
FIREARMS AND FORA: CONSTRUCTING PUBLIC CARRY DOCTRINE

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ABSTRACT

Where can a person lawfully carry firearms in public? Under what conditions can they do so? Now that the Supreme Court has formally recognized a Second Amendment right to public carry, these are among the most important unresolved questions regarding the right to bear arms. The Second Amendment's public carry doctrine is in its infancy. How the doctrine develops will have a profound impact on the exercise of Second Amendment rights in public places and on the public square. Integrating a new constitutional right into the public square is not a novel problem. After the Supreme Court recognized First Amendment rights to speak and peaceably assemble in public, it developed permitting, public forum, and time, place, and manner doctrines. As they construct similar Second Amendment doctrines concerning public carry, policymakers and courts can draw upon invaluable lessons from the First Amendment experience. Learning from First Amendment doctrine does not entail borrowing or adopting its concepts or standards for public carry—in fact, in some respects, it may entail substantially departing from them. The architects of public carry doctrine can learn many lessons—general, specific, positive, and negative—from the development and implementation of public expression doctrine. If they heed these lessons, we may end up with a public carry doctrine that avoids certain critical mistakes and even improves on First Amendment doctrine.

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INTRODUCTION

In *District of Columbia v. Heller*,¹ the Supreme Court recognized an individual right to keep and bear arms for self-defense.² In *New York State Rifle & Pistol Association v. Bruen*,³ the Court recognized that this right extends to at least some firearms in some public places.⁴ Recognition of a Second Amendment right to public carry raises pressing questions about where individuals will be allowed to carry firearms.⁵ At this moment we do not know whether the Second Amendment protects bearing deadly weapons in public parks and zoos, sports stadiums, university campuses, bars, and airports.⁶ There are also many unanswered questions about who is entitled to receive a license to carry firearms and the types of time, place, and manner limits governments can impose on the public exercise of the right.

Courts and policymakers must now construct a public carry doctrine.⁷ Given the stakes for public safety and the exercise of constitutional rights, it is vital that they get this doctrine right. Fortunately for the architects of public carry doctrine, determining the nature and scope of a constitutional right once it enters the public square is not a novel problem. The Supreme Court has addressed similar issues regarding First Amendment rights to speak and assemble in public places. Once the Court formally recognized the right to access certain public places for the purpose of exercising these rights during the late 1930s,⁸ it turned to developing permitting, public forum, and time, place, and manner doctrines that define the scope of these rights over the next several decades. After *Bruen*, the Court will face a similar set of challenges.

Public carry doctrine is in its infancy. So far, the Court has recognized that the Second Amendment is not homebound, has suggested a few “sensitive” places where public carry might be banned altogether, and has indicated that governments have the authority to regulate the time, place, and mode of bearing

¹ 554 U.S. 570 (2008).

² *Id.* at 620-21.

³ 142 S. Ct. 2111 (2022).

⁴ *Id.* at 2122 (holding Second Amendment protects right to keep and bear handgun outside home for self-defense).

⁵ See Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, *The Geography of a Constitutional Right: Gun Rights Outside the Home*, 83 LAW & CONTEMP. PROBS. i, iv (2020) (“It is no exaggeration, then, to say that the single most important substantive debate in Second Amendment litigation and scholarship is whether and how the right to keep and bear arms extends outside the home.”).

⁶ See *infra* Section I.C.

⁷ For a discussion of the importance of doctrine building, see generally Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM. & MARY BILL RTS. J. 319 (2019).

⁸ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (recognizing public has First Amendment right with strong historical support to access public streets and parks for purposes of speech and assembly).

arms in public places.⁹ In its Second Amendment decisions, the Court has repeatedly invoked the First Amendment as a model or positive example.¹⁰ Perhaps not surprisingly, the broad questions raised in its public carry doctrine—licensure, sensitive places, and time, place, and manner—very closely resemble the permitting, public forum, and time, place, and manner doctrines that govern public exercise of First Amendment rights.

This Article uses the First Amendment’s doctrinal experience to help inform the future construction of Second Amendment public carry doctrine. In *Bruen*, the Court claimed that the historical method it adopted to interpret and implement the Second Amendment “comports with” First Amendment doctrine.¹¹ That claim is highly suspect.¹² For purposes of this Article, it is beside the point. This Article does not advocate adoption of specific First Amendment standards for constructing public carry doctrine. Rather, it invokes the First Amendment for a different purpose—to ask what policymakers, courts, and commentators can learn from the Court’s experience as they develop public carry doctrine.¹³ In this Article, the First Amendment is an occasional role model, but more often is a foil or counterexample.

Policymakers and courts constructing public carry doctrine can learn valuable lessons, both positive and negative, from how and why First Amendment public expression doctrine developed.¹⁴ There are some overarching or general lessons. First, as indicated, like its public expression counterpart, public carry doctrine will not be defined by a single concept or feature. Instead, it will consist of a layered set of concepts and doctrines: permitting requirements, sensitive place restrictions, and time, place, and mode regulations. Second, just as developing the First Amendment’s doctrine took many decades, courts and policymakers will develop public carry doctrine over several decades. Third, public expression

⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”); *Bruen*, 142 S. Ct. at 2138 (“Throughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.”).

¹⁰ See, e.g., *Heller*, 554 U.S. at 582, 591, 595, 606, 618, 634-35 (invoking First Amendment’s free speech right as analogous to individual Second Amendment right to keep and bear arms).

¹¹ *Bruen*, 142 S. Ct. at 2130.

¹² See generally Timothy Zick, *Second Amendment Exceptionalism: Public Expression and Public Carry*, 102 TEX. L. REV. 65 (2023).

¹³ Cf. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381-93 (2009) (drawing general lessons about future development of Second Amendment doctrine from First Amendment uses of categorical rules and balancing).

¹⁴ See, e.g., Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333, 338-40, 346-47 (2021).

doctrine was influenced by external actors and forces, including claims by labor agitators, religious proselytizers, and civil rights activists.¹⁵ Public carry doctrine will also be subject to external influences, including legislative activity, gun violence, political lobbying, and Second Amendment advocacy.¹⁶ Fourth, just as standards pertaining to public expression developed in fits and starts, we can expect public carry doctrine to likewise change over time. Fifth, like public expression doctrine, public carry doctrine will consist of a combination of categorical rules and more variable considerations. Finally, as with First Amendment doctrine, we can expect important questions to remain open even after the basic contours of the doctrine become clearer.

The First Amendment experience offers more specific doctrinal lessons. For example, some of the earliest conflicts the Court was asked to resolve once expression entered the public square involved permitting schemes.¹⁷ In states that require concealed-carry licenses, determining in advance who may exercise the right and under what conditions will be a central aspect of public carry doctrine. Relying on early First Amendment precedents, *Bruen* observed that concealed-carry licensing laws, like ordinances regulating expression, should feature “‘narrow, objective, and definite standards’ guiding licensing officials, rather than requiring the ‘appraisal of facts, the exercise of judgment, and the formation of an opinion.’”¹⁸ The First Amendment experience suggests this line will be difficult to draw. Courts will need to distinguish valid objective concealed-carry licensing laws from invalid subjective ones and assess the permissibility of various fees and other conditions. In the case of Second Amendment permitting, they will need to do so with reference to the nation’s tradition of firearms licensing.¹⁹ More generally, they will need to assess whether permitting requirements, alone or in aggregate, constitute an invalid burden on the public carry right.²⁰

¹⁵ See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 499 (1939) (noting underlying suit brought by individual workers and labor organizations); *Fowler v. Rhode Island*, 345 U.S. 67, 68 (1953) (brought by Jehovah’s Witness minister); *Cox v. Louisiana*, 379 U.S. 536, 537-38 (1965) (brought by reverend and civil rights leader).

¹⁶ See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192-94 (2008) (explaining recognition of individual right to keep and bear arms can be traced to constitutional politics of late twentieth century).

¹⁷ See, e.g., *Schneider v. State*, 308 U.S. 147, 162 (1939) (invalidating ordinance requiring permit to distribute handbills in public places); *Hague*, 307 U.S. at 516 (invalidating ordinance granting official unbridled discretion to grant or deny permit to use parks and streets for expressive purposes).

¹⁸ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138 & n.9 (2022) (citation omitted) (first quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); and then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

¹⁹ See *id.* at 2126 (requiring government “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation”).

²⁰ Cf. C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 941 (1984) (expressing

Space and place issues will be critical under public carry doctrine. The First Amendment's public forum doctrine addresses *where* speakers and assemblies have a right to engage in expressive activity.²¹ The Second Amendment's sensitive places concept—which recognizes that “longstanding” bans on firearms in schools, government buildings, and other places are presumptively valid—will be used to address where firearms and other weapons may be banned.²² Of the three elements of public carry doctrine, the sensitive places concept has received by far the most attention from policymakers, courts, and commentators.²³ In fact, the Supreme Court has decided to address a small, but potentially important, aspect of sensitive place doctrine—the extent to which states can regulate public carry on private properties generally open to the public.²⁴ However, as commentators have observed, “neither law nor theory have yet refined sensitive place doctrine to match the geographically granular features of, say, the First Amendment's public forum doctrine.”²⁵ As they construct sensitive place standards, policymakers and courts should heed several lessons from the development of public forum doctrine.

First, as others have observed, the concept of sensitive place needs *ex ante* theoretical and conceptual grounding.²⁶ The justifications for the First Amendment's public forum concept followed its adoption. Because the Supreme Court adopted the public forum concept and related doctrines without providing

concern Court's speech-conduct dichotomy “immediately relegates assemblies . . . to a lesser constitutional status than speech”).

²¹ See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (describing three categories of public forum); see also Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 (“[W]hat is required is in effect a set of [standardized rules] for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.”).

²² *District of Columbia v. Heller*, 554 U.S. 570, 626-28 (2008).

²³ See, e.g., Patrick J. Charles, *The Second Amendment and Heller's “Sensitive Places” Carve-Out Post-Rahimi: A Historiography, Analysis, and Basic Framework*, 58 U. ILL. CHI. L. REV. 813, 888-97 (2025) [hereinafter Charles, “Sensitive Places” Carve-Out]; Julia Hesse & Kevin Schascheck II, *The Expansive ‘Sensitive Places’ Doctrine: The Limited Right to ‘Keep and Bear’ Arms Outside the Home*, 108 CORN. L. REV. ONLINE 218, 223-33 (2024); Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, “A Map Is Not the Territory”: *The Theory and Future of Sensitive Places Doctrine*, 98 N.Y.U. L. REV. ONLINE 438, 443-50 (2023); Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 676, 678, 701-02 (2023) [hereinafter Charles, *Fugazi Second Amendment*]; Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795, 1803-10 (2023) [hereinafter Blocher & Siegel, *Guided by History*]; Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 465 (2020).

²⁴ *Wolford v. Lopez*, 116 F.4th 959, 1003 (9th Cir. 2024), *cert. granted*, 2025 WL 2808808 (Oct. 3, 2025).

²⁵ Blocher et al., *supra* note 23, at 439.

²⁶ See *id.* at 440 (observing public forum concept developed “decades before the principled justifications for those categorical choices”).

coherent justifications for why speakers had access to some, but not other public places, courts and commentators had to reverse engineer theories or values to support the Court's choices.²⁷ Understanding how public carry relates to and affects the public square will help policymakers and courts develop more coherent and stable locational standards. To achieve this goal, architects of public carry doctrine will need a deeper understanding of concepts including place, sensitivity, and the public square.

Second, public forum doctrine is based on a static and wooden conception of the public square. Its categorical approach is based on the premise that the entire public square can be divided into just three property types.²⁸ Public forum doctrine thus far has struggled to recognize or accommodate changes to public places.²⁹ Further, its thin account of place is insensitive to how people rely upon the public square for expressive and non-expressive purposes. Second Amendment sensitive place doctrine can do better. *Bruen* indicated that firearms regulations in new places can be justified by reference to analogous locations previously recognized as sensitive.³⁰ That is at least a step in the direction of a more nuanced and flexible understanding of the public square. Fleshing out the contours of the sensitive place concept will require both an understanding of how the public square has developed over time and some methodological flexibility.³¹ Courts will need to acknowledge that just as the nation's firearms laws were not "trapped in amber" in the eighteenth century,³² neither was its public square. Sensitive place doctrine will need to recognize both the evolution of the public square and how the police power was exercised to preserve peace there.³³ It will need to accommodate a public square featuring *new* parks and

²⁷ See Robert C. Post, *Between Government and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) ("Although public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations.").

²⁸ See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (delineating three categories of public property for public forum doctrine purposes).

²⁹ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696-98 (1992) (Kennedy, J., concurring) (criticizing public forum doctrine for failing to recognize changes in communicative culture).

³⁰ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022) (noting "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible" (emphasis omitted)).

³¹ See Charles, "*Sensitive Places*" *Carve-Out*, *supra* note 23, at 836 ("[F]rom late thirteenth century through the late nineteenth century, so-called 'sensitive place' restrictions were far from constant or all that geographically uniform.").

³² *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

³³ See, e.g., Charles, "*Sensitive Places*" *Carve-Out*, *supra* note 23, at 842-44 (discussing how concerns about mass shootings affected need for locational firearms bans and restrictions).

entertainment spaces, modern modes of transportation, and other venues unknown and unknowable to eighteenth- and nineteenth-century lawmakers.³⁴

Third, although it will likely include a categorical component reflecting firearms bans at schools and other locations, public carry doctrine can improve on public forum doctrine by focusing less on property characteristics and more on how spatial limits affect both the right and enjoyment of the public square.³⁵ For instance, under public forum doctrine, public parks are treated categorically as traditional public fora.³⁶ Under the Second Amendment, however, a public park in a densely populated urban area may raise different firearms-related concerns than one located in a rural or isolated part of the state.³⁷ A more variable and flexible approach to locational bans could create more breathing space for the Second Amendment right, while allowing officials to restrict deadly weapons where the justifications for doing so are most compelling.³⁸

Fourth, First Amendment doctrine recognizes that the public forum concept does not fully capture the nature or extent of the government's power to regulate the public exercise of expressive rights. Public expression doctrine allows for regulation of the time, place, and manner of speech and assembly—including in places where expressive activity is otherwise allowed.³⁹ At the oral argument in

³⁴ See *Rahimi*, 144 S. Ct. at 1897-98 (concluding “Second Amendment permits more than just those regulations identical to ones that could be found in 1791” and “[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers”); see also William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1490-92, 1498-506 (2024) (contending validity of contemporary regulations does not turn on eighteenth- or nineteenth-century historical analogs). See generally Robert Spitzer, *Understanding Gun Law History After Bruen: Moving Forward by Looking Back*, 51 FORDHAM URB. L.J. 57 (2023) (explaining historical sequence in which lawmakers responded to various weapons using their police power).

³⁵ See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234 (1984) (“Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases.”).

³⁶ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (noting streets and parks “have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939))).

³⁷ See Baude & Leider, *supra* note 34, at 1508 (arguing *Bruen* requires broad legal principles, “not the Framing era’s specific applications,” be applied to sensitive place questions); see also Blocher et al., *supra* note 23, at 447 (arguing focusing on specific locations and historical analogs “would distort the law’s development and create a body of law even more convoluted than public forum doctrine”).

³⁸ See Charles, “Sensitive Places” Carve-Out, *supra* note 23, at 892 (arguing sensitive place doctrine should focus in part on “preventing and limiting the propensity for mass shooting casualty events at places where people are generally known to congregate”).

³⁹ See *Perry Educ. Ass’n*, 460 U.S. at 45 (describing standards applicable in traditional and designated fora); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (recognizing governmental authority to regulate time, place, and manner of expression in public places).

Bruen, Paul Clement, representing the challengers to New York’s concealed-carry permit law, argued that a ban on public carry in Times Square during a New Year’s Eve celebration should be analyzed as a time, place, and manner regulation, rather than a sensitive place ban.⁴⁰ *Bruen* recognized that the American tradition of firearm regulation supports “well-defined restrictions governing the *intent* for which one could carry arms, the *manner* of carry, or the exceptional *circumstances* under which one could not carry arms.”⁴¹ The lesson here is that even in places *not* deemed sensitive, lawmakers have latitude to impose reasonable regulations on the time, place, and manner of public carry.⁴²

In sum, looking in the direction of the First Amendment to inform the construction of public carry doctrine has several benefits. It helps identify the constituent features of public carry doctrine and the developmental challenges that lie ahead. The First Amendment experience also suggests, in both positive and negative ways, how public carry doctrine can develop such that both the individual right and the government’s authority to limit its public exercise are properly recognized. Paying attention to the lessons of the First Amendment experience can help produce a public carry doctrine that is coherent, defensible, and stable.

The Article proceeds as follows. Part I identifies and describes doctrinal similarities or parallels for public expression and public carry doctrines. Part II considers how the development of First Amendment public expression doctrine ought to inform the construction of Second Amendment public carry doctrine. As part of that consideration, Part II provides a theoretical foundation for thinking about place, sensitivity, and the public square. Again, the purpose of considering First Amendment lessons, both positive and negative, is not to apply the same First Amendment standards to Second Amendment problems. Rather, the purpose is to construct a public carry doctrine that leverages the lessons of the First Amendment but seeks to avoid many of its pitfalls. Part III examines, in more concrete terms, what a public carry doctrine that attended the First Amendment’s lessons might look like.

I. PUBLIC EXPRESSION AND PUBLIC CARRY: DOCTRINAL PARALLELS

Public carry doctrine, which is still in its infancy, raises difficult questions concerning where, when, and how firearms and other weapons can be possessed and used in public places. Consciously or not, the Supreme Court has already

⁴⁰ Transcript of Oral Argument at 31-32, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843).

⁴¹ *Bruen*, 142 S. Ct. at 2138 (emphasis added).

⁴² See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (upholding restrictions on overnight camping in Lafayette Square Park and National Mall, in part because protesters could communicate their message elsewhere including in media); see also Baude & Leider, *supra* note 34, at 1508 (“When it comes to determining how expansively a legislature may prohibit weapons in specific locations, probably the most important principle is that the legislature cannot designate places (either individually or when aggregated) that operate to effectively deny people most of the right to bear arms outside the home.”).

begun to establish a public carry doctrine that, at least in general terms, resembles First Amendment doctrines relating to public expression. This Part identifies the existing doctrinal parallels.

A. *Recognition of the Right*

Regarding the First Amendment, it was not always clear that individuals and groups had *any* right to use public places for expressive purposes. Indeed, in *Davis v. Massachusetts*,⁴³ which was decided before the First Amendment was applied to the states, the Supreme Court concluded that states and local governments had plenary power to restrict access to public properties.⁴⁴ Like any private owner of property, the Court reasoned, governments could exclude expressive activities from properties it owned and operated.⁴⁵

As far as the First Amendment was concerned, that is essentially where matters stood until the Court's decision in *Hague v. Committee for Industrial Organization*.⁴⁶ In *Hague*, the Court recognized that labor activists had a First Amendment right to access at least *some* public properties, namely public streets and parks, for the purpose of engaging in expressive activities.⁴⁷ In what would later become important dicta, Justice Roberts wrote: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁴⁸ The scope of the right to use public places for expressive purposes was then addressed over the next several decades in Supreme Court decisions establishing licensure, public forum, and time, place, and manner doctrines.

The Supreme Court did not recognize a Second Amendment individual right to keep and bear arms until *Heller* in 2008.⁴⁹ Although the decision did not address a right to carry arms in public, it suggested individuals had a Second Amendment right to keep and bear firearms for purpose of self-defense or "confrontation."⁵⁰ *Heller* also suggested that bans on carry in some public places, including "schools and government buildings," were lawful, which indicated firearms bans may not be lawful in *all* public places.⁵¹

⁴³ 167 U.S. 43 (1897).

⁴⁴ *Id.* at 47 (concluding state, like any owner of property, has right to exclude speakers from using its property).

⁴⁵ *Id.* ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

⁴⁶ 307 U.S. 496 (1939).

⁴⁷ *Id.* at 515.

⁴⁸ *Id.*

⁴⁹ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

⁵⁰ *Id.* at 592.

⁵¹ *See id.* at 626.

Bruen made matters more explicit, holding that the Second Amendment protects an individual right to carry firearms *outside* the home.⁵² As the Court explained, “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.”⁵³ The Court indicated that in many cases the textual analysis would “be fairly straightforward.”⁵⁴ For example, regarding public carry, it concluded that the reference to “bear arms” in the Second Amendment’s text *presumptively* covered the act of carrying a concealed handgun in public.⁵⁵ Lower courts have generally interpreted *Bruen* as holding that the Second Amendment’s text covers carrying a concealed handgun for self-defense in public.⁵⁶

If the conduct is covered by the text, *Bruen* requires that the government demonstrate its regulation is “consistent with this Nation’s historical tradition of firearm regulation.”⁵⁷ The extent to which governments can regulate the public carry right thus depends primarily on whether governments can identify relevantly similar historical regulations. *Bruen* indicated the history and tradition standard was demanding. New York bore the burden of demonstrating its concealed-carry licensing law was supported by “relevantly similar” eighteenth- and/or nineteenth-century laws, “apply[ing] faithfully the balance struck by the founding generation to modern circumstances.”⁵⁸ The Court observed that “how and why the regulations burden a law-abiding citizen’s right to armed self-defense” are central to this inquiry.⁵⁹

However, in *United States v. Rahimi*,⁶⁰ the Court’s most recent Second Amendment decision, the Court cautioned that “the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.”⁶¹ It emphasized that a contemporary regulation “must comport with the principles underlying the Second Amendment but,” under *Bruen*’s analysis, “it need not be a ‘dead ringer’ or a ‘historical twin.’”⁶² Going forward, the scope of the public carry right will

⁵² N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

⁵³ *Id.*

⁵⁴ *Id.* at 2131.

⁵⁵ *Id.* at 2134-35 (“To confine the right to ‘bear’ arms to the home would nullify half of the Second Amendment’s operative protections.”).

⁵⁶ See, e.g., Koons v. Platkin, 673 F. Supp. 3d 515, 627-28 (D.N.J. 2023) (“Unquestionably, the . . . Plaintiffs’ proposed course of conduct of carrying their handguns in public for self-defense falls within the Second Amendment’s text.”), *aff’d in part, vacated in part, rev’d in part sub nom.*, Koons v. Att’y Gen. of N.J., 156 F.4th 210 (3d Cir. 2025), *vacated, reh’g granted en banc*, 162 F.4th 100 (3d Cir. 2025).

⁵⁷ *Bruen*, 142 S. Ct. at 2126.

⁵⁸ *Id.* at 2132, 2133 n.7.

⁵⁹ *Id.* at 2133.

⁶⁰ 144 S. Ct. 1889 (2024).

⁶¹ *Id.* at 1898 (emphasis added).

⁶² *Id.* (quoting *Bruen*, 142 S. Ct. at 2133).

depend to some extent on how these historical principles are defined and identified.

In some respects, then, *Bruen* is the Second Amendment's *Hague*. Although state laws had allowed public carry for decades, *Bruen* recognized a constitutional public carry right. *Bruen* went beyond *Hague* in terms of the Court's attempt to simultaneously provide an interpretive methodology for determining the scope of the newly recognized right. However, beyond invalidating strict and subjective licensure laws like New York's, it is not yet clear precisely how that methodology will affect the scope of public carry rights.

B. *Licensing the Public Exercise of Rights*

The *Hague* Court recognized public expression rights in certain locations. However, it also recognized the government's interests in maintaining public order and safety. One traditional mechanism for furthering these interests was the requirement of a permit or license. By the close of the nineteenth century, authorities were routinely requiring that speakers or groups obtain a permit to engage in public speech and assembly.⁶³ As preachers, labor activists, and others sought access to public parks, streets, and other properties for the purpose of exercising free speech and assembly rights, courts began to confront challenges to permitting laws.⁶⁴

Hague invalidated a permit scheme that effectively granted local officials unbridled discretion to determine who could speak and assemble on public streets.⁶⁵ During the 1930s and 1940s, the Court invalidated numerous permitting or licensing schemes—many targeting the pamphleteering and proselytizing activities of Jehovah's Witnesses—because they vested broad or absolute discretion in officials to deny speakers or assemblies a license to access public properties.⁶⁶ The Court's decisions limited authorities' censorial power by requiring that permitting decisions be based on *objective* criteria that limited the enforcement discretion of authorities.⁶⁷

⁶³ See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 993 (2014) (noting permit requirements became widely adopted after ruled constitutional by Supreme Court in 1897).

⁶⁴ See generally WILLIAM KAPLAN, *STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS* (1989) (providing historical context for free speech and free assembly challenges brought by Jehovah's Witnesses and labor activists in United States and Canada).

⁶⁵ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 506, 516 (1939).

⁶⁶ See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (concluding ordinance provided overbroad discretion to officials to license expression); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (invalidating ordinance requiring permit to distribute handbills in public places); *Saia v. New York*, 334 U.S. 558, 562 (1948) (concluding licensing ordinance on use of sound amplifying device gave officials overbroad discretion).

⁶⁷ See *Cox v. Louisiana*, 379 U.S. 536, 556-57 (1965) (noting although city permit law prohibited all parades and meetings, officials had not enforced it against certain speakers).

For example, in 1941, *Cox v. New Hampshire*⁶⁸ upheld a permit requirement and an adjustable permitting fee.⁶⁹ The Court noted:

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.⁷⁰

The Court recognized that permitting requirements provided law enforcement with advance notice of who would be using the streets for demonstrations, parades, and other events.⁷¹ It also recognized the government's authority to demand that speakers pay a non-discriminatory fee pegged to offset the costs associated with public expression.⁷² The Court's review of licensing schemes continued during the 1950s and 1960s, when it invalidated several subjective permitting ordinances used to suppress speech and assembly, often in the context of civil rights and religious demonstrations.⁷³

These decisions did not end First Amendment controversies over licensing. Some have argued that permitting, even when based on non-discriminatory reasons, represents an unreasonable form of prior restraint.⁷⁴ In most circumstances, conditioning speech or assembly on prior governmental permission amounts to a presumptively unconstitutional prior restraint.⁷⁵ Yet, the Court has also concluded that permitting or licensing laws based on objective considerations are not prior restraints on expression.⁷⁶ In exercising their permitting authority, governments have enacted measures requiring additional

⁶⁸ 312 U.S. 569 (1941).

⁶⁹ *Id.* at 578.

⁷⁰ *Id.* at 574.

⁷¹ *Id.* at 576.

⁷² *Id.* at 577 (concluding "nothing contrary to the Constitution in the charge of a fee limited to the purpose" of "meet[ing] the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed" (quoting *State v. Cox*, 16 A.2d 508, 513 (N.H. 1940))).

⁷³ See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 321-22, 325 (1958); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951).

⁷⁴ See, e.g., *Baker*, *supra* note 20, at 951-53 (advancing "absolutist" approach to evaluating government practices abridging expressive freedom).

⁷⁵ See, e.g., *Shuttlesworth*, 394 U.S. at 150-51 (noting several prior decisions "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"); *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) ("[A] scheme conditioning expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'" (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965))).

⁷⁶ See *Thomas*, 534 U.S. at 322.

fees, bonds, and liability insurance.⁷⁷ Lower courts have sometimes invalidated governmental efforts to shift the costs of exercising expressive rights onto public speakers.⁷⁸ However, the Supreme Court has largely been silent on the matter since it upheld the permit fee in *Cox*.⁷⁹

As the Court's First Amendment decisions show, the power to license the exercise of constitutional rights raises important questions about the scope of those rights. For licensing can be used in ways that nullify rights. Perhaps, then, it should not be surprising that the question the Court addressed in *Bruen* immediately after it recognized a right to public carry was the validity of a state permitting law.⁸⁰

At the time *Bruen* was decided, only six states, including New York and California, had "may issue" concealed-carry licensing laws.⁸¹ Under these laws, licensing officials could deny a license based on lack of need or suitability—even if an applicant otherwise met threshold legal requirements.⁸² Other states have either relied on "shall issue" permit laws or imposed no licensure requirements.⁸³ As Justice Kavanaugh explained in his concurring opinion, shall-issue regimes "may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements."⁸⁴ If the applicant satisfies these requirements, the license *shall* be issued,⁸⁵ and officials lack discretion to deny a license based on considerations of need or other criteria.

Relying in part on First Amendment jurisprudence, the Court held in *Bruen* that may-issue permit schemes limiting public carry only to those "who demonstrate a special need for self-defense" violate the Second Amendment.⁸⁶

⁷⁷ Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 258, 352-62 (1985).

⁷⁸ See, e.g., *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 681-82 (7th Cir. 2003) (invalidating \$4,935 fee charged to cover costs of police protection as condition for group's rally on city hall grounds).

⁷⁹ See Neisser, *supra* note 77, at 260 (arguing *Cox* is of limited significance given doctrinal evolution and urging reconsideration of "when and how one may charge for free speech"); David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403, 404-05 (1983) (noting Court has not addressed issue of whether public speakers may be charged fees to defray government expenses since 1944). However, in *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992), the Court did take up this issue, conceding that raising necessary revenue for expected police services "undoubtedly is an important government responsibility, it does not justify a content-based permit fee." *Id.* at 135-36.

⁸⁰ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2135 (2022).

⁸¹ *Id.* at 2123-24.

⁸² *Id.*

⁸³ *Id.* at 2123 & n.1 (compiling and characterizing state concealed-carry statutes).

⁸⁴ *Id.* at 2162 (Kavanaugh, J., concurring).

⁸⁵ *Id.* at 2123 (majority opinion).

⁸⁶ *Id.* at 2138.

The Court concluded that the historical tradition of firearms regulation did not support such an extensive ban on public carry.⁸⁷ It suggested that concealed-carry licensing laws, like ordinances regulating expression, must be based on “‘narrow, objective, and definite standards’ guiding licensing officials, rather than requiring the ‘appraisal of facts, the exercise of judgment, and the formation of an opinion.’”⁸⁸ The majority also recognized that “any permitting scheme can be put toward abusive ends.”⁸⁹ Accordingly, it emphasized that future challenges to licensing laws could arise “where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.”⁹⁰

That said, the Court simultaneously indicated that nothing in its opinion invalidating New York’s permit scheme should be interpreted as casting doubt on the constitutionality of shall-issue laws then in effect in forty-three states.⁹¹ It explained that “[b]ecause these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent ‘law-abiding, responsible citizens’ from exercising their Second Amendment right to public carry.”⁹² Again, Justice Kavanaugh clarified the legal landscape in his concurrence:

Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today’s decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States.⁹³

In sum, *Bruen* invalidated a licensing law the Court concluded vested too much discretion in public officials and lacked a historical analogue. However, it recognized that at least some public carry licensing is presumptively valid under the Second Amendment. As under the First Amendment, the scope of licensing authority regarding public exercise of Second Amendment rights will be a central concern in the future development of public carry doctrine. Some governments will test the boundaries of their permitting authority by imposing

⁸⁷ *Id.* at 2156 (“Apart from a few late-19th century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.”).

⁸⁸ *Id.* at 2138 n.9 (citation omitted) (first quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); and then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (“To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes . . .”).

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

⁹³ *Id.* at 2162 (Kavanaugh, J., concurring).

various conditions, costs, and restrictions, as they have done on the issue of expression.⁹⁴

C. *Place Doctrines—Public Forum and Sensitive Place*

Once a constitutional right enters the public square, it is important to establish *where* it may be exercised. The locational question has been central to determining the scope of First Amendment public expression rights, and the Supreme Court has answered this question in part by adopting and developing a public forum doctrine. Likewise, deciding where firearms may be carried will be a central component of the Second Amendment's public carry doctrine. Just as the public forum concept has significantly affected where expression may occur, the sensitive place concept will be critical to mapping the scope of public carry rights.

In the First Amendment context, public forum doctrine developed in fits and starts, over a period of several decades. As mentioned earlier, until the 1930s, speakers had no enforceable First Amendment right to engage in expression in or near *any* public property.⁹⁵ Once the Court recognized a limited right to use certain public properties for expressive purposes, it ventured to develop an approach for determining which locations or places would be made available and for what purposes.⁹⁶

Writing during the 1960s, Professor Harry Kalven, Jr. posited that the concept of the “public forum” was “implicit” in the Court's earlier decisions—including those from the 1930s and 1940s—striking down licensing provisions granting officials unbridled discretion to deny permits.⁹⁷ Analyzing the Court's decisions in civil rights protest cases, Kalven worked to make the concept of the public forum more explicit. He wrote:

[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a *public forum* that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.⁹⁸

Although Kalven referred to “other public places,” like the Court in *Hague*, his primary focus was the use of public streets and parks during political protests.⁹⁹ In early decisions, the Court simultaneously addressed the substantive

⁹⁴ See, e.g., *Cal. Rifle & Pistol Ass'n v. L.A. Cnty. Sheriff's Dep't*, 745 F. Supp. 3d 1037, 1044-45 (C.D. Cal. 2024) (deciding challenge to California's concealed-carry permitting law, revised after *Bruen*, which included waiting periods, training, fingerprinting, character witness interviews, and fee requirements).

⁹⁵ See *supra* notes 43-48 and accompanying text.

⁹⁶ See generally Kalven, *supra* note 21 (tracing Court's precedents on whether and under what circumstances citizens may use public spaces for speech).

⁹⁷ *Id.* at 3.

⁹⁸ *Id.* at 11-12 (emphasis added).

⁹⁹ See *id.* at 12.

scope of the textual “speech” right and its locational parameters.¹⁰⁰ For example, even on streets and highways, which Kalven referred to as a “public forum,” the Court concluded officials had greater authority to regulate marching, assembling, and other conduct than they did “pure speech.”¹⁰¹ Thus, the Court’s initial supposition was that different modes of expression may be entitled to less First Amendment protection based on public safety and order concerns.¹⁰²

The Court’s original conception of the public forum was implicit, tentative, and under-theorized. Several additional decades would pass before the public forum concept would ripen into anything resembling a First Amendment *doctrine*. In fact, the Court did not refer expressly to the “public forum” until 1972.¹⁰³ And it took two decades after Kalven first proposed the public forum concept for Professor Robert Post to publish the still-definitive account of how the public forum doctrine originated.¹⁰⁴

By the time Post published his account in the late 1980s, the concept had found its way into several First Amendment decisions.¹⁰⁵ Unfortunately, as Post noted, by that time the doctrine had already “evolved into an elaborate, even byzantine scheme of constitutional rules designed to ascertain when members of the general public can use government property for communicative purposes.”¹⁰⁶ Based primarily on “the character of the property at issue,” the Court had separated public properties into three general categories: (1) traditional public fora including public streets and parks, which had been “immemorially” open for expressive use; (2) designated public fora, which the government intentionally opened to the general public for expressive use; and (3) limited public fora, which were dedicated primarily to non-expressive uses or activities.¹⁰⁷ In traditional and designated public fora, the government’s authority to regulate expression was circumscribed by content neutrality and other rules; however, in the third category of limited public fora, the government could restrict expression so long as its regulations were “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹⁰⁸

¹⁰⁰ See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (summarizing prior cases distinguishing between protections afforded to “pure speech” and to use of public thoroughfares for expressive activity).

¹⁰¹ *Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

¹⁰² See *id.* at 554-55.

¹⁰³ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96, 99 & n.6 (1972).

¹⁰⁴ See generally Post, *supra* note 27.

¹⁰⁵ See, e.g., *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 280 (1984) (considering whether college administration meetings were traditionally public forum); *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (finding school mail facilities not traditionally public forum).

¹⁰⁶ Post, *supra* note 27, at 1714-15 (footnote omitted).

¹⁰⁷ See *Perry Educ. Ass’n*, 460 U.S. at 44-46 (describing public forum categories).

¹⁰⁸ *Id.* at 46.

At this point, the specifics of the categorical approach are secondary to the story of how the Court went about developing public forum doctrine. As Post observed, “[a]lthough public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations.”¹⁰⁹ The Court, Post charged, had not “articulate[d] a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories.”¹¹⁰ The result was a doctrine “virtually impermeable to common sense” and a “serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government’s requirements in controlling its own property.”¹¹¹ As Post observed, he was hardly alone in condemning the doctrine as constructed.¹¹²

Post’s article offered not just an account of how the public forum developed, but also “a constitutional theory that is responsive to the values which the history of public forum doctrine reveals have animated the Court” and a “reformulation of the doctrine that is consistent with contemporary constitutional principles.”¹¹³ In other words, Post offered, *ex post*, a theory or justification for public forum doctrine that the Court itself failed to provide.

Post’s account began with *Kalven*, whom he partially faulted for focusing on a particular category of place, namely public streets, rather than “the relationship between such categories and the underlying constitutional value of public discussion.”¹¹⁴ Indeed, Post argued, the Court’s earliest First Amendment decisions were not solely concerned with protecting speech in public places.¹¹⁵ Even *Hague*, he noted, relied on common law property principles rather than

¹⁰⁹ Post, *supra* note 27, at 1715.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1715-16, 1716 n.7 (collecting critical accounts). Criticism of public forum doctrine has never subsided; if anything, it has become more vocal. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum: From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536-37 (1998) (attacking public forum doctrine as “oxymoronic” and “deeply inhospitable to speech in new or nontraditional forums”); Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1362-63 (2001) (arguing Court’s application of public forum doctrine “leads to results that conflict with sound intuitions about the proper balance of constitutional interests”); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 309 (1999) (describing public forum doctrine as “labyrinth of conflicting rules”); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 88-94 (1987) (offering several observations on Court’s application of public forum doctrine, including “general lack of care in articulating its standards”); Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 24-26 (2007) (labeling issue of government-provided internet as “yet another circumstance that highlights the inflexibility of the Court’s rules for categorizing public places”).

¹¹³ Post, *supra* note 27, at 1716-17.

¹¹⁴ *Id.* at 1719.

¹¹⁵ *Id.* at 1720.

First Amendment values.¹¹⁶ In sum, Post disagreed with Kalven's premise that the Court had recognized "a special geographical location or category of government property where speech merits unusual protection."¹¹⁷

As Post observed, starting in 1972, when the Court first invoked the "public forum" concept, it "experimented with various definitions of the phrase."¹¹⁸ The Court shifted from accepting the premise that the government, like any private property owner, could preserve a property for its intended use—including by prohibiting expression—to rejecting the private property metaphor altogether.¹¹⁹ At one point, it seemed to adopt a standard based on whether the speech in question was "basically incompatible" with the property in question.¹²⁰ That approach appeared to reject categorization of public properties as the foundation for public forum doctrine, focusing instead on the First Amendment value of maximizing communication in public places.¹²¹ However, as Post observed, this approach was undermined by a decision handed down *the same day*, which relied instead on a more categorical approach.¹²²

In sum, in its public forum decisions, the Court seemed torn between developing a doctrine that maximized freedom of speech generally and one that focused specifically on speech in public places. There followed what Post called another "Period of Experimentation," during which the Court regularly invoked the public forum concept but struggled to translate it into a coherent doctrine.¹²³ Over the course of just a few years, Post noted, the Court adopted a "rigid view" that if the government created a forum by allowing expression on a public property, it was disabled from drawing distinctions based on the content of speech.¹²⁴ That approach had serious implications for the management and operation of a wide variety of public properties. As Post observed, "[p]ublic forum doctrine had developed so rapidly that the Court apparently had not had the opportunity to think through these implications."¹²⁵

Not long after adopting a rigid content neutrality standard for public speech regulations, the Court decided the approach was untenable. Confronted with a challenge to speech restrictions imposed in the public areas of a military base, it

¹¹⁶ *Id.* at 1721.

¹¹⁷ *Id.* at 1724.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1725-33. Compare *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (invoking private property owner principle in case involving protest near jailhouse), with *Grayned v. City of Rockford*, 408 U.S. 104, 118-19 (1972) (rejecting same principle in case involving protest near school).

¹²⁰ *Grayned*, 408 U.S. at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

¹²¹ Post, *supra* note 27, at 1731.

¹²² *Id.* at 1731-32 (discussing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972)).

¹²³ *Id.* at 1733.

¹²⁴ *Id.* at 1738 ("By 1975, the Court could describe the issue . . . as 'whether the city had created a "public forum" and thereby obligated itself to accept all advertising.'").

¹²⁵ *Id.* at 1739.

concluded the government did not create a public forum merely by allowing some expressive activity to occur in a location.¹²⁶ The Court distinguished public properties such as streets and parks, which have *traditionally* been venues for expression, from other properties that lacked such a tradition.¹²⁷ In the latter type of place, the Court reverted to the private-property-owner metaphor. However, the Court did not explain why a *tradition* of public access was critical to creating a public forum. As Post observed, the Court “made no effort to articulate any connection between its definition of a public forum and a theory of the first amendment.”¹²⁸

Four decades after the Court first recognized a First Amendment right to speak and assemble in some public places, and two decades after *Kalven* introduced the “public forum” concept, the Court settled on a doctrine based on a rigid categorization of government properties based mostly on their characteristics.¹²⁹ As Post observed, the result of all the Court’s experimentation was “a public forum doctrine that sharply distinguishes public from nonpublic forums, and that cedes to the government virtual immunity from independent judicial scrutiny regarding the control of public access to the latter for communicative purposes.”¹³⁰

As this account shows, modern public forum doctrine is the product of decades of judicial experimentation and ad hoc decision making. At no point did the Court explain *why* a tradition of access should be a defining characteristic of the public forum.¹³¹ Further, as Post and others have long protested, public forum doctrine “does not focus on speech and the justifications for its suppression, but rather on the kind of government property at issue.”¹³² One commentator characterized the doctrine as “crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee.”¹³³

As mentioned, Post sought ex ante to develop theoretical justifications for the doctrine. In brief, his explanation focused on whether the government’s relationship to the property in question was one of “governance” (in which case speech-protective standards should apply) or “managerial” (in which case the

¹²⁶ *Greer v. Spock*, 424 U.S. 828, 836 (1976) (finding lower court “mistaken” in thinking “whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment”).

¹²⁷ *Id.* at 835-37.

¹²⁸ Post, *supra* note 27, at 1741.

¹²⁹ See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (categorizing different types of property and their respective restrictions).

¹³⁰ Post, *supra* note 27, at 1745.

¹³¹ See *id.* at 1759 (“Unless the Court can articulate why tradition matters, contemporary doctrine will be left to focus dully on the brute passage of historical time. This is a recipe for crude and arbitrary results.” (footnote omitted)).

¹³² *Id.* at 1766.

¹³³ Massey, *supra* note 112, at 310.

government should have more deference to regulate expression).¹³⁴ While that approach might address some of the inconsistencies and conceptual issues relating to the public forum, other problems remain. For instance, a central issue arising from the Court's lack of theoretical work is that the public forum doctrine, as it exists, cannot account for significant changes to the public square over time.¹³⁵ Despite massive social, demographic, technological, and many other changes over the past half century, public forum doctrine still recognizes only three types or categories of public places. More generally, the doctrine does not account for, or in many contexts even consider, the relationship between expressive rights and place or location.¹³⁶

Regarding the Second Amendment, the Court has only just begun to answer “*where*” questions regarding public carry rights. Under the Second Amendment, where an individual has a right to bear firearms and other weapons in public depends, in part, on whether the location aligns with concept or idea of the sensitive place. This concept is essentially the inverse of the public forum: It identifies places or locations where exercise of the right can presumptively be *banned*.

In *Heller*, the Court observed that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”¹³⁷ The Court did not cite any historical or other authority for firearms bans in these places, indicating “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”¹³⁸ Nor did the Court explain what “sensitivity” means in relation to public places, why the apparently illustrative categories of places are or should be considered sensitive, or how to determine which *other* places are sensitive. Like the “public forum,” the “sensitive place” entered the Court's lexicon without any conceptual or theoretical foundation.

Bruen likewise acknowledged that firearms could be prohibited in some sensitive places.¹³⁹ Prior to *Bruen*, lower courts had assessed place and other

¹³⁴ Post, *supra* note 27, at 1775 (“In situations of governance the state is bound by the ordinary principles of first amendment jurisprudence, but when exercising managerial authority ordinary first amendment rights are subordinated to the instrumental logic characteristic of organizations, and the state can in large measure control speech on the basis of an organization's need to achieve its institutional ends.”).

¹³⁵ This issue was part of Justice Kennedy's critique of the doctrine. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696-98 (1992) (Kennedy, J., concurring).

¹³⁶ For a general consideration of how the concept of place relates to speech and assembly rights, see generally TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2008).

¹³⁷ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court repeated and affirmed this passage on the Second Amendment's scope, including the reference to “sensitive places,” in *McDonald v. City of Chicago*, which held that the Second Amendment applies to the states. See 561 U.S. 742, 786 (2015).

¹³⁸ *Heller*, 554 U.S. at 635.

¹³⁹ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133-34 (2022).

regulations under a two-step approach that involved analysis of text and history at step one and means-end scrutiny at step two.¹⁴⁰ In *Bruen*, the Court expressly rejected that approach in favor of the requirement that contemporary firearms laws must be “consistent with this Nation’s historical tradition of firearm regulation.”¹⁴¹ The Court clarified that the Second Amendment’s scope—including *where* the right can be exercised—must be determined through a method of analogical reasoning rooted in eighteenth- and/or nineteenth-century history.¹⁴²

In *Bruen*, the Court stated that it “ha[d] no occasion to comprehensively define ‘sensitive places.’”¹⁴³ It has not yet reviewed any sensitive place laws or locational bans. Nor has the Court addressed the *concept* or meaning of “sensitivity” as it applies to place or location.

By way of providing *some* guidance, the Court indicated in *Bruen* that if a contemporary locational restriction or ban addresses a firearms-related problem that was known to the Founders, the absence of a “distinctly similar historical regulation” is “relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”¹⁴⁴ *Bruen* further explained that “analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check.”¹⁴⁵ Courts should not, the Court explained, “uphold every modern law that remotely resembles a historical analogue” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.”¹⁴⁶ “On the other hand,” explained the Court, “analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. 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.”¹⁴⁷

If prior generations used “materially different means” to address such a problem, presumably including methods other than locational public carry bans, *Bruen* indicated that these means would be grounds for declaring a contemporary public carry ban unconstitutional.¹⁴⁸ Evidence that attempts to ban firearms in certain places were rejected by courts on constitutional grounds would also be a reason for declaring the present public carry ban

¹⁴⁰ See *id.* at 2126-27 (describing pre-*Bruen* lower court approach).

¹⁴¹ *Id.* at 2126.

¹⁴² *Id.* at 2130.

¹⁴³ *Id.* at 2133.

¹⁴⁴ *Id.* at 2131.

¹⁴⁵ *Id.* at 2133.

¹⁴⁶ *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

¹⁴⁷ *Id.* (emphasis omitted).

¹⁴⁸ *Id.* at 2131 (asserting historical evidence indicating alternative solution to societal firearms issue by means other than regulation, which in question can be evidence regulation is unconstitutional).

unconstitutional.¹⁴⁹ To carry its burden, the government must show that analogous historical restrictions on public carry “impose a comparable burden on the right of armed self-defense” and that this burden is “comparably justified.”¹⁵⁰ In contrast, the Court stated that where governments faced “unprecedented societal concerns or dramatic technological changes,” possibly including those relating to the construction and use of the public square, a “more nuanced” approach to historical analogies might be appropriate.¹⁵¹ Finally, it indicated public carry bans in “new and analogous sensitive places” may be valid if the government can show the historical record supports them.¹⁵²

Having dismissed interest balancing and tiered scrutiny as judge-empowering doctrines, the Court replaced them with amorphous standards like “resembles,” “outliers,” “dead ringer,” “well-established,” “representative,” and “analogous enough.”¹⁵³ It did not clarify which historical periods or eras were relevant in terms of identifying analogs, elaborate on the meaning of “tradition” (including regarding its existence, duration, enforcement, geography, and evolution), explain why the absence of positive law or regulatory silence *should* count against the validity of locational bans and other firearms regulations, or identify any numerical or empirical standard for determining when a modern sensitive place analogy was adequately supported by historical tradition.¹⁵⁴

United States v. Rahimi, the Court’s most recent Second Amendment decision, likewise did not address the sensitive place concept. However, its approach to history and tradition will affect the validity of sensitive place and other firearms laws. The *Rahimi* majority, five of whom were in the *Bruen* majority, endorsed the Court’s analogical methodology, but added that courts should focus on the “principles” underlying historical laws to determine whether contemporary laws are valid.¹⁵⁵ The Court also emphasized that regulatory laws, “[t]aken together,” may justify burdening the Second Amendment right.¹⁵⁶

¹⁴⁹ *Id.* (explaining historical evidence showing similar regulation had previously been found unconstitutional is evidence of unconstitutionality today).

¹⁵⁰ *Id.* at 2133.

¹⁵¹ *Id.* at 2132.

¹⁵² *Id.* at 2133 (emphasis omitted).

¹⁵³ See *id.* Commentators have identified various problems with *Bruen*’s command to engage in analogical reasoning. See Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 51-52 (noting degree of discretion inherent in identifying historical “outliers”); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 108-10 (2023) (identifying historical-analogical inquiry as lacking sufficient guiding principles, raising problems of anachronism, and suffering from institutional limitations).

¹⁵⁴ See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 99-122 (2023) (discussing open issues relating to *Bruen*’s historical analogy approach).

¹⁵⁵ See *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

¹⁵⁶ *Id.* at 1901 (contending history of surety and “going armed” laws confirms regulation burdening possession of arms for individuals who pose clear threats of physical violence is justifiable).

Finally, it again emphasized that courts should not require “dead ringer[s]” or treat the history of firearms regulation as if it were “trapped in amber.”¹⁵⁷ *Rahimi* may suggest that the Court has adopted a more flexible and nuanced approach that focuses less on near-perfect analogs and more on general regulatory principles.

So much for sensitive place interpretive methodology. Based on its review of the historical record, the majority in *Bruen* concluded that it “yields relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether prohibited.”¹⁵⁸ The majority identified “legislative assemblies, polling places, and courthouses” as locations where public carry had historically been banned, without any apparent objection.¹⁵⁹ It also rejected New York’s argument that the entire island of Manhattan was a sensitive place, owing to the presence of armed law enforcement personnel, because “expanding 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.”¹⁶⁰ “Respondents’ argument,” the Court concluded, “would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense.”¹⁶¹

In his *Bruen* dissent, Justice Breyer asked: “So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums?”¹⁶² State lawmakers have been asking the same questions. Before and after *Bruen*, legislatures enacted a variety of locational bans.¹⁶³ Lower courts have addressed laws that ban firearms at public zoos, public parks, bars, treatment centers, entertainment venues, playgrounds, summer camps, government buildings, and other public places.¹⁶⁴ However, as noted, they have done so with little guidance.

Like the public forum, the sensitive place sprang into existence with little theoretical, conceptual, or historical foundation. Neither *Heller* nor *Bruen*

¹⁵⁷ *Id.* at 1897-98.

¹⁵⁸ *Bruen*, 142 S. Ct. at 2133.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2134.

¹⁶¹ *Id.*

¹⁶² *Id.* at 2181 (Breyer, J., dissenting).

¹⁶³ See, e.g., W. VA. CODE ANN. § 8-12-5a (West 2025) (prohibiting possession of firearms in municipal recreational facilities); ILL. COMP. STAT. ANN. 66/65 (West 2025) (banning knowing possession of firearms in amusement parks and public transportation); MO. ANN. STAT. § 571-215 (West 2025) (regulating possession of firearms on riverboat casinos); N.C. GEN. STAT. § 14-269.2 (2025) (criminalizing knowing possession of firearm on school bus); MO. ANN. STAT. § 571.107 (West 2025) (prohibiting possession of firearms in stadiums); D.C. CODE § 22-4502.01 (2025) (regulating possession of firearms at public swimming pools); HAW. REV. STAT. ANN. § 134-23 (LexisNexis 2025) (regulating possession of personal firearms at gun shows).

¹⁶⁴ See, e.g., *Antonyuk v. James*, 120 F.4th 941, 957 (2d Cir. 2024) (addressing New York law prohibiting public carry of firearms in certain sensitive places, including zoos, public parks, and entertainment venues, among others).

explained what sensitivity means with reference to places or locations. Nor have the Court's precedents clarified how to determine, other than by historical analogy, whether a place qualifies as sensitive. As the First Amendment experience demonstrates, coining a concept is a far cry from constructing a doctrine.¹⁶⁵ At this point, there is essentially no sensitive place doctrine.¹⁶⁶

D. *Time, Place, and Manner Regulations*

First Amendment doctrine does not rely *solely* on broad classifications or categories of properties. Even if an individual has a right to access a public place, expressive rights can be limited in such fora.¹⁶⁷ Speakers do not have a First Amendment right, even in these places, to communicate at any time or in any location or manner they choose.

From the beginning, the Supreme Court recognized a broad police power to maintain order and safety through time, place, and manner regulations. As Justice Roberts observed in *Hague*, even in public parks and streets, expressive rights are subject to limitations based on "general comfort and convenience."¹⁶⁸ In *Cox v. New Hampshire*, an early licensing decision, the Court concluded: "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets."¹⁶⁹

Professor Harry Kalven later referred to such regulations as "a set of Robert's Rules of Order for the new uses of the public forum."¹⁷⁰ Once people began to gather in newly constructed streets and public parks and demanded to proselytize, protest, and engage in other expressive activities, governments responded by regulating such activities in the interest of public safety and order. The Court's decisions have recognized "that in the face of multiple valid claims upon the use of the streets, some effort must be made to satisf[y] the various

¹⁶⁵ See Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 56-60 (1997) (discussing difference between constitutional interpretation and constitutional doctrine).

¹⁶⁶ See Blocher et al., *supra* note 23, at 439 (observing that "to call this concept a 'sensitive places doctrine' is perhaps a bit generous, as a handful of lower court cases represent more or less the sum total of cases applying *Heller* to locational restrictions").

¹⁶⁷ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (stating despite speech in public places historically being privilege of United States citizens, it may still be regulated in public interest).

¹⁶⁸ *Id.* at 516.

¹⁶⁹ *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). The Court used similar language a year earlier in *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon . . .").

¹⁷⁰ Kalven, *supra* note 21, at 12.

inconsistent demands.”¹⁷¹ In *Cox*, the Court seemed to have in mind a balancing of competing demands on public resources. For example, it observed that two parades cannot occupy the same public street at the same time.¹⁷²

As Post observed, the Court ultimately transformed the time, place, and manner doctrine into an all-purpose standard under which content-neutral speech restrictions “could be imposed anywhere, so long as the restrictions met certain criteria.”¹⁷³ Under the current First Amendment standard, to be valid, a time, place, and manner regulation must be “justified without reference to the content of the regulated speech,” “narrowly tailored to serve a significant governmental interest,” and must “leave open ample alternative channels for communication of the information.”¹⁷⁴ Applying this standard, the Court has upheld restrictions on public expression based on government interests in public order,¹⁷⁵ safety,¹⁷⁶ tranquility,¹⁷⁷ fraud,¹⁷⁸ residential privacy,¹⁷⁹ personal repose,¹⁸⁰ resource conservation,¹⁸¹ protection of the right to vote,¹⁸² and aesthetics or appearance.¹⁸³ This list is not exhaustive. Although it has occasionally invalidated broad content neutral speech

¹⁷¹ Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260 (1995).

¹⁷² *Cox*, 312 U.S. at 576.

¹⁷³ Post, *supra* note 171, at 1261.

¹⁷⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In other kinds of fora, which the Court has labeled “limited” or “non-public,” the standard is even more permissive: Regulations need only be “reasonable” and viewpoint-neutral. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

¹⁷⁵ *See Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965) (recognizing officials have authority to preserve public order).

¹⁷⁶ *See Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651, 653 (1981) (upholding state fair rule limiting solicitation from booths based on state interests in orderly pedestrian movement and crowd safety).

¹⁷⁷ *See Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (upholding park rule requiring performers to use city’s sound system in public forum).

¹⁷⁸ *See Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992) (upholding ban on airport solicitation based, in part, on concerns about fraud).

¹⁷⁹ *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding ban targeting picketing of residences).

¹⁸⁰ *See Hill v. Colorado*, 530 U.S. 703, 718 (2000) (upholding state law banning unconsented-to speech near health care clinics).

¹⁸¹ *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding National Park Service regulation banning camping in certain national parks).

¹⁸² *See Burson v. Freeman*, 504 U.S. 191, 199 (1992) (upholding ban on campaign speech near polling places).

¹⁸³ *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807-08 (1984) (upholding ban on displaying political and other signs on city property to prevent “visual clutter”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-13 (1981) (plurality opinion) (suggesting content-neutral ban on public billboards would be valid); *id.* at 528 (Brennan, J., concurring) (concluding ban on public billboards, adequately justified by concerns about traffic safety and appearance, would not violate First Amendment).

regulations,¹⁸⁴ the Court has generally allowed governments to burden expression so long as an intermediate scrutiny standard is met.

Commentators have criticized the time, place, and manner doctrine on various grounds. Characteristically pulling no punches, Post referred to it as “an unmitigated disaster.”¹⁸⁵ Regulations of the circumstances of expression, including when and where it occurs, can substantially affect expressive rights.¹⁸⁶ Nevertheless, the Court has signaled that lower courts should generally defer to the government’s determination that such regulations are appropriate means of furthering its interests.¹⁸⁷ Tellingly, it has seemingly interpreted the requirement that a regulation leave open “ample alternative channels” of expression to require little more than theoretical alternatives.¹⁸⁸ Further, like the public forum doctrine, the time, place, and manner doctrine is not clearly rooted in First Amendment values or justifications.¹⁸⁹ Instead, it has become a tool for governments to impose restrictions on public expression, so long as they do not discriminate based on content or viewpoint.

In its Second Amendment decisions, the Court has at least implicitly recognized governmental authority to regulate the time, place, and mode of public carry. For example, when it recognized the individual right to keep and bear arms, *Heller* also observed that the Second Amendment does not protect a “right to keep and carry *any weapon whatsoever in any manner whatsoever and*

¹⁸⁴ See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 490 (2014) (invalidating thirty-five-foot buffer zones outside state reproductive health care facilities because they “burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests”); *United States v. Grace*, 461 U.S. 171, 182 (1983) (invalidating ban on signs, banners, and other devices on public sidewalks bordering Supreme Court building, reasoning “total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city”).

¹⁸⁵ Post, *supra* note 171, at 1261.

¹⁸⁶ See, e.g., John D. Inazu, *The First Amendment’s Public Forum*, 56 WM. & MARY L. REV. 1159, 1181 (2015) (noting devastating effect restrictions on time, place, and manner can have on expression).

¹⁸⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (“So long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.”).

¹⁸⁸ See Post, *supra* note 171, at 1263-64 (“Seen from a sufficiently detached perspective, of course, ‘alternative’ channels of communication will always exist.”). See generally Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1661-62 (2016) (“The doctrine calls on judges to substitute their First Amendment values for the restricted speaker’s; to engage in counterfactual, post-hoc reasoning as to the choices the speaker could have made, but did not; and to focus on such hypotheticals at the expense of the relevant inquiry: whether the state has adequately justified its interference with speech.”).

¹⁸⁹ Post, *supra* note 171, at 1277 (noting Court “never thought to focus on the particular ways that speech makes possible the material preconditions of the specific social order of democracy” in developing doctrine).

for whatever purpose.”¹⁹⁰ Further, during its historical review, the *Bruen* majority recognized that early American history supports “well-defined restrictions governing the *intent* for which one could carry arms, the *manner* of carry, or the exceptional *circumstances* under which one could not carry arms.”¹⁹¹ The Court summarized part of this evidence:

The historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.¹⁹²

Thus, even in places where bearing firearms has generally been historically protected—i.e., *non*-sensitive places—governments can presumably impose historically analogous restrictions on the time, location, or mode of public carry.¹⁹³ Further, *Rahimi* suggests that public carry time, place, and manner regulations are valid if they are “consistent with the principles that underpin our regulatory tradition.”¹⁹⁴

Like the licensure and sensitive place aspects of public carry doctrine, the Second Amendment’s time, place, and manner principle is still in its infancy. Regarding public carry, policymakers, courts, and scholars have devoted far more attention to sensitive places than to the narrower class of time, place, and manner regulations. However, as the First Amendment experience shows, these regulations can supplement, or serve as alternatives to, categorical bans or allowances.

II. WHAT THE FIRST AMENDMENT CAN TEACH THE SECOND

Part I identified similarities and points of overlap between public expression and public carry doctrines. The Second Amendment’s emerging public carry doctrine will likely consist of the same basic elements as the First Amendment’s public expression doctrine. As they develop public carry doctrine, policymakers

¹⁹⁰ District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (emphasis added).

¹⁹¹ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (emphasis added).

¹⁹² *Id.* at 2150 (emphasis omitted).

¹⁹³ See Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162 (2007) (concluding “colonial and early state governments routinely exercised their police power to restrict the time, place, and manner in which Americans used their guns”); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 73-74 (1996) (comparing time, place, and manner limits on public carry to those applicable to public expression).

¹⁹⁴ United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

and courts can learn valuable lessons from why and how public expression doctrine was constructed. The constitutional standards that will be used to determine the scope and substance of public carry rights will differ markedly from those applied to public expression. However, lessons from the First Amendment could lead to development of a public carry doctrine that is more coherent, stable, and respectful of the competing interests of rights-bearers and those charged with managing the public square. This Part begins with several general lessons or observations. It next examines the *ex ante* conceptual and theoretical considerations regarding place, sensitivity, and the public square that are necessary to construct a workable public carry doctrine. The Part then turns to more specific First Amendment lessons, both positive and negative, that policymakers and courts can draw upon as they develop public carry doctrine.

A. *General Lessons*

Development of First Amendment public expression doctrine suggests several general lessons or observations that apply to the construction of public carry doctrine. As they proceed, policymakers, courts, and scholars should keep these general points in mind.

First, as demonstrated in Part I, public carry doctrine will likely consist of constituent elements that resemble those that make up public expression doctrine. The Supreme Court has begun mapping the contours of a public carry doctrine that consists of licensing requirements, locational restrictions, and time, place, and manner regulations.¹⁹⁵ Although most of the legislative, scholarly, and lower court focus has been dedicated to solving the sensitive place puzzle, licensure laws and time, place, and manner regulations will also be critical parts of the public carry doctrine. As the public forum doctrine has demonstrated, the sensitive place concept will not—indeed cannot—define public carry doctrine in its entirety. Instead, as with the First Amendment’s public expression doctrine, policymakers and courts will need to build out all three elements of public carry doctrine. This *combination* will largely define the scope of public carry rights. One implication is that, from a regulatory perspective, public officials ought not to be thinking myopically about locational or sensitive place bans. Instead, they should consider the full panoply of the regulatory powers the Court has already recognized.

Second, as the First Amendment experience shows, building out the constituent elements of public carry doctrine will take years and, more likely, several decades. As discussed in Part I, the public forum concept was birthed during the 1930s, coined during the 1960s, first invoked by the Court in the 1970s, and became a centerpiece of the doctrine by the early 1980s.¹⁹⁶ Similarly, the time, place, and manner standard originated in the 1930s, but did not take its

¹⁹⁵ See discussion *supra* Part I (explaining rulings on public carry regulations Court has made since recognition of public carry doctrine).

¹⁹⁶ See discussion *supra* Section I.B (detailing evolution of public forum in First Amendment doctrine over fifty years).

modern form until the 1960s.¹⁹⁷ With regard to the Second Amendment, the Court recognized an individual right to keep and bear arms in 2008 and a public carry right in 2022, but has since not elaborated on the scope of the public carry right.¹⁹⁸ While we may not have to wait a full half century for public carry doctrine to come into view, we should anticipate decades of litigation over concealed-carry licensing laws, sensitive place bans, and time, place, and manner regulations. Further, we ought to anticipate that some important questions about the scope of the public carry right will remain unanswered. For example, the Court has still not settled the scope of the government's power to require permitting fees and other financial constraints on public expression.

Third, as in the First Amendment context, developing public carry doctrine will require that judges explain and elaborate concepts, principles, and methods. As they have done in the First Amendment context, courts will need to develop standards for distinguishing objective and subjective permitting requirements and reviewing the validity of cost-shifting and other permitting regulations.¹⁹⁹ Like the public forum, the concept of the sensitive place, which is an invention of the *Heller* Court, will have to be methodologically situated, historically examined, and theoretically justified.²⁰⁰ Finally, courts will need to elaborate on the meaning and scope of time, place, and manner regulations as they pertain to public carry.

Fourth, the First Amendment experience suggests that the process of constructing public carry doctrine will be characterized by a degree of experimentation and uncertainty. Professor Robert Post's account of the public forum doctrine is instructive.²⁰¹ The Court's struggle to define, refine, and implement the public forum concept involved a long period of doctrinal uncertainty. Regarding the public forum, the Court briefly flirted with a speech "compatibility" standard and then lurched in the direction of a content neutrality standard, before ultimately settling on a categorical approach to governmental properties.²⁰² In the Second Amendment context, the text, history, and tradition method will provide the foundation for constructing public carry doctrine. However, that interpretive approach raises far more questions than it answers—including about public carry rights.²⁰³ *Rahimi*, which relied on general principles

¹⁹⁷ See Kalven, *supra* note 21, at 25 (describing implicit time, place, and manner doctrine present in cases from 1930s and 1940s).

¹⁹⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134 (2022).

¹⁹⁹ See *supra* Section I.B.

²⁰⁰ See Charles, "Sensitive Places" Carve-Out, *supra* note 23, at 836 ("[U]ntil *Heller* was decided, there was no such thing as a 'sensitive place' in Anglo-American law.").

²⁰¹ See *supra* Section I.C.

²⁰² See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (articulating compatibility standard); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (noting caselaw articulating content neutrality standard, and articulating categorical approach).

²⁰³ See, e.g., Charles, *supra* note 154, at 95-122 (discussing variety of open doctrinal issues after *Bruen*).

rather than *Bruen*'s close historical analogies, suggests the possibility of a more flexible approach to public carry and other regulations.²⁰⁴ Indeed, some scholars have suggested that the opinion in *Rahimi* posits there is significant internal disagreement about whether to apply a strictly originalist or more pragmatic approach when reviewing firearms regulations.²⁰⁵ As the public expression experience shows, we should anticipate interpretive uncertainty and doctrinal flux as public carry doctrine develops.

Fifth, like public expression doctrine, public carry doctrine will consist of some combination of categorization and balancing.²⁰⁶ Like its public forum counterpart, sensitive place doctrine will likely consist in part of categorical or type-of-property limits on exercise of the right.²⁰⁷ However, as with public expression doctrine, some balancing will likely be present in public carry doctrine.²⁰⁸ Indeed, as commentators have observed, the Court's historical method itself invites and incorporates a form of rights balancing.²⁰⁹ The balancing under public expression doctrine is explicit. For example, under the time, place, and manner doctrine, courts review the extent to which government regulations are tailored to further its interests and the extent to which speakers retain the right to communicate.²¹⁰ Insofar as it relies on *how* and *why* legislatures have traditionally restricted public carry, some implicit balancing will necessarily occur under public carry doctrine.²¹¹

Sixth, and finally in terms of general observations, like public expression doctrine, public carry doctrine will be influenced by both internal and external factors. Development of public expression doctrine involved conflicts on the Court over how broad access to public resources should be.²¹² Since that

²⁰⁴ See *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (explaining *Bruen* approach and finding regulation in question is permissible).

²⁰⁵ See Amanda L. Tyler, *Levels of Generality, the Limits of Originalism, and the Supreme Court's Second Amendment Jurisprudence*, 78 SMU L. REV. 265, 266 (2025) (concluding even self-identifying "originalist" Justices have demonstrated uncertainty regarding Second Amendment interpretive methods).

²⁰⁶ See generally Blocher, *supra* note 13 (describing potential effects of categoricism and balancing on Second Amendment doctrine based on First Amendment developments).

²⁰⁷ See discussion *infra* Section III.B; see also Blocher et al., *supra* note 23, at 448 ("Courts have to resolve controversies, after all, and in doing so they generate precedent, which over time can calcify into [categorical] rules.").

²⁰⁸ Blocher, *supra* note 13, at 435 ("The Second Amendment, like the First, might end up as a patchwork of categorical and balancing tests.").

²⁰⁹ See Baude & Leider, *supra* note 34, at 1491-92.

²¹⁰ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) ("We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

²¹¹ See Blocher, *supra* note 13, at 434-35.

²¹² See *supra* notes 118-22 (discussing Court's adoption of different standards for access to public properties).

doctrinal development spanned decades, the Court's makeup likely influenced how the doctrine was shaped. As *Rahimi* shows, early internal conflicts regarding public carry doctrine have centered on methodological questions, including how strictly or loosely to apply the history and tradition standard.²¹³ Further, as with public expression doctrine, external forces will influence public carry doctrine. As the Court worked to develop public forum and other speech doctrines, religious proselytizers, labor agitators, civil rights activists, and others relied with increasing frequency on access to the public square. The Court had to reconcile free speech and assembly rights with the need to preserve safety and order in increasingly crowded, tumultuous, and potentially dangerous public spaces.²¹⁴ Second Amendment public carry doctrine will likewise be affected by external concerns, including the frequency of mass shootings, the rise in political violence, and conflicts between public carry and the exercise of other rights in public places.²¹⁵

B. *(Re)constructing the Public Square*

Although public carry doctrine will have several elements, the sensitive place concept will be key to determining where individuals and groups will be allowed to carry weapons. The First Amendment experience suggests that if courts want to produce a stable and coherent place doctrine, they will need to have a clear understanding of how the exercise of public carry rights will affect public places and the public square. In contrast to First Amendment public forum doctrine, policymakers and courts ought to think more carefully *in advance* about the concepts of place, sensitivity, and the public square. As in the First Amendment context, the challenge under the Second Amendment will be to look both back in time to what the public square once was, and forward in time to what it has or will become. To do this, courts, policymakers, and scholars will need to do conceptual work regarding place, sensitivity, and the public square. This work will pay dividends for both lawmakers, as they consider enacting limits on public carry, and courts, as they review these contemporary regulations under the Second Amendment.

1. Conceptualizing Place

As it is now developing in legislatures and lower courts, the Second Amendment's public carry doctrine, as I have defined it, has focused primarily on the concept of the sensitive place. Six federal courts of appeal have reviewed,

²¹³ See *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

²¹⁴ See *Kalven*, *supra* note 21, at 12 (discussing need for "Robert's Rules of Order" for public streets).

²¹⁵ See *Miller*, *supra* note 23, at 465-78 (examining conflicts between public carry and other constitutional rights and concerns, including freedom of speech, free exercise of religion, and violence in public sphere).

and largely upheld, locational firearms bans under the sensitive place rubric.²¹⁶ Although courts and scholars have devoted significant time and energy to analyzing the concept of *sensitivity*, little has been said or written about the underlying resource itself—*place*.²¹⁷

To understand what sensitivity might or does mean, we must first shed light on place—not specific locations (at least not yet), but rather place at the conceptual level.²¹⁸ Place, after all, is the modified noun or subject, the thing that is potentially *sensitive* to the introduction of firearms. The scope of public carry rights will not depend on the sensitivity of persons to firearms but rather on the sensitivity of places to their presence and use. To understand what might make a place sensitive, we first need some understanding of what “place” is and represents. And then we will need to consider how the concept of spatial sensitivity applies to the public square, which is made up of various places where firearms may or may not be permitted.

Legal constructs, including First Amendment doctrines, generally fall short in terms of their capacity to explain or appreciate the complexity of place.²¹⁹ Since Second Amendment doctrine is relatively new, there is an opportunity to avoid or cure this deficiency. Owing to law’s relative lack of consideration of the concept, the discussion that follows relies in part on cross-disciplinary studies of place.²²⁰ The turn to knowledge beyond law is not meant to be a claim that courts or policymakers should or must incorporate specific sociological, geographical, or other concepts into decisions or laws. However, they should have an appropriate understanding of one of the concepts at the center of controversies over public carry.

²¹⁶ See *Antonyuk v. James*, 120 F.4th 941, 1006-42 (2d Cir. 2024) (finding bans of firearms in treatment centers, places of worship, parks, and zoos, among others, were not facially unconstitutional under sensitive place doctrine); *Koons v. Att’y Gen. of N.J.*, 156 F.4th 210, 249-71 (3d Cir. 2025) (evaluating plaintiffs’ challenges to New Jersey’s “sensitive places” regulations and finding “most . . . of those restrictions comport with traditional firearms regulation”); *LaFave v. Cnty. of Fairfax*, 149 F.4th 476, 483-84 (4th Cir. 2025) (holding restrictions on carrying firearms at preschools situated in county parks are presumptively constitutional under sensitive places doctrine); *United States v. Allam*, 140 F.4th 289, 300 (5th Cir. 2025) (rejecting as-applied challenge to statute banning public carry of firearms in school zone); *Schoenthal v. Raoul*, 150 F.4th 889, 907 (7th Cir. 2025) (recognizing public transportation as sensitive place); *Wolford v. Lopez*, 116 F.4th 959, 983-89 (9th Cir. 2024), *cert. granted*, 2025 WL 2808808 (Oct. 3, 2025) (holding bans on firearms in public parks, beaches, playgrounds, youth centers, bars, and places of amusement are likely constitutional).

²¹⁷ See sources cited *supra* note 23 (highlighting extensive scholarship regarding sensitive place doctrine).

²¹⁸ See generally ZICK, *supra* note 136 (centering concepts of space and place as they relate to public expression).

²¹⁹ See *id.* at 9 (“[T]he conception of place-as-property is too blunt and narrow to recognize the expressive qualities of place.”).

²²⁰ Cf. Post, *supra* note 27, at 1788 (relying on organizational studies to explain public forum concept).

Law generally treats place or space as a form of *property*—a given, inert, and static resource defined by material ownership and rights of exclusion.²²¹ Speaking broadly of spatial studies, the historian and political scientist Professor William Sewell, Jr. lamented, “the literature has treated space as an assumed and unproblematic background, not as a constituent aspect of contentious politics that must be conceptualized explicitly and probed systematically.”²²²

Sewell’s criticism could extend to constitutional analyses of place, including public forum doctrine and current judicial and scholarly analyses of the concept of the sensitive place. In First Amendment decisions, for example, place is generally presented as a background upon which events occur, rather than an independent or constituent aspect of history, culture, or expression.²²³ As they relate to public expression, some First Amendment concepts require that litigants and judges focus on place, but only or primarily in terms of whether the government has the property-based right to exclude speakers.²²⁴

First Amendment doctrines thus generally fail to appreciate how place facilitates human interaction, preserves democratic values, and influences cultures. By contrast, some scholars have examined “the depth and complexity with which people construct meaningful relationships with their surroundings.”²²⁵ Their work shows that place is constructed, variable, and dynamic.²²⁶

People do not merely occupy public places, like potted plants. Rather, by acting in and upon public places, and sometimes resisting limits on their presence there, people alter and transform a place’s appearance, functioning, and

²²¹ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (“[P]roperty entails ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2)).

²²² William H. Sewell, Jr., *Space in Contentious Politics*, in SILENCE AND VOICE IN THE STUDY OF CONTENTIOUS POLITICS 51-52 (2001).

²²³ See ZICK, *supra* note 136, at 8 (“In First Amendment doctrine and scholarship, place has generally been treated as a background principle, not a *fundamental* aspect of assembly, expression, and other public liberties.”).

²²⁴ See, e.g., *Greer v. Spock*, 424 U.S. 828, 837 (1976) (holding plaintiffs had no general First Amendment right to make political speeches or distribute leaflets on military reservation in part because military has similar powers as private property owner to preserve property’s intended use).

²²⁵ See, e.g., Setha M. Low & Denise Lawrence-Zúñiga, *Locating Culture*, in THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE 18 (Setha M. Low & Denise Lawrence-Zúñiga eds., 2003).

²²⁶ In their work on public carry and sensitive places, Joseph Blocher and Reva Siegel come closest to recognizing these features of place and the public square. See Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulations Under Heller*, 116 NW. U. L. REV. 139, 140-43 (2021) [hereinafter Blocher & Siegel, *When Guns Threaten*] (arguing focus of gun regulations is not just about narrow public safety concerns but also about preserving various aspects of public life such as peace, order, and democracy); Blocher & Siegel, *Guided by History*, *supra* note 23, at 1804 (discussing relationship between public carry regulations and preservation of democratic community).

character.²²⁷ For example, people can transform inert and rarely used public spaces into thriving community centers. The once moribund site of a controversial public monument can be transformed through occupation, symbolism, and other activities.²²⁸ Under certain conditions, even places that appear to be solely functional can take on great significance to a community. For example, a public parking lot located in Jerusalem has become an important site of religious and cultural assemblage for Christians as the center of a conflict over a controversial land deal.²²⁹

Individuals can develop personal attachments to, or affinities for, specific places—including capitol grounds, community centers, universities, public parks, bars, and places of worship.²³⁰ Scholars have observed that places can induce anxiety or instill a sense of peace and tranquility.²³¹ Denying or deterring access to places can affect not just individual well-being but also social movements and communal practices. When connections to place are severed or substantially interfered with, people may experience a state of “*placelessness*.”²³² Under such isolating conditions, places can become sites “where people coexist or cohabit without living together.”²³³ In these places, people might retreat into themselves, which in turn impedes social interaction and community.²³⁴

²²⁷ For sociological accounts of how “place” is constructed, see generally J.E. MALPAS, *PLACE AND EXPERIENCE: A PHILOSOPHICAL TOPOGRAPHY* (1999); ROBERT DAVID SACK, *HOMO GEOGRAPHICUS* (1997).

²²⁸ See Ezra Marcus, *Will the Last Confederate Statue Standing Turn Off the Lights?*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2020/06/23/style/statue-richmond-lee.html> (describing how Lee Circle in Richmond, Virginia went from being site of protest to “something of a round-the-clock community space” during 2020 Black Lives Matter protests).

²²⁹ See Yolande Knell, *Jerusalem: Armenian Christians Fight Controversial Land Deal*, BBC (Jan. 21, 2024), <https://www.bbc.com/news/world-middle-east-68034722> [<https://perma.cc/BEST-GJAK>] (reporting on efforts by Armenian Christians to retain car park used for communal gatherings in protest of controversial land deal in Armenian Quarter of Jerusalem).

²³⁰ See CHRISTOPHER TILLEY, *A PHENOMENOLOGY OF LANDSCAPE: PLACES, PATHS AND MONUMENTS* 15 (1994) (observing certain places serve as “centres of . . . human significance and emotional attachment”); see also YI-FU TUAN, *TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES* 93-100 (1974); MALPAS, *supra* note 227, at 7; SACK, *supra* note 227, at 66.

²³¹ See generally ESTHER M. STERNBERG, *HEALING SPACES: THE SCIENCE OF PLACE AND WELL-BEING* (2009).

²³² See EDWARD RELPH, *PLACE AND PLACELESSNESS* 79-80 (1976).

²³³ MARC AUGÉ, *AN ANTHROPOLOGY FOR CONTEMPORANEOUS WORLDS* 110 (Amy Jacobs trans., 1999); see also ZICK, *supra* note 136, at 146-49 (discussing concept of “non-place”); TILLEY, *supra* note 230, at 22 (noting dehumanizing nature of modern landscapes arising from their being excessively planned and controlled).

²³⁴ MARC AUGÉ, *NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY* 94, 119 (John Howe trans., 1995).

Place is both constituted by and constitutive of social, political, and other interactions.²³⁵ For example, people have long interacted in “third places,” which sociologist Professor Roy Oldenburg described as the “great variety of public places that host the regular, voluntary, informal, and happily anticipated gatherings of individuals beyond the realms of home and work.”²³⁶ Oldenburg ascribed a variety of functions to places such as bars, cafes, community centers, and general stores, including: “mixing” or uniting neighborhoods, sorting persons with similar and dissimilar interests, serving as a staging area in times of crisis, providing a place for public characters attuned to community events, encouraging diversity and inclusion, and serving as political and intellectual forums.²³⁷ Taverns, for instance, have long been considered a “genuine social solvent,” with Alexander Hamilton once describing dining at a tavern with “very mixed company of different nations and religions.”²³⁸ Like other public locations, third places build community and serve various social functions. Some, like the tavern and coffeehouse, have also historically been sites of peaceful forms of political activism.²³⁹

Public places have also frequently been sites of divisive political conflicts because they allow communities to be seen, heard, identified, and represented. Rather than inert resources, places can constitute the political community and express collective values. The politics of place involves exerting power over public venues, thereby deciding who will be allowed to be present in a place and what activities will be permitted there.²⁴⁰ In this sense, laws authorizing or restricting conduct, including expression and arms-carrying, are expressions of democratic will and sovereign power over places.²⁴¹

Historically, the politics of place has had a profound effect on the public square. Political conflicts have focused on and determined how people experienced public places, what rights, if any, they could exercise there, and

²³⁵ See Blocher & Siegel, *Guided by History*, *supra* note 23, at 1804-09 (discussing relationship between public places and democratic community).

²³⁶ RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS, HANGOUTS, AND HOW THEY GET YOU THROUGH THE DAY* 16 (1989).

²³⁷ See *id.* at 4-5, 99, 103, 185, 189.

²³⁸ CARL BRIDENBAUGH & JESSICA BRIDENBAUGH, *REBELS AND GENTLEMEN: PHILADELPHIA IN THE AGE OF FRANKLIN* 21-22 (1962) (quoting ALEXANDER HAMILTON, *ITINERARIUM* (Albert B. Hart ed., William K. Bixby 1907) (1744)).

²³⁹ See OLDENBURG, *supra* note 236, at 23, 66-67.

²⁴⁰ Anne Norton, *Writing Property and Power*, in *PUBLIC SPACE AND DEMOCRACY* 189-90 (Marcel Hénaff & Tracy B. Strong eds., 2001) (“We are accustomed to reading the inscriptions of authority on the city. There are flags and seals, the familiar grandeur of city hall, the courthouse, and the museums. In these we see the grandeur of the state and know ourselves to be within its power.”).

²⁴¹ See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 172 (“The sovereign imperative to regulate weapons in the name of public peace and public order is an ancient one . . .”); Don Mitchell, *Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Forum Doctrine*, 17 *URB. GEOGRAPHY* 152, 153-54 (1996).

whether the public square would reflect what some viewed as a civilized community or one marred by chaos and confrontation.²⁴² Thus, the nature and character of a community's public places highlight distributions of political power and social norms.²⁴³ For example, eighteenth- and nineteenth-century public carry laws varied by region, with northern legislatures generally favoring a public square with fewer firearms and southern legislatures protecting broader public carry rights.²⁴⁴ These differences reflected who had power in and over public places, how peace was expected to be maintained there, and who would maintain it. Antebellum southern laws favoring open carry over concealed carry reflected cultural norms and perceptions of supposed courage and masculinity in the public square.²⁴⁵

In First Amendment-related conflicts over place, marginalized groups—including racial minorities, religious proselytizers, and panhandlers—have challenged restrictions on their right to simply be *present* in the public square. Early labor agitators and Jehovah's Witnesses fought for access to the public streets and sidewalks not only to speak and assemble but also to make identity claims.²⁴⁶ With regard to public carry, during Reconstruction, authorities in some southern states allowed White people to bear arms in public while banning public carry (and even gun *ownership*) by Black people.²⁴⁷

Those who could speak and assemble, and those who were lawfully armed, possessed *full* citizenship in the public square. Those who were censored or disarmed were viewed as *less than* full citizens.

These place-based conflicts continue today. As commentators have observed, “open-carry activists have tried to normalize gun displays in shared public spaces, from big-box stores to coffee shops.”²⁴⁸ Armed protesters, like those in Charlottesville during the 2017 “Unite the Right” rallies, have asserted a form

²⁴² See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 147 (“Heavily armed and unarmed Americans comingle, not infrequently, in shared spaces Many of these scenes increasingly involve forms of mass armed mobilization and intense political conflict.”); see also Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 537 (2009); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1173, 1234 (1996).

²⁴³ See Mitchell, *supra* note 241, at 158-78; see also HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 73-74 (Donald Nicholson-Smith trans., 1991); David E. Sopher, *Place and Location: Notes on the Spatial Patterning of Culture*, 53 SOC. SCI. Q. 321, 321-27 (1972).

²⁴⁴ See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 125-27 (2015), <https://yalelawjournal.org/essay/firearm-regionalism-and-public-carry> [<https://perma.cc/9CGQ-VDJR>].

²⁴⁵ See *id.* at 127 (noting antebellum southern laws favored open carry to concealed carry because it was considered more “honorable”).

²⁴⁶ See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920*, at 381-82 (1997).

²⁴⁷ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 203 (1988) (noting several southern states made it illegal for Black people to own weapons, reflecting “white fears of black insurrection”).

²⁴⁸ Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 194.

of political power over public places by openly carrying semi-automatic rifles.²⁴⁹ In response, advocates of public carry bans or restrictions have resisted what they consider public carry's encroaching threat to peace and safety in public places. Recently enacted laws forbidding public carry in a variety of public places are a manifestation of the legal, political, and social struggles to define the character of the public square.²⁵⁰

Places are historically and culturally dynamic. As suggested, part of their dynamism stems from the changes in the types of conduct deemed lawful and appropriate in them. In that sense, places evolve—both in terms of their characteristics and the public's relationship with them. What is permitted or prohibited in public places by laws and social customs shapes how these places are used and experienced. For example, excluding a speaker or racial minority from a public place or privatizing what had been a public venue may turn a location into a “non-space,” devoid of “meaningful communication,”²⁵¹ whereas broadening public access and developing public projects creates and facilitates shared or communal places. Similarly, forbidding or restricting firearms in public places, or allowing liberal public carry in those places, will alter the characteristics of the public square.

Public places can become militarized through aggressive law enforcement tactics, deeply contested due to social and political conflicts, or inscribed with historical memories from public use.²⁵² Officials sometimes change the nature and character of public places when they build architectures that restrict movement, control commerce, facilitate surveillance, or limit human interactions in a place.²⁵³ In sum, the nature and character of public places are deeply affected by their architectures, as well as the laws and social practices that determine what behaviors (or exercises of rights) are allowed there.

As legally conceptualized, place is just a thing or a resource some institution owns or manages. Under a property-based framework, place is rooted primarily

²⁴⁹ See David M. Shapiro, *Guns, Speech, Charlottesville: The Semiotics of Semiautomatics*, 106 GEO. L.J. ONLINE, Fall 2017, at 1, 1-2, <https://www.law.georgetown.edu/georgetown-law-journal/submit/glj-online/106-online/commentary-guns-speech-charlottesville> [<https://perma.cc/773W-MM36>].

²⁵⁰ See sources cited *supra* note 163.

²⁵¹ See ZICK, *supra* note 136, at 146-49, 179-81 (describing “non-place” as homogeneous and increasingly privatized space devoid of meaningful human interaction); see also TILLEY, *supra* note 230, at 21 (discussing how commercialization of modern spaces strips human meaning from them).

²⁵² See generally ZICK, *supra* note 136, at 10.

²⁵³ See *id.* at 36-43 (discussing how built environment affects expressive activities); see generally JAMES HOWARD KUNTSLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993) (discussing how American settlements and eventual suburban sprawl were influenced by expansive industrialization and technological development).

in powers of exclusion and proprietorship.²⁵⁴ Managerial and exclusionary authority, therefore, are important to understanding concepts relating to the public exercise of rights, including public forum and sensitive place doctrines.²⁵⁵ However, as scholars have discovered, place is far more dynamic and complex than the property metaphor suggests.²⁵⁶ Place is not some static resource or fixed background—to the contrary, it is dynamic, symbolic, politically salient, and perpetually evolving.

2. Understanding Spatial Sensitivity

If courts, policymakers, and scholars had a more complete understanding of place when they developed public forum and time, place, and manner doctrines, the law of public expression would have been based on sounder theoretical footing. However, the Supreme Court's public forum doctrine came decades before the principled justifications for the Court's categorical choices.²⁵⁷ Thus, the Court adopted the public forum and time, place, and manner concepts without a clear understanding of (1) *why* certain places were open to expression while others were not, (2) the scope and basis of the government's authority to limit or ban expression in public places, and (3) the general relationship between exercise of the right and the nature and character of the public square.²⁵⁸

In this respect, First Amendment doctrine offers a negative lesson for the Second Amendment's public carry doctrine. Rather than reverse engineer the foundation for sensitive place doctrine years or decades hence, policymakers, courts, and scholars should start this project now. They should assess what "sensitivity" *means* as applied to public places. As they construct a doctrine of sensitive place, they should develop justifications for this doctrine that value both individual rights and the public's interests. In the Second Amendment context, this will require attention to sensitivity's history. But *Bruen* does not anticipate a valueless sensitive place doctrine. Indeed, it expressly requires that

²⁵⁴ See ZICK, *supra* note 136, at 8-9 ("The government was initially considered the *owner* of traditional venues like public parks and streets, and some time later a *trustee* of these and other public properties on behalf of the people as beneficiaries.").

²⁵⁵ See, e.g., *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019) (relying in part on federal government's proprietary interest in parking lot near United States Capitol in determining lot was sensitive place), *abrogated by*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1473-75 (2009) (discussing government's proprietary interest in regulating public carry).

²⁵⁶ See Sewell, *supra* note 222, at 52, 54-57 (discussing space as "semantically complex concept").

²⁵⁷ See Blocher et al., *supra* note 23, at 440 (observing public forum concept developed "decades before the principled justifications for those categorical choices"); see also Post, *supra* note 27, at 1715 ("Although public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations.").

²⁵⁸ See generally ZICK, *supra* note 136.

courts assess *why* early legislatures, courts, and commentators considered certain places to be sensitive to public carry.

Here, then, is an opportunity to improve upon First Amendment doctrine. To better explain what it means for a place to be sensitive, and to more generally construct a coherent public carry doctrine, courts and policymakers should consider the relationship between public carry and public places—in other words, how and why the exercise of the right affects the nature, character, and enjoyment of places and how and why officials have responded to those effects over time.²⁵⁹

By definition, a place is “sensitive” if and to the extent that it is *responsive to environmental change*.²⁶⁰ Just as a person can be sensitive to light or a plant to drought, places are or can be sensitive to a wide variety of things. In the Second Amendment context, one way to define or conceptualize spatial sensitivity is *the effect on the use and character of a place once firearms or other deadly weapons are introduced*. The presence of firearms or other weapons may affect how or even whether a place serves its primary social and governmental functions. It may determine whether a place is lived and experienced by the public or abandoned. The dependent variable—place—may be altered as weapons or activities that affect public safety, order, and tranquility are introduced. In Second Amendment terms, then, sensitivity is a measure of the effects firearms have on recreation, education, self-government, commerce, worship, or other public activities.²⁶¹

Spatial sensitivity in this sense is not a novel problem. The First Amendment’s public expression doctrine responds to similar concerns. For as long as people have gathered in public places, speech and assembly have been treated as potentially dangerous and disruptive activities.²⁶² Public places, including parks and government buildings, are sensitive to expression because it may disrupt daily routines and pose a threat to public safety and order. A public place may be sensitive to protesters’ efforts to occupy it, governmental efforts to police it, or policymakers’ plans to privatize or otherwise limit access to it. These actions affect not just the occupiers, officers, or privatizers, but the public at large, which may be excluded from certain locations. Public forum and time, place, and manner doctrines are thus examples of sensitive place doctrines; they

²⁵⁹ See Blocher et al., *supra* note 23, at 445 (encouraging sensitive place doctrine focuses on reasons why certain places are sensitive).

²⁶⁰ *Sensitive*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sensitive> [<https://perma.cc/B4XQ-BDBG>] (last visited Apr. 27, 2025) (defining “sensitive” as “capable of being stimulated or excited by external agents”).

²⁶¹ See Blocher et al., *supra* note 23, at 450-51 (describing various interests firearms affect when introduced into public places).

²⁶² As commentators have noted, the Supreme Court has itself viewed public expression with a degree of skepticism and even hostility. See Kalven, *supra* note 21, at 8 (noting Court’s opinions in cases involving obstruction of public passageway and picketing near courthouse “bristled with cautions and with lack of sympathy for such forms of protest”).

arose as responses to how the public exercise of First Amendment rights affected existing uses of the public square.

The Second Amendment sensitive place concept addresses similar concerns. Scholars and courts have proposed a variety of approaches to interpreting the Supreme Court's cryptic and so far un-theorized references in *Heller*, *McDonald*, and *Bruen* to "sensitive places."²⁶³ They have focused on factors or attributes including: the presence of vulnerable populations or those with impaired judgment, the special governmental or other functions that occur there, the government's managerial and proprietary interests, the nature of information stored in a location, the degree of state-provided security in a place, the need to protect the exercise of non-Second Amendment constitutional rights (including freedoms of speech and assembly), and interests in facilitating and preserving democratic community.²⁶⁴

It is not surprising that no uniform approach to, or overarching definition of, sensitivity has emerged. As discussed, place is a complex concept. Places can be sensitive to a multitude of factors and influences including, but not limited to, those already identified by scholars and courts. Although there is no overarching theory or definition of sensitivity, courts and scholars are doing the necessary work of asking *how* the presence of firearms affects the nature, character, and function of places, and the public square more generally. Public safety is only part of the story. As Professors Joseph Blocher and Reva Siegel have explained, the potential for physical harm associated with misuse of firearms is one, but not the sole, source of spatial sensitivity.²⁶⁵

Law-abiding individuals have a Second Amendment right to bear arms in some public places. However, the presence of firearms may undermine or harm the social, political, and cultural connections people have formed with specific

²⁶³ See Blocher et al., *supra* note 23, at 450-51 (identifying factors that may make a place "sensitive").

²⁶⁴ See *United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019) (quoting *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1319 (M.D. Ga. 2011)) (defining sensitivity with reference to "the people found there" or "activities that take place there"), *abrogated by*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); Brian C. Whitman, *In Defense of Self-Defense: Heller's Second Amendment in Sensitive Places*, 81 Miss. L.J. 1987, 2017 (2012) ("A place may be deemed sensitive if there is sensitive information or material contained or conveyed in that place."); 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. ELEC. SUPP. I.-60, I.-69 (2022) (arguing for sensitive place doctrine that considers people and activities of particular location, rather than "limiting sensitive places to locations protected by government security"); Volokh, *supra* note 255, at 1527 (arguing *Heller* "leaves open the possibility" that prohibitions on public carry apply to both "government-owned" and "privately-owned buildings"); Miller, *supra* note 23, at 466 (focusing on relationship between places and exercise of constitutional rights); Blocher & Siegel, *Guided by History*, *supra* note 23, at 1804 (focusing on relationship between public places and self-government activities).

²⁶⁵ See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 140-41 (demonstrating "government's public safety interest in regulating weapons includes preventing *social* as well as physical harms").

places and the public square. The potential for deadly violence may render certain public places unsafe and thus unwelcoming. For instance, allowing intoxicated individuals to arm themselves inside or near bars undermines the social and political functions of “third places.”²⁶⁶ Similarly, allowing public carry in places where people congregate for recreational or sporting purposes, for example in stadiums or similar venues, may affect not just public safety but also the social bonds that develop in such places.²⁶⁷

The presence of armed groups in public parks also may fundamentally alter the nature and character of these places. Parks serve recreational, expressive, and other communal functions, and thus may be quite sensitive to the introduction of deadly weapons. Parks may be “perceived to be a public landmark—that is, a location where the public commonly frequents, perceives to have a collective ownership over, and is easily recognizable.”²⁶⁸ When a park serves as an expressive venue, it may be at least temporarily sensitive to the introduction of firearms because of their effect on the exercise of expressive rights.²⁶⁹ Studies suggest that people may be unwilling to attend protests or public events where public carry is allowed, or, if they do attend, will be reticent to speak up for fear of provoking armed confrontation.²⁷⁰ Again, sensitivity must account not only for how public carry affects safety and order in public places, but also broader concerns about its effect on the myriad functions public places serve.

Public carry risks severing the connection people have with places that may matter deeply to them and their communities. At some point, the presence of deadly weaponry increases the risk that public places will become locations where people coexist or cohabit, but do not actually *live* together.²⁷¹ Commentators have noted the degree to which people in the United States increasingly avoid public places and opt for solitude.²⁷² There are many possible

²⁶⁶ See OLDENBURG, *supra* note 236, at 20-42 (describing social and political roles of “third places”).

²⁶⁷ See Charles, *Fugazi Second Amendment*, *supra* note 23, at 713 (noting “places where people were known to congregate,” including “places where events of amusement took place,” were generally deemed sensitive places by nineteenth-century local and state laws).

²⁶⁸ Charles, “*Sensitive Places*” *Carve-Out*, *supra* note 23, at 892.

²⁶⁹ See *id.* at 893 (noting “institutional justifications,” including concerns about effect of firearms on exercise of speech, worship, and other rights, may render place sensitive to public carry).

²⁷⁰ See Darrell A.H. Miller, Alexandra Filindra, Noah Kaplan & Craig Burnett, *Technology, Tradition, and “The Terror of the People,”* 99 NOTRE DAME L. REV. 1373, 1405-11 (2024) (finding statistically significant drops in support among some groups for attending public protests and carrying sign when guns were allowed).

²⁷¹ See AUGÉ, *supra* note 234, at 77-78.

²⁷² See Derek Thompson, *The Anti-Social Century*, ATLANTIC (Jan. 8, 2025), <https://www.theatlantic.com/magazine/archive/2025/02/american-loneliness-personality-politics/681091/> (“Self-imposed solitude might just be the most important social fact of the 21st century in America.”).

explanations for this trend, but the problem will only worsen if more public places where people congregate are considered unsafe or unsocial.

Justifications for banning firearms in certain public places must account for the complex and various *sensitivities* of place. To do so, they must be based on an understanding of what place is, does, and represents.²⁷³ Once place is understood to be a dynamic resource and not an inert background, it becomes easier to appreciate when, how, and most importantly, *why* public places can be considered sensitive to the presence of firearms.

Since *Bruen* requires that contemporary restrictions on public carry be justified on grounds similar to those relied on by our forebears, we need to develop something akin to a *sensitivity index* that accounts for these justifications. Indeed, scholars have already started this project, focusing on public safety and order, as well as the preservation of the democratic, social, and other functions of public places.²⁷⁴ This proposed index cannot be used to designate *all* public places as sensitive, lest the public carry right be extinguished. However, as the First Amendment's public expression doctrine shows, the public exercise of constitutional rights is not absolute, and may be substantially limited.

Thus far, the point of this project has been to explain what sensitivity means as applied to place, and to seek a better understanding of how the introduction of firearms can affect the nature, character, and functions of public places. What about the sensitivities of those who want to bear arms in public places for purposes of self-defense? After all, they may view certain public places as dangerous and inhospitable. To be sure, sensitive place doctrine must account for the interests of rights-holders. As said, governments cannot nullify or destroy the public carry right through overbroad sensitive place dedications. However, under *Heller* and *Bruen*, sensitivity refers to places, not people. The focus of the doctrine must be on how the behavior the government seeks to regulate—carrying deadly weapons—affects public places.

3. The Evolving Public Square and the Policing Power

The places that collectively comprise the public square are diverse in terms of their origins, characteristics, and functions. The First Amendment experience demonstrates that it is difficult to fashion constitutional doctrines that account for such a wide variety of places. In addition to thinking about the concepts of place and sensitivity, when building out public carry doctrine, it is also necessary to consider, or potentially reimagine, the public square. For purposes of this discussion, the public square comprises all public places where people congregate for various recreational, communal, educational, commercial, and

²⁷³ Cf. Baude & Leider, *supra* note 34, at 1508 (arguing sensitive place doctrine should focus on “the legal principles that govern sensitive places” rather than “the Framing era’s specific applications” of those principles).

²⁷⁴ See sources cited *supra* note 264 (focusing on different aspects of spatial sensitivity).

democratic purposes. It does not include residential properties or lands that are not generally held open to the public.

Like historical gun regulations, the public square is not “trapped in amber.”²⁷⁵ Rather, similar to and along with gun regulations, the public square has evolved over time. Since their methodology is backwards-looking, *Bruen* and *Rahimi* require that we engage with this historical evolution. As we do so, we must recognize the central roles lawmakers and courts traditionally performed in developing and preserving the public square.²⁷⁶ Particularly under *Rahimi*’s approach, how the public square evolved and how public officials *responded* to its evolution are important aspects of the nation’s history of firearms regulation.²⁷⁷

There is not sufficient space here to provide anything approaching a complete history of the public square’s evolution. However, even the broad strokes reveal a dramatic historical transformation over the past two centuries.

The public square did not appear all at once or as a pre-ordained collection of locations. Rather, it has evolved over time in response to population shifts, social practices, economic conditions, and other influences. To be sure, there has been some continuity. For instance, like today’s public square, early iterations included polling places, taverns, shops, and government buildings. Public and private schools, including universities, existed even prior to the Founding—although not in the expansive form we see today. However, the eighteenth- and nineteenth-century public squares did not include paved public streets and sidewalks, shopping malls, recreational parks, national parks, sports arenas, nuclear facilities, airports, and other locations that comprise the modern public square.

Some places extant in the early republic resembled, if only faintly, modern-day analogs. For example, an 1870 Texas law prohibited carrying dangerous weapons “into a ball room, social party, or other social gathering.”²⁷⁸ However, nineteenth-century ballrooms and social spaces bear only a slight resemblance to the massive sports and entertainment complexes of the twentieth century. Other locations were simply not part of the early public square, such as municipal public parks, which did not become widespread until the late

²⁷⁵ *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).

²⁷⁶ See NICHOLAS J. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER*, at xii-xiii (1994) (observing judges and lawmakers are often overlooked in terms of their influence on public space).

²⁷⁷ For a discussion on the tension between reliance on regulatory tradition and originalism, see Lawrence Rosenthal, *Litigating Original Meaning from Heller to Rahimi: The Role of Lawyering in the Confused Path of Second Amendment Jurisprudence*, 73 AM. U. L. REV. 1857, 1901-04 (2024).

²⁷⁸ 2 GEORGE W. PASCHAL, *A DIGEST OF THE LAWS OF TEXAS CONTAINING THE LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST, FROM 1864 TO 1872*, at 1322 (3d ed., 1873).

nineteenth and early twentieth century.²⁷⁹ Children's playgrounds are likewise a relatively modern invention which did not become common in the United States until the early 1900s.²⁸⁰ And, of course, given the dramatic changes in transportation technology, modern-day airports and airlines have no direct historical analog.

The absence of many of these public places at the Founding, or even as late as post-Reconstruction, obviously complicates an interpretive approach that demands proof of historical laws regulating public carry in locations similar or analogous to those that existed in the eighteenth or nineteenth centuries. It is equally obvious that any approach based on history and tradition must recognize and somehow come to terms with the evolution of the public square over time.

First Amendment doctrines have faced a similar problem. Unfortunately, public forum doctrine has largely failed to appreciate the evolutionary nature of the public square. For example, the doctrine has failed to account for important changes to the physical public square and how these alterations impact public expression.²⁸¹ The public forum doctrine's categorical approach to the public square has created a spatial straitjacket that ignores how changes in the physical landscape affect individual rights and public interests.²⁸² This rigidity has made it difficult to appreciate how the construction of new places, such as shopping malls and airport concourses, affect First Amendment rights and interests.²⁸³ In sum, the development of First Amendment doctrines regarding the exercise of rights in public places cautions that lawmakers and courts can rely on history, but they must also recognize the dynamic nature of the public square.

Public carry doctrine should learn from and incorporate this wisdom. Given the evolution of the public square, it makes little sense to rely solely or primarily on how public carry was regulated in *specific* places or locations that may or may not have existed at the Founding and/or during Reconstruction. Such an approach cannot account for the dramatic changes to the public square or new

²⁷⁹ See Kari Still, Kellen Heniford & Mark Anthony Frassetto, *The History and Tradition of Regulating Guns in Parks*, 19 HARV. L. & POL'Y REV. 201, 223-24 (2025).

²⁸⁰ See Kaitlin O'Shea, *How We Came to Play: The History of Playgrounds*, NAT'L TR. FOR HISTORIC PRES. (Aug. 15, 2013), <https://savingplaces.org/stories/how-we-came-to-play-the-history-of-playgrounds> [<https://perma.cc/X6J3-Z45T>].

²⁸¹ See generally ZICK, *supra* note 136 (examining how speakers and assemblies use public places to communicate).

²⁸² See Stone, *supra* note 112, at 93 (criticizing public forum doctrine for "myopic focus on formalistic labels"); Massey, *supra* note 112, at 310 (characterizing public forum doctrine as "crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee").

²⁸³ See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 697-98 (1992) (Kennedy, J., concurring) ("In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.").

threats from more advanced weaponry.²⁸⁴ A rigid spatial approach cannot effectively discover *how* the public square has changed or *why* governments responded to these changes as they did.

To the extent it has addressed the matter, nothing the Court has said is inconsistent with this general approach. Indeed, the Court has implicitly acknowledged the dynamic character of the public square. In *Bruen*, the Court expressly noted that firearms and other weapons could be banned from modern or “new” places if they are sufficiently analogous to eighteenth- or nineteenth-century locations.²⁸⁵ *Bruen* also recognized that technological, social, and cultural changes, presumably including those affecting the public square, may require a “more nuanced” approach to developing sensitive place and other aspects of public carry doctrine.²⁸⁶ Finally, *Rahimi* counsels courts and lawmakers to rely on “the principles that underpin our regulatory tradition.”²⁸⁷ These “principles” ought to include the evolution of the public square.

Public carry doctrine should also incorporate an understanding that the police power evolved along with the public square—indeed, often in tandem with it.²⁸⁸ Although courts addressing modern firearms regulations have mostly ignored them, background principles regarding the policing authority—specifically as it relates to public places—are part of the historical context in which public carry restrictions were adopted.²⁸⁹ The use of policing power to protect the public square is a critical background principle regarding spatial and other restrictions on public carry.²⁹⁰

²⁸⁴ See Charles, “Sensitive Places” Carve-Out, *supra* note 23, at 843 (“That a single individual was unable to carry out a mass shooting helps explain *why* location specific or ‘sensitive place’ firearm prohibitions were few and far between up through the early nineteenth century.”).

²⁸⁵ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

²⁸⁶ *Id.* at 2132.

²⁸⁷ United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

²⁸⁸ See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 164 (“Regulating arms to protect public safety is a basic precept of sovereignty and of police power that has deep roots in the common law.”).

²⁸⁹ See, e.g., Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 748 (2007); Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140, 149 (1854) (“This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.”).

²⁹⁰ See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *162-67 (discussing early conception of police power); 3 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 147-50 (1953) (examining eighteenth-century powers of government to preserve public peace, tranquility, and order); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 91 (1904) (referring to “general principle that constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security”); see also Baude & Leider, *supra* note 34, at 1488-89 (discussing police power as part of “general law” relating to Second Amendment); Adam Winkler, *The Reasonable Right to Bear Arms*, 17 STAN. L. & POL’Y REV. 597, 598 (2006) (observing state courts historically have asked whether firearm regulation is consistent with exercise of state’s police power).

During the eighteenth and nineteenth centuries, lawmakers and officials enacted public carry regulations pursuant to established principles of civil government and administration—including the power to regulate the exercise of rights.²⁹¹ The government’s domain over the public square rested on its general authority to maintain peace, safety, and order in places where the public congregated.²⁹² As scholars have observed, the Founding generation’s conceptions of official power, including the police power, were quite different from our own.²⁹³ In general, they viewed regulation of constitutional and other rights as a means of *preservation* rather than abrogation.²⁹⁴ Laws aimed at limiting the disruption associated with riots or violent forms of confrontation in the public square were not considered infringements of expressive or other rights, but rather means of avoiding anarchy.²⁹⁵ In short, early generations viewed the unbridled exercise of rights as a threat to public order, safety, health, and welfare.

Although the concept of police power changed in certain respects after the Founding, nineteenth-century constitutions, laws, and judicial decisions continued to recognize state and local police power to enact firearms regulations—including for the purpose of preventing violence in and destruction of *public properties*.²⁹⁶ Moreover, this power was understood to be “exercised under the changing exigencies of society.”²⁹⁷ As the public square developed, lawmakers retained and frequently exercised the power to respond to new threats and conditions—including the presence of deadly weapons.

As the historian Professor Saul Cornell has observed, the Anglo-American legal tradition involved balancing public carry with preserving first the King’s

²⁹¹ See Legarre, *supra* note 289, at 781-85 (discussing early conceptions of police power in U.S. law).

²⁹² See SAUL A. CORNELL, BRENNAN CTR. FOR JUST., THE POLICE POWER AND THE AUTHORITY TO REGULATE FIREARMS IN EARLY AMERICA 7 (2021), <https://www.brennancenter.org/our-work/research-reports/police-power-and-authority-regulate-firearms-early-america> [<https://perma.cc/2RF2-7AAX>] (discussing centrality of police power to early American rights theory and antebellum jurisprudence).

²⁹³ See, e.g., Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 50 (2020).

²⁹⁴ See generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 (1969) (describing balance Framers intended to strike with police forces to ensure citizens did not have so much liberty they fell into anarchy).

²⁹⁵ See *id.* at 23.

²⁹⁶ See CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 4-5 (1886) (observing police power “extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State”); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (“The power to direct the removal of gunpowder is a branch of the police power”); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85-86, 96 (1851) (recognizing breadth of police power, including laws regulating gun powder storage).

²⁹⁷ *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 592 (1847) (opinion of MacLean, J.).

Peace, and later the “people’s peace.”²⁹⁸ As Cornell has explained, public carry was a contextualized right, subject to different rules and standards depending on, among other things, *where* it occurred.²⁹⁹ Thus, from the beginning, the act of publicly bearing arms was subject to locational and other restrictions. As Cornell concluded, “[t]he necessity of demilitarizing the public square and restoring the peace led states to experiment with a range of legal mechanisms to address the problem of gun violence.”³⁰⁰ Thus, the police power evolved along with the built environment and the public’s use of it.³⁰¹

As public carry norms and practices changed, officials imposed new limits on firearms in public places. For example, they responded to the threat of public carry in large crowds—which began to gather in *new* places including public exhibitions, dance halls, and fairs—by banning public carry in these locations.³⁰² And they responded to increased access to firearms by minors by banning them in schools and at many universities.³⁰³

Modern court decisions have begun to recognize both the dynamic character of the public square and the need to account for police power responses to its evolution. For example, reviewing the sensitive place laws recently adopted by California and Hawai’i, the Ninth Circuit observed: “In 1879, *reflecting the evolution of places of amusement occurring in the Nation*, New Orleans expanded its list of places where firearms are prohibited to include any ‘place for shows or exhibitions,’ as well as any ‘house or other place of public entertainment or amusement.’”³⁰⁴

Early lawmakers and courts did not think or write in socio-legal terms about place, sensitivity, or the presence of firearms in the public square. However, they did consider the police power to extend to the preservation of recreational, educational, democratic, and other functions of a developing public square.³⁰⁵ As trustees of the public square, lawmakers enacted laws and regulations that protected not only public safety but the tranquility and peace of mind necessary for people to live, work, recreate, worship, and vote in the public square.³⁰⁶

²⁹⁸ Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 14 (2017).

²⁹⁹ *Id.* at 36-39 (describing different rules for bearing arms in home, when traveling, and in public).

³⁰⁰ CORNELL, *supra* note 292, at 11.

³⁰¹ See Cornell, *supra* note 298, at 34 (observing “meaning of arms bearing was not static in the early American republic, but evolving”).

³⁰² See Charles, “*Sensitive Places*” *Carve-Out*, *supra* note 23, at 868-72, 892 (stating “there is indeed a historically identifiable rationale—preventing and limiting the propensity for mass shooting casualty events at places where people are generally known to congregate”).

³⁰³ *Id.* at 845-50.

³⁰⁴ *Wolford v. Lopez*, 116 F.4th 959, 987 (9th Cir. 2024) (emphasis added).

³⁰⁵ See sources cited *supra* note 290.

³⁰⁶ See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 164-70 (discussing early firearms laws, including prohibitions on “carrying weapons to the terror of the people” and brandishing laws).

Early judicial decisions recognized these principles and traditions. In 1871, the Texas Supreme Court rejected various constitutional objections to the state's public carry law, concluding it was "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."³⁰⁷ The Georgia Supreme Court likewise considered bearing arms at courthouses as "improper," "shocking to all sense of propriety," and "wholly useless and full of evil."³⁰⁸ Indeed, the court described public carry in many public places as "defiant" and "disorderly" behavior.³⁰⁹ The court further characterized carrying firearms at public gatherings as "an eye-sore to good citizens, offensive to peaceable people, an indication of a want of a proper respect for the majesty of the laws, and a marked breach of good manners."³¹⁰

Referring expressly to the police power, Georgia's Supreme Court explained that 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 is to be understood and construed in connection and in harmony with these constitutional duties."³¹¹ The court concluded that bearing arms in public may have been useful "when every man was at war with his neighbor, but [is] utterly useless and disgraceful in a well ordered and civilized community."³¹²

These early judicial decisions are evidence that officials understood that preserving the public square sometimes required exercising the police power to limit the right to bear arms in public places. State lawmakers and courts worried that an armed public square would fundamentally threaten peace, order, and tranquility. They responded by enacting restrictions on public carry not only in government buildings where the people's business was transacted, but also in other public places where large crowds gathered to socialize, recreate, protest, and learn.³¹³ As new locations were constructed and the public gathered there, locational firearms restrictions followed. Indeed, during the nineteenth century, localities across the United States responded to concerns about firearms-related violence by adopting broad prohibitions on carrying weapons within entire "corporate" or "incorporate" jurisdictions.³¹⁴

To construct coherent public carry doctrine, lawmakers and courts will need to consult the history of the public square and principles of government that applied there. Lawmakers relied on traditional police powers to address new

³⁰⁷ *English v. State*, 35 Tex. 473, 479 (1871).

³⁰⁸ *Hill v. State*, 53 Ga. 472, 475 (1874).

³⁰⁹ *Id.*

³¹⁰ *Id.* at 476.

³¹¹ *Id.* at 477.

³¹² *Id.* at 479.

³¹³ See Charles, "Sensitive Places" Carve-Out, *supra* note 23, at 842 (discussing early concerns regarding discharge of firearms in populated areas).

³¹⁴ *Id.* at 872-74 ("What this meant was that the carrying of dangerous weapons within these localities' commercial or public epicenters . . . was legally off limits.").

threats in an evolving public square.³¹⁵ As the locations comprising that public square became central to the political, social, and cultural lives of their constituents, lawmakers sought to protect and preserve them. State courts frequently accepted that these limits did not infringe on the right to bear arms under state laws and constitutions.

III. THE FUTURE OF PUBLIC CARRY DOCTRINE

Going forward, the challenge for policymakers and courts will be to translate the foregoing observations regarding place, spatial sensitivity, and the public square into a workable public carry doctrine. As that project gets underway in earnest, officials ought to draw on the First Amendment experience pertaining to public expression doctrine. This Part examines how that experience can help shape public carry doctrine.

A. *Public Carry Licensure*

Some have suggested that legislatures will react to *Bruen* by shifting their attention away from licensing or permitting measures to bans on firearms in particular places.³¹⁶ If the First Amendment experience is any guide, however, no matter how sensitive place doctrine develops, licensure will continue to be a critical part of public carry doctrine.

Under the First Amendment, development of a public forum doctrine did not displace permitting laws. To the contrary, permitting remains one of the government's principal means of regulating demonstrations and other means of public expression.³¹⁷ To be sure, many states have moved toward permit-less carry.³¹⁸ But in states that continue to rely on licensing regimes, concealed carry licensure will remain a key part of public carry regulation.

Public carry licensure authority is broad, but not unlimited. As under the First Amendment, governments cannot exercise an effective veto over the public exercise of a constitutional right. Because New York's "may issue" licensing law effectively nullified public carry rights, *Bruen* invalidated it.³¹⁹ However, in his concurring opinion, Justice Kavanaugh suggested that governments may

³¹⁵ See Blocher & Siegel, *When Guns Threaten*, *supra* note 226, at 169-72 (finding "common law tradition" restricting arms "grew across continents and centuries, evolving with the legal systems of which it was a part").

³¹⁶ See Hesse & Schascheck, *supra* note 23, at 245 (claiming "[l]ocation-based bans and regulations on firearms will likely replace, at least in part, permitting regimes that were common prior to *Bruen*" and that "permitting regimes may no longer be the best avenue for states to regulate weapon possession outside the home").

³¹⁷ See TIMOTHY ZICK, *MANAGED DISSENT: THE LAW OF PUBLIC PROTEST* 51-55 (2023) (discussing modern permitting restrictions).

³¹⁸ See Chip Brownlee, *Permitless Carry: These States Allow Gun Owners to Carry Without a License*, TRACE (May 12, 2023), <https://www.thetrace.org/2023/05/permitless-carry-gun-laws-states-map> [<https://perma.cc/L94Z-NX3H>] (reporting on number of states repealing public carry licensure laws).

³¹⁹ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134-35 (2022).

impose background checks, fingerprinting, mental health records checks, firearms training, and other conditions on concealed-carry licensure.³²⁰ As *Rahimi* requires, the imposition of objective, minor burdens on public carry thus appears to be “consistent with the principles that underpin our regulatory tradition.”³²¹

Like other aspects of public carry doctrine, the Second Amendment’s licensure standards are far from settled. As in the First Amendment context, we should anticipate robust litigation about a variety of “shall issue” licensure requirements. Relying on First Amendment permitting precedents, the Court in *Bruen* suggested that licensure provisions should be based on objective considerations, be proportionate to the harm the state seeks to address, and not be part of an effort to extinguish or nullify the public carry right.³²² Within these boundaries, governments appear to retain significant power to impose licensure requirements for public carry permits.

As they have in the First Amendment context, some states likely will seek to expand the scope of their licensure power. Like other public carry issues, how the doctrine develops will depend largely on the Court’s methodological choices. Colonies, states, and cities all traditionally licensed public carry and the use of firearms in public places.³²³ This authority has been broad but, as noted, not unlimited.³²⁴ As the Court observed in *Rahimi*, a regulatory tradition may be defined by general classes of regulation, presumably including licensure and related laws limiting or conditioning public carry.³²⁵ Accordingly, the Court ought not to base the validity of licensure or other restrictions on the presentation of a critical mass of precise eighteenth- or nineteenth-century licensing provisions, but rather on general principles regarding the government’s policing and licensure power.³²⁶

As they review historical exercises of the licensure authority, courts will need to consider the transformation of the public square and the evolution of the policing power. As the Second Circuit observed, “[l]icensing was the result of

³²⁰ *Id.* at 2162 (Kavanaugh, J., concurring).

³²¹ *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024).

³²² *Bruen*, 142 S. Ct. at 2138 n.9.

³²³ *See* Hesse & Schascheck, *supra* note 23, at 237-38 (describing colonial, state, and municipal licensure provisions).

³²⁴ *See, e.g.,* *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (stating police powers do not authorize “palpable invasion of rights secured by the fundamental law”); CORNELL, *supra* note 292, at 6 (“No jurisdiction enumerated the full contours of the police power in a single text or in a single statute or ordinance. Rather, it was well understood that the exercise of this power would need to adapt to changing circumstances and new challenges as they emerged.”).

³²⁵ *See Rahimi*, 144 S. Ct. at 1901 (“Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”).

³²⁶ *See* Baude & Leider, *supra* note 34, at 1494 (“Nowhere as part of this analogical reasoning does *Bruen* require courts to find a critical mass of similar firearm regulations from early America.”).

changes in American society in the nineteenth century, including urbanization and concomitant shifts in norms of governance. The post-Civil War world was transformed by rapid urbanization.”³²⁷ The court further recognized that the evolution of the public square produced significant changes in governance institutions.³²⁸ The historical record regarding public carry licensure includes the circumstances giving rise to the licensure power and the evolution of its exercise. That record necessarily includes nineteenth-century evidence regarding the extent and scope of firearms licensure.³²⁹

Courts are starting to address the parameters of public carry licensure authority after *Bruen* and *Rahimi*. The United States Court of Appeals for the Fourth Circuit upheld the imposition of nominal fees for issuance of a license, up to an amount necessary to recoup the cost of processing applications.³³⁰ However, in future cases courts may have to determine whether higher fees or permitting costs are valid. Again, as they do so, courts should not be searching for precise fee analogs (updated for inflation), but rather should ask whether the fees are consistent with preservation of the public carry right and proportionate to the state’s interests.

Although general principles like these will be important, history will still play an important role in assessing modern permitting schemes. For example, a district court recently held that plaintiffs were likely to succeed in a challenge to significant *delays* in processing applications and residency requirements because such restrictions are not supported by the general tradition of licensure time periods.³³¹ The court’s decision did not rest on the absence of historical number-of-days analogs, but rather the fact that an *exorbitant* delay—in that case eighteen months—effectively nullified the right.

As in the First Amendment context, courts will also be drawn into disputes concerning the objectivity of permitting requirements. For example, the United States Court of Appeals for the Second Circuit recently upheld New York’s “good moral character” requirement against a facial challenge because it concluded the requirement was supported by early American laws and was an appropriate “proxy for dangerousness.”³³² Whether licensure conditions such as

³²⁷ *Antonyuk v. James*, 120 F.4th 941, 992 (2d Cir. 2024).

³²⁸ *See id.* at 993 (“Accompanying the nineteenth-century explosive growth of cities was the development of governance institutions that were more tightly organized, specialized, and bureaucratic than those required by the towns of the late eighteenth and early nineteenth centuries.”); *see also* PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 141-47 (2018).

³²⁹ *Antonyuk*, 120 F.4th at 989 nn.40-41 (discussing why and how licensing arose and evolved).

³³⁰ *See* *Md. Shall Issue, Inc. v. Moore*, 116 F.4th 211, 229 (4th Cir. 2024) (upholding Maryland shall issue licensing law requiring fingerprinting, background check, completion of firearms safety course, and payment of \$50 application fee).

³³¹ *See, e.g., Cal. Rifle & Pistol Ass’n v. L.A. Cnty. Sheriff’s Dep’t*, 745 F. Supp. 3d 1037, 1057-58, 1066-67 (C.D. Cal. 2024) (concluding eighteen-month delay was excessive).

³³² *Antonyuk*, 120 F.4th at 981, 984 n.30.

the “good moral character” requirement are the sort of “narrow, objective, and definite” standards *Bruen* suggested are valid, or are suspect regulations that require the “appraisal of facts, the exercise of judgment, and the formation of an opinion,” will be a central issue in future licensure disputes.³³³

Even assuming courts apply general regulatory and historical principles, evidentiary issues are likely to arise. The Supreme Court has not decided whether the relevant historical tradition includes the Reconstruction or later eras.³³⁴ Although *Bruen* suggested that objective permitting laws were likely valid, these laws were not adopted until after Reconstruction.³³⁵ Advances in knowledge and technology will also complicate permitting issues. For example, courts addressing the validity of psychoanalysis and urinalysis requirements (to say nothing of fingerprinting, of course) will search in vain for *direct* historical analogs.³³⁶ Instead, they will have to determine whether contemporary regulations are consistent with the general tradition of licensure. As Professors William Baude and Robert Leider have observed, “judges will often have to reason from first principles, at least where the law is underdeveloped.”³³⁷ As they have long done in First Amendment permitting cases, courts “will have to make judgments about whether legislatures have regulated the right for proper purposes and whether the regulations are sufficiently severe that they undermine the core function of the right.”³³⁸

Over time, courts will develop a Second Amendment public carry licensure doctrine, based on some combination of history and general principles. If the First Amendment experience is any indication, we should not expect this doctrine to develop rapidly. Nor can or should we expect the Supreme Court to address every conceivable licensure issue. Even today, First Amendment permitting doctrine is incomplete. For example, nearly a century after it first addressed permitting fees, the Supreme Court has not settled whether various fees, bonds, insurance requirements, and other cost-shifting measures are valid under the First Amendment.³³⁹

The general principles of shall issue licensure authority will become clearer as courts address laws imposing various requirements and conditions. Through

³³³ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022) (first quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); and then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

³³⁴ See *United States v. Rahimi*, 144 S. Ct. 1889, 1898 n.1 (2024) (finding unnecessary to resolve whether ratification of Fourteenth Amendment in 1868 should change how courts rely on prevailing understanding of individual right).

³³⁵ See Charles, “Sensitive Places” Carve-Out, *supra* note 23, at 844 & n.196 (discussing adoption of firearms licensure laws in late nineteenth and early twentieth centuries).

³³⁶ See, e.g., *Cal. Rifle & Pistol Ass’n*, 745 F. Supp. 3d at 1061 (concluding plaintiffs had not presented evidence concerning how use of psychoanalytic testing worked).

³³⁷ Baude & Leider, *supra* note 34, at 1497.

³³⁸ *Id.*

³³⁹ See Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 TEX. L. REV. 233, 261 (2021) (discussing permitting fees, insurance bonds, and other cost measures).

the licensure power, authorities will likely be allowed to condition access to firearms on demonstrations of mental fitness, lawful behavior, facility with firearms, and other criteria. Notably, this authority affects public carry rights across the public square. In that sense, permitting power is broader than the authority to simply ban arms in *specific* locations. However, the licensure power is also narrower than locational bans, in the sense that it addresses discrete, objective restrictions on exercise of the right that necessarily fall short of bans. In any event, licensing or permitting will be an important part of a layered public carry doctrine.

B. *Locational Bans*

How sensitive place doctrine develops will, of course, significantly define the scope of the public carry right. It will determine which places in the public square will be *firearms fora* in which public carry is allowed (subject to any licensure or other valid regulations). A variety of implementation issues regarding sensitive places will have to be resolved. Again, there are opportunities to learn from the First Amendment experience, in particular from development of public forum doctrine. There are opportunities for lawmakers and courts to create a more coherent and defensible location-based doctrine than exists under the First Amendment.

1. The Evolving Public Square

As discussed in Part II, understanding sensitive place bans under the *Bruen* methodology requires careful attention to the construction of the public square over time and how officials exercised the police power to respond to the introduction of firearms into public places. Since the Second Amendment must be interpreted by reference to history and tradition, it is important that policymakers, courts, and scholars have a more holistic view of how the public square evolved and how its construction affected firearms sensitivity.

The Court's decisions implicitly, and sometimes explicitly, recognize the dynamic construction of the public square. *Heller* observed that the few sensitive places it identified—schools and government buildings—were not exclusive of others.³⁴⁰ Early lawmakers were certainly aware that these were not the *only* locations where the presence of firearms threatened the functions of the public square. Indeed, *Bruen* recognized that legislative assemblies, polling places, and courthouses were also sensitive to the presence of firearms.³⁴¹ Further, early stewards of the public square did not determine sensitivity all at once, but rather as tensions between public carry and the people's use of the public square became apparent.³⁴² *Bruen* itself is evidence of this evolution: The dates of laws

³⁴⁰ District of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008).

³⁴¹ N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

³⁴² See Blocher & Siegel, *Guided by History*, *supra* note 23, at 1819 (asserting *Bruen*'s analogical method "allows sensitive place restrictions to evolve and form as democratic community does").

the Court itself cited in support of sensitive place firearms bans ranged from the seventeenth to the nineteenth century.³⁴³ These dates reflect significant eras in terms of the construction of the public square.

In *Bruen*, the Court also distinguished modern responses to problems that existed during the eighteenth century—which it suggested should be “distinctly similar” to early laws—from “cases implicating unprecedented societal concerns or dramatic technological changes [which] may require a more nuanced approach.”³⁴⁴ Changes to the public square, which today includes unforeseen and indeed unforeseeable locations, are surely among these “dramatic technological changes.”³⁴⁵

Finally, *Bruen* expressly accounted for the evolution of the public square when it observed that “courts can use analogies to those historical regulations of ‘sensitive places’ to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.”³⁴⁶ Given the development of the public square, it makes little sense, as the Court has stated, to require the government to identify “twin” or “dead ringer” laws relating to specific public venues.³⁴⁷

Recognition of the public square’s evolution will have a significant impact on future sensitive place litigation. For example, in one of the first federal appellate court decisions addressing sensitive place legislation after *Rahimi*, the United States Court of Appeals for the Ninth Circuit applied an evolutionary approach to Hawai’i and California laws banning firearms in various locations. The court observed that judicial analysis of locational restrictions will often require a “more lenient standard.”³⁴⁸ It further explained:

For places that have existed since the Founding, it suffices for Defendant to identify historical regulations similar in number and timeframe to the regulations that the Supreme Court cited as justification for designating other places as sensitive. For places that are newer, Defendant must point to regulations that are analogous to the regulations cited by the Court, *taking into account that it is illogical to expect a government to regulate a place before it existed in its modern form*. For example, it makes little sense to ask whether the Founders regulated firearms at nuclear power plants.³⁴⁹

The Ninth Circuit also acknowledged the responsive nature of the police power, as when officials addressed public carry in newly constructed locations:

[O]ne way that Defendants can show a historical tradition is by establishing that, when a type of place first arose, or first arose in modern form, states

³⁴³ *Bruen*, 142 S. Ct. at 2133, 2140-56 (canvassing early firearms laws).

³⁴⁴ *Id.* at 2131-32.

³⁴⁵ *See id.* at 2132.

³⁴⁶ *Id.* at 2133.

³⁴⁷ *See id.* (emphasis omitted); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).

³⁴⁸ *Wolford v. Lopez*, 116 F.4th 959, 979 (9th Cir. 2024).

³⁴⁹ *Id.* at 980 (emphasis added).

and municipalities began to regulate the possession of firearms at that type of place, the regulations were considered constitutional at the time, and the regulations were comparable to a tradition of regulating a similar place or places in the earlier years of the Nation.³⁵⁰

The Ninth Circuit's decision takes the evolution of the public square into account in two respects. First, it recognizes there is no sense in requiring the government to provide evidence of sensitive place bans in places that did not exist at the relevant historical moment. Second, it explains that governments can meet their burden under *Bruen* and *Rahimi* by pointing to regulation *once a place is added* to the public square. Regulations enacted in response to the development of a place or location are part of the relevant tradition. The court adds that these regulations must have been considered valid once enacted, and it requires government to identify "comparable" regulations in "a similar place or places."³⁵¹

The Ninth Circuit's approach can help courts analyze a wide variety of locational bans. For example, some states have banned public carry in public parks.³⁵² Scholars have shown that parks, at least as we know and recognize them today, did not exist at the Founding—indeed, they were not established until the nineteenth century.³⁵³ As these scholars have observed, "[t]he city parks of the mid-to-late nineteenth century developed in light of the new social and political pressures of a rapidly modernizing country, and they differed significantly from the urban green spaces that preceded them."³⁵⁴ Moreover, the nation's early parks were not uniform in terms of function, geography, and other characteristics. For example, the characteristics and uses of municipal parks were different from those of rural parks, which in turn differed from vast nature preserves.³⁵⁵ As municipal and other parks transformed cities and were opened to the public for recreation and other activities, local governments responded by adopting firearms bans in these places to ensure social order and preserve peace and public safety—all without apparent controversy.³⁵⁶ This history is directly relevant to contemporary laws that have continued the tradition of banning firearms in modern-day public parks for similar reasons.³⁵⁷

³⁵⁰ *Id.* at 981.

³⁵¹ *Id.*

³⁵² See, e.g., Jonah E. Bromwich, *New York's Ban on Guns in Parks and Other 'Sensitive' Sites Is Affirmed*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/nyregion/new-york-gun-law.html>.

³⁵³ See Still et al., *supra* note 279, at 204 (noting prohibitions on firearms in public parks "appeared in most major cities and many smaller cities and towns in the nineteenth century as parks were first created").

³⁵⁴ *Id.* at 216-17.

³⁵⁵ See *id.* at 209.

³⁵⁶ See *id.* at 220 ("From the creation of modern parks in the mid-nineteenth century, laws, ordinances, and regulations have prohibited carrying guns within them.").

³⁵⁷ See Charles, "*Sensitive Places*" *Carve-Out*, *supra* note 23, at 878-83 (discussing late nineteenth-century firearms bans in municipal parks).

Public parks are only one example of the public square's generational evolution. Airports, subway systems, public beaches, large entertainment complexes, nuclear power plants, public zoos, youth centers, and playgrounds were all added to the public square over time. None of these places existed at the Founding, and indeed most also post-date Reconstruction. It thus obviously makes no sense to look for Founding-era firearms bans in places like public beaches and large athletic facilities, which would not come into being until much later.

However, once these places were constructed, legislatures and municipalities responded to the potential of firearm-related violence by banning public carry there.³⁵⁸ They did so for the same reasons early American lawmakers banned them at other crowded public venues—to preserve safety and order and protect the recreational and commercial functions of such places. Similar reasoning supports public carry bans at public zoos, which began as offshoots of municipal public parks.³⁵⁹ As these and other places became more popular and populated—including by families and children on field trips—legislatures and officials responded to the threat of firearms violence by banning public carry there.³⁶⁰

This is partly why, as commentators have emphasized, sensitive place doctrine should focus on the “principle” of regulation rather than the “particular” place.³⁶¹ And it should, as the Court observed in *Rahmi*, make some room for “common sense.”³⁶² For example, there were no public playgrounds at the Founding.³⁶³ However, public playgrounds are comparable to both public parks and schools, where firearms were historically prohibited to protect children and preserve their educational and recreational functions.³⁶⁴ Even under an evolutionary approach, governments must still show that locational bans have been comparably *justified* over time. Applying “common sense,” we can presume the justifications for firearms bans on playgrounds are similar to those that applied to schools.

This interpretive flexibility does not entail authorizing firearms bans *everywhere* in the public square. For example, the Ninth Circuit reasoned that a stricter historical standard should apply to public carry bans in places that *did*

³⁵⁸ See, e.g., *Wolford v. Lopez*, 116 F.4th 959, 984 (9th Cir. 2024) (upholding laws banning firearms at public beaches and athletic facilities).

³⁵⁹ See, e.g., *Antonyuk v. James*, 120 F.4th 941, 1027 (2d Cir. 2024) (upholding ban on firearms at public zoos).

³⁶⁰ See *id.* at 1026 (acknowledging “firearm ban in zoos is consistent with the State’s analogues that establish a history of regulating firearms in crowded places and locations frequented by children”).

³⁶¹ Blocher et al., *supra* note 23, at 443.

³⁶² *United States v. Rahimi*, 144 S. Ct. 1889, 1901 (2024).

³⁶³ *Wolford*, 116 F.4th at 985 (recognizing “[p]laygrounds did not exist in modern form at the time of the Founding (or even at Reconstruction)”).

³⁶⁴ See *id.* (“[P]laygrounds are found primarily at schools and parks; both categories of places qualify as ‘sensitive places’ that have a historical tradition of firearm bans . . .”).

exist at the Founding.³⁶⁵ That would include not only the locations the Supreme Court has identified—schools, legislative assemblies, polling places, and courthouses—but also places like taverns, places of worship, public gatherings, financial institutions, and medical facilities. Courts may require the government to identify a tradition of firearms bans or regulations in such locations. Under this approach, the Ninth Circuit ruled in favor of the plaintiffs as to places of worship,³⁶⁶ public gatherings,³⁶⁷ financial institutions,³⁶⁸ and hospitals.³⁶⁹

As the Ninth Circuit observed, courts have come to different conclusions regarding the validity of public carry bans in some of these places.³⁷⁰ That is to be expected, since historical records may be sparse, difficult to locate, or point in more than one direction.³⁷¹ At this early stage of the doctrine's development, courts and lawmakers are just starting to develop sensitive place standards that account for the historical complexities regarding the introduction of firearms into the public square. Recall that the Supreme Court recalibrated the First Amendment's public forum doctrine more than once over several decades. *Heller* introduced the sensitive place concept.³⁷² The doctrine has not developed significantly since. In line with the First Amendment experience, we should anticipate a period of uncertainty and, in the meantime, inconsistent approaches and results in lower courts.

An evolutionary perspective regarding the public square also affects important methodological issues the Supreme Court has not settled. For example, the Court has left open the question of whether laws from the nineteenth century or beyond can be relied upon in assessing the validity of modern firearms regulations.³⁷³ As with licensure, an evolutionary perspective suggests courts need to broaden the historical inquiry to include post-Founding laws and regulations regarding locational firearms bans. As discussed, it makes no sense to try to fix the public square as of the late eighteenth century or to view places in existence during that century as the *only* relevant analogs. The

³⁶⁵ See *id.* at 980 (remarking “*Bruen* addressed a societal problem that had been present since the Founding, which caused the Court to apply the stricter ‘distinctly similar’ test” (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022))).

³⁶⁶ *Id.* at 996-97.

³⁶⁷ *Id.* at 997-98.

³⁶⁸ *Id.* at 998-99.

³⁶⁹ *Id.* at 999-1000.

³⁷⁰ *Id.* at 1000 (“District courts have divided on the question whether a national historical tradition of banning firearms at medical facilities exists.”).

³⁷¹ See Charles, “*Sensitive Places*” *Carve-Out*, *supra* note 23, at 864 (observing existing historical records relating to locational firearms regulations are “fragment of the regulatory whole”).

³⁷² *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

³⁷³ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2163 (2022) (declining to decide “whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope”).

Court's own precedents appear to recognize this reality. For example, *Heller* claimed schools are sensitive places,³⁷⁴ even though there is no record of laws banning firearms at universities until 1824—nearly three decades after the ratification of the Second Amendment.³⁷⁵

The Court has also not determined whether or to what extent *municipal* laws can be relied upon in establishing the historical tradition of firearms regulation. Since the public square's principal architects have historically been local officials, it makes no sense to exclude their work when constructing sensitive place doctrine. As commentators have observed with regard to public parks, "[d]evaluing *city* laws . . . is an odd approach given that modern parks originated in *cities*."³⁷⁶ The same argument applies to most locations in the public square, including public beaches, zoos, playgrounds, and entertainment venues.³⁷⁷

Having a better understanding of how the public square developed will help produce a more accurate assessment of the spatial scope of public carry rights. This would be a vast improvement over the First Amendment's public forum doctrine, which from the start was based on either unstated or suspect premises. For example, the Supreme Court treated public parks like Boston Common as "immemorially" or "time out of mind" dedicated to public speech and assembly.³⁷⁸ However, as scholars have observed, "for the first two hundred-plus years of its existence, the Common was a grazing zone, a training field, and, frankly, a dump."³⁷⁹ These places *are* critical for public speech and assembly, but not because they have *always* been used for that purpose. The Court's use of history to construct public forum doctrine offers a cautionary tale about constructing place doctrines without a more accurate understanding of the evolutionary history of the public square.

Moreover, as discussed, First Amendment public forum doctrine has experienced marked difficulties when it comes to incorporating and analyzing *new* places.³⁸⁰ The Supreme Court has not added a single place or property to the "traditional public forum" category (parks, streets, and sidewalks) since it established its categorical approach in the 1980s.³⁸¹ Further, public forum

³⁷⁴ See *Heller*, 554 U.S. at 626-27.

³⁷⁵ David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 249-50 (2019) (noting first "notable arms ban at an American University" established in 1824 at University of Virginia).

³⁷⁶ See Still et al., *supra* note 279, at 230.

³⁷⁷ Because of changes in local government law, today such firearms regulations would necessarily have to emanate from state legislatures. See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 72 (2018) (discussing diminished role local governments play when regulating local firearms threats).

³⁷⁸ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

³⁷⁹ Still et al., *supra* note 279, at 213.

³⁸⁰ See discussion *supra* Section II.B.3.

³⁸¹ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992) (discussing characteristics of "traditional public for[a]" and holding airport terminals not public fora).

doctrine has been insensitive to technological and cultural changes to the public square, including the construction of new places and the migration of audiences to different locations. Courts and policymakers now have an opportunity to approach the sensitive place concept, which presumably will one day ripen into a doctrine, with a better understanding of how to incorporate new places into Second Amendment doctrine. Again, making this effort will ensure that the Second Amendment's place doctrines, unlike First Amendment analogs, are based on an accurate accounting of the construction and regulation of public spaces.

2. Categorical and Variable Approaches to Place

One thing that remains uncertain is whether the sensitive place concept will produce rigidly categorical or more flexible standards concerning public carry. First Amendment doctrine has highlighted serious problems with an overreliance on rigid categories. As discussed, public forum doctrine has been criticized on various grounds, including that it focuses primarily on property characteristics rather than the relationship between place and expression.³⁸² Sensitive place doctrine could fall victim to its own rigidity, based on specific historical analogs and narrow conceptions of tradition.

Whatever shape it takes, sensitive place doctrine will have a categorical component. Indeed, as commentators have observed, "a legal regime focused entirely on sensitivity and not on places would almost certainly be constitutionally deficient—not simply as a matter of doctrinal design, but of due process."³⁸³ Sensitive place doctrine must provide adequate notice of *where* in the public square public carry is lawful. Thus, the doctrine "should, over time, broadly recognize certain categories of places as subject to gun prohibitions (or not). Courts have to resolve controversies, after all, and in doing so they generate precedent, which over time can calcify into rules."³⁸⁴

Indeed, this process is already underway. The Court has indicated that schools, government buildings, polling places, courthouses, and legislative assemblies are sensitive places.³⁸⁵ To be sure, questions remain about the scope of these spatial categories—for example, whether "schools" include public university campuses or "government buildings" include areas adjacent to such structures.³⁸⁶ Nevertheless, a categorical approach identifies some locations in

³⁸² See *supra* Section I.C.

³⁸³ See Blocher et al., *supra* note 23, at 447.

³⁸⁴ See *id.* at 448 (footnote omitted).

³⁸⁵ See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022) (listing examples of sensitive places parsed from eighteenth- and nineteenth-century historical records).

³⁸⁶ For support that those who voted to ratify the Fourteenth Amendment understood "buffer zones" around schools, government buildings, and other properties to be consistent with the Second Amendment, see Mark Anthony Frassetto, *Firearms in Sensitive Places and the Military Appropriations Crisis of 1879*, GONZAGA L. REV. (forthcoming 2026) (manuscript at 13-14, 26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5348011.

the public square where firearms likely can be prohibited.³⁸⁷ Correspondingly, through litigation concerning common sensitive place bans, the doctrine will identify places where firearms likely *cannot* be prohibited.

However, as the First Amendment experience shows, a categorical approach can be so rigid and wooden that it becomes a doctrinal straitjacket. Consider public parks. Under the First Amendment's public forum doctrine, a public park is a traditional public forum—full stop.³⁸⁸ The category dictates the rules under which speech and assembly can be regulated there.³⁸⁹ This remains true regardless of any difference in terms of the geography or characteristics of the park. If it is a park, the First Amendment applies with full force there. In the First Amendment context, whatever its faults, this rigidity can benefit speakers—if they are in a park, certain speech-protective rules apply.³⁹⁰ By contrast, in the Second Amendment context, a rigid categorical rule may *undermine* the right. For example, if *all* public parks are sensitive places, then public carry can be banned there regardless of the park's characteristics.

Because the Supreme Court has not reviewed any sensitive place laws, it has not resolved whether places *must* be treated categorically or with more flexible or variable standards. Perhaps a more flexible and variable sensitive place doctrine would better calibrate both constitutional rights and governmental interests. Suppose, for example, that rather than treating *all* public parks as sensitive places, firearm bans in urban parks, rural parks, nature preserves, and national parks were assessed on their own historical and other merits.³⁹¹ After all, as Professor Joseph Blocher has observed, public carry has long been subject to greater legal restrictions in urban areas than in more rural communities.³⁹² Under principles of “firearm localism,” perhaps officials and courts ought to be allowed to distinguish urban from rural public parks.³⁹³ Disaggregating parks would allow officials to regulate their communities in a manner that is more sensitive to local norms and practices.³⁹⁴

³⁸⁷ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (indicating prohibition of firearms in “schools” and “government buildings” is presumptively valid).

³⁸⁸ *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).

³⁸⁹ *Id.* (declaring stringent standard of review required for such traditional public fora).

³⁹⁰ *See id.* (holding state may enforce content-neutral time, place, and manner restrictions if they are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).

³⁹¹ *See Still et al.*, *supra* note 279, at 220–30.

³⁹² Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82, 87 (2013) (observing “United States has a deeply rooted tradition of comparatively stringent urban gun control”). Historical gun regulations also had distinctive regional variations. *See Ruben & Cornell*, *supra* note 244, at 123–24.

³⁹³ *See Blocher*, *supra* note 392, at 89–92.

³⁹⁴ *See Antonyuk v. James*, 120 F.4th 941, 1025 (2d Cir. 2024) (expressing “doubt that the evidence presently in the record could set forth a well-established tradition of prohibiting firearm carriage in rural parks,” but noting parties “did not distinguish between rural and urban parks” in arguments).

To be sure, this more variable approach may raise practical difficulties of its own. What defines or distinguishes urban and rural parks? Government lawyers may have to identify, and courts may need to examine, more specific or granular histories relating to parklands. However, as noted, scholars and courts have already started to uncover this history.³⁹⁵ Whatever its faults, a more flexible and variable approach could produce a more accurate historical accounting of the places where public carry has been banned while preserving a degree of geographic variation in terms of public carry rights.

A more variable approach would be based more on the justifications (in *Bruen*'s terms, the *why*) for sensitivity than on property characteristics. Rather than asking only whether a place fits within a particular category (schools, parks, government buildings, etc.), lawmakers and courts could construct a sensitive place doctrine based on the justifications for prohibiting public carry in a particular place.³⁹⁶

Further, as commentators have argued, there is no reason sensitive places "must be *fixed*."³⁹⁷ For example, as some have suggested, perhaps public auditoriums ought to be considered sensitive only at certain *times* or during certain *events*.³⁹⁸ Likewise, a "public street might not be sensitive, except for when a President speaks or lives there, a localized riot has broken out, or a natural disaster has struck."³⁹⁹ The same logic might apply to public parks and streets where demonstrations are scheduled to take place—the properties could be deemed sensitive *only* during the duration of the permitted event. Or, rather than characterizing an *entire* public university campus as a sensitive place, perhaps the Second Amendment allows banning public carry *only* in certain areas of university campuses—for example, classrooms, but not adjacent parking lots or on-campus housing.⁴⁰⁰ As explained below, some of these restrictions might best be considered as part of a public carry time, place, and manner doctrine, as they all fall short of flat bans on public carry. But they are also examples of a variable, as opposed to categorical, approach to the sensitive place concept or idea.

To be clear, this is less an *endorsement* of the variable approach than an effort to think through what a future sensitive place doctrine might look like. As

³⁹⁵ See Still et al., *supra* note 279, at 220-29; see also *Antonyuk*, 120 F.4th at 1025-26 (observing New York's ban on firearms in parks was justified by historical analogs relating to urban, but not rural, parks).

³⁹⁶ See Blocher et al., *supra* note 23, at 445-47.

³⁹⁷ *Id.* at 449.

³⁹⁸ See *id.* (suggesting, for example, public gymnasium "might not be a sensitive place for most of the year, except for the one day a year it is used as a polling place").

³⁹⁹ *Id.*

⁴⁰⁰ See *DiGiacinto v. Rector & Visitors of Geo. Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (upholding arms ban "inside campus buildings and at campus events"); cf. *State v. Spingola*, 736 N.E.2d 48, 53-53 (Ohio Ct. App. 1999) (refusing to classify campus green as traditional public forum and therefore allowing university to designate portions of green as nontraditional public fora and other portions as nonpublic fora).

discussed in the next Section, one of the concerns with a broad sensitive place doctrine is that it threatens to nullify or destroy the right. Authorities might be compelled to consider narrower bans and restrictions. Thus, lawmakers ought to think in advance about alternatives to broad sensitive place bans.

It is likely sensitive place doctrine will comprise *both* categorical rules and more variable standards. As commentators have observed, “the upshot of court decisions should not just be a list of places ticked off as inside or outside the sensitive-places safe harbor. It should be the articulation of reasons *why* those places are in or out.”⁴⁰¹ Thus, as indicated, it will be vital to develop a kind of sensitivity index that catalogues why places have been considered sensitive. For example, after reviewing the history of state and local firearms bans, Patrick Charles developed (1) public safety, (2) institutional, and (3) common sense justifications for banning firearms in certain locations.⁴⁰² These are not the only possible or plausible indicia of sensitivity, but they are an example of the kind of analysis that can contribute to the development of a sensitive place doctrine.

3. Spatial Nullification of the Right

Rahimi states that modern firearms laws must be consistent with general historical principles relating to firearms regulation.⁴⁰³ One such principle is that sensitive place laws cannot have the effect of nullifying or destroying the right.⁴⁰⁴ Thus, if all or nearly all the places in a community are deemed off limits to public carry, the law “could eviscerate the core purpose that the right sought to achieve, in which case the law would amount to a denial or abridgement of the right rather than a mere regulation.”⁴⁰⁵

Under First Amendment public expression doctrine, this concern is addressed in various ways: ensuring that there is some minimal access to public places like parks and streets, assessing the fit between the speech restriction and the government’s interests, and requiring that “ample alternative channels for communication” remain available.⁴⁰⁶ Although it will be rooted in history and tradition, sensitive place doctrine will need to address similar scope and breadth concerns.

The Supreme Court is plainly aware of the threat overbroad sensitive place laws pose to public carry rights. In *Bruen*, the Court described as “far too broad[]” the notion that “all places of public congregation that are not isolated from law enforcement” could qualify as “sensitive.”⁴⁰⁷ Further, it admonished

⁴⁰¹ Blocher et al., *supra* note 23, at 446.

⁴⁰² See Charles, “*Sensitive Places*” *Carve-Out*, *supra* note 23, at 891-97.

⁴⁰³ United States v. *Rahimi*, 144 S. Ct. 1889, 1898 (2024).

⁴⁰⁴ See Baude & Leider, *supra* note 34, at 1490.

⁴⁰⁵ *Id.*

⁴⁰⁶ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (adopting intermediate scrutiny standard for content neutral time, place, and manner speech regulations).

⁴⁰⁷ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2134 (2022).

that the Second Amendment did not allow New York to designate the entire island of Manhattan a sensitive place.⁴⁰⁸ However, the Court has not offered any additional guidance concerning how to assess the breadth of sensitive place laws.

Some recent state laws ban public carry in a multitude of public places. For example, a California law enacted after *Bruen* bans firearms in over two dozen locations including the following: preschool or childcare facilities, hospital and medical facilities, buses and trains, airports, bars, playgrounds and youth centers, parks, athletic facilities, gambling facilities, universities, stadiums, public libraries, museums, amusement parks, places of worship, banks and other financial institutions, and polling places.⁴⁰⁹ When assessing laws of this nature, should courts consider the *cumulative* effect of all such bans, or assess locational bans individually? If they are considered in the aggregate, at *what point* has the public carry right been effectively nullified?

Firearms rights proponents would certainly not be satisfied with either tailoring or alternative channels approaches similar to those applied under the First Amendment. These standards do not generally demand the narrowest possible restriction and, in terms of alternative channels, permit regulation of the right so long as there is *some* other place—however remote, inconvenient, or even ineffective—in which to exercise the right.⁴¹⁰ Further, under First Amendment doctrine, courts typically examine speech regulations individually rather than in the aggregate. Regulations that apply in distant or even nearby areas are not typically considered in determining whether a specific regulation is adequately tailored.

Thus far, lower courts have analyzed sensitive place laws on a location-by-location basis rather than in the aggregate.⁴¹¹ Although some early American laws banned public carry in a few locations (for example in places of worship, schools, and polling places), lawmakers also responded to places such as parks and zoos as they were opened to public access. However, there are likely to be few historical analogs for something like California's recently enacted law, which bans firearms in more than *two dozen* locations.

Sensitive place analysis could include consideration of the cumulative effect of sensitive place laws. Professors William Baude and Robert Leider have

⁴⁰⁸ *Id.* (“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.”).

⁴⁰⁹ CAL. PENAL CODE § 26230(a) (West 2025).

⁴¹⁰ *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (suggesting advocates for unhoused who were prohibited from camping to demonstrate their message could deliver same message to media in other ways); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (upholding demonstration zone sharply restricting access to political delegates in part because “messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets”).

⁴¹¹ *See, e.g., Welford v. Lopez*, 116 F.4th 959, 982-1002 (analyzing each location separately).

argued: “When it comes to determining how expansively a legislature may prohibit weapons in specific locations, probably the most important principle is that the legislature cannot designate places (*either individually or when aggregated*) that operate to effectively deny people most of the right to bear arms outside the home.”⁴¹² For example, they claim that designating as sensitive *all* means of transit (including cars) is too broad, but “designating more specialized and rarer forms of transportation (like airplanes and most interstate railroads) may well be permissible.”⁴¹³ They also assert that lawmakers can regulate public carry, but only up to the point of “infringement or abridgement.”⁴¹⁴

The obvious difficulty with an aggregate approach is determining whether or when a law or collection of laws effectively abridges or nullifies the right to public carry. Baude and Leider do not elaborate on how that analysis should be performed. Nevertheless, they are right that public carry doctrine will need to address concerns about spatial nullification of the right. Acknowledging that regulations on the exercise of the right do not apply in a vacuum would be an improvement over First Amendment doctrine, which generally ignores or downplays such effects. Here, again, is an opportunity to construct a Second Amendment doctrine that improves on the First Amendment analog. However, it is not clear how courts would implement a cumulative or aggregate approach. Under First Amendment doctrine, that could be done under the rubric of tailoring or alternative channels.⁴¹⁵ It is less clear how an aggregate approach might work under Second Amendment doctrine.

One way to address the nullification concern is to invalidate sensitive place designations that cover very broad geographic areas. For example, as noted, *Bruen* made clear that legislatures cannot treat entire cities as sensitive places.⁴¹⁶ Further, the Second Amendment historical analysis depends, in part, on whether a locational ban is similar in means and scope to prior laws or regulations. *Bruen*’s requirement that laws be judged in part according to *how* firearms regulations operate may extend to matters of geographic scope. Still, ultimately there must be some benchmark of nullification. Among other difficulties, it would likely be impossible to compare and assess the geographic scope of nineteenth-century and contemporary sensitive place laws. The footprint of the public square has changed dramatically, rendering comparisons across generations difficult and suspect.

Whatever courts make of this problem, lawmakers can avoid destruction of the right by adopting narrower public carry restrictions. Baude and Leider’s “transportation” ban example, which includes airlines but exempts automobiles,

⁴¹² Baude & Leider, *supra* note 34, at 1508 (emphasis added).

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ See *supra* Section I.D.

⁴¹⁶ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2134 (2022) (declaring effectively exempting cities from Second Amendment “would eviscerate the general right to publicly carry arms for self-defense”).

is an instructive example.⁴¹⁷ Geographic or categorical narrowing may also be possible, as in the earlier example of public parks. Another way to address concerns about nullifying public carry rights is to encourage lawmakers to limit their sensitive place *lists* to locations where firearms pose the greatest danger to vulnerable populations and places. To be sure, litigation will cull these lists to a degree. However, as the final Section of the Article proposes, aiming smaller in terms of regulation might avoid charges that lawmakers are seeking to nullify the public carry right.

C. *Aiming Smaller: The Time, Place, and Manner of Public Carry*

Like First Amendment doctrine, public carry doctrine will have a time, place, and manner component. History and tradition support the general principle that lawmakers have authority to impose reasonable and proportionate regulations governing where, when, and how individuals carry weapons in public places.⁴¹⁸ *Bruen* recognized that early American history supports “well-defined restrictions governing the *intent* for which one could carry arms, the *manner* of carry, or the exceptional *circumstances* under which one could not carry arms.”⁴¹⁹ And early state court decisions upheld various regulations of the time, place, and manner of public carry.⁴²⁰

Owing to the established nature of this authority, governments need not rely solely on licensure and sensitive place laws to protect the public square from firearms-related harms. As in the First Amendment context they can, either in addition to sensitive place designations or in the alternative, impose narrower restrictions on when, where, and how individuals exercise their rights. This means that even in places where public carry is generally protected—that is, locations *not* determined to be sensitive—governments can regulate the conditions under which it occurs.

These regulations could take many forms. A partial list, drawn from historical and contemporary examples, could include the following:

- Banning firearms in auditoriums, streets, or other public places during certain times or under certain circumstances.⁴²¹
- Banning open carry while preserving a right to concealed carry, or vice versa.⁴²²

⁴¹⁷ Baude & Leider, *supra* note 34, at 1508.

⁴¹⁸ See Churchill, *supra* note 193; Lund, *supra* note 193.

⁴¹⁹ *Bruen*, 142 S. Ct. at 2138 (emphasis added).

⁴²⁰ See, e.g., *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 181-82 (1871); *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896).

⁴²¹ See Blocher et al., *supra* note 23, at 449.

⁴²² See *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920) (upholding law prohibiting concealed weapons because it “does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them”); see also Baude & Leider, *supra* note 34, at 1473 (explaining laws restricting concealed carry have historically been treated as valid).

- Prohibiting groups from parading or drilling in public with firearms.⁴²³
- Regulating the size or caliber of firearms carried in public.⁴²⁴
- Banning the carrying of loaded weapons in public transportation facilities.⁴²⁵
- Prohibiting the criminal brandishing of firearms.⁴²⁶
- Banning “going armed to the terror” of the public.⁴²⁷
- Restricting public carry during permitted rallies, demonstrations, and other events.⁴²⁸
- Banning public carry *near* sensitive places including government buildings, schools, and polling places.⁴²⁹
- Banning the discharge of firearms during certain times of day.⁴³⁰
- Forbidding anyone from firing weapons at trains or other conveyances.⁴³¹
- Imposing zoning restrictions on the location of shooting ranges.⁴³²

These and other time, place, and manner regulations will be an important part of public carry doctrine. The First Amendment experience demonstrates that categorical location rules do not exhaust the government’s authority to regulate public exercise of rights. Time, place, and manner authority supplements the government’s power over places and allows it to restrict exercise of the right even in locations where the First Amendment grants access to speakers.

Under *Bruen* and *Rahimi*, governments will need to present historical evidence to defend public carry time, place, and manner regulations. However, this should not entail presentation of “a critical mass of historical firearm

⁴²³ See *Murphy*, 44 N.E. at 138 (upholding Massachusetts law that banned groups from parading with firearms); see also *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (upholding conviction for unauthorized drilling or parading with arms in city).

⁴²⁴ See *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (describing laws requiring pistols not be under certain length).

⁴²⁵ *Wolford v. Lopez*, 116 F.4th 959, 1001 (9th Cir. 2024) (referencing train companies’ historical bans on carriage of loaded firearms in passenger cars).

⁴²⁶ See Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1194 (2021) (concluding *Heller* does not jeopardize brandishing and other firearms offenses).

⁴²⁷ See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2120 (2022) (discussing armed to the terror laws).

⁴²⁸ See Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 233, 264-65 (2018) (discussing public carry manner regulations at public protests).

⁴²⁹ See Hesse & Schascheck, *supra* note 23, at 250-51 (arguing “gravitational pull” principle allows firearms bans near sensitive places).

⁴³⁰ See *id.* at 244-45 (discussing time restriction on firing arms).

⁴³¹ *Id.* at 239 (describing Indiana statute prohibiting shooting at passenger trains).

⁴³² See *id.* at 249-50 (noting historical zoning restrictions on shooting ranges in New Orleans).

regulations that look precisely (or almost precisely) like the challenged law.”⁴³³ As *Heller* and *Bruen* acknowledged, the traditional police power included enforcement of time, place, and manner restrictions on public carry. Exercises of this authority are consistent with *Rahmi*’s reliance on general principles and the Court’s recognition of “common sense” when it comes to firearms regulation.⁴³⁴

The foregoing list is merely suggestive of the types of public carry regulations legislatures could enact to respond to concerns about firearms possession and use in the public square. All of them are less burdensome than sensitive place *bans* and none are nullifications of the public carry right. Like time, place, and manner speech regulations, they represent traditional exercises of the government’s power to establish a basic set of rules for public carry.

Time, place, and manner regulations are attractive for several reasons. They provide flexibility in terms of governmental responses to firearms dangers that may arise in the public square. For instance, should armed groups suddenly appear on the public streets, threatening the safety and liberty of the public, authorities can act swiftly to address this problem. Further, since we do not yet know what sensitive place standards will look like, more targeted or limited restrictions may serve as a hedge against a strictly categorical sensitive place doctrine. A public carry time, place, and manner doctrine can also relieve some of the considerable and mounting pressure on the sensitive place concept. Right now, too much attention is given to this concept, and too little attention is given to the more limited but still effective governmental authority to regulate public carry. Even if the Supreme Court decides in the future not to expand the list of sensitive places, governments can still regulate when, where, and how public carry occurs. Finally, reliance on time, place, and manner regulations responds to concerns about effective nullification of the public carry right.⁴³⁵

In sum, in this area, First Amendment doctrine shows that governments can impose regulations on the public exercise of a constitutional right even in places where the right is generally recognized.⁴³⁶ Thus, lawmakers and courts need not treat places as *either* sensitive places *or* wide-open firearms fora. The doctrine can and should allow for limits on when, where, and how firearms are carried in the public square.

⁴³³ See Baude & Leider, *supra* note 34, at 1491.

⁴³⁴ United States v. Rahimi, 144 S. Ct. 1889, 1901 (2024).

⁴³⁵ See Joseph Blocher, *Bans*, 129 YALE L.J. 308, 355-59 (2019) (discussing how First Amendment doctrine allowing restrictions on time, place, and manner of speech may be carried into Second Amendment law and public carry restrictions in particular).

⁴³⁶ See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (noting government can impose time, place, and manner restrictions on speech and assembly in traditional public fora).

CONCLUSION

Bruen formally resolved that the Second Amendment is not a home-bound right. However, Second Amendment public carry doctrine is still in its infancy. Policymakers, courts, and scholars must now turn to the task of constructing constitutional doctrines relating to bearing deadly weapons in public places.

Incorporating a newly recognized constitutional right into the public square and public life is not an entirely novel challenge. Once free speech and assembly formally entered the public square in the 1930s, courts and policymakers had to establish rules and standards for their exercise. To be sure, public expression and public carry pose distinct challenges in the public square. Further, Second Amendment methodologies and standards deviate from some of the doctrinal choices the Court has made regarding the scope of First Amendment rights. Nevertheless, the First Amendment experience offers many critical lessons, both positive and negative, for those charged with constructing public carry doctrine.

That doctrine is already taking shape. Some of its elements resemble First Amendment doctrines. Like doctrines applicable to public expression, public carry doctrine will consist of licensure, locational, and time, place, and manner components. Lawmakers will have the power to issue permits based on objective considerations, designate certain locations where the public carry right cannot be exercised, and regulate the time, place, and mode of the respective activities. Like First Amendment doctrines relating to public expression, public carry doctrines will likely be developed over several decades, exhibit methodological conflicts and inconsistencies, and leave important matters undecided. As the First Amendment experience teaches, public carry doctrine will consist of categorical rules and looser standards. It will be influenced by matters external to courts, including the strategies of litigants and firearms violence in the public square.

We are still at the preliminary stages in terms of development of public carry doctrine. But lawmakers and courts are not without analogies and examples to draw upon as they construct this doctrine. If the First Amendment's lessons are closely studied, they may help policymakers and courts construct a more historically accurate, methodologically sound, and coherent public carry doctrine. Now that public carry is a matter of constitutional right in at least some parts of the public square, courts and policymakers need to construct Second Amendment standards that preserve both the right and the public square.