

Study examines 'red flag' gun laws and state efforts to block local legislation

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"Red flag" gun laws—which allow law enforcement to temporarily remove firearms from a person at risk of harming themselves or others—are gaining attention at the state and federal levels, but are under scrutiny by legislators who deem them unconstitutional. A new analysis by legal scholars at NYU School of Global Public Health describes the state-by-state landscape for red flag legislation and how it may be an effective tool to reduce gun violence, while simultaneously protecting individuals' constitutional rights.

Gun violence is a significant public health problem in the U.S., with more than 38,000 people killed by firearms each year. Following several mass shootings this spring, President Biden urged Congress to pass legislation to reduce gun violence, including a red flag law—also known as a "extreme risk protection order" law—at the federal level and legislation to incentivize states to pass their own. In June, the Department of Justice published model legislation to help states craft their own red flag laws.

"Research shows that prior to an attempted suicide or homicide, there are warning signs that a shooter intends to act," said Jennifer Pomeranz, assistant professor of public health policy and management at NYU School of Global Public Health and the lead author of the study, which was published in the *American Journal of Preventive Medicine*.

"Removing firearms during crisis situations allows for mental health intervention or [law enforcement](#) investigation, and can prevent tragedies from occurring."

In May 2020, Oklahoma passed the nation's first law preempting or blocking local governments from enacting their own red flag laws. The state's "anti-red flag" bill was one of several proposed across the country based on arguments that red flag laws are unconstitutional. Legal scholars have evaluated constitutional arguments supporting and opposing red flag laws, and while lower courts have upheld the laws, to date there is limited case law on their constitutionality.

To better understand the current landscape of red flag laws, the researchers gathered and analyzed all state red flag laws and related preemption bills and laws proposed or enacted as of July 1, 2020. They found that 19 states and the District of Columbia enacted a total of 43 red flag laws for both temporary and final orders; the majority were enacted between 2018 and 2020. They also identified five preemption bills in four states (Alaska, Georgia, Minnesota, and Kansas with two bills) and one that was signed into law (Oklahoma).

State legislators had a variety of rationales for wanting to stop local governments from passing red flag laws. The four most common concerns were based on constitutional law:

- The First Amendment: State legislators argued that red flag laws violated the First Amendment, which protects against unwarranted government interference with expression; however, threats of violence, intimidation, harm, or death are not protected.
- The Second Amendment: State legislators also argued that red flag laws violate the right to bear arms for self-defense. If a firearm is removed under a protection order, the respondent would temporarily not be able to exercise this right, but the Supreme Court has confirmed that some people may be "disqualified" from possessing firearms.
- The Fourth Amendment: Two states introducing preemptive bills

pointed to the Fourth Amendment, which protects against unreasonable searches and seizures and requires probable cause to issue a warrant. All laws required probable cause (or higher) for a warrant; one law allowed for warrantless [firearm](#) removal, which the Supreme Court considers reasonable when a person is armed and presently dangerous.

- The Fifth Amendment: State legislators argued that red flag laws violate the right to due process, which requires procedures that provide notice, an opportunity to be heard, and appeal. However, all existing red flag laws provide these due process protections, including requiring strict or heightened burden of proof standards for final orders removing firearms.

The researchers found that red flag laws are similar to other civil laws that protect people from harming themselves or others, including laws for involuntary commitment and removing children from unfit parents. Red flag laws provide the same or even more procedural due process than do some of these laws that confine or remove individuals—as opposed to their property—against their will.

"Without judicial determination that red flag [gun laws](#) are unconstitutional, it is premature for states to block the ability of [local governments](#) to temporarily remove firearms from people in crisis situations," said Gilberto Ochoa, a research intern at NYU School of Global Public Health and the study's coauthor.

"States have drafted red [flag](#) laws in an effort to allow authorities to restrict or remove firearms from people at risk to themselves or others, while simultaneously protecting their constitutional right. As such, there are strong arguments in favor of enacting these laws, rather than preempting them," Pomeranz concluded.

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