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The Next Fight Over Guns in America

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IDEAS

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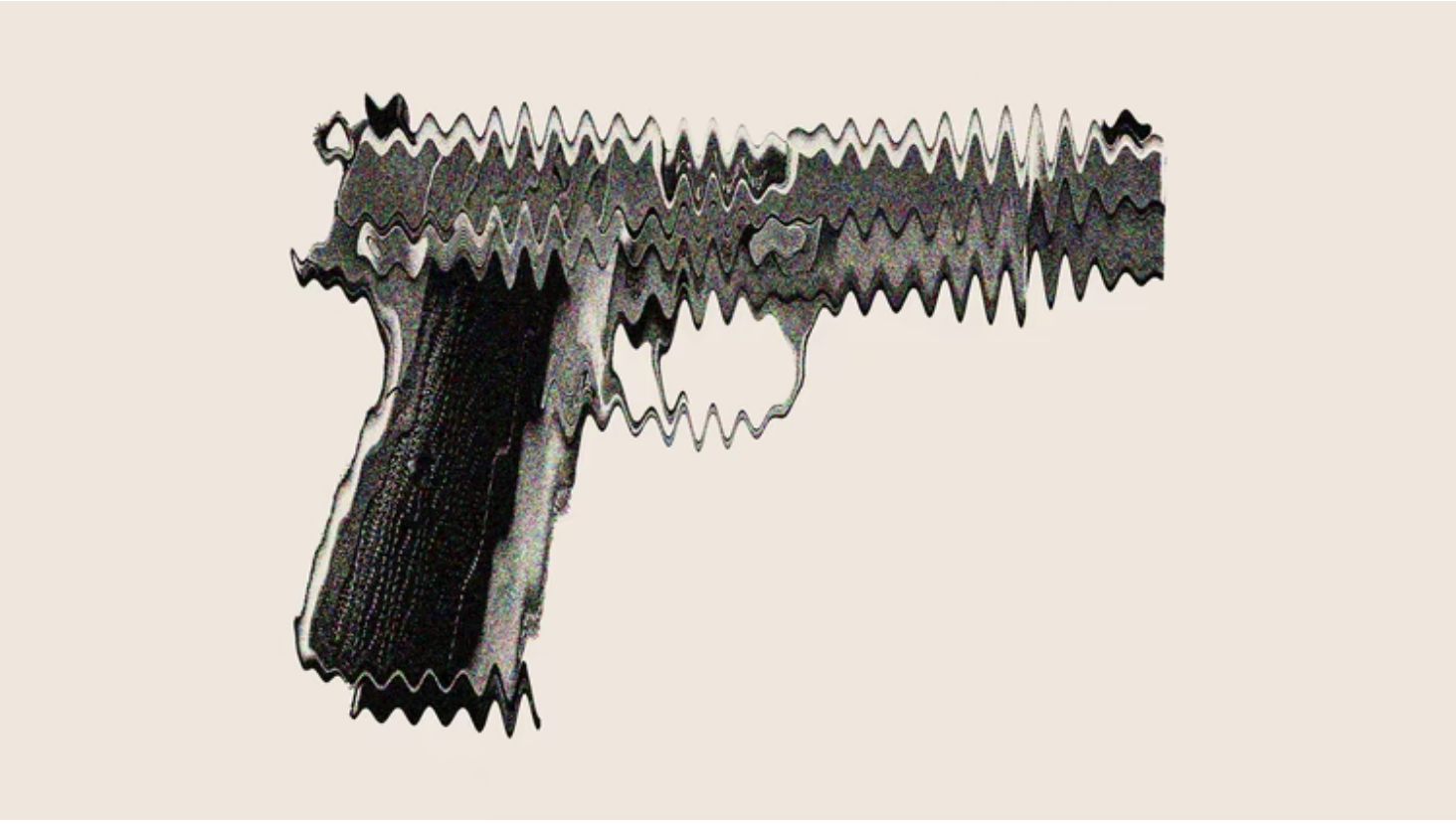
With Thursday's Supreme Court decision, the only real remaining question is not whether Americans can carry firearms, but where.

By Timothy Zick and Diana Palmer



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councilmember in Glens Falls, New York, and a part-time lecturer at Northeastern University.

This morning, the Supreme Court struck down a New York State law that limited concealed-firearm permits to those with a demonstrated need to carry arms outside the home. Justice Clarence Thomas, writing for the 6–3 majority in *New York State Rifle & Pistol Association Inc. v. Bruen*, said, "The Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen* thus opens one of the next major battlegrounds over guns in America: not *who* can buy guns or *what* guns can be bought but *where* these firearms can be carried, every day, by the millions and millions of Americans who own them.

This question will have major implications for what it's like to be an American. Are people carrying guns at schools and shopping malls and public parks? What about at churches and synagogues and mosques? What is it like to pray in places where fellow supplicants are armed? Courts and legislatures will have to decide whether people can carry guns at protests and political demonstrations, in voting booths, on the subway and bus, and in pretty much every other public space in American life. The Supreme Court spent several decades determining where in the public square—streets, sidewalks, airports, fairgrounds, public libraries, public plazas—speakers have a First Amendment right to communicate. The Court's answer—not in every place, and not equally in all places—is probably a harbinger for how the justices will determine the "sensitive places" where firearms can be restricted.

After all, something must be done to stem the flow of weapons into all parts of the public square. Even with the staggering frequency of mass shootings in our country**,** the Supreme Court in *Bruen* has now limited states' discretion in regulating guns. New research by the Violence Project on mass shootings from 1966 to 2019, funded by the National Institute of Justice, finds that more than three-fourths of mass shooters bought "at least some of their guns legally." If states can no longer use discretion to limit the number of people and places with guns at the permitting stage, identifying "sensitive places" will become an important means of restricting the presence of firearms in the public square.

Thomas P. Crocker: Don't forget the first half of the Second Amendment

Most states already have robust public-carry rights. But tellingly, state laws in both red and blue states are also chock-full of bans on public carry in a host of locations. They include public transit, polling places, areas near permitted events, athletic facilities, public swimming pools, riverboat casinos, school-bus stops, pharmacies, business parking lots, public highways, amusement parks, zoos, liquor stores, airports, parades, demonstrations, financial institutions, theaters, hotel lobbies, tribal lands, and even gun shows. Discovering commonalities across such a variety of locations is difficult. But it is possible to identify the core safety, functional, and constitutional-value concerns that have long justified treating some places as "sensitive" for purposes of public carry.

Nearly 15 years ago, the Court indicated that public carry of firearms could be restricted or even banned in at least some places. In *District of Columbia v. Heller*, which recognized an individual right to keep and bear arms for self-defense, Justice Antonin Scalia wrote that nothing in his majority opinion should "cast doubt" on "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." These "longstanding" restrictions, the Court held, are "presumptively lawful." Such wording raised more questions than it answered. What makes these places "sensitive"? And what about all the other public and private places where people engage in worship, commerce, and other activities—are any, or all, of these places "sensitive"? This question was very much on the justices' mind during the oral argument in *Bruen*. They asked about public-carry rights in Times Square, on the New York City subway, at public demonstrations, and on university campuses.

For some gun-rights supporters, banning or restricting public carry *anywhere* violates the right to self-defense recognized in *Heller*. They argue that the need for protection can

arise in any place. That position ignores the historical recognition that there are some places where firearms can and ought to be presumptively banned. By contrast, some gun-regulation advocates might argue that *every* place is "sensitive," owing to general concerns about public safety or the discomfort many people experience when they see firearms or know they are present. But this position would deny that the Second Amendment has any application outside the home, a position expressly rejected in *Bruen*.

A number of gun-rights proponents have also argued that places are "sensitive" only insofar as the government or private-property owners provide adequate security for the defense of unarmed civilians. But that standard is inconsistent with both history and *Heller*. Many schools and government buildings do not and likely will not have the kind of security these gun proponents demand. More to the point, the "adequate owner defense" argument ignores the many nonsafety justifications for restricting public carry in some places, such as protecting the civic functions of government buildings.

At oral argument in the *Bruen* case, advocates for both sides struggled to provide answers, as the Court has not yet issued any clear guidance on the matter, and no ready-made formula for determining the "sensitivity" of places exists.

History can be a helpful, if imperfect, guide—and that's clearly where the Court's conservative super-majority will turn for reference. "If you concede, as I think the historical record requires you to, that states did outlaw guns in sensitive places, can't we just say Times Square is a sensitive place?" Justice Amy Coney Barrett asked during oral argument.

British, colonial, and early state laws banned or restricted firearms in a variety of public and private places. Some laws banned arms for an entire geographic region, while others did so in specific places, such as schools or churches. The 1328 English Statute of Northampton provided that no person may "go nor ride armed by night nor by day, in fairs, markets." (In today's decision, the Court made an effort to discount the value of this law, saying it came "more than 450 years before the ratification of the Constitution.") Supporting the Court's designation of schools as sensitive places, Texas banned guns in schools and where people gathered for "educational, literary, or social purposes." Missouri and Oklahoma Territory had similar laws. Harvard University said students couldn't have firearms on campus as early as the mid-1600s, and the University of Virginia did the same beginning with its inaugural class in 1825. Several states also banned or restricted firearms in churches. In 1877, Virginia outlawed people from "carrying any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place."

Graeme Wood: Think gun laws are hard to change? Try gun culture.

Restrictions on where firearms could be carried were not controversial. A Georgia Supreme Court decision from 1874 characterized "the practice of carrying arms at courts, elections and places of worship, etc." as "a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee." Referring to carry bans at "legislative assemblies, polling places, and courthouses," the Court states in *Bruen* it is "aware of no disputes regarding the lawfulness of such prohibitions … We therefore can assume it settled that these locations were 'sensitive places.'" If "sensitivity" turns on historical pedigree, as *Bruen* says it does, there is significant support for allowing state and local authorities to forbid carrying guns in certain places.

But at some point, historical analogies are likely to run out or not present themselves at all. Times Square and shopping malls may be like modern-day "fairs" or "markets," but what about a subway, a polling place, a public protest? History will not answer every

question, but it sheds light on the *reasons* lawmakers and courts have long considered place restrictions to be necessary. Certain values are imbued in these considerations, and they provide guidance for today. Colonial and early American laws treated all these locations as sensitive not just because of public-safety concerns but also to preserve the civic functions and constitutional values associated with such places.

The first, and most obvious, reason to treat some places as sensitive relates to public safety. Consider the recent mass shootings in nightclubs, concerts, the New York City subway, a Buffalo supermarket, and an elementary school in Uvalde, Texas. "I'm still a little bit scared, because this was supposed to be a safe environment," a cashier who survived the attack in Buffalo told reporters. Sadly, as we have seen all too frequently, places where large numbers of people gather present a target-rich environment for someone bent on committing mass murder.

Public safety is an important reason to disallow public carry in certain venues. But as historical and contemporary examples show, it is not the *only* reason.

Public carry can interfere with the principal functions of places. When armed protesters opposed to Michigan's COVID-related health restrictions descended on the legislature openly carrying long guns, they threatened not only lawmakers' physical safety but also the legislative process itself and the functioning of the state government. The January 6 riot likewise demonstrated the need for firearm bans not just *in* but also *around* government buildings.

Similarly, some places at times facilitate important civic and constitutional functions. Consider mass protests in public streets, such as those that occurred across the nation during the summer of 2020. As some of the justices observed during oral argument in *Bruen*, crowded public assemblies raise serious public-safety and order concerns. Justice Elena Kagan wondered if a "protest or event that has more than 10,000 people" could be sensitive. Justice Barrett asked, "Why not?" Speaking about Times Square on New Year's Eve, she said, "People are on top of each other. We've had experience with violence, so we're making a judgment: It's a sensitive place."

What the justices failed to mention is that having arms in the public square during protests threatens the exercise of First Amendment rights to speak and peacefully assemble.

This is a real trade-off, not a theoretical one. Empirical evidence, including the doctoral work of one of this article's authors, Diana Palmer, demonstrates that most individuals are far less likely to participate in protests if they know firearms will be present there. When asked if they would attend a local rally on a topic they cared about if they knew some protest participants would be carrying firearms, 71 percent of survey participants said they were unlikely or very unlikely to attend. An American Psychological Association poll found that more than three-quarters of adults fear mass public shootings and one-third avoid some public places because of that fear. Armed individuals and groups in Charlottesville, Virginia; Kenosha, Wisconsin; and other cities altered the traditional character and function of the public forum, a venue for the free and peaceful exchange of ideas. While gun-rights proponents may advocate for unrestricted *freedom to* carry guns to protests, preservation of First Amendment rights means policy makers must ensure that in the public forum people enjoy *freedom from* fear, intimidation, and interference with free expression.

Read: 'This is the price we pay to live in this kind of society'

Non–Second Amendment constitutional values are also implicated in other private and public places, as the law professor Darrell A. H. Miller noted in a 2019 article. Like public forums, university campuses facilitate the free exchange of ideas, and churches provide a sanctuary for the free exercise of religion. Polling places are locations where citizens are, or should be, able to exercise their right to vote free from intimidation or coercion.

Critics may argue that designating a place as "sensitive" will not guarantee that murderers will abide by the designation. While that's true, it misses the point. Nearly 400 million firearms are owned by civilians in the U.S. We have arrived at a crossroads where we must determine, as a nation, how freely firearms will flow in public and private

places. The *Bruen* decision has removed another important power of government to limit public carry. America's highest Court has embraced an interpretation of the Second Amendment that will ensure more guns will be carried in more public places. For the foreseeable future, guns will continue to be part of the warp and weft of American life. That the question of "sensitive places" is now front and center is a sign of where the country is with its gun laws—fighting over the margins of its expansive gun freedoms, not whether those freedoms should be so expansive in the first place.

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