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

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

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

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

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INTRODUCTION

Does the Supreme Court’s decision in New York State Rifle & Pistol Ass’n v. Bruen prohibit legislators from enacting gun laws that differ from those at the time of the Second Amendment’s ratification? Some conservative judges enforcing Bruen and some liberal critics protesting the decision reason as if Bruen mandated antiquarianism. But Bruen’s

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1 142 S. Ct. 2111 (2022).
analogical method breaks with originalist premises and authorizes regulatory change. In this Article we show that *Bruen*’s analogical method looks to the past to guide regulatory change rather than to prevent it, enabling government to protect the public against weapon threats of the twenty-first century. To illustrate, we apply the analogical method to locational restrictions that protect “sensitive places” of public gathering, a previously obscure area of Second Amendment law that has now become central to litigation.

In *District of Columbia v. Heller*, the Supreme Court noted 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 . . . .” *Bruen* affirmed the constitutionality of such locational restrictions, while announcing a new historical test for evaluating modern gun laws, including those involving additional “sensitive places.” Applying that test, district courts have already struck down—for supposed lack of historical support—prohibitions on guns in places of worship, in libraries, museums, and bars, and in subways, domestic violence support centers, summer camps, and zoos.

Why? Does *Bruen* condemn every gun regulation that deviates from past practice? *Bruen* explains that history is an anchor, yet cautions that Americans are not limited to copying the past. The Constitution is not a script for *Groundhog Day*. Through its analogical method, *Bruen* sanctions gun regulations not within the understanding or

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3 See Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1501 (2023) (“Post-ratification practices have guided both major cases defining the rights to keep and bear arms under the Second Amendment.”).


5 Id.

6 142 S. Ct. at 2133–34.


10 See infra Part II.

practice of those who ratified or incorporated the Second Amendment. It extends constitutional protection to classes of weapons whose lethality was unfathomed by its framers, as well as to shall-issue licensing regimes that did not exist at the time of the Second Amendment’s ratification. In short, the Court has explained that the Second Amendment protects forms of weaponry and forms of community that did not exist at the time of its ratification. Judges need not find “historical twin[s].” We show how Bruen’s analogical method can extend the longstanding tradition of restricting weapons in government buildings and schools to other places of public gathering that play an important role in maintaining and sustaining democratic community.

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

Under the analogical method, might any of the sensitive-places restrictions thus far invalidated be relevantly similar to those enumerated in Heller and Bruen? The method requires understanding why governments traditionally imposed locational restrictions at the sites

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


14 See infra Part III.

15 Bruen, 142 S. Ct. at 2133.

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

17 Bruen, 142 S. Ct. at 2133–34 (emphasis omitted).
the Court has specifically approved as sensitive: “schools and government buildings” in *Heller*¹⁸ and “legislative assemblies, polling places, and courthouses” in *Bruen*.¹⁹ The principle that connects these places cannot be limited to formal actions of governance like voting and law-making, given that Justice Scalia’s opinion in *Heller* specifically includes “schools” as well.²⁰ Rather, we argue, excluding weapons from these places of public gathering protects a public sphere for democratic dialogue, democratic governance, and the reproduction of democratic community in which people can relate freely without intimidation or coercion. In prior work we have demonstrated that *Heller* recognizes government’s common law prerogative to “protect valued civic activities and the ability of all citizens to live free of terror and intimidation.”²¹ The “sensitive places” laws vindicate these very concerns as they protect not only individual lives but the public sphere on which a democracy depends—domains of public gathering that extend beyond legislative assemblies, polling places, and courthouses. For example, we show that there are historical antecedents for using locational restrictions to protect commerce and transportation, which are essential to creating and sustaining democratic community.²²

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

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¹⁹ *Bruen*, 142 S. Ct. at 2133 (citing these locations as examples of the few historical “sensitive places”). In *Bruen* the Court reiterated that schools and government buildings were sensitive places. *Id.*
²⁰ *Heller*, 554 U.S. at 626.
²² See infra Section III.B.
Constitution’s founding and the Fourteenth Amendment’s ratification differed in fundamental particulars from our own day.24

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

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

The Article’s structure is straightforward. Part I explains how Bruen has increased the practical importance of location-based restrictions and describes the Court’s new historical-analogical approach to evaluating their constitutionality. Part II explores the two primary principles of similarity identified by the Court—the “why” and “how” of

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

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

26 Id. at 2133 (explaining that gun regulations must be consistent with the balancing inquiry struck by the founding generation, and “Heller and McDonald point toward at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense”). Bruen’s analogical method thus authorizes change in regulation. We contrast this account with another reading of Bruen that diverts attention from its concern with analogical reasoning in an effort to characterize the decision as conforming to a particular form of originalist method. See infra notes 103–18 and accompanying text.

historical restrictions—and shows that the historical record of place-based restrictions supports broad regulatory authority to protect not just individuals’ lives but democratic community itself. Finally, in Part III, we employ Bruen’s analogical method to show that sensitive-places regulation is not limited to sites of governance and education but could extend to other places where those bonds are formed and strengthened, such as sites of commerce and transportation. Just as Bruen extends the right of self-defense to weaponry of the twenty-first century, Bruen recognizes democracy’s competence to protect places of public gathering against weapons threats of the twenty-first century.

I

**Bruen’s Impact on Sensitive Places**

In Bruen, the Court struck down a New York law requiring that individuals seeking concealed-carry permits for handguns demonstrate that they have “proper cause.” In doing so, the Court called into question similar laws in other states that together governed about a quarter of the country’s population. But the Court also emphasized that states can utilize other contemporary forms of gun regulation, including “shall-issue” licensing laws that rely on more objective criteria.

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

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28 *Bruen*, 142 S. Ct. at 2122, 2156.
30 See supra note 13 and sources cited therein.
31 *Bruen*, 142 S. Ct. at 2125 n.2 (listing statutory language of other states’ proper cause laws).
Unsurprisingly, then, the regulatory response to Bruen—and ensuing Second Amendment litigation—has largely focused on enumerating locations where guns are forbidden. Soon after Bruen, New York amended its laws to remove the good cause requirement, provide new application requirements, and list additional gun-free zones. The latter now include not only polling places, courts, and schools, but also businesses serving alcohol, museums, places of public transportation, libraries, health care facilities, and Times Square. New Jersey followed suit a few months later, significantly expanding its own list of gun-free locations.

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

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

To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is

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33 See supra notes 7–9 and sources cited therein.
34 Concealed Carry Improvement Act, ch. 371, 2022 N.Y. Sess. Laws 1447 (McKinney).
35 Id.
38 See, e.g., Worman v. Healey, 922 F.3d 26, 33 (1st Cir. 2019), cert. denied, 141 S. Ct. 109 (2020); Libertarian Party of Erie Cnty. v. Cuomo, 970 F.3d 106, 127 (2d Cir. 2020), cert. denied, 141 S. Ct. 2797 (2021); Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J., 974 F.3d 237, 241–42 (3d Cir. 2020), cert. granted, 142 S. Ct. 2894 (2022) (reciting the district court’s application of the test); Harley v. Wilkinson, 988 F.3d 766, 769 (4th Cir. 2021); Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Kanter v. Barr, 919 F.3d 437, 441–42 (7th Cir. 2019); Young v. Hawaii, 992 F.3d 792, 800–01 (9th Cir. 2019), vacated, 142 S. Ct. 2895; United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); GeorgiaCarry.Org v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Class, 930 F.3d 460, 463 (D.C. Cir. 2019); see also United States v. Adams, 914 F.3d 602, 610 (8th Cir. 2019) (Kelly, J., concurring).
39 See United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011).
consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

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

II
THE HISTORICAL WHY AND HOW OF SENSITIVE PLACES

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

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

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40 Bruen, 142 S. Ct. at 2126 (citation omitted); see also id. at 2129–30 (reiterating this test).
41 Id. at 2132–33.
42 Id. (emphasis added).
43 Id. (emphasis omitted) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).
44 Id. at 2133.
45 Id.
46 Id. (emphasis omitted) (quoting McDonald, 561 U.S. at 767).
A. Why

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

But it is also important to note that weapons laws—including sensitive-place restrictions—historically were used not only to preserve life but, as we have shown in prior work, to protect the public peace and thus the freedom of all people to participate in democratic community without terror and intimidation.\(^{49}\) As the Georgia Supreme Court put it in an 1874 decision involving that state’s locational restrictions: “The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.”\(^{50}\)

As this passage illustrates, the Georgia court construed the right to bear arms in connection with the legislature’s duty to regulate weapons not only against violence but also in the interest of preserving public peace. Regulating weapons was not a limitation on freedom, but instead was an expression of collective self-governance\(^{51}\) and a prerequisite of democracy itself. Legislatures enacted sensitive-place restrictions

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\(^{47}\) Id. at 2133.

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

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

\(^{50}\) Hill v. State, 53 Ga. 472, 477 (1874) (emphasis added).

\(^{51}\) See generally William J. Novak, The People’s Welfare: Law & Regulation in Nineteenth-Century America 10–16 (1996) (observing that self-government “was part of a broader, more substantive understanding of the freedoms and obligations accorded citizens . . . . No community was deemed free without the power and right of members to govern themselves, that is, to determine the rules under which the locality as a whole would be organized and regulated” and chronicling the “deluge of laws and ordinances passed by states and municipalities regulating American life between 1787 and 1877”).
protecting against weapons threats in the areas where people met or mingled to form democratic community.

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

Polling places and other electoral sites have a particularly significant history of gun prohibition. Many restrictions were adopted amid concerns about violence and intimidation in the democratic process—whether between Loyalists and Patriots in the Revolutionary era or between white supremacists and Black citizens during Reconstruction.

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

During Reconstruction, at least four more states passed similar statutes. In 1870, following major incidents of racialized political violence,59 Louisiana prohibited the carrying of a “dangerous weapon, concealed or unconcealed, on any day of election during the hours the polls are open, or on any day of registration or revision of registration, within a distance of one-half mile of any place of registration or revision of registration.”60 Tennessee forbade “any qualified voter or other person attending any election” to “carry about his person, concealed or otherwise” any “deadly or dangerous weapon,”61 and Texas prohibited

57 An Act Concerning the Rights of the Citizens of this State, ch.1, 1787 N.Y. Laws 344, 345.
58 An Act to Regulate the Election of Members of the Legislative Council and General Assembly, Sheriffs and Coroners, in this State, XII, 1797 N.J. Laws 229, 231. New Jersey’s law came amid both fabricated and credible threats of election maladministration and corruption, particularly in the state’s first elections under the new U.S. Constitution in 1789, widely believed to be marred by fraud. Carl E. Prince, New Jersey’s Jeffersonian Republicans: The Genesis of an Early Party Machine 1789–817, at 8 (1967); see also Campbell Curry-Ledbetter, Note, Women’s Suffrage in New Jersey 1776-1807: A Political Weapon, 21 Geo. J. Gender & L. 705, 717 (2020) (“Election and voter fraud were rampant in early New Jersey elections. . . . [E]lections were frequently overturned after allegations of corruption.”); Richard P. McCormick, New Jersey’s First Congressional Election, 1789: A Case Study in Political Skulduggery, 6 Wm. & Mary Q. 237, 244 (1949) (discussing the extent of vote tampering schemes in which official inspectors were complicit across various counties in New Jersey’s 1879 Congressional election).
weapons at “any election precinct.” In Texas’s case, the restrictions came amid concerns from Republicans about intimidation of Black voters.

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

Another traditional set of locational restrictions that Heller, McDonald, and Bruen all recognize is those governing schools. Education is an activity, like voting and legislating, in which the bonds that constitute democratic community are formed and reproduced. This link between education and democracy was one that the founding generation recognized. And crucially, many schools were privately operated, and thus the relevant records for these restrictions—which, again,
Heller specifically approved70—were generally imposed by the educational bodies themselves rather than by legislatures.

That history of gun regulation in schools traces back to at least the mid-seventeenth century. In 1655, Harvard College barred students from having a “[g]un in his or their chambers or studies, or keep[ing] for their use any where else in the town . . . .”71 As early as the mid-eighteenth century, Yale College had a similar prohibition on students “keep[ing] a Gun or Pistol, or Fir[ing] one in the College-Yard or College . . . .”72 The University of Virginia’s rule book from 1825 was little different.73 A variety of other educational institutions, from women’s colleges to public universities to private schools, did the same.74 Oakland College’s prohibition is notable for its inclusion of language establishing the purpose of its rule. It noted its aim to bar “immoral conduct” and “[n]eglect of study,” and as part of its mission of ensuring students would “consider themselves and each other as young gentlemen associated for purposes of mutual improvement,” they must “[a]void[,] all turbulence, rudeness and violence.”75

70 See supra text accompanying note 18.
73 Meeting Minutes of University of Virginia Board of Visitors, 4–5 Oct. 1824, 4 October 1824, Univ. of Va. Press: Am. Hist. Collection, https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4598 [https://perma.cc/5WCL-FLAH] (“No student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gunpowder.”).
74 The Statutes of Dickinson College 22–23 (1830) (prohibiting students from keeping any “gun, firearms or ammunition, sword-dirk, sword-cane, or any deadly weapon whatever”); The Laws of Kemper College, Near St. Louis, Missouri 9 (1840) (“No Student shall keep arms of any sort, or keep or fire powder on the College premises.”); The Minutes of the Senatus Academicus, 1799–842, at 86 (transcribed by Leslye Seltzer, University of Georgia Libraries) (“[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk sword cane or any other offensive weapon in College or elsewhere . . . .”); American Annals of Education and Instruction for the Year 1837, at 185 (Wm. A. Alcott & William C. Woodbridge, eds.) (1837) (outlining the rule prohibiting dangerous weapons at the University of Nashville); Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (Univ. of N.C. 2005) (1838) (prohibiting students to “carry, keep, or own at the College, a sword, . . . , or any deadly weapon”); Laws of Waterville College, Maine 11 (1832) (“No Student shall keep firearms, or any deadly weapon whatever.”); Laws and Regulations of the College of William and Mary, in Virginia 19 (1830) (forbidding its students “to keep, or to have about their person, any dirk, sword or pistol”).
75 Constitution & Laws of the Institution of Learning Under the Care of the Mississippi Presbytery 10 (1831) (prohibiting “duelling, or aiding or abetting it” and “wearing or carrying a dirk or other deadly weapon”).
States also passed laws in the late nineteenth century barring public carriage of firearms in schools. The first of these was in Texas in 1870, which prohibited weapons at “any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or into a ballroom, social party or other social gathering composed of ladies and gentlemen, or to any election precinct . . . or any other public assembly.”76 The Texas Supreme Court upheld the statute.77 Similar prohibitions followed in Mississippi in 1878, Missouri in 1879, Oklahoma in 1893, and Arizona in 1901.78 Municipalities enacted similar laws. Huntsville, Missouri, for example, barred individuals from going armed into “any school room or place where people are assembled for educational, literary or social purposes . . . .”79

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

We do not suggest that sustaining democratic community is the only value that can validate location-based gun restrictions to protect places of public gathering. Prior to Bruen, some scholars and judges pointed to the government’s role as a proprietor,82 or to places where the

76 An Act Regulating the Right to Keep and Bear Arms, ch. 46, § 1, 1870 Tex. Gen. Laws 63.
77 English v. State, 35 Tex. 473, 480 (1871).
79 Huntsville, Mo., Ordinance in Relation to Carrying Deadly Weapons, § 1 (June 11, 1894); see also Darrell A.H. Miller, Institutions and the Second Amendment, 66 DUKE L.J. 69, 101–03 (2016) ( recounting gun restrictions in schools).
81 Id. ( quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
82 See, e.g., Bonidy v. U.S. Postal Service, 790 F.3d 1121, 1126 (10th Cir. 2015) (highlighting the relevance of the government as a market participant in the First Amendment context and how that distinction applies here as well); United States v. Class, 930 F.3d 460, 464 (D.C. Cir. 2019) (explaining the significance of the government acting as a proprietor); Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical
government has effectively taken over the role of security guard.83 Our account is compatible with these other explanations, especially those that focus on whether a given place is central to certain governmental or constitutionally protected activities.84

B. How

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

A first principle is that legislatures enacted, and courts accepted, sensitive-place restrictions that burdened the right to the extent needed to effectuate the regulatory interest. In some cases burdens on individual gun-owners were of short duration—as might arguably be true of a polling place restriction that requires persons to give up their gun while voting—while other laws concerned activities that could extend for much longer periods. The school restrictions above,87 for example,
disarmed students on campus. Several laws forbade weapons carrying in places of public speech, assembly, and worship generally, as well as in several specific places where democratic community is formed and strengthened. Georgia, for example, forbade weapons at “any place of public worship, or any other public gathering in this State.” Several other states and territories followed in the later nineteenth century. Oklahoma Territory, for example, listed “any . . . place where persons are assembled for public worship, for amusement, or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering . . . .”

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

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

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

A second principle that emerges from these cases is that courts and legislatures balanced burdens on armed self-defense with public

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88 Deadly Weapons Not to Be Carried in Public, § 4528, 1873 Ga. Laws 818.
89 Public Buildings and Gatherings, ch. 25, § 7, 1893 Okla. Sess. Laws 504. For further examples, see, e.g., Carrying Certain Weapons to Church, § 387, 1901 Ariz. Sess. Laws 1252 (banning guns at a similar set of public gatherings); An Act to Amend Section 1274, Article 2, Chapter 24 of the Revised Statutes Of Missouri, entitled “Of Crimes and Criminal Procedure,” § 1, 1883 Mo. Laws 76 (same); Carrying Deadly Weapons, etc., Mo. Rev. Stat. § 1274 (1879) (same).
90 *Bruen*, 142 S. Ct. at 2134 (internal citation omitted).
safety interests, rather than treating individual self-defense as a trump. This *historical* interest-balancing is precisely what *Heller* and *Bruen* direct courts to consider under the analogical method, instead of engaging in their own “independent means-end scrutiny.”91 According to the Court, “the Second Amendment is the ‘product of an interest balancing by the people,’ not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances . . . .”92 This is a direction to consider the balance struck by our forebears, not to reject the concept of balancing altogether.93 In other words, though the *Bruen* Court disclaims modern “interest-balancing,” the analogical method is an instruction to consider how our predecessors coordinated the values served by regulating guns and the burdens they imposed on the right of self-defense.

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

[I]t appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance

91 *Bruen*, 142 S. Ct. at 2133 n.7. 
92 *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).
94 English v. State, 35 Tex. 473, 480 (1871).
into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.95

In another case, the Texas Court of Appeals upheld the statute’s categorical prohibition on arms in schools, even where danger was imminent and self-defense interests might be thought to trump: “Nor does it matter how much or with what good reason I may be in dread of an immediate and pressing attack upon my person from a deadly enemy; the imminence of such danger affords no excuse in my wearing deadly weapons” in places like churches, ballrooms, and schoolrooms.96

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

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

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

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

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

95 Id. at 478–79.
96 Owens v. State, 3 Tex. Ct. App. 404, 407 (1878); see also Alexander v. State, 11 S.W. 628, 628 (Tex. Ct. App. 1889) (“The law does not in terms accord to them such a privilege, and, without a clearly expressed exception in such case, this court will not sanction a defense the effect of which would be to authorize every school-teacher in the state to carry prohibited weapons upon his person in our school-rooms.”).
97 Deadly Weapons Not to Be Carried in Public, § 4528, 1873 Ga. Laws 818.
99 Id. at 476.
100 Miller, supra note 84, at 465–66.
courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice. 101

These historical examples confirm that legislatures have long had authority to impose burdens—sometimes significant ones—on gun-owners in particular places. 102 In doing so, legislatures and courts struck a balance between the right to armed self-defense and important regulatory interests like public safety.

III

Bruen and Analogical Method

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

Others read Bruen differently, and contrasting our positions illuminates the methodological stakes. As we have been writing this article, Professors Randy Barnett and Lawrence Solum—both leading originalists—have posted evolving drafts of a recently published article that seeks to characterize Bruen’s use of history and tradition as conforming to an approved form of originalism. 103 Before publication, they revised their article in ways that minimize the role of analogical reasoning under Bruen. In their first reading of Bruen, Professors Barnett and Solum concluded that the opinion’s “historical analogue test is an implementing rule that is not justified by originalist reasoning.” 104 In a revised draft they

102 The fact that these prohibitions were total is particularly notable given that legislatures could have written locational rules that restricted but did not ban guns—and indeed did so in other contexts. See infra notes 145–46 and accompanying text.
103 See Randy E. Barnett & Lawrence B. Solum, Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition, 118 Nw. U. L. Rev. 433, 472 (2023) (arguing that “the historical tradition test in Bruen operates within an originalist framework and is not a rejection of originalism”).
104 Randy E. Barnett & Lawrence B. Solum, Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition (unpublished manuscript at 23) (Jan. 26, 2023 version) (on file with authors) (“Bruen involves both originalist and nonoriginalist elements. The core
later claimed that *Bruen* engages in originalist interpretation and that the historical tradition test provides the content of a preexisting common law right to bear arms. They hedged this claim on all sides—emphasizing that they were not expressing views on the validity of *Heller*’s historical conclusions, nor “affirming nor rejecting the preexisting legal rights approach ...; nor are we arguing that the historical tradition test does, in fact, accurately identify the content of the preexisting legal rights.” After explaining that they would not take a position on whether the Court’s analysis or their own was supported by the historical record, they defended their reading of the decision with a claim about Justice Thomas, without discussing the other Justices in the majority: “It would be quite odd indeed for Justice Thomas to view the assignment to write the majority opinion in *Bruen* as an opportunity to undermine the originalist framework of *Heller* and move the constitutional jurisprudence of the Court in the direction of Constitutional Pluralism and living constitutionalism.” They escalated this open appeal to methodological—and political—polarization in the conclusion of the article where they cautioned about the types of constitutional interpreters who can be trusted: “[O]riginalists should be wary of the use of history and tradition by nonoriginalists, whether they be Progressive [living constitutionalists] or Conservative Constitutional Pluralists.”

The Barnett/Solum account fails to grapple with *Bruen*’s explicit and sustained discussion of the analogical method, which itself authorizes change over time so long as that change is consistent with how and why past practice burdened exercise of the right. Similarly, their reading of *Bruen* as originalist does not and cannot explain why the Court affirmed shall-issue licensing regimes. More generally, they do

holding of *Bruen* rests on an originalist foundation, but the historical analogue test is an implementing rule that is not justified by originalist reasoning.”).  
105 See Barnett & Solum, supra note 103, at 470 (“On this reading, historical analogues, or the lack thereof, are being offered as evidence of the content of the preexisting right that constitutes the original meaning of the right to keep and bear arms.”).  
106 See id. at 463.  
107 Id. at 472.  
108 Id. at 471.  
109 Id. at 494.  
110 See supra Part II.  
111 By contrast, in another paper co-authored with Professor Nelson Lund, Professor Barnett suggests that “[r]ather than relying on specious historical traditions, courts could evaluate gun laws against the purpose of protecting the right to keep and bear arms: facilitating the exercise of the fundamental right of personal and collective self-defense.” Barnett & Lund, supra note 23. This approach, too, is consistent with originalism, but recognizes the need for construction as well as interpretation. See Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1 (2018) (describing an approach of “good faith” construction focusing on the original function or purpose of the particular clauses and general structure of the text).
not explain how a judge following their account decides whether laws are constitutional. How are courts to determine how to enforce a “pre-existing legal right” in the kinds of real-world cases we discuss below, and can it be by resorting to analogical reasoning?

Notably, Barnett and Solum do not test their reading against the views expressed by other members of the Bruen majority. In his Heller II dissent—generally credited as the first prominent statement of the “text, history, and tradition” test—then-Judge Brett Kavanaugh wrote “when legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations.”112 He emphasized that while the Second Amendment might apply to such situations, that does not “mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.”113 In his Bruen concurrence (joined by Chief Justice Roberts), Justice Kavanaugh quoted at length from the portions of Heller that authorize regulation of guns consistent with the Anglo-American common law tradition.114

In Kanter v. Barr,115 then-Judge Barrett reasoned from the common law tradition that Justice Scalia invoked in Heller and concluded that “the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”116 Judge Barrett explained that ancient practices would change in form under the American constitutional order.117 The point, she explained, quoting Chief Justice Roberts, is that just as there were “lineal descendants of the arms . . . presumably there are lineal descendants of the restrictions as well.”118

What these accounts have in common is that they authorize gun regulation to change when guided by history—a kind of legal change that can be implemented through the analogical method that Bruen

113 Id. (emphasis added).
114 N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring). For a more extensive discussion of this part of Heller, see Blocher & Siegel, When Guns Threaten the Public Sphere, supra note 21, at 163–80.
115 919 F.3d 437 (7th Cir. 2019).
116 Id. at 454 (Barrett, J., dissenting).
117 Id. at 456–58 & n.4; see also id. at 458 n.7 (observing that “[i]t should go without saying that [historic] race-based exclusions [from the right to bear arms] would be unconstitutional today”).
118 Id. at 465 (quoting Transcript of Oral Argument at 77, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290)).
explicitly and repeatedly authorizes. In the following Sections, we show how that method can apply to a variety of contemporary gun regulations responsive to technological and other forms of change.

A. Building Democratic Community in New Places

Roughly two weeks after *Bruen* was decided, residents of Highland Park, Illinois, gathered for a July Fourth parade. At 10:15 that morning, a gunman began firing on them with a semiautomatic rifle. Seven people were killed, dozens more physically injured, and countless more traumatized by the carnage, including a toddler orphaned by the murder of both parents.119 Illinois prohibits firearms at “any public gathering” licensed by the government.120 Assume a gun-owner wishing to carry a gun at next year’s July Fourth parade argues that this restriction violates his right to armed self-defense. How should the constitutionality of this sensitive place restriction be resolved under *Bruen*?

No sensible reading of the Second Amendment would require the grieving and traumatized community of Highland Park to permit guns at its next July Fourth parade.121 Analyzing the constitutionality of such a restriction through the lens of sensitive-places doctrine opens various interpretive possibilities.

One approach would be to uphold the Highland Park restriction on the basis of historical antecedents restricting guns at public assemblies. Georgia’s representative law, for example, prohibited guns at “any . . . public gathering in this State.”122 And in a 1905 case the Georgia Supreme Court upheld the conviction of an individual who brought a firearm to a Fourth of July gathering, finding that “[t]he wholesome purpose of this statute would be much limited by putting a narrow construction upon the expression ‘any other public gathering.’ A barbecue on the 4th of July, at which the public is assembled in considerable

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122 Deadly Weapons Not to Be Carried to Public Places, § 4528, 1873 Ga. Laws 818; *see also supra* notes 88–89 and accompanying text (discussing Georgia’s law and similar restrictions in other states and territories).
numbers, constitutes a public gathering within the meaning of the statute.”123 Whether this would be sufficient is hard to say, given the substantial uncertainty that Bruen has introduced. The historical research necessary to identify these examples might not be possible, especially on a briefing schedule,124 or a judge might require a higher quantity of laws to demonstrate a “tradition.”125

But public assembly laws—or those specifically addressing parades, for example—are not the only historical basis to which Highland Park might turn. Bruen admonishes courts not to look for “historical tinsel[s],”126 but to instead compare modern and historical laws based on why and how they restricted the right to keep and bear arms. Such an analysis must also be conducted with respect to how the modern and historical laws were “justified,”127 and not with a singular focus on where they applied. We have illustrated one such justification in detail above: Many location-based historical gun restrictions protected democratic community and the formation of a shared civic life, not simply individual, physical lives. Precisely because those laws played a similar role to the Highland Park restriction, they, too, can be mustered to support its constitutionality. For example, the Court has specifically approved as constitutional the tradition (described above128) of prohibiting guns in schools,129 which it has recently described as “nurseries of democracy.”130 Restricting guns in such places can thus be understood as an effort to protect and promote democratic community itself—the

123 Wynne v. State, 51 S.E. 636, 637 (Ga. 1905); id. (“The purpose of Pen. Code 1895, § 342, is to protect the public against the danger arising from allowing persons to carry deadly weapons to courts of justice, or election grounds or precincts, or places of public worship, or any other public gathering in this state.”).
124 Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRx, 2022 WL 15524977, at *6 n.9 (C.D. Cal. Oct. 21, 2022) ("[T]here is no possibility this Court would expect Defendants to be able to present the type of historical analysis conducted in Bruen on 31 days' notice (or even 54 days' notice."); adopted, No. CV 22-6200-GW-AGRx, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).
125 See, e.g., Firearms Pol'y Coal. v. McCraw, No. 4:21-CV-1245-P, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 25, 2022) ("[T]he historical record before the Court establishes (at most) that between 1856 and 1892, approximately twenty jurisdictions (of the then 45 states) enacted laws that restricted the ability of those under 21 to 'purchase or use firearms.'"); Antonyuk v. Hochul, No. 22-CV-0986, 2022 WL 5239895, at *9 (N.D.N.Y. Oct. 6, 2022) ("[T]he Court generally has looked to instances where there have been three or more such historical analogues . . . .").
127 Id. at 2126.
128 See supra notes 69–79 and accompanying text.
130 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021); see also Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (noting that education is “the very foundation of good citizenship”)}
same values that are at stake in a July Fourth parade, since recalling and honoring the nation’s war of independence cultivates a sense of pride and belonging that connects present and past generations. The point is that schools and parades are, to borrow Bruen’s analogical framework, relevantly similar with respect to the “why”—of interest served by restricting guns.

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

Crucially, Bruen’s analogical method enables government to employ locational restrictions to protect places of public gathering from

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132 Bruen, 142 S. Ct. at 2132–33.


134 Putnam, supra note 133, at 338.

135 John R. Parkinson, Democracy and Public Space: The Physical Sites of Democratic Performance 149 (2012) (arguing that democracy requires physical public space and exploring the different kinds of spaces where democratic action can occur).

136 See, e.g., Brennan Gardner Rivas, The Deadly Weapon Laws of Texas: Regulating Guns, Knives, and Knuckles in the Lone Star State, 1836–930 (manuscript at 73) (May 2019) (Ph.D. dissertation, Texas Christian University) (on file with author) (stating that the kinds of locations and events protected by the Texas 1871 law were the very ones that most frequently became targets of Klan or other white vigilante intimidation and violence for the purpose of Black voter suppression).
weapons threats whether or not there are identical antecedent restrictions. The government must “identify a well-established and representative historical analogue, not a historical twin.”137 Indeed, the Court made plain its understanding that sensitive-places restrictions can continue to evolve. That does not mean that anything goes, of course—the Court asserted that, for example, it would be unconstitutional to permanently designate all of Manhattan a sensitive place.138 But the hypothetical the Court discussed is wildly more expansive than imposing gun restrictions at a public gathering. A court could well characterize the why of the Highland Park regulation as limiting guns at public events and places that build community ties, bringing it within the tradition of sensitive-places regulation discussed above—including the restriction of guns in school buildings. The antecedent statute for a sensitive-place restriction for the Highland Park Fourth of July parade could therefore be a law or tradition of restricting weapons at public gatherings or schools or both.

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

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

[N]o Man great nor small, of what Condition soever he be, except the King’s Servants in his presence, and his Ministers in executing of the King’s Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King’s Justices, or other of the King’s Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King’s pleasure.139

The degree to which the Statute broadly prohibited public carrying of weapons has been the subject of long-running scholarly and legal debate,140 but for purposes of sensitive-place restrictions we think it particularly notable that “fairs” and “markets”—places of significant

137 Bruen, 142 S. Ct. at 2133 (2022).
138 See supra note 90 and accompanying text.
139 Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.).
140 See Blocher & Siegel, When Guns Threaten the Public Sphere, supra note 21, at 165–67 (describing the debate about Northampton).
community life at the time—were singled out for protection alongside political figures like justices and ministers. Some colonial governments incorporated this language directly into their statutes.141

Security of commerce is an element of democratic community, as our forebears clearly appreciated.142 “The Framers of the 1787 Constitution . . . believed that commercial relations between different parts of the country would foster national connection and social cohesion,” and viewed “commerce as intercourse that produces social cohesion.”143

Although we do not thoroughly explore the matter here, we suspect that protecting commerce from weapons threats was an important part of “this Nation’s historical tradition of firearm regulation.”144 Some states had statewide locational restrictions that prohibited weapons in places “where persons are assembled for amusement”—with that location listed alongside bans on weapons in the vicinity of a polling place.145

Tennessee restricted guns at fairs, with these places of commerce represented as places of “public assembly”: its sensitive-place restriction prohibited gun possession at “any fair, race course, or other public assembly of the people.”146 Fairs and places of public assembly feature people gathered in physically crowded circumstances, and in circumstances of exchange and intercourse that sustain social bonds of

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


143 Id.

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

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

Elsewhere, we see places of commerce treated as public places in *Maupin v. State*, where the Tennessee Supreme Court affirmed conviction under a statute prohibiting arms at a mill despite the fact that the defendant worked and slept at the mill because “[t]he mill was a public place[—]a place to which customers were constantly invited and daily expected to go. In such a place a man, though he be the proprietor, may not lawfully carry pistols concealed about his person.”

Many historical restrictions on gun displays and use (not carriage *per se*) specifically singled out various places of commerce like hotels, saloons, groceries, and the like, such as an 1886 New Mexico law imposing special penalties on those who “unlawfully draw, flourish or discharge a rifle, gun or pistol within the limits of any settlement in this territory, or within any saloon, store, public hall, dance hall or hotel, in this territory.” To be clear, these particular restrictions were not total prohibitions—their *how*, as it were, was different from the bans discussed above. But they do potentially suggest a common *why*—a special focus on protecting sites of the commercial activity that itself is an element of democratic community.

As with some of the school examples recounted above, we would expect that private actors imposed many of the locational restrictions on weapons in places of commerce. Evidence of such restrictions should

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

148 17 S.W. 1038, 1039 (Tenn. 1890).

149 An Act to Prohibit the Unlawful Carrying and Use of Deadly Weapons, ch. 30, § 4, 1886 N.M. Laws 56; see also Act to Revise, Consolidate and Amend the Charter of the City of Neenah, vol. 2, ch. 184, tit. 12, § 162, Approved March 14, 1873, and the Several Acts Amendatory Thereof, 1883 Wis. Sess. Laws 841 (referring to “any saloon, shop, store, grocery, hall, church, school house, barn, building or other place within said city”); *Fort Worth*, Tex., *Revised Ordinances of the City of Fort Worth*, Texas, No. 85, § 3 (1879) (referring to “any public road, street or alley, inn, tavern, store, grocery, workshop, or any place to which people resort for purposes of business, recreation, or amusement”).

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

151 *See, e.g.*, Austin Charles Rhodes, Good Saloon, Bad Saloon: Saloons in Wichita, Kansas 1865–881 (May 2014) (M.A. thesis, Wichita State University) (on file with Shocker Open Access Repository, Wichita State University) (“[A] saloon would not have stayed in business very long if there were bar fights that smashed bottles and glasses every day. Furthermore, it was rare for a person to start a fight or pull a gun in a saloon and make it out without being arrested.”).
still be probative under *Bruen*’s historical-analogical test, especially considering the degree to which the relevant sites—the historical antecedents—were privately controlled. We expect that many historical analogues for locational restrictions on weapons in transportation were, as with the school limitations discussed above, likely private—for example, sites of mass transit, which have been the subject of Second Amendment litigation in the wake of *Bruen*. Certainly it is crucial to have further historical research regarding specific public and private restrictions of guns in sites of transit—omnibuses, railways, ferries, depots, stations, and the like. Evidence of locational restrictions in these transit settings could be extended via analogical reasoning to support contemporary locational restrictions on weapons in such places as subways, trains, and airplanes.

Even as research on these transit antecedents is ongoing, we think that some public authorities might argue for extending sensitive-place restrictions via analogical reasoning from government buildings and schools directly to subways, trains, and airplanes. Freedom of travel and confidence in the security of transportation is necessary to sustain the bonds of community. Locational restrictions on weapons in government buildings and schools are relevantly similar to locational restrictions in subways, trains, and airplanes in why and how they burden the right to bear arms. Both build bonds of democratic community, and only temporarily burden the right to bear arms.

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

What kind of deference to the past does fidelity to the Constitution require? *Bruen*’s analogical method understands the Second Amendment through an historical lens, yet allows government to recognize and act

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152 See *infra* notes 71–79 and accompanying text.
154 See *infra* note 9.
156 See *infra* Section II.0 (explaining in the context of *Bruen*’s “how” metric that many sensitive-place restrictions impose a total prohibition on arms-bearing, albeit one that applies only when one is in a restricted location).
on change in many ways: “Fortunately, the Founders created a Constitution—and a Second Amendment—‘intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.’”  

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

In short, while the Court has interpreted the Second Amendment as mandating fidelity to tradition, it did not require blind deference to specific past practices. Traditions are living. We observe that the Court’s embrace of change under the Second Amendment includes technological change, regulatory change, and change in understandings of community. Consider race. The Court’s recent gun rights cases have reasoned that the rights of Black people to bear arms are equal to the rights of white people, and have shown little interest in tying access to guns to the racially discriminatory history and traditions of the American people during slavery or Reconstruction. Justice Thomas, for example, employed originalist interpretation to protest an American history and tradition of racism in the regulation of arms, not to venerate and entrench it. The Court has recognized that as We the People evolves in history,

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

159 See id.


161 See McDonald v. City of Chicago, 561 U.S. 742, 855–58 (2010) (Thomas, J., concurring) (urging the Court to overrule major parts of the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), and United States v. Cruikshank, 92 U.S. 542 (1875), and holding out the right to
who counts as a rights-bearing member of the community under the Second Amendment evolves as well. Imagine if Bruen restricted the right to bear arms only to those kinds of persons the framers thought fit—or restricted the Amendment’s protections only to those kinds of weapons the framers possessed. It does not.

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

In United States v. Perez-Gallan, Judge David Counts reasoned that the general societal problem of intimate partner violence has existed from before the founding and asserted that, until the 1970s, the American legal system rarely took formal legal action in response. The judge recognized that legislatures historically disarmed “dangerous” people, but found that domestic abusers were not regarded as such. For Judge Counts, that meant that under the history-and-tradition method espoused by Bruen, the domestic violence prohibitor was unconstitutional because it broke with the nation’s traditional response of inaction. (Observe that the tradition of inaction Judge Counts celebrates depended on women’s disfranchisement; § 922(g)(8) was enacted only after women had the political voice to secure its passage.)

bear arms as a symbolic repudiation of the history of racist mob violence that spanned the Reconstruction era to the 1960s, in the process recounting lynchings from 1882 to 1968).

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

163 United States v. Rahimi, 61 F.4th 443, 450 (5th Cir. 2023).


165 Id. at *11.

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

167 See State v. Philpotts, 194 N.E.3d 371, 373 (Ohio 2022) (Brunner, J., dissenting) (“[T]he glaring flaw in any [historic] analysis . . . is that no such analysis could account for what
A few months later, in *United States v. Rahimi*, a panel of the Fifth Circuit including Judges Cory Wilson, James Ho, and Edith Jones also struck down § 922(g)(8), invoking our “ancestors”\(^ {168}\) while minimizing the social dimension of domestic violence. Though purporting to apply the analogical method, their interpretation of *Bruen*, filed on Groundhog Day,\(^ {169}\) reads the Constitution as a script for Groundhog Day.\(^ {170}\)

In *Rahimi*, the Fifth Circuit considered a variety of historical analogues both inside and outside the domestic violence context. First, the court recognized that laws at the time of ratification disarmed “dangerous” people (for example, “those unwilling to take an oath of allegiance, slaves, and Native Americans”\(^ {171}\)) but held that § 922(g)(8) was not relevantly similar because the purpose of those laws “was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of domestic gun abuse, posed by another individual.”\(^ {172}\) In effect, the court said that the “how” (disarmament) was similar but the “why” (preserving social order rather than preventing individual threat) was different. The court also recognized that historical surety laws had a similar “why” (protecting an individual from a risk of harm) and even a similar procedural “how” (a legal proceeding demonstrating threat), but that they did not fully prohibit weapons possession and therefore were not sufficiently similar.\(^ {173}\) *Rahimi* Court thus struck down the law disarming those under protective orders for domestic violence as an “outlier[] that our ancestors would never have accepted.”\(^ {174}\)

It takes a special kind of narrow legal mind to describe § 922(g)(8) as protecting persons from threats but not as protecting “political and social order.” To begin with, *Rahimi* (and *Perez-Gallan*) overstate the law’s historical failure to protect women from abuse. The common law authorized a man to “correct” subordinate members of the household, including his wife. Blackstone’s *Commentaries on the Laws of England*\(^ {175}\)

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\(^ {168}\) 61 F.4th 443, 461 (5th Cir. 2023).

\(^ {169}\) *Rahimi* was initially filed on February 2, see 2023 WL 1459240 (5th Cir. Feb. 2, 2023), but was later withdrawn and replaced with an opinion featuring a lengthier concurrence from Judge Ho.

\(^ {170}\) *Cf. supra* note 11 and accompanying text.


\(^ {172}\) *Id.* at 457 (internal quotation marks and citation omitted).

\(^ {173}\) *Id.* at 459–60.

\(^ {174}\) *Id.* at 461 (quoting N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2132 (2022)).

stated that husbands could exercise over their wives “domestic chastise-
ment, in the same moderation that a man is allowed to correct his ser-
vants or children . . .” But that power to “correct” did not contemplate
death or threat of death inflicted by modern firearms in the hands of an
abuser.

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

Yet this tradition of regulation has evolved in form, both because
of changes in the technology and availability of firearms and because of
changes in our understanding of women’s citizenship. At the founding,
guns were so cumbersome they were rarely used for domestic abuse; but
as weapons have become more numerous and deadly, they have amplified
the threats, injuries, and lethality of domestic violence. As importantly,
over the decades Americans have come to view the system of common law peace warrants—which rooted legal action in harm to the social order instead of the rights of the individual— as inadequate, as were other enforcement practices that failed to treat intimate partner violence with the same seriousness as other forms of interpersonal violence.

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

The very goal of § 922(g)(8) is thus to protect not only persons but a “political and social order” in which women as well as men are entitled to the equal protection of the civil and criminal law. Does the Second Amendment require Congress to reason about the sexes and respond to dangerousness on the basis of the old common law assumptions “that a husband, as master of his household, could subject his wife to corporal punishment or ‘chastisement’ so long as he did not inflict permanent injury upon her”? The Fifth Circuit’s claim that § 922(g)(8) lacks antecedents is a classic exemplar of courts hiding behind the analogical method to choose

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313 (2006) (noting that roughly sixty percent of intimate-partner homicides are committed with a firearm).

181 Roth, supra note 180, at 183.

182 See supra note 179 and sources cited therein.

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

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

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

187 Siegel, supra note 183, at 2118 (citation omitted).
amongst arms regulation in ways that are not compelled by *Bruen* itself and are instead ventriloquizing historical sources with their own values. True, the *Bruen* Court’s ode to history and traditions encourages uncritical deference to status-based reasoning of the past of the kind on display in *Perez-Gallan* and *Rahimi*. That said, there is nothing in *Bruen* that requires federal judges to expose domestic partners—and others—to this heightened risk of gun violence. Given how emphatically the Roberts Court has modeled the importance of enforcing twenty-first century—rather than eighteenth- or nineteenth-century—understandings of racial status in defining gun rights, we think *Perez-Gallan* and *Rahimi* are clearly wrong to insist on enforcing the Second Amendment with traditional status-based understandings of citizenship rights. Congress and the states can regulate guns with our twenty-first century understanding of We the People. *Bruen* does not require legislators to regulate guns based on premises of slavery, Jim Crow, the legal doctrine of marital unity, or separate spheres any more than it limits the Second Amendment’s protection of weapons of self-defense to muskets and bayonets or weapons regulations to those existing at the time of the founding. *Bruen*, after all, approved shall-issue licensing laws without even identifying a historical antecedent.

These cases involving the domestic violence prohibitor show the range of discretion that courts—including the Supreme Court—have when it comes to recognizing or blocking change, including broadening

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189 See Reva B. Siegel, Commentary, How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization, 60 Hous. L. Rev. 901, 901 (2023) (manuscript at 101) (observing that the history-and-tradition methods the Court employed in *Bruen* and other cases “tie the Constitution’s meaning to lawmaking from which women were excluded,” and provide the Court “resources for expressing identity and value drawn from a culture whose laws and mores were more hierarchical than our own”).

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


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

193 See supra note 13 and sources cited therein.
social equality. We may well learn that the Roberts Court only invokes values of equality under the Second Amendment to serve the cause of expanding gun rights, but the Court has not yet decided a case making that crystal clear. Until it does, it seems reasonable that legislators may premise weapons regulation on an evolving understanding of equal citizenship, much as the Court has reasoned from evolving understandings of race to uphold gun rights.

**Conclusion**

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

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

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

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