THE EXPANSIVE 'SENSITIVE PLACES' DOCTRINE: THE LIMITED RIGHT TO 'KEEP AND BEAR' ARMS OUTSIDE THE HOME

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In Bruen, the Supreme Court struck down New York's "may-issue" licensing regime, recognized the right to carry arms outside the home, and announced the historical analogue method to analyze the constitutionality of modern gun laws. In doing so, the Court did not disavow the 'sensitive places' doctrine announced in Heller.

In response, New York and other states enacted gun safety laws on the basis of location. This Article provides an account of the doctrinal and historical support for such regulations, proposes a list of locations where gun regulations will survive constitutional scrutiny, and offers a theory of gravitational pull whereby the places around 'sensitive places' become sensitive by virtue of their proximity to the core 'sensitive place.'

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INTRODUCTION

Guns are among the most controversial of subjects in American policy discourse. In 2022, the Court issued the *Bruen* decision. In *Bruen*, the Court adopted a text and history test for analyzing the constitutionality of gun laws. History has long played a role in the Court's jurisprudence—but never so strong a one as it does today. Under *Bruen*, the history and tradition framework is the key metric in analyzing the constitutionality of modern gun laws.[1]

In addition to its novel test, *Bruen* brought two major substantive changes to Second Amendment law. First, discretionary permitting regimes are unconstitutional. Second, the right to keep and bear arms, to a certain extent, applies outside the home. While courts previously diverged on whether the Second Amendment right applied outside the home, it is now clear that it does. Further, it is also clear that some permitting regimes are in danger, as *Bruen* struck down a discretionary permitting regime and non-discretionary permitting regimes *post-date* discretionary ones—indicating that they may also fare poorly under *Bruen*'s history-driven test.[2] This may mean that location-based restrictions are a constitutionally safer vehicle with which to regulate arms outside the home.

The above considerations, without more, might lead one to believe that the Second Amendment right is only somewhat limited, if at all, outside the home. However, in *Heller*, the Supreme Court explained that "nothing" in its opinion "should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[3]

It may be true that the only doctrinal wall between a

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1 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring) ("The Court employs and elaborates on the text, history, and tradition test.").

2 Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History,* 73 DUKE L. J. 67, 100 nn. 212-13 (2023) (citing Adam M. Samaha, *Is Bruen Constitutional? On the Methodology That Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming 2023) and Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 69 (2022)).

3 District of Columbia v. Heller, 554 U.S. 570, 626, 661 n.26 (2008); *accord* McDonald v. Chicago, 561 U.S. 742, 786 (2010) (plurality opinion).

locationally unlimited Second Amendment is the sensitive places doctrine that resulted from *Heller*. As we show in Part I, this language has spawned an entire doctrine within Second Amendment jurisprudence on locational restrictions.[4] *Bruen*'s judicial expansion of the Second Amendment outside the home brings with it a new urgency to revisit the sensitive places doctrine.

Crucially, it must be noted that when we discuss sensitive places, we are not saying that guns are automatically forbidden in such places. The sensitivity of any given place speaks not to whether guns are allowed, but to an earlier threshold question of the state's discretion to regulate guns in that place. Places may be deemed sensitive for doctrinal purposes (i.e., for purposes of saying that the Second Amendment allows states the authority to regulate guns in those areas) and yet, as a matter of legislative choice, states may choose to permit guns in those sensitive places.

Accordingly, this Article proceeds in three parts. In the Introduction, we provide a summary of the doctrinal development of sensitive places, tying together certain themes which unite factions of the case law. In Part II, we provide and expound upon a lengthy list of historical regulations on sensitive places ranging from the colonial to Reconstruction eras. Additionally, we provide advice and words of caution on the use of historical analogues.

Then, in Part III, we propose two independent tests to determine whether a given place is 'sensitive.' The first test relies on reasonableness, doctrine, and history in the structure of family, genus, species to identify sufficient conditions to render a place sensitive. The second test, reflecting a gravitational pull theory, speaks to the sensitivity of peripherally sensitive places, i.e., how close or related a location must be to a sensitive place in order to be deemed sensitive via association.

We conclude that, as evidenced by the case law and historical analogues, the majority of places may be deemed sensitive and that states are therefore permitted to regulate or ban the use or carrying of firearms in most locations. While courts have not converged on a clear and uniform application of *Heller*'s sensitive places doctrine, we build on prior work,

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[4] This doctrine is a subset of the broader 'presumptively lawful' categories announced in *Heller*. *See* C. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L. J. 1371, 1374-79 (2009); Kevin Schascheck, *Recalibrating Bruen: The Merits of Historical Burden-Shifting In Second Amendment Cases*, 11 BELMONT L. REV. 38, 56 (2023).

doctrine, and history to explain how courts should analyze the constitutional validity of location-regulating statutes.

I
DOCTRINAL DEVELOPMENTS

Much ink has been spilled on the doctrinal development of the Second Amendment.[5] The key information that is required to appreciate the utility of the sensitive places doctrine is as follows. In 2008, the Supreme Court held for the first time in our nation's history that the Second Amendment confers an individual right to keep and bear arms.[6]

A. The Amendment's Journey

When *Heller* was decided, the Court was careful to limit the reach of its holding. The Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[7] The Court further stated that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[8] Lower courts have applied the presumption in numerous ways, but the presumption itself played a role in case law in every circuit.[9] The existence of the presumption of lawfulness,

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5 *See e.g.*, AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 48-49 (1998); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 56-57 (2022); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67 (2023), Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes*: Bruen's *Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/ [https://perma.cc/2LET-WKKQ]; Charles, Jacob D. et al., *'A Map Is Not The Territory': The Theory and Future of Sensitive Places Doctrine*, N.Y.U. L. REV. ONLINE (forthcoming).

6 United States v. Miller, 307 U.S. 174, 182 (1939); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 956 (5th ed. 2015).

7 District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

8 *Id.* at 627 n. 26.

9 Hightower v. City of Boston, 693 F.3d 61, 73 (1st Cir. 2012) ("We have interpreted this portion of *Heller* as stating that 'laws prohibiting the carrying of concealed weapons' are an 'example [] of 'longstanding' restrictions that [are] 'presumptively lawful' under the Second Amendment.'") (citing United States v. Rene E., 585 F.3d 8, 12 (1st Cir. 2009)); Libertarian Party v. Cuomo, 970 F.3d 106, 126 (2d Cir. 2020) (cert. denied) (quoting *Heller*'s language that 'nothing in our opinion should be taken to cast doubt' on presumptively lawful regulations); United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) (cert. denied)

whatever form that may take, is vital to the functionality of the doctrine.

Next, in 2010, the Supreme Court incorporated the right to 'keep and bear' arms against the states.[10] Until 2022, lower courts applied a two-part test to analyze the constitutionality of gun regulations. First, courts considered how burdensome the law at issue was on the right to keep and bear arms. Then, depending on how burdensome the law at issue was, courts would choose a level of scrutiny to apply and generally upheld the laws at issue as constitutional.[11]

(concluding prior to *Bruen*'s doctrinal alterations that 'presumptively lawful' means that such laws "regulate conduct outside the scope of the Second Amendment"); Hamilton v. Pallozzi, 848 F.3d 614, 624 (4th Cir. 2017) ("Because the presumption of constitutionality from *Heller* and *Moore* governs, we need not pursue an analysis of the historical scope of the Second Amendment right.") (citing U.S. v. Preuss, 703 F.3d 242, 245-46, 246 n.3 (4th Cir. 2012)), NRA of Am. v. Bureau of Alcohol, 700 F.3d 185, 196 (5th Cir. 2012) ("For now, we state that a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment."); *see also* United States v. Rahimi, 61 F.4th 443, 464 (5th Cir. 2023) (citing the categories and stating that *felons* can be disarmed without violating the Second Amendment); United States v. Goolsby, No. 21-3087, 2022 U.S. App. LEXIS 6096, at *6 (6th Cir. Mar. 7, 2022) ("Pointing to [the presumptively lawful] language, we have repeatedly found that 'prohibitions on felon possession of firearms do not violate the Second Amendment.'"); United States v. Yancey, 621 F.3d 681, 684 (7th Cir. 2010) (expanding *Heller*'s list of presumptively lawful regulations to drug users by analogizing to the felon possession and mental illness categories); United States v. Williams, 24 F.4th 1209, 1211 (8th Cir. 2022) ("Given the 'assurances' in *Heller* and *McDonald* . . . we reject Williams's contention that. . . § 922(g)(1) [is] unconstitutional as applied to him."); Mai v. United States, 952 F.3d 1106, 1114 (9th Cir. 2020) ("A law does not burden Second Amendment rights 'if it either falls within one of the 'presumptively lawful regulatory measures' identified in *Heller or* regulates conduct that historically has fallen outside the scope of the Second Amendment.'") (emphasis added) (cert denied); United States v. Cox, 906 F.3d 1170, 1187 (10th Cir. 2018) (citing the presumptively lawful categories in holding that the Second Amendment does not protect the making and selling of silencers) (cert. denied); NRA v. Bondi, 61 F.4th 1317, 1320 (11th Cir. 2023) ("Indeed, the Supreme Court has already identified 'laws imposing conditions and qualifications on the commercial sale of firearms' as 'longstanding' and therefore 'presumptively lawful' firearm regulations"); United States v. Class, 930 F.3d 460, 463 (D.C. Cir. 2019) (applying a sensitive places analysis).

10 McDonald v. Chicago, 561 U.S. 742 (2010) (plurality opinion).

11 United States v. Marzzarella, 614 F.3d 85, 97 (3d Cir. 2010). "The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny." Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) (citing United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)), United States v. Tallion, No. 8:22-po-01758-AAQ,

After over a decade of doctrinal development, the Court in *Bruen* jettisoned the tiers of scrutiny analysis. The test was replaced by a "history and tradition" analysis that requires modern laws to be justified by reference to historical laws and traditions—a test which we explain in Part III applies differently to sensitive places under a proper reading of *Bruen*.[12] For now, there are two important developments to note from *Bruen*. First, *Bruen* held that the right to keep and bear arms extends *outside* the home.[13] Second, *Bruen* announced a new test for Second Amendment cases generally:

> 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."[14]

B. The 'Sensitive Places' Doctrine

Recall that *Heller* announced that arms regulations on sensitive places are presumptively lawful. Courts and commentators have diverged on what presumptively lawful means. That divergence has also featured in sensitive places cases. The sensitive places doctrine, as applied by lower courts, does not form a cohesive whole. Courts have handled the doctrine in many ways, from giving it relatively little

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2022 U.S. Dist. LEXIS 225175, at *3-4 (D.N.H. 2022). *See also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 n. 4 (2022) (citing Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J., 910 F. 3d 106, 117 (3d Cir. 2018)); *accord* Worman v. Healey, 922 F.3d 26, 33, 36-39 (1st Cir. 2019); Libertarian Party of Erie Cty. v. Cuomo, 970 F.3d 106, 127-28 (2nd Cir. 2020); Harley v. Wilkinson, 988 F.3d 766, 769 (4th Cir. 2021); National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 194–95 (5th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Kanter v. Barr, 919 F.3d 437, 442 (7th Cir. 2019); Young v. Hawaii, 992 F.3d 765, 783 (9th Cir. 2021) (en banc); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); GeorgiaCarry.Org, Inc. 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 generally* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67 (2023) (detailing the success rate of various types of Second Amendment claims).

12 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022); *see also* Charles, Patrick J., *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. STATE L. REV. 628, 676, 681.

13 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022).

14 *Id.* at 24.

weight[15] to viewing it as dispositive.[16] Litigators attempting to find a catchy one-liner from the case law with which to persuade judges or a common theme will be disappointed to find that nothing unites the cases into one single principle.

The most important place to start is the Supreme Court's dicta in *Bruen*. In *Bruen*, the Court rejected New York's argument that its licensing regime was a sensitive places law.[17] New York defined a sensitive place as "all 'places where law enforcement and other public safety professionals are presumptively available'"[18] *Bruen*'s answer to this argument was that the factors of congregation and the presence of law enforcement, as sufficient conditions, would define the category of sensitive places far too broadly, would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense."[19] The Court continued, "[p]ut 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."[20] The Court was careful, however, not to undermine the doctrine itself. Citing Kopel's seminal work on the subject, it explained that it was "aware of no disputes" regarding the lawfulness of sensitive locations such as "legislative assemblies, polling places, and courthouses."[21]

Whether the Supreme Court intended the above language to be legal commentary or factual commentary is unclear. On one hand, the Court talks about the doctrine of sensitive places (i.e., a question of law). On the other hand, the Court discusses some examples of historical sensitive places. If the language the Court used is meant to provide doctrinal clarity, then we may simply take it to mean that whatever the sensitive places test is, it is not correct to say that it is *all* places where (1) people congregate and (2) law enforcement is presumptively

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15 *See* Antonyuk v. Hochul, 639 F. Supp. 3d 232 (N.D.N.Y. 2022) (stayed pending appeal); Koons v. Platkin, No. 22-7464, 2023 U.S. Dist. LEXIS 85235 (D.N.J. May 16, 2023) (appeal docketed).

16 *See e.g.*, United States v. Class, 930 F.3d 460, 464 (D.C. Cir. 2019); United States v. Dorosan, 350 Fed. App'x. 874 (5th Cir. 2009) (per curiam) (cert. denied).

17 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 31 (2022).

18 *Id.* Under *Heller*, the Second Amendment pertains to self-defense. *Id.* The idea behind the argument relating to availability of law enforcement is that if government agents are available to protect the public, the necessity of self-defense is diminished.

19 *Id.*

20 *Id.*

21 *Id.* at 29.

available. This must be true, because people may congregate in *any* place and law enforcement is presumptively available *everywhere*. Taking Justice Thomas's words at their face value, it is of course true that the sensitive places doctrine must entail something different.

If, however, the language speaks to the sensitive places doctrine as a question of fact, then lower courts will likely not be bound by a finding of fact by the Supreme Court.[22] As we demonstrate in Part II, to the extent the Court was making a factual rather than a doctrinal point, it erred. While the court said that there is "no historical basis" for New York to declare Manhattan a sensitive place—a more comprehensive review of historical location-based restrictions shows the exact opposite. The malleability of the historical inquire allows a response to this criticism that simply emphasizes custom over regulation. The protean nature of the *Bruen* inquiry lends itself to such intellectual escape hatches.

Although cases on the sensitive places doctrine are sparse, different rationales in favor of the sensitivity of a given place have emerged from the lower courts and scholars. They include: (1) large numbers of defenseless or vulnerable people, (2) children and the value of young lives, (3) governmental proprietorship and functions, and (4) expectations of safety.[23]

For example, the Ninth Circuit held in *Nordyke* that "although *Heller* does not provide much guidance, the open, public spaces the County's Ordinance covers" are sensitive places in the same way as schools and government buildings.[24] The court stated that schools and government buildings are examples of sensitive places "presumably because possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children)."[25] Although the case was later vacated, it has been cited favorably by other courts[26] and

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22 The binding nature of factfinding by the Supreme Court is not always clear. Case law may sometimes "rel[y] upon changeable facts." DAVID L. FAIGMAN, A UNIFIED THEORY OF CONSTITUTIONAL FACTS, 70 (2008). Although historical facts are frequently solidified by the findings of the Supreme Court, the analogue test is novel and may therefore abide by different rules.

23 Other rationales have emerged as well, such as protecting democratic community. *See* Joseph Blocher & Reva B. Siegel, *Guided By History: Protecting the Public Sphere From Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. (forthcoming).

24 Nordyke v. King, 563 F.3d 439, 460 (9th Cir. 2009), *vacated*, 575 F.3d 890 (9th Cir. 2009).

25 *Id.*; *see also* Teixeira v. County of Alameda, No. C 12-03288, 2013 U.S. Dist. LEXIS 36792, 15-17 (N.D. Cal. Feb. 26, 2013).

26 *See e.g.*, United States v. Masciandaro, 648 F. Supp. 2d 779, 791 (V.A.E.D. 2009).

provides useful insight into the meaning of sensitivity.[27] The same principle is illustrated on appeal in *Antonyuk v. Chiumento*, where the Second Circuit explained that the relevant level of abstraction from the states proffered historical analogues to defend various sensitive places laws was that they were aimed at "firearm prohibition (how) in places frequented by and for the protection of vulnerable populations (why)."[28]

Children and the value of young lives represent another factor that has weighed heavily in courts' analysis of sensitivity. While *Nordyke* included children as a *subpart* of the defenseless congregation analysis, other courts have relied upon it as its own factor in evaluating sensitivity. As one court put it, "[i]]t is beyond peradventure that a school zone. . .is precisely the type of location of which *Heller* spoke."[29] Similarly, in *Frey v. Nigrelli*, the court stated that "schools are a paradigmatic sensitive place because of the presence of children."[30] Even in *Antonyuk* at the district court level, a case which has gained a reputation for its skepticism of location-based restrictions, recognized that the Supreme Court "has already recognized the permissibility of this restriction as it applies to 'schools.'"[31] The court added that this made sense "based on the historical analogues" presented to and found by the court—though it is noteworthy that here, the *Antonyuk* court found analogues from the late 1800s persuasive whereas in other portions of the opinion, the *Antonyuk* court discounted laws from that era heavily.[32]

Governmental functions and government-owned buildings have been separate bases for courts to conclude that certain locations are sensitive. In *Bonidy*, the Tenth Circuit held that

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27 *See also* Blocher & Siegal, *supra* note 23, at 108 (challenging the "deregulatory Second Amendment" and arguing that the tradition of location-based restrictions is not limited to "sites of governance and education" but also "sites of commerce and transportation").

28 Antonyuk v. Chiumento, No. 22-2908, at 144 (2d Cir. 2023).

29 United States v. Lewis, No. 2008-45, 2008 U.S. Dist. LEXIS 103631, at *7 (D.V.I. Dec. 24, 2008).

30 Frey v. Nigrelli, No. 21 CV 05334, 2023 U.S. Dist. LEXIS 42067, at *60 (S.D.N.Y. Mar. 13, 2023). Though this analysis has sometimes mingled with the tiers of scrutiny analysis jettisoned by *Bruen*, the theme runs through the sensitive places case law. *See* Miller v. Smith, No. 18-cv-3085, 2022 U.S. Dist. LEXIS 44490, at *26-27 (C.D. Ill. Mar. 14, 2022) (collecting cases).

31 Antonyuk v. Hochul, 639 F. Supp. 3d 232, 327 (N.D.N.Y. 2022) (vacated in part).

32 *Id.* at 320 ("Again, to the extent the laws come from territories near the last decade of the 19th century (i.e., the 1889 Arizona law and 1890 Oklahoma law), the Court discounts their weight, because of their diminished ability to shed light on the public understanding of the Second Amendment in 1791 and/or of the Fourteenth Amendment in 1868.").

a postal-office building and adjacent parking lot were government buildings, and therefore sensitive.[33] The *Bonidy* court, much like the famous *Marzzarella* decision, concluded that because of the sensitive places dicta in *Heller*, the right to carry firearms "does not apply to federal buildings, such as post offices."[34] The court came to a similar conclusion for the adjacent parking lot, which it described as a "single unit" with the post office, citing the fact that there was a "drop-off box for the post office in the parking lot, meaning that postal transactions" took place in the building *and* the lot. [35] Notably, this is a test which encompasses both government *ownership* and governmental *functions*.[36]

The *Bonidy* dissent agreed that the government "'has more flexibility to regulate when it is acting as a proprietor'",[37] but adopted the opposite view of sensitivity on the issue of the parking lot, concluding that "most places are sensitive for someone [and]. . .[s]uch a conclusion would give the government untrammeled power to restrict Second Amendment rights in any place even plausibly considered sensitive."[38] The dissent provided an alternative view of sensitive places in its intermediate scrutiny analysis.[39] As the dissent explained, whether a place is sensitive must depend on the place itself, rather than the place to which it is connected. In the dissent's view, sensitivity requires a "particular vulnerability."[40] Specifically for buildings, the dissent described the post-office as an "enclosed space" which requires

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33 Bonidy v. United States Postal Service, 790 F.3d 1121, 1125 (10th Cir. 2015).

34 *Id.*; *see also* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) (cert. denied).

35 Bonidy, 790 F.3d at 1125.

36 The court prophetically provided an alternative holding under the assumption that "the right to bear arms recognized in *Heller* in the home would also apply, although with less force, outside the home." *Id.* Seers have limits too though, and the court's subsequent reliance on intermediate scrutiny has now been jettisoned by *Bruen*.

37 Bonidy, 790 F.3d at 1137 (Tymkovich, J., concurring and dissenting in part).

38 *Id.* at 1136. As the dissent explained, whether a place is sensitive must depend on the place itself, rather than the place to which it is connected. In the dissent's view, sensitivity required a "particular vulnerability." Further, the dissent described the post-office as an "enclosed space" which requires interactions in "close quarters" and "even a lawful use" of arms for self-defense in that space would pose "great risks to innocent bystanders" than in the parking lot. *Id.* at 1137-40. Moreover, "business involving valuables", or a "reasonable target for criminals" occurs within the post office but not the parking lot.

39 *Id.* at 1137.

40 *Id.*

interactions in "close quarters."[41] Accordingly, "even a lawful use" of arms for self-defense in that space would pose "great risks to innocent bystanders" than in the parking lot.[42] Moreover, "business involving valuables", or a "reasonable target for criminals," occurs within the post office but not the parking lot, indicating that the post office is more sensitive than the parking lot.[43]

Similarly, in *United States v. Class*, the court concluded that "as the owner of the [parking] lot, the government—like private property owners—has the power to regulate conduct on its property."[44] The court indicated that it would also find, for example, that the White House lawn is sensitive "for purposes of the Second Amendment."[45]

Class is additionally notable for its discussion of due process concerns within the context of the sensitive places doctrine. Sensitive places litigation sometimes involves questions of due process because there is disagreement about what constitutes a sensitive place, meaning there may be open questions about where the right to keep and bear arms may be properly exercised when statutes simply ban guns in sensitive places without describing those places.

However, in *Class*, the court rejected the claim that the restriction of carriage around the Capitol Grounds was void for vagueness.[46] Both the prohibition on the carriage of arms and the "precisely defined" metes and bounds of the Capitol Grounds rendered the prohibition on the carriage of arms sufficiently clear for the court.[47] Although it is not an easy task to look through the U.S. Code to determine which areas constituted prohibited Capitol Grounds, the court relied on the maxim that "[i]t is a bedrock principle that '[c]itizens] are charged with generally knowing the law.'"[48] Accordingly, fair notice for due process considerations "usually requires a legislature to 'do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.'"[49]

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41 *Id.*

42 *Id.* at 1140.

43 *Id.*

44 United States v. Class, 930 F.3d 460, 464 (D.C. Cir. 2019) (explaining that similar rules apply in free speech cases).

45 *Id.* (citing Suppl. Class. Br. 25 n.7).

46 *Id.* at 466.

47 *Id.*

48 *Id.* at 467 (quoting United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017)).

49 *Id.*

Other courts have also recognized the role of government functions or property. In *Solomon*, the court explained that the rationale of sensitive places included "gatherings of large groups of people or *performance of government functions*."[50] *Antonyuk*, an above-referenced case, also recognized regulations on arms in "'[A]ny place. . . . under the control of federal, state or local government, for the purpose of government administration'" would be permissible.[51]

In one federal property case, the court noted that "the logical corollary of a weapons ban on federal property is an individual's lessened expectation of privacy in terms of equally *fundamental* Fourth Amendment rights."[52] The court proceeded to cite to cases involving airports, courthouses, military installations, and prisons, where prior courts had determined that warrantless searches were permitted in light of the government's "concurrent legitimate interest" in maintaining security on its property.[53] The development of the possible relationship between the Fourth Amendment and the sensitive places doctrine is outside the scope of this Article, though we note that such a view might limit the sensitive places doctrine in a way that counters *Heller*'s description of its robust function.[54]

Other courts have described sensitivity as a metric of reasonable expectations. While the courts have provided relatively little guidance on *where* individuals may enjoy reasonable expectations of safety, courts have described sensitivity in this way. For example, in *Digiacinto*, George Mason University banned the possession of arms by everyone except for police officers on certain parts of its property, such

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50 Solomon v. Cook Cty. Bd. of Comm'rs, 559 F. Supp. 3d 675, 692 (N.D. Ill. 2021) (citing *Nordyke* and *Bonidy*) (emphasis added). *See also* United States v. Dorosan, No. 08-042, 2008 U.S. Dist. LEXIS 49628, at *15-19 (E.D. La. June 30, 2008), United States v. Giraitis, 127 F. Supp. 3d 1, 3 (D.R.I. 2015) (noting also the strict scrutiny component, which is no longer good law); Digiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 369 (Va. 2011); Eaker v. City of Moss Point, No. 1:20cv92-HSO-JCG, 2021 U.S. Dist. LEXIS 36285, at *14 (S.D. Miss. Feb. 26, 2021); Doe v. Wilmington Housing Authority, 880 F. Supp. 2d 513, 532 (D. Del. 2012) (acknowledging the strength of the argument that people congregate and governmental business occurs in common areas, but ultimately deciding the case based on intermediate scrutiny).

51 Antonyuk v. Hochul, 639 F. Supp. 3d 232, 261 n. 12 (N.D.N.Y. 2022). While this issue was dismissed for lack of standing, the court recognized that such restrictions are allowed according to the Supreme Court.

52 Dorosan, 2008 U.S. Dist. LEXIS 49628, at *23.

53 *Id.*

54 See infra Part III.

as "inside campus buildings and at campus events."[55] Though individuals could still carry throughout the open grounds, the court upheld the limited locational restrictions in part because "parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm."[56] That is not to say that the reasonable expectation factor stood alone in this case—or that it would ever be dispositive—indeed, the court also noted that the campus was a school, that the buildings, unlike streets, were not traditionally open to the public, and that the government was a proprietor of the buildings.[57] Similarly, in *Doe*, the court recognized that 'common areas' in housing facilities are a "fairly strong" analogy to other sensitive places based on congregation, government offices, and the fact that "residents and guests. . .have a reasonable expectation that the [housing authority] will do everything within the bounds of its power to keep its property safe."[58]

Rationales against sensitivity have appeared as well. For instance, in *Solomon v. Cook County Bd. Of Comm'rs*, described above, the court viewed it as problematic that part of the place in question was a "large set of 'distinct, non-adjacent' places covering 70,000 acres."[59] Such a view indicates that sensitive places are a narrow category of places and that the place must form a cohesive whole. A Virginia state court cast the category with exceptional narrowness stating that "[t]he sensitive places outlined in [*Heller* and *Bruen*] are confined, mostly enclosed areas, where individuals congregate and government business takes place."[60] However, it should be noted that the court reached this conclusion only by referencing *DiGiacinto* and analogizing to the non-exhaustive list of sensitive places listed in *Heller* and *Bruen*, rather than considering the nature of sensitivity or history.

Similarly, in *Antonyuk*, the court expounded upon *Bruen*'s rejection of New York's sensitive places argument. First, the court explained that the "Restricted Locations" portion of New York's post-*Bruen* location-based regulations barred weapons in all privately owned property not open to business for the

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

56 *Id.*

57 *Id.*

58 Doe v. Wilmington Housing Auth., 880 F. Supp. 2d 513, 532 (D. Del. 2012).

59 Solomon v. Cook City. Bd. of Comm'rs, 559 F. Supp. 3d 675, 693 (N.D. Ill. 2021) (proceeding to analyze the law at issue under heightened scrutiny).

60 *See* Stickley v. City of Winchester, No. CL21-206, 2022 Va. Cir. LEXIS 201, **50 (Va. Cir. Sept. 27, 2022).

public as well as privately owned property that is open to public business, absent permission.[61] Then, the court described the regulation as a "thinly disguised version of the sort of impermissible sensitive location regulation that the Supreme Court considered and rejected in *Bruen*.[62] The court granted a TRO against a large number of New York's other placed-based restrictions, including on facilities for behavioral health or chemical dependence care,[63] places of worship,[64] public parks,[65] zoos,[66] airports,[67] buses,[68] bars,[69] theatres,[70] conference halls,[71] banquet halls,[72] and gatherings to collectively express constitutional rights,[73] but *not* public playgrounds,[74] libraries,[75] nursery schools[76] and preschools.[77]

Comparable results obtained in *Koons*. Shortly after *Bruen*, litigants challenged New Jersey's new sensitive places law, which included prohibitions on firearms in "publicly owned or leased librar[ies] and museum[s]", sites where alcohol is sold for on-premises consumption, entertainment facilities (including "theater[s], stadium[s], museum[s], arena[s], racetrack[s], and more), private property without owner consent, or in vehicles unless the firearm is unloaded and safely secured.[78] The final order enjoined the regulations on arms in zoos, functional firearms in vehicles, and private property open to the public but denied preliminary injunctions against the law for playgrounds, youth sports events, airports and transportation hubs (provided that the firearm could be checked luggage), and health care facilities for mental health

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61 Antonyuk v. Hochul, 639 F. Supp. 3d 232, 339-40 (N.D.N.Y. 2022).
62 *Id.* at 342-43.
63 *Id.* at 319.
64 *Id.* at 321.
65 *Id.* at 326.
66 *Id.* at 327.
67 *Id.* at 331.
68 *Id.*
69 *Id.* at 331.
70 *Id.* at 335.
71 *Id.*
72 *Id.*
73 *Id.* at 335.
74 *Id.* at 327.
75 *Id.*
76 *Id.* at 327.
77 *Id.*
78 Koons v. Platkin, No. 22-7464, 2023 U.S. Dist. LEXIS 85235, at *16-17 (D.N.J. May 16, 2023).

and addiction.[79]

In an earlier decision, the same court had stated that for the relevant locations, the state was still required to show consistency with "'this Nation's historical tradition of firearm regulation'" pursuant to *Bruen*.[80] Especially noteworthy to the court was the court's view that the plaintiffs could not "decipher what constitutes a 'sensitive place'" and that the law "'effectively shuts off most areas'" from carrying arms for self-defense.[81] Importantly, the opinion's substantive rights analysis stood in some tension with *Class*'s Due Process interpretation. Like *Class*, referenced above, the court considered the difficulty of compliance with the law. However, the court instead focused on the breadth of New Jersey's new sensitive places law and explained that "[p]laintiffs cannot decipher what constitutes a 'sensitive place,' and so they have abandoned their constitutional right to bear arms out of fear of criminal penalty."[82] The court noted that the sensitive places regulations in New Jersey was "sweeping legislation that includes catch-alls", noting in a footnote that the state banned handguns in entertainment facilities "'*including but not limited to* a theater, stadium, museum, arena, racetrack, or other place where performances, concerts, exhibits, games, or contests are held.'"[83] While *Class* focused on Due Process and *Koons* focused on the nature of the right, the conflicting intuitions of constitutionality for locational restrictions merit mentioning.

Ultimately, the analysis in *Antonyuk* has been largely disavowed by the Second Circuit.[84] The Second Circuit adopted a more permissive approach than *Antonyuk* and *Koons* to determine whether historical categories of firearm regulations form a "tradition" and are analogous to modern sensitive places laws. For example, the Second Circuit did not infer that historical legislative *silence* regarding certain laws would mean that such laws are unconstitutional today.[85]

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79 *See id.* at *2. This is but a small sample of takeaways from the opinion, which may be the lengthiest of the sensitive places cases to date.

80 Koons v. Reynolds, 649 F. Supp. 3d 14, 32 (D.N.J. 2023).

81 *Id.* at 33.

82 *Id.* It is possible that the analysis would have overlapped more with more emphasis on Due Process, but the analysis considers similar factors.

83 *Id.* at 42 n.29.

84 Antonyuk v. Chiumento, No. 22-2908, at 144 (2d Cir. 2023).

85 *Id.* at 9. *See also* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67, 153 (2023) (criticizing such an inference because it "elevates mere unregulated conduct to the status of

The doctrinal viewpoints do not converge on a single factor or rule. Predictably, places may be deemed sensitive for a plurality of reasons. Although policy analysis may not be allowed under a standard *Bruen* analysis, a discussion of policy aims may be relevant to whether a place may be deemed sensitive. To rehearse the doctrine thus far, certain categories of gun laws are presumptively lawful, including regulations on sensitive places. Places may be sensitive as a *doctrinal* matter for reasons including, but likely not limited to, the amount of congregation, the presence of children, government proprietorship and functions, and reasonable expectations of safety. On the other hand, some courts have viewed the doctrine with great skepticism—indicating that the category is narrowly circumscribed and not conducive to expansion.

II. HISTORICAL ANALOGUES

We are not the first to index and analyze the extensive history of firearms regulation in sensitive places.[86] However, with much of the scholarship on the subject being pre-*Bruen* work, we think *Bruen*'s history and tradition approach—however it might be applied to presumptively lawful categories of gun regulations such as sensitive places—merits a broad marshalling of historical analogues.

A. Historical Methodology

We are not formally trained historians. We are lawyers engaging with *Bruen*'s test precisely as *Bruen* and lower courts say we should. Accordingly, we have assembled historical analogues which establish, among other possible categories, the permissibility of restrictions on guns or the firing thereof near (1) buildings, towns, and cities, (2) parks, (3) roads, (4) railroads, trains, and railyards, (5) polling places, (6) schools, (7) legislatures, (8) courthouses, (9) places of worship, (10) the

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inviolate constitutional right"). This observation by the Second Circuit also indicates the opportunity for burden-shifting—in other words, silence may be shown to be evidence of unconstitutionality where the historical record reflects such a conclusion. Kevin Schascheck, *Recalibrating Bruen: The Merits of Historical Burden-Shifting In Second Amendment Cases*, 11 BELMONT L. REV. 38, 42 (2023); *Chiumento,* at 207 ("That observation, however, does not require courts to reflexively discount evidence from the latter half of the19th century absent indications that such evidence is inconsistent with the National tradition.").

86 *See generally*, David B. Kopel & Joseph G.S. Greenlee, *The 'Sensitive Places' Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 204 (2018).

property of others, and (10) public assemblies.[87] Additionally, we have assembled statutes regulating sensitive *times* for shooting weapons, including at night, on holidays, and on Sundays.[88]

Prior to cataloguing and explaining the historical analogues, we note that the assembled analogues come from a large number of states and wide variety of time periods up to 1899. When incorporating the below analogues, litigators will need to consider a few doctrinal questions. First, litigators will need to evaluate how courts in the applicable jurisdiction evaluate presumptively lawful categories of gun laws such as sensitive places. Second, litigators should consider whether courts in the same jurisdiction have decided one the open questions in Justice Barrett's concurrence, namely, whether 1791 or 1868 is the relevant time period for admissible historical analogues and whether analogues *after* that time period are admissible for purposes of liquidating[89] the Second Amendment.[90] Third, many of the below statutes regulate *firing* rather than *carrying* weapons. This distinction does not weaken the value of the collected analogues because these analogues demonstrate a history and tradition of state regulation of the individual right to bear arms with the details of such regulations left open to the legislature.

We note that prior to *Bruen*, most scholars focused on the general tradition of firearm carriage, but after *Bruen*, it is clear that courts are more focused on historical statutes than anything else. Accordingly, such statutes are the primary material expounded upon below.

Before continuing—a few practical strategic points to add to the doctrinal ones above. First, we advise litigants to consider carefully how to assemble historical analogues into specific categories. In this Section, we have compiled

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87 Note that the list of historical analogues we have identified is not intended to be a comprehensive list. Rather, we memorialize in this Article and the related appendix the historical analogues we identified in approximately fifty hours of historical research. We encourage others with interest in this subject matter to build upon this work.

88 For a similar list of categories based on New York law, *see* Christopher Hernandez, *Justified Sensitive Locations under the Second Amendment Post-Bruen* (2022) (analyzing *Antonyuk v. Hochul*, 639 F. Supp. 3d 232 (N.D.N.Y. 2022)).

89 Liquidation is the idea that, after an amendment is ratified, subsequent practices and adjudications may help to establish or "liquidate" its meaning. In jurisdictions that decline to endorse liquidation, litigators will be limited to statutes that are prior to or concurrent with either 1791 or 1868, as applicable. *See generally* THE FEDERALIST NO. 37 (James Madison).

90 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 81-83 (2022) (Barrett, J., concurring).

analogues into categories which we find most useful. Reasonable minds may differ on whether one statute is 'relevantly similar' to another, whether one statute is constitutive *enough* of the subcategory into which it is placed, or whether a category or statute resembles closely a modern one. No person may resolve plainly these open questions—they are now yet another advocacy tool available to litigants.[91]

Second, *Bruen* invites courts to look for similarities, but as shown by the doctrine, some courts are more focused on finding distinctions. Whether these distinctions are meaningful will vary by court, but whether they exist at all must be determined by the litigants in a specific matter to anticipate and respond to inquiries about whether certain statutes are on point under a *Bruen* analysis. While spacing constraints prevent us from listing the full text of every statute we discuss, we recommend that litigants and courts follow the references we and others have assembled to compile their own repositories of the *full text* of each.[92] It will likely be the only context that the court will have to rely on.

Third, recall the two questions raised by Justice Barrett. First, which historical period is most important? Is it the period when the Second Amendment was ratified *or* the period when it was incorporated against the states via the Fourteenth Amendment? Second, to what extent can post-enactment history (or historical analogues) inform the content of ratified constitutional amendments? As to the admissibility of the below statues with regard to the two questions raised by Justice Barrett, it must *at least* be true that courts may *either* rely on statutes enacted before 1868, as opposed to 1791, or that, assuming courts decide 1791 is the appropriate metric of the Second Amendment's content, courts are entitled to look far later than 1791 to determine the liquidation of that content over time. This is because in both *Bruen* and *Heller*, the Supreme Court considered history shortly before and after the

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91 Any use of history will be subject to critiques regarding "law office history." Law office history is history which "fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development" or is "highly selected and carefully prepared" in a way that unfairly favors one outcome. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132, 144 (1965).

92 The full text of all citations is available in the attached historical appendix. We invite readers to contact us for copies of our source material. Some historical analogues are not included, specifically, analogues regulating ships, cemeteries, powder houses, bridges, and pubs.

Fourteenth Amendment was drafted.[93] The analogues follow below.

B. Historical Analogues

At least twenty-three historical analogues exist for the regulation of firearms near buildings, towns, and cities, ranging from 1712 to 1899. The regulation of firearms in urban areas is deeply rooted in American history. Although scholars such as Kopel and Greenlee have noted that colonial and founding-era "Americans certainly did not think that bringing guns to town was a problem",[94] we found to the contrary that states and cities frequently regulated weapons in and near urban areas.

Despite this statement, we found that colonies and states restricted both carriage and firing of weapons in towns and cities. The colony of New York restricted carriage of firearms as early as 1763.[95] In 1782, only nine years before the ratification of the Second Amendment, Massachusetts prohibited the mere bringing of cannons and firearms into certain houses, stables, barns, shops, and other buildings within Boston—the punishment for which was seizure of the arm.[96] York, Pennsylvania, prohibited the malicious carriage of certain arms.[97] The state of Tennessee prohibited carriage of weapons at any fair or public assembly.[98] The city of Boulder, Colorado barred the carriage of arms in "any of the parks" belonging to the city.[99]

There is also an extensive record of regulation on firing of weapons in cities and towns. The colony of Pennsylvania was among the first to enact such statutes. In 1712, the colony forbade the firing of guns on vessels in the evening and morning, as well as within the "built part" of Philadelphia

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93 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 68 (2022) (explaining why specific analogues from after 1868 were insufficient); District of Columbia v. Heller, 554 U.S. 570, 616-19 (2008) (citing post-Civil War sources).

94 Kopel & Greenlee, supra note 86, at 232.

95 An Act to prevent hunting with Fire-Arms in the City of New-York, and the Liberties thereof, 27th-29th Assemblies, 390, at 441 (N.Y. 1763).

96 1782 MASS. ACTS 120.

97 1851 Pa. Laws 323 § 4. FREDERICK C. BRIGHTLY, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR 1700 TO THE 10TH DAY OF JULY 1872, at 323 (10th ed. 1873). Similar prohibitions existed for carrying concealed weapons in Philadelphia and Schuykill County. *Id.* at 322-23.

98 JAMES H. SHANKLAND, PUBLIC STATUTES OF THE STATE OF TENNESSEE, SINCE THE YEAR 1858, at 108 (1871).

99 OSCAR F. GREENE, REVISED ORDINANCES OF THE CITY OF BOULDER 157 (1899).

absent license from a city official.[100] The colony then enacted another statute in 1721 forbidding the firing of "any gun or other firearms" within the city of Philadelphia without license.[101] The colony of Massachusetts enacted a law in 1746 forbidding firing of arms within the town of Boston or in the harbor between "the castle and said town."[102] The law was re-enacted by the colony in 1751 and 1772, then by the state in 1778.[103] In 1752, the colony of Pennsylvania prohibited firing arms "within any of the said towns or boroughs" absent license.[104] In 1760, the colony prohibited firing at fowl within "the open streets" of Philadelphia, gardens, orchards, and enclosures between homes within city limits.[105]

After the Founding, states continued regulating weapons in locations on the basis of urbanity. We identified several examples of states that enacted prohibitions on firing within cities and towns, including Ohio in 1788[106] and an ordinance from an Ohioan city in 1833,[107] Delaware in 1812,[108] Bristol, Rhode Island in 1819[109] and Providence, Rhode Island, in 1835,[110] then Rhode Island again in 1896,[111] Macon, Georgia in 1858,[112] Texas in 1866[113] and an ordinance from a Texan

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100 An Act for the Better Government of the City of Philadelphia, 2 PA. STAT. 414, 420 (1712).

101 An Act for Preventing Accidents That May Happen By Fire, 3 PA. STAT. 252, 253 (1721).

102 An Act to Prevent the Firing Of Guns Charged With Shot[t] Or Ball In The Town Of Boston, MASS. PROVINCE LAWS ch. 11, at 305 (1746) (re-enacted by MASS. PROVINCE LAW ch. 7, at 574 (1751); further re-enacted by MASS. PROVINCE LAWS ch. 53, at 258 (1772); further re-enacted by MASS. PROVINCE LAWS ch. 17, at 903, with detailed citations in the historical appendix).

103 *See supra* note 98.

104 An Act for More Effectual Preventing Accidents Which May Happen by Fire, and for Suppressing Idleness, Drunkenness, and Other Debaucheries, 1752 Pa. Laws 52.

105 1752 Pa. Laws 55.

106 An Act for Suppressing and Prohibiting Every Species of Gaming for Money or Other Property, and for Making Void All Contracts and Payments Made in Furtherance Thereof, 1788 Ohio Laws 42, § 4.

107 LAWS OF THE NORTHWEST TERRITORY, 1788-1800, at 106 (Theodore Calvin Pease ed., 1925).

108 1812 Del. Laws 329.

109 An Act To Prevent Certain Disorders In The Town Of Bristol, 1819 R.I. Pub. Laws 289.

110 Providence, R.I., Ordinance in Relation to the Firing of Guns, Pistols and other Fire-arms (1835).

111 R.I. GEN LAWS § 23, at 372 (1896).

112 Macon, Ga., Ordinances, § 5 (Feb. 14, 1858).

113 An Act to Prohibit the Discharging Of Fire Arms In Certain Places Herein Named, 1866 Tex. Gen. Laws 210, § 1.

city in 1871,[114] Norwich, Connecticut in 1877,[115] Neenah, Wisconsin in 1883,[116] Fall River, Massachusetts in 1887,[117] and La Crosse, Wisconsin in 1888.[118]

Laws that are not limited to firing arms near cities are also known to the American tradition. For example, a law in York, Pennsylvania, prohibited the malicious carriage of certain arms and the city of Boulder, Colorado barred the carriage of arms in "any of the parks" belonging to the city.

At least twenty-two historical analogues exist for the regulation of firearms near roads, ranging from 1713 to 1899. The colonies of Massachusetts and Pennsylvania regulated guns near roads. In response to incidents of horses throwing off riders at the sound of weapons, the colony of Massachusetts prohibited firing arms "upon Boston Neck, within ten rods of the road or highway leading over the same" in 1713.[119] In 1760, the colony of Pennsylvania prohibited firing "on or near any of the king's highways."[120] The states had more robust regulations. For example, in 1819, Bristol, Rhode Island prohibited firing guns "in any of the streets, roads, [and] lanes" without "justifiable cause"[121] and then, in 1835, Providence, Rhode Island prohibited opening "any pistol gallery" or other place for "testing or firing any pistol" and other arms without precaution as the city marshal might have directed "within the distance of two hundred feet from any street, highway, gangway, or open way" within the limits of the city.[122] Other state statutes and ordinances prohibited firing arms in or within certain distances of roads and highways, including

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114 An Act to Incorporate the Town Of Millican, County of Brazos, 1871 Tex. Gen. Laws 14, art. 10.

115 Norwich, Conn., Ordinances of Norwich, § 15 (1877).

116 An Act to Revise, Consolidate and Amend the Charter of the City of Neenah, 1883 Wis. Sess. Laws 841, § 162.

117 Fall River, Mass., Ordinance on Discharge of Firearms, § 20 (1887).

118 La Crosse, Wis., Ordinance in Relation to the Discharge of Firearms and firecrackers and to the use and exhibition of fireworks, § 1 (1888).

119 An Act to Prohibit Shooting or Firing Off Guns Near the Road or Highway on Boston Neck, 1713 Mass. Gen. Ct. 720 (1713).

120 JOHN W. PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 534 (Kay & Brother, 9th ed. 1862); *see* Kopel & Greenlee., *supra* note 86, at 235 n. 119.

121 An Act to Prevent Certain Disorders In The Town Of Bristol, 1819 R.I. Pub. Laws 289, § 3.

122 Providence, R.I., Ordinance in Relation to the Firing of Guns, Pistols and other Fire-arms (1835).

Maryland in 1874,[123] Norwich, Connecticut in 1877,[124] Nevada in 1881,[125] Wallingford, Connecticut in 1882,[126] Georgia in 1882,[127] Neenah, Wisconsin in 1883,[128] Fall River, Massachusetts in 1887,[129] Rhode Island in 1892 and 1896,[130] Oregon in 1893, North Carolina in 1899,[131] and South Carolina in 1899.[132] Notably, some of these laws contained exceptions for self-defense, military duty, private property with permission of the owner, and hunting. This demonstrates that states viewed themselves as having the authority to exclude certain conduct from prohibitions—i.e., the states had discretion to regulate guns.[133]

At least ten historical analogues exist for the regulation of firearms in trains, railroads, and railyards, ranging from 1855 to 1899. An 1855 statute from Indiana prohibited shooting pistols or other weapons at "any locomotive, or car, or train of cars containing persons, on any railroad in this State".[134] These statutes became more common after the ratification of the 14th Amendment in 1868 (and presumably with the national expansion of rail networks), with examples from Iowa in 1876,[135] Pennsylvania in the same year,[136] Wyoming in

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123 EDWARD OTIS HINKLEY, SUPPLEMENT TO THE MARYLAND CODE: CONTAINING THE ACTS OF THE GENERAL ASSEMBLY PASSED AT THE SESSION OF 1864, at 76 (1865).

124 R.I. GEN LAWS § 23, at 372 (1896).

125 An Act to Prohibit the Use of Firearms in Public Places, 1881 Nev. Stat. 19-20, § 1 (1881).

126 The Charter and By-Laws of the Borough of Wallingford, Conn., § 15 (1882).

127 An Act To Prevent Discharge of Fire-arms on and Near Public Highways, 1882 Ga. Laws 131, § 1 (1882) (banning willful firing within fifty feet of public highways "between dark and daylight" except in defense).

128 An Act to Revise, Consolidate and Amend the Charter of the City of Neenah, 1883 Wis. Sess. Laws 841, § 162 (1873).

129 Fall River, *supra* note 117.

130 Of Firearms And Fireworks, 1892 R.I. Pub. Laws 14, § 1 (1892).

131 An Act to Prohibit Shooting Guns or Pistols in the Towns of Sparta, Alleghany County, and Jefferson, Ashe County, 1899 N.C. Sess. Laws 250, § 1 (1899).

132 An Act to Prevent Drunkeness And Shooting Upon The Highway, 1899 S.C. Acts 97, § 1 (1899).

133 *See* Range v. AG United States, 53 F.4th 262, 284 (3d Cir. 2022) ("[Laws *preventing* disarmament of certain offenders] underscore legislatures' power and discretion to determine when disarmament is warranted."), *vacated by* Range v. AG United States, 56 F.4th 992 (3d Cir. 2023).

134 An Act to Provide For the Punishment of Persons Interfering With Trains or Railroads, 1855 Ind. Acts 153, § 1 (1855).

135 An Act to Diminish Liability to Railroad Accidents and to Punish Interference with, and Injury to the Property of Railroad Companies, 1876 Iowa Acts 142, § 1 (1876).

136 JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE

1879,[137] Indiana again in 1881,[138] Texas in 1889,[139] Georgia in 1892[140] and 1897,[141] Alabama in 1899,[142] and Florida in 1899.[143] Although the relevance of these statutes, other than the Indiana statute from 1855, may depend entirely on a court's answer to the question of constitutional liquidation raised by Justice Barrett (whether statutes after 1868 in this context are relevant), these statutes are noteworthy for the fact that they are statewide rather than local. Such statutes, particularly in tandem with the regulations governing roads and public highways, may serve as compelling historical analogues for modern regulations involving public transportation, commercial transportation, commerce generally, and more.

Polling places as sensitive places find ample support in the historical records. We identified ten examples of laws restricting carriage in or near polling places from 1776 to 1890.[144] The majority of analogues are from after the ratification of the 14th Amendment. However, it is perhaps of elevated importance Delaware's *constitution* in 1776 restricted carriage of firearms in polling places. As *Heller* framed it, its holding was "confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed

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THOUSAND SEVEN HUNDRED TO THE SIXTH DAY OF JUNE, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-THREE 1451 (11th ed. 1885).

137 An Act to Prevent the Use of Firearms from Railroad Cars, and Provide for the Punishment Thereof, 1879 Wyo. Sess. Laws 97, § 1 (1879).

138 JAMES S. FRAZER, ET AL., THE REVISED STATUTES OF INDIANA 366 (E. B. Myers and Company, 1881).

139 1889 Tex. Gen. Laws 36, art. 683b (1889).

140 Rocking or Shooting at or in Cars, GA. CODE ANN. § 511 (1896).

141 An Act to Make It Unlawful for Any Person to Fire Any Pistol, Gun or Other Firearm on Any Excursion Train or at Any Picnic, 1897 Ga. Laws 96-97 (1897) (criminalizing firing at "any excursion train, or at any picnic, except in his or her defense").

142 An Act For The Better Protection Of Passengers On Railway Trains In This State, 1899 Ala. Acts 154.

143 An Act for the Better Protection of Passengers on Railway Trains in the State of Florida, 1899 Fla. Laws 93, § 1 (1899).

144 Del. Const. art. 28 (1776); 1 Ga. Laws 421 (1870); 1868 La. Acts 159-60; JOHN PRENTISS POE, THE MARYLAND CODE: PUBLIC LOCAL LAWS: ADOPTED BY THE GENERAL ASSEMBLY OF MARYLAND, MARCH 14, 1888, at 1457 (King Bros, ed. 1888); 1883 Mo. Laws 76; An Act to Prevent the Carrying of Guns, Pistols, Dirk-knives, Razors, Billies or Bludgeons by Any Person in Calvert County, on the Days of Election in Said County, Within One Mile of the Polls, 1886 Md. Laws 315 (1886); JAMES SHANKLAND, supra note 94; An Act Regulating the Right to Keep and Bear Arms, 1870 Tex. Laws 63 (1870); GEORGE W. PASCHAL, REPORTER A DIGEST OF THE LAWS OF TEXAS: CONTAINING LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST. CAREFULLY ANNOTATED 1322, 1317 (S. S. Nichols, 3rd ed., 1873); Andrews v. State, 50 Tenn. 165, 181-82 (1871); LEANDER G. PITMAN, THE STATUTES OF OKLAHOMA, 1890, at 496 (Guthrie, 1891).

adoption of the Second Amendment."[145] Given that the Court in *Heller* viewed state constitutions as confirmatory of its interpretation of the Second Amendment, courts may find this analogue in particular persuasive.[146]

Schools, legislatures, and courthouses are quintessential sensitive places under the doctrine, both as announced by the Supreme Court and as analyzed by lower courts in the previous Section. The historical support for each of these is vast. The regulations on these places are relatively split between ones that regulate the carrying and firing of arms. Analogues exist for schools from 1824 to 1893[147] and for courthouses from 1870 to 1899.[148] The assiduous reader should note that most of the analogues cited in the footnotes below come not only from after the ratification of the Second Amendment, but *also after the ratification of the 14th Amendment*, a critical data point when discussing the presumptively lawful categories of gun regulations and Justice Barrett's concurrence. The importance of this information is that it either means that (1) 'presumptively lawful' categories do not require history in the way other categories do, *or* (2) that courts may rely on even post-Fourteenth Amendment-era history.

Places of worship have long been a source of contention regarding the right to keep and bear arms. In 1871, the Supreme Court of Tennessee wrote that "the exercise" of the right "is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places."[149] The court stated further, in dicta, that "a man may well be prohibited from carrying his arms to church, or other public assemblage,

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145 District of Columbia v. Heller, 554 U.S. 570, 603 (2008).

146 *See id.*

147 *Meeting Minutes of University of Virginia Board of Visitors* (Oct. 4, 1824); An Act To Prevent The Carrying Of Concealed Weapons And For Other Purposes, 1878 Miss. Laws 176 (1878); Carrying Deadly Weapons, 1879 Mo. Laws 224, § 1274 (1879), in 1 JOHN A. HOCKADAY, ET AL., THE REVISED STATUTES OF THE STATE OF MISSOURI, 1879, at 224 (Carter & Regan, 1879) (enforced in State v. Wilforth 74 Mo. 528, 529-531 (1881)); An Act to Prohibit the Discharge of Firearms in the Immediate Vicinity of Any Courthouse, Church or Building Used for School or College Purposes, 1879 Mo. Laws 90, § 1276 (1879); 1883 Mo. Laws 76 (1883); An Act to Revise, Consolidate and Amend the Charter of the City of Neenah, 1883 Wis. Sess. Laws 841, § 162 (1883); LEANDER G. PITMAN, *supra* note 144, at 496; An Act to Incorporate Vestibule Church (Colored) in Cleveland County, 1893 N.C. Sess. Laws 348 (1893).

148 An Act to Preserve the Peace and Harmony of the People of This State, 1870 Ga. Pub. Laws 42; State v. Hill, 53 Ga. 472, 475 (1874); 1883 Mo. Laws 76; 1879 Mo. Laws 90.

149 Andrews v. State, 50 Tenn. 165, 181–82 (1871). This was in response to the state's regulation on polling places.

as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in their use."[150]

At least eleven analogues from 1835 to 1893 restricted carriage or firing of weapons in places of worship. In 1835, Pennsylvania prohibited firing near "any congregation. . .assembled for the purpose of religious worship."[151] Other statutes prohibited firing near churches specifically or places of worship generally, including Texas in 1870,[152] Missouri in 1879,[153] a Wisconsin ordinance in 1883,[154] and North Carolina in 1889[155] and 1893.[156] Other Reconstruction-era laws banned the mere carrying of arms near places of worship, including Georgia in 1870,[157] Virginia in 1877,[158] Missouri in 1879 (in addition to its ban on firing)[159] and 1883,[160] and Oklahoma in 1890.[161]

An increasingly relevant body of historical analogues concerns the state's authority to ban arms on the private property of *others* without their consent. Some courts have been skeptical of such modern laws. Historical research reveals that such laws existed dating from the colonial era, which restricted carriage of firearms on or across other people's property. At least ten analogues exist, including statutes that regulated carriage of firearms in the colonies of

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150 *Id.* Firearm regulations that restrict access in churches have additional First Amendment restrictions. Antonyuk v. Chiumento, No. 22-2908, at 27 (2d Cir. 2023).

151 JOHN W. PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE THIRTEENTH DAY OF OCTOBER, ONE THOUSAND EIGHT HUNDRED AND FORTY 923 (M'Carty & Davis, 6th ed., 1841).

152 GEORGE W. PASCHAL, *supra* note 144 at 1322. This statute contained exceptions for "locations subject to Indian depredations" and "any person or persons whose duty it is to bear arms on such occasions in discharge of duties imposed by law." *Id.*

153 1879 Mo. Laws 75, § 1274.

154 1883 Wis. Sess. Laws 841.

155 An Act to Incorporate Mount Pleasant Baptist Chapel Church — In Ashe County, 1889 N.C. Sess. Laws 820.

156 1893 N.C. Sess. Laws 348.

157 1870 Ga. Pub. Laws No. 34, 42.

158 1877 Va. Acts 305.

159 1879 Mo. Laws 75, § 1274.

160 1883 Mo. Laws 76, § 1.

161 LEANDER G. PITMAN, *supra* note 143, at 496.

Maryland in 1715,[162] New Jersey in 1718,[163] Pennsylvania in 1721,[164] New Jersey in 1741,[165] Pennsylvania in 1760,[166] and New Jersey in 1771.[167]

Other analogues exist from the states. In 1866, Texas prohibited carrying arms "on the enclosed premises or planation of any citizen, without the consent of the owner or proprietor."[168] Pennsylvania barred hunting on "enclosed or improved lands" without consent.[169] An Oregon law from 1893 regulated carrying[170] and a Rhode Island law from 1896 regulated firing.[171]

At least twelve analogues from 1869 to 1899 regulated carrying or firing arms near public assembly. Texas had perhaps the broadest version of such a law in 1870, a mere two years after the ratification of the Fourteenth Amendment, regulating carrying firearms in: "any church or religious assembly, any school-room or other place where persons are assembled for educational, literary, or scientific purposes, or into a ball room, social party, or other social gathering or to any election precinct on the day or days of any election, where any portion of the people of this state are collected to vote at any election, or to any other place where people may be assembled to must or to perform any other public duty, or any other public assembly, and shall have about his person. . .

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162 An Act for the Speedy Trial of Criminals, 1715 Md. Laws 90 ("Maryland's 1715 law forbade convicted criminals and vagrants from hunting on private property without permission, and also provided that the offender would only be fined after first receiving one free warning.").

163 An Act to Prevent Killing of Deer Out of Season and Against Carrying of Guns and Hunting by Persons Not Qualified, 1718 N.J. Laws 101 (1718).

164 An Act to Prevent the Killing of Deer Out of Season, and Against Carrying of Guns or Hunting by Persons Not Qualified, 1721 Pa. Laws 254, 256 (1721). *See also* Kopel & Greenlee, *supra* note 86, at 235 n.118.

165 An Act to Prevent Killing of Deer Out of Season and Against Carrying of Guns and Hunting by Persons Not Qualified, 1741 N.J. Laws. 101.

166 JOHN W. PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 534 (9th ed. 1862).

167 1771 N.J. Laws 346.

168 An Act to Prohibit the Carrying of Fire-Arms on Premises or Plantations of Any Citizen Without Consent of the Owner, 1866 Tex. Gen. Laws 90.

169 Act of Mar. 7, 1821, ch. 53, § 1 (1821), in ACTS OF THE COMMONWEALTH OF PENNSYLVANIA, PASSED AT A SESSION WHICH WAS BEGUN AND HELD AT THE BOROUGH OF HARRISBURG (Authority, 1821) ("An Act More effectually to restrain gunners, and for other purposes.").

170 An Act to Prevent a Person from Trespassing upon Any Enclosed Premises or Lands Not His Own Being Armed with a Gun, Pistol, or Other Firearm, and to Prevent Shooting upon or From the Public Highway, 1893 Or. Laws 79, §§ 1-3, (1893).

171 Of Firearms and fire-works, R.I. GEN. LAWS § 1 (1896).

fire-arms."[172]

A Tennessee law from 1869 prohibited carrying in fairs, race courses, and other public assemblies.[173] A Georgia law from 1870 prohibited the same at "any other public gathering in this State, except militia muster grounds."[174] Similar laws on carriage appeared in Missouri in 1879[175] and 1883[176] for the "public assemblage" of persons, as well as in Oklahoma in 1890.[177] These laws do not necessarily specify that their application is outside—but context such as exempting militia muster grounds and including public assemblies render that reading likely. Similar laws regulating firing appeared in Nevada in 1881,[178] Wallingford, Connecticut in 1882 (including any "park or public ground, provided this section does not apply to the use of weapons in lawful defense of the person, family, or property of any one, in the performance of any duty required by law"),[179] Neenah, Wisconsin in 1883 (including grocery stores),[180] Cleveland County, North Carolina in 1893,[181] Wappingers Falls, New York in 1898,[182] and Boulder, Colorado in 1899.[183]

No less important is the concept of a sensitive *times* doctrine. From before the Founding to the late 19th century, such laws existed in droves—particularly with regard to shooting on Sundays, during nighttime, and on holidays. While these periods are example of short sensitive times categories, they must also be considered in light of seasonal hunting law sensitive times statutes. As is common with *Bruen*, some readers will view such statutes as narrow and limited while others will view them as temporally broad. We view these statutes as further evidence that the tradition of

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172 1870 Tex. Laws 63.

173 JAMES SHANKLAND, supra note 98.

174 1 Ga. Laws 421 (1870).

175 1879 Mo. Laws 75, § 1274.

176 1883 Mo. Laws 76.

177 LEANDER G PITMAN, THE STATUTES OF OKLAHOMA, 1890, at 496 (Guthrie, 1891).

178 An Act to Prohibit the Use of Firearms in Public Places, 1881 Nev. Stat. 19-20.

179 The Charter and By-Laws of the Borough of Wallingford, Conn., § 15 (1882).

180 An Act to Revise, Consolidate and Amend the Charter of the City of Neenah, 1883 Wis. Sess. Laws 841, § 162.

181 An Act to Incorporate Vestibule Church (Colored) in Cleveland County, 1893 N.C. Sess. Laws 348, § 5.

182 Wappinger Falls, N.Y., Park Ordinances, § 1 (1898).

183 Boulder, O.R., Ordinances of the City of Boulder, No Firearms or Shooting, § 1 (1893).

regulating individual use and carrying of arms on a temporal basis is deeply rooted in and consistent with "this Nation's history of firearm regulation."

III
A PROPOSED FRAMEWORK

As permitting regimes continue to be challenged in federal courts, legislatures will seek to find constitutional reprieve in the presumptively lawful sensitive places doctrine. Where courts effectuate the presumptively lawful doctrines enunciated in *Heller*, reaffirmed in *McDonald*, recognized by the circuits, and endorsed by at least five justices in *Bruen*, location-based regulations of and bans on firearms will likely be upheld.[184]

As Professors Charles, Blocher, and Miller have stated, the development of a meaningful framework for the sensitive places doctrine will focus more on the adjective than the noun.[185] While there are some cases and a growing body of literature on the subject, the utility of and interest in the sensitive places doctrine is more important than ever.

Location-based bans and regulations on firearms will likely replace, at least in part, permitting regimes that were common prior to *Bruen*. Given that *Bruen* held that the quotidian includes the right to armed self-defense outside the home,[186] permitting regimes may no longer be the best avenue for states to regulate weapon possession outside the home. This is because although the Supreme Court did not extend its holding in *Bruen* to "shall-issue" permitting regimes,[187] or permitting arrangements that are not discretionary in the way "may-issue" regimes are, scholars have noted that "shall-issue" regimes post-date the discretionary permitting regulations struck down in *Bruen*, meaning that they may be endangered

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184 The precise role of the presumptively lawful categories has been contested both before and after *Bruen*. While most courts agree that the categories do doctrinal work, there are divisions among the courts and scholars on the *operation* of the doctrine, even if the results are largely the same. Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67 (2023).

185 Charles, Jacob D. et al., *'A Map Is Not The Territory': The Theory and Future of Sensitive Places Doctrine*, N.Y.U. L. REV. ONLINE (forthcoming).

186 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 33-34 (2022).

187 "Shall issue" jurisdictions provide that "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on perceived lack of need or suitability." *Id.* at 13.

under a history and tradition test.[188]

This Part proceeds in three steps. First, we address the pre-interpretive questions inherent in the Second Amendment's sensitive places doctrine. Second, we propose a test to determine whether specific places are sensitive and a theory of gravitational pull that accompanies those places. Third, we explain and address criticisms that will have arisen in response to our doctrinal, historical, and interpretive analysis.

A. The Non-Originalist Meta-Analysis

The sensitive places doctrine does not require, though it may be contradicted by, an originalist or historical inquiry.[189] Affirmatively requiring history to justify *every* modern gun law would fail to make sense of the language included in *Heller* or its application among the circuit courts. This is because *Heller* explained that history supported the category as part of "presumptively lawful" regulations.[190]

The sensitive places doctrine does not call for an originalist inquiry because the doctrine is not the product of an originalist analysis. This is because such a view of the sensitive places doctrine, or any other presumptively lawful category under *Heller*, would fail to make structural sense when reading *Heller* as a whole. *Heller* is a deeply originalist opinion. Both the majority and Justice Steven's dissent focus heavily on the original meaning or the Second Amendment. But the presumptively lawful categories of gun regulations identified by *Heller*, including sensitive places, had no basis in the plain text of the Second Amendment, other than perhaps the felon ban category.[191] The text of the Second Amendment states nothing about the presumptively lawful categories of gun

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188 Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L. J. 67, 31 (2023).

189 Whether *Bruen* is an originalist opinion is the subject of debate. *See generally* Lawrence B. Solum & Randy E. Barnett, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023). Even if history were required, sensitive places restrictions "appear to have more historical support." *See* NRA of Am., Inc. v. Swearingen, 545 F. Supp. 3d 1247, 1264 (N.D. Fla. 2021).

190 *See* District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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 [].").

191 *See* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (finding that *Bruen* does not forbid courts from considering what a regulated person is part of "the people" in Second Amendment cases).

regulations identified in *Heller*.

To link the presumptively lawful categories to the originalist portion of *Heller* would be a mistake. *Heller*'s originalist analysis explains that the Second Amendment confers an individual right to bear arms for the use of self-defense.[192] But Justice Scalia went on to say that:

> "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of guns."[193]

While Justice Scalia did cite some historical evidence for the notion that certain categories of guns would merit presumptively lawful gun regulations, this was hardly a textual argument and may stand only for the proposition that history can be used to justify modern laws or the existence of new presumptively lawful *categories*, such as sensitive places. Moreover, where the history led to a distasteful result (guaranteeing a right to machine guns) Justice Scalia stated that it would be a "startling" read of *Miller* (a 1939 case holding that the Second Amendment does *not* guarantee the right to possess a sawed-off shotgun) to conclude that machine guns would be protected.[194] The text of the Second Amendment does not provide a clear answer on why these and other categories of gun regulations are presumptively lawful and others are not. *Rahimi* may make explicit what *Heller* implies—that whatever *Bruen*'s historical framework test demands for new forms of gun regulations, the framework for sensitive places must differ to vindicate the presumptively lawful categories of gun regulations outlined by *Heller*.[195]

Further, modern sensitive places laws should not mandate a historical analogue inquiry because it would sometimes render the doctrine meaningless, though, as mentioned above, history may still be relevant.[196] If the sensitive places doctrine must mean anything—as the case law says it must—then it

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192 *See* Heller, 554 U.S. at 599.

193 *Id.* at 626-27.

194 *Id.* at 624.

195 *See* Kevin Schascheck, *Recalibrating Bruen: The Merits of Historical Burden-Shifting In Second Amendment Cases*, 11 BELMONT L. REV. 38, 59 (2023).

196 The historical test has been criticized on other grounds as well, including bad faith. *See* 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, 623, 676, 2023 (2023) (describing *Bruen*'s test as an "analytical double standard" in the sensitive places context).

cannot be the case that only sensitive places laws which are *longstanding* comport with the *Bruen* test. This view was neatly summarized by Judge Barron during an oral argument at the First Circuit while asking about the presumptively lawful categories as a general matter. The following response was in reply to the argument that only *longstanding* regulations can be presumptively lawful, which merely duplicates *Bruen*'s historical analogue test:[197]

> Barron, J.: "[], but if that's the case, then the key parts of *Bruen* [aren't] really in play here, because all we're doing is applying the [presumptively lawful] category that *Heller* identified and figuring out whether these things fit within that category, which we had to do under *Heller*, so how is *Bruen* adding anything?"[198]

We propose two independent tests for the determination of whether a location is sensitive. Neither test relies on the acceptance of the other.

B. The Categorical Test and the Gravitational Pull Theory

Doctrine and history support a broad conception of the sensitive places doctrine. Because there is not a unifying theme that would make sense of every historical and doctrinal example, we think the most likely answer is that there are many factors which establish presumptive sensitivity.

Doctrinally, freestanding inquiries of reasonableness have considered the following as the common themes of sensitivity: (1) large numbers of defenseless people, (2) children and the value of young lives, (3) governmental proprietorship and functions, and (4) expectations of safety. But what does governmental proprietorship of land have to do with protecting children? What does congregation have to do with youth? Is an expectation of safety heightened in a group? Or is it lessened? Because these rationales are not clearly linked, courts should view each category as a sufficient rationale to hold that a place is sensitive. This vindicates the broad nature of the doctrine. Each broad category is a genus, and history reveals various species thereof—as well as potentially new genera.

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197 The reason for the duplication, as explained in the reply, is that *Bruen* requires historical analogues. If the presumptively lawful categories require the same justification, then they are not additive and are simply surplusage.

198 Oral Argument at 7:10, No. 22-1478, 2023 U.S. App. LEXIS 16067 (1st Cir. Apr. 7, 2023) (remanded) (lightly edited for clarity). In other words, if we read *Heller* to say that only those categories which have a longstanding history of regulation are presumptively lawful, that simply duplicates the *Bruen* test and the categories are irrelevant.

History confirms the doctrinal understanding that the category of sensitive places is a broad one. As we demonstrated, analogues exist for (1) buildings, towns, and cities, (2) parks, (3) roads, (4) railroads, trains, and railyards, (5) polling places, (6) schools, (7) courthouses, (8) places of worship, (9) the property of others, (10) public assemblies, and (11) sensitive *times* for shooting weapons, including at night, on holidays, and on Sundays. Other examples may include private property or areas that are more vulnerable at certain times. This would, of course, conflict with *some* of the case law—but given the role *Bruen* assigns historical analogues and the presence thereof, cases like *Antonyuk* and *Koons* present a view of history which is stricter than the *Bruen* standard.

Accordingly, when applying the sensitive places doctrine, courts should hold that any location which is 'relevantly similar' to the above doctrinal categories is sensitive and that legislatures may therefore regulate the right to keep and bear arms within those locations, unless litigants can show substantially contrary historical evidence. Then, courts should allow the party challenging the locational restriction at issue to show historical evidence that a given location is *not* sensitive. This is not a theory without limits.

To be valid, three things must be true of a state's sensitive places regulations. First, the right to keep and bear arms inside the home must be maintained in accordance with *Heller*. Second, persons must be allowed to bring their arms to places which are not sensitive (absent another constitutionally permissible reason to prevent them from doing so). Occasionally, this will mean bringing an arm through a sensitive place, but a state may regulate the manner in which an arm is taken through that sensitive place.[199] Third, as the doctrine is about where legislatures *may* regulate, legislatures must take care to craft their regulations with sufficient specificity and form so as to not run afoul of Due Process constraints.

There will be hard cases. For instance, is the common area of an apartment complex a sensitive place? On one hand, it is an extension of the home. On the other, the core of the home does not include common areas. Another example might be gun ranges. Historical evidence exists for the regulation of

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[199] Some of the case law discussed herein stands in tension with this view of sensitive places, for instance, *Antonyuk* found that longer journeys mandate a higher ability to carry arms. But historical regulations on roads demonstrate that the opposite is true.

shooting ranges,[200] and yet, it is challenging to rationally classify a place a sensitive for purposes of gun prohibitions when the exact purpose of that place is to carry guns.

Independent of whether courts accept the categorical test, doctrine and history reveal support for a "gravitational pull" theory (i.e., that an area around a sensitive place may also be regulated). How great is the gravitational pull of a sensitive place? What is the physical penumbra of a sensitive place? Although other areas of constitutional law could provide guidance, such as discussions of the home's curtilage in the Fourth Amendment context,[201] we need not look outside the parameters of the case law and historical analogues provided earlier. A few examples follow.

Doctrinally, courts have explicitly stated that sensitive places have buffer zones. In *United States v. Walter*, the court clearly endorsed the idea that sensitive places have had buffer zones historically and do still as a doctrinal matter today.[202] In *United States v. Redwood*, the court reached the same conclusion by analogizing to First Amendment cases regarding adult theatres and children.[203] Historically, many of the analogues cited above regulated weapons within *and near* the places at issue.[204]

In *United States v. Class*, the court acknowledged the

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200 *See, e.g.*, 1857 Ordinances of the City of New Orleans No. 500.

201 *See* Florida v. Jardines, 569 U.S. 1, 6-7 (2013) ("We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'").

202 United States v. Walter, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, at *20-23 (D.V.I. Apr. 20, 2023) (finding that "the area within 1,000 feet of the school grounds is within the scope of sensitive places as contemplated by *Heller*").

203 United States v. Redwood, No. 16 CR 000802016, Dist. LEXIS 109735, at *15 (N.D.Ill. Aug. 18, 2016).

204 We identified thirty-six historical analogues in our research where the law regulated carriage or firing in a place and within a defined buffer zone. *See e.g.*, An Act for Suppressing and Prohibiting Every Species of Gaming for Money or Other Property, and for Making Void All Contracts and Payments Made in Furtherance Thereof, 1788 Ohio Laws 42, § 4 (regulating firing within "one quarter mile from the nearest building of any such city, town, village, or station"); An Act to Prevent the Discharging of Fire-Arms Within the Towns and Villages, and Other Public Places Within this State, and for Other Purposes, 1812 Del. Laws 329, § 1 (regulating firing "within one quarter-of-a mile of the centre of such town or village"); John W. Purdon, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 534 (9th ed. 1862) (banning carrying of guns "on or near any of the king's highways"); An Act to Regulate the Conduct and to Maintain the Freedom of Party Election . . ., 1870 La. Acts 159-60, § 73 (banning carrying of guns within "one-half mile of any place of registration or revision of registration"). These represent a small sample of historical firearm regulations with a gravitational pull, which are summarized in more detail in the appendix to this Article.

constitutionality of bans in a government parking lot near the Capitol both because (i) that parking lot was sufficiently integrated with the Capitol and because bans on carrying near sensitive sites impose only light burdens on the Second Amendment right.[205] Although *Class* references both proximity and integration, integration appears especially important here. This view of sensitivity is slightly more demanding, as explained below.

Whatever courts may eventually decide constitutes a sensitive place, that sensitive place will have a buffer zone around it.[206] Conceptually, the buffer zone includes places that are sensitive by virtue of their proximity to the core sensitive place. Buffer zones may exist for two reasons.

First, the surrounding area may sufficiently integrated with the core of the area that it is sensitive by virtue of that connection, as in *Class*. Second, the surrounding area may be sensitive solely based on its proximity to the core place, as in *Walter* and *Redwood*.

While the first reason may sound conceptually neater, it cannot stand alone. Sensitivity is about whether a place is *sensitive* to guns or gun violence. Hypothetically, if a shooting occurs within a mile of a school, but not in the core sensitive area of the schools grounds, the school would be significantly affected and go into lockdown. The area surrounding the school is sensitive because of the effect it has on the school, not because of any particular integration.

Naturally, this view is not unlimited. Although the proximity view of sensitivity is an easier test than the integration view of sensitivity, proximity must be relatively close.[207] A shooting in Virginia could not reasonably cause a school in Massachusetts to go into lockdown. This proximity view accords with historical statutes as well. Historically, statutory buffer zones for locational gun restrictions were based on surrounding proximity, rather than proximity *and* a special connection or integration. This is one of several reasons the theory we offer is limited, as an integration test

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205 United States v. Class, 930 F.3d 460, 464-65 (D.C. Cir. 2019).

206 This view is not unanimous. *See* David B. Kopel & Joseph Greenlee, *The 'Sensitive Places' Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 232 (2018). According to Kopel and Greenlee, "[b]uffer zones are not sensitive places." *Id.* (emphasis removed).

207 We do not purport to conjure a doctrinal or historical answer regarding the precise extent of proximity-based regulation permitted by the Constitution.

could render a significantly broader area sensitive.[208]

Nor is this view undisputed. Kopel and Greenlee, the authors of one of the most influential sensitive places pieces, have rejected the buffer zone theory on the notion that *Heller*'s language references regulations "in" sensitive places.[209] But this requires a theoretical assumption that places cannot be sensitive by virtue of proximity, or as others may argue, integration. This also requires ignoring or rejecting the vast number of historical examples where laws regulating carriage or firing of weapons included buffer zones. Some may criticize the view we are advancing by saying that if places can be sensitive via proximity, then sensitivity is an endlessly cascading line of dominos whereby every place will become sensitive. We think this concern may be dispensed with by acknowledged that our notion of proximity relies on a distinction between "core" sensitive places and "penumbral" sensitive places. Proximity to core sensitive places, like schools, is sufficient to render a place 'sensitive.' But proximity to a place which is sensitive not because it is a core sensitive place, but rather because it itself is proximate to a core sensitive place, is not sufficient.

C. Addressing Criticism

Expansive doctrinal views invite criticism—but here, an expansive view is the best way to vindicate the history and doctrine of sensitive places. An immediate first criticism of the sensitive places doctrine as explained herein is that it would nullify *Bruen*'s holding that the right to bear arms extends beyond the home. We do not purport to offer a theory without limits, as that would contradict, in effect, *Bruen*'s holding that the right to bear arms extends beyond the home. What we offer instead is a theory that comports with rather than contradicts *Bruen*'s holding.

Although it is true that the right to bear arms extends beyond the home, the Supreme Court has repeatedly affirmed

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208 *See* Frey v. Nigrelli, 21 CV 05334, 2023 U.S. Dist. LEXIS 42067, at *60 (S.D.N.Y. Mar. 13, 2023) (rejecting the argument that public transportation was integrated with the school system because children ride it to get to school). To be clear, we do not think that integration is an unreasonable test. It may or may not be. But proximity must be part of the doctrine, even if integration is not. Proximity is more administrable, finds broader historical support, and prevents strange self-defeating scenarios whereby, for example, a person may bring a gun to a non-sensitive building neighboring a school because that building is not sufficiently integrated with the school.

209 *Id.*

that the right to bear arms is not unlimited.[210] The Second Amendment does not confer the right to bear arms in any place whatsoever.[211] The Supreme Court has provided a short, "[nonexhaustive]"[212] list of sensitive places, including "schools and government buildings." But this list of examples is only that. The limited[213] nature of the Second Amendment means that where rights extend, limits exist on those rights in relatively discrete locations.[214]

The sensitive places doctrine functions as a limit on the right to bear arms outside the home.[215] Adopting this understanding post-*Bruen* accords with how courts have applied the other presumptively lawful categories, such as the categories for "dangerous and unusual" weapons and "felon bans." While there is a right to keep and bear firearms, the dangerous and unusual weapons category functions as a limit on *types* of firearms that a person can carry. In this way, a person may purchase a handgun but not a machine gun.[216] Similarly, the felon ban category imposes a limit on *persons* and perceived *purposes*. Persons have the right to bear arms in self-defense, but not where the law suspects unlawful purposes based on felon status.

Accordingly, it can only be true that a robust view of the sensitive places doctrine contradicts the holding of *Bruen* if it is also true that, for example, felon-in-possession bans (including nonviolent felonies) and regulations of similar ilk are also unconstitutional, as those are similarly broad views of other presumptively lawful categories under *Heller*.[217]

The second criticism likely to be levied is that our argument is unfaithful to *Bruen*'s dictum on sensitive places and cities. In *Bruen*, the Court rejected the argument that the

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210 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 21 (2022).

211 *Id.*

212 *Id.* (Kavanaugh, J., concurring).

213 A right which has been declared to be not unlimited can only be characterized, in turn, as limited.

214 Antonyuk v. Chiumento, No. 22-2908, at 62 (2d Cir. 2023).

215 *See* Gould v. Morgan, 907 F.3d 659, 670 (1st Cir. 2018) (explaining that *Heller*'s pronouncement of the sensitive places doctrine and description of the right in the home means that the right extends beyond the home). *Gould* foreshadowed *Bruen*'s holding that the right extends beyond the home. The *Gould* court implied the existence of the right outside the home from the presence of a sensitive places category. This Article makes more explicit *Gould*'s tying of the two ideas together by explaining why the sensitive places doctrine is a substantial limit on the right.

216 *See* District of Columbia v. Heller, 554 U.S. 570, 624 (2008).

217 *But see* Kanter v. Barr, 919 F.3d at 451 (Barrett, J., dissenting) (explaining that dispossession of all felons, "both violent and nonviolent" is unconstitutional).

island of Manhattan could be deemed a sensitive place "simply because it is crowded and protected generally by the New York City Police Department."[218] To expand the category to "all places of public congregation that are not isolated from law enforcement defines the category of sensitive places far too broadly."[219]

We do not purport to disagree with Justice Thomas. If rights can be banned in certain states and cities altogether, it can hardly be said that the *right*, as such, exists. This Article, as stated in Part I, explains that while entire cities could not be wholly exempted from the Second Amendment category, there is a history and tradition of regulation[220] and the right is meaningfully limited by the doctrine. The right would still exist, as before *Bruen*, in the home. Moreover, the right would extend to a panoply of non-sensitive places, such as gun shows, shooting ranges, particularly dangerous locations, and especially rural or unsettled areas.

The third criticism is that our historical analogues are poorer for not including mandatory carrying requirements and traditional *practice*. We think this criticism may be disposed of by noting that *Bruen*'s test focuses on consistency "with this Nation's historical tradition of firearm *regulation*."[221] Although *Bruen* considers whether carrying was *permitted*, such a consideration is different from being *unregulated*.[222]

To be clear, *Bruen* does consider the non-enforcement of laws as factor. But, non-enforcement is different from tradition—laws may be enforced despite customary and common disobedience thereof. Further, and of vital importance, *Bruen* also weighs whether there were historical challenges to such laws. Given that challenges would likely have come up *during enforcement*, the Court's emphasis on historical challenges undercuts its discussion of historical enforcement. Accordingly, historical records of enforcement, which would likely be challenging to find in any event, should play a minimal role if any in modern Second Amendment jurisprudence.[223]

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218 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 3-5 (2022).

219 *Id.* at 31.

220 Including a history and tradition *in New York* of laws prohibiting carriage of weapons in "inclosed lands" of the entire city of New York "and its Liberties." *See infra* note 97.

221 Bruen, 597 U.S. at 34 (emphasis added).

222 *Id.* at 49. Express permission to act differs from the absence of a prohibition on an action.

223 *Bruen* is not entirely consistent on these points. Later in the opinion, that

Regarding mandatory carrying, if it is true that *Bruen*'s test, as the Court states, is consistent with how First Amendment cases have been adjudicated, there are similar concerns for both compelled speech and suppressed speech that parallel compelled and suppressed carriage. Accordingly, traditions of mandatory carrying serve as evidence of valid state discretion and would not serve as counterpoints. As courts have stated, viewing mandatory carrying laws as evidence that modern laws are unconstitutional "mistakes a legal obligation for a right."[224] One factor to consider is whether *mandating* firearms is similarly burdensome to *banning* firearms. Just as the First Amendment counsels that there is a right to speak *or not speak*, there may also be a right to carry *or not carry*.

A derivative criticism focuses on our inclusion of laws regulating firing rather than carrying, or for not waxing more on exceptions to certain statutes. However, the purpose of owning guns is to fire them, or potentially fire them, and where states have regulated *firing* arms, that should be viewed as states having historical discretion to regulate arms generally by virtue of their purpose. This understanding is confirmed by *Heller* and *Bruen*, which stated unambiguously that "self-defense" is the 'central component' of the Second Amendment.[225] Self-defense differs dramatically from deterrence in that it involves firing for the purpose of protection, whereas deterrence is something used to prevent the need *for* self-defense. If the 'central purpose' were deterrence rather than self-defense, laws that only regulated firing would be minimally relevant.

A similar reply goes to enumerated exceptions within these analogues—if a state includes exceptions, it implies that the statute would have covered such conduct otherwise. Such statutes further demonstrate that states historically regulated and developed state-specific conditions on locational carrying of firearms, which we argue they may still do under the sensitive places doctrine.[226] Similarly, conspicuously missing

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fact that territorial laws were rarely subject to judicial scrutiny weighed against their usefulness as analogues. *Id.* at 68-69. The Second Circuit has determined that territorial analogues and analogues from the late nineteenth century should considered. *Antonyuk v. Chiumento*, No. 22-2908, at 213 (2d Cir. 2023).

224 United States v. Lowry, No. 1:22-CR-10031-CBK, 2023 U.S. Dist. LEXIS 91294, 13 (N.D.S.D. May 5, 2023) (citing National Rifle Association v. Bondi, 61 F.4th 1317, 1331 (11th Cir. 2023)).

225 *Bruen*, 597 U.S. at 3; *Heller,* 554 U.S. at 635.

226 One may think that states included carve-outs because their legislatures

from our list are historical analogues for guns legislatures, yet legislatures are included in our list of sensitive places. There were not many historical regulations for legislatures, but this only serves to prove the point that sensitivity need not be affirmatively rooted in history, even if it can be disproved by history, as the category was endorsed by the Supreme Court per Part I.

The fourth criticism is our view of historical discretion. As we argue, the fact that a historical legislature regulated guns and mentioned certain weapons and locations in their statutes is sufficient to show discretion as to similar locations. Absent disavowal by *Rahimi* and its progeny, this criticism misses the mark. *Bruen* instructs courts to consider whether modern laws are 'relevantly similar'[227] to historical laws. The details of that similarity are to be filled in by the courts, and we think that for purposes of the sensitive places doctrine, the locational details and discretionary exclusions are the primary relevancies whereas the nature of the burden is ancillary—but we note that this is a methodological question that could be resolved in *Rahimi*.

The fifth criticism is that expanding the sensitive places doctrine would pose issues of Due Process. The argument would proceed by arguing that if states may regulate or ban guns in broad categories of sensitive places, then gun-owners may not know where they may lawfully exercise their rights. In other words, there could be a chilling effect.

This argument, while it must be addressed, is somewhat beyond the scope of this Article because it primarily imposes demands on legislatures that are significantly more generalized than most of the questions surrounding the Second Amendment. Of course, legislatures must provide notice and other foundational building blocks of due process as to locational regulations. But for now, it is sufficient to say that the sensitive places doctrine creates *discretion* for legislatures to regulate within those areas. Places may be sensitive and, by virtue of legislative discretion, have no gun regulations whatsoever. That is the nature of the category. It is up to legislatures to define the regulations and locations thereof with sufficient precision to satisfy Due Process constraints.

There are arguments from the legal left that should be addressed as well. For example, why should courts apply a

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viewed such applications as unconstitutional and wanted to avoid covering such conduct. But this is one of many possible answers, presumably because of danger often inherent during travel.

227 Bruen, 597 U.S. at 29.

sensitive places doctrine when there are textual conclusions that courts could reach instead, such as simply declaring certain locations to be outside the text of the Second Amendment? Such textual rulings in the Second Amendment context would be broader and affect more cases. There are two replies to this question. The first reply revolves around *Bruen*'s discussion of textualism and its extension of the right beyond the home and the second reply concerns the merits of constitutional avoidance, the idea that constitutional questions should be avoided where possible.[228]

The notion that Second Amendment cases should primarily be decided as a matter of textualism is problematic. The text of the Second Amendment, like most constitutional text, is open-textured. Both sides of the gun debate may readily infer all manners of limits, both on the scope of the right and the ability of the state to regulate that right, that could plausibly flow from the text of the Second Amendment. It follows, then, that the real Second Amendment battles will likely occur outside of textual arguments.[229] This would mean that courts and litigators could experiment with the analogue test while they await a shift in jurisprudence in higher courts. This move makes sense, because the degree to which the analogue test is used is more likely to morph than reliance on textualism, which will likely be more stable over time.

Moreover, not all judges are capable of deciding every case correctly.[230] Frequently, a judge may even feel that a case could just as easily go either way—and making a new decision about constitutional law, particularly constitutional text, can have big impacts. Judges do not necessarily have a duty to decide every case that comes before them.[231] True, abstention from deciding cases can be characterized as decisions in and of themselves.[232] But the express legitimization and contouring of various laws and constitutional provisions is significant.[233] In expounding upon our constitutional

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228 *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). While this tends to be more common when courts have the option to avoid constitutional questions by resolving statutory issues, some constitutional questions have multiple parts and avoiding some of those parts is a form of constitutional avoidance.

229 *Bruen*'s analysis is triggered by Second Amendment *coverage*, which may be significantly broader than Second Amendment *protection*. Accordingly, we focus on the limited nature of Second Amendment protection.

230 *See* RONALD DWORKIN, LAW'S EMPIRE 241 (1986).

231 *See* Alexander M. Bickel, *Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 45 (1961).

232 *Id.* at 45-46.

233 *See id.* at 48.

aspirations, legitimizing wrong answers is a graver sin than legitimizing no answer.[234]

In summary, then, there are multiple reasons to avoid deciding the exact boundaries of the Second Amendment's text. If any of these reasons are persuasive, it is better to focus on developing the sensitive places doctrine than to focus on textualist arguments.

CONCLUSION

The sensitive places doctrine is broad but not unlimited—the research presented herein reflects that reality. Case law and historical analogues provide evidence that sensitivity is ubiquitous and covers a large number of locational categories, such as churches, legislatures, polling places, compact parts of cities, roads, and more. Further, those sensitive locations have a gravitational pull whereby the surrounding area becomes a sensitive buffer zone. Taken together with the limits of Due Process and the right to transport arms between sensitive places, these findings demonstrate the expansive, but not unlimited, nature of the doctrine. Although gun regulations are currently facing more constitutional scrutiny than ever before, fidelity to *Bruen*'s history-driven inquiry and *Heller*'s doctrinal pronouncements compels us to conclude that locational restrictions on the Second Amendment are generally permissible.

234 *See id.* at 50.