 83.

[115] Allan Colbern et al., *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.").

[116] Villazor, *supra* note 5 at 150.

[117] Bryan A. Garner, BLACK'S LAW DICTIONARY (Thomson Reuters 2019).

[118] *See* Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 904-06 (1995) (exploring the role of religious leaders in the 1980s immigrant civil rights movement); *see also generally* Robert Tomsho, THE AMERICAN SANCTUARY MOVEMENT (Texas Monthly Press 1987) (providing contemporary historical account).

place[s]" protecting undocumented immigrants from immigration enforcement officials.[119]

The first public city "sanctuary" ordinances appeared in San Francisco and Davis, California in 1985.[120] These symbolic resolutions sought to create "a welcoming city" without providing for any specific actions.[121] The number of cities declaring themselves immigrant sanctuaries exploded during the Bush II and Obama administrations, as both presidents prioritized removal of undocumented immigrants through increasingly invasive investigative techniques carried out by the newly-created ICE.[122] President Trump's anti-immigrant rhetoric both before and after the election drove another spike in sanctuary city resolutions between 2016 and 2019.[123] Today, some estimate that as many as 560 cities and other municipalities (as well as the state of California) have passed some form of immigrant sanctuary resolution.[124]

As with Second Amendment Sanctuaries, "[t]here are various types of sanctuary city policies."[125] Many are symbolic, but increasingly sanctuary jurisdictions proactively establish protocols to "maintain the confidentiality of an individual's undocumented status and ensure open communication between residents and employees, especially law enforcement officers."[126] These measures are most often accomplished through "noncooperation policies" wherein law enforcement agree not to communicate with ICE about an individual's immigration status.[127] Similarly, more than 600 county jurisdictions have enacted policies

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[119] Hilary Cunningham, GOD AND CAESAR AT THE RIO GRANDE 58 (University of Minnesota Press 1995); *United States v. Aguilar*, 883 F.2d 662, 670-71 (9th Cir. 1989) (describing activities of Fife and others to assist the sanctuary movement).

[120] *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) (collecting nationwide sanctuary ordinances passed in 1985 and 1986); *see also* Villazor & Gulasekaram, *supra* note 3 at 1216.

[121] *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.

[122] Marcia Zug, *The Mirage of Immigration Reform: The Devastating Consequences of Obama's Immigration Policy*, 63 U. KAN. L. REV. 953, 955 (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.

[123] *See* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 266 (2018).

[124] *Id.*

[125] Villazor & Gulasekaram, *supra* note 3 at 1253.

[126] *Id.* at 1236; *see also* Chuck Wexler, *Police Chiefs Across the Country Support Sanctuary Cities Because They Keep Crime Down*, L.A. TIMES (Mar. 6, 2017), http://www.latimes.com/opinion/op-ed/la-oe-wexler-sanctuary-cities-immigration-crime-20170306-story.html.

[127] Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 722

refusing to honor immigration detainer requests from the federal government, arguing alternatively that enforcement of federal detainers is the responsibility of the federal government and that such detainers are a violation of the Fourth Amendment because they require prolonged detention without probable cause that a crime has been committed.[128]

These passive noncooperation policies echo the passive non-enforcement declarations in Second Amendment Sanctuaries. Much like an officer's refusal to communicate with ICE, local sheriffs have committed not to cooperate with state enforcement of state firearms law. Moreover, both types of resolutions claim a constitutional duty to resist superior government action as violations of individual protections in the Bill of Rights.

The most proactive immigrant sanctuary communities "provide free legal assistance to undocumented immigrants and children in removal proceedings."[129] 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 the "mere presence of legal counsel dramatically alters the prospects for noncitizens in removal proceedings."[130] Even this policy does not seek to "block the law, but simply insist it should be enforced by those who have the responsibility to do so."[131]

Similarly, Second Amendment Sanctuary resolutions pledging taxpayer money to defend local officials in court represent a willingness to affirmatively denounce state law without actively preventing its enforcement by state officials.[132] Arguably, however, resolutions adopted in Virginia calling for the local raising of a militia and deputizing of thousands of private citizens as an end run around state gun control regulations represent an affirmative local regulatory scheme at odds with proposed state legislation. Such affirmative action finds no close fit analog in the immigrant sanctuary context.

Some 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 the

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(2013) (suggesting such noncooperation policies do not prevent individual officers from collaborating with ICE); Jason A. Cade, *Sanctuaries as Equitable Delegation in An Era of Mass Immigration Enforcement*, 113 N.W. U.L. REV. 433, 455 (2018).

[128] *See Cnty. 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)).

[129] Villazor & Gulasekaram, *supra* note 3 at 28-29 (This provision of legal services "may perhaps be a quintessential form of safe haven.").

[130] *Id.* (citing Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2289 (2012)).

[131] Toscano, *supra* note 6.

[132] *See* Picket, *supra* note 93.

undesirable legislation by refusing cooperation rather than proactively attempting to create a parallel system of immigration or gun regulation.[133] And both types of sanctuaries assert a legal right to resist the undesirable policy, though the legal justifications for each issue differs. Immigrant sanctuaries claim a federalism right to resist under the Tenth Amendment[134] while gun sanctuaries claim a substantive Second Amendment duty to resist.

It is this difference that creates the greatest 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.[135] In contrast, Second Amendment Sanctuaries largely do not have a right to ignore state gun control measures because, in most states, local municipalities are subservient subdivisions of state governments and subject to preemption by state law.[136] In other words, there exists no sub-federal anticommandeering principle protecting localities from state preemption. But unlike immigrant sanctuaries, gun sanctuary advocates claim a 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 asking whether Second Amendment Sanctuaries are even worth the attention given to them here. 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" but which are not intended to have legal effect.[137] There is currency in this argument to the extent that most sanctuary resolutions have been adopted in response to the mere suggestion of gun control measures rather than the enactment of laws.[138] Laws resisting laws that do not exist have no legal effect. This

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[133] 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 laws they take on a new proactive resistance quality not present in traditional federalism contexts. *See infra* Part II.

[134] *City of Philadelphia v. Sessions,* 280 F.Supp.3d 579, 651 (E.D. Pa. 2017) (enjoining parts of President Trump's executive order withholding funding from immigrant sanctuary cities, 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)).

[135] *Id.*; *see also* Josh Blackman*, Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 972 (2019) (making anticommandeering case for immigrant sanctuary cities).

[136] *See generally infra* Part II.A.

[137] *See* Thompson, *supra* note 38.

[138] *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-

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.[139] Moreover, some resolutions articulate not just a passive dissatisfaction with gun regulation, but an active intention to resist state enforcement through financial defunding, law enforcement and prosecutorial nullification, and regulatory militia-raising.

These more robust resolutions have inspired the second major argument dismissing sanctuary jurisdictions: that they will "never hold up in court."[140] Critics ranging from Virginia delegate David Toscano[141] and Virginia Attorney General Mark Herring[142] to Professor Mary McCord[143] have all declared the legal case against Second Amendment Sanctuaries open and shut. Their intuitions are understandable. State law preempts local law, rendering these 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, and 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

The single greatest threat to Second Amendment Sanctuaries is state preemption. Local governments traditionally have little independence from their state governments and no structural guarantees of autonomy akin to states' Tenth Amendment protections from federal government interference. Moreover, those

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sanctuary-movement-grows-in-virginia-as-democrats-ready-gun-control-measures ("Though the 2020 legislative session has not yet begun," counties have passed resolutions "in opposition to . . . potential gun control bills.").

[139] 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 33 at 330 ("[A]s of yet, courts have identified few tools to determine when incidental burdens raise Second Amendment concerns.").

[140] McCord, *supra* note 26.

[141] Toscano, *supra* note 6.

[142] Thompson, *supra* note 43; 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.

[143] McCord, *supra* note 26.

localities with some form of "home rule" often find their regulations expressly preempted by states anyway, with state sovereignty prevailing in court.[144]

But Second Amendment Sanctuary resolutions present unique challenges to this state dominance paradigm. Many sanctuary resolutions do not erect affirmative ordinances like minimum wage hikes[145] or fracking bans[146] 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.[147]

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."[148] 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 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 for the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."[149]

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[144] *See* Briffault, *supra* note 22 at 2015 (noting that home rule does not provide "formal immunity protections from state preemption").

[145] Paul A. Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1172 (2007) (exploring whether local minimum wage ordinances should be subject to preemption in home rule states).

[146] *City of Longmonth Colo. v. Colo. Oil & Gas Ass'n*, 2016 CO 29, 33 (2016) ("[T]he inalienable rights provision of the Colorado Constitution does not save the [local] fracking ban from preemption by state law."); Scharff, *supra* note 19 at 1472 n.10 ("There is particularly voluminous literature on local fracking bans.") (collecting sources).

[147] *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2364 (2003) (summarizing constitutional home rule guarantees in state constitutions).

[148] Scharff, *supra* note 19 at 1475.

[149] 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, 916-17 (1994)

This is not to say that local governments have no power, but that power is traditionally limited to those specifically enumerated in the states' respective constitutions. 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, and the rest are reserved for the states and the people.[150] State governments have general police powers, and reserve to the local governments only what is specifically granted to them.

These limited powers, available to at least some localities in a majority of states, are often referred to collectively as "home rule" powers.[151] Under home rule, state law grants localities some authority over local affairs "and may limit the state's ability to interfere in local affairs."[152] However, such autonomy is limited in a majority of these jurisdictions to structural and personnel decisions – 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.[153] Moreover, many states (like Virginia) practice "Dillon's Rule," which provides no autonomy for local governments and treats them as entirely subservient subdivisions of the government.[154]

Even when local governments have authority to act, this authority is almost always subject to state legislative preemption.[155] Thus, even if a locality otherwise 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 these

("[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. 1059, 1111 (1980) (criticizing the emerging power of the state as the dominant subfederal government entity).

[150] *Gamble v. United States*, 139 S.Ct. 1960, 1988 (2019) (describing federalism principles as it relates to the Fifth Amendment's Double Jeopardy Clause).

[151] *Cmty. Communications Co. v. Boulder*, 455 U.S. 40, 55 (1982) (explaining that states can grant "powers of self-government in local and municipal matters by a 'home-rule' amendment in the constitution of the state").

[152] Scharff, *supra* note 19 at 1482.

[153] *Id.* at 1475 ("[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.").

[154] Natl. League of Cities, *Local Government Authority*, (last visited Jan. 28, 2020), https://web.archive.org/web/20160804131854/http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority; *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'"); *id.* 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.").

[155] Scharff, *supra* note 19 at 1476.

ordinances. In doing so, states often pass preemption legislation for the sole purpose of eliminating a local regulation without enacting any replacement scheme in what Richard Briffault has identified as "deregulatory preemption."[156]

B. Partisan Preemption

Scholars have long explored the proper normative balance between state and local government power sharing. "Nevertheless, in recent years, preemption debates have taken on a decidedly partisan tone."[157] Local policy efforts themselves have increased the partisan nature of preemption debates because local policy innovation has grown increasingly liberal.[158] Increased political polarization has led to a "geographic political sorting" wherein urban residents are more liberal than their rural counterparts.[159]

As a result, cities have passed first-in-the-nation progressive 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.[160] It is precisely this local liberal policymaking, and not any principled preference for statewide uniformity, that has "invited pushback from Republican-controlled state legislatures."[161] Often working with the conservative American Legislative Executive Council, Republican legislatures have passed reactive preemption laws designed to invalidate these liberal reforms, often without replacing them with a statewide policy.[162]

The partisan nature of preemption in many ways defines 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

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[156] Schragger, *supra* note 18 at 1182.

[157] Scharff, *supra* note 19 at 1481; *see also* Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROB. 115, 136 (2016) (referring alternatively to "partisan preemption" and "manufactured preemption").

[158] Scharff, *supra* note 19 at 1482.

[159] *Id.*; *see also* 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).

[160] Scharff, *supra* note 19 at 1482 ("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."); Amber Phillips, *The 10 Most Liberal and Conservative Cities in the U.S. – As Judged By Campaign Donors*, WASH. POST: THE FIX (Dec. 14, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/the-10-most-liberal-and-conservative-cities-in-the-u-s-as-judged-by-campaign-donors/.

[161] Scharff, *supra* note 19 at 1482; *see also* Schragger, *supra* note 18 at 1194.

[162] Henry Grabar, *The Shackling of the American City*, SLATE (Sep. 9, 2016), https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html ("For progressives, ALEC has become a boogeyman for its role propagating laws supporting a host of corporate and conservative priorities.").

certain kinds of gun control.[163] Though it broke with the tradition of local governance typically espoused by conservatives and endorsed elsewhere by the NRA, the preemption campaign was incredibly successful.[164] By 2002, forty-one states had preempted some or all local gun control, a number that rose to forty-three in 2015.[165]

Of these states, eleven have adopted absolute preemption of municipal firearm regulations, barring any exceptions.[166] New Mexico, a home rule state, implemented this broad preemption rule by amending the state constitution.[167] As one New Mexico state legislator proclaimed in support of the amendment, "There are lots of areas where home rule certainly applies, … but this is not one of them. Not when it comes to an unalienable, natural, God-given right for people to protect themselves."[168]

These preemption statutes vary, but each one expressly preempts all, or substantially all, aspects of local firearms and ammunition regulation.[169] Typical of these statutes, 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."[170] In addition to this broad preemption language, many states impose civil or criminal penalties on local officials violating the preemption statute, including holding local

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[163] Harry S. Wilson, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 408 (2016) ("The 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 eliminate "confusion" 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").

[164] Blocher, *supra* note 22 at 133.

[165] 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, 363 (2003); Joe Raedle, *Cities Grow Bolder on Gun Control Laws*, U.S. NEWS (Jan. 10, 2020), https://www.usnews.com/news/cities/articles/2020-01-10/cities-grow-bolder-on-gun-control-clashing-with-states (describing urban pushback to state preemption laws in forty-three states); *see also* Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 705 (2004) (quoting gun control activist lamenting "the NRA's effort to pass preemption laws" as "a serious setback").

[166] *See* Giffords L. Ctr. to Prevent Gun Violence, *supra* note 17.

[167] N.M. Const., art. II, § 6 (amended 1986).

[168] Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, THE ATLANTIC (Mar. 6, 2014), https://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/.

[169] Giffords L. Ctr., *supra* note 17.

[170] S.D. CODIFIED LAWS § 7-18A-36 (2018) ("Any ordinance prohibited by this section is null and void.").

officials personally liable and exempting them from qualified immunity, removing elected officials from office, and imposing fines up to $50,000.[171]

Some local firearms regulations have survived preemption challenges, however, 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.[172] This partial preemption statute gives significant leeway for local regulation, and courts have upheld local ordinances in the state regulating the location and operation of firearms dealers, and the sale and possession of firearms and ammunition on county-owned property.[173]

The political opportunism extends to both major political parties. For their part, liberal gun control organizations have long hailed the virtues of local gun laws, because local gun regulations predominantly took the form of strict gun control measures in urban centers.[174] 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."[175] While the Giffords Center makes salient points about the virtues of firearm localism, including the need to recognize local variations in urban and rural communities and the ability for localities to experiment with innovate gun control solutions,[176] the

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[171] ARIZ. REV. STAT. § 13-3108(I) (2018) (providing for $50,000 fine for "knowing and willful violations"); FLA. STAT. § 790.33(3)(f) (2018) (providing for $5,000 fine); IOWA CODE § 29C.25 (2019) (permitting personal liability for public officials); KY. REV. STAT. ANN. § 65.870(4) (2018) (same); MISS. CODE ANN. § 45-9-53(5)(c) (2019) (same); ARIZ. REV. STAT. § 13-3108(J) (2018) (authorizing removal from office for public officials); FLA. STAT. § 790.33(3)(e) (2018) (same); KY. REV. STAT. ANN. § 65.870(6) (2018) (authorizing criminal liability for public officials who violate law).

[172] CAL. GOV'T CODE § 53071 (2019) (preempting registration or licensing of commercially manufactured firearms); CAL. GOV'T CODE § 53071.5 (2019) (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).

[173] *See Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425 (Cal. 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.").

[174] *Cal. Rifle and Pistol Ass'n, Inc. v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591, 594 (Cal. 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 Western 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 (Cal. 2002) (upholding ordinance banning possession of firearms and ammunition on county-owned property).

[175] *See* Giffords L. Ctr. to Prevent Gun Violence, *supra* note 17.

[176] *Id.* ("Broad state preemption statutes threaten public safety because they: Ignore important local variations . . . between urban and rural communities [and] . . . thwart local

organization also spent over $300,000 supporting Virginia democrats promising to enact statewide gun control legislation.[177]

The rise of the Second Amendment Sanctuary fits within this issue-specific preemption narrative, but it also reflects a reversal of broader priorities for conservatives and liberals. Conservative policymakers have "railed against" immigrant "sanctuary cities" as anarchic attempts to disregard valid laws with which the jurisdictions simply disagree, but many of those same politicians now support declaring a firearms refuge in their towns and counties in violation of locally unpopular gun laws.[178] 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.[179] 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, "preferences about 'state' versus 'local' control often do not reflect institutional commitments to a particular division of governmental power."[180] Rather, advocates advance their own substantive policy commitments by considering which level of government is most likely to enact their preferences."[181] In this sense, "preemption arguments . . . [are] susceptible to institutional flip-flops" like the ones playing out in Second Amendment Sanctuary jurisdictions.[182] But Second Amendment Sanctuaries need not be viewed solely through a partisan lens, as discussed below.

B. Normative Localism

There are normative reasons for preferring greater local autonomy generally, and greater autonomy specifically in the field of firearm regulation. Local autonomy advances the "traditional advantages that attend decentralization," including "more participatory and responsive government . . . [and] more flexibility in responding to

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innovation in gun violence prevention strategies which can lay the groundwork for state-level change.").

[177] Jane Coaston, *The NRA's big loss in Virginia, explained*, VOX (Nov. 6, 2019), https://www.vox.com/2019/11/6/20951639/nra-virginia-democrats-spending-gun-control (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").

[178] Toscano, *supra* note 6.

[179] *Id.*; *see also* Scharff, *supra* note 19 at 1482 (summarizing progressive discontent with municipal powerlessness in Dillon's Rule states); Gulasekaram, *supra* note 15 at 862 (describing challenge of immigrant sanctuary movement in Dillon's Rule states).

[180] Scharff, *supra* note 19 at 1482.

[181] *Id.*

[182] *Id.*; *see also* Gulasekaram, *supra* note 174 at 882 ("Neither state-level preemption nor local authority inherently tracks political ideologies or partisan preferences.").

changing circumstances."[183] These advantages are more pronounced when either differences in localities require locally tailored solutions or when "a divided populace [cannot] maximize[e] policy preferences" on a state or national level.[184] 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."[185] The same is true for firearms. Far more rural residents own and regularly use firearms than urban residents.[186] Rural residents are far more likely to use firearms for hunting, target shooting, and other recreation, activities that require space not available in urban centers.[187] The types of firearms used in these activities differ from those owned and used in urban areas.[188] And to the extent both urban and rural gun owners exercise the "core" Second Amendment right of self-defense, geographical variance informs how these rights will be exercised in various ways.[189] In urban areas, many gun owners prefer a single, concealable handgun to provide short-term deterrence until law enforcement can arrive.[190] Gun owners in rural areas, in contrast, express the 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 or death situations.[191]

Likewise, urban residents face unique challenges rural residents do not. Rates of gun violence (and crime rates in general) are far higher in high-density areas, and the potential for mass casualty events is significantly greater.[192] Given these

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[183] David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 384 (2001).

[184] *Id.*

[185] Scharff, *supra* note 19 at 1492.

[186] Ruth Igielnik, *Rural and urban gun owners have different experiences, views on gun policy*, PEW RESEARCH CENTER (Jul. 10, 2017), https://www.pewresearch.org/fact-tank/2017/07/10/rural-and-urban-gun-owners-have-different-experiences-views-on-gun-policy/ ("Among adults who live in rural areas, 46% say they own a gun, compared with . . . 19% in urban areas.").

[187] *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).").

[188] *See id.* ("Three-quarters of those in rural areas (75%) say they own more than one gun, compared with 48% of urban gun owners."); Kim Parker et al., *1. The Demographics of Gun Ownership*, PEW RESEARCH CENTER (Jun. 22, 2017), https://www.pewsocialtrends.org/2017/06/22/the-demographics-of-gun-ownership/ ("For those with a single gun, handguns are by far the most common type.").

[189] *See* Igielnik, *supra* note 186 ("[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.").

[190] Parker, *supra* note 188.

[191] Luna, *supra* note 101 at 81.

[192] *See* David Kairys, *Challenging the Normalcy of Handgun Violence*, 156 U. PA. L. REV. PENNUMBRA 194, 198 (2007) ("The large urban areas of the nation [are] where

differences, "[i]t is no surprise . . . that the vast majority of gun control regulations in the United States are local, and are tailored to the particular risks of gun use in densely populated areas."[193]

While the majority of these local regulations take the form of restrictions – tighter controls and restrictions on the possession, sale, and use of firearms – the local variance described above counsels in favor of local deregulatory efforts in rural areas as the locality in question sees fit. Thus, while the purpose of Second Amendment Sanctuary resolutions may be to thwart perceived unconstitutional infringements from the state, the effect of these resolutions – fewer restrictions on gun ownership and use in rural areas – may make good sense as policy.[194]

C. Constitutional Home Rule

This history of and normative case for firearm localism also provide the strongest legal arguments in favor of limited local autonomy via constitutional home rule. This 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 via state constitutional home rule guarantees.[195] While many states do not afford such constitutional protections, "[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."[196] Admittedly, most courts have defined "local concern"

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unregulated handgun markets have taken such a terrible toll."); Blocher, *supra* note 22 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 REPORT (Apr. 24, 2018), https://www.calhealthreport.org/2018/04/24/gun-violence-increasingly-rural-problem-study-finds/.

[193] Blocher, *supra* note 22 at 99-100 ("Indeed, perhaps no characteristic of gun control in the United States is as 'longstanding' as the stricter regulation of guns in cities than in rural areas.").

[194] 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 "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. *Cf.* Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (recasting institutional sovereignty as incorporating individualized "rebellious decisions" where "minorities rule without sovereignty").

[195] *See* Gulasekaram, *supra* note 15 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 147 at 2347 (Constitutional "home 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.").

[196] Schragger, *supra* note 18 at 1220.

narrowly and deemed even the most "intralocal" regulation to fall within the state's broad sovereignty powers.[197] State courts generally appear "wary of broad grants of local power," though courts and legislatures alike are showing greater willingness to recognize local home rule.[198]

This intrastate federalism has roots in the "new federalism" movement of the last thirty years.[199] For over fifty years, interstate commerce was defined so broadly as to leave little sovereign room at all for states.[200] Beginning with the Rehnquist Court, the "new federalism" set tangible limits to this power, including in firearm regulation.[201] At least some state constitutions envision a similar subfederalism with teeth, at least in function if not in practice.

In Colorado, for example, courts considering whether a policy is sufficiently of "local concern" to fall within that state's home rule guarantees examine whether a need for statewide uniformity exists, the impact of statewide legislation on individual localities, and whether there exists a history and tradition of local regulation.[202] All three factors favor local firearm autonomy. The geographical and cultural variances of urban and rural localities in many ways requires locally tailored solutions to firearms. Statewide preemption of such tailoring would unnecessarily "flatten these deep differences, potentially to the detriment of both" types of localities.[203] 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.[204]

One compelling response to this 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. Thus, firearms are not truly a "local concern," but a state or national

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[197] *See Sterling Beef Co. v. Ft. 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).

[198] Schragger, *supra* note 18 at 1220.

[199] *See* Gulasekaram, *supra* note 15 at 856 ("[L]ike the trajectory of federalism, the development of localism in many states has been toward expanding local autonomy and increasing state limits on state interference.").

[200] *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35-38 (2004).

[201] *See United States v. Lopez*, 514 U.S. 452, 456 (1995) (invalidating the Gun-Free School Zones Act of 1990); *see also* Young, *supra* note 200 at 1 (hailing the "Federalist revival"); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL OF RTS. J. 1191, 1201 (2003) (describing the "new federalism" under the Rehnquist Court).

[202] Schragger, *supra* note 18 at 1222; *see also* Paul A. Diller, *Reorienting Home Rule: Part 2-Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067-68 (2017).

[203] Blocher, *supra* note 22 at 122.

[204] *Cf.* Diller, *supra* note 202 at 1068 ("Of the Colorado Supreme Court's factors, tradition perhaps is the most suspect.").

concern.[205] But the significant variance in use of and crime rates related to firearms in urban and rural areas counsels in favor of at least some moderate local tailoring not otherwise allowed by broad preemption laws.

The federal Constitution may provide space for constitutional home rule as well. The Supreme Court has occasionally suggested 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.[206] This suggestion would seem to apply with particular force when the constitutional right at issue adapts with the locality.

While the old maxim that incorporated constitutional rights apply identically to all levels of government remains true, "geographic nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism."[207] These statements do not stand in contrast to one another, but simply reflect the fact that construction of constitutional rights through means-end balancing involves consideration of facts often interwoven with variances in locality. "A growing number of scholars have explored and celebrated the role of localism in constitutional law," noting specifically the role of locality in the First Amendment's "time, place, and manner" restrictions.[208] 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."[209]

The historical-categorical approach adopted by Justice 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 Breyer's dissent.[210] Under the historical-

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[205] *See* Kyle Beachy, *State says Zimmerman may have crossed state lines to buy a gun in Indiana*, HEART OF ILL. ABC (Apr. 24, 2019), https://hoiabc.com/2019/04/24/state-says-zimmerman-may-have-crossed-state-lines-to-buy-a-gun-in-indiana/ ("[I]n Illinois a person needs a background check, registration, and waiting period before purchasing a gun from another person. . . . those checks and balances don't exist in Indiana. Illinois and Indiana have the second highest gun transfer rate in the country.").

[206] *See, e.g.*, *Romer*, 517 U.S. at 629 (protecting Boulder's anti-discrimination ordinance against Colorado's state law which attempted to preempt the ordinance through an unconstitutional law singling 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).

[207] Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133 (1999).

[208] Blocher, *supra* note 22 at 88; *see also generally* David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006).

[209] *Heller*, 554 U.S. at 626-27 & n.26.

[210] *Compare id.* 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 "prohibiti[ons] on the carrying of 'dangerous and unusual weapons'") with *id.* at 689 (Breyer, J., dissenting) ("I would simply adopt . . . an interest-balancing inquiry explicitly."); *see also Gould v. Morgan*, 907 F.3d

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."[211] 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, and 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 bright line guideposts for permissible regulation.[212] For instance, city-wide handgun bans are likely always unconstitutional after *Heller*, while prohibitions on possession in "sensitive places" likely remains safe from constitutional challenge.[213] 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.

Indeed, when the Supreme Court confronts a Second Amendment challenge to these regulations, a compelling argument exists for local tailoring of the right. Justice Scalia's historical approach supports a localism lens for such line-drawing 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.[214]

Thus, a normative and jurisprudential case exists for the viability of Second Amendment Sanctuary resolutions as matters of local regulation. But even if the recent wave of "hyper preemption" prevents the widespread adoption of constitutional home rule for firearms, the passive nature of these resolutions may create a second avenue for viability.[215] Most of these resolutions do not erect conflicting gun control ordinances, but merely passively resist statewide enactments

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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. ATF*, 700 F.3d 185, 194 (5th Cir. 2012) (same); *Greeno*, 679 F.3d at 518 (same); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (same); *United States v. Chester*, 628 F.3d 673, 680 (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).

[211] Blocher, *supra* note 22 at 87 (quoting *Heller*, 554 U.S. at 627 n.26).

[212] *Id.* at 129.

[213] *See* Joseph Blocher, *Bans*, 129 YALE L.J. 308, 356 (2019) (considering "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.").

[214] *Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

[215] Scharff, *supra* note 19 at 1476.

and require state officials to enforce state law. Thus, regardless of whether a locality has a state or federal constitutional right to "home rule," the question becomes whether a locality can decline enforcement of superior state law or whether states can commandeer local officials and 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 relationships differ dramatically."[216] The United States Constitution grants to the federal government only those powers specifically enumerated to it, and even when the government acts within those powers it may not compel a state or local government to enforce it.[217] Thus, courts have consistently found that, although the federal government has the exclusive right to regulate immigration,[218] state and local governments have a Tenth Amendment right to be free from federal compulsion to enforce federal immigration law, a right to be free from "commandeering."

No similar right inures 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 to commandeer localities to enforce state or federal law. This commandeering may involve removing enforcement discretion traditionally afforded local officials like sheriffs and prosecutors, as immigrant "anti-sanctuary" states like Texas and North Carolina have attempted.[219]

This Part asserts that a limited form of "subfederal anticommandeering" should insulate local entities from such state commandeering at least when 1) the local resistance remains entirely passive in nature, and 2) a superior body of law provides support for the resistance, be it a federal statute or the United States Constitution.

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[216] *Id.* at 1478; *see also* Gulasekaram, *supra* note 15 at 852.

[217] *See* Gulasekaram, *supra* note 15 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.").

[218] *Arizona v. United States*, 567 U.S. 387, 400 (2012).

[219] 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); WBTV Web Staff, *Gov. Cooper vetoes bill requiring sheriffs to cooperate with ICE*, WECT NEWS (Aug. 20, 2019), https://www.wect.com/2019/08/20/nc-house-passes-bill-requiring-sheriffs-cooperate-with-ice-bill-heads-gov-roy-cooper/
(explaining that North Carolina governor vetoed HB370, which would "authorize the removal of a sheriff from office for failing to comply with ICE detainers" because 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.").

A. Local-Federal Anticommandeering

In *Printz v. United States*,[220] the Supreme Court recognized a state's right to be free from federal compulsion under longstanding federalism principles articulated in the Tenth Amendment.[221] 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."[222] 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."[223] The Court subsequently made clear that such coercion can take the form of threats to withhold federal funding as well as direct commands to act.[224]

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 requiring local police officers to conduct federal background checks prior to the sale or transfer of a handgun.[225] 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. . . . the Supreme Court does not draw a distinction between local and state for purposes of its commandeering and coercive spending doctrines."[226]

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[220] 521 U.S. 898 (1997).

[221] *Id.* at 935 (citing *New York v. United States*, 505 U.S. 144, 188 (1992).

[222] *Id.* at 936.

[223] *Id.*

[224] *See Nat'l. Federation of Independent Business v. Sebelius*, 567 U.S. 519, 577 (2012) (holding that the federal government cannot coerce states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place: "Otherwise 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.").

[225] *Printz*, 521 U.S. at 927-28 (rejecting 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 (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); *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013) (invalidating portions of similar Montana law authorizing criminal penalties for any federal official attempting to enforce federal firearms laws in the state).

[226] Schragger, *supra* note 18 at 1217. The petitioners in *Printz* were municipal officers: local sheriffs. *Printz*, 521 U.S. at 900.

Immigrant sanctuary cities have asserted their Tenth Amendment right to resist federal attempts to coerce immigration enforcement cooperation as far back as 1996.[227] 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.[228] New York City challenged the law on Tenth Amendment grounds but the Second Circuit upheld the law, explaining that Congress had not "compelled state and local governments to enact or administer any federal regulatory program."[229] Rather than "affirmatively conscripting states, localities, or their employees into the federal government's service," the statute merely prohibited states and cities from allowing their officers to voluntarily assist with federal immigration functions.[230] Renewed litigation over the constitutionality of this statute is pending in several courts, with some early victories for sanctuary activists.[231]

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.[232]

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.[233] The Order was challenged by sanctuary jurisdictions on

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[227] *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (explaining New York City's contention that Congress is "forbidding state and local government entities from controlling the use of information regarding the immigration status of individuals obtained in the court of their official business" in violation if the city's Tenth Amendment rights).

[228] 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, [federal immigration enforcement agency] information regarding the . . . immigration status . . . of any individual").

[229] *City of New York*, 179 F.3d at 35.

[230] *Id.* ("These sections do not directly compel states or localities to require or prohibit anything.").

[231] *See 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 & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1230 (9th Cir. 2018) (questioning the constitutionality of 8 U.S.C. § 1373); Blackman, *supra* note 135 at 982 (arguing that "Section 1373(a) is facially unconstitutional").

[232] *See also* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 645 (2017) (noting that "the anticommandeering principle and related state sovereignty rationales play leading roles in the scholarship defending subfederal sanctuary policies").

[233] Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (asserting that "sanctuary jurisdictions . . . willfully violate Federal law in an attempt to shield aliens from removal" and "ensur[ing] that jurisdictions that fail to comply with applicable federal law do not receive Federal grants").

numerous grounds, including Tenth Amendment anticommandeering grounds.[234] The Ninth Circuit enjoined the Order in 2018 in *City & Cty. of San Francisco v. Trump*,[235] but did not resolve the Tenth Amendment question. Instead, the court found that such financial coercion through an executive order violated the separation of powers because Congress "holds the power of the purse."[236] Notably, the ruling also voided the Order for vagueness because it merely referenced "sanctuary cities" as targets of the Order without defining the term.[237]

B. Subfederal Commandeering

These types of federalism challenges often act as proxies for "an ongoing struggle between state and local governments."[238] But the types of protections afforded "subordinate" governments against federal intervention do not exist at the local-state level.[239] "[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.[240] In the immigration sanctuary context, however, the question arises whether states can commandeer localities to compel compliance federal law, when the federal government itself has no such authority.[241]

Early attempts by states to wield this plenary power over local sanctuary jurisdictions is taking root now, as an increasing number of states pass "anti-sanctuary" legislation requiring local governments to cooperate with federal immigration authorities.[242] In Texas, for example, SB4 "requires local officials to

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[234] *See Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510-11 (N.D. Cal. 2017).

[235] 897 F.3d 1225 (9th Cir. 2018).

[236] *Id.* at 1235 ("The United States Constitution exclusively grants the power of the purse to Congress, not the President.")

[237] *Id.*

[238] Scharff, *supra* note 19 at 1473; *see also* Su, *supra* note 32 at 233.

[239] *See generally supra* note 215-17 and accompanying text.

[240] Schragger, *supra* note 18 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."

[241] *See id.* at 1218 (arguing that states "cannot force cities to do what the state or federal governments cannot each do separately").

[242] *Kansas Among Several States Looking to Ban Sanctuary Cities*, KSN.com (Feb. 2, 2016),http://ksn.com/2016/02/02/kansas-among-several-states-looking-to-ban-sanctuary-cities/ (discussing multiple proposed laws to either ban sanctuary cities or restrict funding to "cities that don't cooperate with immigration officials"); *see also* H.B. 179, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017) (restricting funding to local jurisdictions and providing for removal and prosecution of local government officers); *see also* Schragger, *supra* note 18 at 1180-81 ("Since November 2016, at least fifteen states have proposed legislation to preempt sanctuary cities. Of those states, four do not have any known sanctuary cities: Arkansas, Idaho, Oklahoma, and Tennessee.").

comply with federal immigration law on threat of civil and criminal liability."[243] Such a law clearly would amount to commandeering if passed by Congress, but can this type of "subfederal commandeering" circumvent the Tenth Amendment protections that run to local governments?

Perhaps. "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."[244]

But subfederal commandeering statutes like SB4 coerce local governments to enforce *federal* law, which is the trigger for possible Tenth Amendment challenges. Second Amendment Sanctuaries, in contrast, seek protection from *state* law. Can a subfederal anticommandeering principle do so in the face of a state law command to enforce state law?

C. Subfederal Anticommandeering?

Subfederal anticommandeering would represent a "novel" reframing of local-state power sharing.[245] But while "no state court has explicitly adopted a state anticommandeering doctrine in name," the principle may already exist in certain constitutional home rule states.[246] Courts in a variety of contexts have held that home rule states cannot direct local officials to take affirmative actions to implement statewide regulations.

In *State ex. Rel. Sprague v. City of St. Joseph*,[247] the Missouri Supreme Court invalidated a state mandate that local officials serve on a board of examiners created by the state, finding that it violated the state constitutional bar on states "fixing the powers, duties, or compensation of any municipal office."[248] And in Ohio, where the state constitution broadly prohibits state "influence[] or control" over municipalities, the Ohio Supreme Court has invalidated state attempts to regulate the organization and function of local police forces."[249] These decisions reflect an effort to give teeth

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[243] S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted); *see also* TEX. GOV'T CODE §§ 752.053, .056 (West 2017); TEX. PENAL CODE ANN. § 39.07 (West 2017).

[244] Schragger, *supra* note 18 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.").

[245] Schragger, *supra* note 18 at 1217 ("[But] the principle is sound if one assumes that the people act most immediately through their local governments.").

[246] Gulasekaram, *supra* note 15 at 868.

[247] 549 S.W.2d 873 (Mo. 1977).

[248] *Id.* at 881; *see also State ex re. Burke v. Cervantes*, 423 S.W.2d 791, 794 (Mo. 1968) (striking down state law requiring locality to create an arbitration board).

[249] *See 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,

to constitutional home rule provisions, at least in circumstances where state enactments attempt directly to command actions from local officers.[250]

Of course, these decisions setting state commandeering boundaries in home rule states provide little comfort to Second Amendment Sanctuaries in Dillon's Rule states. Moreover, state mandates 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 regulations.

There may be a second avenue for a broader anticommandeering doctrine, however, 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."[251] For example, the Supreme Court has held that states can neither interfere with federal funds granted to localities[252] nor be compelled to satisfy a federal judgment against a locality.[253] Likewise, localities would appear immune from state gun control regulations that conflicted with federal statutes or the United States Constitution. But this immunity would stem not from a state's improper commandeering of a locality, but from the state's improper enactment of a regulation that conflicts with federal statutory constitutional law.

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 Cnty.*,[254] the Court held that local governments must adhere to the "one person, one vote" principle in implementing constitutional voting protections.[255] And in *Milliken v. Bradley*,[256] the Court held that for federal constitutional purposes the relevant boundary lines for desegregation are local school districts and not the state as a whole.[257]

These cases are instructive for the Second Amendment Sanctuary context. In both *Avery* and *Milliken*, the Court articulated a constitutional right that applies

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as well as its civil service functions, are within a municipality's powers of local self-government.").

[250] *Cf. 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 government at all times"); *State ex rel. Burns v. Linn*, 153 P. 826, 826 (Okla. 1915) (holding that the state of Oklahoma may impose duties and penalties upon local officers).

[251] Schragger, *supra* note 18 at 1219 (articulating the existence of a "limited 'shadow-doctrine' of local-government status that could be invoked to make out a larger anticommandeering claim.").

[252] *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985).

[253] *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 288 (1883).

[254] 390 U.S. 474 (1968).

[255] *Id.* at 480.

[256] 418 U.S. 717 (1978).

[257] *Id.* at 744-45.

uniformly and with equal force across the country but found 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 necessarily must reflect the individual characteristics of local school districts themselves. Similarly, certain firearm restrictions may run afoul of the "core" Second Amendment right of self-defense, but only in certain locations or geographies.[258] Much like how First Amendment doctrine requires local tailoring for its "time, place, and manner" restrictions and Second Amendment doctrine similarly allows firearm prohibitions in "sensitive places," a broader argument can be made that such context-specific constitutional line-drawing for firearms regulation should reflect the urban-rural divide driving those regulations.[259]

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. 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 anticommandering.

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 question of which branch of government has the authority to decide it.

IV. SANCTUARIES AND CONSTITUTIONAL INTERPRETATION

Unlike immigrant sanctuaries resolutions or local environmental ordinances, Second Amendment Sanctuary resolutions uniformly 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.[260]

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[258] *Heller*, 554 U.S. at 626 (finding that a regulation requiring any firearm inside the home to be disassembled or bound by a trigger lock "makes it impossible for citizens to use arms for the core lawful purpose of self-defense"); *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018) ("While the Amendment's guarantee of a right to 'keep' arums effectuates the core purpose of self-defense within the home, the separate right to 'bear' arms protects the core purpose outside the home.").

[259] Blocher, *supra* note 22 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 people and arms can be regulated.").

[260] *See, e.g.,* Res. of Cumberland Cnty. Bd. of Supervisors Declaring Cumberland Cnty. as a "Second Amendment Sanctuary", (Dec. 10, 2019),

As a consequence, many of these gun sanctuary jurisdictions claim a right, if not a duty, to ignore gun control measures they deem unconstitutional.[261] In Virginia, for example, several county resolutions expressly state that "constitutional officers" such as commonwealth's attorneys and police officers take an oath to uphold the U.S. Constitution and must not enforce laws contrary to it.[262] In New Mexico, a full eighty-eight percent of sheriffs in that state signed a letter defending their county's sanctuary resolutions as mandated by the oath they took when ascending to their respective offices.[263]

The text of 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 of the Second Amendment belied by *Heller* itself.[264] At a minimum, they appear to assume that background checks, assault weapons bans, and extreme risk laws do violate the Second Amendment, when those legal issues are 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"

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, however, to note that Second Amendment doctrine remains "in a state of flux," relatively unconstrained by Supreme Court precedent.[265] This comparative

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https://cumberlandcounty.virginia.gov/sites/default/files/2019-12/121019.BOS_.Addendum.packet_complete.pdf.

[261] *Id.* (reserving right "to direct law enforcement and employees . . . to not enforce" any "unconstitutional" gun regulation); Gregory Gwyn-Williams, *340 Sheriffs Refuse to Enforce Unconstitutional Gun Control Laws*, CNS NEWS (Mar. 19, 2019), https://www.cnsnews.com/blog/gregory-gwyn-williams-jr/340-sheriffs-refuse-enforce-unconstitutional-gun-control-laws.

[262] *See* Toscano, *supra* note 6

[263] *Defiant: Dozens of New Mexico sheriffs take stance against state's new gun control legislation,* THE 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/ (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.").

[264] *See* Res. of Cumberland Cnty. Bd. of Supervisors Declaring Cumberland Cnty. as a "Second Amendment Sanctuary", *supra* note 260; *Heller*, 554 U.S. at 627 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts regularly explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

[265] Blocher, *supra* note 22 at 89; Lars, *supra* note 139 at 189; *see also* Blocher & Miller, *supra* note 33 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.").

blank slate in Second Amendment doctrine leaves much room for debate over regulations operating at the margins of core Second Amendment guarantees, like the ones giving rise to the current Second Amendment Sanctuary movement.

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."[266] Given the complexity of the *Heller* decision itself, courts disagree over foundational questions of Second Amendment interpretation, such as what doctrinal test to apply,[267] whether and to what extent history is relevant,[268] whether a local dimension exists in Second Amendment rights ordering,[269] and whether "bans" on certain classes of arms can ever survive constitutional scrutiny.[270]

Virtually all courts since *Heller* considering Second Amendment challenges have examined whether to employ Justice Scalia's historical-categorical approach or the balancing test articulated in Justice Breyer's dissent.[271] Most scholars and lower courts have adopted the balancing test approach akin to the standards of scrutiny found in other areas of constitutional law, which follows the familiar "coverage – protection" two-step analysis.[272] "Coverage refers to the threshold question of whether a particular person, activity, or thing triggers constitutional

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[266] Blocher, *supra* note 213 at 341-42.

[267] *See, e.g., Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1273 (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).

[268] *See Heller*, 554 U.S. at 605 (defending use of nineteenth century sources in considering scope of 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, 3-8 (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).

[269] *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.").

[270] *See Heller II*, 670 F.3d at 1262 (majority opinion upholding bans on semiautomatic rifles as a constitutional ban on "dangerous and unusual weapons"); *id.* at 1285 (Kavanaugh, J., dissenting) (arguing that applying intermediate scrutiny "to a ban on a class of arms" is in appropriate because a "ban on a class of arms is not an 'incidental' regulation. It is equivalent to a ban on a category of speech."); Blocher, *supra* note 213 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").

[271] 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, 1478-92 (2018) (collecting data on nearly 1,000 post-*Heller* cases and noting how often courts discuss the historical versus means-end tests).

[272] *Id.* at 1492 T. 12 (finding that nearly half of all opinions explicitly employ the means-ends test, while less than ten percent discuss historical sources).

analysis at all."[273] If so, the court engages in a "protection" means-end analysis to determine if the end purpose of a particular government action is sufficiently important and accomplished through sufficiently narrow means.[274] In the Second Amendment context, this protection test has taken on the look of intermediate scrutiny in function if not in name.[275] But even when the court can agree on invocation of this test, significant disagreement arises over how much to 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.[276] Moreover, a not-insubstantial minority of courts and commentators contend that this balancing test is inappropriate, given that the majority opinion in *Heller* used a historical-categorical analysis.[277]

While so-called "assault weapons bans," generally referring to prohibitions against the purchase or sale of semiautomatic rifles,[278] have generated the greatest fault line in this embryonic doctrinal landscape, background checks and extreme risk laws have also created 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.[279] But

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[273] Blocher, *supra* note 213 at 319-20.

[274] *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.").

[275] *See Tyler v. Hillsdale Cnty Sheriff's Dep't*, 837 F.3d 678, 690 (6th Cir. 2016) (concluding that intermediate scrutiny applied to federal firearm prohibition as applied to involuntarily committed individual, but noting that strict scrutiny might be appropriate in some circumstances); *Drake v. Fillo*, 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) (The "Ninth Circuit has repeatedly applied intermediate scrutiny in cases where it has reached the second step of *Heller*.").

[276] *See, e.g., Keyes v. Sessions,* 282 F. Supp. 3d 858, 875 (M.D. Pa. 2017) (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").

[277] *See* Ruben & Blocher, *supra* note 271 at 1492 (noting that as many as ten percent of lower courts apply only the historical-categorical approach).

[278] E. Gregory Wallace, *"Assault Weapon" Myths*, 43 S. ILL. U.L.J. 193, 193-94 (2018) (describing lack of a "generally agreed-upon definition of 'assault weapon,'" and the faulty reasoning used by some legislators in defining weapons by "looks").

[279] *Heller*, 554 U.S. at 627; Ruben*, supra* note 271 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").

both background checks and extreme risk laws contemplate denying firearm possession to at least some individuals who have not been adjudicated as criminal offenders.[280] This, the history and tradition of denying felons possession rights does not definitively save these laws. Yet a court employing a means-end analysis certainly could 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.[281] The constitutional answer, and even the test used to arrive at the 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 that violate the Second Amendment. Determining which laws do so is a difficult task indeed.

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.[282] Critics respond that courts have the sole and final say over "what the law is," 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."[283] This principle, forcefully advanced by the Warren Court but arguably present in *Marbury v. Madison*,[284] 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."[285]

Judicial supremacy has normative appeal. As Larry Alexander and Frederick Schauer have explained, law provides the benefits of authoritative settlement and

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[280] *See supra* note 57-74 and accompanying text.

[281] *See, e.g., Hope*, 163 Conn. App. at 42.

[282] *See* Toscano, *supra* note 6.

[283] 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 (2009) ("The question of who may interpret the Constitution is a question of separation of powers.").

[284] 5 U.S. (1 Cranch) 137 (1803).

[285] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also Planned Parenthood of Southeastern Pennsylvania 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.").

coordinating social behavior.[286] These benefits "provide reasons for following laws even when one disagrees with the content of those laws,"[287] and *stare decisis* provides a convenient vehicle through which to coordinate behavior around a settled view of what would otherwise be an indeterminate state of legal order.[288]

Early critics of Second Amendment Sanctuaries claim they violate this well-settled principle of judicial supremacy in favor of the competitor approach of departmentalism.[289] The theory of departmentalism comes in many forms.[290] But the "Lincoln-Meese" model most commonly advanced as an alternative to judicial supremacy, and most closely aligned with the text of sanctuary resolutions, posits that nonjudicial officials in other branches of government "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 fit rather than the Constitution as the Court sees it."[291]

Departmentalism of this stripe is having a bit of a scholarly resurgence.[292] Judicial supremacists view this resurgence as "terrifying" because it has a destabilizing effect avoided by judicial supremacy.[293] If the Supreme Court renders a constitutional interpretation that the other branches disagree with, "Congress might

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[286] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-72 (1997); Larry Alexander & Frederick Schauer, *Defining Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455-56 (2000).

[287] Kevin C. Walsh, *Judicial Supremacy v. Judicial Departmentalism*, 58 WM. & MARY L. REV. 1713, 1719 (2017) (citing Alexander & Schauer, *supra* note 286 at 1374).

[288] Alexander & Schauer, *supra* note 286 at 1373-74 (asserting that the value of precedent within the judiciary translates to respect for precedent outside it).

[289] Toscano, *supra* note 6; *see also* Fallon, *supra* note 33 at 490 (2018) (observing that "departmentalism not only strikes many of us as terrifying, but also contravenes intuitions about the requirements of the rule of law").

[290] *See* Walsh, *supra* note 287 at 1720 (discussing divided departmentalism and overlapping departmentalism before advancing a separate theory of "judicial departmentalism").

[291] *Id.*; *see also* Alexander & Schauer, *supra* note 286 at 1381 n.9 (arguing that "there is nothing more anti-textual about expecting nonjudicial officers to show the same deference" to Supreme Court judgments as lower court judges do).

[292] *See* Fallon, *supra* note 33 at 492-93 (advancing a mixed form of judicial supremacy and "popular constitutionalism" that provides greater flexibility for subfederal officials); Matthew Steilen, *Collaborative Departmentalism*, 61 BUFFALO L. REV. 345, 352 (2013) (arguing for "moderate departmentalism"); Walsh, *supra* note 287 at 1713. More recently, Judge Easterbrook of the Seventh Circuit Court of Appeals appeared to implicitly endorse departmentalism in *Baez-Sanchez v. Barr*, 2020 U.S. App. LEXIS 2034, at *4-*5 (Jan. 23, 2020) ("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."); *see also* Howard Wasserman, *Judge Easterbrook does judicial departmentalism*, PRAWFS BLAWG (Jan. 25, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/01/judge-easterbrook-does-judicial-departmentalism.html.

[293] Fallon, *supra* note 33 at 490.

well continue passing laws of the type that the court has held unconstitutional."[294] 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."[295]

These normative arguments favoring judicial supremacy are compelling, but ultimately of little relevance in the Second Amendment Sanctuary context. Judicial supremacy can only have a settlement and coordinating function if a clear judicial pronouncement has 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,[296] and *McDonald* settled the issue of whether that right applies against the states.[297] These decisions also presumptively settled other broad Second Amendment questions, including the unconstitutionality of absolute bans on handgun possession[298] and the constitutionality of bans on firearm possession for felons.[299] 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.[300] 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 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.[301] But virtually no judicial guidance on extreme risk laws exist to guide legislators or executives rightfully concerned with their constitutional duties.[302]

The result is what I call first impression departmentalism, of which sanctuary resolutions are an example. The various state legislatures passing or proposing

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[294] Walsh, *supra* note 287 at 1719.

[295] Alexander & Schauer, *supra* note 286 at 1617; *see also* Yoshino, *supra* note 283 at 3 (cautioning against the "unrestrained ambition" of political branches to stake out "as much interpretive power as possible," when the judicial branch self-imposes restraints such as standing, ripeness, mootness, and the case-or-controversy requirement).

[296] *Heller*, 554 U.S. at 631 (recognizing historical argument for Second Amendment right "to keep and bear arms for defense of the home").

[297] *McDonald*, 561 U.S. at 788.

[298] *Heller*, 554 U.S. at 628 (invalidating 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).

[299] *Id.* at 626.

[300] *McDonald*, 561 U.S. 742; *New York State Rifle and Pistol Association, Inc. et al. v. City of New York*, 18-280 (asking whether ban on transportation of handgun outside New York City limits violates the Second Amendment).

[301] *See generally* Ruben & Blocher, *supra* note 271 (reporting results and content of more than one thousand post-*Heller* Second Amendment challenges).

[302] *See supra* notes 71-74.

extreme risk laws presumably believe in their constitutional soundness. 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 question to one of intrastate federalism.

Local constitutional officers retain another advantage in their quest to these contours: discretion. Prosecutors and sheriffs wield enormous discretion in carrying out their duties, and some may use that discretion decline to arrest or prosecute in the name of the Constitution.[303] 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] . . . discretion to resist Second Amendment changes that are apparently unconstitutional on their face."[304] Whether that discretion can be removed depends on the contours of subfederal anticommandeering doctrine, which local officials may wish to assert should they bring an impact litigation claim as discussed below.

C. Impact Litigation Localism

An alternative to local enforcement discretion as passive constitutional resistance, "local authority can be exercised in the form of constitutional litigation itself."[305] Local jurisdictions can "represent their constituents' constitutional interests directly" through litigation or "assert the [locality's] own constitutional authority to protect."[306] This type of impact litigation localism allows localities to seek judicial guidance on either 1) the substantive constitutional contours of undesirable superior government regulation or 2) 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

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[303] *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 eliminate them.").

[304] Laura McFarland, *Constitutional officers address logistics of Second Amendment Sanctuary designation*, RICHMOND TIMES-DISPATCH (Jan. 6, 2020), https://www.richmond.com/news/local/central-virginia/powhatan/powhatan-today today/constitutional-officers-address-logistics-of-second-amendment-sanctuary-designation/article_bfedeb2a-30a7-11ea-bfde-3b66878ad625.html ("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.").

[305] Schragger, *supra* note 18 at 1222.

[306] *Id.*

challenging Proposition 8, a statewide referendum redefining marriage under the California Constitution as between one man and one woman.[307] One could envision a similar action brought by a locality 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.[308] Most states and the federal government deny cities "associational standing" to assert representative claims.[309] This denial ignores that many metropolitan areas exert far greater protective control, influence, and innovative capacity that many states with unquestioned standing to sue on behalf of their residents.[310] It also becomes more difficult to justify doctrinally as "area-driven nonprofit corporations" invoke associational standing on increasingly shaky ground.[311] Nevertheless, such proactive litigation faces an uphill battle.

Alternatively, localities can bring structural litigation. These claims assert that the "withdrawal of local authority is itself a structural component of the constitutional injury."[312] The most prominent examples of this litigation involves Equal Protection challenges to statewide preemption of local antidiscrimination

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[307] *Id.* at 1223 (describing San Francisco as a uniquely activist city, where the "City Attorney's Office made a concerted effort to become an impact litigation arm of the municipal community").

[308] *Id.*; *see also* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 39 n.310 (2012).

[309] Kaitin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 63 (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 (2006) (describing the "quagmire" of trying to determine city standing in state and federal courts).

[310] Caruso, *supra* note 309 at 63-64 (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, 1254 (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 207 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").

[311] *See* Caruso, supra note 309 at 65.

[312] Schragger, *supra* note 18 at 1220.

ordinances[313] and appointment of statewide receiverships to assume control of majority-black cities.[314] Localities in those cases argued not that the state had no authority to preempt local law but that it did so for unconstitutional, animus-driven reasons.[315] 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 status,"[316] "firearm owners" is not a constitutionally protected class triggering heightened scrutiny of gun regulations.[317] Nor do any of the disfavored gun regulations stem from the kind of explicit, outright bare animus against gun owners necessary to invalidate them under rational basis review.[318]

Instead, the "structural" challenges most likely to prevail are the ones outlined herein regarding the structural power balance between states and localities: constitutional home rule and subfederal anticommandeering. A locality undoubtedly would have standing to bring this type of structural claim, as the illegal usurping of

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[313] *See Romer*, 517 U.S. at 627 (invalidating Colorado's state law prohibiting localities from passing antidiscrimination ordinances to protect LGBTQ+ members because it singled out a disfavored group for no rational reason); *cf. Carano v. McCrory*, 203 F. Supp. 3d 615, 620 (M.D.N.C. 2016) (denying injunctive relief 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).

[314] *See* Schragger, *supra* note 18 at 1223.

[315] *See, e.g., Romer*, 520 U.S. at 632 ("[T]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.").

[316] *See* Ilya Shapiro & Matthew Larosiere, *The Supreme Court is too Gun-Shy on the Second Amendment*, WALL ST. J. (Jan. 2, 2019), https://www.wsj.com/articles/the-supreme-court-is-too-gun-shy-on-the-second-amendment-11546473290 (claiming the Court's reluctance to take up firearms cases relegates the right to bear arms to "second class status); *cf.* Timothy Zick, *The Second Amendment as Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 624 (2018) ("[N]othing about the Supreme Court's post-*Heller* treatment of the Second Amendment suggested its 'second-class' status.").

[317] *See 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 suspect classifications, such as race or national origin"); *Scocca v. Smith*, 2012 U.S. Dist. LEXIS 87025 *1, 17 (C.D. Cal. Jun. 22, 2012) ("[G]un 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).

[318] *Washington*, 426 U.S. at 264; *Cleburne v. Cleburne Living Center, 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* Jeff Stein, *The NRA is a powerful political force – but not because of its money*, VOX (Oct. 5, 2017), https://www.vox.com/policy-and-politics/2017/10/5/16430684/nra-congress-money-no (claiming that the ability of the NRA to "mobilize and excite huge numbers of voters" threatens all politicians who speak out in favor of gun control).

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 resist on constitutional grounds, this Article sets forth the normative and legal basis for either course of action.

CONCLUSION

The Second Amendment Sanctuary moment 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 have resonance 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 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 local refusals to issue state concealed carry licenses may serve as one example of passive resistance in the vein of both immigration and gun sanctuary movements. And 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.