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### Second Amendment Exceptionalism: Public Expression and Public Carry

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# Second Amendment Exceptionalism: Public Expression and Public Carry

Timothy Zick\*

*In New York State Rifle & Pistol Ass’n v. Bruen, the Supreme Court recognized a right to carry firearms in public places. The scope of that right will depend on where, why, and how governments regulated public carry during the eighteenth and perhaps nineteenth centuries. The Court claimed that its turn to history for determining the scope of Second Amendment rights “accords with” and “comports with” how the Court has interpreted First Amendment rights. This Article examines and rejects that claim, both in general and specifically as it applies to the public exercise of Second Amendment rights. Although Bruen purports to seek interpretive parity, the Court is construing the Second Amendment as an exceptional super-right. Second Amendment doctrines are shaping up to be the mirror opposite of First Amendment public forum and time, place, and manner doctrines. Although governments will retain broad authority to restrict and sometimes ban public expression, they may have very limited authority to restrict or ban public carry. Indeed, if courts apply a rigid historical standard to public carry laws, Americans will have stronger rights to carry firearms in public places than to speak there—an anomalous and astonishing result in a democracy committed to peaceful discourse. Recognizing a public carry super-right will produce dangerous disparities in terms of the scope of fundamental rights, chill public expression, and privilege self-defense over self-government.*

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## Introduction

Gun rights proponents and judges have long complained that the Second Amendment has been treated like a “second-class” constitutional right.<sup>1</sup> One of the complaints of the second-class chorus was that the Court had not recognized a right to carry firearms in public.<sup>2</sup> After all, if individuals and groups have a right to engage in peaceful expressive activity in public places, then they surely must have a right to bear lethal arms there as well.<sup>3</sup>

In *New York State Rifle & Pistol Ass’n v. Bruen*,<sup>4</sup> the Supreme Court held that the Second Amendment protects the exercise of Second Amendment rights outside the home.<sup>5</sup> The Court also adopted a text, history,

1. See Eric Ruben & Joseph Blocher, “*Second-Class*” Rhetoric, Ideology, and Doctrinal Change, 110 GEO. L.J. 613, 643 (2022) (“After *McDonald*, the argument that the Second Amendment is not a ‘second-class’ right was seized by advocates, commentators, politicians, and judges—many of them citing Justice Alito’s opinion in contexts having nothing to do with the issue it was written to address.”); Robert J. Cottrol, *Taking Second Amendment Rights Seriously*, HUM. RTS., Fall 1999, at 5 (“[T]he Second Amendment has become the Rodney Dangerfield of the Bill of Rights . . . .”); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion) (criticizing municipal respondents’ argument as a request “to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees”); see also Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 622 (2019) (rejecting the claim that courts, including the Supreme Court, have in fact treated the Second Amendment as a second-class right).

2. See *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting) (arguing, in an opinion joined by Justice Gorsuch, that the Court’s refusal to rule on whether public-carry rights are protected rights reflects its treatment of the Second Amendment as less favorable than other constitutional rights).

3. See Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 102–03 (2009) (arguing that the exercise of Second Amendment rights outside of the home supports free public debate and interchange).

4. 142 S. Ct. 2111 (2022).

5. *Id.* at 2122. Prior to *Bruen*, some scholars had argued that the Second Amendment ought to be considered a right that applies only within the home. *E.g.*, Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39

and tradition standard that threatens to broadly invalidate public carry and other firearms laws not supported by eighteenth- or nineteenth-century analogues.<sup>6</sup> The majority assured readers that its approach to defining the scope of Second Amendment rights “accords with” and “comports with” how the Court has defined the scope of First Amendment (and other) rights.<sup>7</sup>

That claim is false, both as a general matter and as it applies to the public exercise of the two rights. While governments retain broad authority to regulate public expression, on its present trajectory the Second Amendment will protect a public carry super-right with few apparent limits.<sup>8</sup> If the Court and lower courts embrace this interpretation of the Second Amendment, Americans will have broader rights to carry lethal firearms in public places—including subways, zoos, public university campuses, and festivals—than they do to speak and assemble peaceably there. For a democracy rooted in peaceful discourse, this is an anomalous and astounding result.

The Court’s justifications for adopting this standard include a purported desire to accord equal respect to analogous fundamental rights.<sup>9</sup> In fact, the Court has been eager to place the Second Amendment in the company of the presumably “first-class” First Amendment. In *District of Columbia v. Heller*,<sup>10</sup> which first recognized an individual right to keep and bear arms, the Court repeatedly invoked the First Amendment to burnish the legitimacy of the Second Amendment right.<sup>11</sup> The majority also made passing reference to the methods the Court has used to interpret other rights, including First Amendment rights, while claiming “[t]he Second Amendment is no different.”<sup>12</sup>

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FORDHAM URB. L.J. 1695, 1707, 1723–24 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317–18 (2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008).

6. See *Bruen*, 142 S. Ct. at 2126 (announcing that firearms regulations must henceforth be “consistent with this Nation’s historical tradition of firearm regulation”). Although this Article, like the Court, will address firearms specifically, the Second Amendment’s text covers an array of non-firearms weapons. See generally Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173 (2021) (analyzing the right to keep and bear weapons that are not firearms).

7. *Bruen*, 142 S. Ct. at 2130.

8. Zick, *supra* note 1, at 624. See also Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 69–70 (2022) (observing the unique features of the Second Amendment right as interpreted in *Bruen*).

9. See *Bruen*, 142 S. Ct. at 2156 (emphasizing that the Second Amendment is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees” (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion))).

10. 554 U.S. 570 (2008).

11. See *id.* at 595 (recognizing an individual right to keep and bear arms); see also *id.* at 582, 595, 606, 618, 634–35 (invoking the First Amendment’s free speech right as analogous to an individual’s Second Amendment right to keep and bear arms).

12. *Id.* at 635.

In *Bruen*, the Court’s most recent Second Amendment decision, the Court doubled down on that claim by asserting that its historical analogy standard “accords with” and “comports with” how the First Amendment is interpreted.<sup>13</sup> For a decision that insists on analogical reasoning, which the Court described as “a commonplace task for any lawyer or judge[.]”<sup>14</sup> that claim is both highly misleading and hypocritical.

Although the Court has claimed to rely on history and tradition in a few limited areas of First Amendment doctrine, it has not *generally* required that governments point to any historical evidence to support restrictions on expression.<sup>15</sup> Indeed, in its most recent First Amendment decision, a Court majority—including some Justices in the *Bruen* majority—did not consult history to determine the scope of the “true-threats” doctrine.<sup>16</sup> In *Bruen*, the Court expressly rejected application of judicial means-end scrutiny, interest balancing, or any form of tiered scrutiny for Second Amendment regulations.<sup>17</sup> However, as the Court was—and is—well aware, that kind of review is quite common across a range of First Amendment doctrines.<sup>18</sup> Indeed, the Court’s own description of First Amendment doctrine in *Bruen* included citations to precedents that embraced and applied interest balancing.<sup>19</sup> In general terms, *Bruen*’s methodology does not comport or accord with how First Amendment rights are interpreted.<sup>20</sup> To borrow a criticism from Justice Scalia, the Second Amendment standard articulated in *Bruen* “comports with” First Amendment doctrine only if that phrase

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13. *Bruen*, 142 S. Ct. at 2130.

14. *Id.* at 2132.

15. In recent decisions, the Court has insisted that certain categories of speech, including incitement and threats, are outside the First Amendment’s domain because they have been treated that way as a matter of history and tradition. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 468–71 (2010) (holding that the government must show that any new category or class of excluded expression belongs to a “historic and traditional categor[y]” that was “long familiar to the bar” (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring))). However, scholars have questioned the accuracy of the Court’s historical claims. *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2207–11 (2015) (arguing that the Court “invented” a historical tradition over time and relies today on “a false view of First Amendment history”).

16. *See* *Counterman v. Colorado*, 143 S. Ct. 2106, 2117 (2023) (adopting a “recklessness” standard for threats liability).

17. *Bruen*, 142 S. Ct. at 2129–30.

18. For example, the Court has used balancing standards to determine the validity of restrictions on public speech and assembly. *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298–99 (1984) (upholding restrictions on overnight camping in national parks under intermediate scrutiny).

19. *See Bruen*, 142 S. Ct. at 2130 (discussing First Amendment precedents that apply intermediate scrutiny).

20. *See, e.g.*, *Bridges*, *supra* note 8, at 69–70 (noting the general distinctions between the Court’s First Amendment and Second Amendment interpretive approaches).

“refer[s] not to the standards of Versace, but to those of Omar the tentmaker.”<sup>21</sup>

The analogy also fails spectacularly regarding the public exercise of rights, which was the central concern in *Bruen*. The Court has long accepted that governments have broad authority to restrict speakers’ access to public places and impose regulations on expression—even in places governments have opened for that purpose.<sup>22</sup> The majority in *Bruen* and gun rights proponents claim to want only equal respect for First Amendment and Second Amendment rights.<sup>23</sup> If so, they should be content with a regime in which individuals are roughly as free to carry weapons in public as they are to engage in expression there. Indeed, that is essentially how post-*Heller* lower courts interpreted the Second Amendment. Taking their cue from the Court’s reliance on free speech analogies, lower courts looked first to see whether the activity was covered by the text of the Second Amendment and, if so, applied an appropriate level of scrutiny to determine whether it was protected—an analysis consciously borrowed from First Amendment doctrines.<sup>24</sup>

*Bruen* expressly rejected that approach.<sup>25</sup> Although the Court made a pretense of following the First Amendment’s interpretive model,<sup>26</sup> it adopted a standard for Second Amendment public carry rights that is exceptional and, indeed, *sui generis*. If the Court’s method of assessing public carry regulations did accord with or even faintly resemble First Amendment doctrines respecting the public exercise of fundamental rights, the text of the Second Amendment would exclude various public carry activities from coverage, individuals and groups would have limited or no rights to carry firearms in most public places, and governments would have broad authority to regulate public carry to further various contemporary public interests.<sup>27</sup> By contrast, under the Court’s approach to public carry in *Bruen*, the text itself may exclude little, if any, conduct; individuals appear to have a presumptive right to carry firearms nearly everywhere; and even the most compelling

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21. *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting).

22. See generally TIMOTHY ZICK, *MANAGED DISSENT: THE LAW OF PUBLIC PROTEST* (2023) (analyzing the laws and doctrines that restrict public expression).

23. See *Bruen*, 142 S. Ct. at 2130 (“This Second Amendment standard accords with how we protect other constitutional rights.”).

24. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 & n.4, 96–99 (3d Cir. 2010) (drawing from First Amendment precedent to articulate an analysis assessing whether a challenged law burdened conduct within the scope of the Second Amendment and then, if it did, applying strict or intermediate scrutiny); *United States v. Skoien*, 587 F.3d 803, 813–14 (7th Cir. 2009), *reh’g en banc granted and vacated*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010), and *aff’d on reh’g*, 614 F.3d 638 (7th Cir. 2010) (en banc) (adapting First Amendment doctrine to the Second Amendment context).

25. *Bruen*, 142 S. Ct. at 2125–26.

26. *Id.* at 2130.

27. See discussion *infra* Part II.

public safety justifications are irrelevant when considering the validity of contemporary regulations.<sup>28</sup>

The problem is not just that the analogy is bad. The Court's embrace of exceptional Second Amendment standards will have important real-world consequences. Where and to what extent public carry will be protected under the Second Amendment are among the most important open questions concerning the scope of the right to keep and bear arms.<sup>29</sup> How courts answer those questions will determine the nature and character of public places and whether governments have the authority to respond to public safety and other concerns associated with lethal arms in the public square.

Before and after *Bruen*, many states loosened their public carry laws and expanded the places where firearms can be lawfully carried.<sup>30</sup> However, public opinion polling suggests that most Americans—including most gun owners—support limiting the public places where people can carry firearms.<sup>31</sup> Reflecting this sentiment and in response to public shootings, state laws currently restrict or prohibit public carry in recreational facilities, public transportation, public swimming pools, riverboat casinos, school buses, amusement parks, stadiums, and even gun shows.<sup>32</sup>

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28. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (recognizing the Second Amendment does not protect carrying firearms “in sensitive places such as schools and government buildings”); *Bruen*, 142 S. Ct. at 2133 (identifying polling places, courthouses, and legislative chambers as “sensitive places”); see also *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) (confirming that the Second Amendment does not prohibit excluding firearms from “sensitive places”).

29. See Luke Morgan, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 207 (2018) (“No broadly accepted theory of ‘sensitive places’ has emerged.”); Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 49) (on file with author) (reviewing post-*Bruen* lower court decisions).

30. See *Carrying Firearms in Public and Stand Your Ground Laws*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, <https://publichealth.jhu.edu/departments/health-policy-and-management/research-and-practice/center-for-gun-violence-solutions/solutions/public-carry-of-firearms> [<https://perma.cc/SR26-YK23>] (presenting data on the relaxation of concealed carry laws from 1980 through 2021); Jennifer Mascia, *Tracking the Effects of the Supreme Court's Gun Ruling*, THE TRACE, <https://www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/> [<https://perma.cc/Z4MT-CKES>] (Oct. 14, 2022) (describing changes to state gun laws post-*Bruen*).

31. See Julia A. Wolfson, Stephen P. Teret, Deborah Azrael & Matthew Miller, *US Public Opinion on Carrying Firearms in Public Places*, 107 AM. J. PUB. HEALTH 929, 929 (2017) (reporting that fewer than one in three adults surveyed supported carrying firearms in any of the specified venues); Cassandra K. Crifasi, Julie A. Ward, Emma E. McGinty, Colleen L. Barry & Daniel W. Webster, *Public Opinion on Laws Regulating Public Gun Carrying*, PREVENTIVE MED., June 2022, at 1, 3 (finding broad public support for limits on the locations where firearms can be carried).

32. See, e.g., W. VA. CODE ANN. § 8-12-5a (West 2020) (recreational facilities); 430 ILL. COMP. STAT. ANN. 66/65 (West 2021) (public transportation), *invalidated in part by Solomon v. Cook Cnty. Bd. of Comm'rs*, 559 F. Supp. 3d 675 (N.D. Ill. 2021); D.C. CODE ANN. § 22-4502.01 (West 2007) (public swimming pools); MO. ANN. STAT. § 571.215 (West 2016) (riverboat casinos,

In response to *Bruen*, some states enacted extensive locational restrictions. New York passed a law that restricted carrying arms in public parks, zoos, airports, buses, houses of worship, bars, conference centers, banquet halls, medical facilities, and public protests.<sup>33</sup> New Jersey banned firearms in libraries, museums, bars, playgrounds, entertainment venues, and other places.<sup>34</sup> Purporting to follow the approach required by *Bruen*, lower courts have enjoined many of these spatial restrictions on the grounds that they are not supported by both well-established and representative historical analogues.<sup>35</sup> If the lower courts' approach is correct, lawmakers will have little authority to ban or restrict public carry.

This Article proceeds in three parts. Part I describes current First Amendment and Second Amendment doctrines concerning, respectively, public expression and public carry. Describing the central concepts and tenets of the respective doctrines will facilitate assessment of the Court's interpretive analogy as well as the analogy's real-world effects.

Part II critically examines—and rejects—the claim that *Bruen*'s approach to interpreting Second Amendment rights accords with and comports with First Amendment standards, either as a general matter or with specific reference to standards governing the public exercise of the respective fundamental rights. Although it insisted that governments identify and defend relevant analogies to defend firearms regulations, the Court itself relied on a specious interpretive analogy. The Court's recognition of a Second Amendment super-right also openly contradicts its assertion that it insists only on equality of status and treatment regarding First Amendment and Second Amendment rights.

Part III examines the real-world hazards associated with the Court's Second Amendment exceptionalism. It illustrates, through concrete applications, the anomalous and dangerous results that flow from special solicitude for Second Amendment rights in the public sphere. Considering the relationship between public carry and public expression, recognition of a Second Amendment super-right will lead to absurd and dangerous

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stadium, amusement park); N.C. GEN. STAT. ANN. § 14-269.2 (West 2015) (school buses); HAW. REV. STAT. ANN. § 134-23 (West 2006) (gun shows).

33. N.Y. PENAL LAW § 265.01-e (McKinney 2023) (Concealed Carry Improvement Act).

34. See *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*3, \*6 (D.N.J. May 16, 2023) (summarizing the New Jersey legislation enacted post-*Bruen*, which was at issue in the case).

35. See *id.* at \*4 (granting injunction in part against enforcement of various locational restrictions). Parts of New York's law have been enjoined in several district court proceedings. See *Antonyuk v. Bruen*, 624 F. Supp. 3d 210, 246, 254, 256 (N.D.N.Y. 2022) (denying plaintiff's request for injunction based on lack of standing but calling into question certain Concealed Carry Improvement Act provisions); *Antonyuk v. Hochul*, 635 F. Supp. 3d 111, 122–23, 131 (N.D.N.Y. 2022) (granting temporary restraining order against certain Concealed Carry Improvement Act provisions); *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 WL 16744700, at \*58, \*86 (N.D.N.Y. Nov. 7, 2022) (granting preliminary injunction against certain Concealed Carry Improvement Act provisions).



interpretations of fundamental rights, chill public expression, and elevate self-defense and confrontation over peaceful forms of self-government.<sup>36</sup>

### I. First Amendment and Second Amendment Doctrines

As discussed in Part II, contrary to the Court's claim in *Bruen*, the Court's approach to interpreting Second Amendment rights is vastly different from longstanding First Amendment doctrines and standards. As we will see, this is true as a general matter. But since *Bruen* involved the *public* exercise of Second Amendment rights, an apples-to-apples comparison of doctrines governing the public exercise of First Amendment rights is most relevant and appropriate.<sup>37</sup> First Amendment doctrines concerning where and under what terms individuals can engage in expressive activity are longstanding and well-developed. By contrast, Second Amendment public carry doctrines are still under construction. Given the relative lack of Supreme Court and other authority, statements concerning the Second Amendment's doctrines will necessarily be more tentative and uncertain. However, the Court has identified the broad contours of public carry rights in *Heller* and *Bruen*.

#### A. *The First Amendment: Coverage Exclusions; Public Forum; and Time, Place, and Manner*

Three primary First Amendment doctrines define the scope of public expression rights.<sup>38</sup> First, certain categories of expression and some forms of conduct are not covered by the First Amendment.<sup>39</sup> Second, the "public forum" doctrine governs where an individual has a First Amendment right to speak and the scope of governmental authority to regulate speech in public places.<sup>40</sup> Third, the First Amendment's "time, place, and manner" doctrine generally governs the validity of content-neutral regulations imposed on expression in public places speakers have a right to access.<sup>41</sup> Together, these

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36. See generally Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulations Under Heller*, 116 NW. U.L. REV. 139 (2021) (shifting the focus of gun regulations from narrow public safety concerns to interests in the preservation of various aspects of public life). See also Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 237–38 (2018) (examining how public carry affects public expression at public demonstrations).

37. Like the right to carry firearms for self-defense, First Amendment expressive rights may be exercised collectively but belong to the individual. The Court has never developed a freestanding doctrine relating to the rights of groups or assemblies to gather and speak in public. Thus, we are comparing two fundamental *individual* rights. See generally JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (explaining and criticizing the Court's refusal to recognize independent assembly rights).

38. See generally ZICK, *supra* note 22 (describing the principal doctrines and standards applicable to public expression).

39. *Id.* at 44.

40. *Id.* at 49.

41. *Id.* at 50–51.

doctrines exemplify the Court’s general approach to First Amendment rights, which relies primarily on a few narrow categorical exclusions and a significant amount of interest balancing.

*1. Uncovered Expression and Conduct.*—As a threshold matter, the First Amendment does not protect an absolute right to communicate. The text’s reference to freedom of speech does not include certain narrow classes of expression and various forms of conduct.<sup>42</sup> Thus, even in public places where they have a right to express themselves, speakers do not have a right to say whatever they wish however they wish.

Speakers do not have a First Amendment right to intentionally direct others to commit illegal acts when such acts are likely to occur imminently.<sup>43</sup> Thus, assuming these elements are present, a protester could not direct others to burn a police station to the ground or incite them to engage in an unlawful riot. In addition to prohibitions on incitement, public speakers cannot recklessly communicate an intent to inflict bodily harm or death on any person or group.<sup>44</sup> Nor does the First Amendment protect “fighting words,” or the face-to-face communication of profanity or epithets likely to induce the reasonable person to act violently toward the speaker.<sup>45</sup> Finally, speakers can be sued for defamation, false statements of fact that cause reputational harm to public officials or private individuals.<sup>46</sup>

These categorical exclusions apply in *all* places and contexts.<sup>47</sup> Thus, they limit the scope of First Amendment speech rights whether in public parks, streets, plazas, zoos, or on social media. Although the Supreme Court indicated in early decisions that such utterances were excluded based on a judicial balancing of the values and harms associated with certain classes of

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42. See *infra* notes 43–46 and accompanying text.

43. See *Brandenburg v. Ohio*, 395 U.S. 444, 445, 447–49 (1969) (per curiam) (invalidating conviction of a member of the Ku Klux Klan for criminal syndicalism where there was no evidence that speech was likely to lead to imminent violence).

44. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam) (noting that threats are not covered by the Free Speech Clause); *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”); *Counterman v. Colorado*, 143 S. Ct. 2106, 2117 (2023) (holding that speakers can be held liable for recklessly communicating threats).

45. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–70, 573 (1942) (upholding conviction based on communication of profanity to police officer).

46. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (imposing First Amendment limits on defamation liability in cases involving public officials).

47. See *Chaplinsky*, 315 U.S. at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).

speech, in recent decisions it has explained that these exclusions are a product of history and tradition.<sup>48</sup>

First Amendment protection also does not extend to violent conduct, even when it occurs as part of expressive activity.<sup>49</sup> Public speakers can be arrested for a long and expanding list of public order offenses. These include breach of peace, disorderly conduct, unlawful assembly, failure to obey a lawful order to disperse, and incitement to riot.<sup>50</sup> Even if speakers otherwise have a right to be in a public place, they are prohibited from blocking sidewalks, occupying highways, jaywalking, and other conduct that disrupts public order or threatens the safety of others.<sup>51</sup> Courts have generally accepted that these and other content-neutral limitations on public expression are supported by the government's authority to maintain public safety and order.<sup>52</sup>

Some conduct with an expressive element is covered by the First Amendment. However, for the First Amendment to apply, speakers generally bear the burden of demonstrating they intended to communicate a message through their actions and there was a great likelihood an audience would understand it.<sup>53</sup> For example, burning a flag at a public protest is speech covered by the Free Speech Clause.<sup>54</sup> By contrast, courts have held the act of carrying a firearm in public is not covered speech because there is no intent to communicate or, absent some explanation, public audiences would not be able to discern any articulable message from the simple act of public carry.<sup>55</sup>

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48. See, e.g., *id.* at 572 (defining categorical exclusions by reference to a balance of the harms the speech produces and its value); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (placing the burden on the government to show that a type of speech belongs to a “historic and traditional categor[y]” of constitutionally unprotected speech “long familiar to the bar”) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

49. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889, 916 (1982) (emphasizing that violent conduct engaged in as part of a civil rights boycott is not protected by the First Amendment).

50. See *ZICK*, *supra* note 22, at 218–20 (discussing criticisms of public order offenses).

51. See *id.* at 38, 42, 54 (“Even though these activities are all non-violent in nature, the First Amendment does not protect them.”).

52. *Id.* at 54.

53. See *Spence v. Washington*, 418 U.S. 405, 406, 410–11 (1974) (per curiam) (finding that displaying a flag upside down was communicative because it demonstrated both an intent to communicate a message and a likelihood that the message would be understood).

54. See *Texas v. Johnson*, 491 U.S. 397, 399, 406 (1989) (invalidating a state law conviction for “desecrating” the United States flag).

55. See *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 618–19 (E.D. Mich. 2016) (finding that bystanders reacted to public carry with fear, not understanding); *Northrup v. City of Toledo Police Div.*, 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014), *rev'd on other grounds*, 785 F.3d 1128 (6th Cir. 2015) (rejecting the argument that the plaintiff, who was carrying a firearm in a holster when arrested, was engaged in expressive conduct); *Deffert v. Moe*, 111 F. Supp. 3d 797, 814 (W.D. Mich. 2015) (finding that openly carrying a pistol to increase gun control awareness does not “support a great likelihood that the message would be understood by those who viewed [him]”); *Baker v. Schwarb*, 40 F. Supp. 3d 881, 895 (E.D. Mich. 2014) (observing that the audience did not

Even if a speaker demonstrates that conduct is sufficiently expressive to merit First Amendment coverage, governments can regulate expressive conduct so long as they do so in a way that is neutral as to content and narrowly tailored to advance an important governmental interest.<sup>56</sup> In other words, the government's interest in protecting public safety can outweigh a person's right to engage in political and other forms of expressive activity in public places.

In sum, according to the Supreme Court, the First Amendment does not extend to several excluded classes of speech, conduct that threatens public safety or order (even if it is part of an expressive event, such as a demonstration), or conduct that is not sufficiently expressive. These limits apply as a matter of textual coverage in every public place regardless of context.

2. *The "Public Forum."*—Two First Amendment doctrines limit *where* speakers can exercise expressive rights. The public forum doctrine generally governs which public properties or resources speakers have a right to access.<sup>57</sup> The time, place, and manner doctrine, discussed below, allows governments to impose locational restrictions including in places where speakers otherwise have a right to engage in expression.

Under the public forum doctrine, governments exercise broad authority concerning access to properties they own or manage.<sup>58</sup> Speakers and assemblies have a recognized right to access a small but important category of public properties. As to the remainder, however, the burden rests on speakers to demonstrate a right to use a place for expressive purposes.

For much of America's history, government officials possessed plenary authority to exclude speakers from properties the government owned or operated.<sup>59</sup> In *Davis v. Massachusetts*,<sup>60</sup> the Court upheld a Boston ordinance that prohibited anyone from speaking, discharging firearms, selling goods, or maintaining any booth for public amusement on any of the public grounds of

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appear to understand the message the armed defendants were seeking to convey); *Nordyke v. King*, 319 F.3d 1185, 1190 (9th Cir. 2003) ("Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.").

56. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding a conviction for the public destruction of a draft card by burning).

57. The Court has held that there is no First Amendment right to access *private* properties for the purposes of exercising speech and assembly rights. *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976).

58. See generally TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2009) (criticizing the Court's public forum and time, place, and manner doctrines for their lack of attention to the concepts of space and place).

59. See *Davis v. Massachusetts*, 167 U.S. 43, 47–48 (1897) (upholding prohibition on speech and assembly in public park).

60. 167 U.S. 43 (1897).

the city except under a permit from the mayor.<sup>61</sup> The Court reasoned, “For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”<sup>62</sup> The Court also reasoned, “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”<sup>63</sup> Although *Davis* was decided before the First Amendment was applied to the states, the Court concluded that the Fourteenth Amendment did not alter the states’ power to enact police regulations as to properties under their control.<sup>64</sup>

Insofar as the Supreme Court’s precedents were concerned, this was where things stood until 1939, when the Court decided *Hague v. Committee for Industrial Organization*.<sup>65</sup> In *Hague*, the Court invalidated broad restrictions on the rights of labor activists to speak, distribute literature, and gather in public streets and parks.<sup>66</sup> Justice Roberts, with whom Justice Black and Chief Justice Hughes concurred, concluded that the regulations violated the labor activists’ privileges and immunities as United States citizens.<sup>67</sup> Among those privileges and immunities, Roberts wrote, are the right to speak and assemble in public.<sup>68</sup>

In what would later become the foundation for modern public forum doctrine, Roberts wrote:

Wherever the title of streets and parks may rest, they have *immemorially* been held in trust for the use of the public and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, *from ancient times*, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>69</sup>

Still, the right to use the public streets and parks was, Roberts emphasized, “not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”<sup>70</sup>

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61. *Id.* at 44, 47–48.

62. *Id.* at 47.

63. *Id.* at 48.

64. *Id.* at 47–48.

65. 307 U.S. 496 (1939).

66. *Id.* at 515–16 (plurality opinion); *id.* at 532 (Hughes, J., concurring).

67. *Id.*

68. *Id.* at 515–16 (plurality opinion).

69. *Id.* at 515 (emphasis added).

70. *Id.* at 515 (emphasis added).

Justice Roberts did not provide a single case or other citation for his assertions that public parks and streets had “immemorially,” “time out of mind,” and “from ancient times” been used for speech and assembly. Respondents’ brief relied in part on post-Reconstruction state court decisions invalidating similar laws and references to “America’s long history of town meetings and public assemblages.”<sup>71</sup> Despite the lack of concrete support, particularly from the Founding Era, Roberts’s historical assumptions have become a central part of modern public forum doctrine.

The *Hague* dicta only mentioned two categories of places—public parks and streets.<sup>72</sup> Later, the Court added public sidewalks as likewise immemorially held in trust for the people—again, without citations or resort to historical evidence.<sup>73</sup> In these public places, as Justice Roberts recognized in *Hague*, rights to speak and assemble were not absolute; they were subject to reasonable regulations in the interests of public order and convenience.<sup>74</sup> Thus, the Court’s recognition of an immemorial trust relating to certain public places did not generally undermine the state’s broad police powers. The trust was subject to, and included exercise of, those powers.

Modern public forum doctrine took shape during the decades following *Hague*. The Court first proceeded place-by-place, seeking to determine where, in addition to public streets and parks, Americans had First Amendment rights to speak and assemble. It reviewed restrictions on expression in a public library reading room, the grounds near a public jailhouse, a military base, postal mailboxes, the advertising space on municipal buses, and other locations.<sup>75</sup> The Court’s decisions did not chart a clear or consistent path or adopt a workable standard. For a very brief time, the Court based access determinations on whether speech and assembly were “compatible” with the forum in question.<sup>76</sup> However, by the early 1980s, the

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71. Respondent’s Brief at 63–64, 66, *Hague v. Comm. for Indus. Org.*, 307 U.S. 596 (1939) (No. 651), 1939 WL 48838.

72. *Hague*, 307 U.S. at 515–16 (plurality opinion).

73. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 183 (1983) (invalidating speech regulations as applied to public sidewalks bordering the Supreme Court building).

74. *Hague*, 307 U.S. at 515 (plurality opinion); *see Grace*, 461 U.S. at 183–84 (“Of course, this is not to say that those sidewalks, like other sidewalks, are not subject to reasonable time, place, and manner restrictions, either by statute or by regulations . . .”).

75. *See Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (plurality opinion) (invalidating breach of peace conviction based on silent protest in public library reading room); *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (upholding breach of peace convictions of protesters who assembled on the curtilage of a jailhouse); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (upholding regulations that barred political activities, including speeches and demonstrations, on the grounds of a military base); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 128–29 (1981) (finding that individuals had no First Amendment right to place unstamped material in a letter box); *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (upholding exclusion of campaign ads from advertising space on city buses).

76. *See Greer*, 424 U.S. at 860 (Brennan, J., dissenting) (asking whether public speech is “basically compatible with the activities otherwise occurring at the locale”).

Court had settled on a categorical approach under which the scope of speech and assembly rights depended on the type or category of public property involved and the government's intent regarding access.<sup>77</sup>

Under this approach, First Amendment speech and assembly rights are most robust in “quintessential” or “traditional” public forums.<sup>78</sup> Following Roberts's dicta in *Hague*, this category consists of public streets, public parks, and public sidewalks—properties the Court has concluded were “time out of mind” and “immemorially” open for speech and assembly activities.<sup>79</sup> As the Court explained, traditional public fora are those places which “by long tradition or by government fiat have been devoted to assembly and debate.”<sup>80</sup> Speakers are free to assert that other places share the characteristics of and thus ought to be accorded the status of traditional public fora. However, the Supreme Court has never recognized *any* public properties other than streets, parks, and sidewalks as belonging to this category.

Under the public forum doctrine, the government can allow speech and assembly in other places, but it has no obligation to do so. The Court has held that when the government *intentionally* opens a public place to expressive activities it creates a “designated” public forum.<sup>81</sup> A designated public forum is one that is “generally open to the public” for expressive uses.<sup>82</sup> This category of forum does not come into being merely because the government owns a property or some speakers or groups have used the place for speech or assembly in the past.<sup>83</sup> Rather, whether the government has created a designated public forum depends on whether a speaker can produce clear evidence that governmental policies and practices, along with the principal functions of the property at issue, support a right of access.<sup>84</sup> As the Court observed, “We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”<sup>85</sup>

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77. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (describing categorical approach).

78. See *id.* (noting that rights of the government to limit expressive activity are limited in “quintessential” public forums).

79. *Hague*, 307 U.S. at 515 (plurality opinion). The Court has also recognized public sidewalks as falling into the traditional public forum category. *Grace*, 461 U.S. at 180.

80. *Perry*, 460 U.S. at 45.

81. *Id.* at 45–46.

82. *Id.*

83. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”).

84. *Id.* at 802–03.

85. *Id.* at 803 (citations omitted).

The government's evidence of contrary intent need not extend back in time to when a place or property was first created or used. In fact, the Court has upheld access restrictions in force for as little as a few decades and, in some instances, far less time.<sup>86</sup> Given the burden of proving intent to *generally* open a public place to expression, designated public forums are a rare breed of place.<sup>87</sup> Even if a government does intentionally open a public place to expression, the Court has said the place need not retain this open character indefinitely.<sup>88</sup> Thus, officials are free to change their minds and ban all or most expression in these places.

Finally, speakers or groups may seek access to public places that are neither traditional nor designated public forums. In these places, which the Court has sometimes referred to as "limited" and other times "nonpublic" forums, officials can reserve the property for what they consider to be its primary function.<sup>89</sup> Ordinarily, governments cannot regulate expression based on its subject matter or discriminate against speakers based on their identity or status.<sup>90</sup> But in nonpublic fora, governments can limit access to only certain speakers or subject matters.<sup>91</sup> The Court has reasoned that because these properties serve primarily nonexpressive functions, governments, just like private property owners, can limit access to preserve these uses.<sup>92</sup>

The public forum doctrine is a powerful managerial tool.<sup>93</sup> It grants officials broad authority to determine where and under what conditions expressive activities can occur. Under this categorical doctrine, in public places other than streets, parks, and sidewalks, speakers have very limited First Amendment rights. As noted, speakers must prove that the government intended to allow expression in all other places. This approach gives officials

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86. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300–01, 304 (1974) (plurality opinion) (upholding restriction where the city had limited access to advertising spaces for twenty-six years); *Perry*, 460 U.S. at 40–41, 55 (upholding an access restriction that immediately preceded the filing of a First Amendment claim).

87. See *Perry*, 460 U.S. at 45 (describing designated forums as those the government has made "generally open to the public" for expressive activity); *Cornelius*, 473 U.S. at 802–03 (explaining that the government can only create a public forum "by intentionally opening a nontraditional forum for public discourse").

88. *Perry*, 460 U.S. at 46.

89. *Id.* at 46, 48–49; see *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (mentioning "traditional," "designated," and "limited" public forums).

90. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 168 (2015).

91. *Perry*, 460 U.S. at 49.

92. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.")

93. See generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1717 (1987) (discussing the "managerial" theory of regulation over public properties).



wide discretion to ban expression in places owned or managed by the government. For example, courts have upheld federal laws banning expression in the plaza outside the Supreme Court Building and inside the Jefferson Memorial.<sup>94</sup> Further, the government's managerial power allows it to open and close forums at its discretion and deny access to certain properties based on the subject matter of speech or the status of speakers.

Although public forum doctrine has some defenders,<sup>95</sup> it has been the subject of longstanding academic and judicial criticism. Among the many criticisms are that the doctrine diverts judges' attention from important questions about the scope of speech and assembly rights, allows too little access to government properties for speech and assembly activities, and ignores the dynamic and complex relationship speakers have with place and the critical role location plays in communicating thoughts and ideas.<sup>96</sup> Summarizing many of the criticisms, Justice Kennedy observed that public forum doctrine "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government."<sup>97</sup> Despite these criticisms, the Court has shown zero interest in revisiting or revising the public forum doctrine.

3. *Time, Place, and Manner Regulations.*—As Justice Roberts noted in *Hague*, even in quintessential public fora, expressive rights are subject to limitations based on "general comfort and convenience."<sup>98</sup> Officials presumably cannot ban or prohibit *all* expression in such locations. Nor can governments, without compelling justification, restrict expression based on

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94. See *Hodge v. Talkin*, 799 F.3d 1145, 1158, 1170 (D.C. Cir. 2015) (concluding the Supreme Court plaza was a limited public forum and upholding a ban on assemblies on the plaza); *Oberwetter v. Hilliard*, 639 F.3d 545, 552, 554 (D.C. Cir. 2011) (upholding speech restrictions at the Jefferson Memorial, which the court characterized as a nonpublic forum).

95. See generally Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (defending public forum doctrine's categorical approach as a means of generalizing about the kinds of places where government distortion of expression is most concerning).

96. See Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223 (1984) ("Even when public forum analysis is irrelevant to the outcome of a case, the judicial focus on the public forum concept confuses the development of first amendment principles."); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (criticizing the Court's approach to public expression); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 459 (2006) (rejecting the public forum's conception of place and advocating in favor of a more expressive conception).

97. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

98. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) (plurality opinion).

the content of an individual's or group's message.<sup>99</sup> However, officials have broad authority to regulate the time, place, and manner of expressive activities.<sup>100</sup>

In both traditional and designated public forums, governments can impose regulations that facilitate order, protect public safety, and serve other content-neutral purposes.<sup>101</sup> Notwithstanding their significant impact on public expression, time, place, and manner regulations are valid so long as they satisfy an intermediate scrutiny standard that requires they serve an important interest, burden no more speech than necessary, and leave open alternative channels of communication.<sup>102</sup> As discussed, in limited or nonpublic forums the standard is even more permissive: regulations need only be "reasonable" and viewpoint-neutral.<sup>103</sup>

Public forum doctrine recognizes and preserves the government's police power to impose a variety of restrictions on the time, place, and manner of expression. Under this approach, a lonely pamphleteer may attempt to hand materials to passersby on the public sidewalks, but governments can enforce regulations that limit the times of day when this activity may occur, ensure the sidewalks remain clear, and enforce laws prohibiting harassment and fraudulent conduct.<sup>104</sup> The same standard applies if a public property qualifies as a designated public forum.<sup>105</sup>

Granting officials the authority to regulate these and other aspects of public expression has long been considered necessary to impose what Harry Kalven, Jr. called Robert's Rules of Order in public places.<sup>106</sup> The intermediate scrutiny applied to these rules acknowledges the need to preserve public tranquility, order, safety, and other common goods.<sup>107</sup> The standard balances the speaker's right to engage in public expression and the government's interest in a variety of important or substantial interests.<sup>108</sup> The Court has long held that so long as a restriction on public expression burdens no more speech than is necessary to further the government's interest and a

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99. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983).

100. *Id.*

101. *Id.* at 45–46.

102. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

103. *Perry*, 460 U.S. at 46.

104. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.").

105. *Perry*, 460 U.S. at 45–46.

106. *See* Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 ("[W]hat is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.").

107. *See, e.g., Rock Against Racism*, 491 U.S. at 790 (1989) (explaining the need for local restrictions on noise).

108. *Id.* at 791.

speaker has *some* access to alternative places or means of expression, the restriction does not violate the First Amendment.<sup>109</sup>

Under this doctrine, the Supreme Court has upheld restrictions on public expression based on government interests in public order,<sup>110</sup> safety,<sup>111</sup> tranquility,<sup>112</sup> fraud,<sup>113</sup> residential privacy,<sup>114</sup> personal repose,<sup>115</sup> resource conservation,<sup>116</sup> protection of the right to vote,<sup>117</sup> and aesthetics or appearance.<sup>118</sup> The list is not exhaustive. As noted earlier, in limited or nonpublic fora, the government's justification for limiting expression does not even have to be important or substantial but merely reasonable.<sup>119</sup> Relying on this broad authority, governments have adopted and enforced detailed permit schemes; measures that displace, confine, or remove speakers from public properties; prohibitions on access to certain locations even *within* public fora; and limits on the duration and manner of public expression.<sup>120</sup>

Other aspects of the time, place, and manner standard also highlight the degree of deference it affords regulators. The Court has explained that the narrow tailoring requirement is satisfied so long as the regulation does not

109. *Id.*; see *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297–98 (1984) (weighing the government's interest in preserving public property against the speaker's interest in sleeping there overnight).

110. *Cf. Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (recognizing that officials have authority to preserve public order).

111. See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643, 650, 654–55 (1981) (upholding a state fair rule that limited solicitation outside of booths based on state interests in orderly pedestrian movement and crowd safety).

112. See *Rock Against Racism*, 491 U.S. at 803 (upholding a park rule requiring performers to use the city's sound system in a public forum).

113. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992) (stating in dicta that a ban on airport solicitation can be based, in part, on concerns about fraud).

114. See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding ban on picketing residences).

115. See *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000) (upholding state law banning nonconsensual speech directed at unwilling listeners near health care clinics).

116. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (upholding National Park Service regulation banning camping in certain national parks).

117. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding ban on campaign speech near polling places).

118. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–09 (1984) (upholding ban on displaying political and other signs on city property to prevent “visual clutter”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510, 512 (1981) (plurality opinion) (indicating that a ban on commercial billboards, justified by concerns about appearance, would not violate the First Amendment); *id.* at 541 (Stevens, J., concurring in part and dissenting in part) (agreeing with the plurality that the constitutionality of the prohibition is not undercut by the distinction drawn between onsite and offsite commercial signs).

119. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983).

120. See Timothy Zick, *Speech and Spatial Tactics*, 84 TEXAS L. REV. 581, 581–82, 587–88 (2006) (discussing the measures and tactics used by governments to regulate public expression); see also John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1181 (2015) (noting the devastating effect restrictions on time, place, and manner can have on expressive content).

burden “*substantially* more speech than is necessary to further the government’s legitimate interests.”<sup>121</sup> It has indicated that a regulation of public expression is valid so long as it “promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>122</sup> In other words, when regulating public expression officials need not adopt the least restrictive regulatory means.<sup>123</sup>

Under the time, place, and manner standard, regulations must leave open “alternative channels of communication.”<sup>124</sup> This element purportedly ensures that speakers have *some* access to places and audiences, even if it is not their preferred time, place, or manner of expression or the most effective means of communicating. Courts have generally interpreted the sufficiency of alternative channels to mean that so long as speakers and assemblies can communicate a message in some place, at some time, and through some manner, the element is satisfied.<sup>125</sup> For example, in one case the Supreme Court reasoned that the federal government could prohibit demonstrators seeking to emphasize the plight of the homeless from sleeping on the National Mall and near the White House because they could still demonstrate elsewhere and, in any event, could speak to the media about their cause.<sup>126</sup>

As forgiving as the standard is, it is not a free pass. The Supreme Court has occasionally invalidated time, place, and manner regulations that are insufficiently tailored to an important government interest.<sup>127</sup> For example, in *United States v. Grace*,<sup>128</sup> the Court invalidated a law that banned displays on the public sidewalks near the Supreme Court building.<sup>129</sup> The offending display was a sign with the words of the First Amendment printed on it.<sup>130</sup> The Court readily accepted that maintaining “decorum” near the Supreme Court grounds was an important and content-neutral interest for regulating expression.<sup>131</sup> However, it held that a total ban on carrying flags, banners, and other devices was not narrowly tailored to that interest.<sup>132</sup>

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121. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (emphasis added).

122. *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

123. *Id.* at 800.

124. *Id.* at 802.

125. For a critique of the alternative channels principle, see Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 WASH. & LEE L. REV. 1657, 1661–62 (2016).

126. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (“Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.”).

127. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 469, 497 (2014) (invalidating a thirty-five-foot buffer zone outside reproductive-healthcare facilities).

128. 461 U.S. 171 (1983).

129. *Id.* at 183.

130. *Id.* at 174.

131. *Id.* at 182.

132. *Id.*

Tellingly, however, there is more to the story of speech directed at the Court. In a later case, a federal appeals court upheld a federal law banning displays on the *plaza* outside the Court based on the government's interests in maintaining decorum there and promoting "the appearance and actuality" of a judiciary "immune to public opinion and invulnerable to public pressure."<sup>133</sup> The court acknowledged that the speaker's "desired activities in the Supreme Court plaza—picketing, leafleting, and speechmaking—lie at the *core* of the First Amendment's protections. Still, he does not have an automatic entitlement to engage in that conduct wherever (and whenever) he would like."<sup>134</sup> Concluding, based on the government's intent, that the Court's plaza was a nonpublic forum and invoking the private owner metaphor, the court upheld the speech and assembly bans as reasonable and viewpoint-neutral restrictions.<sup>135</sup>

As applied, the time, place, and manner standard allows governments to regulate, displace, and even ban expression in public places. Although the challenged regulations are purportedly or facially content-neutral, many significantly burden the exercise of fundamental speech and assembly rights, including the ability to engage in political expression.<sup>136</sup> Nevertheless, courts have held that governments can impose burdens on fundamental expressive rights to preserve decorum, protect aesthetic sensibilities, and for many other reasons.<sup>137</sup> Further, governments need only pay lip service to the adequacy of purported alternative channels of communication. In many cases, this approach leaves speakers with unattractive and ineffective communication options.

#### B. *The Second Amendment: Text, Sensitive Places, and Historical Analogues*

Second Amendment doctrines concerning public carry are not nearly as developed as those relating to public expression. However, after *Heller* and *Bruen*, the contours are clearer. The Court has suggested there are threshold coverage restrictions. It has also started to develop doctrines relating to the scope of public carry rights, including restrictions on public carry in certain "sensitive places."

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133. *Hodge v. Talkin*, 799 F.3d 1145, 1158, 1162 (D.C. Cir. 2015).

134. *Id.* at 1157 (emphasis added).

135. *Id.* at 1157, 1170.

136. *See Inazu*, *supra* note 120, at 1181 (discussing the negative effects of time, place, and manner regulations).

137. *See, e.g., Hodge*, 799 F.3d. at 1158, 1162 (upholding a federal law banning displays on the plaza outside the Court based on the government's interests in maintaining decorum there); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296–98 (1984) (discussing a prohibition on camping as a reasonable time, place, or manner regulation); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807–08 (1984) (upholding ordinance banning the posting of signs on city property due to visual clutter).

1. *Text and Coverage.*—*Bruen* rejected lower courts’ two-step approach, which was explicitly modeled on First Amendment doctrines.<sup>138</sup> It replaced that approach with a two-step standard of its own, which focuses on text and history.<sup>139</sup> As the Court explained, “[w]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.”<sup>140</sup> If conduct falls outside the text of the Second Amendment, it is not covered, and the regulation is presumably valid. If the conduct or activity is covered by the text, the government must demonstrate a regulation is “consistent with the Nation’s historical tradition of firearm regulation.”<sup>141</sup>

Thus, like the First Amendment, the Second Amendment appears to contain threshold coverage limits. Conduct that is not covered by the plain text is not within the domain of the Second Amendment. In *Bruen*, the Court indicated that in some cases the text or coverage analysis would “be fairly straightforward.”<sup>142</sup> For instance, the Court held that the reference to “bear” arms in the Second Amendment’s text presumptively covered the act of public carry.<sup>143</sup> Thus, it held that New York had to demonstrate that its licensing statute was supported by historically analogous laws.<sup>144</sup>

At this level of generality, it is not clear how governments can prevail on a step one textual argument that relates to the act of public carry. Indeed, several lower courts have held that the Second Amendment’s text covers, as one put it, “carrying a concealed handgun in public for self-defense . . . .”<sup>145</sup> If that is the end of the matter, the textual threshold may not impose *any* limits on public carry. Instead, the government would have to demonstrate, at step two, that a public carry restriction is supported by established and representative eighteenth- or nineteenth-century historical analogues.

The text *might* exclude publicly bearing certain types of arms, bearing arms by felons, brandishing firearms, or other conduct. The problem, as Jacob Charles has observed, is that *Bruen* left the threshold standard “unspecified.”<sup>146</sup> Thus, it is not clear how courts are to determine which restrictions implicate the text of the Second Amendment and which are

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138. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2125–26 (2022).

139. *Id.* at 2131.

140. *Id.* at 2129–30.

141. *Id.* at 2130.

142. *Id.* at 2131.

143. *Id.* at 2134–35.

144. *Id.* at 2135.

145. *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 WL 16744700, at \*59 (N.D.N.Y. Nov. 7, 2022); *see Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*72 (D.N.J. May 16, 2023) (“Unquestionably, the . . . Plaintiffs’ proposed course of conduct of carrying their handguns in public for self-defense falls within the Second Amendment’s text.”); *Hardaway v. Nigrelli*, 636 F. Supp. 3d 329, 348 (W.D.N.Y. 2022) (concluding that public carry is covered by the Second Amendment’s text).

146. Charles, *supra* note 29, at 24.

properly addressed at the second stage of analysis.<sup>147</sup> Nor is it clear whether the textual inquiry is to be conducted solely by reference to the language in the Second Amendment or be informed by historical evidence.<sup>148</sup>

At this point, then, we have only the *possibility* of Second Amendment coverage exclusions. The Court has not elaborated on the textual analysis or identified any threshold public carry exclusions. Some lower courts have assumed there are none, which is not necessarily an implausible interpretation of *Bruen*.<sup>149</sup>

2. *Sensitive Places*.—As discussed, under the First Amendment, *where* one has a right to speak is governed primarily by the public forum doctrine. Under the Second Amendment, where one has a right to bear arms depends in significant part on future development of the sensitive places concept. In *Heller*, the Court emphasized that, like other constitutional rights—including First Amendment rights—the right to keep and bear arms was subject to certain limits.<sup>150</sup> It observed, in dicta, that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>151</sup> The Court did not cite any historical or other authority for arms bans in these places. Nor did it define what sensitivity means in relation to public places. Rather, it indicated “there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”<sup>152</sup>

*Bruen* likewise acknowledged that firearms could be prohibited in some sensitive places.<sup>153</sup> As noted earlier, prior to *Bruen* lower courts had assessed place and other regulations under a two-step approach that combined an analysis of history and means-end scrutiny.<sup>154</sup> In *Bruen*, the Court expressly rejected that approach in favor of the requirement that spatial restrictions must be “consistent with this Nation’s historical tradition of firearm

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147. See *id.* at 25–26 (identifying several gaps in *Bruen*’s explanation of the textual inquiry).

148. *Id.* at 25.

149. See, e.g., *United States v. Quiroz*, 629 F. Supp. 3d 511, 522 (W.D. Tex. 2022) (finding *Bruen*’s framework to create an almost insurmountable barrier); *United States v. Rahimi*, 61 F.4th 443, 454, 460–61 (5th Cir. 2023) (finding criminal statute in question unconstitutional because there are no relevantly similar historical analogues, despite the statute embodying “salutary policy goals meant to protect vulnerable people in our society”).

150. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[T]he right secured by the Second Amendment is not unlimited.”).

151. *Id.* The Court repeated and affirmed this scope passage, including the reference to “sensitive places,” in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion), which held that the Second Amendment applies to the states, *id.* at 750 (majority opinion).

152. *Heller*, 554 U.S. at 635.

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

154. *Id.* at 2125 (describing lower court approach).

regulation.”<sup>155</sup> The Court clarified that the Second Amendment’s scope—including where the right can be exercised—must be determined through a method of analogical reasoning rooted in eighteenth- or nineteenth-century history.<sup>156</sup> Assuming a burdened activity, such as public carry, falls within the coverage of the Second Amendment, the government appears to bear the burden of defending a place restriction with relevant and convincing historical evidence that prior generations formed a consensus that firearms and other weapons could be excluded from the contested location.<sup>157</sup>

Writing as if it had already scoured the historical record, the Court in *Bruen* found that it “yields relatively few 18th- and 19th-century ‘sensitive places’ where weapons were altogether prohibited.”<sup>158</sup> *Bruen* identified “legislative assemblies, polling places, and courthouses” as locations where public carry had historically been banned without any apparent objection.<sup>159</sup> The Court suggested public carry regulations in “new and analogous sensitive places” could also be upheld, but again only if the historical record supported them.<sup>160</sup> To carry that burden, it said, the government must show that analogous historical restrictions on public carry “impose a comparable burden on the right of armed self-defense” and that this burden is “comparably justified.”<sup>161</sup>

To recap, thus far the Court has identified two categories of public places (schools and government buildings) and three specific public locations (polling places, courthouses, and legislative chambers) where governments can presumably prohibit public carry.<sup>162</sup> While the Court allowed that there may be other analogously sensitive places, its own review of the record identified “relatively few” places where firearms were prohibited.<sup>163</sup> In sum, *Bruen* suggested public carry is presumptively protected nearly everywhere and governments bear the burden of rebutting that presumption with historical evidence that a place has traditionally been considered sensitive or is sufficiently analogous to the sensitive places the Court has already identified.

In his *Bruen* dissent, Justice Breyer asked: “So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century

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155. *Id.* at 2126.

156. *Id.* at 2133.

157. *Id.* at 2135.

158. *Id.* at 2133.

159. *Id.*

160. *Id.* (emphasis omitted).

161. *Id.*

162. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (identifying “schools and government buildings” as sensitive places); *Bruen*, 142 S. Ct. at 2133 (identifying “legislative assemblies, polling places, and courthouses” as places where firearms were historically prohibited).

163. *Bruen*, 142 S. Ct. at 2133.



analogue? What about subways, nightclubs, movie theaters, and sports stadiums?”<sup>164</sup> Referring to firearm regulations in places it had identified as traditionally “sensitive,” the Court responded that “courts can use analogies to those historical regulations of ‘sensitive places’ to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.”<sup>165</sup> And again, analogous place restrictions must “impose a comparable burden on the right of armed self-defense” and this burden must be “comparably justified.”<sup>166</sup>

Applying this approach, the *Bruen* majority rejected the argument that the entire island of Manhattan was a sensitive place.<sup>167</sup> The Court explained, “expanding the category of ‘sensitive places’ simply to all places of public congregation that are not isolated from law enforcement defines the category of ‘sensitive places’ far too broadly. Respondents’ argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense . . . .”<sup>168</sup> Of course, the Court’s comments about entire cities did not answer Justice Breyer’s question about specific places within those cities.

After *Bruen*, the contours of the sensitive places doctrine remain largely unsettled. Indeed, some commentators have suggested that referring to the Court’s musings about place restrictions as a “doctrine” is “perhaps a bit generous.”<sup>169</sup> To recap, at this point we have a relatively thin conception of sensitivity and a short list of presumptively sensitive places. *Bruen* retains the sensitive places concept but tethers it to the Court’s newly adopted historical analogy method. Henceforth, governments can apparently prohibit or sharply limit public carry *only* in places that have by established long tradition, and perhaps by national consensus, been treated as sensitive or are sufficiently analogous to such places.

3. *Other Historically Analogous Regulations.*—As noted, in *Bruen* the Court expressly rejected interest balancing or tiered scrutiny as applied to firearms regulations.<sup>170</sup> Indeed, it chastised lower courts that had applied intermediate scrutiny to these regulations for engaging in what the Court characterized as a form of judicial activism.<sup>171</sup> Thus, the government cannot

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

165. *Id.* at 2133 (emphasis omitted).

166. *Id.*

167. *Id.* at 2134.

168. *Id.*

169. Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, “A Map Is Not the Territory”: *The Theory and Future of Sensitive Places Doctrine*, N.Y.U. L. REV. ONLINE (forthcoming) (manuscript at 4) (on file with author).

170. See *supra* note 17 and accompanying text.

171. See *Bruen*, 142 S. Ct. at 2129 (highlighting that the Courts of Appeals’ analysis was inconsistent with *Heller*—a decision that the Court contends rejected intermediate scrutiny).

defend firearm regulations on the ground that they “promote[] an important interest.”<sup>172</sup> Going forward, as the Court suggested in its discussion of sensitive places in *Bruen*, regulations of the public exercise of Second Amendment rights will be judged according to whether they are “consistent with this Nation’s historical tradition of firearm regulation.”<sup>173</sup>

Whatever its ultimate contours, the sensitive places concept will not exhaust the scope of potentially legitimate public carry regulations. Even if a regulation does not qualify as a sensitive place restriction, it might nevertheless be valid if “consistent with this Nation’s historical tradition of firearm regulation.”<sup>174</sup> For example, laws imposing training requirements, criminalizing the public brandishing of firearms, banning public carry of certain types of arms, prohibiting armed groups from assembling in public, or narrowing place or time restrictions on public carry may be valid if they satisfy the Court’s text-and-history standard.<sup>175</sup>

Under *Bruen*, the validity of these or other regulations of textually covered activity will depend on the government’s ability to adduce evidence that its contemporary regulations are analogous to eighteenth- and nineteenth-century laws. The Court adopted various interpretive rules for the assessment of historical analogues. For example, it indicated that the government should produce evidence of a “distinctly similar historical regulation” if addressing a firearms-related problem that was known to the Founders.<sup>176</sup> If prior generations used “materially different means” to address such a problem, *Bruen* indicated that such evidence would support declaring a contemporary firearms regulation unconstitutional.<sup>177</sup> Evidence that courts quashed attempts to regulate firearms on constitutional grounds during the relevant historical period would support the same conclusion.<sup>178</sup>

*Bruen* requires that eighteenth- and nineteenth-century analogues be “relevantly similar” to modern firearm regulations.<sup>179</sup> The Court explained that courts must consider “*how* and *why* the regulations burden a law-abiding

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172. *Id.* at 2126.

173. *Id.*

174. *Id.*

175. *See, e.g.*, Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEXAS L. REV. 1173, 1194 (2021) (concluding *Heller* does not jeopardize brandishing and other firearms offenses); *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (opining that *Bruen* did not invalidate objective public carry licensing laws, including training requirements); *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (acknowledging the historical tradition of banning “dangerous and unusual” weapons); *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886) (upholding conviction for drilling or parading in public with arms).

176. *Bruen*, 142 S. Ct. at 2131.

177. *Id.*

178. *Id.*

179. *Id.* at 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

citizen's right to armed self-defense."<sup>180</sup> Historical laws that served purposes unrelated to or different from the contemporary restriction, or that imposed lesser burdens on self-defense than the current regulation, will not count as relevantly similar analogues.<sup>181</sup>

The Court allowed that, where governments faced “unprecedented societal concerns or dramatic technological changes,” a “more nuanced” approach to historical analogies might be appropriate.<sup>182</sup> *Bruen* also observed that “analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check.”<sup>183</sup> The Court explained that courts should not “‘uphold every modern law that remotely resembles a historical analogue,’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted.’”<sup>184</sup> “On the other hand,” explained the Court, “analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.”<sup>185</sup>

*Bruen* confidently asserted that judges and litigants were up to the task of identifying and assessing historical analogues. It characterized reasoning by analogy as a “commonplace task for any lawyer or judge” and a staple of constitutional interpretation.<sup>186</sup> Having dismissed intermediate scrutiny and other forms of interest balancing as judge-empowering doctrines, the Court replaced these methods with amorphous standards like “resembles,” “outliers,” “dead ringer,” “well-established,” “representative,” and “analogous enough.”<sup>187</sup> It did not clarify which historical periods or eras were relevant in terms of identifying analogues; elaborate on the meaning of tradition (including its existence, duration, enforcement, geographic, and

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180. *Id.* at 2132–33 (emphasis added).

181. *Id.* at 2133–34.

182. *Id.* at 2132.

183. *Id.* at 2133.

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

185. *Id.* (emphasis omitted).

186. *Id.* at 2132.

187. *Id.* at 2133. Commentators have noted the various problems with *Bruen*'s command to engage in analogical reasoning. See Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 52, 70, 72 (noting the degree of discretion inherent in identifying historical outliers); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 15, 38–39, 49, 72) (on file with author) (concluding that redressing the doctrinal problems presented by *Bruen* will “require more than identifying principles of relevant similarity, avoiding anachronism, and addressing institutional limitations”).

evolutionary dimensions); or explain why the absence of positive law or regulatory silence should count against the validity of firearms regulations.<sup>188</sup>

## II. Second Amendment Exceptionalism and Public Carry Super-Rights

In *Bruen*, the Court asserted that its approach to analyzing New York’s public carry licensure law “comports with” and “accords with” First Amendment doctrines.<sup>189</sup> Whether one considers First Amendment doctrines generally or those specifically applicable to public expression, that claim is at best misleading and at worst knowingly false. For a decision that centers on analogical reasoning and declares it “a commonplace task,”<sup>190</sup> it is also embarrassingly hypocritical. Likewise, purporting to equalize Second Amendment rights while adopting an exceptional standard applicable only to the right to keep and bear arms is an act of judicial pretense. The point of the rejoinder that follows is not to argue that the Second Amendment’s public carry doctrines ought to be fashioned in the image of the First Amendment’s public expression standards, which have very serious flaws of their own. Rather, it is to respond to the Court’s claims of interpretive parity and status equality respecting First Amendment and Second Amendment rights.

### A. *The First Amendment Analogy*

In its decisions interpreting the Second Amendment, the Supreme Court has invoked the First Amendment as a kind of lodestar fundamental right. Both *Heller* and *Bruen* leaned into the First Amendment analogy, first to justify recognition of an individual right to keep and bear arms and then to support the Court’s methodological choices.

In *Heller*, the Court noted that both the First and Second Amendment codified pre-existing rights.<sup>191</sup> In terms of scope, the Court observed that just as the Free Speech Clause’s protection extends to modern forms of communication (such as speech on the Internet), so too must the Second Amendment right extend beyond the types of arms available at the founding.<sup>192</sup> At the same time, the Court observed that the Second Amendment, like the First Amendment, is not absolute.<sup>193</sup> In terms of these broad generalities, the Court’s description was accurate.

However, addressing interpretive methodologies, *Heller* appeared to reject an interest-balancing approach to Second Amendment rights—i.e., a

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188. See Charles, *supra* note 29, at 27, 29, 38–39 (discussing open issues relating to *Bruen*’s historical analogy approach).

189. 142 S. Ct. at 2130.

190. *Id.* at 2132.

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

192. *Id.* at 582.

193. *Id.* at 595.

weighing of the individual's right to keep and bear arms against the state's interests in regulating such activities.<sup>194</sup> The Court invoked the First Amendment, which it said "contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. *The Second Amendment is no different.*"<sup>195</sup> The Court also rejected any form of "rationality" review for Second Amendment regulations, claiming that this form of low-level review had never been applied in the free speech context.<sup>196</sup>

*Bruen* doubled down on *Heller*'s First Amendment interpretive analogy. In more express terms, it asserted a form of interpretive parity between First Amendment and Second Amendment rights. The Court wrote that its new history and tradition approach, described in Part I, "accords with" and "comports with" how the Court has long interpreted First Amendment rights.<sup>197</sup>

One might assert *Heller* and *Bruen* were merely speaking in general terms when they invoked the First Amendment analogy. But that claim is belied by both the force and context of the Court's statements. Following its general (but as we will see substantially incomplete) summary of First Amendment doctrine, *Heller* asserted, "*The Second Amendment is no different.*"<sup>198</sup> *Bruen* made the same assertion in more explicit terms. The "accords with" and "comports with" language in *Bruen* immediately followed a discussion of the historical method adopted in *Heller* and *Bruen*.<sup>199</sup> The Court then proclaimed, "*This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms.*"<sup>200</sup> This was followed by passages about historically excluded classes of expression and the government's general burden of demonstrating that restrictions on covered speech are constitutional.<sup>201</sup>

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194. *Id.* at 635. As commentators predicted, however, some interest balancing was inevitable. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–83 (2009) (explaining the distinction between categoricalism and balancing approaches and how this might affect interpretation of the Second Amendment); Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 421–22 (2009) (explaining that some balancing in Second Amendment doctrine is inevitable).

195. *Heller*, 554 U.S. at 635 (emphasis added).

196. *Id.* at 628 n.27.

197. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

198. *Heller*, 554 U.S. at 635 (emphasis added).

199. *Bruen*, 142 S. Ct. at 2129–30.

200. *Id.* at 2130 (emphasis added).

201. *Id.*

It is not possible to avoid or downplay the interpretive analogy. The Court asserts that what it is doing in *Heller* and *Bruen* is “no different” from its approach to fundamental rights including freedom of speech.<sup>202</sup> It asserts in *Bruen* that the Second Amendment’s historical analogue standard “accords with” the approach it has taken when interpreting the First Amendment.<sup>203</sup>

Particularly regarding a decision that purports to be so strongly committed to analogical reasoning, it is important to hold the Court accountable for its own interpretive analogies. It is also important to assess the Court’s claim that it insists only on interpretive parity for the Second Amendment. As the Court has said, “[t]he constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’”<sup>204</sup> However, as explained below, the Second Amendment *is* subject to an entirely different body of rules—one that will expand its scope far beyond that of the First Amendment and other fundamental rights.

#### B. General Disparities

*Heller* and *Bruen* relied on both a general analogy to First Amendment rights and a more specific methodological analogy. Neither holds up under scrutiny. The Court’s general description of First Amendment doctrine was substantially incomplete and misleading. Its invocation of First Amendment interpretive methods was similarly flawed. The Court has recognized a *sui generis* super-right, not a First Amendment analogue.

In pressing the First Amendment analogy, *Heller* and *Bruen* both engaged in selective descriptions of free speech doctrine. *Heller*’s recitation of First Amendment doctrine was glaringly deficient. As discussed in Part I, the First Amendment does indeed contain some coverage exclusions for obscenity, libel, and other categories of speech.<sup>205</sup> It also generally forbids, as the Court observed, viewpoint-based discrimination.<sup>206</sup> So far, so good—at least if one assumes the Second Amendment’s text excludes *something*. However, the Court’s general description of First Amendment doctrine glossed over various critical matters.

The Court has indicated that First Amendment categorical exclusions are the product of history and tradition.<sup>207</sup> That strikes some scholars as a

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202. *Id.*; *Heller*, 553 U.S. at 635.

203. *Bruen*, 142 S. Ct. at 2130.

204. *Id.* at 2156 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)).

205. *See supra* notes 42–46 and accompanying text.

206. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing viewpoint-based regulations as “an egregious form of content discrimination”).

207. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (noting that restrictions upon the content of speech are limited to “historic and traditional categories” (quoting *Simon & Schuster*,

form of revisionist history.<sup>208</sup> The Court's recent effort to recharacterize the First Amendment's categorical exclusions as historically grounded resembles *Bruen*'s effort to recharacterize the First Amendment as the model for Second Amendment doctrines.

Even accepting the Court's historical revisionism, its approach to First Amendment categorical exclusions indicates a limited commitment to history. For example, in its most recent Term, the Court was asked to determine what mental state the First Amendment requires to hold a speaker liable for communicating an unprotected threat.<sup>209</sup> Instead of asking what eighteenth- or nineteenth-century laws said on the matter, the majority based its holding that recklessness was the required *mens rea* primarily on a *balance* between the speaker's right to communicate and the social and other harms caused by threats.<sup>210</sup> In other words, when presented with an opportunity to tie the scope of free speech coverage exclusions to eighteenth- or nineteenth-century laws, the Court balked. It has done precisely the opposite when it comes to the Second Amendment, emphasizing that coverage exclusions must be both textually and historically rooted.<sup>211</sup>

Further, in terms of coverage, the Court's First Amendment analogy does not acknowledge that free speech protection applies only to a relatively small universe of speech activity. In addition to several recognized coverage exclusions, as Fred Schauer has observed, most of the vast universe of speech-restricting laws, including antitrust law, the law of criminal solicitation, and the law of sexual harassment, have not received *any* consideration under the First Amendment.<sup>212</sup> While we do not yet know what the Second Amendment's coverage universe will be, so far it does not appear to have the same limited scope when it comes to "arms" that the First Amendment has regarding "speech." As the Court has made clear, arms includes "all instruments that constitute bearable arms."<sup>213</sup> Applying this capacious standard, the Ninth Circuit Court of Appeals recently held that all "bladed weapons" are arms covered by the Second Amendment's text.<sup>214</sup>

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Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

208. See Lakier, *supra* note 15, at 2207 (observing that "the Court relied very little on historical precedent to actually define the low-value categories").

209. *Counterterman v. Colorado*, 143 S. Ct. 2106, 2111 (2023).

210. See *id.* at 2117 (concluding that a reasonable person standard would "chill too much protected, non-threatening expression").

211. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (holding that a court may conclude that an individual's conduct falls outside the Second Amendment "[o]nly if a firearm regulation is consistent with this Nation's historical tradition").

212. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778, 1783–84 (2004).

213. *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

214. *Teter v. Lopez*, No. 20-15948, 2023 WL 5008203, at \*8–9 (9th Cir. Aug. 7, 2023) (concluding that *all* bladed weapons "facially constitute 'arms' within the meaning of the Second

*Heller* also excluded from its description of First Amendment doctrine the bread and butter of First Amendment methodology—the very interest balancing the Court rejected for Second Amendment rights. But one cannot simply wish away such a core tenet of First Amendment doctrine. As discussed in Part I, the public forum and time, place, and manner doctrines incorporate, or are based on, interest balancing.<sup>215</sup> So are other large swaths of First Amendment doctrine, including content-neutrality analysis and the doctrine relating to expressive conduct.<sup>216</sup> In this respect as well, the Second Amendment’s doctrine *is* substantially different.

The Court’s attempted interpretive analogy ignores the fact that the overall proportion of First Amendment doctrine that depends or relies on history and tradition is vanishingly small. Even leaving aside the public forum and time, place, and manner doctrines, broad areas of First Amendment doctrine relating to the speech rights of public-school students, government employees, contractors, grant recipients, broadcasters, and even governments themselves depend not on close historical analogies but rather on application of bespoke standards the Court has developed—many of them based on interest balancing.<sup>217</sup> The same is true for doctrines the Court has developed for tort and other common law actions that implicate freedoms of speech and press.<sup>218</sup> As David Strauss has observed, the Court’s interpretation of the First Amendment is a product of precedent and common law, not text, historical evidence, or eighteenth-century understandings.<sup>219</sup>

Nevertheless, in *Bruen*, the Court defended its interpretive analogy on the ground that constitutional doctrines, including First Amendment

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Amendment” and rejecting Hawaii’s argument that the “purported ‘dangerous and unusual’ nature of butterfly knives” takes them outside the coverage of the Second Amendment).

215. See *supra* subpart I(A).

216. See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 170–71 (2015) (applying strict scrutiny to a content-based restriction on speech); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (applying intermediate scrutiny to a federal law banning destruction of draft cards).

217. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (adopting a “material and substantial inference” standard for regulations of public school student speech); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (adopting a balancing standard to determine the scope of public employee speech rights); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (applying unconstitutional conditions doctrine to federal funding restrictions on abortion counseling); *FCC v. Pacifica Found.*, 438 U.S. 726, 734, 738 (1978) (upholding order limiting time of day when “indecent” speech could be broadcast on the radio); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–66 (1980) (applying intermediate scrutiny to laws that burden commercial speech).

218. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (adopting an “actual malice” standard to be applied to defamation claims brought by public officials); *Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (holding that speech on “matter[s] of public concern” could not be the basis for an intentional infliction of emotional distress claim).

219. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (explaining how “two of the most important developments in our constitutional system are the products not of the text of the Constitution, and not of the original understandings, but of a common law approach to the Constitution”).



doctrines, frequently require courts to “consult history” and “loo[k] to history for guidance.”<sup>220</sup> But, as interpretive methods, consulting and looking to history, which is indeed a fair description of at least some First Amendment standards, are a far cry from the kind of historical analysis *Bruen* demands. Even at a very high or superficial level of generality, Second Amendment methodology *is* different—and markedly so.<sup>221</sup>

The *Heller* majority also boldly asserted: “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”<sup>222</sup> The Court did not look very hard. Under the First Amendment, regulations of core political speech that are based on content are not automatically invalid. Rather, they are subject to strict scrutiny, a form of the interest balancing the Court rejected for regulations of core self-defense rights. Under that standard, the Court has held that even core political speech can indeed be outweighed by compelling governmental interests.<sup>223</sup> Core political speech is also deeply affected by nominally-content-neutral time, place, and manner regulations, which again are reviewed under an interest-balancing approach. The *Bruen* majority surely must have realized this: its own description of First Amendment doctrines cited precedents that expressly *embraced* the very interest balancing the Court purported to reject.<sup>224</sup>

The Court’s discussion of “core protection” in *Heller* also confused this concept for doctrines relating to *uncovered* content categories. The Court asserted that since legislatures historically lacked the authority to suppress the “expression of extremely unpopular and wrongheaded views,” the core of the First Amendment, like the core of the Second Amendment, was

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220. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (alteration in original) (quoting *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

221. *Bruen*’s exceptionalism extends beyond the First Amendment’s freedom of speech, assembly, and press rights. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to some laws that restrict free exercise of religion); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny under the Fifth Amendment’s equal protection component to racial classifications); *Clark v. Jeter*, 486 U.S. 456, 461, 463–64 (1988) (applying intermediate scrutiny under the Fourteenth Amendment’s Equal Protection Clause to gender-based classifications).

222. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

223. *See, e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 36, 39 (2010) (upholding content-based ban on providing “material support,” in the form of instruction and representation, to designated foreign terrorist organizations); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455, 457 (2015) (upholding state bar rule prohibiting judicial candidates from personally soliciting campaign funds).

224. *See Bruen*, 142 S. Ct. at 2130 (relying on *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000) and *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). In fact, *Playboy* applied strict scrutiny to a content-based speech regulation and *Konigsberg* explained that regulations of covered expression involve “a weighing of the governmental interest involved.” *Konigsberg*, 366 U.S. at 51; *Playboy*, 529 U.S. at 815.

determined at the founding.<sup>225</sup> But under the First Amendment, whether the government can regulate extremely unpopular and wrongheaded views is not a question of categorical exclusion. Rather, that determination depends on application of the content-neutrality standard, which is not a Founding-era analogue but a modern invention.<sup>226</sup> In any event, even the core as the Court describes it is subject to interest balancing and various standards not at all rooted in history, e.g., strict scrutiny if government regulates according to content, intermediate scrutiny if a regulation only incidentally burdens political speech, explicit balancing if the political speech is communicated by federal employees, and so on.<sup>227</sup>

The Court also erred regarding more specific claims. It is true, as *Heller* indicates, that rational basis is not among the tiers of scrutiny the Court has generally applied to speech regulations.<sup>228</sup> However, the Court has allowed governments to burden expressive rights in nonpublic fora so long as the regulations are *reasonable* and viewpoint-neutral.<sup>229</sup> Similar logic has been applied to spending conditions that burden expression: in one such case, the Court concluded, “It is also *not irrational* for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans’ organizations.”<sup>230</sup> Justice Scalia, the author of the *Heller* opinion, once asserted that generally applicable laws are not entitled to *any* First Amendment scrutiny—even if they incidentally burden expression.<sup>231</sup> In many respects the Court did not acknowledge in *Heller* and *Bruen*, governments retain broad authority to regulate expression, including core political speech.

General First Amendment doctrines are a poor analogy for Second Amendment doctrines as developed so far. Something “accords with” or “comports with” another thing when it is consistent with that thing.<sup>232</sup> When it comes to the two fundamental rights provisions at issue, agreement or fit

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225. *Heller*, 554 U.S. at 635.

226. *See supra* subpart I(A).

227. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (applying strict scrutiny to a content-based restriction on speech); *United States v. O’Brien*, 391 U.S. 367, 371, 377 (1968) (applying intermediate scrutiny to a federal law banning destruction of draft cards); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (adopting a balancing standard to determine the scope of public employee speech rights).

228. *Heller*, 554 U.S. at 628 n.27.

229. *See Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (discussing applicable standards for government restrictions in nonpublic fora).

230. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983) (emphasis added).

231. *Heller*, 554 U.S. at 572; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (asserting public indecency laws do not merit First Amendment review even if they burden expression).

232. *Accord*, THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH (1999); *Comport*, THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH (1999).

is absent even at a very high level of generality. The Court's reliance on skeletal descriptions of basic First Amendment doctrines is also an implausible basis on which to stake a claim of doctrinal parity or equal status (whatever that might mean as applied to constitutional rights). Even at this level of generality, the Second Amendment operates more like a super-right than an equal right.

C. *Public Expression and Public Carry Doctrines*

The Court's analogical pretense becomes even clearer once we compare First Amendment public expression and Second Amendment public carry doctrines, as described in Part I. *Bruen* was about public carry licensure, a restriction on the public exercise of Second Amendment rights. Yet the standard it adopts does not comport with, accord with, or even resemble doctrines governing public expression. In fact, as developed so far, public carry doctrine is closer to a mirror image of First Amendment doctrines than an interpretive analogue.

As a general matter, there is no First Amendment analogue for the type of historical-record-scouring and analogical evidence *Bruen* demands. The Court's assertion that certain categories of expression "long familiar to the bar" have been excluded from First Amendment coverage hardly suffices as an analogue for *Bruen*'s historical deep dive, which would entail scouring the relevant record for convincing evidence that speech categories were historically excluded.<sup>233</sup> The public forum doctrine's bare references to "immemorial" or "time out of mind" access to public streets and parks are likewise faint shadows of *Bruen*'s demanding historical approach.<sup>234</sup> The Court has never presented *any* historical evidence for the public forum categories, but has simply asserted that some places have "immemorially" been open for expression (even though, prior to 1939, they clearly were not).<sup>235</sup> References to and unsupported assertions of history and tradition are clearly not what the Court has in mind for the Second Amendment. Simply put, when confronted with a public speech regulation, the Court does not turn to the history books to determine its validity. As anyone who has read even a sample of the Court's First Amendment precedents can attest, history plays virtually no role at all when it comes to interpreting public expression rights.

There are several more specific problems with the Court's interpretive analogy as it pertains to public exercise of the respective rights. For instance, the threshold inquiries concerning coverage are at best superficially related. First Amendment and Second Amendment doctrines both entail two steps.

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233. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022) (quoting *United States v. Stevens*, 559 U.S. 460, 468–71 (2010)).

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

235. *See supra* notes 69–73 and accompanying text.

Step one, a coverage inquiry, requires courts to consider whether regulated public expression or public carry activities come within the scope of the constitutional right.<sup>236</sup> As discussed, under the First Amendment this inquiry focuses in part on excluded classes or categories of speech. Under the Second Amendment, *Bruen*'s textual inquiry is apparently intended to identify classes or categories of *conduct* that are not covered by the Second Amendment.

However, the coverage resemblance ends at the surface. Under the First Amendment, certain narrow categories of public expression, including incitement and threats, are indeed excluded from coverage.<sup>237</sup> So is conduct that is violent, breaches public order, and is insufficiently expressive to trigger First Amendment scrutiny.<sup>238</sup> By contrast, at least as it pertains to regulations of the act of public carry, the Second Amendment's textual inquiry appears to preclude little or nothing at all. Although the First Amendment excludes communications that threaten others or incite violence via communication, as a function of text the Second Amendment appears to have no analogous exclusions for arms. *Bruen* held that the textual reference to "bear arms" covers public carry, and lower courts have read that to mean the act of carrying firearms in public for self-defense is textually protected conduct.<sup>239</sup> If that is correct, the scope of public carry under the Second Amendment is much broader than the scope of public expression under the First Amendment.

Further, the Second Amendment's doctrine relating to access to public places hardly accords with the First Amendment's public forum doctrine. Both the First Amendment and Second Amendment protect public exercise of fundamental rights. However, that is where the similarity ends. Second Amendment doctrines radically depart from First Amendment methodology as it pertains to access to public places. They deviate in terms of access

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236. See *supra* Part I.

237. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam) (noting that threats are not covered by the Free Speech Clause); *Virginia v. Black*, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."); *Counterman v. Colorado*, 143 S. Ct. 2106, 2117 (2023) (holding that speakers can be held criminally liable for recklessly communicating threats).

238. See, e.g., *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (requiring that to invoke the First Amendment, a challenger must demonstrate an intent to communicate a message and there must be a great likelihood that the audience would understand the message).

239. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134 (2022) ("We therefore turn to whether the plain text of the Second Amendment protects . . . carrying handguns publicly for self-defense. We have little difficulty concluding that it does."); see also *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*72 (D.N.J. May 16, 2023) ("Unquestionably, the . . . Plaintiffs' proposed course of conduct of carrying their handguns in public for self-defense falls within the Second Amendment's text."); *Hardaway v. Nigrelli*, 636 F. Supp. 3d 329, 332 (W.D.N.Y. 2022) (concluding that public carry is covered by the Second Amendment's text).

presumptions, burdens, evidentiary requirements, and deference to the government's managerial authority over public resources.

The sensitive places concept *reverses* the constitutional presumptions the Court has adopted under First Amendment doctrines pertaining to public places. While speakers have robust access rights only in places time out of mind used for expression or purposefully designated for such use, public carry seems to be presumptively allowed in every public place absent evidence of an established and relevant history of exclusion (or a locational restriction very closely analogous to the few the Court has identified).<sup>240</sup> As a result, arms carriers have stronger and broader claims to exercise their rights in public places than do speakers.

For example, the Court has upheld bans or severe restrictions on public expression in state fairgrounds, airport terminals, sidewalks abutting post offices and other government buildings, and the curtilage of a jailhouse.<sup>241</sup> Lower courts have upheld similar restrictions in nonpublic fora including public subways, the Supreme Court plaza, the Jefferson Memorial in Washington, D.C., the plaza outside the Lincoln Center in New York City, and other venues.<sup>242</sup> Even core political speech has been banned in these and other places. However, the Second Amendment is notably different. Thus far, the Court has identified only five types of public places—two general categories (schools and government buildings) and three more specific places (polling places, courthouses, and legislative assemblies)—where firearms can presumptively be banned.<sup>243</sup> As a result, individuals have strong access claims under the Second Amendment in most public places, whereas speakers are free to communicate only in certain quintessential fora and other places government has intentionally opened to expression.

To be sure, there is some overlap under the respective doctrines in terms of locational restrictions. For example, although it reached these conclusions by way of disparate methods, the Court has indicated that bans on public

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240. See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (describing forum categories); see also *supra* subpart I(A).

241. See *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (upholding ban on leafletting on a sidewalk used to enter a United States Post Office building); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (upholding ban on leafletting and solicitation in public airport terminal); *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966) (upholding the trespass convictions of civil rights protesters located in the curtilage of a jailhouse); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding ban on certain expressive activities outside booths at state fair).

242. See, e.g., *Hodge v. Talkin*, 799 F.3d 1145, 1170 (D.C. Cir. 2015) (upholding a ban on assemblies on the Supreme Court plaza); *Oberwetter v. Hilliard*, 639 F.3d 545, 553 (D.C. Cir. 2011) (upholding ban on expression inside the Jefferson Memorial); *Hotel Emps. & Rest. Emps. Union v. City of New York Dept. of Parks & Recreation*, 311 F.3d 534, 554 (2d Cir. 2002) (upholding prohibition of union leafletting and rally in Lincoln Center plaza); *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 164 (2d Cir. 1990) (upholding ban on begging in New York City subways).

243. See *supra* note 162 and accompanying text.

expression and public carry are valid near polling places and courthouses.<sup>244</sup> However, these are exceptions to the general rule that public carry will be presumptively allowed in far more public places than public expression. Consider, for example, a law banning speech from the concourses of a public zoo. That law would likely be valid as a reasonable and viewpoint-neutral restriction on expression in a nonpublic forum, amply supported by governmental safety and order interests. However, applying *Bruen*'s standard, courts have held that bans on public carry in those same concourses violate the Second Amendment.<sup>245</sup> If post-*Bruen* lower court decisions are any indication of what is on the horizon, the same constitutional disparity will apply across a range of public properties including buses, transit hubs, and public museums.<sup>246</sup>

In addition, under First Amendment doctrine the burden rests on speakers to establish a right of access to public properties. They must show either that the property in question has time out of mind been open to expressive activities or that government *intended* the public, or some portion of it, to engage in expression there.<sup>247</sup> By contrast, under the Second Amendment, once an individual demonstrates the text covers the regulated conduct (public carry), the burden shifts to the government to justify the locational restriction or ban.<sup>248</sup> In other words, arms are presumptively bearable *everywhere* confrontation might take place and self-defense rights might be implicated—except in places governments can prove there is a long tradition of banning or severely restricting them or places that meet some uncertain and largely unspecified analogical standard.

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244. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding ban on political expression near polling places); *Bruen*, 142 S. Ct. at 2133 (observing that public carry has been historically banned near polling places and courthouses); *Cox v. Louisiana*, 379 U.S. 559, 562–63 (1965) (observing that speech can be banned near courthouses to protect the judicial system).

245. See *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 WL 16744700, at \*67 (N.D.N.Y. Nov. 7, 2022) (invalidating ban on public carry at public zoos); *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*81, \*108 (D.N.J. May 16, 2023) (granting preliminary injunction against enforcement of law banning carrying of firearms at the zoo).

246. Courts have already invalidated public carry bans in these and other places. See *Antonyuk*, 2022 WL 16744700, at \*71 (invalidating ban on public carry in aviation transportation facilities, airports, and buses); *Koons*, 2023 WL 3478604, at \*86 (invalidating public carry ban in public museums and libraries). By contrast, lower courts have *upheld* speech restrictions in the very same places. See *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 164 (2d Cir. 1990) (upholding ban on begging and panhandling in New York City subways); *Price v. Garland*, 45 F.4th 1059, 1068 (D.C. Cir. 2022) (listing museums as an example of a nonpublic forum); *Diener v. Reed*, 232 F. Supp. 2d 362, 384 (M.D. Pa. 2002), *aff'd*, 77 Fed. App'x 601 (3d Cir. 2003) (concluding municipal museum was a limited public forum).

247. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (explaining the public forum intent requirement).

248. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130, 2134 (2022).

First Amendment and Second Amendment doctrines also diverge regarding the scope of governments' managerial authority over public properties. Under First Amendment doctrines, governments can manage properties flexibly pursuant to new and evolving policies. They can open or close most public properties to expression *by fiat* and are not required to maintain properties as public fora indefinitely.<sup>249</sup> The Court has indicated that, like any private property owner, government can preserve most public properties for their intended uses—including by banning or severely restricting expression there.<sup>250</sup> By contrast, under the Second Amendment's sensitive places doctrine, history generally confines present-day public property managers to access policies adopted by their eighteenth- or nineteenth-century forebears.<sup>251</sup> As developed so far, the doctrine makes no room for present-day managerial considerations, much less the kind of deference shown to property managers and proprietors under First Amendment doctrines.

Finally, public carry doctrines substantially diverge from public expression doctrines at the protection stage of the inquiry. As noted in Part I, regulations of public expression, including in quintessential public fora, are subject to the very means-ends scrutiny and judicial balancing the *Bruen* Court expressly rejected.<sup>252</sup> Further, under the First Amendment, content-based regulations receive strict scrutiny, while content-neutral regulations are assessed under an intermediate standard of review.<sup>253</sup> By contrast, the *only* interest-balancing that matters under *Bruen*'s approach is the balancing legislatures and courts performed in the eighteenth or nineteenth centuries.<sup>254</sup>

As discussed earlier, sensitive places doctrine does not necessarily define the limits of regulatory authority over public carry. However, licensing, permitting, zoning, and other laws will be valid only if they meet *Bruen*'s exacting historical standard. Governments will need to come to court armed with evidence of historically analogous laws and regulations for each and every public carry measure. By contrast, under the time, place, and manner doctrine, governments can ban expression or certain means of communication for a host of reasons and without the kind of empirical

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249. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

250. *See, e.g., Hodge v. Talkin*, 799 F.3d 1145, 1158 (D.C. Cir. 2015) (concluding that the Supreme Court plaza is a “nonpublic forum”).

251. *See supra* note 156 and accompanying text.

252. *See supra* Part I; *Bruen*, 142 S. Ct. at 2129–30 (citing First Amendment precedents based on interest balancing).

253. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (stating the strict scrutiny standard applies to content-based laws); *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989) (stating the intermediate scrutiny standard applies to content-neutral laws).

254. *See Bruen*, 142 S. Ct. at 2131 (“It is this balance—struck by the traditions of the American people—that demands our unqualified deference.”).

support *Bruen* demands.<sup>255</sup> They have even greater latitude in nonpublic fora, which governments can regulate like any private property owner.<sup>256</sup> Again, Second Amendment doctrines do not recognize anything remotely comparable.

Governments have long exercised broad authority over public expression. Under the intermediate scrutiny standard applied to time, place, and manner regulations, they have imposed a host of restrictions on public expression: permitting conditions, fees, insurance requirements, speech zones, buffer zones, local zoning restrictions, and bans on speech and assembly at designated locations including health care clinics, funerals, national monuments, and the homes of federal judges.<sup>257</sup> As noted, the Court has recognized an array of governmental interests as sufficiently important to justify such measures, including public safety, order, tranquility, repose, privacy, aesthetics, and the appearance of judicial neutrality.<sup>258</sup>

Under First Amendment doctrines, government managers can also tailor regulations to local conditions such as traffic patterns, population density, and spatial limitations.<sup>259</sup> By rejecting interest balancing and intermediate scrutiny, *Bruen* appears to prohibit *any* consideration of the current public safety effects of public carry—much less the long list of non-safety considerations deemed important enough to justify burdens on public expression. Further, in contrast to their police power to tailor expressive regulations to local circumstances, under *Bruen*'s approach governments will lack the power to regulate public carry according to current local cultures, norms, geographies, and other circumstances.<sup>260</sup>

The limited scope of regulatory authority under the Second Amendment will affect not only *where* firearms can be restricted or banned but a broader array of localized regulations of public carry.<sup>261</sup> In contrast to public expression, which localities are generally allowed to regulate, in many states

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255. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808, 810 (1984) (upholding ordinance banning the posting of signs on public property).

256. See *supra* note 229 and accompanying text.

257. See 18 U.S.C. § 1507 (banning picketing or parading—with the intent to influence any judge, juror, witness, or court officer—in or near a building housing a United States court or a building or residence occupied by a federal judge); ZICK, *supra* note 22, at 40, 50 (discussing speech and assembly bans at a healthcare clinic, a funeral, and the Jefferson Memorial); see also ZICK, *supra* note 22, at 40, 87 (highlighting various types of government-imposed restrictions on public expression).

258. See *supra* notes 110–118 and accompanying text.

259. See *infra* note 275 and accompanying text.

260. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (arguing that Second Amendment doctrines should account for variations in rural and urban gun cultures).

261. See *id.* at 142–46 (discussing types of arms and types of carry restrictions); see also SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 142 (2006) (“The first laws banning concealed weapons enacted in the period between 1813 and 1859 were essentially time, place, and manner restrictions.”).



legislatures have forbidden localities to regulate any aspect of public carry.<sup>262</sup> That restriction further shrinks local authority to regulate public carry, again in a manner that has no relevant analogue in the context of public expression.

It is certainly true, as the *Bruen* majority observed, that the First Amendment does not require that speakers demonstrate “some special need” to engage in “unpopular speech.”<sup>263</sup> As the Court’s analogy suggests, governments may only impose *objective* permit schemes with respect to both activities.<sup>264</sup> However, that is only part of the doctrinal story. It is as important to understand what the First Amendment *allows* governments to do as it is to recite what it forbids. As the Court has interpreted the free speech right in public places, governments are allowed to burden public expression in a host of ways *Bruen* does not contemplate or likely allow.

For example, under *Bruen* it seems highly implausible that governments will be allowed to regulate public carry to preserve a certain community aesthetic, protect the tranquility of individuals intimidated by the presence of firearms, ban unpleasant forms of firearms conduct, or generally maintain public order. Those considerations are relevant, if at all, only insofar as the government can prove past generations of lawmakers took them into consideration *and* reached a similar conclusion that they warranted firearms restrictions. *Bruen* makes clear that as freestanding or general governmental interests, these concerns do not authorize burdens on public carry.<sup>265</sup> In contrast, each has long authorized governments to regulate public expression.<sup>266</sup> To be sure, the Court has observed that the Second Amendment right, like the freedom of speech, is not absolute.<sup>267</sup> But that superficial similarity tells us very little. In terms of the restrictions the rights permit, the Second Amendment *is* different.

The Court has long recognized that governments have a duty to maintain public order to protect liberty. Regarding public expression, the Court has recognized time and again that some restrictions are necessary to preserve peace, order, public safety, and other collective goods:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any

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262. See Blocher, *supra* note 260, at 133–36 (critiquing preemption of local firearm regulation).

263. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

264. See *id.* at 2122 (recognizing that many states have objective permitting schemes for public carry); see also *id.* at 2162 (Kavanaugh, J., concurring) (observing that the Court’s decision did not call into question objective permitting schemes). Notably, the Justices did not provide any historical support for their seeming acceptance of objective permitting requirements.

265. See *id.* at 2129–30 (reiterating the history and tradition standard).

266. See *supra* subpart I(A).

267. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (noting the right conferred by the Second Amendment “was not unlimited, just as the First Amendment’s right of free speech was not”).

time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.<sup>268</sup>

The Court has even observed that since they raise distinct public order and safety concerns, certain forms of expressive conduct, including demonstrations and pickets, are not entitled to the *same* First Amendment protection as what it has sometimes referred to as pure speech.<sup>269</sup> The Court has done this even though the relevant regulations burden the exercise of fundamental constitutional rights.

Under similar logic, restricting arms-bearing at public gatherings, demonstrations, public exhibitions, and other events likewise ensures “the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.”<sup>270</sup> If no speaker would be “justified in ignoring the familiar red light because this was thought to be a means of social protest” or “insist[ing] upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly,” the Court’s purported analogy suggests there must or should be similar limits on where and how arms-bearers exercise their rights.<sup>271</sup> If acts of civil disobedience such as ignoring red lights or blocking traffic are treated as gateways to anarchy and public disorder under the First Amendment, courts should not be required to turn a blind eye to the imminent danger of arming citizens with deadly weapons in anticipation of confrontation in public places. And yet *Heller* and *Bruen* appear not to recognize the logic of or need for this sort of parity.

Perhaps, one might argue, the First Amendment analogy must be interpreted considering the manner of exercise of the respective rights. For instance, in many cases public expression is engaged in as a group activity, whereas public carry is more frequently a form of individual conduct. However, the Court’s First Amendment precedents draw no such distinction. Free speech doctrines apply to individual speakers and groups alike.<sup>272</sup> Thus, a solo pamphleteer or picketer is subject to the same limits as a group or assembly. Further, to the extent the Court has taken the special dangers of collective exercises of First Amendment rights into account, this too demonstrates its willingness to *balance* the government’s interests against

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268. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

269. *See id.* at 555 (“We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.”).

270. *Id.* at 554.

271. *Id.*

272. *See supra* note 37.

the speakers' First Amendment rights—something, again, *Bruen* says courts cannot do when interpreting the Second Amendment.<sup>273</sup>

If we were to take the Court's First Amendment analogy seriously, the sensitive places concept would justify public carry bans or significant restrictions in places such as military bases, airport terminals, sidewalks abutting postal buildings, state fairs, and other places.<sup>274</sup> Under the First Amendment's doctrine, the Court has upheld such regulations as necessary to prevent fraudulent behavior, ensure the safe flow of pedestrian traffic, protect commerce, and ensure that public properties serve their intended functions—again, without ever saying a word about how these restrictions compare to eighteenth- or nineteenth-century laws.<sup>275</sup> Under the Second Amendment, by contrast, governments are forbidden to rely on social harms except as they are reflected in the historical record.

Further, under the First Amendment, otherwise lawful public expression can be restricted for content-neutral reasons so long as individuals or groups have access to alternative channels of communication—even if those channels are measurably less-effective ways of communicating thoughts and ideas.<sup>276</sup> By contrast, under *Heller* and *Bruen* government cannot defend public carry regulations by arguing that individuals who have access to one type of firearm or weapon can be prohibited from keeping and bearing some other lawful weapon.<sup>277</sup> Again, the Second Amendment *is* different, and appreciably so.

In *Bruen* the Court nearly let slip that its approach to Second Amendment rights was exceptional:

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such

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273. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129 (2022).

274. See *Greer v. Spock*, 424 U.S. 828, 838 (1976) (upholding regulations that barred political activities, including speeches and demonstrations, on the grounds of a military base); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677, 685 (1992) (upholding restrictions on speech inside public airport terminal); *United States v. Kokinda*, 497 U.S. 720, 732–33 (1990) (upholding leafletting ban on sidewalk fronting postal office); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 & n.16 (1981) (upholding rule limiting certain expressive activities at the state fair to booths).

275. See *Greer*, 424 U.S. at 838 (ensuring the military base serves its intended function); *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 684 (mentioning that preventing fraudulent behavior is an “appropriate target of regulation”); *Kokinda*, 497 U.S. at 725 (discussing protecting commerce); *Heffron*, 452 U.S. at 651 (“The flow of the crowd and demands of safety are more pressing in the context of the Fair [than on public streets].”); *Bruen*, 142 S. Ct. at 2176 (Breyer, J., dissenting) (“As *Heller*'s First Amendment example illustrates, the Court today is wrong when it says that its rejection of means-end scrutiny and near-exclusive focus on history ‘accords with how we protect other constitutional rights.’”).

276. See *supra* section I(A)(3).

277. See *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”).

difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. *But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.*<sup>278</sup>

Why “elsewhere” but not “here”? Although the Court did not explain, it suggested that at least some regulations of fundamental rights do merit deference. Thus, under the First Amendment, deference is appropriate so long as public expression (even if about matters of public concern) is not regulated because of its unpopular viewpoint, while under the Second Amendment it is simply *never* appropriate. Deference to legislative interest balancing is common under the time, place, and manner doctrine.<sup>279</sup> As the Court observed in a case involving limits on demonstrations on the National Mall, the doctrine does not “assign to the judiciary the authority to replace the Park Service as the manager of the Nation’s parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.”<sup>280</sup> By contrast, according to the Court it would be inappropriate to defer to *any* measure that regulates conduct covered by the Second Amendment’s text.<sup>281</sup> Under that approach, even incidental burdens on the right may require strong historical support. Of course, that approach facially treats the Second Amendment as exceptional by defining its core as essentially *every* exercise of the right and precluding interest balancing regardless of context. Put another way, under the Court’s doctrines the First Amendment is mostly periphery and little core, while the Second Amendment is mostly core and little periphery.

None of the foregoing comports with First Amendment doctrine. Indeed, it is so obvious that public carry doctrine radically departs from any supposed First Amendment analogue that one wonders how the Court could have made such a claim. *Bruen* recognizes a right that is seemingly immune from—and impervious to—the kinds of regulations that have long been upheld under the First Amendment. The Court has shown no sign that it intends to change either doctrine in ways that bring them closer together. If one had to guess, however, it seems more likely that the Second Amendment will continue to develop as a super-right while public expression will

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278. *Bruen*, 142 S. Ct. at 2131 (emphasis added).

279. *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (noting that “restrictions of [time, place, or manner] are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information”).

280. *Id.* at 299.

281. *See Heller*, 554 U.S. at 635 (observing that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense).

continue to be regulated and managed under First Amendment doctrines that provide far less robust protection.

*D. Public Carry in Accord with Public Expression Doctrines*

The Court's invocation of the First Amendment analogy in *Heller* and *Bruen* raises an intriguing question. What *would* Second Amendment public carry doctrines look like if they did comport with First Amendment public expression doctrines?

First, public carry rights would be subject to significant threshold coverage limits.<sup>282</sup> *Bruen* may contemplate some such limits, for example restrictions on who can carry or what they can carry in public. As noted, however, with respect to the act of public carry itself one can just as plausibly read *Bruen* as establishing no threshold textual limit at all. So long as a person is carrying a weapon for self-defense, the textual issue is resolved, and all other scope questions relate to stage two's historical inquiry. A Second Amendment that identified *several* public carry coverage exclusions would better comport with First Amendment doctrines relating to public expression.

Second, a public carry doctrine that accords with public expression doctrine would adopt a presumptive right to carry in only a few categories of public places—perhaps only those open time out of mind or designated for that purpose.<sup>283</sup> Second Amendment doctrine would otherwise place the burden on would-be arms-carriers to demonstrate a right of access to a public place for purposes of public carry.<sup>284</sup> Under an approach that comports with the First Amendment, the access right would depend primarily on the government's intent, as demonstrated by its past practices and policies, to exclude or allow public carry on the premises. Even in places where public carry has been allowed, the government would have the authority to change its mind and close the public carry forum. In addition, the Court would need to recognize at least some public places where the government, like any private property owner, could ban firearms to preserve the forum for its intended use. In sum, regarding public carry, the Court would have to recognize that the government retains significant managerial authority when it comes to public places.

Third, under supposed First Amendment analogues, in *all* public properties where public carry was allowed, governments could regulate the activity in the interest of public safety, order, tranquility, and other interests.<sup>285</sup> A person carrying a firearm may have a right to do so in a public park, for example, but only at certain times of day, or only in certain areas of

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282. See *supra* subpart I(A).

283. See *supra* subpart I(A).

284. See *supra* subpart I(B).

285. See *supra* subpart I(A) and notes 110–118 and accompanying text.

the park, or only in a concealed but not open manner. Even flat bans on firearms would be constitutional if they posed a peculiar danger in the place or constituted the very “evil” the government sought to regulate.<sup>286</sup> As under the First Amendment, governments would be empowered to consider “psychological and economic” interests when regulating public carry.<sup>287</sup> As the Court put it in a decision upholding a ban on public signage including campaign signs: “The character of the environment affects the quality of life and the value of property in both residential and commercial areas.”<sup>288</sup> Second Amendment doctrines would need to acknowledge that widespread public carry and firearms can have similar negative effects.

Finally, if an individual had some alternative means of self-defense, including access to less-lethal arms, a public carry regulation would generally be valid notwithstanding that the form of self-defense was not the most optimal.<sup>289</sup> In other words, arms-carriers would be no more entitled to their choice of self-defense instrument than speakers are to their preferred means and location of expression.

The foregoing approach would not render the Second Amendment a second-class right. To the contrary, it accords and comports with how the First Amendment has long been interpreted. Again, the point of the Article’s analogical rejoinder is not to urge the Court to apply the First Amendment’s doctrines to regulations of public carry. Rather, it is to demonstrate how disingenuous and off-base it is to claim that Second Amendment doctrine tracks First Amendment standards. The Court could decide to revise its Second Amendment approach to align more closely with First Amendment doctrines. Or it could decide to revise its First Amendment doctrines so that they are more like the Second Amendment super-right it has recognized. What the Court cannot plausibly maintain, at least under current doctrines, is interpretive parity between fundamental rights of public expression and public carry.

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286. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (upholding city ordinance that required musicians to use the city’s sound technician and sound board for performances, to reduce noise levels in the city); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (upholding city ordinance banning the posting of signs on city property based on substantial aesthetic interests).

287. *Taxpayers for Vincent*, 466 U.S. at 817.

288. *Id.*

289. See generally Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 HARV. J. LEGIS. 279 (2016) (discussing whether access to non-lethal alternatives to self-defense satisfies the Second Amendment).

### III. The Hazards of Second Amendment Exceptionalism

*Heller* and *Bruen* have been attacked historically, methodologically, and on other grounds.<sup>290</sup> This Article sets the record straight on the Court's flawed analogy between First Amendment and Second Amendment doctrines. But even if the Court had not invoked the First Amendment, the fact remains that the Court is constructing radically different constitutional doctrines for public expression and public carry. The Court's approach is already producing anomalous, and in some instances dangerous, results in lower courts.<sup>291</sup> More broadly, as it concerns First Amendment and Second Amendment rights, the Court's Second Amendment exceptionalism threatens public expression and undermines peaceful democratic discourse.

#### A. *Anomalous and Dangerous Results*

As some of the discussion thus far has suggested, methodological and other disparities affecting First Amendment and Second Amendment rights will produce disparate results in actual cases. Thus far the Court has not been moved by concerns about the social costs associated with broad interpretations of public carry and other Second Amendment rights. In *Heller*, the Court acknowledged "the problem of handgun violence in this country," but asserted that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."<sup>292</sup> Again, that judicial attitude stands in stark contrast to the Court's consideration of social and other harms associated with freedom of speech, which have frequently been invoked to restrict political and other kinds of expression.

This disparity has already contributed to anomalous and dangerous results in terms of public expression and public carry rights. The scope of public expression and public carry rights will affect the character of the public sphere by determining which rights are protected there.<sup>293</sup> Consider the following examples of restrictions on public expression and public carry, and the likely outcomes in challenges brought under the respective constitutional standards:

- Under the First Amendment, governments can ban demonstrators from carrying objects including sign poles at public demonstrations to protect

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290. See generally Charles, *supra* note 29 (critiquing *Bruen's* methodology); ROBERT J. SPITZER, *THE GUN DILEMMA: HOW HISTORY IS AGAINST EXPANDED GUN RIGHTS* (2023) (criticizing the Court's treatment of the history of gun laws).

291. See *supra* notes 35, 149, 239, 242 and accompanying text.

292. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

293. See Joseph Blocher & Reva Siegel, *Guns Are a Threat to the Body Politic*, ATLANTIC (March 8, 2021, 1:03 PM), <https://www.theatlantic.com/ideas/archive/2021/03/guns-are-threat-body-politic/618158/> [<https://perma.cc/3BK9-6LVA>] (encouraging courts and lawmakers to consider the social harms caused by the proliferation of firearms in public places).

the public and law enforcement officers from physical harm.<sup>294</sup> By contrast, the Second Amendment covers and protects the bearing of objects commonly used for self-defense and confrontation, perhaps including poles, baseball bats, and other dangerous arms.<sup>295</sup>

- Under the First Amendment, some courts have held that panhandlers can be excluded from public subway systems based on safety and public order concerns.<sup>296</sup> By contrast, under the Second Amendment, armed individuals must be allowed on the subway absent proof that eighteenth- or nineteenth-century lawmakers banned firearms from relevantly similar places.<sup>297</sup>
- Under the First Amendment, authorities can ban certain forms of public expression to address the problem of visual clutter.<sup>298</sup> Under the Second Amendment, by contrast, public carry's current effects on the appearance, tone, or tenor of public places are only relevant insofar as this was the basis for banning public carry from the same or similar places under "relevantly similar" laws enacted during the Founding or Reconstruction eras.<sup>299</sup>
- Under the First Amendment, restrictions on speech inside public museums are valid so long as they are viewpoint-neutral and reasonable.<sup>300</sup> But under the Second Amendment, a court recently

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294. *See* *Vlasak v. Superior Ct. of Cal.*, 329 F.3d 683, 691 (9th Cir. 2003) (upholding ordinance prohibiting possession during demonstrations of wooden and other objects exceeding a certain thickness).

295. *See* *Heller*, 554 U.S. at 582 (observing that the Second Amendment protects "all instruments that constitute bearable arms"); *see also* Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1409 (2009) (discussing regulation of tasers); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 220 (2009) (concluding that some nonlethal weapons constitute "arms" under the Second Amendment).

296. *See, e.g.*, *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 161 (2d Cir. 1990) (upholding ban on begging and panhandling in New York City subways).

297. *Cf.* *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 WL 16744700, at \*70 (N.D.N.Y. Nov. 7, 2022) (invalidating restrictions on possession of firearms on buses in part because "the burdensomeness of the modern law is unreasonably disproportionate to the burdensomeness of the relevant historical analogues").

298. *See* *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816–17 (1984) (upholding ban on hanging political and other signs from telephone poles to prevent "visual clutter"); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding restrictions on overnight camping at Lafayette Square Park and the National Mall designed to preserve the appearance of these properties).

299. *See* *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132–33 (2022).

300. *Diener v. Reed*, 232 F. Supp. 2d 362, 385 (M.D. Pa. 2002), *aff'd*, 77 Fed. App'x 601 (3d Cir. 2003).



- enjoined a ban on public carry in museums based on a purported lack of proof that early lawmakers enacted similar restrictions.<sup>301</sup>
- Under the First Amendment, the Supreme Court has upheld zoning ordinances dispersing or concentrating establishments based on their intention to show adult movies, in part owing to concerns about the “secondary effects” associated with such establishments (e.g., crime, effects on children, decreases in property values, etc.).<sup>302</sup> But a (pre-*Bruen*) federal court of appeals determined that there was not sufficient historical support for a township’s zoning regulations that prohibited center-fire rifle practice on certain properties.<sup>303</sup>
  - Under the First Amendment, courts have applied public forum doctrine to public university campuses, in many cases limiting students’ and others’ expressive rights to portions of campus.<sup>304</sup> Under the Second Amendment, pro-gun advocates have argued that there is no historical tradition of banning firearms anywhere on public university campuses.<sup>305</sup>
  - Under the First Amendment’s standard for content-neutral speech regulations, speakers do not have a recognized constitutional right to be seen and heard by an audience of their choosing.<sup>306</sup> By contrast, under the Second Amendment as interpreted in *Heller* and *Bruen*, individuals have a broad right to be armed whenever “confrontation” might occur or self-defense might be necessary.<sup>307</sup>
  - Under the First Amendment, governments can ban the “targeted picketing” of private residences to protect the privacy and tranquility of

301. See *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*85–86 (D.N.J. May 16, 2023) (granting an injunction against enforcement of a law banning firearms in public libraries and museums).

302. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 50–51 (1986).

303. *Drummond v. Robinson Twp.*, 9 F.4th 217, 227–29 (3d Cir. 2021).

304. See, e.g., *State v. Spingola*, 736 N.E.2d 48, 53–54 (Ohio Ct. App. 4th 1999) (reasoning that campus sidewalks and other areas are nonpublic fora where students have limited expressive rights).

305. See David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 289 (2018) (arguing that history and tradition do not support campus-carry bans). But see *Wade v. Univ. of Mich.*, No. 330555, 2023 WL 4670440, at \*1, \*10 (Mich. Ct. App. July 20, 2023) (per curiam) (upholding campus-carry ban that applied with limited exceptions).

306. See, e.g., *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (“[A]lthough the opportunity to interact directly with the body of delegates . . . would doubtless have facilitated the demonstrators’ ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access.” (emphasis added)).

307. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (concluding that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation”); see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2135 (2022) (recognizing the need for self-defense in public today because many Americans “hazard greater danger outside the home than in it”).

homeowners.<sup>308</sup> Under the Second Amendment, however, an individual carrying a firearm pursuant to state law may have a viable Second Amendment claim if arrested for standing in front of a private residence bearing a firearm.

- Some courts have upheld insurance requirements for public demonstrations as valid time, place, and manner regulations.<sup>309</sup> But a court recently enjoined similar requirements for those who carry firearms in public on the ground that there are no eighteenth- or nineteenth-century analogous requirements.<sup>310</sup>
- Although the Supreme Court has held that municipal airports can ban leafletting, solicitation, and other expressive activities in all parts of airport terminals, a post-*Bruen* decision held that public carry is protected either while in the public terminal or at least in open areas where the municipality does not provide security for passengers.<sup>311</sup>
- Authorities can ban leafletting on a sidewalk abutting a United States post office building under the First Amendment to preserve the property for its intended commercial use.<sup>312</sup> But carrying firearms on that same sidewalk is likely protected under the Second Amendment (assuming the postal sidewalk is not a sensitive place and there is no evidence of a long practice or tradition of regulating public carry on similar sidewalks).<sup>313</sup>

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308. See *Frisby v. Schultz*, 487 U.S. 474, 484, 486 (1988) (rejecting a First Amendment challenge to a local ordinance that banned “targeted picketing” of residences).

309. See, e.g., *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1031–32 (9th Cir. 2009) (rejecting First Amendment challenge to insurance requirement). But see Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 328 (1985) (arguing insurance requirements violate the First Amendment).

310. See *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*40–\*41 (D.N.J. May 16, 2023) (granting preliminary injunction against firearm insurance requirement); see also Adam B. Shniderman, *Gun Insurance Mandates and the Second Amendment*, S.C. L. REV. (forthcoming) (manuscript at 30) (on file with author) (arguing that firearms insurance mandates violate the Second Amendment).

311. Compare *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684–85 (1992) (upholding ban on expressive activities in public areas of airport terminal), with *Antonyuk v. Hochul*, No. 1:22-CV-0986, 2022 WL 16744700, at \*69–70, \*86 (N.D.N.Y. Nov. 7, 2022) (enjoining provisions of New York law banning public carry in places used for “aviation transportation” including airports), and *Koons*, 2023 WL 3478604, at \*90 (directing parties to take discovery on security measures in airports after noting that “some places in the airport may be secure while others are not”).

312. See *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (upholding ban on leafletting on a sidewalk used to enter a United States Post Office building).

313. Cf. *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1140 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) (suggesting that proximity to a government building, without more, cannot be sufficient to exempt a location from the Second Amendment).

- Courts have upheld free speech zones that limit the exercise of First Amendment speech and assembly rights to confined locations.<sup>314</sup> Unless the place in question qualifies as a sensitive place or the government proves public carry has been confined in the same or a similar manner in the distant past, this sort of locational restriction also likely violates the Second Amendment.

As these examples show, in a variety of contexts it will be much more difficult for authorities to ban or restrict public carry than it will be for them to ban or restrict public expression. In ways the *Bruen* Court did not or would not acknowledge, First Amendment doctrines have allowed officials to restrict expression for a multitude of reasons. As discussed in Part II, courts have long accepted that speech and assembly can be constrained, confined, displaced, and otherwise regulated in public places to preserve safety, order, and other interests.

On its terms, *Bruen* makes it far less likely governments will be able to successfully defend similar regulatory actions with respect to public carry. Indeed, under the developing approach to public carry, the Second Amendment may prohibit most regulations that preserve public safety, order, and other interests. Unless the Court moderates its approach, in many places where even peaceable speech and assembly can be significantly burdened or banned, including zoos, parks, and subways, lawmakers will likely not have the power to restrict or ban the carrying of deadly weaponry. A public carry super-right will be recognized and exercised in more public places, and with fewer restrictions, than purportedly comparable fundamental free speech rights.

When constitutional doctrines produce such results, it provides an additional justification for questioning their construction, logic, and effects. But the problem is not merely one of doctrinal or interpretive disparity. The Court is constructing a doctrine that will have real-world consequences for public places and the people who occupy and use them. The public exercise of constitutional rights will have significant consequences for where, when, and how people experience the democratic, commercial, and other aspects of the public sphere.<sup>315</sup> As it ignores the many social harms from public carry, the Court will continue to retain longstanding limits on public expression

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314. See, e.g., *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (upholding use of a demonstration zone at a political convention based on governmental safety and security concerns).

315. See generally Blocher & Siegel, *supra* note 36 (shifting the focus of gun regulations from narrow public safety concerns to interests in the preservation of various aspects of public life); Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. (forthcoming 2023) (discussing the relationship between public carry and the preservation of democratic community) [hereinafter Blocher & Siegel, *Guided by History*].

based on precisely the same kinds of concerns. As the Court has recognized in its First Amendment precedents, the public exercise of rights affects the character of public spaces and the psychological and economic lives of the people who occupy them.<sup>316</sup> The proliferation of firearms raises similar concerns. Indeed, given the lethality of firearms, the stakes of reducing governmental power to restrict their presence in public places are much higher.

Doctrines that privilege public carry relative to public expression also communicate something about the nature and character of a political community. A resort to history may resurrect—or produce as self-fulfilling prophecy—a public square characterized by threats and the need for armed confrontation. As one district court judge observed in a recent case:

The colonial generation recognized that citizens attending public gatherings exposed themselves to violent attack. While public assemblies might conjure the notion that there is “strength in numbers,” history reveals that the more crowded the gathering, the greater the risk of attack. To abate that risk, American colonists obligated their citizenry to arm themselves for protection.<sup>317</sup>

So they did—against real and perceived hostile *enemies*, but not their fellow community members. In any event, the historical lesson the court drew—that the more crowded the gathering, the greater the risk of attack—supports limiting public carry rather than expanding it.

If governments have broader power to treat public expression as a threat to public order, safety, and other concerns than public carry, Second Amendment super-rights will do more than alter the scope of governmental power over what activities are protected in public places. They will fundamentally alter the nature of those places. Public places will become sites of physical and sometimes deadly confrontation rather than venues used time out of mind for the peaceful exchange of views. The hostile narrative of the public square, which the Court’s decisions are actively encouraging, is directly contrary to the First Amendment’s conception of a public sphere immemorially held in trust by government for the purposes of peaceful speech and assembly.

#### *B. Chilling Public Expression*

Another disturbing irony of the Court’s bankrupt First Amendment analogy is the negative effects that Second Amendment doctrines are likely to have on public expression. Arming the public square will reduce the

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316. *E.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).

317. *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*73 (D.N.J. May 16, 2023).

public's willingness to engage in demonstrations and other forms of expression there.<sup>318</sup>

Quantitative and qualitative data confirm what common sense suggests: the presence or even the prospect of armed protesters chills expression.<sup>319</sup> Potential participants in public protests and other events are less likely to attend if they believe others are carrying weapons and if they attend are less likely to speak out for fear that armed counter-protesters will harm or kill them.<sup>320</sup> The fear and intimidation associated with public carry threaten to chill or even suppress peaceful forms of democratic participation.<sup>321</sup>

In terms of social costs, the prevalence of firearms at public demonstrations has also been shown to lead to increased violence and use of deadly force. A recent study concluded that armed demonstrations “are nearly six times as likely to turn violent or destructive compared to unarmed demonstrations.”<sup>322</sup> The study also concluded the presence of firearms at demonstrations does not make such events safer; in fact, the study found open carry significantly increased the chance that a demonstration would involve a fatality.<sup>323</sup> One in six armed protests that took place during the study period turned violent or destructive, and one in sixty-two turned deadly; by contrast, one in thirty-seven unarmed protests turned violent or destructive, and only one in 2,963 unarmed gatherings turned fatal.<sup>324</sup>

As Darrell Miller has observed, the historical record shows that early lawmakers prohibited public carry during public assemblies and demonstrations precisely because they sought to protect the exercise of First

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318. For fuller considerations of these concerns, see Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018).

319. See generally Diana Palmer, *Fired Up or Shut Down: The Chilling Effect of Open Carry on First Amendment Expression at Public Protests* (May 28, 2021) (Ph.D. dissertation, Northeastern University) (ProQuest) (finding that research participants perceived firearms in protest situation to be sufficiently dangerous to instill fear of speaking freely).

320. See *id.* at 142–43 (reporting quantitative and qualitative findings concerning the effect of firearms on protest activity).

321. See, e.g., Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEXAS L. REV. 49, 95 (2012) (“Even keeping arms to enable insurrection would undermine debate by fostering a climate of mistrust and fear.”); Miller, *supra* note 5, at 1309–10 (arguing that “the presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange”); MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 44, 81, 102, 152 (2019) (discussing intimidation associated with open carry).

322. *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (August 23, 2021), <https://everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america/> [https://perma.cc/2TKR-YYBK].

323. *Id.*

324. *Id.*

Amendment rights.<sup>325</sup> Founding-era lawmakers were concerned that the carrying of firearms and other weapons would undermine peaceful forms of democratic governance.<sup>326</sup>

In *Bruen*'s parlance, a ban on public carry at a permitted protest, demonstration, or other event is consistent with both how and why early lawmakers regulated such activity.<sup>327</sup> Yet a recent post-*Bruen* district court decision invalidated a New Jersey law that banned public carry at public assemblies and other events requiring a government permit.<sup>328</sup> Although the court recognized that several states had banned public carry during such events in the eighteenth and nineteenth centuries, it concluded under *Bruen* that these laws were not “representative” because they were enacted too late, covered too few Americans, were transitory in nature, or amounted to “outliers.”<sup>329</sup> As discussed earlier, the same court characterized public assemblies as inherently dangerous events.<sup>330</sup>

In this respect and others, *Bruen*'s methodology undermines expressive rights. Viewing the public square through the lens of distant history encourages courts to view it as a violent place beset by threats. Courts are being primed to view crowds as inherently threatening and ripe for confrontation. Again, that view conflicts with the proposition that (at least) public parks and streets have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>331</sup> It is incongruous to recognize under the First Amendment the long tradition of peaceful demonstrations in public places while at the same time enshrining under the Second Amendment a view that lethal arms are a necessity in those same places—including during expressive events.

Gun rights proponents sometimes point to the absence of governmental security as a reason public carry rights should be interpreted broadly.<sup>332</sup> That argument holds no sway in the context of public protests. Public

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325. See Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 466 (2019) (focusing on the relationship between public places and the exercise of First Amendment rights).

326. See Blocher & Siegel, *Guided by History*, *supra* note 315 (manuscript at 104) (focusing on the relationship between public places and activities that define democratic community).

327. See ZICK, *supra* note 22, at 150–52 (defending ban on public carry during permitted protests and other events); see also Morgan, *supra* note 29, at 205–07, 209–10 (arguing that public protests are a sensitive place under *Heller*).

328. *Koons v. Platkin*, No. 22-7464, 2023 WL 3478604, at \*75 (D.N.J. May 16, 2023).

329. *Id.* at \*75–76 (citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133, 2153–55 (2022)).

330. *Id.* at \*73.

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

332. See, e.g., Brief of *Amicus Curiae*, The Independent Institute in Support of Petitioners at 22, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (arguing that a place is sensitive only if the government provides strict security measures).

demonstrations are hardly characterized by a lack of security; indeed, if anything law enforcement aggressively polices these events—often to the detriment of free expression.<sup>333</sup> In any event, the security argument fails to recognize that public carry complicates protest policing and undermines law enforcement’s ability to protect peaceful assemblies and speakers. Officers must quickly separate lawful public carriers from those inflicting or seeking to inflict harm. Further, as the Supreme Court has recognized, the First Amendment imposes a duty on law enforcement to protect those engaged in lawful speech and assembly from a “hostile audience.”<sup>334</sup> Faced with the proliferation of firearms, law enforcement may be unable to carry out this crucial duty. In that event, in the very places the government holds in trust for their benefit, peaceful protesters would be left at the mercy of armed and hostile crowds.

The introduction of firearms into public places may also cause additional expressive harm. Responding to the fear of violence associated with armed protesters, governments may enact burdensome restrictions on public protests. This would affect the expressive rights not only of those intending to bring firearms to protests, but also of unarmed protesters subject to the same regulations. For example, out of fear that some protesters targeting a venue offering drag shows would be armed, a local police department in Montana ordered that no protests could occur in town *except* in a parking lot at City Hall.<sup>335</sup> This demonstrates another way the presence of firearms can crowd expression out of the public square. The answer to concerns about gun violence at public protests is not to ban or restrict public expression; at least during such events, it is to disarm the public square.

If public places are to function as venues for non-violent exchange and democratic discourse, governments must have the authority to restrict or ban firearms and other weapons to preserve peace and order.<sup>336</sup> If courts do not recognize legislative authority to curtail or ban access to firearms at public protests and demonstrations, an arms race involving protesters, counter-protesters, armed militias, and law enforcement will make engaging in

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333. See ZICK, *supra* note 22, at 55–58 (discussing aggressive tactics used by police at public demonstrations).

334. See *Feiner v. New York*, 340 U.S. 315, 320 (1951) (“We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings.”); see also Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1684–89 (2019) (discussing the obligations of law enforcement in response to hostile audience reactions).

335. Eugene Volokh, *Montana Town Forbids All Protests (Except at City Hall), Because of Planned Protests of “Drag Story Hour”*, VOLOKH CONSPIRACY (May 19, 2023, 2:37 PM), <https://reason.com/volokh/2023/05/19/montana-town-forbids-all-protests-except-at-city-hall-because-of-planned-protests-of-drag-story-hour/> [https://perma.cc/8C7X-Z8UY].

336. See Blocher & Siegel, *Guided by History*, *supra* note 315 (manuscript at 104) (emphasizing the need to regulate firearms in public to protect democratic and other values).

peaceful but robust public protest increasingly difficult if not impossible. During protests, the public square will become a dangerous powder keg. In that event, perhaps only a small segment of the population will be willing to risk participating in protest activities. Or perhaps armed protesters and counter-protesters will drive peaceful assemblies and unarmed persons out of the public square altogether.

C. *Self-Government and Self-Defense*

The chilling of public expression points to a more systematic concern with Second Amendment exceptionalism. A public carry super-right threatens democracy itself. A legal system that privileges armed self-defense over peaceful forms of self-government is inconsistent with the Nation's tradition of peaceful democratic change.<sup>337</sup>

Regarding democratic governance, the theoretical underpinnings of First Amendment and Second Amendment rights point in dramatically different directions. The First Amendment's free-speech and peaceable-assembly guarantees are grounded in values concerning peaceful participation in self-government and the search for truth through discourse.<sup>338</sup> By contrast, the Supreme Court has identified the core of the Second Amendment as self-defense and self-preservation in the event of confrontation.<sup>339</sup> The First Amendment looks toward peaceful forms of democratic participation, while the Second Amendment focuses on rights relating to the use of lethal and non-lethal force—including, perhaps, as a means of protecting individuals from what they perceive to be tyrannical government.

Access to public places facilitates self-governance and marketplace values. Although they do so imperfectly, First Amendment doctrines at least nominally preserve space for public discourse among diverse individuals and groups.<sup>340</sup> As some commentators have observed, robust public carry rights threaten these values and pose other challenges to the formation and preservation of democratic community.<sup>341</sup> By protecting public discourse, the

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337. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 109, 116 (1980) (explaining that protecting political speech is a critical means of maintaining our open political process).

338. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (“[I]t is that authority of these truth-seeking activities which the First Amendment recognizes as uniquely significant . . .”); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (“To be afraid of ideas, any idea, is to be unfit for self-government.”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995) (noting that, in First Amendment contexts, “[t]he principle that the individual should be free to pursue truth without government interference has also been stringently followed”).

339. *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008).

340. See generally ZICK, *supra* note 22 (arguing that the First Amendment strives to protect speech rights in part by providing interlocutors with a space to test and debate ideas).

341. E.g., Blocher & Siegel, *Guided by History*, *supra* note 315 (manuscript at 109).



First Amendment reinforces democracy and offers a channel for peaceful political change. Broad public carry rights may undermine these protections and values by offering or even encouraging a violent alternative to peaceful channels of self-government.

As we have seen, these different theoretical foundations have contributed to significant doctrinal disparities. But different underlying values affect more than the scope of individual First Amendment and Second Amendment rights. Public carry restrictions preserve democratic dialogue and democratic governance. They allow people to relate to one another in shared public spaces without intimidation and coercion, thereby shaping the nature and character of the public square. As Joseph Blocher and Reva Siegel have explained, restrictions on public carry are necessary to “protect the public peace and thus the freedom of all people to participate in democratic community without terror and intimidation.”<sup>342</sup>

To have a free and open public discourse, individuals must also have *equal* access to public places.<sup>343</sup> Equal access cannot exist where peaceful discourse is doubly curbed—first, by restrictions on public expression, and second, by suppression of speech caused by public carry—while self-defense rights are subject to few limits. Some of the sensitive places the Court has identified, such as government buildings and schools, illustrate concerns regarding free and equal access to democratic spaces. As the Second Amendment doctrines relating to public carry develop, it will be critically important to recognize this value in other public places.<sup>344</sup>

First Amendment doctrines limit fundamental free speech and assembly rights in part to preserve the conditions necessary for democratic deliberation. A Second Amendment theory that comports with this approach would likewise recognize the need for limits on public carry, sometimes for similar reasons. Public places where bearing arms and robust conceptions of self-defense rights occupy a privileged status compared to carrying placards, raising voices, and engaging in other peaceful means of self-government will not facilitate and, indeed, will likely undermine participatory democracy.

As Blocher and Siegel have observed, “If Americans do not recognize the social dimensions of public safety—the ancient role that weapons laws play in securing peace and public order—the use of guns will come to define America’s constitutional democracy, rather than the other way around.”<sup>345</sup>

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342. *Id.*

343. See Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 253 (2007) (discussing access concerns as they relate to democratic discourse).

344. See Blocher & Siegel, *Guided by History*, *supra* note 315 (manuscript at 123–27) (arguing that access to mass transit, places of commerce, and other locations contribute to the preservation of democratic community).

345. Blocher & Siegel, *supra* note 293.

Rather than engaging in peaceful discourse, we will settle differences by mustering with self-declared militias, “standing our ground,” and resorting to violence or the threat of it when confronted with ideas we do not like.<sup>346</sup> As lawmakers and courts struggle to define which places are sensitive and how much of our public square will be armed, they must realize that deliberative democracy is itself in peril.

This discussion assumes that individual self-defense remains the central component or sole justification for protecting Second Amendment public carry rights. If the Court were to recognize an anti-tyranny or insurrectionist justification for bearing arms in the public square, Second Amendment exceptionalism would pose an existential threat to democratic community and peaceful democratic change.<sup>347</sup> Again, a public square armed for rebellion or resistance is the antithesis of one immemorially dedicated to peaceable assembly and discourse. Just imagine a January 6th insurrection in which most or all participants were carrying firearms. Broad insurrectionist-based public carry rights are in direct conflict with the First Amendment’s long tradition of bringing about democratic change through peaceful democratic discourse.

#### Conclusion

Contrary to the Supreme Court’s assertions, its decisions in *Heller* and *Bruen* do not adopt Second Amendment standards that comport or accord with First Amendment doctrines. To the contrary, the Court has embraced Second Amendment exceptionalism. Under its approach to firearms regulations, including public carry laws, the individual right to keep and bear arms is a super-right impervious to the kinds of regulations long imposed on other rights, including the right to speak and assemble in public. While the Court has insisted that litigants and courts engage in sound analogical reasoning in Second Amendment cases, it has invoked a bogus First Amendment analogy to defend its new interpretation of the Second Amendment.

The consequences of Second Amendment exceptionalism are disturbing and dangerous. Under current First Amendment and Second Amendment doctrines, individuals have stronger constitutional rights to carry firearms in public places than to speak and assemble peaceably there. This has already produced anomalous results in lower courts, which have issued rulings that provide greater protection to firearms than free speech in public places.

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346. See FRANKS, *supra* note 321, at 93, 95–97, 100 (discussing proliferation and effects of state “stand your ground” laws).

347. See Magarian, *supra* note 321, at 51 (arguing that “an embrace of constitutionally sanctioned insurrectionism under the Second Amendment would threaten our commitment to uninhibited political debate”).

Privileging public carry over public expression also threatens to chill public expression. Putative protesters will balk at entering an armed public square. Responding to the threat of armed protest, authorities may further limit free expression for everyone. Finally, the Court's current doctrinal path elevates violence and self-defense over peaceful forms of self-government.

Recognizing a public carry super-right is itself inconsistent with the nation's tradition of firearm regulation. It is also contrary to the nation's long First Amendment tradition of facilitating and preserving peaceful forms of democratic change. As it develops Second Amendment doctrine going forward, the Supreme Court should abandon facile analogies and confront the very real tensions its doctrinal moves are creating between First Amendment and Second Amendment rights.