

“A MAP IS NOT THE TERRITORY”: THE THEORY AND FUTURE OF
SENSITIVE PLACES DOCTRINE

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ABSTRACT

In the wake of the Supreme Court’s transformative decision in New York State Rifle & Pistol Association v. Bruen, courts are now confronted with new questions about where guns can be restricted and what justifications support those regulations. This Essay urges that the development of the doctrine governing location-based prohibitions should focus as much on the why as the where. Instead of simply isolating each location and considering the historical pedigree of gun restrictions in that place, judges should

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evaluate the reasons behind the sensitive places doctrine itself. We aim to recenter these first order questions to avoid haphazard doctrinal development that threatens to leave Second Amendment law incoherent and unpredictable.

Judges developing the doctrine will need to avoid several pitfalls. Among them: historical analogies pitched too narrowly, neglect of sensitive location mobility, and excessive focus on locational features rather than regulatory justifications. Whatever values ultimately underpin the doctrine, they should direct the shape of location-based challenges. Whether the doctrine is grounded in safeguarding the exercise of other constitutional rights, protecting the vulnerability of specific populations, recognizing the inhibited judgment or discretion of those gathered, or other values altogether, this Essay shows why justificatory and constitutional foundations must be set before the doctrinal structure is completely built.

INTRODUCTION

Where can guns be prohibited, and why?

In *District of Columbia v. Heller*, the Supreme Court made it clear that some locations can ban guns, without much in the way of explanation: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in *sensitive places*

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such as schools and government buildings.”¹ In so doing, the Court gave a name—“sensitive places”—to the idea that certain locations (as do certain people, arms, and activities²) fall outside the boundaries of the Second Amendment. Invoking this passage in *Heller*, lower courts upheld firearm prohibitions on guns in a variety of places that fell within (or adjacent to) the “schools and government buildings” that *Heller* offered as examples: university events and buildings,³ national parks,⁴ churches,⁵ post office parking lots,⁶ certain government-owned recreational areas,⁷ and the U.S.

¹ 554 U.S. 570, 629 (2008) (emphasis added).

² *Id.* at 635–36 (also referring to individuals with felony convictions, individuals with mental illnesses, dangerous and unusual weapons, and concealed carrying as falling outside the scope of the Second Amendment).

³ *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011).

⁴ *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011).

⁵ *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

⁶ *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015).

⁷ *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d 1348, 1366 (N.D. Ga. 2016) (considering sensitive Army Corps of Engineers’ reservoir areas, including recreational areas and facilities).

Capitol grounds.⁸

But to call this concept a “sensitive places doctrine” is perhaps a bit generous, as the handful of lower court cases represent more or less the sum total of cases applying *Heller* to locational restrictions. This is not to say the Second Amendment is insensitive to place—in fact, variation in firearm regulations based on geographic distinctions is a signature feature of the history of American firearms law.⁹ But neither law nor theory have yet

⁸ United States v. Class, 930 F.3d 460, 465 (D.C. Cir. 2019).

⁹ See Joseph Blocher, Jacob D. Charles & Darrell A. H. Miller, *The Geography of A Constitutional Right: Gun Rights Outside the Home*, 83 LAW & CONTEMP. PROBS. i, i, iii (2020) (“Perhaps more so than most constitutional rights, Second Amendment questions are space-sensitive—the interests underlying the right, and the governmental interests in regulation, can both vary depending on location”); see also Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (arguing that the Second Amendment can and should accommodate the long-standing difference between gun regulation in urban and rural areas); Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459 (2019) (arguing that locations may be sensitive because they are the site of other constitutionally protected activity guaranteed by other constitutional rights);

refined sensitive place doctrine to match the geographically granular features of, say, the First Amendment’s public forum doctrine.

Public forum doctrine provides a cautionary tale. In the case of public forum doctrine, the constitutional categorization of particular places—sidewalks and the like—as public fora came decades *before* the principled justifications for those categorical choices.¹⁰ One result was doctrinal incoherence.¹¹ The project of this short Essay is to suggest that the Second

Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121 (2015) (emphasizing differences between antebellum gun regulation in Southern states and others following a more restrictive “Massachusetts model”).

¹⁰ Although the literature is voluminous, a standard citation—to which our title is a partial homage—is Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

¹¹ *Id.* at 1715 (“The Court has yet to articulate a defensible constitutional justification for . . . dividing government property into distinct categories, much less for the . . . formal rules governing the regulation of speech within these categories. These rules have proliferated to such an extent as to render

Amendment's "sensitive places" doctrine can avoid a similar fate by focusing more on the justifications for locational restrictions than on the superficial features of specific locations themselves.

I. BRUEN, ANALOGIES, AND THE URGENCY OF AVOIDING REDUCTIONISM

New York State Rifle & Pistol Association v. Bruen has added urgency to this project. In a 6-3 decision, the Court struck down the State of New York's requirement that a concealed carry applicant show "proper cause" to obtain a license.¹² More significantly, the Court also mandated an entirely new

the doctrine virtually impermeable to common sense."). *See also* Daniel A. Farber & Daniel E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234 (1984) ("Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases."); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (arguing that public forum analysis is plagued by a "myopic focus on formalistic labels" that "serves only to distract attention from the real stakes").

¹² *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

methodology for assessing Second Amendment questions.¹³

Under this test, if the Second Amendment’s “plain text” covers the conduct at issue, the government has to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”¹⁴ *Bruen* says that lower courts should assess both the burden and the justification for historical laws to determine whether modern ones are similar enough to meet constitutional muster.¹⁵ The Court used the sensitive places doctrine as an example: After identifying several historical place-based restrictions, it underscored that “courts can use analogies to those

¹³ *Id.* at 2129-2130. The Court rejected the two-part framework that had previously been broadly adopted throughout the court of appeals. That framework asked first whether the challenged conduct fell within the scope of the Second Amendment and then, if it did, applied either strict or intermediate scrutiny to decide the law’s constitutionality. See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 10-15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335545 (describing the genesis, adoption, and replacement of this framework).

¹⁴ *Bruen*, 142 S.Ct. at 2130.

¹⁵ *Id.* at 2133.

historical regulations of ‘sensitive places’ to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.”¹⁶

But the injunction to “use analogies” to uphold “*new* and analogous” place-based restrictions offers little guidance. Between a historical regulation and a modern one lie countless margins of similarity and difference at multiple levels of generality. For example, modern federal regulations allow the Secret Service to prohibit an unauthorized person from carrying a firearm into the presence of a current or former President.¹⁷ As a possible analogue, the government might point out that King Edward III’s Statute of Northampton prohibited carrying weapons into the presence of the King’s justices and his ministers.¹⁸ But what are the relevant justifications for this ancient regulation (assuming such a justification can be reliably unearthed) and at what level of generality do they apply? Is it to protect the monarchy?¹⁹

¹⁶ *Id.*

¹⁷ 18 U.S.C. §§ 1752, 3056.

¹⁸ Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.).

¹⁹ Curiously, the statute of Northampton does not specifically forbid arms in the presence of the King himself, perhaps undermining this rationale. *See id.* Why this omission is unclear; it could be that the statute assumed such

The head of state? The state’s monopoly on legitimate force?²⁰ How would we evaluate the burden on armed individuals? *Bruen* provides no guidance about how to evaluate these analogies or the theory behind them.

This is unfortunate, as *Bruen* is almost certain to lead to more guns in more places, in ways that put pressure on those seeking to enact and defend location-based gun restrictions. Practically, many states with good-cause permitting requirements rendered unconstitutional by *Bruen* might opt to impose specific location-based restrictions as a second-best option. Indeed, almost immediately in the wake of *Bruen*, New York proposed prohibitions on guns in roughly twenty categories of “sensitive location[s].”²¹ New Jersey

behavior to be unlawful, or that such behavior was so taboo it did not require specific prohibition.

²⁰ See Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & CONTEMP. PROBS. 11, 26 (2017) (“Merely traveling with arms impugned the majesty of the crown”); see also *Sir John Knight’s Case* (1686) 87 Eng. Rep. 75, 76 (KB) (public carry to the terror of the people is “likewise a great offence at the common law, as if the King were not able or willing to protect his subjects”).

²¹ N.Y. PENAL LAW § 265.01-e (McKinney 2022).

followed suit a few months later, and California was not far behind.²² The New York law lists a wide range of locations, including parks, sidewalks, restaurants serving alcohol, daycares, hospitals, Times Square, and more. At oral argument in *Bruen*, the Justices previewed exactly the questions that these restrictions raise. What about Times Square on New Year’s Eve?²³

²² Tennyson Donyéa, *New Jersey Gov. Murphy Signs Law Upping Requirements for Concealed Carry*, WHYY (Dec. 22, 2022), <https://whyy.org/articles/new-jersey-concealed-carry-restrictions-law-murphy/>; Hannah Wiley, *California Democrats Try Again To Rewrite Concealed-Carry Gun Law*, L.A. TIMES (Feb. 1, 2023), <https://www.latimes.com/california/story/2023-02-01/california-concealed-carry-gun-law-supreme-court-ruling> (describing California proposals that would be similar).

²³ Transcript of Oral Argument at 31, *N.Y. State Rifle & Pistol. Ass’n v. Bruen* (2021) (No. 20-843) (question of Barrett, J.) (“[C]an’t we just say Times Square on New Year’s Eve is a sensitive place?”).

What about Giants Stadium?²⁴ What about large protests or assemblies?²⁵

For the legislators, judges, and lawyers navigating these questions, pitfalls abound. Here, we focus on one in particular: The danger of allowing the concreteness and specificity of these places to overwhelm the development of constitutional principles. To borrow a phrase from a different context, “the map is not the territory.”²⁶ This is not to deny the potential value of building constitutional doctrine inductively—from particulars, rather than grand theories. But we fear that the very physicality of locational gun restrictions raises a heightened risk—which *Bruen*’s historical-analogical

²⁴ *Id.* at 64 (question of Roberts, C.J.) (“I can understand, for example, a regulation that says you can’t carry a gun into, you know, Giants Stadium, just because a lot of things are going on there and it may not be safe to have -- for people to have guns.”).

²⁵ *Id.* at 30 (Kagan, J.) (“Suppose the state says no protest or event that has more than 10,000 people.”)

²⁶ ALFRED KORZYBSKI, *SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS* 750 (4th ed. 1958).

method further amplifies²⁷—that results will be mistaken for reasons.²⁸

Already, we have seen courts falling into this kind of error. In the first major sensitive places case litigated after *Bruen*,²⁹ a district court judge—in

²⁷ See *infra* note 76 and accompanying text. For a more thorough discussion of *Bruen*'s analogical approach, see Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (arguing that *Bruen*'s test must be applied by articulating principles of relevant similarity, using levels of generality to avoid the problem of anachronism, and with attention to the judiciary's institutional limits).

²⁸ Some lower courts are now focusing on the locational type of regulation in assessing sensitive-place restrictions, cementing the overly narrow importance of the place itself. *Antonyuk v. Hochul*, 22-CV-0986, 2022 WL 16744700 (N.D.N.Y.), at *60 (striking down a bar on guns in locations providing behavioral health or chemical dependence care and services because “the State Defendants do not cite (and the Court has been unable to yet locate) any laws from those time periods prohibiting firearms in places such as ‘almshouses,’ hospitals, or physician’s offices”).

²⁹ In a statement respecting the Supreme Court's denial of an application to lift the Second Circuit's stay of the ruling, Justice Alito, joined by Justice

three separate opinions³⁰—struck down many of New York’s locational restrictions on the basis that they lacked historical analogues. In the first two opinions, the court struck down the state’s prohibition on guns in mass transit;³¹ in the third, it suggested that a ban on guns on New York City buses would be constitutional “during the period before school.”³² Though it eventually relented on the point,³³ the court twice held that guns could be prohibited in schools but *not* at summer camps.³⁴ The court found that there

Thomas, underscored that the case presented “novel and serious questions” for Second Amendment law. *Antonyuk v. Nigrelli*, 598 U.S. __ (2023) (Alito, J., statement respecting the denial of the application to vacate stay).

³⁰ See *Antonyuk v. Bruen*, 1:22-CV-0734, 2022 WL 3999791 (N.D.N.Y. Aug. 31, 2022) (hereinafter *Antonyuk I*); *Antonyuk v. Hochul*, 1:22-CV-0986 (GTS/CFH), 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022) (hereinafter *Antonyuk II*); *Antonyuk v. Hochul*, 1:22-CV-0986 (GTS/CFH), 2022 WL 16744700, at *2–3 (N.D.N.Y. Nov. 7, 2022) (hereinafter *Antonyuk III*).

³¹ *Antonyuk I*, 2022 WL 3999791, at *34; *Antonyuk II*, 2022 WL 5239895, at *17.

³² *Antonyuk III*, 2022 WL 16744700, at *71 n.114.

³³ *Antonyuk III*, 2022 WL 16744700, at *22 n.35.

³⁴ *Antonyuk I*, 2022 WL 3999791, at *34; *Antonyuk II*, 2022 WL 5239895,

was no historical tradition with regard to the latter—nor with regard to other places like zoos (despite finding there was such a tradition with respect to parks).³⁵

This focus on the particular rather than the principle is at the heart of Justice Oliver Wendell Holmes’s old saw about the Vermont justice of the peace who adjudicated a civil dispute about a broken churn. Having looked through all the laws and “find[ing] nothing about churns . . . [he] gave judgment for the defendant.”³⁶ Sensitive places doctrine shouldn’t depend solely on whether something is a school or a government building, any more than tort law should turn solely on whether something is a churn. This short Essay does not attempt to catalogue places as sensitive—risking the “law of the churn”—but rather to recenter first order questions about what makes a place sensitive; in other words, this Essay begins to establish what a sensitive places doctrine is *for*.

at *17.

³⁵ *Antonyuk III*, 2022 WL 16744700, at *67 n.114.

³⁶ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

I. DE-CENTERING “PLACES”; FOCUSING ON “SENSITIVE”

The hazard that sensitive places doctrine must avoid is the “radical reductionism”³⁷ whereby every category of sensitive place becomes “a law unto itself.”³⁸ If the coming rush of location-based Second Amendment litigation moves too quickly to identify discrete categories of places as subject to gun prohibition, without sufficient theoretical development to accompany those rulings, it will fall into the trap of public forum doctrine, which “developed with extraordinary speed” but “in a manner heedless of its constitutional foundations.”³⁹

A similar cautionary tale can be told based on the development of other

³⁷ Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1071 (1990).

³⁸ *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (stating that “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator” are each “a law unto itself” with respect to the First Amendment).

³⁹ *Post*, *supra* note 10, at 1715. *See supra* note 11 and sources cited therein (noting divergence between public forum doctrine’s focus on labels and the underlying values of the First Amendment).

areas of Second Amendment law, and indeed part of our ambition in this essay is to learn from past dynamics. The same passage in *Heller* that blessed sensitive place restrictions as constitutional did the same for laws prohibiting dangerous and unusual weapons, and weapon possession by those convicted of felonies or found to be mentally ill.⁴⁰ But the Court declined to provide *reasons* for these exceptions.⁴¹ Even though some categories of disqualification—felony conviction, for example—seem to represent categories that, unlike “sensitive places,” come with a more-or-less readymade legal definition, the Court still failed to offer justifications for the category. The federal law making felony conviction a disqualification for firearm possession has generated hundreds of Second Amendment challenges, nearly all of which been rejected,⁴² usually with little more than

⁴⁰ *Heller*, 554 U.S. at 626–27.

⁴¹ *Id.* (“[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

⁴² See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1447 n.68 (2018); *United States v. Belin*, No. 21-CR-10040, 2023 WL 2354900, at *2 (D. Mass. Mar. 2, 2023) (stating that the federal

a citation to *Heller*. Beneath that superficial uniformity in case outcomes, however, lies a simmering debate among judges about how to understand and justify the exception. Is it about virtuousness? Dangerousness? Something else?⁴³ These reasons point in very different directions for case outcomes.⁴⁴

prohibition on firearm possession for those with a felony conviction is constitutional, even after *Bruen*).

⁴³ See Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 L. & CONTEMP. PROBS. 53, 58–62 (2020) (exploring the emerging debate).

⁴⁴ See, e.g., *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that individuals with nonviolent felony convictions cannot constitutionally be prohibited from possessing firearms). Two post-*Bruen* trial judges have, for example, struck down felon indictment prohibitions as insufficiently traditional. *United States v. Hicks*, W:21-CR-00060-ADA, 2023 WL 164170 (W.D. Tex. Jan. 9, 2023); *United States v. Quiroz*, 4:22-cr-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022). A similar point holds for “what” questions. The Supreme Court has appeared to adopt a “common use” test that presumptively protects weapons in common use by law-abiding citizens for lawful purposes. *Bevis v. City of Naperville, Illinois*, No. 22 C 4775, 2023 WL 2077392, at *9 n.7 (N.D. Ill.

How best, then, to secure the foundations of a doctrine, even as the doctrine develops?

A. Why Before Where

It is commonplace to divide gun regulations into categories based on who, what, where, and how they apply.⁴⁵ In this taxonomy, sensitive places restrictions are the archetypal “where” regulation—they are drafted, and constitutionally challenged, based on their locational scope. And yet, the *reasons* for these regulations—and for their insulation from Second Amendment challenge—cannot be understood purely locationally.

The distinction is well illustrated by *Class v. United States*, perhaps the most prominent sensitive places analysis yet undertaken by a federal appeals court.⁴⁶ In *Class*, issued before *Bruen*, the D.C. Circuit was faced with a

Feb. 17, 2023) (observing that under Supreme Court precedent “bans on weapons not in common use fall outside the Second Amendmen’s text only protecting certain ‘arms’”).

⁴⁵ See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, U.C.L.A. L. REV. 1443, 1446–47, 1461, 1473 (2009).

⁴⁶ *United States v. Class*, 930 F.3d 460, 462 (D.C. Cir. 2019), *abrogated*

constitutional challenge to the federal law prohibiting guns on the grounds of the U.S. Capitol—and, in particular, whether that law constitutionally applied to a person who parked, with two pistols and a rifle in his car, “approximately 1,000 feet from the entrance to the Capitol itself.”⁴⁷ The panel had little trouble concluding that “there are few, if any, government buildings more ‘sensitive’ than the ‘national legislature at the very seat of its operations.’”⁴⁸

But why? What makes those places sensitive? In response to Class’s argument that sensitive place prohibitions should be limited to those places where the government has taken special security precautions—as it does *inside* the Capitol—the court explained:

For this inquiry, we do not look to the “level of threat” posed in a sensitive place. Many “schools” and “government buildings”—the paradigmatic “sensitive places” identified in *Heller I*—are open to the public, without any form of special security or screening. In an unsecured government building like a post office or school, the risk of crime may be no different than in any other publicly accessible

by *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

⁴⁷ *Id.*

⁴⁸ *Id.* at 463 (quoting *Jeannette Rankin Brigade v. Chief of the Capitol Police*, 421 F.2d 1090, 1093 n.3 (D.C. Cir. 1969)).

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building, yet the *Heller I* opinion leaves intact bans on firearm possession in those places.⁴⁹

Instead, whether a place is sensitive depends on “the people found there” or the “activities that take place there.”⁵⁰ The court went on to emphasize that the Capitol restrictions were supported both by a heightened need for safety and by the government’s special role as the equivalent of a private property owner exercising the right to exclude, rather than attempting to govern outright.⁵¹

The result in *Class* strikes us as quite correct. More interesting for present

⁴⁹ *Id.* at 465.

⁵⁰ *Id.* (quoting *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011), *aff’d*, 687 F.3d 1244 (11th Cir. 2012)).

⁵¹ *Id.* at 464. This is roughly the same distinction that Post finds at the foundation of public forum doctrine. Post, *supra* note 10, at 1717 (“public and nonpublic forums should not be distinguished because of the character of the government property at issue, but rather because of the nature of the government authority in question,” with “managerial” authority permitting regulations “necessary to achieve instrumental objectives” and “governance” authority to which the “ordinary and generally applicable principles of first amendment adjudication” apply).

purposes are the many routes that one might take to justify it—some but not all of which the court specifically discussed. It’s the *ratio decendi* of a case that binds, and for that reason alone attention must be paid to the justifications for upholding or striking down the sensitive place designation. This is especially true in this and other sensitive places cases, where the applicable *ratio* are only beginning to take shape. If law development and law application are among the primary functions of courts, it is the former that courts need to focus on now. In other words, the upshot of court decisions should not just be a list of places ticked off as inside or outside the sensitive-places safe harbor. It should be the articulation of reasons *why* those places are in or out.

Given the moniker *Heller* coined, judicial and scholarly discussion of sensitive places has tended to focus on categories of *places*.⁵² Guns can be prohibited in one national park,⁵³ and so another national park, in a different environment, is plunked into the category of “national park” sensitive places.

⁵² See *Antonyuk III*, 2022 WL 16744700, at *2–3 (listing and separately analyzing each distinct place for a similar locational analogue in history).

⁵³ *United States v. Masciandro*, 638 F.3d 458, 460 (4th Cir. 2011) (involving gun possession at Daingerfield Island, a small park just off the George Washington Memorial Parkway in Alexandria, Virginia).

That’s fine on the margin of treating all national parks similarly, but fails in supplying a way to understand why a government can prohibit arms in a national park, but not in a city of comparable size. The point of locational gun restrictions is not to protect places as such, especially at the level of specificity at which litigation inevitably occurs. It would be misreading the Tenth Circuit’s decision in *Bonidy v. U.S. Postal Service*, for example, to say that there is an important government interest in protecting rural post office parking lots in particular.⁵⁴

Bruen’s requirement to search for historical analogues makes it even more likely that granularity will replace rationality in reviewing place-based challenges. But, it would make no sense for a sensitive places test to ask whether there’s a history or tradition of restricting firearms in Times Square—or, for that matter, at bars.⁵⁵ At oral argument in *Bruen*, Chief Justice Roberts asked, “Can they say you cannot carry your gun at any place where alcohol is served?”⁵⁶ Paul Clement, petitioners’ counsel, responded: “[P]robably the right way to look at those cases would be [to] look at them

⁵⁴ *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015).

⁵⁵ *See supra* notes 29-35 and accompanying text.

⁵⁶ Transcript of Oral Argument at 25, *N.Y. State Rifle & Pistol. Ass’n v. Bruen* (2021) (No. 20-843) (question of Roberts, C.J.).

case by case”⁵⁷ Case by case development of law in our common law system is of course entirely understandable and inevitable. But if “case by case” means that the government must show a historical tradition *specifically* prohibiting guns in places serving alcohol, it would distort the law’s development and create a body of law as convoluted as public forum doctrine.

To put it another way, it is important not to confuse the *outputs* of sensitive places analysis—the particular locations where gun prohibitions are or are not prohibited—with the analysis itself. The permissibility of gun prohibitions in post offices, county fairs, and the U.S. Capitol are case outcomes, and binding as such, but they are only points joined by a broader, and yet-unarticulated set of justifications. The map is not the territory.

B. Developing a Principled, Place-Focused Doctrine

Thus far we have emphasized the importance of “constitutional foundations” when constructing sensitive places doctrine.⁵⁸ But it would be a poor structure that had *only* foundations, and a poor doctrine that had *only*

⁵⁷ *Id.*

⁵⁸ Post, *supra* note 10, at 1715 (coining this term to examine public forum doctrine).

justifications and no rules. Ultimately, the reasoning must connect to outcomes—the words to things⁵⁹—if it is to provide guidance to judges, litigants, and legislatures.

Indeed, a legal regime focused entirely on sensitivity and not places would almost certainly be constitutionally deficient—not simply as a matter of doctrinal design, but of due process. People subject to locational restrictions must have an adequate understanding of where they apply, and legal restriction must thus be drafted differently from their underlying constitutional justifications.⁶⁰ The *Class* court, for example, considered and rejected such a Due Process challenge to the place-based restrictions in and

⁵⁹ Cf. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899) (“We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”).

⁶⁰ For example, a statute barring firearm possession by “dangerous” individuals—without more—would surely be struck down, notwithstanding the fact that Justice Barrett proposed this very criterion as the underlying rationale for prohibited possessor laws. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

around the U.S. Capitol.⁶¹ But its analysis would have looked much different if the challenged restriction had prohibited guns in all places where there's a risk of “disrupt[ing] the operations of Congress”⁶² instead of “on the [Capitol] Grounds or in any of the Capitol Buildings.”⁶³ Prima facie, at least, there is a much stronger argument that the former violates the Due Process because it “fails to give ordinary people fair notice of the conduct it punishes” or is “so standardless that it invites arbitrary enforcement.”⁶⁴

An analogous but less rigorous requirement of specificity applies to the constitutional doctrine itself: It should, over time, broadly recognize certain categories of place as subject to gun prohibitions (or not).⁶⁵ Courts have to

⁶¹ *United States v. Class*, 930 F.3d 460, 466–70 (D.C. Cir. 2019), *abrogated by* *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

⁶² *Id.* at 464 (calling the parking lot in question “a potential stalking ground for anyone wishing to attack congressional staff and disrupt the operations of Congress”).

⁶³ 40 U.S.C. § 5104(e)(a)(i).

⁶⁴ *Johnson v. United States*, 576 U.S. 591, 595 (2015).

⁶⁵ *See* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 121 (defending the public

resolve controversies, after all, and in doing so they generate precedent, which over time can calcify into rules.⁶⁶ As the Court itself has noted, “categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction.”⁶⁷ Indeed, it has been argued that the

forum’s categorical approach to the degree that it “conserves judicial resources for those circumstances in which the risks of abuse and distortion are high”).

⁶⁶ Though common, this development carries risks of its own—namely, losing sight of what the rules are *for*. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652 (2005) (“In a striking number of cases the Court has forgotten the reasons behind the particular rules and has come to treat them as nothing more than statements of constitutional requirements. This mistaken equation of judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values; it also distorts the relationship the Court has to other governmental actors and to the American people.”).

⁶⁷ U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989). *See also* Antonin Scalia, *The Rule of Law as a Law*

public forum doctrine itself evolved in such a fashion.⁶⁸ Sensitive places doctrine, too, must find the right mix of rules and standards. And, to the degree that locational rule-ification becomes part of sensitive places doctrine, some caveats should be kept in mind.⁶⁹

First, there is no reason that locations must be *fixed*. Some locational rules in constitutional law are, for lack of a better phrase, definitional rather than geographical. For example, the Supreme Court has held that a suspect's presence in a high-crime area is relevant in determining whether an officer

of Rules, 56 U. CHI. L. REV. 1175, 1183 (1989) (same).

⁶⁸ See Kathleen M. Sullivan, *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 311 (1992) (“Each of these distinctions (public forum/nonpublic forum, public speech/private speech, extracurricular/curricular, and penalty/non-subsidy) has been precipitated into a rule from an implicit prior weighing of substantive values.”).

⁶⁹ Cf. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 808–09 (2005) (hypothesizing “that there are forces pushing standards towards rules that are stronger than the forces pushing rules towards standards”).

has reasonable suspicion to conduct a stop.⁷⁰ These areas are of course not geographically stable—they move along with crime rates (or, more accurately, along with officers’ assertions and intuitions about crime rates⁷¹). Notably, in keeping with the theme of our Essay, “the Court provided remarkably little guidance on how to interpret and implement the high-crime area standard in practice. Indeed, the opinion said nothing at all about what ‘high-crime area’ means, and the lower courts have made little progress filling the gap.”⁷²

Similar principles will almost certainly develop in the context of sensitive places. A public gymnasium might not be a sensitive place for most of the year, except for the one day a year it is used as a polling place.⁷³ A public

⁷⁰ *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

⁷¹ See Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345, 347 (2019).

⁷² *Id.*

⁷³ Cf. *Polling Places*, NAT’L CONF. STATE LEGISLATURES (Oct. 20, 2020) <https://www.ncsl.org/research/elections-and-campaigns/polling-places.aspx> (noting use of such facilities as polling places). The same of course goes for speech prohibitions against “electioneering,” which are broader and more widespread than gun prohibitions. Cf. *Electioneering*, NAT’L CONF. STATE

street might not be sensitive, except for when a President speaks or lives there, or a localized riot has broken out, or a natural disaster has struck. Such situations will inevitably require judges to return to first principles, not to make notes on a map or merely consult the list of locations prior cases upheld.

Second, it should be recognized that any location-specific doctrinal rules will inevitably be both over- and underinclusive. The examples above, like residential streets, are under-inclusive—places that might not always be sensitive, but can become so under certain conditions. The same might be said of over-inclusive rules, however. *Heller* specifically mentions the prohibition of firearms in “government buildings,” and courts have generally taken this as a categorical exception—roughly akin to the government’s power to control speech on its own property when acting as proprietor.⁷⁴ But it is easy to imagine situations in which gun prohibition, even on government property—indeed, even in a government *building*—would not align with the

LEGISLATURES (April 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx> (noting that every state has such restrictions, and enumerating characteristics).

⁷⁴ *United States v. Class*, 930 F.3d 460, 464–65 (D.C. Cir. 2019), *abrogated by* *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

reasons for recognizing sensitive places in the first place. A bathroom in a lightly trafficked area of a national park comes to mind, for example. In such cases, one can imagine “as-applied” challenges based on some kind of exigency or necessity—one that attempts to distinguish this particular place, under this particular set of circumstances, from the general class of places to which it arguably belongs.⁷⁵

Third, and finally, there is a serious danger that *Bruen*’s historical-analogical methodology will lead judges to pitch their analogical inquiries

⁷⁵ See *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1129 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (“[T]he government has not shown that successfully combating potential crime at . . . a run-of-the-mill post office parking lot in a Colorado ski town [] hinges on restricting the Second Amendment rights of lawfully licensed firearms carriers. . . . Thus, *as applied in this case*, the regulation restricts far more conduct than is necessary. . .”) (emphasis added); Brian C. Whitman, *In Defense of Self-Defense: Heller’s Second Amendment in Sensitive Places*, 81 *MISS. L.J.* 1987, 2009 (2012) (arguing that “each restriction must be considered on a case-by-case basis” and that if a person “is left without sufficient means to defend himself, and a sufficient means of security is not provided in that place” guns cannot be prohibited to that person in the location).

too narrowly, as might be true in Clement’s call for a “case by case” approach to sensitive places doctrine.⁷⁶ This strikes us as far too narrow—like asking whether there is a “historical tradition” of prohibiting gun possession by those who violate federal securities laws, instead of whether there is a historical tradition of prohibiting gun possession by those convicted of felonies. Indeed, the malleability of levels of generality is one of the central weaknesses of *Bruen*’s approach, and is especially heightened with regard to sensitive places, since the class of “natural” categories might or might not be useful in answering analogical questions. What is Times Square “like”? Given these challenges, let alone the difficulty of extracting answers from a limited historical record, *Bruen* amplifies these concerns about specificity. But even within its confines, judges can and should resist that reductionist urge, and we think the decision means it is all the more important to pitch questions more broadly and functionally.

CONCLUSION

Our focus here has been on the shape of sensitive places doctrine, not its

⁷⁶ *Cf.* Tribe & Dorf, *supra* note 37, at 1071 (warning of a “radical reductionism” when the level of generality is too specific).

specific content. We do not, in other words, attempt here to elaborate the particular values that do or could make a place “sensitive” for purposes of Second Amendment analysis. Some cases and scholars have focused on aspects of the government as proprietor, essentially looking past the place and looking more to the ownership of the place as a reason to designate someplace sensitive.⁷⁷ Others have concentrated on the risk of physical danger that comes with significant congestion or the risk of catastrophic injury or death that unregulated gun possession could inflict on passengers in a jet airplane, fans at Giants stadium, or partygoers in Times Square on New Year’s Eve.⁷⁸ Some have recognized that places where judgment or inhibitions may be reduced, such as bars, dispensaries, or healthcare facilities, or where children or other vulnerable individuals may congregate, such as in daycare centers or parks, may qualify as sensitive.⁷⁹ Still others have suggested that places become sensitive because they facilitate other kinds of constitutional values and rights, such as free expression, political

⁷⁷ *Class*, 930 F.3d at 464; Volokh, *supra* note 45, at 1473.

⁷⁸ *Id.* at 31 (comment of Barrett, J.); Adam B. Sopko, *Second Amendment Background Principles and Heller’s Sensitive Places*, 29 WM. & MARY BILL RTS. J. 161, 202 (2020).

⁷⁹ Volokh, *supra* note 45, at 1475.

participation, exercise of the franchise, or religious worship.⁸⁰

Space limitations prevent us from exploring fully each of these kinds of justifications, but we want to emphasize that to avoid the haphazard fashion in which public forum doctrine has developed, courts and litigators will have to begin paying more attention to the adjective in “sensitive places” and less on the noun. *Bruen* itself forces such a reckoning. Analogical reasoning, by its nature, requires some kind of “rule of relevance” that makes one thing relevantly similar to another.⁸¹ In offering reasons for why analogs to historical prohibitions on firearms in churches, or at polling places, or during elections, or at fairs and markets are or are not apt, the courts will have to figure out what features of these places are relevantly as opposed to trivially similar.

⁸⁰ Miller, *supra* note 9, at 466. *See also* Joseph Blocher & Reva B. Siegel, *The Second Amendment, Sensitive Places, and Self-Government*, N.Y.U. L. REV. (forthcoming 2022); David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 290 (2018).

⁸¹ Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 578–79 (1987) (“In some form or another, this type of rule of relevance inheres in any assertion of similarity.”).

The practical challenge of resolving sensitive places challenges is, as we have described it, an invitation to think more deeply about why we regulate guns at all. Even if it is a place-based challenge that poses the question, the answer may be critical to a broader range of gun laws. If guns can be barred in sensitive places because doing so protects other important constitutional values,⁸² then the same rationale might be used to support other kinds of prohibitions as well. For example, if firearms can be prohibited in polling places because of the need to protect both the fact and the perception that America resolves political disputes through democracy and the rule of law, that may, in turn, weigh on whether a particular weapon's utility for political violence is to be credited in deciding whether it's protected under the Second Amendment. Reasoning both for and from the particulars might help yield a richer theory of the Second Amendment, just as thinking hard about sidewalks has done for the First.

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⁸² *See supra* note 80 and sources cited therein.