

The Freedom to Restrict Firearms: *Halleck* and the Future of the Second Amendment

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A few days after a gunman in El Paso, Texas, opened fire in a Walmart, killing 22 and wounding 24, Dmitriy Andreychenko walked into a Walmart in Springfield, Missouri wearing body armor and carrying a loaded, military-style rifle. Charged with making a terrorist threat, Andreychenko told authorities he “wanted to know if Walmart honored the Second Amendment.” On its face, such a concept is nonsensical. The Second Amendment, like the other amendments in the Bill of Rights, imposes obligations on the state, not on private actors—Walmart has no duty to honor the Second Amendment.

But Andreychenko’s actions do reflect an expansionist, populist view of the Second Amendment that has long been promoted by the gun lobby, most notably by the National Rifle Association. Much like an expansionist view of the First Amendment has encouraged individuals to believe that private social media companies are obligated to carry their speech, the expansionist view of the Second Amendment encourages individuals to believe that private businesses are obligated to accommodate their choice to arm themselves. For a long time, many private businesses seemed happy to indulge this belief, adopting permissive carry policies, helping facilitate the manufacture and sale of firearms, and offering discounts to NRA members.

But shortly after the El Paso shooting, Walmart enacted a policy against the open carry of weapons in its stores. Walmart’s change in policy is part of a larger shift in private business policies regarding firearms in recent years. Since the 2018 mass shooting in Parkland, Florida, major stores have stopped selling AR-15s and raised the minimum age for purchasing firearms; banks have stopped financing companies that manufacture assault rifles; airlines have ended their NRA member discounts; and the software giant Salesforce announced that it would no longer allow its CRM (customer relationship management) products to be used for sales of military-style weapons.

While right now all eyes are on *New York State Rifle & Pistol Association v. City of New York* for an indication of how broadly the Supreme Court will interpret gun rights beyond the individual right to self-defense in the home articulated in *Heller*, there is another recent Supreme Court case that should influence the analysis of where else individuals are entitled to be armed, for what purposes, and with what restrictions. The expansionist view of the Second Amendment seeks more guns in the hands of more people in more spaces. But outside of their homes, Americans spend a lot of time in private spaces: other people’s houses, restaurants, shopping centers, grocery stores, private schools, banks. Because of the state action doctrine, the private actors who control these spaces are not obligated to allow guns in them. In *Manhattan Cmty. Access Corp. v. Halleck* (2019), the Court robustly affirmed the state action doctrine:

In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. ... By

enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty.

While *Halleck* involved a dispute over the First Amendment, not the Second, the holding is relevant both because the state action doctrine applies to constitutional rights generally and because the Court has often made parallels between the First and Second Amendments.

*Halleck*'s expression of the state action doctrine is significant because it frames private actors' lack of obligation to honor constitutional rights as a matter of individual liberty. The gun lobby has long framed gun possession and use as a matter of individual freedom to great effect; *Halleck* helps gun safety advocates frame the restriction or prohibition of guns by private actors in the same terms. This framing also highlights a growing tension in conservative rhetoric about the free market. On the one hand, conservatives tend to defend the right of private businesses to discriminate on the basis of characteristics such as sexual orientation or gender identity, as in *Masterpiece Cakeshop* and *Bostock et al.* On the other hand, many conservatives have decried the recent move by some private businesses to adopt slightly less permissive policies regarding firearms. Framing restrictions on firearms as a matter of individual liberty may prove to be a fruitful strategy for gun safety advocates.