
Second Amendment Sanctuaries: A Legally Dubious Protest Movement

Erica Turret, Chelsea Parsons, and Adam Skaggs

Introduction

The years following the mass shooting at Sandy Hook Elementary School in December 2012 have been marked by significant progress as state legislatures across the country have strengthened gun laws. They have enacted a variety of new laws, often on a bipartisan basis, to require universal background checks, disarm domestic abusers, ban assault weapons and high capacity ammunition magazines, and create extreme risk protection orders (ERPOs) that allow courts to remove guns from individuals during temporary periods of crisis.¹ The gun violence prevention movement's strength is growing. According to an analysis by the Giffords Law Center, as of December 2019, 137 gun safety bills had been enacted in 32 states and Washington, D.C. in less than two years after the Parkland shooting in February 2018.² Public opinion has also swung in favor of stronger gun laws³ and candidates for office across the country are increasingly campaigning on their support for them. This message is resonating with voters: in November 2019, for example, Democrats took control of the Virginia legislature for the first time in a generation, a change driven largely by the gun issue.⁴

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Perhaps predictably, a backlash has followed this shifting momentum. One component of that backlash is the so-called “Second Amendment sanctuary” movement in which localities pass ordinances or resolutions that declare their jurisdiction’s view that proposed or enacted state (and sometimes federal) gun laws are unconstitutional and therefore, local officials will not implement or enforce them. The sanctuary movement can be viewed as a natural outgrowth of the Second Amendment fundamentalism that led to the conception of the Second Amendment as an individual right and has shaped American gun culture and conservative politics since the mid-twentieth century.⁵ In contrast to other social movements seeking to challenge laws or government action seen as unjust, the gun rights movement is not just about speech or protest. Its adherents increasingly use the objects of their focus — guns — to intimidate and chill the speech, political participation and rights of others.

The Second Amendment sanctuary phenomenon originated in Illinois in 2018 as the gun safety movement gained political power in the state.⁶ Several rural Illinois counties sought to co-opt the language and recognition of the more well-known and longstanding sanctuary cities movement, in which localities have refused to expend local resources on enforcement of federal immigration laws. While most of the Second Amendment sanctuary activity has thus far taken place in rural counties in states with Democratically controlled governments that pass or are expected to pass gun safety laws — including Illinois, New Mexico, Washington, Colorado, and most recently Virginia — some counties have taken this step in states like Kentucky and North Carolina where the passage of new gun safety laws is unlikely.⁷ These actions serve as a

way for local government officials to prove their “pro-gun” credentials and demonstrate a local response to counteract the increasing political power of gun violence prevention advocacy in state capitols.

As of May 2020, more than four hundred counties across the country had declared themselves Second Amendment sanctuaries to protest the enactment of strong gun laws. The text of these ordinances and resolutions varies by jurisdiction, with some targeting particular bills being contemplated in state legislatures (like ERPO laws), and others articulating broad opposition to a range of policies claimed to infringe Second Amendment rights.

The extent of the movement’s opposition to nearly all gun safety laws and the absolutist position adopted

... while acting in their official capacity, shall:

1. Knowingly and willingly, participate in any way in the enforcement of any Unlawful Act, as defined herein, regarding personal firearms, firearm accessories, or ammunition.
2. Utilize any assets, (LOCALITY) funds, or funds allocated by any entity to the (LOCALITY), in whole or in part, to engage in any activity that aids in the enforcement or investigation relating to an Unlawful Act in connection with personal firearms, firearm accessories, or ammunition.

In some jurisdictions, it is not local legislative bodies, but local sheriffs, who have publicly declared “sanctuary” status and pledged not to enforce state or federal

Numerous flaws in the logic that undergirds the gun sanctuary movement render declarations of sanctuary status not, strictly speaking, legally significant. Even though these ordinances are themselves unenforceable, they may appear to give local law enforcement officials latitude to ignore state law. Moreover, properly understood within the broader context of a social protest movement, gun sanctuaries also threaten public safety and for that reason deserve serious attention.

by many proponents of these Second Amendment sanctuaries is reflected in a model ordinance developed and circulated by a hard-line gun-rights organization, Gun Owners of America.⁸ Following several inaccurate assertions about the Supreme Court’s articulation of the Second Amendment’s scope, the model ordinance includes the following statement:

Therefore, the right to keep and bear arms is a fundamental individual right that shall not be infringed; and all local, state, and federal acts, laws, orders, rules or regulations regarding firearms, firearm accessories, and ammunition are a violation of the Second Amendment.

The model ordinance follows this recitation with a prohibition on any local official participating in the enforcement of “any Unlawful Act,” which under the ordinance’s definition includes any regulation of guns other than fully automatic machine guns:

SECTION 3. PROHIBITIONS

A. Notwithstanding any other law, regulation, rule or order to the contrary, no agent, department, employee or official of (LOCALITY),

gun laws. The phenomenon of some local law enforcement voices opposing gun safety efforts has a longer history than the sanctuary ordinances passed by local legislative bodies. When the Obama administration pushed for the passage of gun safety measures after the Sandy Hook shooting, including universal background checks, it encountered opposition from several sheriffs associated with the Constitutional Sheriffs and Peace Officers Association, a fringe movement that views sheriffs as the highest law enforcement authority in a county and encourages sheriffs to resist laws they believe to be unconstitutional. This earlier opposition from the Constitutional Sheriffs movement, which “vowed to uphold and defend the Constitution against Obama’s unlawful gun control measures,”⁹ can be viewed as a predecessor to the Second Amendment sanctuaries movement.

It is important to assess the validity of these sanctuary efforts from a legal perspective, but it is equally important to examine them in the context of a broader protest movement against efforts to strengthen gun laws. The larger purpose of the Second Amendment sanctuary effort is not merely to nullify restrictive gun laws in these jurisdictions. Rather, the movement’s larger purpose is to create a counter-narrative to the

growing support for stronger gun laws that is at a historic high among nearly every demographic group.

This protest movement against efforts to protect American communities from gun violence poses real risks to public safety and democracy. Not only do these efforts undermine the effective implementation of gun laws shown to protect public safety, they create confusion among gun owners and inflame extremists who engage in open carry demonstrations and other heavily-armed public protest actions. And while sometimes local dissent breeds productive democratic discourse, this particular movement does the opposite because its encouragement of the use of firearms can intimidate and endanger others, pushing opposing views out of the debate.

As set forth below, numerous flaws in the logic that undergirds the gun sanctuary movement render declarations of sanctuary status not, strictly speaking, legally significant. Even though these ordinances are themselves unenforceable, they may appear to give local law enforcement officials latitude to ignore state law. Moreover, properly understood within the broader context of a social protest movement, gun sanctuaries also threaten public safety and for that reason deserve serious attention.

The Flawed Legal Basis for Second Amendment Sanctuaries

The foundational principle behind local Second Amendment sanctuary efforts is that any restrictive gun law enacted (or proposed) by state or federal government is an unconstitutional infringement on the gun rights of local residents. Proponents of these efforts argue they are necessary to prevent any unconstitutional infringement of these rights and that they are permissible and appropriate as exercises of local discretion for the same reasons that sanctuary cities may permissibly decline to enforce federal immigration laws.

But Second Amendment law makes clear that the vast majority of existing or proposed gun policies at issue in the discourse surrounding Second Amendment sanctuaries are, in fact, constitutional. The Supreme Court's landmark gun case, *District of Columbia v. Heller*, explicitly approved several categories of important gun safety laws¹⁰ and its companion case, *McDonald v. City of Chicago*, likewise emphasized that the Second Amendment did not end state and local experimentation with firearms regulation.¹¹ In short, the Supreme Court has held that, like all other constitutional rights, the right to keep and bear arms is not unlimited, and that a broad range of gun laws adopted throughout the nation's history are fully consistent with the Constitution. And in contrast

to other movements like marriage equality that have featured dissenting localities attempting to define the scope of a right for future judicial action, here the absolutist position that the Second Amendment prohibits any and all gun regulation was already squarely rejected by the Supreme Court in *Heller*. Indeed, in the years since *Heller* and *McDonald*, lower courts around the country have upheld the very types of gun safety laws that sanctuary ordinances and resolutions paint as unconstitutional and target for non-compliance. From background check requirements to restrictions on particularly dangerous weapons or ammunition to prohibitions on gun possession by individuals with convictions for violent crimes, courts have repeatedly upheld the types of gun safety laws that these sanctuary ordinances target.¹²

The Second Amendment sanctuary effort ignores this growing body of caselaw, disregarding the orthodox view that it is largely the province of *the courts* to decide which laws comport with the Constitution (and that local legislators and law enforcement officers lack that authority).¹³ To be sure, social movements and institutions other than the courts play important roles in shaping the scope and understanding of constitutional rights; but the central role of the courts in drawing constitutional lines cannot simply be ignored. One recent article that makes a legal argument for Second Amendment sanctuaries proposes a theory of departmentalism in which local officials could refuse to enforce a law when the right at issue has not been firmly settled by the judiciary.¹⁴ But even if one agreed with that position, it is difficult to see the applicability to the Second Amendment sanctuaries context because of the movement's absolutist interpretation of the Second Amendment, which is directly at odds with settled Supreme Court (and lower court) precedent. Furthermore, it is difficult to imagine where one would draw the line to determine when the right at issue, here the Second Amendment, would be decidedly settled by the judiciary. As a result, this approach would appear to leave the door open for local law enforcement officials to perpetually ignore duties mandated under state law based on their personal assessments of constitutionality.

Of course, law enforcement officials — whether they be prosecutors or sheriffs — enjoy discretion in prioritizing enforcement efforts. But enforcement discretion does not give local law enforcement the power to systematically refuse to perform required duties or declare state law unenforceable. For example, if state law requires that an individual subject to an extreme risk protection order surrender his guns to law enforcement, unless and until a court strikes down the law, law enforcement policy must be to effec-

tuates such surrender regardless of individual officers' personal beliefs. Sanctuary jurisdictions do not simply state that law enforcement has discretion about what crimes to prioritize with limited resources or that individual officers may exercise discretion in particular circumstances. Instead, they attempt to declare that the gun laws themselves are legally unenforceable or constitutionally infirm. The rule of law would collapse if local legislative bodies or law enforcement officials were free to declare that state laws have no legal effect in the jurisdiction based on a personal assessment of their constitutionality. This is not to say that local legislative or law enforcement officials have no recourse when they believe a state law to be unconstitutional; like other residents, they may challenge these laws in the courts.

The gun sanctuary movement has explicitly modeled itself after the more well-known and longstanding immigration sanctuaries movement, in which localities have declined to use local resources to enforce federal immigration law. But immigration sanctuaries rely on the Tenth Amendment's anti-commandeering doctrine, a principle of federalism, as the legal basis for their refusal to enforce federal immigration law.¹⁵ That doctrine prohibits the federal government from "commandeering" states or localities into arms of the federal government by compelling them to implement or enforce federal laws.¹⁶ While the doctrine does not give localities the ability to nullify or obstruct federal law, it does vest them with discretion over how to use their own resources and prevents them from being forced to expend their own non-federal resources on enforcing federal law. Sanctuary cities do not question federal authority to regulate immigration or seek to obstruct federal enforcement, they simply require that federal policy is carried out with federal resources.

While state and local governments cannot be compelled by the federal government to use their own resources to implement or enforce federal laws, local governments generally lack such a shield when it comes to state law. Thus, while a jurisdiction that simply prevented local resources from going toward the enforcement of federal gun laws would stand on a comparatively stronger legal footing, the same cannot be said of the broad ordinances that declare state and federal gun laws in their jurisdictions to be null and void.

State leaders are becoming increasingly vocal in making this point. In December 2019, Virginia Attorney General Mark Herring issued an advisory opinion stating that Second Amendment sanctuary resolutions passed by local governments in Virginia "have no legal force" and that "[n]either local governments nor local constitutional officers have the authority to declare state statutes unconstitutional or decline to

follow them on that basis."¹⁷ In February 2020, New Mexico Governor Michelle Lujan Grisham signed an extreme risk protection order law into effect, warning sheriffs in the state who had threatened not to enforce the new law that "[t]hey cannot not enforce ... And if they really intend to do that, they should resign as a law enforcement officer and leader in that community."¹⁸

While there is an argument to be made for "firearm localism" in which urban and rural localities with different gun cultures and gun violence problems could have different gun laws reflecting the needs and viewpoints of their respective localities,¹⁹ here, localities are explicitly attempting to nullify state laws, rather than enact a tailored regulatory scheme that treats jurisdictions differently. It is also a mistake to view the gun violence targeted by state gun safety laws as narrowly targeted to problems that only affect urban areas. For example, suicide, which accounts for the majority of gun deaths in the United States and is specifically targeted by ERPO laws (among others), is a disproportionate problem in rural areas.²⁰ The proper scope of state preemption of local laws and the ability of localities to enact additional gun regulations on top of state law is beyond the scope of this article, but it is important to acknowledge the long history of local regulation of firearms and a stark disparity in attitudes toward guns in urban and rural areas that is an important factor in the origin and growth of Second Amendment sanctuaries.

A Protest Movement Disguised as a Legal Intervention

The Second Amendment sanctuary effort is also occurring against the backdrop of broader — and more extreme — protests against strengthening gun laws. The most extreme of these are open carry protests, during which visibly armed individuals — largely white men — congregate in public spaces to protest efforts to strengthen gun laws. One of the biggest armed protests against efforts to strengthen gun laws occurred on Martin Luther King Day in January 2020 in Richmond, Virginia at the start of the state's first legislative session following an election that put both chambers under Democratic control. The adoption of sanctuary county ordinances and resolutions occurred at the same time — and were spurred by the same organizers — as calls for armed demonstrations against state legislative action, both elements of the same backlash to the gun violence prevention movement's historic success in Virginia's 2019 elections.²¹ Placards, banners, and other materials touting the sanctuary movement in Virginia featured prominently in the January demonstrations in Richmond, but the sanctuary activity and the large armed protest on Martin Luther King

Day failed to achieve their legislative goal, and the legislature subsequently enacted several gun safety measures including an ERPO law and universal background checks.²² Still, as noted below, they were not without effect: concerns over possible violence forced organizers of a counter-demonstration and lobbying in support of the proposed new gun laws to cancel their plans and urge their supporters to stay home rather than exercising their rights of political expression and participation.

The Richmond protest was not a one-off but part of a larger trend of armed demonstrations at state capitols that have had the effect of silencing and intimidating the gun safety majority. In late January 2020, a smaller armed rally of about 100 individuals outside of the state capitol in Kentucky led to groups of heavily armed men marching down the halls inside the building, as they are permitted to do under state law.²³ A similar event encouraging people to protest at the state capitol while carrying firearms was reported in Ohio.²⁴ And in the time of COVID-19, armed demonstrators in several states including Michigan have turned up at state capitols to protest stay-at-home orders.²⁵

Groups like the NRA have consistently characterized any attempts to strengthen gun laws as a step down a slippery slope toward universal gun confiscation. This dangerous rhetoric has reached the highest levels of political discourse in the United States, becoming intertwined in the talking points of conservative elected leaders at all levels of government including President Trump.²⁶ This type of inflammatory rhetoric, the increased presence of armed protestors at statehouses, and the adoption of Second Amendment sanctuary ordinances and resolutions all feed one another. These in tandem efforts are unquestionably designed to intimidate those who disagree and deter legislative action. Together they stoke fears, raise the temperature of the political debate, and legitimize and normalize non-compliance with the law and even potentially more serious acts of violence. They all fuel and perpetuate the mistaken idea that the Second Amendment is absolute and that any government action to regulate guns is a violation of constitutional rights that must be resisted at all costs.

This Protest Movement Presents Multiple Dangers

Understood in the context of these broader efforts to oppose any attempt to strengthen gun laws, it is clear that the gun sanctuary phenomenon has numerous potential dangerous effects. These range from risks that arise when some people's assertions of gun rights intersect with other people's First Amendment rights, to heightened risk of gun violence.

As an initial matter, political activism and engagement by those carrying guns is distinct from similar, unarmed conduct, insofar as it carries at least an implicit threat of violence.²⁷ That dynamic — a gunman-heckler's veto — was illustrated perhaps most clearly by the armed protests in Richmond on Martin Luther King Day. Press accounts have widely documented that law enforcement, citing the risks of violent confrontation, compelled organizers of an annual gun safety vigil that had been held for nearly three decades to cancel their counter-protest, as was the case with a long-planned, annual march for a progressive agenda organized by an advocacy group for working-class Virginians of color. When protesters sharing one point of view are forced to refrain from peaceably assembling, protesting, and lobbying their elected representatives because of implicit — or, in the worst case, explicit — threats of violence from other, armed protesters asserting their own view of their Second Amendment rights, the former's First Amendment rights of speech and assembly have been irreparably harmed. In several other recent cases in which armed protestors or counter-protesters have actually opened fire, the harm can be even worse, resulting in serious injury or death.²⁸

Armed protesters motivated by the absolutist view of the Second Amendment that animates the gun sanctuary movement undermine healthy democratic debate and even the functioning of democracy itself. In May 2020, armed individuals in Michigan protesting the governor's restrictive stay-home order designed to limit the spread of COVID-19 intimidated the state legislature into adjourning their session prematurely.²⁹ The legislature wanted to avoid a repeat of an incident that occurred two weeks earlier, when heavily armed individuals entered the statehouse, confronting lawmakers and standing over them in the gallery. Sheriffs refusing to enforce stay-at-home orders and armed protestors claiming a "willing[ness] to die" rather than comply with COVID-19 restrictions demonstrates the far-reaching consequences of the Second Amendment sanctuary movement's legitimization of open resistance to attempts by states to protect the health and safety of the public.³⁰

The gun sanctuary movement also poses physical dangers to residents living within sanctuary counties. On the one hand, real dangers of gun violence may result from promises of non-enforcement or under-enforcement of otherwise valid gun laws. If a county declares that mandatory background checks on gun transfers are unconstitutional and will not be required, and if county gun owners rely on that declaration and sell guns to strangers without such background checks, it is clear that someone legally prohibited from pos-

sessing guns will have an easier time obtaining a firearm than if the law were broadly followed. Similarly, if local law enforcement officials object to an ERPO law that allows them to petition a court to temporarily disarm someone posing a danger of suicide or violence, their failure to avail themselves of this powerful tool may place a vulnerable person — or community — at risk. Indeed, extreme risk laws have been shown to be effective in preventing suicide,³¹ but support for gun sanctuaries is often highest in the counties with the largest need for suicide prevention tools. In Colorado, for example, 22 out of the 24 sanctuary counties for which suicide data was available — 92% — had firearm suicide rates above the state average.³²

Leaving aside the threat of physical violence, gun sanctuary resolutions or ordinances may also place residents of these counties at risk of legal jeopardy by creating confusion about whether residents must comply with valid gun laws regardless of their locality's public opposition. Causing the misimpression that residents do not have to comply with gun laws — or even encouraging that non-compliance — poses a real threat to gun owners who may face legal consequences, including jail time, if they act in reliance on a symbolic statement that a gun law should not be enforced. This was the case for two unfortunate Kansas gun owners who, relying on a state nullification law that declared certain firearms exempt from federal regulation, illegally purchased gun silencers without complying with federal law, only to be prosecuted and convicted for the crime.

Conclusion

The emergence of Second Amendment sanctuaries is part of a broader protest movement from gun rights absolutists who oppose any attempt to strengthen gun laws. The majority of Americans support common sense gun safety laws like universal background checks and do not favor an extremist interpretation of the Second Amendment that puts all other constitutional rights at risk. As the gun violence prevention movement grows in strength at the state level, gun rights enthusiasts are turning to the local level in an effort to thwart this shifting political tide.

Second Amendment sanctuaries pose important questions about the ability of local governments to undermine state laws and which institutions have the authority and democratic legitimacy to decide the scope and limits of constitutional rights. This movement, the most recent outgrowth of Second Amendment fundamentalism, is unique in that it seeks to entirely nullify the operation of democratically enacted state laws in local jurisdictions. That presents a greater threat to democratic norms than the exer-

cise of discretion or prioritization of resources that are more typical ways in which localities express opposition to state or federal policies. Second Amendment sanctuaries attempt to merge the “sanctuary” rhetoric that has been associated with the left with the gun rights absolutism of the right. And in the proper context of open carry demonstrations and the use of guns to intimidate and chill the expression of opponents, the spread of Second Amendment sanctuaries poses risks to public safety and legitimizes the refusal of gun rights enthusiasts to comply with any perceived restrictions on their Second Amendment rights.

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