

GUIDED BY HISTORY: PROTECTING THE PUBLIC SPHERE FROM WEAPONS THREATS UNDER *BRUEN*

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Since the Founding era, governments have banned guns in places where weapons threaten activities of public life. The Supreme Court reaffirmed this tradition of “sensitive places” regulation in District of Columbia v. Heller, and locational restrictions on weapons have become a central Second Amendment battleground in the aftermath of New York State Rifle & Pistol Association v. Bruen. Liberals have criticized Bruen for requiring public safety laws to mimic founding practice, while conservatives have criticized it for licensing regulatory change not within the original understanding. In this Essay we argue that Bruen’s analogical method looks to the past to guide change in weapons regulation, not to foreclose change. We illustrate the kinds of sensitive place regulations Bruen authorizes with examples spanning several centuries, and close by demonstrating—contrary to recent court decisions—that a 1994 federal law prohibiting gun possession by persons subject to a domestic violence restraining order is constitutional under Bruen.

Where some imagine the past as a land of all guns and no laws, this Article shows how weapons regulation of the past can guide public safety regulation of the present. Governments traditionally have protected activities against weapons threats in sites of governance and education: places where bonds of democratic community are formed and reproduced. We argue that Bruen’s historical-analogical method allows government to protect against weapons threats in new settings—including those of commerce and transportation—so long as these locational restrictions respect historical tradition both in terms of “why” and “how” they burden the right to keep and bear arms.

At the heart of this Article is a simple claim: That Bruen’s analogical method enables public safety laws to evolve in step with the gun-related harms they address. Bruen does not require the asymmetrical and selective approach to constitutional change practiced by some in its name. Just as Bruen extends the right of self-defense to weaponry of the twenty-first century, it also recognizes democracy’s competence to protect against weapons threats of the twenty-first century.

We apply these principles to demonstrate the constitutionality of the federal law prohibiting gun possession by people subject to a domestic violence restraining order, which the Supreme Court is currently considering in United States v. Rahimi.

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INTRODUCTION

Does the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*¹ prohibit legislators from enacting gun laws that differ from those at the time of the Second Amendment's ratification? Some conservative judges enforcing *Bruen* and some liberal critics protesting the decision reason as if *Bruen* mandated antiquarianism.² But *Bruen*'s analogical method breaks with originalist premises and authorizes regulatory change.³ In this Article we show that *Bruen*'s analogical method looks to the past to guide regulatory change rather than to prevent it, enabling government to protect the public against weapon threats of the twenty-first century. To illustrate, we apply the analogical method to locational restrictions that protect "sensitive places" of public gathering, a previously obscure area of Second Amendment law that has now become central to litigation.

In *District of Columbia v. Heller*,⁴ the Supreme Court noted that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding

¹ 142 S. Ct. 2111 (2022).

² For judicial decisions see *infra* notes 1646–56 and accompanying text. For examples of critics who condemn *Bruen* for mandating antiquarianism, see Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. (forthcoming Oct. 2023), <https://ssrn.com/abstract=4330457> [<https://perma.cc/HK68-JSXP>]; 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 7), <https://ssrn.com/abstract=4335545> [<https://perma.cc/HQ8J-UJLB>] ("The test the Court announced remains underspecified on key metrics . . . : what it means to identify the existence of tradition; whether the endurance of that tradition matters; how, if it all, the enforcement of the tradition changes the analysis; and what role the evolution of tradition plays in the inquiry.").

³ See Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 19), <https://ssrn.com/abstract=4366019> [<https://perma.cc/SN8G-MP4P>] ("Post-ratification practices have guided both major cases defining the rights to keep and bear arms under the Second Amendment.").

⁴ 554 U.S. 570, 626 (2008).

the carrying of firearms in sensitive places such as schools and government buildings”⁵ *Bruen* affirmed the constitutionality of such locational restrictions, while announcing a new historical test for evaluating modern gun laws, including those involving additional “sensitive places.”⁶ Applying that test, district courts have already struck down—for supposed lack of historical support—prohibitions on guns in places of worship,⁷ in libraries, museums, and bars,⁸ and in subways, domestic violence support centers, summer camps, and zoos.⁹

Why? Does *Bruen* condemn every gun regulation that deviates from past practice? *Bruen* explains that history is an anchor,¹⁰ yet cautions that Americans are not limited to copying the past. The Constitution is not a script for *Groundhog Day*.¹¹ Through its analogical method, *Bruen* sanctions gun regulations not within the understanding or practice of those who ratified or incorporated the Second Amendment. It extends constitutional protection to classes of weapons whose lethality was unfathomed by its framers,¹² as well as to shall-issue licensing regimes that did not exist at the time of the Second Amendment’s ratification.¹³ In short, the Court has explained that the Second

⁵ *Id.*

⁶ 142 S. Ct. at 2133–34.

⁷ *Hardaway v. Nigrelli*, No. 22-CV-771, 2022 WL 11669872, at *1 (W.D.N.Y. Oct. 20, 2022).

⁸ *Koons v. Reynolds*, No. CV 22-7464, 2023 WL 128882, at *13–14 (D.N.J. Jan. 9, 2023).

⁹ The challenge to New York’s post-*Bruen* law has generated a series of opinions striking down some restrictions and upholding others. *Antonyuk v. Bruen*, No. 22-CV-0734, 2022 WL 3999791, at *33–35, *37 (N.D.N.Y. Aug. 31, 2022) (dismissing claims regarding the Concealed Carry Improvement Act’s list of sensitive locations, 2022 N.Y. Sess. Laws ch. 371, § 4, for lack of subject-matter jurisdiction but concluding that statutory challenges would likely succeed on the merits); *Antonyuk v. Hochul*, No. 22-CV-0986, 2022 WL 5239895, at *24–25 (N.D.N.Y. Oct. 6, 2022) (temporarily restraining the application of the ban in most of the listed “sensitive places”); *Antonyuk v. Hochul*, No. 22-CV-0986, 2022 WL 16744700, at *2, *86 (N.D.N.Y. Nov. 7, 2022) (preliminary enjoinder from enforcing eight of the “sensitive locations” provisions).

¹⁰ *See infra* Part II.

¹¹ *Groundhog Day* is a movie in which a television weatherman becomes trapped in a time loop forcing him to relive February second repeatedly. *Synopsis of Groundhog Day*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0107048/synopsis> [<https://perma.cc/9FYN-JS4J>] (last visited May 15, 2023).

¹² *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (“[E]ven though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.”). *Accord* *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment” but concluding that “[w]e do not interpret constitutional rights that way Just as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

¹³ *See Bruen*, 142 S. Ct. at 2138 n.9 (“[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes.”); *id.* at 2162 (Kavanaugh, J., concurring) (underscoring that “shall-issue licensing regimes are constitutionally permissible”); *see also* Lawrence Rosenthal, *Nonoriginalist Laws in an Originalist World: Litigating Original Meaning from Heller To Bruen*, 73 AM. U. L. REV. at 17-19 (forthcoming 2023),

Amendment protects forms of weaponry and forms of community, that did not exist at the time of its ratification.¹⁴ Judges need not find “historical twin[s].”¹⁵ We show how *Bruen*’s analogical method can extend the longstanding tradition of restricting weapons in government buildings and schools to other places of public gathering that play an important role in maintaining and sustaining democratic community.

Bruen’s historical-analogical method asks whether modern locational restrictions are “relevantly similar” to historical forebears.¹⁶ As we argue in Part II, to identify “new and analogous sensitive places,”¹⁷ *Bruen* requires the analogizer to demonstrate that these places are similar to antecedents with regard to (1) *why* the government has regulated weapons in the past and (2) *how* government has burdened the right to bear arms in self-defense in those past cases.

Under the analogical method, might any of the sensitive-places restrictions thus far invalidated be relevantly similar to those enumerated in *Heller* and *Bruen*? The method requires understanding *why* governments traditionally imposed locational restrictions at the sites the Court has specifically approved as sensitive: “schools and government buildings” in *Heller*¹⁸ and “legislative assemblies, polling places, and courthouses” in *Bruen*.¹⁹ The principle that connects these places cannot be limited to formal actions of governance like voting and lawmaking, given that Justice Scalia’s opinion in *Heller* specifically includes “schools” as well.²⁰ Rather, we argue, excluding weapons from these places of public gathering protects a public sphere for democratic dialogue, democratic governance, and the reproduction of *democratic community* in which people can relate freely without intimidation or coercion. In prior work we have demonstrated that *Heller* recognizes government’s common law prerogative to “protect valued civic activities and the ability of all citizens to live free of terror and intimidation.”²¹ The “sensitive places” laws vindicate these very concerns as

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425067 (May 1, 2023); Adam M. Samaha, *Is Bruen Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming 2023) (noting the apparent inconsistency between *Bruen*’s historical method and its approval of shall-issue licensing).

¹⁴ See *infra* Part III.

¹⁵ *Bruen*, 142 S. Ct. at 2133.

¹⁶ *Id.* at 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)); see also Sunstein, *supra*, at 745 (“The major challenge facing analogical reasoners is to decide when differences are relevant.”).

¹⁷ *Bruen*, 142 S. Ct. at 2133–34 (emphasis omitted).

¹⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹⁹ *Bruen*, 142 S. Ct. at 2133 (citing these locations as examples of the few historical “sensitive places”). In *Bruen* the Court reiterated that schools and government buildings were sensitive places. *Id.*

²⁰ *Heller*, 554 U.S. at 626.

²¹ Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account*

they protect not only individual lives but the public sphere on which a democracy depends—domains of public gathering that extend beyond legislative assemblies, polling places, and courthouses. For example, we show that there are historical antecedents for using locational restrictions to protect commerce and transportation, which are essential to creating and sustaining democratic community.²²

In sum, the Article builds on our prior work to show how sensitive-places laws have long protected democratic community; it provides evidence of that tradition across time and place; and it illustrates how, under *Bruen*, government can analogize from these historical antecedents to enact locational restrictions that protect democratic community against weapons threats in new circumstances. The Article demonstrates—contrary to those who invoke constitutional memories of the nation as a land of unconstrained gun rights²³—that we have always been a nation of gun rights and gun regulation, even if experience at the time of the Constitution’s founding and the Fourteenth Amendment’s ratification differed in fundamental particulars from our own day.²⁴

As importantly, the Article shows that *Bruen*’s analogical method provides for even-handed rather than selective and asymmetric updating. The *Bruen* decision recognizes change in weapons employed in self-defense,²⁵ and, through its analogical method, allows gun regulation to evolve on terms that are consistent with tradition—with the “why” and “how” of historical antecedents.²⁶ In short, *Bruen* does not require gun

of *Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 176 (2021).

²² See *infra* Section III.B.

²³ See e.g., Randy E. Barnett & Nelson Lund, *Implementing Bruen*, LAW & LIBERTY (Feb. 6, 2023), <https://lawliberty.org/implementing-bruen> [<https://perma.cc/8LSS-NXNR>] (arguing that *Bruen* itself “engag[ed] in result-oriented manipulation of history[] . . . when it reaffirmed *Heller*’s approval of bans on guns in ‘sensitive places’” because “there was no tradition of such bans in America during the Founding Era”); David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 289 (2018) (“It is difficult to create a rationale for extending the ‘sensitive places’ doctrine to places that are not schools or government buildings. . . . [T]here are few ‘longstanding’ restrictions on other locations.”).

²⁴ See also Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1134 (2023) (“Originalist judges ventriloquize historical sources.”).

²⁵ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022). The Court speaks in parallel terms: “Much like we use history to determine which modern ‘arms’ are protected by the Second Amendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding.” *Id.*

²⁶ *Id.* at 2133 (explaining that gun regulations must be consistent with the balancing inquiry struck by the founding generation, and “*Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense”). *Bruen*’s analogical method thus authorizes change in regulation. We contrast this account with another reading of *Bruen* that diverts attention from its concern with analogical reasoning in an effort to characterize the decision as conforming to a particular form of originalist method. See *infra* notes

regulation to match practices in the distant past, as judges and scholars often claim.

A case the Supreme Court has accepted for review illustrates how judges weaponize *Bruen* to invalidate laws that are consistent with the nation's traditions of weapons regulation. In *United States v. Rahimi*, the Fifth Circuit applied *Bruen*'s analogical method to strike down the federal law prohibiting those subject to a domestic violence restraining order from possessing a gun, declaring the law an "outlier[] that our ancestors would never have accepted."²⁷ As we demonstrate, this conclusion is compelled neither by the Constitution nor the Court's decision in *Bruen*, for at least two reasons: First, there *are* historical analogues for the modern domestic violence law—as we show, guns and gun rights have always been regulated to prevent both violence and terror. Second, no principled approach to originalism would license a court to engage in *selective* updating through its analogical reasoning, for example by expanding the class of modern "Arms" while limiting legislatures' efforts to expand the class of persons who are protected from gun harms.

The Article's structure is straightforward. Part I explains how *Bruen* has increased the practical importance of location-based restrictions and describes the Court's new historical-analogical approach to evaluating their constitutionality. Part II explores the two primary principles of similarity identified by the Court—the "why" and "how" of historical restrictions—and shows that the historical record of place-based restrictions supports broad regulatory authority to protect not just individuals' lives but democratic community itself. Finally, in Part III, we employ *Bruen*'s analogical method to show that sensitive-places regulation is not limited to sites of governance and education but could extend to other places where those bonds are formed and strengthened, such as sites of commerce and transportation. Just as *Bruen* extends the right of self-defense to weaponry of the twenty-first century, *Bruen* recognizes democracy's competence to protect places of public gathering against weapons threats of the twenty-first century.

I

BRUEN'S IMPACT ON SENSITIVE PLACES

In *Bruen*, the Court struck down a New York law requiring that individuals seeking concealed-carry permits for handguns demonstrate that they have "proper cause."²⁸ In doing so, the Court called into question similar laws in other states that together governed about a quarter of the

103-119 and accompanying text.

²⁷ *United States v. Rahimi*, 61 F.4th 443, 454 (2023) (quoting *Bruen*, 142 S. Ct. at 2132).

²⁸ *Bruen*, 142 S. Ct. at 2122, 2156.

country's population.²⁹ But the Court also emphasized that states can utilize other contemporary forms of gun regulation, including “shall-issue” licensing laws that rely on more objective criteria.³⁰

By striking down good-cause permit requirements, *Bruen* increased the relevance of locational regulations: rules that restrict *where* guns can be carried. In a world where the class of concealed carriers has expanded beyond those who have shown “good cause,”³¹ some states might conclude that the risks of allowing guns in certain public places—bars, for example—are correspondingly higher. A similar dynamic unfolded after *Heller* struck down Washington, D.C.'s municipal handgun ban, as the District responded in part by enacting a variety of locational restrictions, including a prohibition against firearms on public transportation (which is the subject of a post-*Bruen* Second Amendment challenge).³²

Unsurprisingly, then, the regulatory response to *Bruen*—and ensuing Second Amendment litigation³³—has largely focused on enumerating locations where guns are forbidden. Soon after *Bruen*, New York amended its laws to remove the good cause requirement, provide new application requirements, and list additional gun-free zones.³⁴ The latter now include not only polling places, courts, and schools, but also businesses serving alcohol, museums, places of public transportation, libraries, health care facilities, and Times Square.³⁵ New Jersey followed suit a few months later, significantly expanding its own list of gun-free locations.³⁶

How should courts evaluate the constitutionality of these restrictions? As *Bruen* recognized, after *Heller* “the Courts of Appeals . . . coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.”³⁷ In fact, that framework was adopted by every federal court of appeals to consider the question,³⁸ and under it, “historical meaning enjoy[ed] a privileged

²⁹ Adam Liptak, *Supreme Court Strikes Down New York Law Limiting Guns in Public*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/us/supreme-court-ny-open-carry-gun-law.html> [https://perma.cc/R7QM-F3BB].

³⁰ See *supra* note 13 and sources cited therein.

³¹ *Bruen*, 142 S. Ct. at 2125 n.2 (listing statutory language of other states' proper cause laws).

³² Paul Duggan, *Gun Owners Sue D.C., Demanding to Carry Firearms on Metro*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/dc-md-va/2022/06/30/lawsuit-guns-dc-metro-buses> [https://perma.cc/2LBN-MSHT].

³³ See *supra* notes 7–9 and sources cited therein.

³⁴ Concealed Carry Improvement Act, ch. 371, 2022 N.Y. Sess. Laws 1447 (McKinney).

³⁵ *Id.*

³⁶ 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> [https://perma.cc/DZS5-R6JY].

³⁷ N.Y. State Rifle & Pistol Ass'n v. *Bruen*, 142 S. Ct. 2111, 2125 (2022).

³⁸ See, e.g., *Worman v. Healey*, 922 F.3d 26, 33 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 127 (2d Cir. 2020), *cert. denied*,

interpretive role.”³⁹ Existing sensitive-places doctrine evolved under this two-part framework.

But *Bruen* held that a privileged interpretive role for history is not enough, and that whenever a challenged restriction falls within the Amendment’s coverage, that restriction must be tied to antecedent traditions of firearm regulation:

To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”⁴⁰

As the majority recognized—indeed, repeatedly emphasized—application of this new methodology requires not simply identifying historical examples but making analogies.⁴¹

II

THE HISTORICAL WHY AND HOW OF SENSITIVE PLACES

The *Bruen* Court suggested some principles of relevant similarity to guide its historical-analogical approach: “While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: *how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.”⁴² Citing *Heller* and *McDonald*’s emphasis on individual self-defense as the central component of the right to keep and bear arms, the Court said that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. . . . are “central” considerations when engaging in an analogical

141 S. Ct. 2797 (2021); *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 974 F.3d 237, 241–42 (3d Cir. 2020), *cert. granted*, 142 S. Ct. 2894 (2022) (reciting the district court’s application of the test); *Harley v. Wilkinson*, 988 F.3d 766, 769 (4th Cir. 2021); *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437, 441–42 (7th Cir. 2019); *Young v. Hawaii*, 992 F.3d 765, 783–84 (9th Cir. 2021), *vacated*, 142 S. Ct. 2895; *United States v. Reese*, 627 F.3d 792, 800–801 (10th Cir. 2010); *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Class*, 930 F.3d 460, 463 (D.C. Cir. 2019); *see also United States v. Adams*, 914 F.3d 602, 610 (8th Cir. 2019) (Kelly, J., concurring).

³⁹ *See United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

⁴⁰ *Bruen*, 142 S. Ct. at 2126 (citation omitted); *see also id.* at 2129–30 (reiterating this test).

⁴¹ *Id.* at 2132–33.

⁴² *Id.* (emphasis added).

inquiry.”⁴³ In conducting this comparison, the Court emphasized, the laws do not have to be “*twin[s]*”⁴⁴: So “even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.”⁴⁵

To know the range of the government’s authority to enact locational restrictions then, we must consult the historical record to distill both the reasons for such restrictions (the “why”) and their effect (the “how”). The precise contours of *Bruen*’s analogical test remain unclear—the Court appears to formulate different versions of the test—but the opinion identifies why and how as “‘central’ considerations,”⁴⁶ and so we focus on them here. That task, rather than the simple enumeration of specific locations, is the heart of the sensitive-places inquiry.

A. *Why*

The first of *Bruen*’s analogical metrics focuses on “why” historical and modern gun laws burden the right to self-defense.⁴⁷ Obviously the prevention of physical harm is one reason, as the majority seems to recognize.⁴⁸

But it is also important to note that weapons laws—including sensitive-place restrictions—historically were used not only to preserve life but, as we have shown in prior work, to protect the public peace and thus the freedom of all people to participate in democratic community without terror and intimidation.⁴⁹ As the Georgia Supreme Court put it in an 1874 decision involving that state’s locational restrictions: “The preservation of the public peace, *and* the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms

⁴³ *Id.* at 2118 (emphasis omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

⁴⁴ *Id.* at 2133.

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis omitted) (quoting *McDonald*, 561 U.S. at 767).

⁴⁷ *Id.* at 2133.

⁴⁸ *See id.* at 2148–49 (contrasting historical surety laws requiring carriers to post a bond only where there was a known risk of harm with the more stringent New York statute).

⁴⁹ Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 21, at 163–72 (“In the Anglo-American tradition, governments have regulated guns to preserve public peace and public order, not only to prevent violence and save lives[,] . . . through laws that prohibited armed members of the community from inflicting terror on others.”); *see generally* Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 11 (2020) (“‘Public safety’ . . . includes the public’s interest in physical safety . . . as a foundation for community and for the exercise of many of our most cherished constitutional liberties. . . . [G]un laws protect the physical safety of citizens to free them to participate, without intimidation, in a wide variety of domains and activities”); Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, ATLANTIC (Mar. 8, 2021, 1:03 PM), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158> [<https://perma.cc/T4U7-ZS3J>] (emphasizing the importance of gun regulation “to protect . . . citizens’ equal freedoms to speak, assemble, worship, and vote without fear”).

is to be understood and construed in connection and in harmony with these constitutional duties.”⁵⁰

As this passage illustrates, the Georgia court construed the right to bear arms in connection with the legislature’s duty to regulate weapons not only against violence but in the interest of preserving public peace. Regulating weapons was not a limitation on freedom, but instead was an expression of collective self-governance⁵¹ and *a prerequisite of democracy itself*. Legislatures enacted sensitive-place restrictions protecting against weapons threats the areas where people met or mingled to form democratic community.

This principle finds wide-ranging expression in the historical record. For example, public carry restrictions have applied in government buildings since at least the mid-seventeenth century. In 1647, the Maryland state legislature prohibited armed individuals from coming “into the howse of Assembly (whilst the howse is sett) . . . upon perill of such fine or censure as the howse shall thinke fit.”⁵² About a century later, Virginia enacted a statute barring most individuals from “com[ing] before the Justices of any court, or either of their Ministers of Justice, doing their office, with force and arms”⁵³ During Reconstruction and the late nineteenth century, Georgia and Missouri imposed similar restrictions in courthouses.⁵⁴ All of these can be understood as protecting sites of self-government.

Polling places and other electoral sites have a particularly significant

⁵⁰ Hill v. State, 53 Ga. 472, 477 (1874) (emphasis added).

⁵¹ See generally WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 10–16 (1996) (observing that self-government “was part of a broader, more substantive understanding of the freedoms and obligations accorded citizens No community was deemed free without the power and right of members to govern themselves, *that is*, to determine the rules under which the locality as a whole would be organized and regulated” and chronicling the “deluge of laws and ordinances passed by states and municipalities regulating American life between 1787 and 1877”).

⁵² Assembly Proceedings, Jan.-Mar., 1647/8, 1647 Md. Laws 216; see Brief for The Independent Institute as Amicus Curiae Supporting Petitioners at 11–12, N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (associating the Maryland law with the Statute of Northampton’s purpose of sovereign security). The state revised this statute three years later to cover “eyther of the houses,” once the unicameral legislature separated into two houses. Assembly Proceedings, Apr. 1650, 1650 Md. Laws 273.

⁵³ An Act Forbidding and Punishing Affrays, 1786 Va. Acts 35.

⁵⁴ Georgia’s statute prohibited deadly weapons at “any Court of justice.” Deadly Weapons Not to Be Carried to Public Places, 1873 Ga. Laws 818. Missouri’s prohibited concealed carriage “into any court room during the sitting of court” An Act to Amend Section 1274, Article 2, Chapter 24 of the Revised Statutes Of Missouri, entitled “Of Crimes and Criminal Procedure,” §1, 1883 Mo. Laws 76. Broader restrictions were adopted for the same purpose, including General Sickle’s well-known General Order No. 10. See Headquarters Second Military District, General Orders No. 10 (Apr. 11, 1867), in A POLITICAL MANUAL FOR 1867, at 202–04 (Edward McPherson ed., 1867) (“The practice of carrying deadly weapons, except by officers and soldiers in the military service of the United States, is prohibited. The concealment of such weapons on the person will be deemed an aggravation of the offence.”).

history of gun prohibition. Many restrictions were adopted amid concerns about violence and intimidation in the democratic process—whether between Loyalists and Patriots in the Revolutionary era or between white supremacists and Black citizens during Reconstruction.

As early as 1776, Delaware’s Constitution provided: “To prevent any Violence or Force being used at the said Elections, no Persons shall come armed to any of them.”⁵⁵ This provision was enacted against a backdrop of conflict between Loyalists and Patriots that made elections highly unstable and, at times, violent.⁵⁶ Other states soon followed Delaware. In 1787, New York provided that “no person by force of arms nor by malice or menacing or otherwise presume to disturb or hinder any citizen of this State to make free election”⁵⁷ In 1797, New Jersey passed a law barring “any candidate” at “any such election, or previous thereto” from “appear[ing] at such election with any weapons of war, or staves, or bludgeons, or use any threats, that may tend to put any of the candidates or voters in fear of personal danger”⁵⁸

During Reconstruction, at least four more states passed similar statutes. In 1870, following major incidents of racialized political violence,⁵⁹ Louisiana prohibited the carrying of a “dangerous weapon, concealed or unconcealed, on any day of election during the hours the polls are open, or

⁵⁵ DEL. CONST. art. 28 (1776).

⁵⁶ HAROLD B. HANCOCK, *THE LOYALISTS OF REVOLUTIONARY DELAWARE* 48–50 (1977) (describing an insurrection leading up to the constitutional convention, the convention’s lenient policy toward the loyalists, and response to an allegation of weapons seizure).

⁵⁷ An Act Concerning the Rights of the Citizens of this State, ch. 1, 1787 N.Y. Laws 344, 345.

⁵⁸ An Act to Regulate the Election of Members of the Legislative Council and General Assembly, Sheriffs and Coroners, in this State, XII, 1797 N.J. Laws 229, 231.

New Jersey’s law came amid both fabricated and credible threats of election maladministration and corruption, particularly in the state’s first elections under the new U.S. Constitution in 1789, widely believed to be marred by fraud. CARL E. PRINCE, *NEW JERSEY’S JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY PARTY MACHINE 1789–1817*, at 8 (1967); *see also* Campbell Curry-Ledbetter, Note, *Women’s Suffrage in New Jersey 1776-1807: A Political Weapon*, 21 *GEO. J. GENDER & L.* 705, 717 (2020) (“Election and voter fraud were rampant in early New Jersey elections. . . . [E]lections were frequently overturned after allegations of corruption.”); Richard P. McCormick, *New Jersey’s First Congressional Election, 1789: A Case Study in Political Skulduggery*, 6 *WM. & MARY Q.* 237, 244 (1949) (noting “reports of . . . voters being pressured at the polls”).

⁵⁹ *See* Lorraine Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago*, *SMITHSONIAN MAG.* (Sept. 28, 2018), <https://www.smithsonianmag.com/history/story-deadliest-massacre-reconstruction-era-louisiana-180970420> [<https://perma.cc/GCN5-477>] (recounting the lead-up to the Opelousas massacre); James G. Dauphine, *The Knights of the White Camelia and the Election of 1868: Louisiana’s White Terrorists; A Benighting Legacy*, 30 *J. LA. HIST. ASS’N* 173 (1989) (outlining violent voter intimidation perpetuated by the Knights of the White Camelia, a white terrorist organization similar to the Ku Klux Klan); Michael Stolp-Smith, *New Orleans Massacre (1866)*, *BLACKPAST* (Apr. 7, 2011), <https://www.blackpast.org/african-american-history/new-orleans-massacre-1866> [<https://perma.cc/UCA4-BJB>] (describing the New Orleans Massacre, also called the New Orleans Race Riot).

on any day of registration or revision of registration, within a distance of one-half mile of any place of registration or revision of registration.”⁶⁰ Tennessee forbade “any qualified voter or other person attending any election” to “carry about his person, concealed or otherwise” any “deadly or dangerous weapon,”⁶¹ and Texas prohibited weapons at “any election precinct.”⁶² In Texas’s case, the restrictions came amid concerns from Republicans about intimidation of Black voters.⁶³

In 1873, Georgia prohibited deadly weapons at “any election ground, or precinct.”⁶⁴ After Reconstruction, Missouri and Maryland passed similar statutes. In a statute specific to Calvert County, Maryland banned the carriage of firearms “on the days of election and primary election, within three hundred yards of the polls, secretly or otherwise.”⁶⁵ Missouri prohibited the carriage of concealed weapons at “any election precinct on any election day”⁶⁶ Missouri’s Supreme Court upheld that law in *State v. Wilforth*, invoking the “weight of authority” of state court opinions that had previously upheld restrictions on concealed carry.⁶⁷

Another traditional set of locational restrictions that *Heller*, *McDonald*, and *Bruen* all recognize is those governing schools.⁶⁸ Education is an activity, like voting and legislating, in which the bonds that constitute democratic community are formed and reproduced. This link between education and democracy was one that the founding generation recognized.⁶⁹

⁶⁰ An Act to Regulate the Conduct and to Maintain the Freedom of Party Election, § 73, 1870 La. Acts 159–60. Texas had a similarly broad half-mile restriction that applied when polls were open. Carrying Arms About Elections, ch. 4, art. 163, 1879 Tex. Crim. Stat. 24.

⁶¹ An Act to Amend the Criminal Laws of the State, ch. 22, § 2, 1869 Tenn. Pub. Acts 23–24.

⁶² An Act Regulating the Right to Keep and Bear Arms, ch. 46, § 1, 1870 Tex. Gen. Laws 63. Intermediate appellate courts in Texas reviewed convictions under this statute and its later iterations and did not contest its constitutionality. *See* *Cooper v. State*, 10 S.W. 216, 216 (Tex. Ct. App. 1888); *Burns v. State*, 38 S.W. 204 (Tex. Ct. App. 1896).

⁶³ *See* Brennan Gardner Rivas, *An Unequal Right to Bear Arms: State Weapons Laws and White Supremacy in Texas, 1836-1900*, 121 SW. HIST. Q. 285, 299 (2018) (“Many local special elections in the years leading up to 1873 overwhelmingly favored Democrats because armed, white, paramilitary groups took over polling places and intimidated black . . . voters . . .”).

⁶⁴ Deadly Weapons Not to Be Carried to Public Places, § 4528, 1873 Ga. Laws 818.

⁶⁵ Act of 1886, ch. 189, § 71, 1888 Md. Laws 604.

⁶⁶ An Act To Amend Section 1274, Article 2, Chapter 24 of the Revised Statutes Of Missouri, entitled “Of Crimes and Criminal Procedure,” §1, 1883 Mo. Laws 76.

⁶⁷ 74 Mo. 528, 531 (1881); *see also* *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (declining to disturb that precedent).

⁶⁸ *See, e.g., supra* note 18 and accompanying text.

⁶⁹ JOHANN N. NEEM, *DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA* (2017) (tracing development of public school system to the antebellum era and connecting it to goals of national democratic identity); Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 719 (2021). Many of the Founders—including John Adams (who wrote the preamble of the Massachusetts Constitution), Benjamin Franklin, Thomas Jefferson, James Madison, and George Washington—explicitly connected education and democracy. *See, e.g.,* MASS. CONST. pmb1. (“Wisdom and knowledge, . . . diffused generally among the body of the people [are] necessary for

And crucially, many schools were privately operated, and thus the relevant records for these restrictions—which, again, *Heller* specifically approved⁷⁰—were generally imposed by the educational bodies themselves rather than by legislatures.

That history of gun regulation in schools traces back to at least the mid-seventeenth century. In 1655, Harvard College barred students from having a “[g]un in his or their chambers or studies, or keeping for their use any where else in the town . . .”⁷¹ As early as the mid-eighteenth century, Yale College had a similar prohibition on students “keep[ing] a Gun or Pistol, or Fir[ing] one in the College-Yard or College . . .”⁷² The University of Virginia’s rule book from 1825 was little different.⁷³ A variety of other educational institutions, from women’s colleges to public universities to private schools, did the same.⁷⁴ Oakland College’s prohibition is notable for its inclusion of language establishing the purpose of its rule. It noted its aim

the preservation of their rights and liberties . . .”); Letter from James Madison to W.T. Barry (Aug. 4, 1822) (on file with the Library of Congress), https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text [<https://perma.cc/9PLS-V7L>] (“[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”); *see also* Brief of the League of Women Voters as Amicus Curiae Supporting Respondents at 3–4, *N.Y. Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (noting that schools and government buildings are both “public settings that house activities vital to a functioning democratic society, including election-related activities”).

⁷⁰ *See supra* text accompanying note 18.

⁷¹ Allen Rostron, *The Second Amendment on Campus*, 14 GEO. J.L. & PUB. POL’Y 245, 255 (2016) (quoting A COPY OF THE LAWS OF HARVARD COLLEGE 1655, at 10 (1876)).

⁷² 2 FRANKLIN BOWDITCH DEXTER, BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE WITH ANNALS OF THE COLLEGE HISTORY MAY 1745–MAY 1763, at 8 (1896).

⁷³ *Meeting Minutes of University of Virginia Board of Visitors, 4–5 Oct. 1824, 4 October 1824*, UNIV. OF VA. PRESS: AM. HIST. COLLECTION, <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4598> [<https://perma.cc/5WCL-FLAH>] (last visited May 18, 2023) (“No student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gunpowder.”).

⁷⁴ THE STATUTES OF DICKINSON COLLEGE 22–23 (1830) (prohibiting students from keeping any “gun, firearms or ammunition, sword-dirk, sword-cane, or any deadly weapon whatever”); THE LAWS OF KEMPER COLLEGE, NEAR ST. LOUIS, MISSOURI 9 (1840) (“No Student shall keep arms of any sort, or keep or fire powder on the College premises.”); THE MINUTES OF THE SENATUS ACADEMICUS, 1799–1842, at 86 (transcribed by Leslye Seltzer, University of Georgia Libraries) (“[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk sword cane or any other offensive weapon in College or elsewhere . . .”); AMERICAN ANNALS OF EDUCATION AND INSTRUCTION FOR THE YEAR 1837, at 185 (Wm. A. Alcott & William C. Woodbridge, eds.) (1837) (outlining the rule prohibiting dangerous weapons at the University of Nashville); ACTS OF THE GENERAL ASSEMBLY AND ORDINANCES OF THE TRUSTEES, FOR THE ORGANIZATION AND GOVERNMENT OF THE UNIVERSITY OF NORTH CAROLINA 15 (Univ. of N.C. 2005) (1838) (prohibiting students to “carry, keep, or own at the College, a sword, . . . , or any deadly weapon”); LAWS OF WATERTOWN COLLEGE, MAINE 11 (1832) (“No Student shall keep firearms, or any deadly weapon whatever.”); LAWS AND REGULATIONS OF THE COLLEGE OF WILLIAM AND MARY, IN VIRGINIA 19 (1830) (forbidding its students “to keep, or to have about their person, any dirk, sword or pistol”).

to bar “immoral conduct” and “[n]eglect of study,” and as part of its mission of ensuring students would “consider themselves and each other as young gentlemen associated for purposes of mutual improvement,” they must “avoid[] all turbulence, rudeness and violence.”⁷⁵

States also passed laws in the late nineteenth century barring public carriage of firearms in schools. The first of these was in Texas in 1870, which prohibited weapons at “any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ballroom, social party or other social gathering composed of ladies and gentlemen, or to any election precinct . . . or any other public assembly.”⁷⁶ The Texas Supreme Court upheld the statute.⁷⁷ Similar prohibitions followed in Mississippi in 1878, Missouri in 1879, Oklahoma in 1893, and Arizona in 1901.⁷⁸ Municipalities enacted similar laws. Huntsville, Missouri, for example, barred individuals from going armed into “any school room or place where people are assembled for educational, literary or social purposes”⁷⁹

The foregoing history demonstrates the centrality of protecting democratic community as a reason for regulating guns in specific places—a *why*, in *Bruen*’s framework. This value is served by all the historical antecedents recognized in *Bruen* and *Heller*, linking the protection of “legislative assemblies, polling places, and courthouses”⁸⁰ against weapons threats to the protection of “schools and government buildings.”⁸¹ In the framers’ day and in our own times, governments seeking to protect democratic community against weapons threats have enacted locational restrictions to secure the public at these and other sites.

We do not suggest that sustaining democratic community is the *only* value that can validate location-based gun restrictions to protect places of public gathering. Prior to *Bruen*, some scholars and judges pointed to the

⁷⁵ CONSTITUTION & LAWS OF THE INSTITUTION OF LEARNING UNDER THE CARE OF THE MISSISSIPPI PRESBYTERY 10 (1831) (prohibiting “duelling, or aiding or abetting it” and “wearing or carrying a dirk or other deadly weapon”).

⁷⁶ An Act Regulating the Right to Keep and Bear Arms, ch. 46, § 1, 1870 Tex. Gen. Laws 63.

⁷⁷ *English v. State*, 35 Tex. 473, 480 (1871).

⁷⁸ An Act to Prevent the Carrying of Concealed Weapons and for Other Purposes, ch. 46, § 4, 1878 Miss. Laws 176; § 1030, 1892 Miss. Laws 327; Carrying Deadly Weapons, etc., MO. REV. STAT. § 1274 (1879); An Act To Amend Section 1274, Article 2, Chapter 24 of the Revised Statutes Of Missouri, entitled “Of Crimes and Criminal Procedure,” §1, 1883 Mo. Laws 76; Carrying Certain Weapons to Church, § 387, 1901 Ariz. Sess. Laws 1252; Public Buildings and Gatherings, ch. 25, § 7, 1893 Okla. Sess. Laws 504.

⁷⁹ Huntsville, Mo., Ordinance in Relation to Carrying Deadly Weapons, § 1 (June 11, 1894); see also Darrell A.H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 101–03 (2016) (recounting gun restrictions in schools).

⁸⁰ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

⁸¹ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

government's role as a proprietor,⁸² or to places where the government has effectively taken over the role of security guard.⁸³ Our account is compatible with these other explanations, especially those that focus on whether a given place is central to certain governmental or constitutionally protected activities.⁸⁴

B. How

The second part of *Bruen*'s historical-analogical test directs attention to "how" historical gun laws burdened the right to armed self-defense. That burden must then be compared to that imposed by the modern gun regulation. Analyzing sensitive-place restrictions through this lens presents some conceptual challenges. After all, within a sensitive place where guns are prohibited, the burden on armed self-defense is total.⁸⁵ But that cannot be dispositive, since *Heller*, *McDonald*, and *Bruen* all agree that such burdens are permissible in sensitive places.⁸⁶ What principles, then, can be gleaned from the historical record?

A first principle is that legislatures enacted, and courts accepted, sensitive-place restrictions that burdened the right to the extent needed to effectuate the regulatory interest. In some cases burdens on individual gun-owners were of short duration—as might arguably be true of a polling place restriction that requires persons to give up their gun while voting—while

⁸² See, e.g., *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1126 (10th Cir. 2015) (highlighting the relevance of the government as a market participant in the First Amendment context and how that distinction applies here as well); *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (explaining the significance of the government acting as a proprietor); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. REV. 1443, 1475 (2009) (noting that there is "both precedent and reason for allowing the government acting as proprietor extra power to restrict the exercise of many constitutional rights on its property").

⁸³ See, e.g., Volokh, *supra* note 82, at 1526. But see Carina Bentata Gryting & Mark Anthony Frassetto, *NYSRPA v. Bruen and the Future of the Sensitive Places Doctrine: Rejecting the Ahistorical Government Security Approach*, 63 B.C.L. REV. E-SUPP. I-60, I-62 (2022) (arguing that "the 'metal detector and security guard' principle for identifying sensitive places is inconsistent with the original public understanding of the Second Amendment").

⁸⁴ See Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 466 (2019) (noting that "part of the answer" of what makes places sensitive is that "they are the locus of the production of other kinds of public goods protected by other kinds of constitutional rights, and that the protection of the character of these types of institutions justifies limits on private firearms"); see also Brief of the League of Women Voters as Amicus Curiae Supporting Respondents, *supra* note 67, at 17. ("[T]his Court and others have upheld laws that maintain the public's confidence in core governmental objectives . . .").

⁸⁵ To be clear, sensitive-place restrictions are not prohibitions on self-defense itself, and only a small proportion of self-defense incidents involve the use of a weapon. See Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 201–02 (2021) (discussing the rarity of lawful defensive gun uses).

⁸⁶ *Heller*, 554 U.S. at 626; *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133–34 (2022).

other laws concerned activities that could extend for much longer periods. The school restrictions above,⁸⁷ for example, disarmed students on campus. Several laws forbade weapons carrying in places of public speech, assembly, and worship generally, as well as in several specific places where democratic community is formed and strengthened. Georgia, for example, forbade weapons at “any place of public worship, or any other public gathering in this State.”⁸⁸ Several other states and territories followed in the later nineteenth century. Oklahoma Territory, for example, listed “any . . . place where persons are assembled for public worship, for amusement, or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering”⁸⁹

Consider the many settings of public gathering protected from weapons threats by Oklahoma, Arizona, and Missouri in the nineteenth century. Given the breadth of these precedents, what were and are the limits on the burdens that locational restrictions can impose on gun owners? *Bruen* rules out locational restrictions that would “eviscerate” the right, such as a declaration that an entire metropolitan area is “sensitive”:

[E]xpanding the category of “sensitive places” simply to all places of public congregation that are not isolated from law enforcement defines the category of “sensitive places” far too broadly. Respondents’ argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department.⁹⁰

This suggests that the burden should be evaluated against a much larger denominator, and that prohibitions in particular places are permissible so long as, in the aggregate, they do not “eviscerate” the right to armed self-defense and the right to public carry in a particular community or jurisdiction.

A second principle that emerges from these cases is that courts and legislatures balanced burdens on armed self-defense with public safety interests, rather than treating individual self-defense as a trump. This

⁸⁷ See *supra* Section II.0

⁸⁸ Deadly Weapons Not to Be Carried in Public, § 4528, 1873 Ga. Laws 818.

⁸⁹ Public Buildings and Gatherings, ch. 25, § 7, 1893 Okla. Sess. Laws 504. For further examples, see, e.g., Carrying Certain Weapons to Church, § 387, 1901 Ariz. Sess. Laws 1252 (banning guns at a similar set of public gatherings); An Act To Amend Section 1274, Article 2, Chapter 24 of the Revised Statutes Of Missouri, entitled “Of Crimes and Criminal Procedure,” § 1, 1883 Mo. Laws 76 (same); Carrying Deadly Weapons, etc., MO. REV. STAT. § 1274 (1879) (same).

⁹⁰ *Bruen*, 142 S. Ct. at 2134 (internal citation omitted).

historical interest-balancing is precisely what *Heller* and *Bruen* direct courts to consider under the analogical method, instead of engaging in their own “independent means-end scrutiny.”⁹¹ According to the Court, “the Second Amendment is the ‘product of an interest balancing *by the people*,’ not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances”⁹² This is a direction to consider the balance struck by our forebears, not to reject the concept of balancing altogether.⁹³ In other words, though the *Bruen* Court disclaims modern “interest-balancing,” the analogical method is an instruction to consider how our predecessors coordinated the values served by regulating guns and the burdens they imposed on the right of self-defense.

Evaluating the constitutionality of location restrictions in the nineteenth century, some courts characterized gun-owners’ interest in carrying guns *into sensitive places* as minimal, and perhaps even illegitimate—implying that any legally relevant “burden” was minor or negligible. For example, in 1871, the Supreme Court of Texas upheld the state’s sensitive places law on the grounds that it was “in conflict with no higher law.”⁹⁴ The court continued:

[I]t appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.⁹⁵

In another case, the Texas Court of Appeals upheld the statute’s categorical prohibition on arms in schools, even where danger was imminent

⁹¹ *Bruen*, 142 S. Ct. at 2133 n.7.

⁹² *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

⁹³ Many commentators have questioned *Bruen*’s own use of the history on this point. *See e.g.*, Will Baude, *Of Course the Supreme Court Needs to Use History. The Question is How.*, WASH. POST (Aug. 8, 2022), <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen> [<https://perma.cc/9UXZ-YZJ8>] (“[T]he [*Bruen*] court refused to allow any kind of ‘interest balancing’ [yet] historical research might support such balancing At the Founding and during Reconstruction, many constitutional rights were subject to regulation in the name of the public good . . . [supporting] regulation of Second Amendment rights”); Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions> [<https://perma.cc/LB5W-YAZJ>]; George F. Will, *The Supreme Court’s Gun Ruling Is a Serious Misfire*, WASH. POST (June 23, 2022), <https://www.washingtonpost.com/opinions/2022/06/23/supreme-court-gun-ruling-misfire> [<https://perma.cc/3MNT-N3UR>] (“[T]here is an American tradition even older than the nation of striking a ‘delicate balance between the Second Amendment’s twin concerns for self-defense and public safety.’” (quoting an amicus brief filed in *Bruen* by former federal appellate Judge J. Michael Luttig and others supporting the constitutionality of New York’s law on originalist grounds)).

⁹⁴ *English v. State*, 35 Tex. 473, 480 (1871).

⁹⁵ *Id.* at 478–79.

and self-defense interests might be thought to trump: “Nor does it matter how much or with what good reason I may be in dread of an immediate and pressing attack upon my person from a deadly enemy; the imminence of such danger affords no excuse in my wearing deadly weapons” in places like churches, ballrooms, and schoolrooms.⁹⁶

Similarly, Georgia’s state supreme court upheld that state’s prohibition on deadly weapons at “any election ground, or precinct,”⁹⁷ effectively minimizing the legitimacy of a gun owner’s interest in carrying a gun at such places:

The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee.⁹⁸

The court stated that in “concerts, and prayer-meetings, and elections,” “the bearing of arms of any sort, is an eye-sore to good citizens, offensive to peaceable people . . . and a marked breach of good manners.”⁹⁹

On the other side of the ledger, courts recognized that *other* people’s rights and interests are in play in sensitive places, and that locational restrictions on guns are a way to coordinate various public goods.¹⁰⁰ In the same Georgia case, the court emphasized:

The right to go into a court-house and peacefully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.¹⁰¹

These historical examples confirm that legislatures have long had authority to impose burdens—sometimes significant ones—on gun-owners in particular places.¹⁰² In doing so, legislatures and courts struck a balance

⁹⁶ *Owens v. State*, 3 Tex. Ct. App. 404, 407 (1878); *see also Alexander v. State*, 11 S.W. 628, 628 (Tex. Ct. App. 1889) (“The law does not in terms accord to them such a privilege, and, without a clearly expressed exception in such case, this court will not sanction a defense the effect of which would be to authorize every school-teacher in the state to carry prohibited weapons upon his person in our school-rooms.”).

⁹⁷ *Deadly Weapons Not to Be Carried in Public*, § 4528, 1873 Ga. Laws 818.

⁹⁸ *Hill v. State*, 53 Ga. 473, 475 (1874).

⁹⁹ *Id.* at 476.

¹⁰⁰ *Miller*, *supra* note 84, at 465–66.

¹⁰¹ *Hill*, 53 Ga. at 477–78.

¹⁰² The fact that these prohibitions were total is particularly notable given that legislatures *could* have written locational rules that restricted but did not ban guns—and indeed did so in other contexts. *See infra* notes 134–35 and accompanying text.

between the right to armed self-defense and important regulatory interests like public safety.

III

BRUEN AND ANALOGICAL METHOD

Having derived these principles to guide sensitive-places analysis under *Bruen*, in this final Part we show how the government, employing analogical reasoning, could enact locational restrictions beyond the specific locations of formal governance and education already enumerated in *Heller* and *Bruen*, extending to places of civic life such as parades and sites of commerce and mass transportation. In doing so, we demonstrate the fundamental point that *Bruen* reasons from history not as a limit, but instead as a guide to define the scope of gun rights and regulation in circumstances where the kinds of weapons and conditions of democratic community have evolved beyond those in the experience of the Constitution's ratifiers.

Others read *Bruen* differently, and contrasting our positions illuminates the methodological stakes. As we have been writing this article, Professors Randy Barnett and Lawrence Solum—both leading originalists—have posted evolving drafts of a forthcoming article that seeks to characterize *Bruen*'s use of history and tradition as conforming to an approved form of originalism.¹⁰³ During this time, they have revised their article in ways that minimize the role of analogical reasoning under *Bruen*. In their first reading of *Bruen*, Professors Barnett and Solum concluded that the opinion's "‘historical analogue test’ is an implementing rule that is not justified by originalist reasoning."¹⁰⁴ But in subsequent drafts, they repudiated their initial reading, in favor of one they could approve as originalist.

In tacit acknowledgement of the hybrid character of the Court's method in *Bruen*, Professors Barnett and Solum identified five possible roles for the "‘historical traditions test’"¹⁰⁵; they then claimed that *Bruen* engages in originalist interpretation and that the historical tradition test provides the content of a preexisting common law right to bear arms.¹⁰⁶ They hedged this claim on all sides—emphasizing that they were not expressing views on the validity of *Heller*'s historical conclusions,¹⁰⁷ nor "‘affirming or rejecting the

¹⁰³ See Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811.

¹⁰⁴ *Id.* (Jan. 27, 2023 version) at p. 23 ("Bruen involves both originalist and nonoriginalist elements. The core holding of *Bruen* rests on an originalist foundation, but the historical analogue test is an implementing rule that is not justified by originalist reasoning.").

¹⁰⁵ See *id.* Barnett & Solum (April 23, 2023) at 31.

¹⁰⁶ *Id.* (April 23, 2023) at 35 ("On this reading, historical analogues, or the lack thereof, are being offered as evidence of the content of the preexisting right that constitutes the original meaning of the right to keep and bear arms.").

¹⁰⁷ See *id.* Barnett & Solum (April 23, 2023) at 28.

preexisting legal rights approach; nor are we arguing that the historical tradition test does, in fact, accurately identify the content of the preexisting legal rights.”¹⁰⁸ After explaining that they would not take a position on whether the Court’s analysis or their own was supported by the historical record, they defended their reading of the decision with a claim about Justice Thomas, without discussing the other Justices in the majority: “It would be quite odd indeed for Justice Thomas to view the assignment to write the majority opinion in *Bruen* as an opportunity to undermine the originalist framework of *Heller* and move the constitutional jurisprudence of the Court in the direction of constitutional pluralism and living constitutionalism.”¹⁰⁹ They escalated this open appeal to methodological—and political—polarization in the conclusion of the article where they cautioned about the types of constitutional interpreters who can be trusted: “[O]riginalists should be wary of the use of history and tradition by nonoriginalists, whether they be progressive living constitutionalists or conservative constitutional pluralists.”¹¹⁰

The Barnett/Solum account fails to grapple with *Bruen*’s explicit and sustained discussion of the analogical method, which itself authorizes change over time so long as that change is consistent with how and why past practice burdened exercise of the right.¹¹¹ Similarly, their reading of *Bruen* as originalist does not and cannot explain why the Court affirmed shall-issue licensing regimes.¹¹² More generally, they do not explain how a judge following their account decides whether laws are constitutional. How are courts to determine how to enforce a “pre-existing legal right” in the kinds of real-world cases we discuss below, and can it be by resort to analogical reasoning?

Notably, Barnett and Solum do not test their reading against the views expressed by other members of the *Bruen* majority. In his *Heller II* dissent—generally credited as the first prominent statement of the “text, history, and tradition” test—then-Judge Brett Kavanaugh wrote “when legislatures seek to address new weapons that have not traditionally existed or to impose new

¹⁰⁸ See *id.* Barnett & Solum (April 23, 2023) at 36.

¹⁰⁹ Barnett & Solum (April 23, 2023) at 38.

¹¹⁰ Barnett & Solum (April 23, 2023) at 56.

¹¹¹ See *infra* Part II.

¹¹² By contrast, in another paper co-authored with Professor Nelson Lund, Professor Barnett suggests that “[r]ather than relying on specious historical traditions, courts could evaluate gun laws against the purpose of protecting the right to keep and bear arms: facilitating the exercise of the fundamental right of personal and collective self-defense.” Barnett & Lund, *supra* note 23. This approach, too, is consistent with originalism, but recognizes the need for construction as well as interpretation. See Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018) (describing an approach of “good faith” construction focusing on the original function or purpose of the particular clauses and general structure of the text).

gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations.”¹¹³ He emphasized that while the Second Amendment might apply to such situations, that does not “mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach *is to reason by analogy from history and tradition.*”¹¹⁴ In his *Bruen* concurrence (joined by Chief Justice Roberts), Justice Kavanaugh quoted at length from the portions of *Heller* that authorize regulation of guns consistent with the Anglo-American common law tradition.¹¹⁵

In *Kanter v. Barr*,¹¹⁶ then-Judge Barrett reasoned from the common law tradition that Justice Scalia invoked in *Heller* and concluded that “the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”¹¹⁷ Judge Barrett explained that ancient practices would change in form under the American constitutional order.¹¹⁸ The point, she explained, quoting Chief Justice Roberts, is that just as there were “lineal descendants of the arms . . . presumably there are lineal descendants of the restrictions as well.”¹¹⁹

What these accounts have in common is that they authorize gun regulation to change when *guided by history*—a kind of legal change that can be implemented through the analogical method that *Bruen* explicitly and repeatedly authorizes. In the following Sections, we show how that method can apply to a variety of contemporary gun regulations responsive to technological and other forms of change.

A. Building Democratic Community in New Places

Roughly two weeks after *Bruen* was decided, residents of Highland Park, Illinois, gathered for a July Fourth parade. At 10:15 that morning, a gunman began firing on them with a semiautomatic rifle. Seven people were killed, dozens more physically injured, and countless more traumatized by the carnage, including a toddler orphaned by the murder of both parents.¹²⁰

¹¹³ *Heller v. District of Columbia*, 670 F.3d 1244, 1275-76 (D.C. Cir. 2011) (*Heller II*).

¹¹⁴ *Id.* at 1276 (emphasis added)

¹¹⁵ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring). For a more extensive discussion of this part of *Heller*, see Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 21, at 163-180.

¹¹⁶ 919 F.3d 437 (7th Cir. 2019).

¹¹⁷ *Id.* at 454 (Barrett, J., dissenting).

¹¹⁸ *Id.* at 456 n.4; *see also id.* at 458 n.7 (observing that “[i]t should go without saying that [historic] race-based exclusions [from the right to bear arms] would be unconstitutional today).

¹¹⁹ *Id.* at 465 (quoting Transcript of Oral Argument at 77, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290)).

¹²⁰ *These Are the Victims of the Fourth of July Parade Shooting in Highland Park*, CHI. TRIB.

Illinois prohibits firearms at “any public gathering” licensed by the government.¹²¹ Assume a gun-owner wishing to carry a gun at next year’s July Fourth parade argues that this restriction violates his right to armed self-defense. How should the constitutionality of this sensitive place restriction be resolved under *Bruen*?

No sensible reading of the Second Amendment would require the grieving and traumatized community of Highland Park to permit guns at its next July Fourth parade.¹²² Analyzing the constitutionality of such a restriction through the lens of sensitive-places doctrine opens various interpretive possibilities.

One approach would be to uphold the Highland Park restriction on the basis of historical antecedents restricting guns at public assemblies. Georgia’s representative law, for example, prohibited guns at “any . . . public gathering in this State.”¹²³ And in a 1905 case the Georgia Supreme Court upheld the conviction of an individual who brought a firearm to a Fourth of July gathering, finding that “[t]he wholesome purpose of this statute would be much limited by putting a narrow construction upon the expression ‘any other public gathering.’ A barbecue on the 4th of July, at which the public is assembled in considerable numbers, constitutes a public gathering within the meaning of the statute.”¹²⁴ Whether this would be sufficient is hard to say, given the substantial uncertainty that *Bruen* has introduced. The historical research necessary to identify these examples might not be possible, especially on a briefing schedule,¹²⁵ or a judge might require a higher quantity of laws to demonstrate a “tradition.”¹²⁶

(Aug. 3, 2022, 11:35 AM), <https://www.chicagotribune.com/news/ct-highland-park-victims-20220705-tgcgdx5bqbfzrakhzf6jian634-list.html> [<https://perma.cc/E4KD-ATP2>].

¹²¹ Unlawful Use of Weapons, 720 ILL. COMP. STAT. 5/24-1(a)(8) (2012).

¹²² For an account of this trauma in Highland Park and elsewhere see Julie Bosman, *A Year After July 4 Parade Shooting, Some Americans Rethink Big Gatherings*, N.Y. TIMES, July 4, 2023, <https://www.nytimes.com/2023/07/04/us/parades-safety-highland-park-anniversary.html>. See also Alex Leeds Mathews & Dakin Adone, *July Fourth and Fifth Have the Most Mass Shootings of Any Days of the Year*, CNN, July 5, 2023, <https://www.cnn.com/2023/07/04/us/july-4-holiday-mass-shootings-dg/index.html> (reviewing data on mass shootings in the Gun Violence Archive since 2014).

¹²³ Deadly Weapons Not to Be Carried to Public Places, § 4528, 1873 Ga. Laws 818; see also *supra* notes 88–89 and accompanying text (discussing Georgia’s law and similar restrictions in other states and territories).

¹²⁴ *Wynne v. State*, 51 S.E. 636, 637 (Ga. 1905); *id.* (“The purpose of Pen. Code 1895, § 342, is to protect the public against the danger arising from allowing persons to carry deadly weapons to courts of justice, or election grounds or precincts, or places of public worship, or any other public gathering in this state.”).

¹²⁵ *Def. Distributed v. Bonta*, No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *6 n.9 (C.D. Cal. Oct. 21, 2022) (“[T]here is no possibility this Court would expect Defendants to be able to present the type of historical analysis conducted in *Bruen* on 31 days’ notice (or even 54 days’ notice).”), *adopted*, No. CV 22-6200-GW-AGRX, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

¹²⁶ See, e.g., *Firearms Pol’y Coal. v. McCraw*, No. 4:21-CV-1245-P, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022) (“[T]he historical record before the Court establishes (at most) that

But public assembly laws—or those specifically addressing parades, for example—are not the only historical basis to which Highland Park might turn. *Bruen* admonishes courts not to look for “historical twin[s],”¹²⁷ but to instead compare modern and historical laws based on *why* and *how* they restricted the right to keep and bear arms. Such an analysis must also be conducted with respect to how the modern and historical laws were “justif[ied],”¹²⁸ and not with a singular focus on *where* they applied. We have illustrated one such justification in detail above: Many location-based historical gun restrictions protected democratic community and the formation of a shared civic life, not simply individual, physical lives. Precisely because those laws played a similar role to the Highland Park restriction, they, too, can be mustered to support its constitutionality. For example, the Court has specifically approved as constitutional the tradition (described above¹²⁹) of prohibiting guns in schools,¹³⁰ which it has recently described as “nurseries of democracy.”¹³¹ Restricting guns in such places can thus be understood as an effort to protect and promote democratic community itself—the same values that are at stake in a July Fourth parade, since recalling and honoring the nation’s war of independence cultivates a sense of pride and belonging that connects present and past generation.¹³² The point is that schools and parades are, to borrow *Bruen*’s analogical framework, relevantly similar with respect to the “why”—of interest served by restricting guns.¹³³

Protecting public places has a special role in preserving democratic community because those spaces are a prerequisite to democracy.¹³⁴ They

between 1856 and 1892, approximately twenty jurisdictions (of the then 45 states) enacted laws that restricted the ability of those under 21 to ‘purchase or use firearms.’”); *Antonyuk v. Hochul*, No. 22-CV-0986, 2022 WL 5239895, at *9 (N.D.N.Y. Oct. 6, 2022) (“[T]he Court generally has looked to instances where there have been three or more such historical analogues . . .”).

¹²⁷ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

¹²⁸ *Id.* at 2126.

¹²⁹ See *supra* notes 69–79 and accompanying text.

¹³⁰ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹³¹ *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting that education is “the very foundation of good citizenship”).

¹³² Celebrating public holidays transmits stories of the nation’s birth and values across generations. Benedict Anderson famously described nations as “imagined communities” that served as a “way of linking fraternity, power and time meaningfully together.” BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 36 (2006). These communities are constituted through forms of collective memory, “stories about the nation’s past experience to clarify the meaning of the nation’s commitments, to guide practical reason, and to help express the nation’s identity and values.” Reva B. Siegel, *The Politics of Constitutional Memory*, 20 *GEO. J.L. & PUB. POL’Y* 19, 21 (2022).

¹³³ *Bruen*, 142 S. Ct. at 2132–33.

¹³⁴ See John R. Parkinson, *Does Democracy Require Physical Public Space?*, in *DOES TRUTH MATTER?: DEMOCRACY AND PUBLIC SPACE* 101–02 (Raf Geenens & Ronald Tinnevelt eds., 2009) (arguing “public space matters because of the *functional necessity* of physical arenas for democratic

are the places where individuals from different walks of life can come together, break down or understand lines of difference, and build a common belief in a shared civic life. They are the spaces where voluntary associations conduct their business, where “social and civic skills are learned—’schools for democracy.’”¹³⁵ They might also be the places where people gather to communicate concerns, to advocate, and to mobilize.¹³⁶ History suggests that armed crime and terror in these vital public spaces can directly or indirectly suppress voter turnout and other forms of democratic participation.¹³⁷ The protection of these spaces is therefore critical to democracy, just like the protection of a legislative assembly itself. The analogical method allows sensitive place restrictions to evolve and form as democratic community does.

Crucially, *Bruen*’s analogical method enables government to employ locational restrictions to protect places of public gathering from weapons threat whether or not there are identical antecedent restrictions. The government must “identify a well-established and representative historical *analogue*, not a historical *twin*.”¹³⁸ Indeed, the Court made plain its understanding that sensitive-places restrictions *can continue to evolve*. That does not mean that anything goes, of course—the Court asserted that, for example, it would be unconstitutional to permanently designate *all* of Manhattan a sensitive place.¹³⁹ But the hypothetical the Court discussed is wildly more expansive than imposing gun restrictions at a public gathering. A court could well characterize the *why* of the Highland Park regulation as limiting guns at public events and places that build community ties, bringing it within the tradition of sensitive-places regulation discussed above—including the restriction of guns in school buildings. The antecedent statute for a sensitive place restriction for the Highland Park Fourth of July parade could therefore be a law or tradition of restricting weapons at public gatherings or schools or both.

action”); *see also* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 337 (2001) (quoting John Dewey) (“Democracy must begin at home, and its home is the neighborly community.”).

¹³⁵ PUTNAM, *supra* note 134, at 338.

¹³⁶ JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE* 149 (2012) (arguing that democracy requires physical public space and exploring the different kinds of spaces where democratic action can occur).

¹³⁷ *See, e.g.*, Brennan Gardner Rivas, *The Deadly Weapon Laws of Texas: Regulating Guns, Knives, and Knuckles in the Lone Star State, 1836–1930* (May 2019) (Ph.D. dissertation, Texas Christian University) (manuscript at 73) (on file with author) (stating that the kinds of locations and events protected by the Texas 1871 law were the very ones that most frequently became targets of Klan or other white vigilante intimidation and violence for the purpose of Black voter suppression).

¹³⁸ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

¹³⁹ *See supra* note 90 and accompanying text.

B. “Fairs and Markets”: Community, Commerce, and Transportation

Historical analysis of weapons regulations often begins, chronologically, with the Statute of Northampton, enacted in 1328 during the reign of Edward III:

[N]o Man great nor small, of what Condition soever he be, except the King’s Servants in his presence, and his Ministers in executing of the King’s Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King’s Justices, or other of the King’s Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor 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.¹⁴⁰

The degree to which the Statute broadly prohibited public carrying of weapons has been the subject of long-running scholarly and legal debate,¹⁴¹ but for purposes of sensitive-place restrictions we think it particularly notable that “fairs” and “markets”—places of significant community life at the time—were singled out for protection *alongside* political figures like justices and ministers. Some colonial governments incorporated this language directly into their statutes.¹⁴²

Security of commerce is an element of democratic community, as our forebears clearly appreciated.¹⁴³ “The Framers of the 1787 Constitution . . . believed that commercial relations between different parts of the country would foster national connection and social cohesion,” and viewed “commerce as intercourse that produces social cohesion.”¹⁴⁴

Although we do not thoroughly explore the matter here, we suspect that protecting commerce from weapons threats was an important part of “this Nation’s historical tradition of firearm regulation.”¹⁴⁵ Some states had

¹⁴⁰ Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.).

¹⁴¹ See Blocher & Siegel, *supra* note 21, at 165–67 (describing the debate about Northampton).

¹⁴² See An Act Forbidding and Punishing Affrays, ch. 21, 1786 Va. Acts 33; FRANCOIS XAVIER MARTIN, A COLLECTION OF STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60-61 (Newbern ed., 1792) (proclaiming “no man great nor small” shall “ride armed by night nor by day, in fairs, markets nor in the presence of the King’s Justices . . .”).

¹⁴³ See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 17 (2010) (“[M]any eighteenth-century thinkers believed that commercial relations fostered tolerance and understanding, smoothed over social, religious, and cultural differences, brought refinement of manners, and, in the long run, political and social peace.”).

¹⁴⁴ *Id.*

¹⁴⁵ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022); see also *id.* at 2129–30 (“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only

statewide locational restrictions that prohibited weapons in places “where persons are assembled for amusement”—with that location listed alongside bans on weapons in the vicinity of a polling place.¹⁴⁶

Tennessee restricted guns at fairs, with these places of commerce represented as places of “public assembly”; its sensitive-place restriction prohibited gun possession at “any fair, race course, or other public assembly of the people.”¹⁴⁷ Fairs and places of public assembly feature people gathered in physically crowded circumstances, and in circumstances of exchange and intercourse that sustain social bonds of community.¹⁴⁸ Elsewhere, we see places of commerce treated as public places in *Maupin v. State*, where the Tennessee Supreme Court affirmed conviction under a statute prohibiting arms at a mill despite the fact that the defendant worked and slept at the mill, because “[t]he mill was a public place[]—a place to which customers were constantly invited and daily expected to go. In such a place a man, though he be the proprietor, may not lawfully carry pistols concealed about his person.”¹⁴⁹

Many historical restrictions on gun displays and use (not carriage *per se*) specifically singled out various places of commerce like hotels, saloons, groceries, and the like, such as an 1886 New Mexico law imposing special penalties on those who “unlawfully draw, flourish or discharge a rifle, gun or pistol within the limits of any settlement in this territory, or within any saloon, store, public hall, dance hall or hotel, in this territory.”¹⁵⁰ To be clear,

then may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’”).

¹⁴⁶ See Carrying Certain Weapons to Church, § 387, 1901 Ariz. Sess. Laws 1252 (prohibiting firearms at any “church or religious assembly, any school room, or other place where persons are assembled for amusement or for educational or scientific purposes . . . or to any election precinct, on the day or days of any election . . . or to any other public assembly”); Public Buildings and Gatherings, ch. 25, § 7, 1893 Okla. Sess. Laws 504 (prohibiting guns at “any church or religious assembly, any school room or other place where persons are assembled for public worship, for amusement, or for educational or scientific purposes . . . or to any election . . . or to any other public assembly”).

¹⁴⁷ An Act to Amend the Criminal Laws of the State, ch. 22, § 2, 1869-70 Tenn. Pub. Acts 23–24.

¹⁴⁸ New Jersey and New York invoked similar lines of argument in litigation over their sensitive-place restrictions on certain transportation vehicles. See Defendants’ Brief in Opposition to Plaintiffs’ Motion for a Temporary Restraining Order at 37, *Siegel v. Platkin*, No. 22-CV-7463, 2023 WL 185512 (D.N.J. Dec. 30, 2022) (“The concerns that animate regulating firearms-carry on a crowded bus are not relevantly different from those supporting prohibitions on firearms-carry at . . . ‘[f]airs’”); State Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 65, *Antonyuk v. Hochul*, No. 22-CV-986, 2022 WL 16744700 (N.D.N.Y. Oct. 13, 2022) (“A subway, bus, or airport is sensitive in the same way as a ‘fair or market[.]’” or “a ‘fair, race course, or other public assembly of the people’” (internal citations omitted)).

¹⁴⁹ 17 S.W. 1038, 1039 (Tenn. 1890).

¹⁵⁰ An Act to Prohibit the Unlawful Carrying and Use of Deadly Weapons, ch. 30, § 4, 1886 N.M. Laws 56; see also Act to Revise, Consolidate and Amend the Charter of the City of Neenah,

these particular restrictions were not total prohibitions—their *how*, as it were, was different from the bans discussed above.¹⁵¹ But they do potentially suggest a common *why*—a special focus on protecting sites of the commercial activity that itself is an element of democratic community.

As with some of the school examples recounted above, we would expect that private actors imposed many of the locational restrictions on weapons in places of commerce.¹⁵² Evidence of such restrictions should still be probative under *Bruen*'s historical-analogical test, especially considering the degree to which the relevant sites—the historical antecedents—were privately controlled. We expect that many historical analogues for locational restrictions on weapons in transportation were, as with the school limitations discussed above,¹⁵³ likely private—for example, sites of mass transit,¹⁵⁴ which have been the subject of Second Amendment litigation in the wake of *Bruen*.¹⁵⁵ Certainly it is crucial to have further historical research regarding specific public and private restrictions of guns in sites of transit—omnibuses, railways, ferries, depots, stations, and the like. Evidence of locational restrictions in these transit settings could be extended via analogical reasoning to support contemporary locational restrictions on weapons in such places as subways, trains, and airplanes.¹⁵⁶

Even as research on these transit antecedents is ongoing, we think that some public authorities might argue for extending sensitive-place restrictions via analogical reasoning from government buildings and schools

vol. 2, ch. 184, tit. 12, § 162, Approved March 14, 1873, and the Several Acts Amendatory Thereof, 1883 Wis. Sess. Laws 841 (referring to “any saloon, shop, store, grocery, hall, church, school house, barn, building or other place within said city”); FORT WORTH, TEX., REVISED ORDINANCES OF THE CITY OF FORT WORTH, TEXAS, No. 85, § 3 (1879) (referring to “any public road, street or alley, inn, tavern, store, grocery, workshop, or any place to which people resort for purposes of business, recreation, or amusement”).

¹⁵¹ See *supra* notes 65–79 and accompanying text.

¹⁵² See, e.g., Austin Charles Rhodes, Good Saloon, Bad Saloon: Saloons in Wichita, Kansas 1865–1881 (May 2014) (M.A. thesis, Wichita State University) (on file with Shocker Open Access Repository, Wichita State University) (“[A] saloon would not have stayed in business very long if there were bar fights that smashed bottles and glasses every day. Furthermore, it was rare for a person to start a fight or pull a gun in a saloon and make it out without being arrested.”).

¹⁵³ See *supra* notes 71–79 and accompanying text.

¹⁵⁴ See George M. Smerk, *Urban Mass Transportation: From Private to Public to Privatization*, 26 TRANSP. J. 83, 83 (1986) (“The transit industry . . . started in 1830 with the advent of the first omnibus service in New York City. From the beginnings of the horse-drawn omnibus and, shortly thereafter, the development of street railways, transit in the United States was a private, competitive enterprise.”); DAVID E. NYE, *ELECTRIFYING AMERICA: SOCIAL MEANINGS OF A NEW TECHNOLOGY, 1880–1940*, at 90 (1990) (“How were the hundreds of American street railways built? The majority were private, not public, ventures.”).

¹⁵⁵ See *supra* note 9.

¹⁵⁶ See Josh Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, YALE L.J. (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522818 (recounting gun control on railroads in the nineteenth century).

directly to subways, trains, and airplanes. Freedom of travel and confidence in the security of transportation is necessary to sustain the bonds of community. Locational restrictions on weapons in government buildings and schools are relevantly similar to locational restrictions in subways, trains, and airplanes in why and how they burden the right to bear arms. Both build bonds of democratic community, and only temporarily burden the right to bear arms.¹⁵⁷

C. Building Democratic Community for New Rights-Holders, and in New Ways

What kind of deference to the past does fidelity to the Constitution require? *Bruen*'s analogical method understands the Second Amendment through an historical lens, yet allows government to recognize and act on change in many ways: "Fortunately, the Founders created a Constitution—and a Second Amendment—intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."¹⁵⁸ The analogical method can coordinate these very concerns.

Just as the means of self-defense evolves in history,¹⁵⁹ so do a society's methods of sustaining community. How did the founding generations achieve these ends, and how might our own? The practices a society employs to strengthen community ties are likely to vary from the founding era, just as the technology of weapons employed in self-defense does.¹⁶⁰ Legislators must be able to take this kind of change into account. Nothing in the Constitution denies legislators modern means to protect and strengthen community bonds any more than the Constitution denies individuals modern means to defend themselves and their families.

In short, while the Court has interpreted the Second Amendment as mandating fidelity to tradition, it did not require blind deference to specific past practices. Traditions are living. We observe that the Court's embrace of change under the Second Amendment includes technological change, regulatory change, and change in understandings of community.

Consider race. The Court's recent gun rights cases have reasoned that

¹⁵⁷ See *supra* Section II.0(explaining in the context of *Bruen*'s "how" metric that many sensitive-place restrictions impose a total prohibition on arms-bearing, albeit one that applies only when one is in a restricted location).

¹⁵⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)). On translation across contexts in fidelity to the original understanding, see generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

¹⁵⁹ See *Bruen*, 142 S. Ct. at 2132 (recounting the Court's holding in *Heller* that "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense").

¹⁶⁰ See *id.*

the rights of Black people to bear arms are equal to the rights of white people, and have shown little interest in tying access to guns to the racially discriminatory history and traditions of the American people during slavery or Reconstruction.¹⁶¹ Justice Thomas, for example, employed originalist interpretation to *protest* an American history and tradition of racism in the regulation of arms, not to venerate and entrench it.¹⁶² The Court has recognized that as *We the People* evolves in history, who counts as a rights-bearing member of the community under the Second Amendment evolves as well.¹⁶³ Imagine if *Bruen* restricted the right to bear arms only to those kinds of persons the framers thought fit—or restricted the Amendment’s protections only to those kinds of weapons the framers possessed. It does not.

How then does *Bruen* recognize change in weapons regulation? This question is at the heart of the Supreme Court’s decision to review the Fifth Circuit’s decision declaring unconstitutional 18 U.S.C. § 922(g)(8), the 1994 federal law prohibiting gun possession by persons subject to a domestic violence restraining order.¹⁶⁴ Strikingly, in neither of the two most prominent decisions striking down 18 U.S.C. § 922(g)(8) did judges attempt to determine whether license afforded to violence within family relations at the founding and during American history was the kind of social relationship that the Constitution should entrench and protect against change.

In *United States v. Perez-Gallan*, Judge David Counts reasoned that that the general societal problem of intimate partner violence has existed from before the founding and asserted that, until the 1970s, the American legal

¹⁶¹ See, e.g., CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 25–39 (2021) (recounting the history of the Second Amendment’s adoption as “steeped in anti-Blackness, swaddled in the desire to keep African-descended people rightless and powerless”); Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 *CARDOZO L. REV.* 1343, 1367–68 (2022) (describing *Bruen* petitioners’ citation to historically racist gun rights frameworks); Mark Anthony Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 *SMU L. REV. F.* 169, 180 (2021) (arguing for the Court to “reject consideration of the racist laws of the antebellum and early Reconstruction South,” and look to broader traditions as the basis for gun regulation).

¹⁶² See *McDonald v. City of Chicago*, 561 U.S. 742, 855–58 (2010) (Thomas, J., concurring) (urging the Court to overrule major parts of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), and *United States v. Cruikshank*, 92 U.S. 542 (1875), and holding out the right to bear arms as a symbolic repudiation of the history of racist mob violence that spanned the Reconstruction era to the 1960s, in the process recounting lynchings from 1882 to 1968).

¹⁶³ This kind of updating is apparent in a recent case striking down the federal law forbidding handgun sales to people under the age of 21. The district court there concluded that: “(1) taken to its logical extent, the Government’s argument would remove Second Amendment protections for vast swaths of the American population; and (2) *Heller* and *Bruen* support adopting a modern understanding of ‘the people.’” *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:22-CV-410, 2023 WL 3355339, at *11 (E.D. Va. May 10, 2023).

¹⁶⁴ *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023); *United States v. Combs*, No. CR 5:22-136, 2023 WL 1466614, at *1 (E.D. Ky. Feb. 2, 2023); *United States v. Perez-Gallan*, No. PE:22-CR-00427, 2022 WL 16858516, at *12 (W.D. Tex. Nov. 10, 2022).

system rarely took formal legal action in response.¹⁶⁵ The judge recognized that legislatures historically disarmed “dangerous” people, but found that domestic abusers were not regarded as such.¹⁶⁶ For Judge Counts, that meant that under the history-and-tradition method espoused by *Bruen*, the domestic violence prohibitor was unconstitutional because it broke with the nation’s traditional response of inaction.¹⁶⁷ (Observe that the tradition of inaction Judge Counts celebrates depended on women’s disfranchisement;¹⁶⁸ § 922(g)(8) was enacted only after women had the political voice to secure its passage.)

A few months later, in *United States v. Rahimi*, a panel of the Fifth Circuit including Judges Cory Wilson, James Ho, and Edith Jones also struck down § 922(g)(8), invoking our “ancestors”¹⁶⁹ while minimizing the social dimension of domestic violence. Though purporting to apply the analogical method, their interpretation of *Bruen*, filed on Groundhog Day,¹⁷⁰ reads the Constitution as a script for Groundhog Day.¹⁷¹

In *Rahimi*, the Fifth Circuit considered a variety of historical analogues both inside and outside the domestic violence context. First, the court recognized that laws at the time of ratification disarmed “dangerous” people (for example, those unwilling to take an oath of allegiance, slaves, and Native Americans)¹⁷² but held that § 922(g)(8) was not relevantly similar because the he purpose of those laws “was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of domestic gun abuse, posed by another individual.”¹⁷³ In effect, the court said that the “how” was similar (disarmament) but the “why” was different (preserving social order rather than preventing individual threat). The court also recognized that historical surety laws had a similar “why” (protecting an individual from a risk of harm) and even a similar procedural

¹⁶⁵ *Perez-Gallan*, 2022 WL 16858516, at *4.

¹⁶⁶ *Id.* at *11.

¹⁶⁷ *Id.* at *10 (“*Bruen* is clear: if a challenged regulation addresses a ‘general societal problem that has persisted since the 18th century,’ and ‘earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.’”) (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022))).

¹⁶⁸ *See* *State v. Philpotts*, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (“[T]he glaring flaw in any [historic] analysis . . . is that no such analysis could account for what the United States’ historical tradition of firearm regulation *would have been* if women and nonwhite people had been able to vote for the representatives who determined these regulations.”).

¹⁶⁹ 61 F.4th 443, 461 (5th Cir. 2023).

¹⁷⁰ *Rahimi* was initially filed on February 2, *see* 2023 WL 1459240 (5th Cir. Feb. 2, 2023), but was later withdrawn and replaced with an opinion featuring a lengthier concurrence from Judge Ho.

¹⁷¹ *Cf. supra* note 11 and accompanying text.

¹⁷² *Rahimi*, 61 F.4th at 456.

¹⁷³ *Id.* at 457 (internal quotation marks and citation omitted).

“how” (a legal proceeding demonstrating threat), but that they did not fully prohibit weapons possession and therefore were not sufficiently similar.¹⁷⁴ *Rahimi* Court thus struck down the law disarming those under protective orders for domestic violence as an “outlier[] that our ancestors would never have accepted.”¹⁷⁵

It takes a special kind of narrow legal mind to describe § 922(g)(8) as protecting persons from threats but *not* as protecting “political and social order.” To begin with, *Rahimi* (and *Perez-Gallan*) overstate the law’s historical failure to protect women from abuse. The common law authorized a man to “correct” subordinate members of the household, including his wife. Blackstone’s *Commentaries on the Laws of England*¹⁷⁶ stated that husbands could exercise over their wives “domestic chastisement, in the same moderation that a man is allowed to correct his servants or children”¹⁷⁷ But that power to “correct” did not contemplate death or threat of death inflicted by modern firearms in the hands of an abuser.

As Laura Edwards has shown, at common law the system of “peace warrants” allowed battered wives to “legally transform[] their husbands’ violence from personal conflicts into illegal acts that endangered the public order.”¹⁷⁸ On complaint, a magistrate could issue a peace warrant marking the actions of a perpetrator as a potential threat to public order; that individual could post bond for good behavior without incurring criminal penalty unless the individual broke the peace.¹⁷⁹ In other words, the common law did view aggravated acts of domestic violence as a threat to “political and social order.”¹⁸⁰

Yet this tradition of regulation has evolved in form, both because of changes in the technology and availability of firearms and because of changes in our understanding of women’s citizenship. At the founding, guns were so cumbersome they were rarely used for domestic abuse; but as weapons have become more numerous and deadly, they have amplified the

¹⁷⁴ *Id.* at 459-60.

¹⁷⁵ *Id.* at 461 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022)).

¹⁷⁶ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Univ. Chi. Press 1979) (1765). On Blackstone’s authority, see Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment’s Labor Vision Immediately After Its Enactment*, 27 WM. & MARY BILL RTS. J. 1079, 1079 (2019).

¹⁷⁷ BLACKSTONE, *supra* note 176, at 432.

¹⁷⁸ LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* at 180 (2009).

¹⁷⁹ *See id.* at 73-74. For examples peace warrants for domestic violence, see *id.* at 180-83.

¹⁸⁰ For other examples of law enforcement in the domestic violence context, see, for example, ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987); Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1301 (2017); Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 IND. L.J. 185, 207 (2011).

threats, injuries, and lethality of domestic violence.¹⁸¹ As importantly, over the decades Americans have come to view the system of common law peace warrants—which rooted legal action in harm to the social order *instead of* the rights of the individual¹⁸²—as inadequate, as were other enforcement practices that failed to treat intimate partner violence with the same seriousness as other forms of interpersonal violence.¹⁸³

By enacting § 922(g)(8) Congress acted to make clear the government’s readiness to to intervene in intimate partner violence and to address the critical role that guns now play in escalating threats and injury. The law thus responded to changes in the use of guns and the status of women. Even after law repudiated a husband’s prerogative to chastise, the criminal law remained reticent to police violence between intimates as it did violence between other persons.¹⁸⁴ The states’ reticence to intervene and disarm abusers has long been tied to traditional gender status roles in which a woman was viewed as a dependent of her abuser rather than an equal and independent member of the community. Government response to violence between intimates changed began to shift in the late twentieth century as this system of gender hierarchy began slowly to break down.¹⁸⁵

The very goal of § 922(g)(8) is thus to protect not only persons but a “political and social order”¹⁸⁶ in which women as well as men are entitled to the equal protection of the civil and criminal law.¹⁸⁷ Does the Second Amendment require Congress to reason about the sexes and respond to dangerousness on the basis of the old common law assumptions “that a

¹⁸¹ Compare Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, in *A RIGHT TO BEAR ARMS? THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT* 117 (Jennifer Tucker, Barton C. Hacker & Margaret Vining eds., 2019) (“Family and household homicides—most of which were caused by abuse or simple assaults that got out of control—were committed almost exclusively with weapons that were close at hand,” which were not loaded guns but rather “whips, sticks, hoes, shovels, axes, knives, feet, or fists.”) with Elizabeth Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 *EVALUATION REV.* 313, 313 (2006) (concluding that roughly 60% of intimate-partner homicides are committed with a firearm).

¹⁸² *Id.* at 183.

¹⁸³ See *infra* note 180 and sources cited therein.

¹⁸⁴ See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996) (“[A]s the nineteenth-century feminist movement protested a husband’s marital prerogatives, the movement helped bring about the repudiation of chastisement doctrine; but, in so doing, the movement also precipitated changes in the regulation of marital violence that ‘modernized’ this body of status law.”).

¹⁸⁵ See *id.* at 2118.

¹⁸⁶ *United States v. Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023).

¹⁸⁷ See Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 *W. VA. L. REV.* 111, 113 (1991) (connecting the mandate of the Fourteenth Amendment and equal protection doctrine to eradicating inequalities); see also Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note 21, at 190–93 (showing that DV-linked gun restrictions protect against threats and intimidation as well as physical violence).

husband, as master of his household, could subject his wife to corporal punishment or ‘chastisement’ so long as he did not inflict permanent injury upon her[]”¹⁸⁸

The Fifth Circuit’s claim that § 922(g)(8) lacks antecedents is a classic exemplar of courts hiding behind the analogical method to choose amongst arms regulation in ways that are not compelled by *Bruen* itself and are instead ventriloquizing historical sources with their own values.¹⁸⁹ True, the *Bruen* Court’s ode to history and traditions encourages uncritical deference to status-based reasoning of the past of the kind on display in *Perez-Gallan* and *Rahimi*.¹⁹⁰ That said, there is nothing in *Bruen* that requires federal judges to expose domestic partners—and others¹⁹¹—to this heightened risk of gun violence.¹⁹² Given how emphatically the Roberts Court has modeled the importance of enforcing twenty-first century—rather than eighteenth- or nineteenth-century—understandings of racial status in defining gun rights,¹⁹³ we think *Perez Gallan* and *Rahimi* are clearly wrong to insist on enforcing the Second Amendment with traditional status-based understandings of citizenship rights. Congress and the states can regulate guns with our twenty-first century understanding of We the People. *Bruen* does not require legislators to regulate guns based on premises of slavery, Jim Crow, the legal doctrine of marital unity, or separate spheres any more than it limits the Second Amendment’s protection of weapons of self-defense to muskets and bayonets or weapons regulations to those existing at the time of the founding. *Bruen*, after all, approved shall-issue licensing laws without even identifying

¹⁸⁸ Siegel, *supra* note 184, at 2118 (citation omitted).

¹⁸⁹ Judge Wilson, author of the opinion, made clear in an NRA questionnaire—filed as part of a run for office in Mississippi—that he opposes most gun regulation, including universal background checks. Cory Wilson, *2015 Mississippi Candidate Questionnaire*, NAT’L RIFLE ASS’N OF AM. POL. VICTORY FUND (May 21, 2015), <https://afj.org/wp-content/uploads/2020/01/Wilson-Attachments-p450-453.pdf> [<https://perma.cc/C353-ZT4A>].

¹⁹⁰ See Reva B. Siegel, *How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 HOUS. L. REV. (forthcoming 2023) (manuscript at 101) (observing that the history-and-tradition methods the Court employed in *Bruen* and other cases “tie the Constitution’s meaning to lawmaking from which women were excluded,” and provide the Court “resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own”).

¹⁹¹ See Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 INJ. EPIDEMIOLOGY 38, 43–44 (2021) (finding that 59.1% of mass shootings between 2014 and 2019 were DV-related and that in 68.2% of mass shootings the perpetrator either killed at least one partner or family member or had a history of DV).

¹⁹² See *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/STATISTICS> [<https://perma.cc/RG22-KUQJ>] (last visited Apr. 24, 2023) (“The presence of a gun in a domestic violence situation increases the risk of homicide by 500%.”).

¹⁹³ See Danny Li, Note, *Bruen and the Antisubordinating Second Amendment*, 132 YALE L.J. (forthcoming 2023) (showing how *Bruen* adopts racial justice claims made by gun rights scholars and advocates over the past few decades).

a historical antecedent.¹⁹⁴

These cases involving the domestic violence prohibitor show the range of discretion that courts—including the Supreme Court—have when it comes to recognizing or blocking change, including broadening social equality. We may well learn that the Roberts Court only invokes values of equality under the Second Amendment to serve the cause of expanding gun rights,¹⁹⁵ but the Court has not yet decided a case making that crystal clear. Until it does, it seems reasonable that legislators may premise weapons regulation on an evolving understanding of equal citizenship, much as the Court has reasoned from evolving understandings of race to uphold gun rights.

CONCLUSION

We have shown here that, even under *Bruen*'s historical test, governments retain broad authority to use locational gun restrictions to protect both lives and democratic community. That authority to enact sensitive-place restrictions is not limited narrowly to specific buildings where elections and formal lawmaking take place. It extends to other sites of democratic community, including schools, and could encompass other locations where those bonds are formed and strengthened, such as sites of commerce and transportation. There is a thick tradition of regulating places in such a way as to protect democratic community. In some cases, these can supply specific historical analogues; in others, they can be linked based on *Bruen*'s “why” metric—a service of common ends that extends to places not specifically enumerated.

We have shown that *Bruen* sanctions change in many ways: expressly through its analogical method, by examples that extend the right to new weapons and recognize new modes of regulation, and by principle as the Court affirms contemporary understandings of equal citizenship that can alter the shape of gun rights and regulation.

Yet it is already evident that some judges are using *Bruen* as a shield to justify mix-and-match updating that extends rights protection to AR-15s and other forms of high-powered weaponry while cabining the exercise of democratic will to competencies and conceptions of equal citizenship that are 250 years old. Neither the Constitution nor the *Bruen* decision mandates

¹⁹⁴ See *supra* note 13 and sources cited therein.

¹⁹⁵ See Khiara M. Bridges, *The Supreme Court 2021 Term, Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 31 (2022) (“The Court ‘protects’ people of color only when it serves conservative ends. In *Dobbs* and *Bruen*, the protectionist rationale justified the reversal of *Roe* and an expansive interpretation of the Second Amendment; hence, the Court invoked it.”). Justice Thomas has been particularly insistent about the expansion of Second Amendment rights as a remedy for histories and traditions of racist violence. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 856 (2010) (Thomas, J., concurring).

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this reading, and judges who assert it are reasoning from their own twenty-first century values.