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## Firearm Localism

**ABSTRACT.** Second Amendment doctrine is largely becoming a line-drawing exercise, as courts try to determine which “Arms” are constitutionally protected, which “people” are permitted to keep and bear them, and in which ways those arms and people can be regulated. But the developing legal regime has yet to account for one potentially significant set of lines: the city limits themselves. In rural areas, gun crime and gun control are relatively rare, and gun culture is strong. In cities, by contrast, rates of violent gun crime are comparatively high, and opportunities for recreational gun use are scarce. And from colonial Boston to nineteenth-century Tombstone to contemporary New York City, guns have consistently been regulated more heavily in cities—a degree of geographic variation that is hard to find with regard to any other constitutional right. This Article argues that Second Amendment doctrine and state preemption laws can and should incorporate these longstanding and sensible differences between urban and rural gun use and regulation. Doing so would present new possibilities for the stalled debate on gun control, protect rural gun culture while permitting cities to address urban gun violence, and preserve the longstanding American tradition of firearm localism.

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## INTRODUCTION

The image of hardy, frontier-dwelling Americans defending themselves and their families with guns has long captured the imaginations of the public, scholars, commentators, and at least one very important vote on the Supreme Court.<sup>1</sup> Though modern urban areas like Chicago and Washington—the cities whose handgun bans were struck down in the Supreme Court’s two recent Second Amendment decisions<sup>2</sup>—have arguably strayed from it,<sup>3</sup> the vision of armed self-defense in frontier towns remains a powerful archetype. The legal reality, however, was more complicated. Nineteenth-century visitors to supposed gun havens like Dodge City, Kansas, and Tombstone, Arizona, could not lawfully bring their firearms past the city limits.<sup>4</sup> In fact, the famed shootout at Tombstone’s O.K. Corral was sparked in part by Wyatt Earp pistol-whipping Tom McLauray for violating Tombstone’s gun control laws.<sup>5</sup> Matters were entirely different outside of town, where guns were both legal

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1. For discussion of the influence of the frontier on American gun culture, see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 9–12 (1st ed. 1995); B. Bruce-Biggs, *The Great American Gun War*, *PUB. INT.*, Fall 1976, at 37, 61; and Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *HARV. L. REV.* 413, 454–55 (1999). See also WILLIAM R. TONSO, *GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS* 38 (1982) (noting that guns can be “positively or negatively associated with Daniel Boone, the Civil War, the elemental lifestyles [of] the frontier,” and other concepts).

At oral argument in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Kennedy referred to “the right of people living in the wilderness to protect themselves” and the “concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.” Transcript of Oral Argument at 8, 30, *Heller*, 554 U.S. 570 (No. 07-290).

2. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Heller*, 554 U.S. 570.
3. See Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 *RUTGERS L.J.* 1, 24 (1992) (“By many accounts the framers envisioned a rural agrarian based America. . . . [W]e can usefully ask whether disarmament advocacy is driven by an urban vision that exalts luxury at the expense of individual liberty. To the degree it is, it may be in conflict with our core constitutional values.”).
4. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 13 (2011); see also *DODGE CITY, KAN., CITY ORDINANCES* no. 16, § 11 (Sept. 22, 1876) (“[A]ny person who shall in the City of Dodge City, carry concealed, or otherwise, about his or her person, any pistol, bowie knife, sling shot, or other dangerous or deadly weapon, except United States Civil Officers, State, County, Township or City officers shall be fined . . . Seventy-Five Dollars.”).
5. See WINKLER, *supra* note 4, at 172–73.

and prevalent for self-defense and other purposes.<sup>6</sup> The city limits themselves thus played an important role in defining the scope of the right to keep and bear arms.

The not-so-wild West is representative in this regard. Indeed, perhaps no characteristic of gun control in the United States is as “longstanding”<sup>7</sup> as the stricter regulation of guns in cities than in rural areas. In the Founding era, many cities—Philadelphia, New York, and Boston prominent among them—regulated or prohibited the firing of weapons and storage of gunpowder within city limits,<sup>8</sup> even while the possession and use of guns and gunpowder were permitted in rural areas. That geographic tailoring has remained largely consistent in the two centuries since, and it is no accident that *District of Columbia v. Heller*<sup>9</sup> and *McDonald v. City of Chicago*<sup>10</sup> both involved municipal gun regulation.

This Article argues that future Second Amendment cases can and should incorporate the longstanding and sensible differences regarding guns and gun control in rural and urban areas, giving more protection to gun rights in rural areas and more leeway to gun regulation in cities. Part I describes the significant differences between urban and rural areas with regard to the prevalence, regulation, perceived importance, use, and misuse of guns. Violent gun crime and support for gun control are heavily concentrated in cities, while opposition to gun control is strongest in rural areas, where the costs of gun

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6. See *id.* at 165 (citing ROBERT R. DYKSTRA, *THE CATTLE TOWNS* (1968)); see also *Heller*, 554 U.S. at 715 (Breyer, J., dissenting) (“Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays’ Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways.”).
  7. *Heller*, 554 U.S. at 626-27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).
  8. See *infra* notes 165–172 and accompanying text; see also *Heller*, 554 U.S. at 683-85 (Breyer, J., dissenting) (“Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. . . . Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm.”); LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 48 (1975) (“[D]uring the colonial period, the urban areas were relatively free of the consistent use of firearms.”).
  9. 554 U.S. 570 (2008).
  10. 130 S. Ct. 3020 (2010).

crime are lowest. Rural residents are far more likely to own firearms than people living in cities, and have more opportunities to use them for lawful activities like hunting and recreational shooting. These differences, while certainly not universal—not every city has stringent gun control,<sup>11</sup> nor do all rural residents oppose it—are so stable and well-recognized that they have calcified into what are often referred to as different gun “cultures.”<sup>12</sup>

But while this cultural divide is well-established and long-standing, it rarely figures prominently in discussions of constitutional doctrine, and rarer still is it seen as an opportunity rather than an obstacle. This is unfortunate and unnecessary, because Second Amendment doctrine already contains the tools with which to achieve geographic tailoring. *Heller* and *McDonald* left the contours of Second Amendment doctrine fuzzy, aside from approving a set of “presumptively lawful” gun control measures.<sup>13</sup> The opinions did, however, suggest two major jurisprudential alternatives: one rooted in historical analysis, the other in interest balancing.<sup>14</sup> Part II shows how either road can lead to a locally tailored Second Amendment.<sup>15</sup>

11. As explained in more detail below, a simple headcount of existing municipal gun control laws is likely to underrepresent support for urban gun control, since state preemption laws make it difficult or impossible for many cities to regulate guns as they might otherwise choose to do. See *infra* Section III.B.

12. See, e.g., WINKLER, *supra* note 4, at 14 (“The debate over guns is usually portrayed as a cultural battle between urban and rural, with the latter seeing guns as part of their cultural heritage of hunting.”); Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 4-5 (2003); Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003); David Brooks & Gail Collins, *What We Talk About When We Talk About Guns*, N.Y. TIMES: OPINIONATOR (July 25, 2012, 1:22 PM), <http://opinionator.blogs.nytimes.com/2012/07/25/what-we-talk-about-when-we-talk-about-guns> (David Brooks: “The gun control debate is no longer about guns. It’s a culture war between urbanites and rural people.”).

For a detailed argument that the “individual” Second Amendment right is largely the product of a socio-cultural movement, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

13. *Heller*, 554 U.S. at 626-27 & n.26.

14. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (describing categorical and balancing approaches).

15. This is not an Article about what was long the central battle in Second Amendment law and scholarship—whether the Amendment protects only militias, or instead protects an “individual” right to gun ownership for non-militia-related purposes. As a matter of constitutional law, *Heller* and *McDonald* settled that question, coming down squarely on the side of an “individual” right whose “core” and “central component” is self-defense. But translating that principle into constitutional doctrine requires another step. See Richard H.

First, the majorities in *Heller* and *McDonald* endorsed a historical-categorical approach that evaluates contemporary gun control measures based on whether they have “longstanding” historical analogues.<sup>16</sup> This approach is categorical in that it eschews interest-balancing, focusing on line-drawing rather than cost-benefit analysis.<sup>17</sup> Lower courts applying it have looked not just to Founding-era regulations, but to the broad sweep of gun control throughout American history.<sup>18</sup> Under this historical-categorical approach, the fact that the United States has a deeply rooted tradition of comparatively stringent urban gun control is an argument for treating contemporary urban gun control as, if not “presumptively lawful,”<sup>19</sup> at least meriting special deference. As noted above and described in more detail below,<sup>20</sup> cities have traditionally enacted the country’s strictest gun control measures, including handgun bans, safe storage requirements, limits on public carrying, and prohibitions on shooting guns within city limits. To be sure, the historical record is neither complete nor uniform. But it appears to be at least as persuasive as the evidence supporting other Second Amendment rules specifically approved by the Court in *Heller*—the ban on felons in possession, for example.<sup>21</sup>

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Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 56-57 (1997). That is the project I pursue here.

16. *Heller*, 554 U.S. at 626-27; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).
17. See Blocher, *supra* note 14, at 405-11.
18. In the context of municipal gun control, there are especially good reasons to avoid a narrow focus on the Founding era, since technically it was the Fourteenth Amendment that made the Second applicable against states and cities. See *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (arguing that for state and local laws, “the focus of the original-meaning inquiry is carried forward” to the Reconstruction era).
19. *Heller*, 554 U.S. at 627 n.26.
20. See *infra* Section I.B.
21. See, e.g., *United States v. McCane*, 573 F.3d 1037, 1047-49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon-in-possession rules are “longstanding”); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1374-76 (2009) (same); Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731-32 (2012) (“Although Justice Scalia’s opinion in *Heller* characterized disarming felons as a long-standing tradition, federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961.”).

Judges and scholars have questioned the wisdom and coherence of the historical-categorical approach,<sup>22</sup> and many lower courts seem to have shelved it in favor of the pragmatic balancing described by Justice Breyer in his *Heller* dissent.<sup>23</sup> The latter, which has much in common with the standards of scrutiny found in other areas of constitutional law, evaluates the constitutionality of gun control laws based on the strength of the governmental and private interests involved and the degree to which a given law serves the former while protecting the latter.<sup>24</sup> Here, too, the case for local tailoring of Second Amendment analysis is straightforward, for the simple reason that cities and rural areas generally have different gun-related interests and face different gun-related challenges.<sup>25</sup>

Part III broadens the frame by showing how ongoing debates about the general virtues of constitutional localism are relevant to firearm localism and vice versa. Some constitutional rights are already locally tailored,<sup>26</sup> and a growing number of scholars have explored and celebrated the role of localism in constitutional law.<sup>27</sup> Of course, the question of whether any particular right should be locally tailored is ultimately a specific and normative one,<sup>28</sup> which is

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22. See, e.g., *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (concluding that it would be “weird” if a gun control law were to become constitutional simply as a function of its age); Blocher, *supra* note 14, at 413 (“[T]he majority’s attempt to create categories neither reflects nor enables a coherent account of the Second Amendment’s core values, whatever they may be.”); *Civil Rights: The Heller Case: Minutes from a Convention of The Federalist Society*, 4 N.Y.U. J. L. & LIBERTY 293, 301-05 (2009) (remarks of Prof. Nelson R. Lund, George Mason University School of Law).
  23. See Rostron, *supra* note 21, at 706-07, 756-57 (describing the use of a balancing approach in federal courts after *Heller* and *McDonald*); see also Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 715-26 (2007) (describing the “reasonable regulation standard” used by state courts evaluating gun control under state constitutional provisions).
  24. See *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting) (describing a test that would “ask[] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests”).
  25. See *infra* notes 95-101 and accompanying text.
  26. See *infra* Section III.A.
  27. See, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133 (1999) [hereinafter Rosen, *Our Nonuniform Constitution*]; Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005) [hereinafter Rosen, *Tailoring*]; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).
  28. See, e.g., Rosen, *Tailoring*, *supra* note 27, at 1516-17; Schragger, *supra* note 27, at 1818.

why the argument for firearm localism is built on a foundation of geographic tailoring that is unique to gun rights and gun control. But the broader case for constitutional localism confirms that this would not mean treating the Second Amendment as some kind of second-class right.

Section III.B shows how localism arguments would impact not only federal constitutional doctrine, but also state law. Over the past few decades, most states—acting largely in response to local-level handgun bans<sup>29</sup>—have passed laws forbidding or simply limiting municipal gun control.<sup>30</sup> These preemption laws do not reach all cities, nor do they forbid all gun control, so a localized Second Amendment would have significant reach even under current law. But many of the arguments for Second Amendment localism also suggest that broad preemption laws are an undesirable break from historical practice. Especially in the wake of *Heller* and *McDonald*, which constitutionally guarantee the rights that preemption laws purport to protect, the laws themselves can and should be modified or repealed.

Of course, there are various objections, some of them quite strong, to the idea of firearm localism. One might argue that increased deference to urban gun control would undermine the self-defense rights of people living in high-crime inner cities. Or perhaps instead of achieving too much, firearm localism would be crippled from the start by the practical difficulty of defining urban and rural areas. Section III.C attempts to answer these and other objections.

Other potential questions and objections can be answered preemptively by clarifying what this Article does *not* argue. Firearm localism would not exempt cities from the Second Amendment, nor would it permit evisceration of the right to keep and bear arms for self-defense. It would instead mean giving cities extra leeway with regard to matters like the regulation of assault weapons or concealed carrying. Conversely, firearm localism is not an argument against all state or national gun control. As with any other issue, there are some matters that cannot be regulated effectively at the local level<sup>31</sup>—manufacturing

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29. KRISTIN A. GOSS, DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA 162-65 (2006); see also GLENN H. UTTER, ENCYCLOPEDIA OF GUN CONTROL AND GUN RIGHTS 201 (2000).

30. See *infra* Section III.B.

31. See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (arguing that the federal powers enumerated in Article I, Section 8 should be understood in light of collective action problems among the states); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2346 (1996) (arguing that interstate spillover effects can justify federal regulation).



requirements, for example—and others that can, such as public carrying rules that can be enforced on the spot by local police.

The Article concludes by showing how firearm localism might address ongoing Second Amendment debates regarding the regulation of assault weapons and concealed carrying. With regard to the former, *Heller* holds that the “Arms” protected by the Amendment are those in common use, but does not explain how to separate protected arms from proscribable “dangerous and unusual weapons.”<sup>32</sup> Firearm localism would rely on local standards to make that distinction, just as First Amendment doctrine does when separating obscenity from protected speech.<sup>33</sup> It would also justify increased deference for urban prohibitions of concealed carrying—such laws have long been accepted as constitutional,<sup>34</sup> and have a special claim on constitutionality in cities.<sup>35</sup> Either of these specific forms of tailoring would help preserve the firearm localism that has always been a part of our legal tradition.

## I. AMERICA’S TWO GUN CULTURES

Though sizeable majorities of Americans agree on certain basic precepts about the Second Amendment—that it protects an “individual” right to bear arms<sup>36</sup> but permits reasonable gun control laws,<sup>37</sup> which should be more

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32. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); see Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1480-81 (2009) (describing “[t]he difficulty with a ‘dangerous and unusual weapons’ test”).
  33. See *Hamling v. United States*, 418 U.S. 87, 104-05 (1974). To be clear, not every element of the constitutional test for obscenity is locally tailored—a jury must also determine “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). That inquiry is *not* conducted through the lens of community standards. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). An analogous inquiry in Second Amendment doctrine might ask whether a weapon, even though uncommon, has serious value for self-defense.
  34. See *Heller*, 554 U.S. at 626 (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).
  35. See *infra* notes 328-342 and accompanying text.
  36. See Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP, Mar. 27, 2008, <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-OwnGuns.aspx>.
  37. Matthew Bennett, *Misfire: How the Debate over Gun Rights Ignores Reality*, 1 ALB. GOV’T L. REV. 482, 488 (2008) (“Americans not only believe in Second Amendment rights, they support strong gun laws.”); Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA.

strictly enforced<sup>38</sup>—“pro-gun” and “pro-gun control” beliefs are not evenly distributed throughout the country. Scholars and commentators have long recognized this, often describing the gun control debate as being between the South and the rest of the nation,<sup>39</sup> between “cosmopolitan” and “bedrock” America,<sup>40</sup> or between a “primary” gun culture that includes the South, West, and Midwest and a “secondary” gun culture in coastal, urbanized states and cities.<sup>41</sup>

These line-drawing efforts capture important characteristics, but perhaps the most consistent underlying differences are those between urban and rural gun cultures.<sup>42</sup> Americans in cities are, and apparently always have been, less likely to own, use, or approve of guns than those in rural areas. City-dwellers are victimized by gun crime at much higher rates, and are far more likely to support stringent gun control. Rural residents, by contrast, are more likely to grow up with guns, to have positive role models with regard to their responsible use, and to oppose gun control. These differences are historically consistent, and they tend to be obscured by doctrinal analysis that focuses

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L. REV. 1329, 1330-37 (2003) (reporting that at least three-quarters of respondents in a national survey supported registration and child proofing of all handguns, background check requirements for private gun sales, and denial of guns to those convicted of domestic violence misdemeanors).

38. See Washington Post-ABC News Poll, WASH. POST (Jan. 13-16, 2011), [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_01172011.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_01172011.html) (reporting that nearly twice as many respondents (57% vs. 29%) believed stricter enforcement of existing laws would more effectively reduce gun violence than would passing new laws).
39. Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 79-81 (2002).
40. William R. Tonso, *Social Science and Sagecraft in the Debate over Gun Control*, 5 LAW & POL'Y Q. 325, 330-31 (1983); see also KENNETT & ANDERSON, *supra* note 8, at 254-56 (contrasting “cosmopolitan” urban and “shirtsleeve” rural views on guns).
41. Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 209-13 (2008).
42. See SPITZER, *supra* note 1, at 13 (“Those who compose and support the active gun culture are overwhelmingly white males, live in rural areas (especially in the South), are likely to be Protestant, and are from ‘old stock’ . . . . Conversely, those for whom the gun culture carries the least appeal are likely to be females, from larger metropolitan areas, from the Northeast and from more recent immigrant descent.”); Luna, *supra* note 39, at 81 (“A final geographic phenomenon of the pro-gun culture cuts across both the South and the West: rural, small-town America. In the United States, inhabitants of countryside regions are more likely to own firearms and oppose gun control laws.”); Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 477 (2004).

solely on states and the federal government.<sup>43</sup> Taking urban-rural differences into account would have a significant impact, even if “urban” is narrowly defined. As Carl Bogus notes, the fifty metropolitan statistical areas with one million or more people “comprise only a small fraction of the nation’s land mass but include about 58% of the nation’s population.”<sup>44</sup> They also suffer a disproportionate amount of the nation’s gun violence.<sup>45</sup>

It is worth noting that scholarship in this area is rife with disagreement over basic empirical facts—whether defensive gun uses average 2.5 million per year<sup>46</sup> or 80,000,<sup>47</sup> for example, or whether more guns lead to more or less

43. Michael O’Shea makes a thoughtful and convincing argument for constitutional deference to state regulations, but disclaims the urban/rural divide, arguing that “when efforts are made to paint the conflict over guns as urban versus rural, it is useful to recall that the contemporary legal landscape differs greatly from this stereotype.” O’Shea, *supra* note 41, at 212; *see also id.* at 209 (“The major divide on guns is no longer between the rural South and the rest of the nation. Instead it is between several highly urbanized coastal states and cities, whose gun laws reflect a common denominator I call the *secondary gun culture*, and the rest of the nation—Midwest, South, and West—whose laws reflect America’s *primary gun culture*.”).

In part because my goal is to show how the cultures can coexist, I make no effort here to code urban or rural gun culture as “primary.” My major point of departure from O’Shea is with regard to treating states as the sole unit of analysis. O’Shea argues:

[T]he smallest appropriate geographic unit for firearms policy (and for most culturally divisive issues) is not the city or county, but the *state*—because that is the minimum geographic unit for living a balanced life. Rural and exurban residents need cities to visit. Urbanites need to escape to quieter areas.

*Id.* at 212. Though I fully agree that a mix of urban and rural experience helps one lead a “balanced life,” I cannot see how the Constitution compels as much, nor even how that principle supports O’Shea’s conclusion. If a mixture of urban and rural life is important, then doctrine should focus on *that* balance, not on state borders, which were not drawn to balance cities and “quieter areas” and do a bad job of it in any event.

44. Carl T. Bogus, *Gun Control and America’s Cities: Public Policy and Politics*, 1 ALB. GOV’T L. REV. 440, 463 (2008); *see also* LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS (2008) [hereinafter REGULATING GUNS IN AMERICA] (reviewing local gun laws in Boston, Chicago, Cleveland, Columbus, Hartford, Los Angeles, Newark, New York, Omaha, and San Francisco, cities “in states that presently provide local jurisdictions broad authority to regulate firearms”).
45. *See infra* notes 98–104 and accompanying text.
46. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 184 tbl.2 (1995) (basing figures on phone survey designed by authors).

crime.<sup>48</sup> Scandals involving flawed historical research<sup>49</sup> or survey results that could not be replicated<sup>50</sup> cast clouds over even the most seemingly robust findings, and tend to entrench each side's belief that the other is playing fast and loose with the facts. The goal of this discussion is simply to show that Americans are deeply divided about guns and gun control—a proposition that few would dispute—and that this division tracks the urban/rural line. The aim is not to prove that all rural areas or residents are part of the gun culture, nor that all cities and urban dwellers reject it. Rather, it is to show that the differences between urban and rural gun cultures are real, and should influence our evaluation of the constitutionality of gun control.

### A. Rural Gun Culture

America's gun culture generally celebrates the ownership, possession, and use of firearms,<sup>51</sup> and is skeptical of gun control.<sup>52</sup> It is “predominantly rural and small town,” just as “its enemies are predominantly urban.”<sup>53</sup>

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47. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, GUNS AND CRIME: HANDGUN VICTIMIZATION, FIREARM SELF-DEFENSE, AND FIREARM THEFT 1-2 (1994) (basing figures on the National Crime Victimization Survey).
  48. Compare JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS (3d ed. 2010), with Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193 (2003).
  49. See generally James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (reviewing Michael Bellesiles' *Arming America* (2000), and identifying numerous errors and apparent falsifications in the book's historical analysis).
  50. See STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 133 (rev. ed. 2010) (recounting “the troubling allegation that Lott actually invented some of the survey data that support his more-guns/less-crime theory” and reporting that “[w]hen other scholars have tried to replicate his results, they found that right-to-carry laws simply don't bring down crime.”). Cf. Lott v. Levitt, 556 F.3d 564, 566-67 (7th Cir. 2009) (upholding dismissal of a defamation claim brought by John Lott against Steven Levitt on the basis of this passage).
  51. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 419-22 (1992); Richard Hofstadter, *America as a Gun Culture*, AM. HERITAGE, Oct. 1970, at 84; Luna, *supra* note 39, at 82-85; Eric Primm et al., *Race, Fear, and Firearms: The Roles of Demographics and Guilt Assuagement in the Creation of a Political Partition*, 13 J. AFR. AM. STUD. 63, 65 (2009).
  52. This is not to say that the gun culture *unanimously* opposes gun control; surveys have consistently found that large majorities of Americans—necessarily including some members of the gun culture—support reasonable gun control and the enforcement of existing gun laws. See sources cited *supra* notes 37-38; see also Susan Saulny, *For Some, Owning Guns*

Perhaps the most basic element of rural gun culture is, naturally enough, the prevalence of guns. Study after study has shown that “[g]un ownership is more common among those residing in small cities and towns and in the suburbs compared to those living in large cities.”<sup>54</sup> The precise figures vary, but one representative survey found that “[o]nly 29% of urban residents own a gun while 56% of rural residents do so.”<sup>55</sup> This difference is noticeable even at the state and regional level, as households in states that are themselves more rural—primarily those in the South and West—are more likely than those in the Northeast to have guns.<sup>56</sup> The General Social Survey found that only 23% of urban households had guns in the 2000s, compared to 56% in rural areas; the same study found that 22% of households in the Northeast had guns, compared to roughly 40% in the comparatively rural South and mountain regions.<sup>57</sup> Other studies have found similar figures.<sup>58</sup> This “strong regional

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*Doesn't Necessarily Mean Liking Them*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/us/gun-owners-arent-always-gun-lovers.html> (noting views of gun owners who “express[] support for stricter gun control legislation”).

53. DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 170 (2003); *see also id.* at 175 (“[T]he gun culture has a core constituency—white, rural males with conservative values, especially in the South.”).
54. Jan E. Dizard et al., *The War over Guns: Introduction: Numbers Don't Count*, in *GUNS IN AMERICA: A READER* 165, 169 (Jan E. Dizard et al. eds., 1999); *see also* WILLIAMS, *supra* note 53, at 71 (“American gun owners . . . reside primarily in rural areas . . .”).
55. Bogus, *supra* note 44, at 464 (citing THE GALLUP POLL: PUBLIC OPINION 2005, at 141 (Alec M. Gallup & Frank Newport eds., 2006)); *see also* Gary Langer, *Some Gun Measures Broadly Backed but the Politics Show an Even Split*, Mar. 12, 2013, <http://www.langerresearch.com/uploads/1147a2GunControl.pdf> (reporting that gun ownership is “nearly doubly common in rural compared with urban areas”); Chuck Raasch, *In Gun Debate, It's Urban vs. Rural*, USA TODAY, Feb. 27, 2013, <http://www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479> (“A compilation of December [2012] Gallup polls showed that rural Americans—roughly one-sixth of the population—are more than twice as likely to have a gun in the home than those living in large cities.”).
56. *See, e.g.*, Deborah Azrael et al., *State and Local Prevalence of Firearms Ownership Measurement, Structure, and Trends*, 20 J. QUANTITATIVE CRIMINOLOGY 43, 52 (2004) (“The percent of the state’s population that was rural in 1950 is highly correlated (across states) with household gun ownership over four decades later . . .”).
57. Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/us/rate-of-gun-ownership-is-down-survey-shows.html>.
58. A 2008 poll of voters found that only 30% of urban residents own guns, compared to 60% in rural areas; the same poll found 32% gun ownership in the East but 47% in the

pattern” of gun ownership “has been quite stable over time, suggesting that the determinants of gun prevalence have more to do with tradition, culture and childhood experience than with concern about crime or other relatively volatile matters.”<sup>59</sup> In fact, until quite recently, recreation – including hunting, which is a predominantly rural pursuit – was the single most common reason for gun ownership in the United States.<sup>60</sup> It is no surprise, then, that gun ownership is highest among people who self-identify as hunters, nor is it surprising that they are likelier to own rifles and shotguns than handguns.<sup>61</sup>

Perhaps even more important than the simple instrumental point that one must have guns in order to hunt things with them is the fact that for members of the gun culture, “guns symbolize a cluster of positive values, from physical prowess and martial virtue to honor to individual self-sufficiency.”<sup>62</sup> As Justice Antonin Scalia himself has put it, “The hunting culture, of course, begins with a culture that does not have a hostile attitude toward firearms. . . . The attitude of people associating guns with nothing but crime, that is what has to be changed.”<sup>63</sup> The Justice’s argument and his repeated invocation of “culture”

comparatively rural South. Nate Silver, *Party Identity in a Gun Cabinet*, N.Y. TIMES: FIVETHIRTYEIGHT (Dec. 18, 2012, 12:39 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/12/18/in-gun-ownership-statistics-partisan-divide-is-sharp>.

59. Azrael et al., *supra* note 56, at 52; see Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUST. 319, 325 (2002) (noting that geographic differences in ownership are “remarkably stable over time”). A 1998 survey similarly found 25% gun ownership in the Northeast and 60% in the East South Central Census area, which consists of Alabama, Kentucky, Mississippi, and Tennessee. Azrael et al., *supra* note 56, at 43. A 1992 *Times*/CBS News poll reported that only 31% of urban residents own guns, compared to 72% in rural areas. SPITZER, *supra* note 1, at 69. The same poll found 41% gun ownership in the Northeast, but 65% in the comparatively rural South. *Id.*
60. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT’L INST. JUST. 2-3, 11 (1997), <http://www.ncjrs.gov/pdffiles/165476.pdf>.
61. *Id.* at 2-3 (noting that “recreation” is the most common reason for gun ownership); SPITZER, *supra* note 1, at 75 (“By far the most common reasons for gun ownership are hunting and related recreational uses, a fact consistent with the prevalence of long guns over handguns.”).
62. Kahan, *supra* note 12, at 5; see also WILLIAMS, *supra* note 53, at 153 (“The gun culture has embraced guns not just as a tool but as a central symbol of its whole set of cultural values.”).
63. JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 346 (2009); see also David B. Kopel, *America’s Only Realistic Option: Promoting Responsible Gun Ownership*, in GUNS IN AMERICA: A READER, *supra* note 54, at 452, 455 (“New York City would be better off if it had laws like modern Dodge City, Kansas, where guns may be readily purchased and used for sports and self-protection – where, perhaps partly as a result, young people are exposed to models of responsible gun ownership.”).

drive home the point that the issue is not simply what guns do, but also what they symbolize. Other accounts of gun culture have the same emphasis:

The values of this culture are best typified as rural rather than urban: they emphasize independence, self-sufficiency, mastery over nature, closeness to the land, and so on. Within this culture, the ownership and use of firearms are both normal and normatively prescribed, and training in the operation and use of small arms is very much a part of what fathers are expected to provide to their sons—in short, this training is part and parcel of coming of age.<sup>64</sup>

For members of the gun culture, “the possession, handling, and use of guns are a central part of life”; they “read books and magazines about firearms and socialize with kindred spirits in gun clubs and gun stores.”<sup>65</sup>

One might argue that this gun culture is flatly irrelevant to the interpretation of the Second Amendment, at least to the degree that it is rooted in recreational pursuits like hunting that are penumbral to the self-defense right recognized in *Heller*.<sup>66</sup> If the core interests of the gun culture are not constitutionally salient, then there is little reason to use them as a guide for interpreting the Second Amendment, and the frequent invocation of hunting in connection with the right to keep and bear arms should be treated as nothing more than empty rhetoric.<sup>67</sup>

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64. JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 113 (1983); see also Roberta Rampton, *Obama Says Rural Voices Need to Be Heard in Gun Debate: Report*, REUTERS, Jan. 27, 2013, <http://www.reuters.com/article/2013/01/27/us-obama-guns-idUSBRE9oQoBA20130127> (“If you grew up and your dad gave you a hunting rifle when you were 10, and you went out and spent the day with him and your uncles, and that became part of your family’s traditions, you can see why you’d be pretty protective of that.” (quoting President Obama)).

65. Bruce-Biggs, *supra* note 1, at 41.

66. WINKLER, *supra* note 4, at 14 (“Self-defense, not hunting, is at the core of the right to bear arms . . .”).

67. See, e.g., *Transcript: The Republican Debate*, N.Y. TIMES (Jan. 24, 2008), <http://www.nytimes.com/2008/01/24/us/politics/24text-debate.html> (“I do support the right of individuals to bear arms, whether for hunting purposes or for protection purposes or any other reasons. That’s the right that people have.” (quoting Mitt Romney)); Barack Obama, *Remarks by the President at the National Urban League Convention*, WHITE HOUSE (July 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/07/25/remarks-president-national-urban-league-convention> (“I, like most Americans, believe that the Second Amendment guarantees an individual the right to bear arms. And we recognize the traditions of gun

Although historically speaking self-defense might not be as central to rural gun culture as hunting,<sup>68</sup> it represents an increasingly common – and perhaps now predominant<sup>69</sup> – reason for gun ownership. This might largely be due to the decreasing popularity of hunting,<sup>70</sup> but it is also easy to see how armed self-defense could have particular value to rural residents who cannot count on speedy responses from police.<sup>71</sup> As Erik Luna notes, “There are . . . instrumental reasons for pastoral gun ownership, including . . . the need for rural citizens to supplement diffuse law enforcement agencies.”<sup>72</sup>

The prevalence of guns in rural areas also correlates with certain costs, one of which is a higher rate of accidental shootings and suicides,<sup>73</sup> including those involving children.<sup>74</sup> Nevertheless, opposition to gun control remains relatively strong in rural areas.<sup>75</sup> One recent study found that while 56% of urban

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ownership that passed on from generation to generation—that hunting and shooting are part of a cherished national heritage.”).

68. See Alan J. Lizotte et al., *Firearms Ownership for Sport and Protection: Two Not So Divergent Models*, 46 AM. SOC. REV. 499, 499-500 (1981) (finding a “sporting gun culture” but “only partial evidence of a subculture of protective gun ownership”).
69. *Why Own a Gun? Protection Is Now Top Reason*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, Mar. 12, 2013, <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason>.
70. Tavernise & Gebeloff, *supra* note 57 (“According to an analysis of the [2012 General Social Survey], only a quarter of men in 2012 said they hunted, compared with about 40 percent when the question was asked in 1977.”).
71. Raasch, *supra* note 55 (“‘I live 15 miles from the nearest town or police station,’ says [Frank] Jezioro, [West Virginia’s] director of the Division of Natural Resources. ‘My family, my wife, my grandkids are there all the time. A home invasion – what good does it do me to call 911 and wait for someone to come and help me?’”).
72. Luna, *supra* note 39, at 82.
73. Lee T. Dresang, *Gun Deaths in Rural and Urban Settings: Recommendations for Prevention*, 14 J. AM. BOARD FAM. PRAC. 107, 108 (2001) (“Just as regionally comparative studies suggest that firearm homicides are more of an urban problem, they generally show that firearm-related suicides and accidents are a bigger problem in rural areas.”); D.L. Nordstrom et al., *Rural Population Survey of Behavioral and Demographic Risk Factors for Loaded Firearms*, 7 INJ. PREVENTION 112, 112 (2001) (“Firearm unintentional and suicide death rates are raised in rural places, where one quarter of Americans live.” (citation omitted)).
74. See Michael L. Nance et al., *Variation in Pediatric and Adolescent Firearm Mortality Rates in Rural and Urban U.S. Counties*, 125 PEDIATRICS 1112 (2010); James E. Svenson et al., *Pediatric Firearm-Related Fatalities: Not Just an Urban Problem*, 150 ARCHIVES PEDIATRIC & ADOLESCENT MED. 583 (1996).
75. Helen A. Moore & Hugh P. Whitt, *Multiple Dimensions of the Moral Majority Platform: Shifting Interest Group Coalitions*, 27 SOC. Q. 423, 434 (1986); Tom W. Smith, *The 75% Solution: An Analysis of the Structure of Attitudes on Gun Control, 1959-1977*, 71 J. CRIM. L. &



residents favored stricter gun control, only 34% of rural residents did—numbers roughly comparable to those for non-gun owners (59%) and gun owners (31%).<sup>76</sup> One might think that hunters would be more willing to part with their guns than those who own them solely for self-protection,<sup>77</sup> but some evidence suggests that just the opposite is true.<sup>78</sup> The best explanation for this might simply be that, as Gary Kleck puts it, “hunters are likely to be a part of a gun subculture, which would imply being raised in a gun-owning family, associating with other gun owners, engaging in valued gun-related recreational activities including target shooting as well as hunting, and being exposed to more anticontrol rhetoric.”<sup>79</sup> In other words, they are more likely to be members of a robust gun culture.

### B. Urban Gun Control Culture

Just as gun culture is disproportionately prevalent in rural areas, urban areas disproportionately have what might be called a gun control culture. City-dwellers are roughly half as likely as rural residents to own guns,<sup>80</sup> and are far

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CRIMINOLOGY 300, 303 (1980); THE PEW RESEARCH CENTER, IN GUN DEBATE, SEVERAL OPTIONS DRAW MAJORITY SUPPORT 10 (2013), <http://www.people-press.org/files/legacy-pdf/01-14-13%20Gun%20Policy%20Release.pdf> (finding that 60% of rural residents said it was more important to protect gun rights, while only 37% said it was more important to control ownership; for urban residents the figures were nearly the inverse: 37% and 57%); CNN/ORC Poll, CNN & ORC INT’L 41 (Mar. 18, 2013), <http://i2.cdn.turner.com/cnn/2013/images/03/18/rel3a.pdf> (finding that 72% of rural residents believe there should be either “no restrictions” or “minor restrictions” on guns, while only 46% of urban residents endorsed those positions).

76. *Public Opinion on Gun Control Laws* (Feb. 2013), TEX. POL., [http://laits.utexas.edu/txp\\_media/html/poll/features/gun\\_control\\_feature/slide1.html](http://laits.utexas.edu/txp_media/html/poll/features/gun_control_feature/slide1.html) (dataset and methodology described at *Sampling and Weighting Methodology for the February 2013 Texas Statewide Study*, TEX. POL., [http://texaspolitics.laits.utexas.edu/11\\_9\\_16.html](http://texaspolitics.laits.utexas.edu/11_9_16.html) (last visited Sept. 18, 2013)).
77. WINKLER, *supra* note 4, at 14 (“If it’s hard to persuade a hunter to give up the rifle his father gave him for his twelfth birthday, imagine the difficulty of persuading a person to disarm when he thinks his very life is at stake.”).
78. Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control: A Multilevel Application of the General Social Surveys*, 39 AM. BEHAV. SCIENTIST 387, 397 (1996) (“[G]un owners who hunted were even more likely to oppose gun control than owners who did not hunt.”).
79. *Id.* at 397–98.
80. See *supra* notes 54–59 and accompanying text.

more likely to support gun control.<sup>81</sup> Kristin Goss writes that “[g]un control sentiment has always been strongest in urban areas,”<sup>82</sup> and Kleck similarly concludes that “research has . . . found gun control support stronger among city dwellers and suburbanites.”<sup>83</sup> This support manifests itself among some of the strongest and most forceful advocates for gun control—urban police chiefs<sup>84</sup> and mayors.<sup>85</sup> And it cannot be explained by regional differences, for the urban/rural divide is noticeable even within states.<sup>86</sup>

It is no surprise, then, that the vast majority of gun control regulations in the United States are local,<sup>87</sup> and are tailored to the particular risks of gun use

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81. Kahan & Braman, *supra* note 12, at 1300; *see also* SPITZER, *supra* note 1, at 120 (“[G]un ownership and opposition to gun controls are closely related.”).
  82. Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *FORDHAM L. REV.* 681, 705 (2004).
  83. Kleck, *supra* note 78, at 401 (citing Hazel Erskine, *The Polls: Gun Control*, 36 *PUB. OPINION Q.* 455 (1972)); Smith, *supra* note 75, at 303.
  84. WINKLER, *supra* note 4, at 80-81 (noting that “police chiefs [have been] among the strong supporters of reasonable gun control,” and that since the NRA has attacked those who advocate for such controls, most established police organizations have broken ties with the NRA). Notably, some sheriffs in rural areas have taken the opposite position. Dan Frosch, *Some Sheriffs Object to Call for Tougher Gun Laws*, *N.Y. TIMES*, Jan. 31, 2013, <http://www.nytimes.com/2013/02/01/us/some-sheriffs-object-to-call-for-tougher-gun-laws.html> (noting that dozens of sheriffs have publicly opposed calls for stiffer gun laws, and that “[t]heir jurisdictions largely include rural areas, and stand in sharp contrast to those of urban police chiefs, who have historically supported tougher gun regulations”).
  85. UTTER, *supra* note 29, at 308-09 (noting that the United States Conference of Mayors has consistently advocated gun control); *see also* David Hinson, *Pressure Points: How a Combination of Methods Employed to Reduce Urban Firearm Crime Threatens the 4th Amendment and Proposed Solutions*, 43 *NEW ENG. L. REV.* 869, 871 (2009) (discussing the genesis of the Mayors Against Illegal Guns coalition); *MAYORS AGAINST ILLEGAL GUNS*, <http://www.mayorsagainstillegalguns.org> (last visited Sept. 15, 2013).
  86. *See, e.g., Clinton Tops Florida Favorite Sons in 2016 Race, Quinnipiac University Poll Finds 91% Back Universal Gun Background Checks*, *QUINNIPIAC U. POLL* 5 (Mar. 21, 2013), <http://www.quinnipiac.edu/images/polling/fl/flo3212013.pdf> (reporting poll results from Florida in which 55% of urban respondents favored stricter gun control in the state, as compared to only 38% of rural respondents); Michael Virtanen, *Poll Shows New York Regions Divided over Gun Control Regulations*, *SARATOGIAN*, Feb. 4, 2013, <http://www.saratogian.com/articles/2013/02/04/news/doc511010e34ebb8914755213.txt> (finding that 82% of New York City residents support the state’s new gun control law, while only half of upstate residents do).
  87. SPITZER, *supra* note 1, at 181 (“America’s 20,000 gun regulations belie the central, often ignored fact that nearly all these regulations exist at the state and local levels.”); 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 (Jens Ludwig & Philip J. Cook eds., 2003) [hereinafter *EVALUATING GUN POLICY*] (“The key to the 20,000 calculation, therefore,

in densely populated areas. Common categories of municipal regulations are those governing classes of weapons,<sup>88</sup> sales and transfers,<sup>89</sup> gun dealers and other sellers,<sup>90</sup> gun ownership,<sup>91</sup> and consumer and child safety.<sup>92</sup> Permit requirements are also relatively common, and can be very restrictive.<sup>93</sup> Of course, such restrictions are not uniformly adopted in all cities, and many (perhaps most) urban areas do not currently impose much or any gun control of their own. One reason for this, explained in more detail below, is that most states preempt some or all local gun control.<sup>94</sup> This suggests that existing urban gun control laws underrepresent—perhaps significantly so—the breadth and scope of laws that cities *would* pass if they had the authority.

The primary target of such local regulation is gun-related crime. And though the empirics are messy and contested, gun crime is clearly an urban problem.<sup>95</sup> A 2006-2007 study from the Centers for Disease Control and Prevention found that “[t]he 62 center cities of America’s 50 largest metro areas account for 15 percent of the population but 39 percent of gun-related

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would appear to be the contribution of local laws to the total.”); *see also* Scott Medlock, *NRA = No Rational Argument? How the National Rifle Association Exploits Public Irrationality*, 11 TEX. J. C.L. & C.R. 39, 40 n.6 (2005) (“There are only five federal gun laws, most of which restrict who can purchase a firearm and provide for background checks to enforce those prohibitions.”).

88. The Legal Community Against Violence has compiled a comprehensive review of federal and state gun laws, as well as a sampling of major municipal gun laws. *See* REGULATING GUNS IN AMERICA, *supra* note 44, at i. The first category of regulations it reviews is “Classes of Weapons.” *See id.* at 18-67.
89. *Id.* at 68-143 (reviewing regulations regarding “Sales and Transfers”).
90. *Id.* at 144-75 (reviewing regulations regarding “Gun Dealers and Other Sellers”).
91. *Id.* at 176-215 (reviewing regulations regarding “Gun Ownership”).
92. *Id.* at 216-41 (reviewing regulations regarding “Consumer and Child Safety”).
93. In New York City, the cost, delay, and highly discretionary standard involved in permitting are thought to be significant deterrents to gun ownership, as the city has issued fewer than 40,000 premises permits for its 8.3 million residents. WINKLER, *supra* note 4, at 41; *see also* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 39 (2009) (“New York City has been characterized as maintaining a virtual ban on handguns.”).
94. *See infra* Section III.B.
95. *Cf.* Galvan v. Superior Court, 452 P.2d 930, 938 (Cal. 1969) (in bank) (“That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.”).

murders.”<sup>96</sup> A 2013 study found that 69% of gun crimes in Connecticut take place in three major cities, which contain just 11% of the state’s population.<sup>97</sup> Connecticut is not unique in that regard. As Carl Bogus notes, “[t]he murder rate for the nation’s metropolitan areas is about double the rates for either small cities or rural areas,” and “[t]he difference in the robbery rate is even more pronounced: the small city rate is only 36% of the metropolitan rate, and the rural rate is nine percent of the metropolitan rate.”<sup>98</sup> Of course, such crime is a complicated phenomenon, subject to influences other than the prevalence of guns.<sup>99</sup> But at least for some urban populations—African-American men in particular<sup>100</sup>—guns contribute to an increased rate of violent death.<sup>101</sup>

One might argue that these are precisely the populations that need guns the most. *Heller*, after all, identified armed self-defense as the “core” and “central

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96. Richard Florida, *A Growing Divide in Urban Gun Violence*, ATLANTIC CITIES (Jan. 10, 2013), <http://www.theatlanticcities.com/neighborhoods/2013/01/growing-divide-urban-gun-violence/4328>.

97. *The Geography of Gun Violence in Connecticut*, CONN. ASS’N FOR HUMAN SERVICES 1 (Feb. 2013), [http://www.cahs.org/pdf/CAHS\\_CT\\_Geography%20of\\_Gun\\_Violence.pdf](http://www.cahs.org/pdf/CAHS_CT_Geography%20of_Gun_Violence.pdf).

98. Bogus, *supra* note 44, at 444; see also Charles C. Branas et al., *Urban-Rural Shifts in Intentional Firearm Death: Different Causes, Same Results*, 94 AM. J. PUB. HEALTH 1750 (2004) (finding firearm homicides to be more prevalent in urban counties and firearm suicides to be more prevalent in rural counties).

99. See David E. Olson & Michael D. Maltz, *Right-to-Carry Concealed Weapon Laws and Homicide in Large U.S. Counties: The Effect on Weapon Types, Victim Characteristics, and Victim-Offender Relationships*, 44 J.L. & ECON. 747, 749 (2001). Compare LOTT, *supra* note 48 (arguing that more guns yield less crime), with Ayres & Donohue, *supra* note 48 (disputing this claim).

100. Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, 24 CRIME & JUST. 105, 106 (1998) (“Virtually all increases in homicide rates from 1985 to 1990 among people ten to thirty-four years of age were attributable to deaths among African American males; most of the increase was in firearm homicides, and these were overwhelmingly concentrated demographically and spatially among African American males in urban areas.” (citation omitted)); Marianne Gausche et al., *Violent Death in the Pediatric Age Group: Rural and Urban Differences*, 5 PEDIATRIC EMERGENCY CARE 64, 64 (1989).

101. Fagan & Wilkinson, *supra* note 100, at 109 (referring to the “ecology of danger” of guns and violent events in inner-city neighborhoods); see also Jeffrey Fagan et al., *Social Contagion of Violence*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 688, 717 (Daniel J. Flannery et al. eds., 2007) (describing urban gun violence as a “contagion,” and concluding that “[b]ecause the recent epidemic cycle of violence was in reality a gun homicide epidemic, the case for gun-oriented policing strategies is much stronger than practices based on the more diffuse and unsupported theory of disorder control and order-maintenance strategies” (citations omitted)).

component” of the Second Amendment.<sup>102</sup> That right seems especially salient in high-crime urban areas, and unsurprisingly, some city-dwellers respond to the threat of urban crime by arming themselves. Adam Winkler writes that “one of the most powerful elements in today’s gun rights movement represents urban gun owners: people who value firearms as a last line of defense against criminals.”<sup>103</sup> But the gun ownership statistics described above demonstrate that, despite high rates of violent crime, urban residents are disproportionately *unlikely* to purchase and possess guns.<sup>104</sup> Indeed, they are much more likely than rural residents to support stringent gun regulations.<sup>105</sup> Why?

One obvious explanation is that urban residents have concluded—whether rightly or wrongly is beyond the scope of the present argument—that gun control will make them safer, despite the limitations such control might place on their ability to defend themselves with guns. Another explanation is analogous to the account of rural gun culture outlined above: support for gun control is a cultural matter not rooted in empirical suppositions regarding crime. Indeed, those who support gun control tend to do so notwithstanding their skepticism that it actually stops crime.<sup>106</sup> Gary Kleck notes that “gun control support is not increased by higher crime rates. Residents of high-crime cities are not significantly more likely to support gun control than those in low-

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102. *District of Columbia v. Heller*, 554 U.S. 570, 599, 630 (2008); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (same).

103. WINKLER, *supra* note 4, at 14; *see also Kleck & Gertz, supra* note 46, at 178 (finding that those who reported using a gun in self-defense “are disproportionately likely to reside in big cities compared to other people, and particularly when compared to gun owners, who reside disproportionately in rural areas and small towns”); Patrik Jonsson, *Gun Nation: Inside America’s Gun-Carry Culture*, CHRISTIAN SCI. MONITOR, Mar. 11, 2012, <http://www.csmonitor.com/USA/Society/2012/0311/Gun-nation-Inside-America-s-gun-carry-culture> (“It is here along the edges of America’s urban renaissance that the right-to-carry movement is burgeoning . . .”).

104. *See supra* notes 54–60 and accompanying text; *see also Steven Thomas Seitz, Guns, Politics, and Public Policy, in GUNS IN AMERICA: A READER, supra* note 54, at 125, 126 (“[I]n a crowded urban environment, the handgun is a greater source of fear than a government’s potential failure to maintain the proper social order, save those situations of urban unrest when residents of the metropolis, like the citizens of Detroit, rush to buy handguns for a sense of security and self-protection.”).

105. *See supra* notes 81–86 and accompanying text.

106. *See GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL* 338–39 (1997) (noting polls suggesting that many Americans favor gun control despite not believing that it will reduce crime or violence); *see also SPITZER, supra* note 1, at 121 (same).

crime cities.”<sup>107</sup> This suggests that, with regard to gun control, residence in an urban area trumps the experience or fear of crime.

In short, it seems that urban areas have developed a gun control culture that is, like rural gun culture, centered on certain core beliefs. As Dan Kahan explains, proponents of gun control “find the cultural significations of guns to be abhorrent and alarming; they see gun control as symbolizing a competing set of positive values, including civilized nonaggression, racial and gender equality, and social solidarity.”<sup>108</sup> Where members of the rural gun culture see firearms as a positive and beneficial part of life, members of the urban gun culture see them as threats not only to safety but to their core values. Lee Kennett and James LaVerne Anderson conclude, “The city has spawned the new and negative view of the gun . . . .”<sup>109</sup>

Whether this view is actually “new” is unclear. Justice Scalia apparently believes it to be: “I grew up at a time when people were not afraid of people with firearms . . . I used to travel the subway from Queens to Manhattan with a rifle. Could you imagine doing that today in New York City?”<sup>110</sup> But many scholars argue that urban gun control culture is older than the Court’s senior Justice. Steven Thomas Seitz suggests that modern “cosmopolitan Americans who find little utility in the gun” reflect the “remnants of cultural traditions brought by emigrants from Europe to America.”<sup>111</sup> Even Kennett and Anderson conclude that “during the colonial period, the urban areas were relatively free of the consistent use of firearms.”<sup>112</sup> And as Section II.A describes in more detail, comparatively strict urban gun control is a longstanding phenomenon.

### C. *Why the Division Matters*

It would be hard enough to bridge the gap between these views about guns if they were fully predicated on disagreement about empirics. But the debate is, sometimes for the better and often for the worse, deeper than that.<sup>113</sup> It

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107. Kleck, *supra* note 78, at 395, 396-97 tbl.2.

108. Kahan, *supra* note 12, at 4-5.

109. KENNETT & ANDERSON, *supra* note 8, at 254.

110. BISKUPIC, *supra* note 63, at 346.

111. Seitz, *supra* note 104, at 126.

112. KENNETT & ANDERSON, *supra* note 8, at 48.

113. Saulny, *supra* note 52 (“We’ve been struggling with this whole realm of issues—feelings about guns . . . because we’ve talked a lot about gun policy, but not about gun culture.”)

implicates identity and values,<sup>114</sup> and is therefore hard to resolve by marshaling evidence for one side or the other. This can be discouraging, because it contributes to invective-filled debates in which each side becomes frustrated by the other's inability to see what is obviously "right."<sup>115</sup> Many rural gun owners believe—with some justification—that urban gun control advocates are passing moral judgments on gun culture,<sup>116</sup> while those advocates are in turn bewildered by the claim that AR-15s and high-capacity magazines are necessary for hunting or self-defense.<sup>117</sup>

Fortunately, these ideological differences are geographically concentrated, which opens an unexplored possibility for a truce: firearm localism, which would give urban areas more leeway to regulate firearms within city limits while preserving the ability of rural areas to maintain their strong gun culture. Thus even if it is impossible to bridge gun culture and gun control culture,<sup>118</sup> it is also unnecessary. This should be a welcome result for both camps. Rural residents should not have to weigh their desire to own hunting rifles against the possibility that urban youth will use handguns to shoot each other. And

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(quoting Michael Dimock, Director of the Pew Research Center for the People and the Press)).

114. See, e.g., Zell Miller, *The Democratic Party's Southern Problem*, N.Y. TIMES, June 4, 2001, <http://www.nytimes.com/2001/06/04/opinion/the-democratic-party-s-southern-problem.html> ("Gun control . . . is about values. What you are for says a lot about who you are and who you aren't."); see also Brannon P. Denning, *In Defense of a "Thin" Second Amendment: Culture, the Constitution, and the Gun Control Debate*, 1 ALB. GOV'T L. REV. 419, 420 (2008) ("The gun control debate is at bottom a cultural debate.").
115. See Bruce-Biggs, *supra* note 1, at 38 ("In addition to the usual political charges of self-interest and stupidity, participants in the gun-control struggle have resorted to implications or downright accusations of mental illness, moral turpitude, and sedition.").
116. Brooks & Collins, *supra* note 12 (Brooks: "Those who live in rural areas, where gun ownership is more common, take arguments about gun control as a sign that the city snobs want to tell them how to lead their lives."); see also Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 377 (1994) (arguing that the motivation behind "disarming the public . . . is the desire of persons holding certain moral and cultural views to have those views symbolically validated by the law and the contrary view of others condemned").
117. David Sherfinski, *Biden Suggests Shotgun, Not AR-15, for Self-Defense*, WASH. TIMES, Feb. 19, 2013, <http://www.washingtontimes.com/news/2013/feb/19/biden-shoots-down-comparison-drug-and-gun-laws>.
118. See Chemerinsky, *supra* note 42, at 481 ("The political and value choice [about gun control] must be understood in the larger cultural context. Society is obviously deeply divided over the issue of gun control and the meaning of the Second Amendment. There appears to be no bridge between the two sides.").

advocates of urban gun control should not have to denigrate the cultural salience of hunting in Montana when their goal is to limit cheap pistols in Manhattan. As New York Mayor Michael Bloomberg and Boston Mayor Thomas Menino, co-chairs of Mayors Against Illegal Guns, recently put it: “[W]e know that a policy that is appropriate for a small town in one region of the country is not necessarily appropriate for a big city in another region of the country.”<sup>119</sup>

The possibility of such accommodation is all the more important in the wake of *Heller* and *McDonald*. By finding the existence of an individual right to keep and bear arms independent of militia service, and then incorporating that right against state and local governments, the Supreme Court raised the possibility of a nationalized approach to gun control—one that would hold cities, states, and the federal government to identical rules. The response to *Heller* reveals the fault line implicated by that approach: “The reaction broke less along party lines than along the divide between cities wracked with gun violence and rural areas where gun ownership is embedded in daily life.”<sup>120</sup>

A rigid national standard would flatten these deep differences, potentially to the detriment of both gun cultures. For members of the rural gun culture who oppose gun control and would prefer stringent review of gun control measures, the threat—as in prior incorporation debates—is that their rights will be watered down.<sup>121</sup> Michael O’Shea argues persuasively that

the courts are far more likely to protect Southerners, Westerners, and Midwesterners in their right to acquire modern self-loading rifles if the courts can do so without thereby discarding the “assault weapons” laws of the secondary gun culture states, and thereby (as the judges might see it) bringing AR-15s to high-rise apartments in Manhattan.<sup>122</sup>

Urban residents will likely have the opposite concern: that if the Second Amendment is calibrated so as to give rural residents access to firearms for

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119. Michael R. Bloomberg & Thomas M. Menino, *About the Coalition: Message from the Co-Chairs*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalsguns.org/html/about/about.shtml> (last visited Apr. 23, 2012).

120. Chad Livengood, *Court Affirms Gun Rights*, SPRINGFIELD NEWS-LEADER (Mo.), June 27, 2008, at A1, available at 2008 WLNR 26840870.

121. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3095 (2010) (Stevens, J., dissenting) (“When one legal standard must prevail across dozens of jurisdictions with disparate needs and customs, courts will often settle on a relaxed standard.”).

122. O’Shea, *supra* note 41, at 219.



hunting and other recreational uses, it will thereby prevent city-dwellers from protecting themselves against firearms that are being used for murder. This would effectively force urban residents who might care little about hunting in rural areas to subsidize that activity with their own safety.

But the more serious problem with achieving political compromise is that the debate is not simply one about policy analysis. Rather, the underlying conflict is largely about values, and there is no way to resolve such a conflict by appealing to empirics.<sup>123</sup> As David Kairys puts it, “[s]omething else is going on, and at its core is a personal, cultural, and political identification of guns with personal self-worth and with our highest ideals.”<sup>124</sup> Dan Kahan, who along with Donald Braman has thoroughly investigated the cultural salience of gun control,<sup>125</sup> concludes that progress can still be made if voices of moderation, “in the spirit of genuine democratic deliberation, appeal to one another for understanding and seek policies that accommodate their respective world views.”<sup>126</sup>

One way to accommodate those worldviews is through geographic variation in gun laws, allowing each culture to regulate itself.<sup>127</sup> Some scholars have endorsed such an approach, but they have focused almost exclusively on

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123. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 101 (2007) (“It would be nice to think that disagreements over policy could be resolved by empirical evidence. And maybe some can—but not, I think, policy disputes about which people care intensely.”); Kahan & Braman, *supra* note 12, at 1292 (noting that people will “credit or dismiss empirical evidence . . . depending on whether it coheres or conflicts with their cultural values”).

124. David Kairys, *Rebuttal, Challenging the Normalcy of Handgun Violence*, 156 U. PA. L. REV. PENNUMBRA 194, 198 (2007).

125. See Kahan, *supra* note 12; Kahan & Braman, *supra* note 12.

126. Kahan, *supra* note 12, at 11.

127. Eric Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. REV. 395, 396 (1996) (“As with other public health problems, wide variation exists among communities in the nature and extent of firearm-related morbidity and mortality. Such variation suggests that local governments need the ability to adopt reasonable measures to deal with the specific problems faced by their communities.” (footnote omitted)); see also FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 174 (1987) (“Significant variations exist in attitudes toward handguns, and it is only to be expected that these attitudinal differences should more quickly lead to a wider spectrum of state and local variation than to a unified national strategy.”); Anthony P. Badaracco, Note, *Firearm Federalism*, 65 N.Y.U. ANN. SURV. AM. L. 761, 789 (2010) (“[I]t is in precisely this sort of situation, when citizens' interests vary and the law is unclear, that it is most important that regulation take place at a more local level of government.”).

potential diversity of *state* laws, and on the possibility of increased deference to state as opposed to federal regulation.<sup>128</sup> O’Shea, for example, argues that courts should employ a bifurcated standard of review under which “national gun laws receive strict scrutiny, while state and local gun laws receive intermediate scrutiny.”<sup>129</sup> There is much merit in this approach. But as the preceding discussion suggests, it would not capture the important and consistent differences between urban and rural areas.<sup>130</sup>

This discussion has painted a picture using very broad strokes, and therefore cannot capture the details. Some rural areas might have stringent gun control—bans on concealed carrying originated in the comparatively rural South<sup>131</sup>—and many major cities definitely do not.<sup>132</sup> And many millions of people live in areas dominated by a culture of which they are not a part. The best that this discussion can demonstrate is that gun culture is disproportionately concentrated in rural areas, and gun control culture in urban areas. Firearm localism would take that geographic difference seriously.

## II. THE CASE FOR FIREARM LOCALISM

The first Part of this Article focused mainly on political and sociological characterizations of America’s two gun cultures. One could, however, accept the basic accuracy of these admittedly imprecise portraits without concluding that Second Amendment doctrine should, or even can, take account of them. Perhaps the distinction between urban and rural areas is the kind of division that, no matter how deep, the Amendment must ignore, like differential rates of gun crime and victimization between men and women or African Americans and whites.

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128. See, e.g., O’Shea, *supra* note 41, at 203-04.

129. *Id.* at 204.

130. See, e.g., *The Geography of Gun Violence in Connecticut*, *supra* note 97, at 1 (finding that, within the state of Connecticut, 69% of gun crimes in the state take place in three major cities, which account for just 11% of the state’s population).

131. CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 1* (1999) (“[T]he states commonly thought of today as ‘redneck country’ . . . were in the forefront of laws regulating the concealed carrying of deadly weapons.”).

132. As noted below, however, the latter may be a function of state preemption laws that forbid local gun control. See *infra* Section III.B.

This Part argues to the contrary that the Second Amendment need not be blind to the reality of our gun cultures, that urban gun control should receive increased deference and, symmetrically, that rural gun rights are entitled to increased protection.<sup>133</sup> Constitutional law generally, and Second Amendment doctrine in particular, already provide the tools with which to achieve this tailoring. Both the historical-categorical approach employed by the majorities in *Heller* and *McDonald* and the interest-balancing approach endorsed by the dissents (and embraced by many lower courts in subsequent cases) permit special deference to urban gun control—the former because of the “longstanding” tradition of stricter urban gun regulation; the latter because cities have different interests than rural areas when it comes to gun control.

*A. The Historical-Categorical Approach to Second Amendment Localism*

The historical-categorical approach evaluates the constitutionality of contemporary gun control laws based on their similarity to “longstanding” restrictions<sup>134</sup>—it focuses on tradition, rather than cost-benefit analysis. And as the following discussion explains, American cities have traditionally had much more stringent gun control than rural areas. To the degree that Second Amendment doctrine follows the historical-categorical path, it should continue to give broad leeway to urban gun control, precisely because of this lineage.

In *Heller*, the Supreme Court blessed as constitutional a wide array of gun control laws, not because they reduce crime or other harms, but because of their historical lineage. The majority specifically rejected what it called a “freestanding interest-balancing approach,”<sup>135</sup> instead turning to historical practice to discern the permissible scope of firearm regulations. In a passage that has inspired a fair bit of confusion and criticism,<sup>136</sup> the majority wrote:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the

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133. Establishing an appropriate baseline from which to make these adjustments is beyond the scope of this Article—the argument here is simply one of tailoring. For notable efforts to do the former, see Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013); and Volokh, *supra* note 32.

134. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

135. *Id.* at 634 (internal quotation marks omitted).

136. *See, e.g.*, sources cited *supra* notes 21-22.

possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>137</sup>

For similar tradition-based reasons, the Court held that the Amendment permits the prohibition of “dangerous and unusual weapons.”<sup>138</sup> In *McDonald*, the Court reaffirmed its approval of these forms of gun control,<sup>139</sup> and of the historical-categorical approach as well.<sup>140</sup>

It seems that those “traditions are themselves the stuff out of which the Court’s principles are to be formed,” as Justice Scalia explained at length in another context:

[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court’s principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices is to be figured out. . . . I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal

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137. *Heller*, 554 U.S. at 626-27.

138. *Id.* at 627.

139. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion) (“We made it clear in *Heller* that our holding did not cast doubt on . . . longstanding regulatory measures . . . We repeat those assurances here.”).

140. *Id.* at 3050. Allen Rostron notes that the wording of *Heller* leaves it a bit unclear as to whether “longstanding” refers only to laws about felons and the mentally ill, or to all the listed gun control laws, but that “Justice Alito’s opinion in *McDonald* seems to assume that ‘longstanding’ describes every category of laws on the list, not just prohibitions on guns for felons and the mentally ill.” Rostron, *supra* note 21, at 715 n.64.

(and necessarily shifting) philosophical dispositions of a majority of this Court.<sup>141</sup>

Substituting “Second” for “First,” this passage describes the approach Justice Scalia took in *Heller*.<sup>142</sup> But although the concept of a longstanding regulation was central to the holding of the case, Justice Scalia’s majority opinion did little to explain what it means. As Allen Rostron notes, the Court “did not specify what it takes for a law to qualify as longstanding.”<sup>143</sup> Indeed, it is unclear whether the practices so designated can accurately be described as longstanding.<sup>144</sup>

Somewhat more detail can be gleaned from the Court’s efforts to use what has been called the “common use” test<sup>145</sup> to determine what kinds of “Arms” are protected by the Second Amendment. The majority read its precedents to stand for the proposition that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>146</sup> Handguns, for example, are covered in part because of their longstanding popularity for self-defense use:

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141. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) (quoted in Volokh, *supra* note 32, at 1450-51).
142. The Court has similarly relied on tradition to help identify which rights are covered by the Due Process Clauses. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997); *Medina v. California*, 505 U.S. 437, 445-47 (1992); *see also* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 (describing “traditionalist” approach to constitutional adjudication as distinct from originalist and sociological jurisprudential approaches, by which “the open-ended, normative language of the Constitution should be interpreted in light of the long-standing legal practices and traditions of the nation”).
143. Rostron, *supra* note 21, at 715; *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“A 1938 law [banning possession by felons] may be ‘longstanding’ from the perspective of 2008, when *Heller* was decided, but 1938 is 147 years after the states ratified the Second Amendment.”).
144. *See* sources cited *supra* note 21 (questioning whether felon-in-possession rules are “longstanding”).
145. Volokh, *supra* note 32, at 1478-81 (describing and criticizing the “common use” test).
146. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)). At oral argument, Justice Scalia suggested that the word “Arms” in the Second Amendment could be used in a “specialized sense” to denote a weapon “that was used in militias and . . . is nowadays commonly held.” Transcript of Oral Argument at 47, *Heller*, 554 U.S. 570 (No. 07-290).

It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>147</sup>

By contrast, bans on certain other weapons are “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”<sup>148</sup>

The key point for present purposes is not the precise contours of the “Arms” protected by the Second Amendment, but rather the method by which the historical-categorical approach identifies the boundaries of the Amendment: by looking to history and tradition, rather than contemporary costs and benefits.<sup>149</sup> As the Court’s analysis of common use and dangerous and unusual weapons suggests, the relevant history is not simply that of the Founding era, but extends at least through the 1800s.<sup>150</sup> Many lower courts have, in the wake of *Heller* and *McDonald*, taken a similar approach. In *United States v. Rene E.*,<sup>151</sup> for example, the First Circuit rejected a Second Amendment challenge to the federal ban on juvenile possession of handguns. The court employed a kind of historical analysis, but as Allen Rostron notes, the First Circuit “cited no primary sources from the eighteenth century or even the first half of the nineteenth century, such as laws, judicial decisions, treatises, or other writings, addressing the issue of juvenile access to guns.”<sup>152</sup> The court nonetheless found that although the federal law at issue was not enacted until 1994, *state* laws regulating juvenile possession of guns and other weapons could

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147. *Heller*, 554 U.S. at 629.

148. *Id.* at 627 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*148).

149. The two are not necessarily exclusive. Historian Jack Rakove, for example, supports the use of contemporary cost-benefit analysis in Second Amendment doctrine, but has also written that “[i]t is doubtless important to establish as well that [a] regulation is made legitimate by a long history of prior legislation, judicial doctrines permitting such legislation,” and several other historical factors. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 107 (2000); see also *infra* notes 227-230 and accompanying text (describing connections between the two approaches).

150. *Heller*, 554 U.S. at 605 (defending use of nineteenth century sources).

151. 583 F.3d 8 (1st Cir. 2009).

152. Rostron, *supra* note 21, at 741.

be found at least as early as the second half of the nineteenth century,<sup>153</sup> and that this was sufficient to uphold the federal ban.

The historical record supports a similarly deferential approach to urban gun control. To be sure, the historical evidence is not uniform, nor is the analysis here exhaustive.<sup>154</sup> Not every city, nor perhaps even a majority of them, has enacted handgun bans or other stringent gun control. But the geographic differences are nonetheless striking, and the historical evidence is at least as comprehensive and longstanding as that supporting other Second Amendment rules like the felon carve-out.<sup>155</sup>

This geographic variation, and specifically the urban/rural divide, predates the Second Amendment itself. As early as the 1300s, London's statutes provided that no person shall "be found going or wandering about the Streets . . . after Curfew tolled . . . with Sword or Buckler, or other Arms for doing Mischief . . . nor in any other Manner, unless he be a great Man or other lawful Person of good repute, or their certain Messenger, having their Warrants to go from one to another, with Lantern in hand."<sup>156</sup> The oft-cited Statute of Northampton, enacted in 1328, provided that "no Man great nor small, of what Condition soever he be," shall "ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure."<sup>157</sup> Precisely what the Statute of Northampton prohibited is a matter of debate. Some conclude that it banned armed travel,<sup>158</sup> while others say it "was understood by the Framers as covering only those circumstances where carrying arms was unusual and therefore terrifying."<sup>159</sup>

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153. *Rene E.*, 583 F.3d at 14-15.

154. I am particularly grateful to Georgetown 3L Mark Frassetto for identifying many of the historical materials cited here. A document collecting much of his research is available at Mark Anthony Frassetto, *Firearms and Weapons Legislation up to the Early 20th Century*, <http://ssrn.com/abstract=2200991> (last visited Aug. 17, 2013).

155. See sources cited *supra* note 21 (questioning whether felon-in-possession rules are "longstanding").

156. Statutes for the City of London, 1285, 13 Edw. (Eng.).

157. Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

158. See, e.g., Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 8 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317-18 (2009) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*149).

159. Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101 (2009). It is possible that both readings are "correct." As Saul Cornell notes, Blackstone

Under either of these readings, however, the statute was geographically contextual and tailored to public places like “Fairs” and “Markets.”

Many local regulations at the time echoed the Statute of Northampton’s focus on weapons possession in populated areas. For example, another fourteenth-century London law proclaimed that “no stranger or privy person, save those deputed to keep the peace, shall go armed therein after they shall come to their lodgings.”<sup>160</sup> That law’s fifteenth-century successor “forb[ade] any man of whatsoever estate or condition to go armed within the city and suburbs, or any except lords, knights and esquires with a sword.”<sup>161</sup> Blackstone himself explained, by analogy to urban prohibitions in ancient Greece:

The offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.<sup>162</sup>

Echoes of the Statute of Northampton could be heard in colonial America,<sup>163</sup> and urban tailoring also seems to have been embedded in Anglo-American

(whom Miller cites) and Sir William Hawkins (on whom Volokh relies) had slightly different interpretations of the law in question, and since “the Founders were familiar with both English commentators . . . it seems likely that there may have been a range of views on interpreting this question.” Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 *FORDHAM URB. L.J.* 1695, 1713 (2012).

160. 2 *CALENDAR OF THE CLOSE ROLLS, RICHARD II*, at 92 (Nov. 2, 1381, Westminster) (H.C. Maxwell-Lyte ed., 1920); see also JOHN CARPENTER, *LIBER ALBUS [THE WHITE BOOK]* 335 (Henry Thomas Riley ed., 1861) (1419) (specifying “[t]hat no one, of whatever condition he be, [may] go armed in the said city or in the suburbs, or carry arms, by day or by night,” except certain people connected to “great lords” or the royal family or when commanded to keep the peace by those same individuals).
161. 3 *CALENDAR OF THE CLOSE ROLLS, HENRY IV*, at 485 (Jan. 30, 1409, Westminster) (A.E. Stamp ed., 1931).
162. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*148-49 (citation omitted).
163. See, e.g., Act of Jan. 29, 1795, ch. XXV, reprinted in 2 *THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS* 259 (I. Thomas & E. T. Andrews eds., 1801); A *COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE* 33 (Augustine Davis 1794); FRANCOIS-XAVIER MARTIN, *A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA* 60-61 (Newbern 1792); see also *Moore v. Madigan*, 702 F.3d 933, 944 (7th Cir. 2012) (Williams, J., dissenting) (noting the Statute of Northampton’s influence on the colonies, in particular Massachusetts, North Carolina, and Virginia).



common law rules that treated arms-bearing differently in urban and rural areas. As Saul Cornell explains:

The nature of the common law provided considerable flexibility in deciding exactly what constituted an affray. . . . A party of men hunting in season in Pennsylvania would not under most circumstances have been viewed as committing an affray, while an armed assembly riding into town might well be viewed as such and could be legally disarmed by a justice of the peace.<sup>164</sup>

Once again, the city line appears to have made the difference.

Perhaps even more notable (because they earned the attention of the Justices in *Heller*<sup>165</sup>) were laws regulating the use of weapons and storage of gunpowder in urban areas. As Cornell and Nathan DeDino note, some “[s]tates prohibited the use of firearms on certain occasions and in certain locations”<sup>166</sup>—with, in some instances, the city limits defining those locations.<sup>167</sup> Such laws were enacted in growing population centers such as Boston,<sup>168</sup> Philadelphia,<sup>169</sup> and New York City,<sup>170</sup> and governed private homes

164. SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 30 (2006); see also Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 501 (2004) (“Defining exactly what circumstances constituted the crime of affray was . . . [a] complex, context-bound judgment.”).

165. See *District of Columbia v. Heller*, 554 U.S. 570, 631-34 (2008); *id.* at 683-87 (Breyer, J., dissenting).

166. Cornell & DeDino, *supra* note 164, at 505.

167. *Id.* at 505 n.120 (citing Act of Apr. 22, 1785, ch. 81, 1784-85 N.Y. Laws 152; Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78; Act of Jan. 30, 1847, ch. 79, 1846-1847 Va. Acts 67; *A COLLECTION OF ALL THE LAWS OF THE PROVINCE OF PENNSYLVANIA: NOW IN FORCE* 13, 39-40, 85, 197-200, 315-17 (1742), all of which applied specifically to cities).

168. Cornell & DeDino, *supra* note 164, at 511 n.160 (citing Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507 (regulating storage of gunpowder in Boston); Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (same); Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (same); Act of Oct. 4, 1780, ch. V, 1780 Mass. Acts 326 (same)).

169. Cornell & DeDino, *supra* note 164, at 511 n.161 (citing Act of Dec. 6, 1783, ch. MLIX, 11 Pa. Stat. Ann. 209; An Act for the Continuance of an Act, Entitled “An Act for the Better Securing the City of Philadelphia from the Danger of Gunpowder,” ch. CCCLXXII, 1746 Pa. Laws 52; An Act for the Better Securing [of] the City of Philadelphia and Its Liberties from Danger of Gunpowder, § II, 1725 Pa. Laws 31).

170. Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627, cited in Cornell & DeDino, *supra* note 164, at 511 n. 162.

as well as public storage. Boston, for example, provided that “the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous” and that no loaded firearms were allowed in any “Dwelling-House, Stable, Barn, Out-house, Store, Ware-house, Shop or other Building.”<sup>171</sup> The prevalence of these laws is especially notable—and, incidentally, the historical-categorical test all the more difficult to satisfy—because gun violence simply was not the problem then that it would later become. Jack Rakove points out that “because eighteenth-century firearms were not nearly as lethal as those available today, we similarly cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would.”<sup>172</sup>

Safe storage laws also applied to commercial enterprises handling gunpowder within cities. Cornell and DeDino note that “New York City required ships to unload gunpowder at a magazine within twenty-four hours of arrival in the harbor and before the ship ‘hawl[ed] along side of any wharf, pier or key within the city,’” while “Boston subjected any ‘Gun Powder . . . kept on board any ship or other vessel laying to, or grounded at any wharf within the port of Boston’ to confiscation.”<sup>173</sup>

Regional variation was already becoming apparent,<sup>174</sup> but gunpowder restrictions applied in towns of all sizes, not simply the big three of Boston, New York, and Philadelphia.<sup>175</sup> The Pennsylvania statutes establishing the

171. Act of Mar. 1, 1783, chap. XIII, 1783 Mass. Acts 218, *cited in* *District of Columbia v. Heller*, 554 U.S. 570, 631 (2008).
172. Rakove, *supra* note 149, at 110; *see also* Cornell, *supra* note 159, at 1713 (“Interpersonal violence, including gun violence, simply was not a problem in the Founding era that warranted much attention and therefore produced no legislation.”); Eric H. Monkkonen, *Homicide in New York, Los Angeles and Chicago*, 92 J. CRIM. L. & CRIMINOLOGY 809, 816-17 (2002) (“Murders in both New York City and Los Angeles reflect the change: in both cities, guns accounted for about seven percent of murders before 1851 and about twenty-five percent (LA) and twenty-two percent (NYC) from 1855-1875.”).
173. Cornell & DeDino, *supra* note 164, at 512 (quoting Act of June 19, 1801, ch. XX, 1801 Mass. Acts 507; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 628).
174. Cornell, *supra* note 159, at 1711 (quoting 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. B, at 14 (1803)) (“In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.”).
175. *See* Cornell & DeDino, *supra* note 164, at 511 (stating that gunpowder storage laws “were not limited to the largest cities”).

town of Carlisle, for example, provided that anyone keeping gunpowder “in any house, shop, cellar, store or other place, within said borough” must store it “in the highest story of the house . . . unless it be at least fifty yards from any dwelling-house.”<sup>176</sup> Other forms of gun control were similarly thought permissible at the local level. Many states—Florida, New Jersey, Nebraska, and Tennessee among them—gave some newly incorporated towns the power to “restrain and punish . . . shooting and carrying guns, and enact penalties and enforce the same” consistent with the constitution and laws of the state.<sup>177</sup> Cleveland similarly passed an ordinance prohibiting the discharge of firearms in the city.<sup>178</sup> These laws were not merely artifacts of the Founding era, but would remain common even in the years following the ratification of the Fourteenth Amendment.<sup>179</sup>

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176. Act of Apr. 13, 1782, ch. XIV, § XLII, 1781-1782 Pa. Laws 25, 41-42; *see also* An Act to Prevent the Storage of Gun-powder in Larger Quantities than one Hundred Pounds, Within the City of Mobile, 1848 Ala. Laws 121; Act of Sept. 12, 1783, ch. LXXVI, § XLII, 1782-1783 Pa. Laws 124, 140 (concerning the storage of gunpowder in the town of Reading).

177. Act of Dec. 3, 1825, ch. CCXCII, 1825 Tenn. Priv. Acts 307 (incorporating towns of Winchester and Reynoldsburgh); *see also* An Act Incorporating the Cities of Hartford, New Haven, New London, Norwich and Middletown, ch. 1, § 20, 1836 Conn. Pub. Acts 104-05 (“[T]he court of common council . . . shall have power to make by-laws . . . relative to prohibiting and regulating the bringing in, and conveying out, or storing of gun-powder in said cities . . .”); An Act to Incorporate the City of Key West, ch. 58, § 8, 1838 Fla. Laws 70 (“Be it further enacted, That the common council of said city shall have power and authority to prevent and remove nuisances . . . to provide safe storage of gun-powder . . .”); An Act to Incorporate and Establish the City of Dubuque, ch. 123, § 12, 1845 Iowa Acts 119 (giving “power to regulate by ordinance the keeping and sale of gun-powder within the city”); An Act to Incorporate Nebraska City, § 25, 1867 Neb. Laws 68 (“The city council shall regulate the keeping and sale of gun-powder within the city . . .”); An Act to Incorporate the City of Trenton, § 24, 1837 N.J. Laws 373 (“And be it enacted, That it shall and may be lawful for the common council . . . to pass such ordinances . . . for regulating the keeping and transporting of gunpowder or other combustible or dangerous materials . . .”).

178. *See* Cornell & DeDino, *supra* note 164, at 515 (citing *Laws, for the Regulation and Government of the Village of Cleaveland*, § 9, in CLEVELAND HERALD, Aug. 15, 1820, at 1).

179. *See, e.g.*, An Act to Revise and Amend the Charter of the City of Newport, § 6, 1874 Ky. Acts 327, 332 (“To prohibit the manufacture of gunpowder or other explosive, dangerous, or noxious compounds or substances in said city, and to regulate their sale and storage by license.”); An Act to Incorporate Cities of the First Class in the State of Nebraska, § 47, 1869 Neb. Laws 29, 53 (“The City Council shall have power to license all . . . venders of gun powder . . .”); An Act to Prohibit Shooting Guns or Pistols in the Towns of Sparta, Alleghany County, and Jefferson, Ashe county, § 1, 1899 N.C. Sess. Laws 250 (“That it shall be unlawful for any person wantonly or in sport to shoot or discharge any gun or pistol in or within one hundred yards of any street in or any public road leading out of the towns of Sparta in Alleghany county and Jefferson in Ashe county for a distance of one-fourth mile

It might be tempting to dismiss these laws as products of the distinct and unrepresentative cultural values of “coastal states and cities.”<sup>180</sup> But the urban/rural divide appears to have been even more pronounced out West. As noted in the Introduction, even the towns most associated with gun violence—Dodge City and Tombstone, for example—required people to leave their weapons at the city limits when arriving in town.<sup>181</sup> Indeed, many frontier towns passed “blanket ordinances against the carrying of arms by anyone,” and the “carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers” was generally forbidden.<sup>182</sup> Pointing to these prohibitions,<sup>183</sup> historian Garry Wills concludes that “[t]he West was not settled by the gun but by gun-control laws.”<sup>184</sup>

Wills’s use of the word “settled” is significant, for guns were far more prevalent, and far less regulated, outside of settlements. As Adam Winkler describes:

Guns were widespread on the frontier, but so was gun regulation. Almost everyone carried firearms in the untamed wilderness, which was full of dangerous Natives, outlaws, and bears. In the frontier towns, however, where people lived and businesses operated, the law often forbade people from toting their guns around.<sup>185</sup>

The ghosts of those “Natives, outlaws, and bears” shuffled through the Supreme Court during *Heller*’s oral argument, as Justice Kennedy invoked the “the right of people living in the wilderness to protect themselves” and of “the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like

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from the courthouses in said towns.”); Crimes and Punishment, § 4, 1890 Okla. Sess. Laws 412, 474 (“Every person who makes or keeps gunpowder or saltpeter within any city or village, and every person who carries gunpowder through the streets thereof, in any quantity or manner such as is prohibited by law, or by any ordinance of such city or village, is guilty of a misdemeanor.”).

180. O’Shea, *supra* note 41, at 209–11 (describing contemporary “secondary” gun culture as being concentrated in these areas).

181. WINKLER, *supra* note 4, at 13.

182. DYKSTRA, *supra* note 6, at 121.

183. GARRY WILLS, REAGAN’S AMERICA: INNOCENTS AT HOME 89 (1987) (“[T]hose entering the towns had to come disarmed, since it was against the law for anyone but law enforcement officials to carry a gun.”).

184. *Id.* at 380.

185. WINKLER, *supra* note 4, at 165 (citing DYKSTRA, *supra* note 6).

that.”<sup>186</sup> This might well be an accurate portrait of the “remote settler” in the “wilderness,” but the use of guns was heavily circumscribed in towns. If the former is significant enough to shape the meaning of the Second Amendment, then the latter should be as well.

Of course, how well these laws were enforced and whether they were effective is difficult to say, and it is all but impossible to know precisely how prevalent they were. David Courtwright writes that “[t]he gun laws were a good idea but poorly enforced, especially during the 1870s, the worst decade of killing on the cattle frontier.”<sup>187</sup> On the other hand, Robert Dykstra describes instances of zealous enforcement of urban gun control laws in the West,<sup>188</sup> and Robert Spitzer similarly concludes that “[e]ven in the most violence-prone towns, the western cattle towns, vigilantism and lawlessness were only briefly tolerated. . . . Prohibitions against carrying guns were strictly enforced, and there were few homicides.”<sup>189</sup> Indeed, Courtwright himself notes that “[t]he situation changed in the 1880s and 1890s. As the threat of Indians and outlaws receded and the regular police system gradually became more professional and efficient, it was harder to justify carrying personal weapons for self-defense.”<sup>190</sup> In other words, as functioning towns emerged from the frontier, the need and tolerance for private gun use decreased. This was reflected in law, as some states made it illegal to fire weapons within the limits of a city or town—this was true during the colonial era,<sup>191</sup> between the colonial era and the passage of

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186. Transcript of Oral Argument at 8, 30, *District of Columbia v. Heller*, 544 U.S. 570 (2008) (No. 07-290).

187. David T. Courtwright, *The Cowboy Subculture*, in *GUNS IN AMERICA*, *supra* note 54, at 86, 96.

188. DYKSTRA, *supra* note 6, at 137 (describing, for example, the nearly one-hundred arrests in 1873 alone in Ellsworth, Texas).

189. SPITZER, *supra* note 1, at 11 (footnote omitted).

190. Courtwright, *supra* note 187, at 96.

191. An Act to Prevent the Firing of Guns Charged with Shot or Ball in the Town of Boston, ch. X, § 2, 1746 Mass. Acts 208 (“That no Person shall . . . discharge any Gun or Pistol charged with Shot or Ball in the town of Boston (the Islands thereto belonging excepted) or in any Part of the Harbor between the Castle and said Town . . .”); An Act for the More Effectual Preventing Accidents Which May Happen by Fire, and for Suppressing Idleness, Drunkenness, and Other Debaucheries, 1750 Pa. Laws 208 (“That if any person or persons whatsoever, within any county town, or within any other town or borough, in this province, already built and settled, or hereafter to be built and settled . . . shall fire any gun or other fire-arm, or shall make, or cause to be made, or sell or utter, or offer to expose to sale, any squibs, rockets or other fire-works, or shall cast, throw or fire any squibs, rockets or other fire-works, within any of the said towns or boroughs, without the Governor’s special license

the Fourteenth Amendment,<sup>192</sup> and again after.<sup>193</sup> Some of these laws were extremely specific about their geographic reach. One 1866 Texas statute, for example, provided in part:

It shall not be lawful for any person to discharge any gun, pistol, or fire arms of any description whatever, on, or across any public square, street, or alley, in any city or town in this State; *Provided*, this Act shall not be so construed as to apply to the “outer town,” or suburbs, of any city or town.<sup>194</sup>

Other laws flatly prohibited the carrying of nearly any weapon within towns, cities, villages, and settlements.<sup>195</sup>

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for the same, every such person or persons, so offending, shall be subject to the like penalties and forfeitures . . .”).

192. An Act Prohibiting the Firing of Guns and Other Fire Arms in the City of New Haven, 1845 Conn. Pub. Acts 10 (“[E]very person who shall fire any gun or other fire-arm of any kind whatever within the limits of the city of New Haven, except for military purposes, without permission first obtained from the mayor of said city, shall be punished by fine not exceeding seven dollars, or by imprisonment in the county jail not more than thirty days.”); An Act to Prevent the Discharging of Fire-Arms Within the Towns and Villages, and Other Places Within this State, and for Other Purposes, § 1, 4 Del. Laws 329; An Act to Incorporate the Town of Baltimore, Hickman County, § 10, 1856 Ky. Acts 139 (“Any person who shall shoot off a gun or pistol, or shall run or gallop a horse creature in said town, shall be liable to a fine of not less than two nor more than four dollars . . .”).
193. An Act to Prevent the Shooting or Firing of Guns or Pistols in the Village of Vineville, in the County of Bibb § 1, 1875 Ga. Laws 189 (“That from and after the passage of this Act it shall not be lawful for any person or persons to discharge, fire or shoot off any gun or guns, pistol or pistols (except military salutes, and persons discharging, firing or shooting guns or pistols on their own premises, or on the premises of another, with the permission of the owner thereof), within three hundred yards . . . of the public road running through the village of Vineville . . .”); An Act to Prevent Parties from Shooting Within the Limits of Towns and Private Enclosures, § 1, 1873 Mont. Laws 46 (“That it shall be unlawful for any person to fire any gun, pistol or any fire-arm, of whatever description, within the limits of any town, city, or village in this territory, or within the limits of any private enclosure which shall contain a dwelling house.”); Lincoln, Neb., Gen. Ordinances art. 26, § 1 (1895) (“No person, except an officer of the law in the discharge of his duty, shall fire or discharge any gun, pistol, fowling-piece, or other fire-arm, within the corporate limits of the city of Lincoln, under penalty of a fine of ten dollars for each offense.”).
194. An Act to Prohibit the Discharging of Fire Arms in Certain Places Therein Named, ch. 170, § 1, 1866 Tex. Gen. Laws 210.
195. *E.g.*, Crimes Against the Public Peace, § 385, 1901 Ariz. Sess. Laws 1251-52 (“If any person within any settlement, town, village or city within this territory shall carry on or about his person, saddle, or in saddlebags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass knuckles, bowie-knife, or any other kind of knife manufactured or sold for purposes of

Urban gun control was thus a nationwide phenomenon, reaching from the harbors of Boston to the dusty streets of Tombstone, and it took many forms. Important changes were on the horizon, including the professionalization and arming of urban police forces<sup>196</sup> and the passage of the first major federal gun control laws in the 1930s,<sup>197</sup> but gun control has remained consistently stronger and more stringent in cities and towns than in rural areas. In 1976, Washington, D.C., passed its handgun ban, which would later be struck down in *Heller*.<sup>198</sup> In 1981, local gun control gained national attention when the Village of Morton Grove, Illinois, passed its own local handgun ban.<sup>199</sup> The

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offense or defense, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and, in addition thereto, shall forfeit to the county in which he is convicted the weapon or weapons so carried.”); *id.* § 390 (“Persons traveling may be permitted to carry arms within settlements or towns of the territory, for one-half hour after arriving in such settlements or towns, and while going out of such towns or settlements . . . .”); An Act Regulating the Use and Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23 (“[I]t is unlawful for any person, except United States officials, officials of Idaho Territory, County officials, Peace officers, Guards of any jail, and officers or employees of any Express Company on duty, to carry, exhibit, or flourish any dirk, dirk-knife, sword, sword-cane, pistol, gun or other deadly weapons, within the limits or confines of any city, town or village or in any public assembly of Idaho Territory.”); Act of Jan. 14, 1853, § 1, N.M. Laws 67 (“That each and every person is prohibited from carrying short arms, such as pistols, daggers, knives, and other deadly weapons, about their persons concealed, *within the settlements* . . . .”) (emphasis added); An Act to Regulate the Keeping and Bearing of Deadly Weapons, § 1, 1871 Tex. Gen. Laws 25 (forbidding, with exceptions for travelers and in one’s home or place of business, any person but a law officer from carrying a “pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any kind of knife manufactured or sold for the purposes of offense or defense” in a city “unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing . . . .”); 1876 Wyo. Sess. Laws 352, § 1 (forbidding any resident or sojourner from bearing, “concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village”).

196. See William Hosley, *Guns, Gun Culture, and the Peddling of Dreams*, in *GUNS IN AMERICA*, *supra* note 54, at 47, 53 (“At the same time, cities across the country campaigned to transform the archaic constable-watch system into a modern uniformed police force that, increasingly and with great controversy, became armed with guns.”); *cf.* *District of Columbia v. Heller*, 554 U.S. 570, 715 (Breyer, J., dissenting) (“[T]he subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the Amendment’s more basic protective ends.”).
197. National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801, 5849 (2006)).
198. See D.C. CODE §§ 7-2501.01(12), 7-2502.02(a)(4), 7-2507.02 (2001), *ruled unconstitutional in Heller*, 554 U.S. at 635.
199. UTTER, *supra* note 29, at 200-01.

ordinance survived a Second Amendment challenge,<sup>200</sup> but inspired a political backlash that helped lead to the passage of preemption laws in dozens of states.<sup>201</sup>

*Heller*'s historical-categorical approach has been heavily criticized,<sup>202</sup> and this brief discussion cannot fully iron out its wrinkles. Nor does the evidence presented here demonstrate a unanimous or unbroken tradition of urban gun control. The historical record is too spotty for that, but it is as at least as strong as the historical evidence the Supreme Court found sufficient to support specific carve-outs such as the felon-in-possession ban. It demonstrates that local tailoring of the right to keep and bear arms has been significant and historically consistent. Building on that evidence, the argument here is modest: to the degree *Heller* makes such history relevant, the Second Amendment can and should incorporate it.

### B. The Pragmatic-Balancing Approach to Second Amendment Localism

Dissenting in both *Heller* and *McDonald*, Justice Breyer did not discount the importance of the kind of historical analysis set out above. But, he concluded in *Heller*, determining whether a particular gun control law is constitutional requires a sensitive weighing of “practicalities, the statute’s rationale, the problems that called it into being, its relation to those objectives—in a word, the details.”<sup>203</sup> Rather than focusing exclusively on historical analogues of modern gun control laws, Justice Breyer endorsed an interest-balancing inquiry, “with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.”<sup>204</sup> In doing so, he noted that urban areas “have different experiences with gun-related death,

200. *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

201. *Goss*, *supra* note 29, at 162-65.

202. See sources cited *supra* note 22.

203. *Heller*, 554 U.S. at 687 (Breyer, J., dissenting). Jack Rakove, himself a historian, endorses “the seemingly commonsense notion that would hold that this is the one clause of the Constitution for which conclusions drawn from consequentialist arguments should weigh most strongly.” Rakove, *supra* note 149, at 107.

204. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting); see also Richard Schragger, *The Last Progressive: Justice Breyer, Heller, and “Judicial Judgment,”* 59 SYRACUSE L. REV. 283, 284 (2008) (describing Breyer’s alternative as “context-specific, non-categorical, expertise-driven, and infused by a common-law sensibility”).



injury, and crime than do less densely populated rural areas” and that “the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas.”<sup>205</sup> He argued that “any self-defense interest at the time of the framing could not have focused exclusively upon urban-crime-related dangers.”<sup>206</sup> Though other elements of Justice Breyer’s dissenting opinion seem to have prevailed in the approaches actually used by lower courts,<sup>207</sup> his emphasis on *urban* problems has not. This Section argues that it can and should.

Justice Breyer’s effort to take account of how well a gun control law serves particular government interests can be thought of as a “balancing” test,<sup>208</sup> and is essentially a form of means-end scrutiny. The traditional tiers of scrutiny all involve some degree of interest-balancing,<sup>209</sup> as does the “reasonable regulation” test that state courts have overwhelmingly applied to state-level constitutional guarantees of the right to keep and bear arms.<sup>210</sup> Such an approach incorporates some degree of deference to legislatures, which, as Justice Breyer put it, “have primary responsibility for drawing policy conclusions from empirical fact.”<sup>211</sup>

It is easy to see how the pragmatic-balancing approach could incorporate the urban/rural divide. As noted above,<sup>212</sup> the costs of gun violence and the government interest in preventing it are generally higher in urban areas than in rural areas.<sup>213</sup> This is partly the result of poverty, gangs, and the “ecology of

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205. *Heller*, 554 U.S. at 698-99 (Breyer, J., dissenting).

206. *Id.* at 715.

207. See generally Rostron, *supra* note 21 (arguing that lower courts have adopted Justice Breyer’s focus on contemporary public policy interests rather than the *Heller* majority’s focus on historical-categorical analysis).

208. See generally Blocher, *supra* note 14 (describing the distinction in *Heller* as being between categoricism and balancing).

209. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1273 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (contrasting *Heller*’s test “of text, history, and tradition” with intermediate and strict scrutiny).

210. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007) (“The courts of every state to consider the question apply a deferential ‘reasonable regulation’ standard in arms rights cases.”).

211. *Heller*, 554 U.S. at 704 (Breyer, J., dissenting).

212. See *supra* notes 95-101 and accompanying text.

213. Cf. Kairys, *supra* note 124, at 196 (“The large urban areas of the nation, where unregulated handgun markets have taken such a terrible toll, should have the power to regulate handguns within their borders.”).

violence” they create.<sup>214</sup> Other unavoidable characteristics of urban life—higher population density, for example—increase gun-related risks. Stray bullets are more likely to hit a bystander where there are more bystanders to hit. Indeed, proximity to individuals acquiring firearms is inversely correlated with feelings of safety,<sup>215</sup> and densely populated urban areas obviously involve greater proximity to other people, including those acquiring firearms. Whatever the root causes of urban gun violence, gun control is more likely to be constitutional in cities than in rural areas, since the problems it addresses are especially prevalent in the former.

One might say in response that the balancing approach requires (and perhaps permits) no local tailoring for the simple reason that the approach itself will capture any relevant geographic variations. If a particular urban area faces a genuine problem with gun violence and can demonstrate the strength of its interest in gun control, then the test will take account of that without giving any separate weight to the jurisdiction’s urban-ness. Indeed, urban tailoring might often be the *result* of balancing rather than a component of it. But balancing need not be entirely ad hoc; balancers often develop and employ heuristics to reflect the wisdom of prior balancing.<sup>216</sup> The city limits can be one such guide.

The distinction between historical categoricism and pragmatic balancing should not be overstated—in practice, the two approaches seem to have merged in various ways.<sup>217</sup> As Allen Rostron notes, “Without clear or complete

214. Fagan & Wilkinson, *supra* note 101, at 106–07.

215. David Hemenway, Sara J. Solnick & Deborah R. Azrael, *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 124 (1995) (“For the entire population—gun owners and non-gun owners together—71% feel less safe and 19% feel more safe when others in the community acquire firearms.”). When only gun owners are asked, the numbers of respondents feeling safer and less safe are roughly equal. *Id.*; see also *Guns*, GALLUP, Nov. 19–21, 2004, <http://www.gallup.com/poll/1645/Guns.aspx> (last visited Sept. 16, 2013) (reporting that 65% of respondents would feel “less safe” if concealed weapons were allowed “in a public place such as a restaurant or movie theater”).

216. Cf. *Roth v. United States*, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting in part) (“[I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results.”).

217. The two-stage analysis adopted by many courts of appeals, for example, combines an initial categorical inquiry with balancing-heavy intermediate scrutiny. See, e.g., *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670

guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a ‘morass of conflicting lower court opinions’ regarding the proper analysis to apply.”<sup>218</sup> There seems to be general agreement that “historical meaning enjoys a privileged interpretative role in the Second Amendment context.”<sup>219</sup> But precisely what that role should be is a matter of more robust debate.<sup>220</sup> For example, one might conclude that the historical tradition of gun control suggests the constitutional relevance of an urban/rural distinction, and that the pragmatic balancing approach provides a mechanism with which to apply it.

### III. CONSTITUTIONAL AND STATUTORY LOCALISM

The arguments thus far have been largely internal to the Second Amendment. But firearm localism has implications for—and draws support from—broader developments and arguments in constitutional law. It also provides strong historical and normative support for the revision or repeal of strict state laws preempting local gun regulation. Such laws not only represent a break from our longstanding tradition of firearm localism, they unnecessarily prevent urban areas from addressing their unique problems of gun violence. This final Part considers both the federal constitutional backdrop and the state statutory foreground.

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F.3d 1244, 1252-53 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010). For a thoughtful scholarly effort along these lines, see Miller, *supra* note 133.

218. *Rostron*, *supra* note 21, at 706 (quoting *Chester*, 628 F.3d at 688-89 (Davis, J., concurring in the judgment)).
219. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).
220. *Compare Heller II*, 670 F.3d at 1259 (concluding that while longstanding forms of gun control are entitled to some presumption of validity, courts should also apply intermediate scrutiny and look for “meaningful evidence” supporting any given law), *with id.* at 1271 (Kavanaugh, J., dissenting) (arguing that *Heller* required courts to evaluate gun control “based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny”).

### A. Localism and Constitutional Rights

It is often said that incorporated constitutional rights apply identically to all levels of government.<sup>221</sup> In *McDonald* itself, the Court rejected the argument that state gun regulations might be subject to a more forgiving standard of scrutiny,<sup>222</sup> concluding that its jurisprudence “decisively” creates a “well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.”<sup>223</sup> But despite the frequency with which it is invoked, the supposed rule of uniformity is neither universally applicable nor universally desirable. For all the reasons discussed above, the Second Amendment presents a particularly strong case for advocates of constitutional localism, and simultaneously draws strength from that broader framework.

Mark Rosen has provided perhaps the most extensive support for the argument that “geographic nonuniformity of constitutional requirements and proscriptions is a mainstay of American constitutionalism.”<sup>224</sup> He notes that “constitutional rights are defined in part on the basis of community expectations and considerations”<sup>225</sup> and that “[t]he most fundamental lesson is that courts already possess doctrinal tools for accommodating idiosyncratic but valuable communities.”<sup>226</sup> Perhaps the most prominent doctrinal example—which, as explained below, may have particular salience for the Second Amendment<sup>227</sup>—is the First Amendment’s treatment of obscenity. Under longstanding free speech doctrine, obscene materials are said to fall outside the boundaries of constitutional protection.<sup>228</sup> The definition of obscenity,

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221. *E.g.*, *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ . . . the same constitutional standards apply against both the State and Federal Governments.”); *see also* Rosen, *Tailoring*, *supra* note 27, at 1537 (distinguishing between “selective and undifferentiated incorporation” and “selective and differentiated incorporation”).

222. 130 S. Ct. 3020, 3047 (2010).

223. *Id.* at 3035 & n.14.

224. Rosen, *Our Nonuniform Constitution*, *supra* note 27, at 1133; *see* Rosen, *Tailoring*, *supra* note 27, at 1516.

225. Rosen, *Our Nonuniform Constitution*, *supra* note 27, at 1169.

226. *Id.* at 1166.

227. *See infra* notes 322 and accompanying text.

228. This does not necessarily mean that all regulations of obscenity are permissible—among other things, the First Amendment may still protect the right to possess obscene materials in one’s own home. *Stanley v. Georgia*, 394 U.S. 557 (1969). For an influential effort to draw

however, incorporates “community standards.”<sup>229</sup> And those standards are not national, nor even state, but *local*—a “juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes.”<sup>230</sup> The Court has emphasized that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”<sup>231</sup>

Some other federally guaranteed rights manifest themselves differently in different places. For example, the “property” protected by the Due Process and Takings Clauses is a product of subnational law. Indeed, such constitutionally protected entitlements are “not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .”<sup>232</sup> Whether these state-created interests “rise[] to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause” is a question of federal constitutional law.<sup>233</sup> In *Town of Castle Rock, Colorado v. Gonzales*, for example, the Court considered whether a person had a property interest in police enforcement of a restraining order against her husband.<sup>234</sup> Resolution of that issue, the Court recognized, “begins . . . with a determination of what it is that state law provides. In the context of the present case, the central state-law question is whether Colorado law gave respondent a right to police enforcement of the restraining order.”<sup>235</sup> The Court concluded that it did not. But in another state, with different laws, the federal claim could have prevailed.

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connections between obscenity doctrine and the Second Amendment, see *Miller*, *supra* note 133 (cited in *McDonald*, 130 S. Ct. at 3105 (Stevens, J., dissenting)).

229. *Miller v. California*, 413 U.S. 15, 32-33 (1973) (internal citation omitted).

230. *Hamling v. United States*, 418 U.S. 87, 104 (1974).

231. *Miller*, 413 U.S. at 32; see also *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986) (noting that this test “permit[s] differing levels of obscenity regulation in such diverse communities as Kerrville and Houston, Texas”).

232. *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)); see also Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 906 (2007) (arguing for local tailoring of Takings Clause doctrine).

233. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577).

234. 545 U.S. 748 (2005).

235. *Id.* at 757.

Other examples of geographically dependent tailoring incorporate more directly the kinds of interest-balancing described in Section I.C. Time, place, and manner restrictions, for example, are geographically tailored, and speech can also be broadly regulated in particular areas such as schools,<sup>236</sup> airports,<sup>237</sup> and military bases,<sup>238</sup> which might well be the kinds of locations Justice Scalia had in mind when he said that the Second Amendment permits the regulation of guns in “sensitive places.”<sup>239</sup>

Each of these examples can be explained based on considerations specific to the right at issue, but they are also buttressed by strong arguments for localism itself—arguments that are not limited to any particular constitutional right. As David Barron explains:

There is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make. The value inheres in the traditional advantages that attend decentralization. These include more participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny.<sup>240</sup>

These values appeal to a broad audience<sup>241</sup> and represent a “striking harmonization of the otherwise divergent values of the free market, civic republicanism and critical legal studies.”<sup>242</sup> The benefits of local expertise can be considerable, particularly with regard to issues of public safety<sup>243</sup> and where

236. *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007) (reaffirming that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings”) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

237. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-83 (1992) (finding that airports are not public fora).

238. *Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding military bases to be non-public fora).

239. *District of Columbia v. Heller*, 554 U.S. 570, 626.

240. David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 382 (2001).

241. E.g., NEWT GINGRICH, *TO RENEW AMERICA* 9 (1995) (“‘Closer is better’ should be the rule of thumb for our decision making; less power in Washington and more back home, our consistent theme.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1201 (1992) (“[P]opulism and federalism—liberty and localism—work together.”).

242. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1, 1 (1990).

243. See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 267-68 (7th Cir. 1982) (upholding the Village of Morton Grove’s handgun ban against a Second Amendment challenge and

a community is able to internalize both the costs and the benefits of a particular restriction.<sup>244</sup> For these reasons and others, many Justices have, at various times, specifically endorsed the idea that constitutional rights should apply differently to different levels of government.<sup>245</sup>

On some level, this can be reconciled with the one-size-fits-all principle stated in *McDonald*. Local *tailoring* of constitutional rights does not necessarily mean creating separate rights, at least not any more than the various rules governing speech regulations in public parks,<sup>246</sup> military bases,<sup>247</sup> and schools<sup>248</sup> indicate a multiplicity of First Amendment rights. The interpretation-construction distinction endorsed by some constitutional scholars provides further support for this conclusion. It is premised on the notion that there is a difference between the semantic meaning of a constitutional provision and the constitutional doctrine constructed to implement it.<sup>249</sup> On this reading, the meaning of the Second Amendment can be consistent throughout the country (a product of interpretation), even as the doctrine applying it varies locally (a function of construction). Lawrence Solum, a chief proponent of the interpretation-construction distinction,

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observing that “[h]ome rule government is based on the theory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns” (footnote omitted)); see also Tracey L. Meares & Dan M. Kahan, *Black, White, and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, 258-59 (“[T]he residents of Chicago’s high-crime, minority neighborhoods . . . are the citizens entitled to determine whether the . . . law reasonably balances liberty and order.”); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. CHI. LEGAL F. 197, 198 (defending the constitutionality of Chicago’s anti-loitering law and other forms of urban “law enforcement innovation” created with local support).

244. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 171 (2005) (describing a potential justification for *Romer v. Evans*, 517 U.S. 620 (1996), as that “the locality has in a sense ‘internalized’ the costs and benefits of the legislation—both those injured and those benefited by the restriction share the same political and territorial space” (footnote omitted)).
245. Rosen, *Tailoring*, *supra* note 28, at 1517 (listing Chief Justice Rehnquist and Justices Holmes, Cardozo, Jackson, Harlan, Fortas, Powell, Stewart, Stevens, Blackmun, Ginsburg, Scalia, and Thomas).
246. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).
247. *Greer v. Spock*, 424 U.S. 828, 836-38 (1976).
248. *Morse v. Frederick*, 551 U.S. 393, 404-05 (2007).
249. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010).

similarly points out that the meaning of the First Amendment says nothing about “time, place, and manner” doctrine.<sup>250</sup> The latter is a matter of construction rather than interpretation, and the restrictions it permits vary geographically.

Just as local tailoring of constitutional doctrine would not necessarily create a multiplicity of constitutional meanings, neither would it permit local governments to pass whatever gun control they please. Precisely defining the range of permissible local variation is impossible, because Second Amendment doctrine itself is still in flux, but tailoring would operate only at the margins. City-wide handgun bans will almost certainly be found unconstitutional, as they were in *Heller*. And yet gun prohibitions are presumptively permissible in “sensitive places” like government buildings and schools—a form of micro-level local tailoring. Determining where a particular local gun law (a permit requirement, for example, or a ban on concealed carrying) falls on this spectrum of permissibility will depend on the relevant history, the governmental interests involved, and the degree to which private interests are burdened. The local nature of the action would simply be an additional factor to consider.

There are, of course, problems with constitutional localism in general, and with firearm localism in particular. Section III.C will address the latter. As to the former, any kind of localism carries with it the political risks familiar to students of federalism. As James Madison noted, “[a]mong the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”<sup>251</sup> Heather Gerken explains:

The nationalists’ objection to conventional federalism typically takes one of two forms. The first is a worry that local power is a threat to minority rights. The second is a related concern about what we might loosely analogize to the principal-agent problem—the fear that state decisions that fly in the face of deeply held national norms will be

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250. *Solum*, *supra* note 249, at 99; *see also* *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (approving as constitutional “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983))).

251. THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob Ernest Cooke ed., 1961).



insulated from reversal. Both find their strongest examples in the tragic history of slavery and Jim Crow.<sup>252</sup>

That tragic history includes efforts to render African-Americans defenseless by denying them the right to keep and bear arms.<sup>253</sup> How, in light of that risk, can there be any allure in firearm localism?

Part of the answer lies in the comparative ease with which local decisions that “fly in the face” of national or state norms can be reversed. From the perspective of the Federal Constitution, cities are creatures of state law, and their decisions can generally be overturned at the state level.<sup>254</sup> Indeed, state preemption laws do exactly this (though, as I argue below,<sup>255</sup> they go too far in doing so). Moreover, as David Barron notes, “there is little risk that a city will remain a scofflaw for long. The fact that cities are not fully sovereign means that municipal taxpayers enjoy relaxed standing requirements in suits against their cities for disobeying the law.”<sup>256</sup> Even holding aside the ability of states or litigants to check localized tyranny, “[s]ome have argued, in fact, that local political processes are *less* susceptible to capture by special interests” than larger governmental units since it is easier for people to exit local governments.<sup>257</sup> As Robert Cooter notes, “[t]he ‘exit principle’ implies the ‘federalism of individual rights,’ by which I mean that courts should tolerate more interference with

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252. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 46 (2010) (footnotes omitted); see also Barron, *supra* note 27, at 2220 (“[T]he standard view is that the higher up one goes, the less passion and the more reason enters into interpretation.”).
253. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 336-38 (1991) (detailing antebellum Southern restrictions on African-Americans’ use and ownership of guns); *id.* at 344-46 (describing Southern legislative attempts, as part of the “black codes,” to disarm newly freed slaves by forbidding them from carrying firearms without a license).
254. See *Hunter v. City of Pittsburgh*, 201 U.S. 161, 178-79 (1907). Nevertheless, the majority of states provide “home rule” authority to local municipalities. See *Home Rule in the States*, COMMUNITY ENVTL. LEGAL DEF. FUND, <http://www.celdf.org/home-rule-in-the-states> (last visited Sept. 16, 2013).
255. See *infra* Section III.B.
256. Barron, *supra* note 27, at 2234.
257. Schragger, *supra* note 244, at 164 (emphasis added); see Rosen, *Tailoring*, *supra* note 27, at 1610-11. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (describing model in which citizen-consumers will move to communities whose bundle of government services they prefer).

individual liberty when the effects are localized.”<sup>258</sup> Judge J. Harvie Wilkinson III pointed out in his criticism of *Heller* that citizens who oppose gun control “remain free to move to other localities more protective of gun rights.”<sup>259</sup>

And even if such local variation cannot totally be erased by state governments, its persistence might not necessarily be a bad thing. As Gerken and others have shown, local governments and political minorities who resist broader norms can protect minority voices while facilitating broader democratic engagement.<sup>260</sup> Local experimentation with gun control has sometimes been motivated by those very goals. The city council members who enacted Washington’s handgun ban “thought the D.C. law would spark a nationwide trend to ban all handguns in America—if not all guns period.”<sup>261</sup> Similarly, one of the trustees who voted for Morton Grove’s handgun ban told a reporter, “We felt gun control would have to be a grass-roots effort, as with child labor and pollution laws, and wanted to send a message to other villages and towns that they could enact such ordinances.”<sup>262</sup> There is some reason to think that this signaling was effective,<sup>263</sup> even though it eventually served as a greater inspiration to opponents of gun control than to its supporters.<sup>264</sup>

Sometimes these urban gun control efforts have inspired broader political support. In the late 1990s, for example, the city of Richmond initiated Project Exile, which earned the rare simultaneous approval of the NRA and the Bureau of Alcohol, Tobacco, and Firearms. The project brought state and federal prosecutors together to maximize the sentences of anyone using a gun to

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258. ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 323 (2000).

259. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 320 (2009).

260. See Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1351 (2013) (arguing that the ability of minority polities to act contrary to national will has “unique implications for two of the most important projects undergirding much of constitutional theory: integrating a diverse polity and encouraging democratic debate”).

261. WINKLER, *supra* note 4, at 18.

262. Nathaniel Sheppard, Jr., *Illinois Town Faces Lawsuit After Limiting Pistol Use*, N.Y. TIMES, July 4, 1981, at A6.

263. REGULATING GUNS IN AMERICA, *supra* note 44, at 40 n.19 (noting that at least thirteen Illinois communities banned handguns, “making Illinois unique among the states in the number of local ordinances banning handguns”).

264. Goss, *supra* note 82, at 704 (“Interestingly, the gun rights forces appeared to take the political potential of the Chicago-area developments far more seriously than did the gun control side.”).

commit a crime in the city.<sup>265</sup> The success of Project Exile has been debated,<sup>266</sup> but for present purposes what matters most is that it was locally focused but nationally prominent. Targeted programs in Kansas City<sup>267</sup> inspired similar patrols in New York,<sup>268</sup> and available data suggests that “stringent regulation of concealable weapons played an important role in driving down the rate of violent crime” in New York.<sup>269</sup> Similarly, the lauded Boston Gun Project “included an interagency problem-solving group that sought to disrupt the illegal supply of firearms to youth” through various systematic efforts.<sup>270</sup> The Boston and Richmond programs, in turn, served as models for the Bush Administration’s Project Safe Neighborhoods, which encouraged federal-local partnerships in combating gun crime.<sup>271</sup> These partnerships and policy innovations would not have been possible without pioneering local governments taking the first step.

The extent of local tailoring in current constitutional law should not be overstated—there is a general presumption in favor of national uniformity, and the reasons for diverging from that uniformity are always specific to the right involved. Firearm localism would operate at the margins of the right to keep and bear arms, and for reasons that are specific to the right itself. Indeed, our long national tradition of local variation in gun control demonstrates—even before *Heller*—that prohibitionist gun control is not only constitutionally constrained, but politically unlikely.<sup>272</sup> The preceding Sections have argued that the Second Amendment is particularly well suited for local tailoring. The goal of this Section has been to situate that argument in a broader constitutional context.

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265. TUSHNET, *supra* note 123, at 103.

266. *Id.* at 103-10 (describing the debate); Philip J. Cook & Jens Ludwig, *Pragmatic Gun Policy*, in EVALUATING GUN POLICY, *supra* note 87, at 1, 27-28; *see also* Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY, *supra* note 87, at 251 (finding little evidence of Project Exile’s success).

267. TUSHNET, *supra* note 123, at 106 (describing these programs).

268. Cook & Ludwig, *supra* note 37, at 1336.

269. Rosenthal, *supra* note 93, at 5.

270. Braga et al., *supra* note 59, at 345; *see also* Hinson, *supra* note 85, at 873-77 (describing the Gun Project, specialized gun court, and other initiatives in Boston).

271. Cook & Ludwig, *supra* note 37, at 1336-37.

272. Even before *Heller* was decided, Washington, D.C., Chicago, and approximately a dozen other Illinois communities were apparently among the only jurisdictions in the country with handgun bans. *See* REGULATING GUNS IN AMERICA, *supra* note 44, at 38-41.

*B. Against Preemption*

This Article's argument is primarily constitutional: that Second Amendment doctrine can and should be tailored to better reflect the urban/rural divide. As a practical matter, however, the biggest legal obstacles to firearm localism are not to be found in the Federal Constitution, but in state statutes—specifically, in preemption laws that prohibit or sharply limit local gun control. Although these laws do not undermine the constitutional argument for firearm localism, they should nonetheless be repealed or revised in light of the historical, cultural, and pragmatic case for localism.

Though local autonomy with regard to gun regulation was the norm throughout most of American history,<sup>273</sup> the past three decades have seen a dramatic change.<sup>274</sup> Prompted in part by the passage of a handgun ban in Morton Grove, Illinois, in 1981, the NRA and other gun rights organizations began pushing for state-level preemption laws that would forbid local governments from enacting certain kinds of gun control.<sup>275</sup> Though it broke with the tradition of local governance described above (and endorsed elsewhere by the NRA)<sup>276</sup> the preemption campaign was incredibly successful.<sup>277</sup> As of 2002, forty-one states had preempted some or all local gun control,<sup>278</sup> thereby reducing the stringency, scope, and variety of local gun regulations. As the former leader of a national gun control organization put it: “There’s no question that the NRA’s effort to pass preemption laws was a serious setback, and there’s no question that whatever the implications in terms of policy, what you do lose at the local level is the ability to rally people around a local issue . . . .”<sup>279</sup>

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273. Cornell & DeDino, *supra* note 164, at 516 (“[L]ocal regulation was quite common in pre-Civil War America.”); *see also* Badaracco, *supra* note 127, at 762 (“State and local governments have traditionally enjoyed a great deal of latitude in passing gun control laws . . .”).

274. Because these laws are so recent, they do not undermine the historical-categorical case for localism described in Section II.A.

275. *See* UTTER, *supra* note 29, at 200.

276. Stephen P. Teret et al., *Gun Deaths and Home Rule: A Case for Local Regulation of a Local Public Health Problem*, 9 AM. J. PREVENTATIVE MED. 44, 45 (1993) (referencing the NRA’s past support for local control (citing INST. FOR LEGISLATIVE ACTION, NAT’L RIFLE ASS’N. OF AM., NRA STATE LEGISLATIVE ISSUE BRIEF (1986))).

277. Goss, *supra* note 82, at 706; Vernick & Hepburn, *supra* note 87, at 363.

278. Vernick & Hepburn, *supra* note 87, at 349.

279. Goss, *supra* note 82, at 706-07.

State preemption laws have important implications for firearm localism, and vice versa. First, by making local gun control laws harder to pass as a political matter, and barring many of them as a legal matter, preemption statutes narrow the potential scope of this Article's argument—the less local gun control there is, the less relevant firearm localism will be. But the existence of these laws does not impact the strength of the Article's argument in favor of constitutional deference to urban gun regulation. Whether that deference is justified is not dependent on how often it might be invoked. Indeed, those who fear that firearm localism would weaken gun rights might take heart from the fact that states can actively check local regulations that go too far.<sup>280</sup>

Second, and despite the obstacles presented by preemption laws, firearm localism remains enormously significant even under the current legal regime. The vast majority of gun control laws are still local,<sup>281</sup> and some of those laws cover municipalities that are more populous than many states. Moreover, many states with preemption laws have specific statutory exceptions for certain kinds of gun control.<sup>282</sup> And in the eight states with no (or limited) preemption laws, local governments are freer to regulate, subject to constitutional constraints. These are precisely the states where local gun control is most likely to be passed in any event.<sup>283</sup>

Third, many of the arguments in favor of preemption laws have been substantially mooted. *Heller* and *McDonald* constitutionally prohibit the kinds of handgun bans and other especially stringent gun control that proponents of

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280. This was precisely the argument that Illinois made in its amicus brief supporting Chicago in *McDonald*. Brief for the States of Illinois, Maryland, and New Jersey as *Amici Curiae* in Support of Respondents at 21, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (No. 08-1521), 2010 WL 59029, at \*21-22; see also Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011) (discussing the role of state attorneys general in gun control litigation).

281. See sources cited *supra* note 87.

282. REGULATING GUNS IN AMERICA, *supra* note 44, at 15; see also David B. Kopel, *Limited Preemption of Firearms Laws: A Good Step for Civil Rights* (Mar. 11, 2003), DAVE KOPEL, <http://www.davekopel.com/2a/IB/Limited-Preemption.htm> (noting that only half of the states with preemption laws “totally forbid local gun laws”).

283. Cf. O’Shea, *supra* note 41, at 212 n.52 (“Primary gun culture states tend to have broader firearms preemption laws, allowing little leeway for added municipal restrictions, while secondary jurisdictions tend to have very limited preemption (Massachusetts, New York) or none (Maryland)—although California, with strong preemption, is an exception to the pattern.”).

preemption laws sought to prevent at the local level.<sup>284</sup> Since those laws are now unconstitutional, there is no need for preemption laws to prevent them. And while it may not be politically realistic to expect, *Heller* and *McDonald* should give members of the gun culture “less reason to fear creeping confiscation.”<sup>285</sup> This in turn should lessen the impact of the “slippery-slope arguments [that] play a large role in anti-gun-control rhetoric,”<sup>286</sup> and permit “sensible gun control laws—those aimed at disarming criminals, not ordinary citizens—[to] pass much more easily.”<sup>287</sup> Moreover, a locally tailored Second Amendment doctrine would permit courts to uphold “reasonable firearms regulations”<sup>288</sup> in cities without diluting the rights of rural residents.<sup>289</sup> Focusing energy on urban areas, where the costs of gun violence and support for gun control are highest, might give gun control advocates a shot at incremental policy victories that have proven elusive at the state and national levels.<sup>290</sup>

One might 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. But, for all the reasons discussed in Part I, state-level

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284. See Robert VerBruggen, *Self-Defense vs. Municipal Gun Bans*, REASON, June 2005, at 40, 44 (“Local control has nothing to do with denying what I consider a basic right under the state and federal constitutions . . . . A village can no more deny self-defense than they can pass an ordinance that you can’t publish articles in their territory.” (quoting Illinois State Senator Edward Petker)); *supra* note 272.
285. Glenn Harlan Reynolds, Letter to the Editor, REASON, June 1996, at 10 (“If the Supreme Court were to interpret the Second Amendment [to protect an individual right to keep and bear arms], gun owners would have less reason to fear creeping confiscation . . . .”).
286. TUSHNET, *supra* note 123, at 129; see also Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 84-89 (1992) (criticizing the use of slippery slope arguments in the gun control debate); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1033-34 (2003) (describing slippery slope arguments as they relate to gun registration and confiscation).
287. Reynolds, *supra* note 285.
288. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (noting that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment” (quoting Brief of The States of Texas et al. as Amici Curiae in Support of Petitioners at 23, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 4378909, at \*23)).
289. *But see* O’Shea, *supra* note 41, at 219 (“Dilution is a real risk . . .”).
290. See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 31-35 (2d ed. 1993) (noting that issue advocates often seek the most accessible level of government to push their agenda); GOSS, *supra* note 29, at 145-75. (describing policy “incrementalism”).

negotiations are unlikely to achieve a satisfying accommodation.<sup>291</sup> As James Jacobs puts it, “[t]he idea that gun crime in our inner cities (much of which takes place among drug dealers and gang members with significant criminal records) will be significantly reduced by taking guns away from ranchers, farmers, small town residents and suburbanites is, to say the least, a hard sell.”<sup>292</sup> The converse is equally true: it is a “hard sell” to tell inner cities that they must permit “drug dealer gang members” to possess cheap handguns so that ranchers, farmers, and small town residents can have hunting rifles.<sup>293</sup>

A complete analysis of state preemption laws would require the weighing of policy considerations that are beyond the scope of this Article. Supporters of preemption emphasize the difficulty of complying with different local gun regulations,<sup>294</sup> especially when transporting their firearms from one lawful place to another—from home to a shooting range, for example. Opponents of preemption respond that such costs of compliance are commonplace and unobjectionable, particularly when the relevant rules address local safety concerns—rules governing traffic and speed limits, the sale and consumption of alcohol, and others that vary widely from one city to the next. Striking a proper balance between the values of uniformity and local variation requires a nuanced consideration of specific gun regulations. However that balance should be struck, today’s broad preemption laws go too far in preventing the kind of localized gun control that was the norm for most of American history. They should be revised or repealed in order to permit firearm localism, for all the same reasons that Second Amendment doctrine should be tailored to allow it.

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291. See, e.g., Thomas C. Castellano & Edmund F. McGarrell, *The Politics of Law and Order: Case Study Evidence for a Conflict Model of the Criminal Law Formation Process*, 28 J. RES. CRIME & DELINQ. 304, 311-12 (1991) (describing the stark division between New York City and upstate New York).

292. James B. Jacobs, *What Can We Expect of Gun Control?*, 156 U. PA. L. REV. PENNUMBRA 189, 190 (2007).

293. See Teret et al., *supra* note 276, at 44 (arguing that state gun laws preempting municipal ones “represent a step backward for public health”).

294. *Firearms Preemption Laws*, NAT’L RIFLE ASS’N INST. FOR LEGIS. ACTION, (Dec. 16, 2006), <http://www.nraila.org/news-issues/fact-sheets/2006/firearms-preemption-laws> (“Where no uniform state [gun] laws are in place, the result can be a complex patchwork of restrictions that change from one local jurisdiction to the next.”).

### C. *Objections and Answers*

None of the foregoing analysis provides an open-and-shut case for firearm localism, even at a broad conceptual level.<sup>295</sup> Many potential objections have been noted along the way. This final Section attempts to identify and answer a few more.

First, one might object that a Second Amendment doctrine that dilutes the rights of city-dwellers—especially those in high-crime areas—would effectively deny guns to the very people who need them the most. This objection is hard to answer because it is premised on disputed empirical suppositions. For although urban gun control might limit the possibilities for armed self-defense, one of its primary purposes is to lessen the need for such self-defense. A local legislature that passes a particular gun control measure has presumably concluded that the measure will save lives, and while that determination is not immune to judicial evaluation, it is the kind of empirical determination that generally receives deference from the courts.<sup>296</sup> This Article takes no position on whether cities are better off with or without restrictive gun control. The constitutional question is to what degree they even have the option to employ it. And the fact that gun control would inevitably limit access to armed self-defense does not mean it is unconstitutional.<sup>297</sup>

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295. Cf. Schragger, *supra* note 27, at 1892 (“Taking local governments seriously does not entail blinding oneself to their weaknesses. It simply requires giving some attention to the scale of government action and to the fact that local governments and state and federal governments are differently situated with respect to their citizens.”).
296. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting) (“[L]egislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact.”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (holding that courts must “accord substantial deference to the predictive judgments of Congress”) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 *IND. L.J.* 1, 2 (2009) (“It is traditionally assumed that the role of ascertaining and evaluating the facts underlying a statute belongs to the legislatures.”); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 *DUKE L.J.* 1169, 1175 (2001) (“The Court is unlikely to depart from the traditionalist view that the separation of powers places the finding of social facts squarely within the realm of the lawmaking power.”).
297. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).



A second objection might be that firearm localism would be very difficult to implement in practice. As David Barron notes, “[N]o city or state is an island jurisdiction. The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states . . . and, most importantly, by the way the central power structures these relations . . . .”<sup>298</sup> This is powerfully true with regard to guns. In his skeptical account of the effectiveness of gun control, James Jacobs notes that “[s]ome communities wishing to ban private possession of firearms in public places . . . will find their ambition undermined by a neighboring community’s policy of allowing liberal access to firearms.”<sup>299</sup> Studies have unsurprisingly shown that many guns found in areas with restrictive gun control were purchased elsewhere.<sup>300</sup>

Of course, evaluating the efficacy of policy matters is traditionally entrusted to legislative bodies, not to courts, so the argument that gun control would not work is at best a partial argument against its feasibility. Even so, it is worth noting some empirical evidence suggesting that local-level gun control can make a difference, even in urban jurisdictions surrounded by areas with lax gun control. One study concluded that when Washington, D.C., passed its gun control law in 1976, homicides and suicides declined by approximately 25%, thanks in large part to a decline in firearm killings.<sup>301</sup> Though not every effort to reduce gun crime will be successful—crime control is and has always been imperfect—other studies have also found encouraging results.<sup>302</sup>

A third objection lies in the definition of “urban” and “rural.” Those are very broad terms, and their precise contours are and will surely remain the subject of much debate. The resulting imprecision and decision costs could be a reason to avoid relying on them in the first place. How, for example, can firearm localism account for the suburbs, which may form independent municipalities but do not fit neatly into the division between urban centers and rural areas?

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298. Barron, *supra* note 240, at 378–79.

299. JAMES B. JACOBS, CAN GUN CONTROL WORK? 224 (2002).

300. Braga et al., *supra* note 59, at 331.

301. Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615 (1991); see also Bogus, *supra* note 44, at 457 (“The D.C. law . . . had a significant and immediate benefit.”); Rosenthal, *supra* note 93, at 5 (noting apparent success of concealable weapon regulation in New York City).

302. Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in EVALUATING GUN POLICY, *supra* note 87, at 217, 220 (“In our judgment the Pittsburgh program provides at least suggestive evidence that targeted patrols against illegally carried guns may reduce gun crime.”).

This definitional obstacle is not insurmountable. After all, social scientists who study urban issues have developed tools to define and guide their craft.<sup>303</sup> In the specific context of gun violence, for example, scholars have looked to “the sixty-seven U.S. cities with a population of at least 250,000 people as of the 2000 census,”<sup>304</sup> or to Metropolitan or Micropolitan Statistical Areas, which are both defined by the Office of Management and Budget as “a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.”<sup>305</sup> Some “suburbs” meet that definition, and they seem to reflect urban gun control values more closely than rural ones.<sup>306</sup> A 2011 Gallup poll found that 43.6% of rural residents reported personally owning a gun, with those numbers dropping progressively from 27.7% to 15.9% to 15.6% in towns and small cities, suburbs, and large cities, respectively.<sup>307</sup> Other studies have found that suburbanites more closely resemble city-dwellers than rural residents when it comes to gun ownership<sup>308</sup> and views on gun control. Gary Kleck, for example, notes that suburban residents, along with city-dwellers, are more supportive of gun control than their rural counterparts.<sup>309</sup> When asked whether it was more important to protect the right to own guns or to control gun ownership, 63% of rural residents chose the former, compared to only 38% of urbanites and 46% of suburbanites.<sup>310</sup> This is not to say that the issue is clear-cut, however. Another recent article reported:

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303. See, e.g., Colin R. Goodall et al., *Computing and Using Rural Versus Urban Measures in Statistical Applications*, 552 AM. STATISTICIAN 101 (1998).
304. Vernick & Hepburn, *supra* note 87, at 349.
305. *About Metropolitan and Micropolitan Statistical Areas*, U.S. CENSUS BUREAU, <http://www.census.gov/population/metro/about> (last updated Feb. 26, 2013).
306. Another way around the definitional problem would simply be to count as suburbs only those areas that are self-governing.
307. Kathryn Ticknor, *Gun Ownership and Opinion in the United States*, KATHRYN TICKNOR: LINGUISTIC INSIGHTS AND ANALYTICS (Apr. 2, 2012), <https://blogs.commonsgorgetown.edu/ke37/files/Gun-Ownership-and-Opinion-in-the-United-States.pdf> (noting that “[t]hese findings are consistent with trends since the 1970s”).
308. Another recent poll similarly found that 42% of suburban residents own guns, compared to 60% in rural areas and 30% in cities. Silver, *supra* note 59. Though they reflect a suburban-rural disparity as well, these numbers are somewhat higher than those in the General Social Survey. See Tavernise & Gebeloff, *supra* note 57.
309. Kleck, *supra* note 78, at 401; see also Smith, *supra* note 75, at 303 (“As one moves from the countryside, through the small towns, and on to the metropolitan centers, opposition to gun control steadily falls.”).
310. Ticknor, *supra* note 307.

As with so many American campaigns these days, the real fight is for the suburbs. Urban dwellers strongly prioritized gun control, 62 percent to 34 percent. Rural residents were aligned with gun rights, 64 percent to 33 percent. In the battleground suburbs, gun control was ranked more important by a thin plurality, 48 percent to 45 percent.<sup>311</sup>

Firearm localism would not resolve the fight in these battlegrounds. It would, however, enable a more direct focus on it, rather than treating cities, suburbs, and rural areas as identical.

Finally, one might argue that, even if rural and urban can be defined with the requisite precision, these categories do not capture the underlying geographic realities well enough. Even within a city, gun violence might be concentrated in a few particular neighborhoods. It would seem that they, not the city as a whole, should be the focus of the argument for increased gun control deference—firearm localism all the way down, as it were.<sup>312</sup> Indeed, part of the effort here is to identify a geographic unit between “sensitive places” like schools or government buildings<sup>313</sup> and larger governance units like the state. But as a legal matter, the authority for enacting local gun control resides—if it is not preempted by state law—at the level of the municipality, not the neighborhood, which makes the former the appropriate level of analysis.

#### **CONCLUSION: DIRECTIONS FOR SECOND AMENDMENT LOCALISM**

This Article has argued that Second Amendment doctrine can and should incorporate our long national tradition of locally tailored gun control. Translating that general principle into specific constitutional rules is another matter. In conclusion, however, it may be useful to consider how firearm localism would influence ongoing debates regarding assault weapons and concealed carrying. The purpose of the following is to show how a localized Second Amendment might allow us to ask these questions, not to demonstrate

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311. Shane Goldmacher, *Poll Finds That Obama's Base Overlaps with Gun-Control Coalition*, NAT'L J., Jan. 14, 2013, <http://mobile.nationaljournal.com/daily/poll-finds-that-obama-s-base-overlaps-with-gun-control-coalition-20130114> (reporting results of United Technologies/*National Journal* Congressional Connection Poll).

312. Cf. Gerken, *supra* note 252 (describing “federalism all the way down”).

313. *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008) (suggesting that regulation in such places is “presumptively lawful”).

how it would answer them. The latter would, as the discussion shows, require further research.

On December 14, 2012, twenty-six people—twenty of them first-graders—were murdered at Sandy Hook Elementary School in Newtown, Connecticut, by a young man with an assault rifle.<sup>314</sup> The subsequent debate about gun control demonstrated the depth of the cultural divide described in Part I of this Article. The NRA, the gun culture’s most prominent and powerful voice, argued that arming teachers would help prevent gun violence in schools.<sup>315</sup> Meanwhile, New York Mayor Michael Bloomberg—perhaps the most prominent spokesman for urban gun control culture—demanded new restrictions, saying, “If this moment passes into memory without action from Washington, it will be a stain upon our nation . . . .”<sup>316</sup>

The most commonly discussed policy solutions have been bans on high-capacity magazines and “assault weapons” such as AR-15s, which were used at Newtown and in other mass murders like the Aurora movie theater and Beltway Sniper killings.<sup>317</sup> But the federal assault weapons ban was allowed to

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314. James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>.

315. *NRA Calls for Armed Police in Every School*, FOX NATION, Dec. 21, 2012, <http://nation.foxnews.com/nra/2012/21/nra-calls-armed-police-ever-school>; see also Mariano Castillo, *NRA Clear on Gun Debate Stance: Arm Schools*, CNN, Dec. 21, 2012, <http://www.cnn.com/2012/12/21/US/Connecticut-school-shooting>.

316. Elise Foley, *Michael Bloomberg: Failing to Enact Gun Control ‘Will Be a Stain Upon Our Nation,’* HUFFINGTON POST, Dec. 17, 2012, [http://www.huffingtonpost.com/2012/12/17/michael-bloomberg-gun-control\\_n\\_2316855.html](http://www.huffingtonpost.com/2012/12/17/michael-bloomberg-gun-control_n_2316855.html). Speaking on NBC’s *Meet the Press*, David Brooks explicitly noted that “I admire Mayor Bloomberg enormously . . . but it’s counterproductive to have him as the spokesperson for the gun law movement. There has to be more respect and more people, frankly, from rural and red America who are participants in this.” Noah Rothman, *David Brooks Slams ‘Counterproductive’ Mayor Bloomberg in ‘Urban vs. Rural’ Gun Debate*, MEDIAITE, Dec. 16, 2012, <http://www.mediaite.com/tv/david-brooks-slams-counterproductive-mayor-bloomberg-in-urban-vs-rural-gun-debate>.

317. See, e.g., Scott Wilson & Philip Rucker, *Obama Calls on Congress to Ban Assault Weapons, High-Capacity Magazines*, WASH. POST, Dec. 19, 2012, [http://articles.washingtonpost.com/2012-12-19/politics/35929574\\_1\\_assault-weapons-president-obama-high-capacity-magazines](http://articles.washingtonpost.com/2012-12-19/politics/35929574_1_assault-weapons-president-obama-high-capacity-magazines); George Zornick, *How Walmart Helped Make the Newtown Shooter’s AR-15 the Most Popular Assault Weapon in America*, NATION, Jan. 7, 2013, <http://www.thenation.com/article/171808/how-walmart-helped-make-newtown-shooters-ar-15-most-popular-assault-weapon-america> (noting that the AR-15 was used in all three sets of murders).

expire in 2004 despite broad support,<sup>318</sup> and it seems unlikely that Congress will pass another one any time soon.<sup>319</sup> Even with the limitations imposed by preemption laws, local action may be the most realistic immediate option for gun control advocates.

How would a localized Second Amendment evaluate the constitutionality of an urban ban on assault weapons or high-capacity magazines? The answer likely lies in one of *Heller*'s underexplored exceptions to Second Amendment coverage. As noted above, the Court held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,"<sup>320</sup> but did little to explain what kinds of weapons fit within that category.<sup>321</sup> A localized Second Amendment would define the term based on local standards, allowing increased scope for regulation in places—cities, most prominently—where particular types of guns might be considered more uncommon, dangerous, or unusual.

This could happen in at least two ways. First, the Second Amendment might take a page from First Amendment doctrine and use local "community standards"<sup>322</sup> to determine whether a particular weapon is dangerous, unusual, or in common use. It would follow that *if* assault weapons are more uncommon, dangerous, and unusual in cities, then those cities should have more authority than rural areas to ban them. This inquiry would essentially track the pragmatic-balancing approach, at least to the degree that it would incorporate contemporary empirical evidence. It would also be influenced by

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318. See REGULATING GUNS IN AMERICA, *supra* note 44, at 19.

319. Sahil Kapur, *Assault Weapons Ban Sidelined in the Senate*, TALKING POINTS MEMO (Mar. 19, 2013, 11:19 AM), <http://livewire.talkingpointsmemo.com/entry/assault-weapons-ban-sidelined-in-senate>; see Dan Friedman, *Gun Control Efforts Set Back as Senate Democrats Abandon Background Check Measure*, N.Y. DAILY NEWS, Aug. 1, 2013, <http://www.nydailynews.com/news/politics/senate-democrats-abandon-background-check-measure-article-1.1415414>.

320. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008); see Volokh, *supra* note 32, at 1478-83 (describing and criticizing some of these tests for the scope of Second Amendment coverage).

321. Justice Scalia suggested at oral argument that machine guns meet the definition. See Rostron, *supra* note 21, at 711 (citing Transcript of Oral Argument at 22, *District of Columbia v. Heller*, 544 U.S. 570 (2008) (No. 07-290)). Yet there are nearly half a million of them registered with the federal government. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE 2012, U.S. DEP'T JUSTICE 14, <http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf>.

322. See, e.g., *Hamling v. United States*, 418 U.S. 87, 104-05 (1974).

historical traditions of regulation, however, because one of the major determinants of a gun's commonality within a jurisdiction is the degree to which it has been regulated in the past. Unfortunately, it is difficult to find accurate statistics regarding the relative prevalence of assault weapons in cities and rural areas, so it is impossible to say with any confidence whether firearm localism would support deference for urban assault weapons bans.<sup>323</sup> But if the rates of assault weapon ownership are consistent with those of other guns, they are probably much less common in cities. If so, a localized approach to the Second Amendment would give special support to urban assault weapons bans.

A second way for Second Amendment doctrine to take account of local variation with regard to “dangerous and unusual” weapons would be to look directly to local *law*, rather than to extra-legal community standards. This would be akin to the way that Fifth and Fourteenth Amendment doctrine do not themselves create “property,” but rather incorporate background sources such as subnational law.<sup>324</sup> Local laws could likewise be used as a guide to what guns are dangerous and unusual for constitutional purposes. This approach would be consistent with the historical-categorical approach, especially if it were to give extra weight to “longstanding” local laws.

As noted above, the search for evidence is skewed by the fact that most states preempt some or all local gun control; many cities therefore do not have the power to ban assault weapons. But some do have that authority, and exercise it. One recent study examined gun control in ten major cities located in states without stringent preemption laws.<sup>325</sup> Five of those cities (Boston, Chicago, Cleveland, Columbus, and New York City) ban or heavily regulate assault weapons, while another four are located in *states* that ban assault weapons (Newark, Hartford, Los Angeles, and San Francisco).<sup>326</sup> Five ban

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323. Having a more accurate and detailed census of guns would also make it easier to determine whether America's gun cultures are divided not only geographically but with regard to types of guns. Perhaps members of gun culture not only own guns at a higher rate, but also disproportionately favor certain kinds of weapons—those designed for hunting, for example, or self-defense. Or maybe instead the types of high-powered, self-loading rifles favored by some hunters are significantly different from the kinds of guns targeted by “assault weapons” bans, which would suggest that perhaps the cultural divide is not as broad as it seems.

324. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law. . .”).

325. See REGULATING GUNS IN AMERICA, *supra* note 44.

326. *Id.* at 259. Omaha, Nebraska, was the exception.

large-capacity ammunition magazines (Boston, Chicago, Columbus, New York City, and Los Angeles), and two more (Newark and San Francisco) are located in states that do.<sup>327</sup> Again, this is imperfect evidence. But it suggests that urban bans on assault weapons or high-capacity magazines might have a particularly strong claim to constitutionality.

Bans on concealed carrying have traditionally been considered constitutional,<sup>328</sup> and they seem to have been particularly common in cities.<sup>329</sup> Like the gunpowder restrictions, concealed carry laws were often tailored to heavily populated areas, either in the state laws giving cities and towns the power to restrict concealed carrying (and, sometimes, carrying of any kind),<sup>330</sup> or directly in the acts incorporating municipalities.<sup>331</sup> As Saul Cornell explains,

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327. *Id.*

328. See Volokh, *supra* note 32, at 1523 (“For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry.”); see also *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840) (upholding Tennessee’s ban on concealed weapons).

329. ZIMRING & HAWKINS, *supra* note 127, at 131 (“State and local attempts to regulate the carrying of concealed weapons date from the early nineteenth century, with substantial legislative activity occurring during the period from 1880 through 1915.”); see, e.g., An Act to Prevent the Carrying of Concealed Deadly Weapons in the Cities and Towns of this Territory, § 1, 1862 Colo. Sess. Laws 56 (“If any person or persons shall, within any city, town, or village in this Territory . . . carry concealed upon his or her person any pistol . . . or other deadly weapon, shall, on conviction . . . be fined . . .”); An Act to Establish the Municipality of Jacksonville Provide for its Government and Prescribe Its Jurisdiction and Powers, ch. 3775, § 4, 1887 Fla. Laws 160, 164-65 (“The Mayor and City Council shall within the limitations of this act have power by ordinance . . . to regulate and license the sale of firearms and suppress the carrying of concealed weapons . . .”); An Act to Prevent the Carrying of Concealed Deadly Weapons in the Cities and Towns of this Territory, § 1, 1864 Mont. Laws 355 (“If any person shall within any city, town, or village in this Territory . . . carry concealed upon his or her person any pistol . . . or other deadly weapon . . . shall, on conviction . . . be fined . . .”).

330. See *supra* note 198.

331. See, e.g., An Act to Add an Additional Section to Article Two of the Code of Public Local Laws, entitled “Anne Arundel County,” sub-title “Annapolis,” to Prevent the Carrying of Concealed Weapons in Said City, ch. 42, § 246, 1872 Md. Laws 56, 57 (“It shall not be lawful for any person to carry concealed, in Annapolis . . . any pistol, dirk-knife, bowie-knife, sling-shot, billy, razor, brass, iron or other metal knuckles, or any other deadly weapon . . .”); An Act to Revise the Charter of the City of Buffalo, ch. 105 § 209, 1891 N.Y. Laws 176, 177 (“No person other than members of the police force, regularly elected constables, the sheriff of Erie county, and his duly appointed deputies, shall, in the city, carry concealed upon or about his person, any pistol or revolver, or other dangerous weapon or weapons, without having first obtained a permit, as hereinbefore provided . . .”); An Act to Revise, Consolidate and Amend the Charter of the City of Oshkosh, the Act Incorporating the City, and the Several Acts Amendatory Thereof, ch. 183, ch. VI, § 3, pt. 56, 1883 Wis. Sess. Laws

regulations of concealed carrying were the natural descendants of the urban gunpowder regulations discussed above:

The first laws banning concealed weapons enacted in the period between 1813 and 1859 were essentially time, place, and manner restrictions. . . . Prohibitions on the practice of carrying concealed weapons were little different than laws that established rules about the storage of gunpowder, restricted hunting, or prohibited the discharge of weapons in certain areas.<sup>332</sup>

Many of these laws were upheld in the face of constitutional challenge, providing unusually good evidence that, as the Supreme Court put it in 1897, “the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.”<sup>333</sup> Even though *Heller* seemed to reaffirm that holding,<sup>334</sup> the constitutionality of concealed carry restrictions has been one of the primary Second Amendment battlefronts in recent years.<sup>335</sup> Firearm localism suggests that whenever those cases involve municipal restrictions, extra deference is due. The same might be true of other restrictions on public carrying. In *Moore v. Madigan*,<sup>336</sup> the Seventh Circuit struck down

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687, 713 (allowing the common council “[t]o regulate or prohibit the carrying or wearing by any person under his clothes, or concealed about his person, of any pistol or colt, or slung shot, or cross knuckles, or knuckles of lead, brass or other metal, or bowie knife, dirk knife, or dirk or dagger, or any other dangerous or deadly weapon; and to provide for the confiscation or sale of such weapon”); An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, ch. 52, § 1, 1876 Wyo. Sess. Laws 352 (“[H]ereafter it shall be unlawful for any resident of any city, town or village, or for any one not a resident of any city, town or village, in said Territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village.”).

332. CORNELL, *supra* note 164, at 142.

333. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (citations omitted).

334. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”).

335. See, e.g., *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) (“In light of our nation’s extensive practice of restricting citizens’ freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment’s protections.”); see also David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 126 (“In the nineteenth century, concealed carry was often considered outside the scope of the right to bear arms. Today, it is the most common way in which people exercise their right to bear arms.”).

336. 702 F.3d 933 (7th Cir. 2012).



Illinois's statewide ban on public carrying. In doing so, the Court emphasized that the Illinois law was unique,<sup>337</sup> and that it curtailed "the gun rights of the entire law-abiding adult population of Illinois."<sup>338</sup> But what if the law had only applied to a particular city,<sup>339</sup> or even a part thereof? The historical record, not to mention the cost-benefit analysis, might look significantly different if it focused on the constitutionality of an *urban* ban.<sup>340</sup> This would not necessarily mean that a city could outright prohibit both concealed and open carrying—to do so would effectively limit the Second Amendment to the home<sup>341</sup>—but it would give additional deference to "good cause" requirements in urban areas.<sup>342</sup> In this and other ways, the Second Amendment can preserve our longstanding and sensible tradition of firearm localism.

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337. *Id.* at 940.

338. *Id.* at 942 (describing the burden necessary to justify the "uniquely sweeping ban").

339. *Peterson*, 707 F.3d at 1202 (noting that the Denver Revised Municipal Code largely prohibits unlicensed public carrying at any time).

340. See *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011) ("The City points to a number of founding-era, antebellum, and Reconstruction state and local laws that limited discharge of firearms in urban environments."); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1361 (2009) ("In some American jurisdictions today, for example, openly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against 'terrifying the good people of the land' by going about with dangerous and unusual weapons." (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*148)).

341. Lund, *supra* note 340, at 1361-62 ("If courts were to conclude that open carry violates this common law prohibition (and thus is not within the preexisting right protected by the Second Amendment), after *Heller* has decreed that bans on concealed carry are per se valid, the constitutional right to bear arms would effectively cease to exist.").

342. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (upholding a "proper cause" requirement for public carrying of handguns).