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The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation

ABSTRACT. In *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court reaffirmed that laws prohibiting the carrying of firearms in sensitive places were presumptively constitutional. Since *Bruen*, several states and the District of Columbia have defended their sensitive-place laws by analogizing to historical statutes regulating firearms in other places, like schools and government buildings. Many judges, scholars, and litigants appear to have assumed that only statutes can count as evidence of the nation's historical tradition of firearm regulation.

This Note is the first expansive account since *Bruen* to challenge this assumption. It argues that courts should consider sources of analogical precedent outside of statutory lawmaking when applying the Court's Second Amendment jurisprudence. Taking public transportation as a case study, the Note surveys rules and regulations promulgated by railroad corporations in the nineteenth century and argues that these sources reveal a historical tradition of regulating firearm carriage on public transportation.

Bruen permits courts to engage in more nuanced analogical reasoning when dealing with unprecedented concerns or dramatic changes. One such change is the shift in state capacity that has placed sites that were privately or quasi-publicly operated before the twentieth century under public control in the twenty-first century. As in the case of schools, which the Court has already deemed sensitive, a substantial portion of the nation's transportation infrastructure in the nineteenth century was not entirely publicly owned and operated. For this reason, courts should consider evidence of historical firearm regulations enacted not just by legislatures but by quasi-public or private corporations. This case study instructs that courts and litigants can best honor *Bruen*'s history-based test by considering *all* of the nation's history of firearm regulation.

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NOTE CONTENTS

INTRODUCTION 1678

I. RAILROADS AS REGULATORS 1684
- A. Quasi-Public Rail 1685
- B. Limits on Gun Carriage in Passenger Cars 1690
- C. Limits on Firearms in Baggage 1697

II. PUBLIC TRANSPORTATION AS A SENSITIVE PLACE 1701
- A. Defining a Historical Tradition of Firearm Regulation 1702
  1. *Bruen*'s Silence on the Question 1706
  2. Guidance from *Heller* 1707
  3. A Nuanced Approach to Analogical Reasoning 1707
  4. The Case Study of Schools as Sensitive Places 1709
- B. Contemporary Analogues as Confirmatory Evidence of Tradition 1712
- C. The How & the Why 1715

III. IMPLICATIONS 1720
- A. Recognizing New Sensitive Places 1720
- B. Adding Coherence to the Sensitive-Places Doctrine 1722

CONCLUSION 1725

INTRODUCTION

The specter of firearms on the subway was not far from the Justices' minds when they convened for oral argument in *New York State Rifle & Pistol Association v. Bruen*.[1] The case did not involve subterranean carry per se, but rather whether the Second Amendment protected the individual right to carry firearms in public. Yet the narrow question of whether there is a right to carry firearms on the New York City subway served as a Rorschach test for the question presented.

Justice Kagan asked Paul Clement, the oral advocate for the petitioners, whether New Yorkers could take firearms on the subway under a test tethered to history and tradition. Though Clement acknowledged he would "have to go through the analysis," he supposed he could "give away the subway" for his individual clients because they did not reside in or seek to travel to Manhattan.[2] Justice Alito raised a concern. What about the law-abiding New Yorkers who must "walk some distance through a high-crime area" late at night before entering or after departing a subway stop?[3] "They do not get licenses," he surmised, "is that right?"[4] New York Solicitor General Barbara Underwood responded that "the idea of proliferating arms on the subway is precisely, I think, what terrifies a great many people."[5]

Indeed, shootings in the months preceding and following *Bruen* only underscore the urgency of clarifying states' latitude to regulate firearms in public transportation. Two months before the *Bruen* decision, a gunman took a Glock 17 handgun and three ammunition magazines onto a New York City subway car and fired more than thirty shots, injuring ten.[6] New York, of course, is not alone in suffering the lethal consequences of gun violence in the subway.[7] And the

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1. 597 U.S. 1 (2022).
2. Transcript of Oral Argument at 28, *Bruen*, 597 U.S. 1 (No. 20-843).
3. *Id.* at 67.
4. *Id.*
5. *Id.* at 70.
6. *See* Press Release, Dep't of Just., Frank James Pleads Guilty to Mass Shooting on New York Subway (Jan. 3, 2023), https://www.justice.gov/opa/pr/frank-james-pleads-guilty-mass-shooting-new-york-subway [https://perma.cc/VQM4-ZX9M].
7. *See, e.g.*, Katie Mettler & Justin George, *Metro Employee Killed While Trying to Stop Man Shooting at D.C. Commuters*, WASH. POST (Feb. 2, 2023, 12:02 PM EST), https://www.washingtonpost.com/transportation/2023/02/01/potomac-avenue-metro-station-shooting [https://perma.cc/7E64-8B7N] (noting that in February 2023, a gunman shot several commuters, apparently at random, on a D.C. Metro platform, killing a Metro employee and injuring three others); "*I'm Hyper Aware Now": SEPTA Riders Have Guard Up After Rash of Violence on Subway*, CBS NEWS PHILA. (Apr. 10, 2023, 6:23 PM EDT), https://www.cbsnews.com

threat of gun violence in public transportation is not unique to the twenty-first century; past incidents of gun violence in subways and trains are firmly lodged within the American public consciousness.[8]

When the Court first interpreted the Second Amendment to include an individual right to keep and bear arms in *District of Columbia v. Heller*, Justice Scalia provided reassurance 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."[9] Trains and subways went unmentioned in this short list of sensitive places.

Then, in *Bruen*, the Court struck down New York's century-old statute that required residents seeking concealed-carry permits for handguns to show "proper cause."[10] The Court announced a new test for regulations burdening the individual right to bear arms.[11] At the same time, it affirmed its language about sensitive places in *Heller* and specified that among the sensitive places it recognized were "legislative assemblies, polling places, and courthouses."[12] This list was not necessarily exhaustive. Litigants and courts could draw analogies between listed places and new sites,[13] or between historical firearm regulations in other places and regulations in relevantly similar contemporary sites.[14]

/philadelphia/news/philadelphia-septa-shootings-center-city-walnut-locust-subway [https://perma.cc/8BQX-SGRZ] (describing three shootings on the Philadelphia subway in two weeks).

8. Among the most high-profile incidents is Bernhard H. Goetz's shooting of four Black teenagers in a Manhattan subway train in December 1984. *See* Suzanne Daley, *Man Tells Police He Shot Youths in Subway Train*, N.Y. TIMES, Jan. 1, 1985, at 1. Present-day subway violence invites frequent comparisons to Goetz's shooting. *See, e.g.*, Philip Bump, *America Has Another Bernie Goetz Moment*, WASH. POST (May 5, 2023, 11:10 AM EDT), https://www.washingtonpost.com/politics/2023/05/05/new-york-subway-goetz-neely [https://perma.cc/MKS9-WQE2].

9. 554 U.S. 570, 626 (2008).

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

11. *Id.* at 24.

12. *Id.* at 30.

13. *Id.* ("[C]ourts 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.").

14. *Id.* at 24 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

In the months after the decision, several jurisdictions enacted new sensitive-place restrictions[15] while others faced legal challenges to existing laws.[16] Weakened in their ability to restrict *who* could carry, these jurisdictions moved to limit *where* individuals could carry. Many of them designated sites of public transportation, including trains and subways, as sensitive places.[17] Even recently following *Bruen*, when courts have decided the question of whether sites of public transportation can be considered sensitive places under *Bruen*, they have tended to consider only evidence from statutory lawmaking as probative.[18] Finding no examples of state *statutes* regulating firearm carriage on public transportation in the eighteenth or nineteenth centuries, federal judges in New York and New Jersey, for example, have concluded that "firearms were generally permitted" in such places.[19]

This Note challenges that assertion. Using untapped archival materials, it retells the story of U.S. firearm regulation on public transportation.[20] Throughout the nineteenth century, beginning at least in 1835, railroad corporations enacted rules and regulations that restricted the ability of passengers to carry firearms on board.[21] The tradition that emerges from these regulations is one in

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15. Press Release, Off. of Governor Kathy Hochul, Governor Hochul Announces New Concealed Carry Laws Passed in Response to Reckless Supreme Court Decision Take Effect September 1, 2022 (Aug. 31, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-new-concealed-carry-laws-passed-response-reckless-supreme-court [https://perma.cc/92CZ-327T]; Press Release, State of N.J., Governor Murphy Signs Gun Safety Bill Strengthening Concealed Carry Laws in New Jersey in Response to *Bruen* Decision (Dec. 22, 2022), https://www.nj.gov/governor/news/news/562022/20221222a.shtml [https://perma.cc/2CP3-CSBV].

16. Angelo v. Dist. of Columbia, 648 F. Supp. 3d 116 (D.D.C. 2022).

17. Koons v. Reynolds, 649 F. Supp. 3d 14, 39-41 (D.N.J. 2023); Antonyuk v. Hochul, 635 F. Supp. 3d 111, 143 (N.D.N.Y. 2022).

18. *Koons*, 649 F. Supp. 3d at 39-41; *Antonyuk*, 635 F. Supp. 3d at 143.

19. *Koons*, 649 F. Supp. 3d at 41; *see also Antonyuk*, 635 F. Supp. 3d at 143 (rejecting New York's historical analogues for its sensitive-place regulations in places or vehicles used for public transportation).

20. The sources cited in this Note come from, among other places, Yale University's Beinecke Rare Book & Manuscript Library and Yale University Library's Manuscripts & Archives.

21. *See infra* Section I.B. Under the Court's Second Amendment jurisprudence, evidence from eighteenth-century dictionaries leads to the conclusion that firearms are among the "arms" protected by the Second Amendment, Dist. of Columbia v. Heller, 554 U.S. 570, 581 (2008), which in turn "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *id.* at 582. However, the "sorts of weapons protected" are only "those 'in common use,'" not "dangerous and unusual weapons." *Id.* at 627. This Note uses the term "gun," rather than "firearm," only when quoting from or describing a source, such as a nineteenth-century railroad regulation or a judicial opinion, that uses that term, since the Supreme Court's test for the Second Amendment uses the term

which railroads barred passengers from carrying functional firearms or weapons that would render their owners ready for confrontation.[22] At the same time, we can predict that a search for statutes regulating firearms in public transportation will come up empty. State-owned or state-operated public transportation as such did not generally exist before the turn of the twentieth century.[23] Yet so far, only one court has cited a single source other than a statute or judicial opinion as evidence of the nation's historical tradition of firearm regulation in public transportation.[24]

Scholars have made substantial contributions to clarify the role of history in *Bruen*'s test. Many have debated the permissible temporal bounds of history that judges can consider[25] and whether the Court's opinion can be properly described as originalist.[26] Others have theorized about which characteristics render a place sensitive.[27] Still others have contemplated to what extent the decision permits courts to analogize from the history of U.S. territories.[28] An underappreciated and still unresolved dimension of the decision is the extent to which regulations other than statutes constitute evidence of the nation's historical tradition of firearm regulation.

"firearm," not "gun." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022). Guns are a type of firearm. *Gun*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gun [https://perma.cc/VS7M-ZY3X]. This Note uses the term "arms," rather than "firearms," only when quoting from or describing a source, such as a nineteenth-century railroad regulation or a judicial opinion, that uses that term, or when referring to the "right to bear arms" guaranteed by the Second Amendment. U.S. CONST. amend. II.

22. *See infra* Part I.

23. *See infra* Section I.A.

24. *See* Frey v. Nigrelli, No. 21-CV-05334, 2023 WL 2473375, at *19 (S.D.N.Y. Mar. 13, 2023).

25. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 467-68 (2023).

26. *See id.* at 484; William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 17), https://ssrn.com/abstract=4618350 [https://perma.cc/PUH9-LJV7]; Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1514-16 (2023).

27. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 91 (2023). *See generally* Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795 (2023) (analyzing the types of sensitive-place regulations that *Bruen*'s analogical method permits).

28. *See, e.g.*, Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 WASH. U. L. REV. 1, 40 (2023).

This debate arrived at the Supreme Court during oral argument in *United States v. Rahimi*.[29] Solicitor General Elizabeth Prelogar argued that some lower courts, when adjudicating Second Amendment questions after *Bruen*, have erred in concluding that "the only thing that matters under *Bruen* is regulation."[30] General Prelogar contended that courts should not "plac[e] dispositive weight on the absence of regulation," and she called on the Court to "make clear" that *Bruen* is "not a regulation-only test."[31] The Court has the opportunity in *Rahimi* to clarify that sources other than statutes constitute evidence of the nation's historical traditions. But there is a strong possibility that the Court will issue a narrow ruling on the case's central question,[32] which might defer these questions for another day.

This Note embraces General Prelogar's contention that courts should consider a broader set of sources to draw conclusions about the nation's historical tradition of firearm regulation. Railroad rules and regulations from the nineteenth century are, in the case of public transportation, where the nation's historical tradition of firearm regulation resides. Analogizing from the historical record derived from outside statutory lawmaking is consistent with *Bruen*'s test. For one, much of the historical evidence cited by the Court to establish *schools* as sensitive places comes not from legislatures but from school administrators.[33] These regulations appear nonetheless to be among the Court's evidence of a historical tradition of firearm regulation in schools.[34]

In any event, *Bruen* acknowledged that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach," since the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[35] In the case of public transportation, and perhaps other

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29. 143 S. Ct. 2688 (2023) (granting certiorari in *Rahimi*). The question at issue is the constitutionality of 18 U.S.C. § 922(g)(8), which criminalizes the possession of firearms by individuals subject to domestic-violence restraining orders. *See* United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).

30. Transcript of Oral Argument at 38, *Rahimi*, 143 S. Ct. 2688 (No. 22-915).

31. *Id.* at 39-40.

32. Duke Law Podcast, *Reaction: Center for Firearms Law Unpacks Oral Argument in* 'U.S. v Rahimi,' DUKE L. SCH. (Nov. 20, 2023), https://law.duke.edu/news/duke-law-podcast-reaction-center-firearms-law-unpacks-oral-argument-us-v-rahimi [https://perma.cc/6BMS-4R8J] (excerpting a podcast episode in which Professor Joseph Blocher contemplates a "narrow opinion" and Andrew Willinger foresees a majority opinion that "say[s] all we need to decide here is that dangerousness is a historically supported principle, and Rahimi is dangerous").

33. *See* Blocher & Siegel, *supra* note 27, at 1807-08.

34. *See infra* Section II.A.

35. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

public spaces, a critical change between the relevant historical period and today is the twentieth-century revolution in state capacity that rendered sites which had previously been regulated by quasi-public or private actors[36] as sites of purely public ownership and operation.[37]

This observation has important implications for the constitutionality of regulating public carry after *Bruen*. It clarifies the permissible bounds of history that litigants and courts can consider when sketching the nation's historical tradition of firearm regulation. When a state seeks to regulate firearms in a place that is now publicly owned and operated, but which in the eighteenth or nineteenth century was not directly regulated by legislatures, it should consult historical sources other than statute books or local ordinances, which this Note refers to as statutory lawmaking, to search for the historical warrant for its regulation. If those regulations constitute the nation's historical tradition of firearm regulation at that site, then courts should treat them as such.

Part I of this Note recounts the background legal regime for railroads in the nineteenth century and the manner in which these railroads enacted regulations governing firearm carriage. Part II contends that these regulations evince a historical tradition of firearm regulation, granting states the authority to enact comparable firearm regulations on relevantly similar forms of public transportation.[38] Finally, Part III argues that the case study of public transportation provides broader lessons to litigants, judges, and scholars. It points towards a more expansive and historically faithful means of honoring *Bruen*'s command that judges reason from the nation's historical tradition of firearm regulation when adjudicating the contours of the Second Amendment right to bear arms. And it may help courts and litigants add coherence to the nascent sensitive-places doctrine. In so doing, this Note is the first expansive scholarly account to

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36. *See infra* notes 70-72 and accompanying text.

37. *See infra* note 52.

38. The word "public" in public transportation does not necessarily refer to public *ownership* of the mode of transportation at issue. Rather, it can be understood to refer to a transportation service's openness to the public. The U.S. Department of Transportation defines "public transportation service" to mean "the operation of a vehicle that provides general or special service to the public on a regular and continuing basis" consistent with statutory requirements. Fed. Transit Admin., *Interpretations of Definitions*, U.S. DEP'T TRANSP. (2021), https://www.transit.dot.gov/research-innovation/interpretations-definitions [https://perma.cc/W84R-MFSL]. The U.S. Code defines public transportation to mean "regular, continuing shared-ride surface transportation services that are *open to the general public* or open to a segment of the general public defined by age, disability, or low income" excluding, *inter alia*, Amtrak. 49 U.S.C. § 5302(15) (2018) (emphasis added). The exclusion of Amtrak in the statutory definition ensures that the federally run Amtrak is not subject to the same regulations as the predominantly locally run transportation systems regulated by that chapter.

argue that certain nonstatutory materials can inform courts' understanding of the nation's historical tradition of firearm regulation.[39]

Though this Note uses trains as a case study, it would be a mistake to view the argument as confined to the public-transportation setting. The Note's core argument is methodological: it unearths previously overlooked materials and calls on litigants and scholars to incorporate them and similarly situated sources in Second Amendment jurisprudence. Though the Note argues that the historical precursors of present-day public transportation were quasi-public, the Note's conclusions about methodology apply with equal force to sensitive places with purely private historical analogues. For example, this Note does not study in great depth historical firearm regulations at zoos or casinos, many of which were historically private in operation. But in Part III, it argues that the Note's central methodological arguments still justify considering private establishments' historical firearm regulations as part of the nation's historical tradition of firearm regulation at those sites.

The purpose of this Note is to illuminate how overly circumscribed courts and litigants have been when inquiring into the nation's historical tradition of firearm regulation. When courts focus only on statutes, they miss important aspects of the eighteenth- and nineteenth-century legal landscape. In the case of trains and perhaps other settings of Second Amendment jurisprudence, statutes are not the only game in town. A panoramic look at the relevant legal sources, which this Note prescribes, can help courts avoid crabbed understandings and focus their application of Second Amendment law on the entirety of this nation's historical tradition of firearm regulation.

I. RAILROADS AS REGULATORS

This Part begins by exploring how railroads—among the core modes of nineteenth-century public transportation—straddled the line between public and private in their structure and function. Though states did not directly regulate passengers' firearm carriage while riding public transportation, they did incorporate and delegate authority to railroad corporations to enact reasonable regulations. A close examination of nineteenth-century railroads' rules and regulations reveals that, from 1835 to 1900, many railroads restricted the ability of passengers to carry functional firearms on board. These regulations ranged in

39. One court briefly cites to the rules and regulations of one nineteenth-century railroad corporation to decline to enjoin New York State's sensitive-place regulation in public transportation, *see* Frey v. Nigrelli, No. 21-CV-05334, 2023 WL 2473375, at *19-20 (S.D.N.Y. Mar. 13, 2023), but there has not yet been an expansive scholarly analysis of the permissibility of considering such regulations in a Second Amendment sensitive-places case.

severity from an outright ban on all firearms, to a prohibition on loaded or uncased firearms, to a requirement that all firearms be inspected prior to boarding.

A. Quasi-Public Rail

Before the Founding, public transit in the United States was limited to the occasional ferry in major port cities.[40] The rapid urbanization of the country in the early nineteenth century sparked the emergence of transportation networks.[41] In the 1820s and 1830s, the United States' largest cities added networks of horse-drawn carriages, omnibuses, and horsecars, which carried small groups of passengers to and from fixed points.[42] At the same time, the nation began experimenting with rail in the mid-nineteenth century. The first railroad that provided regular passenger and freight service, the Baltimore & Ohio Railroad, was chartered in 1827.[43] Soon, the nation's rail mileage grew from just over 9,000 miles in 1850 to more than 30,000 miles in 1860.[44]

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40. The 1792 Militia Act, which imposed an obligation on certain able-bodied men to carry a gun on their person and keep a gun at home when called to militia service, exempted "Ferrymen," along with legislators, judges, and other officials, from this requirement. *See* Militia Act of 1792, ch. 33, § 2, 1 Stat. 271, 272 (repealed 1903).

41. According to the 1800 U.S. Census, roughly six percent of Americans then lived in what the Census termed "urban territory." *See* ROBERT C. POST, URBAN MASS TRANSIT: THE LIFE STORY OF A TECHNOLOGY 13 (2007). By 1820, that share had changed little. *Id.* It was only between 1820 and 1860 that the United States's urban population began to skyrocket. Many of the country's largest cities saw substantial population growth in that time: New York's population grew eightfold, *id.* at 14, while the country's population grew only threefold, *see* DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 56 (2002) (documenting a population increase from 9.6 million to 31.5 million). *See also* Jay Young, *Infrastructure: Mass Transit in 19th- and 20th-Century Urban America*, OXFORD RSCH. ENCYCS. 1-2 (Mar. 2, 2015), https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-28 [https://perma.cc/4SZR-ZN58] (describing the impact of mass transit on cities).

42. *See* Young, *supra* note 41, at 2-4. In the 1820s, the first fixed-route urban transport service in the United States was a single-vehicle, four-wheel, horse-drawn carriage, which could serve about a dozen passengers at a time, traveling from the Battery to Bleecker Street in Manhattan. *See* BRIAN J. CUDAHY, CASH, TOKENS, AND TRANSFERS: A HISTORY OF URBAN MASS TRANSIT IN NORTH AMERICA 8 (1990). The omnibus, which emerged in the 1830s in New York, Philadelphia, and Boston, "had spoked wheels banded with iron tires, and the driver sat ahead of and above the passenger compartment on an open bench . . . ." POST, *supra* note 41, at 14. The omnibus ultimately fell out of fashion when passengers and investors alike were drawn to rail for its efficiency and comfort. CUDAHY, *supra*, at 10.

43. *See* Gary John Previts & William D. Samson, *Exploring the Contents of the Baltimore and Ohio Railroad Annual Reports: 1827-1856*, ACCT. HISTORIANS J., June 2000, at 1, 6, 38.

44. JOHN STOVER, ROUTLEDGE HISTORICAL ATLAS OF THE AMERICAN RAILROADS 16-17, 20 (1999).

This growth unfolded unevenly across the country. Before the Civil War, rail was a Northern phenomenon. In 1850, only about one-quarter of the nation's rail lay in the South.[45] The Civil War and its aftermath transformed the nation's railroads. During the war, President Lincoln signed the Pacific Railway Bill to award Union Pacific (established in 1863) and Central Pacific (established in 1861) the privilege of constructing the Transcontinental Railroad.[46] By the end of the war, the South's railroads were "in a shambles."[47] During Reconstruction, the federal government made significant land grants to companies to rebuild the nation's rail network.[48] By 1870, rail mileage exceeded 50,000,[49] and by 1880, it topped 90,000 miles.[50] By the late nineteenth century, municipalities supported the formation of a new form of rail—rapid transit, including subways—to reduce congestion on city roads.[51]

Corporations operated all of the foregoing modes of rail transportation in the nineteenth century.[52] But U.S. law treated railroad corporations as regulators in their own right, at a time in U.S. regulatory history in which Americans were "slow to separate public and private."[53] Leading treatises captured the tension between railroads' private ownership and public responsibility. One treatise noted that, because of their public role, railroad companies could be controlled

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45. *Id.* at 16-17.
46. *Id.* at 34.
47. *Id.* at 31. Chief Justice Salmon P. Chase rode the railroad through North Carolina in 1865 and said his train was a "wheezy little locomotive and an old mail car with the windows smashed and half the seats gone." *Id.*
48. *Id.* at 33.
49. *Id.* at 38.
50. *Id.*
51. *See* CHARLES W. CHEAPE, MOVING THE MASSES: URBAN PUBLIC TRANSIT IN NEW YORK, BOSTON, AND PHILADELPHIA—1880-1912, at 145-46 (1980).
52. It was not until the twentieth century that American cities began to exercise purely public ownership over the major channels of public transportation. *See* George M. Smerk, *Urban Mass Transportation: From Private to Public to Privatization*, 26 TRANSP. J. 83, 84 (1986) ("[P]ublic ownership of transit was very rare in the United States until 1965. Indeed, in many places it was illegal." (footnote omitted)); CHEAPE, *supra* note 51, at 31 ("[L]ocal transit . . . had an established tradition of private enterprise."). President Wilson took control of some of the nation's rail network at the start of World War I, but the railroads returned to private ownership after the war. *See* Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983, 994-95 (2013). It was only in the 1970s that nearly all of the nation's passenger rail network became publicly owned and operated. *See generally* Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (nationalizing ownership of the rail network in the United States).
53. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 84 (1996).

by mandamus, a remedy conventionally unavailable against private entities.[54] Another treatise, published in 1905 but citing case law from the 1870s, explained that railroads are "essentially a public business," performing a public function that justifies legislatures in regulating the rates that they charged.[55]

In the late nineteenth century, the U.S. Supreme Court articulated two reasons that railroads were at least quasi-public entities. The first arose from the grants of "extraordinary powers" legislatures made to railroads to "serve the public" and engage "in a public employment affecting the public interest."[56] The second was the railroad's role as a "public highway" and a "function of the state," "none the less so because [it is] constructed and maintained through the agency of a corporation deriving its existence and powers from the State."[57] As a consequence of its public nature, a railroad company could, for example, exercise the power of eminent domain.[58]

For these reasons, the Court described a railroad company as something more than a mere private corporation. To the Court, it was "a quasi public corporation."[59] It was "a public highway, established primarily for the convenience of the people, and to subserve public ends."[60] Its "work was public, as much so as if it were to be constructed by the State."[61] It was, as Justice Harlan articulated in his dissent in *Plessy v. Ferguson*, "in the exercise of public functions."[62]

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54. 2 W.F. Bailey, The Law of Jurisdiction § 803, at 999 (1899) ("Railroad companies are . . . *quasi*-public corporations, having the right of eminent domain. . . . In fact they are constructed and operated for the public use, but for private gain as the result of private investment. Hence they more nearly concern the public than ordinary private corporations formed and organized for private purposes, and to a greater degree are subject to control by *mandamus*.").

55. Harrison Standish Smalley, Railroad Rate Control in Its Legal Aspects: A Study of the Effect of Judicial Decisions upon Public Regulation of Railroad Rates 13-14 (1905) ("The railroad business is essentially a public business, and, therefore, railroad companies, though private corporations, have devoted their property to public use and are discharging a public function. This being the case, it naturally follows that in the employment of their property, in the conduct of their business, railroad companies must be subject to public control. It would be intolerable that the management of a public industry, and essentially rates to be charged by it, should be left to the ungoverned whim of private parties, to whom the state had delegated its function in order that the public might be served.").

56. Chi., Burlington & Quincy R.R. Co. v. Iowa, 94 U.S. 155, 161 (1876).

57. Smyth v. Ames, 169 U.S. 466, 544 (1898).

58. *See supra* note 54.

59. Lake Shore & Mich. S. Ry. Co. v. Smith, 173 U.S. 684, 690 (1899) (emphasis omitted); *see supra* note 54.

60. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 657 (1890).

61. Twp. of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 676 (1874).

62. 163 U.S. 537, 553 (1896) (Harlan, J., dissenting).

The regulatory regime that governed railroad operations mixed both public and private elements. A railroad company had a "general right . . . to conduct and manage its own affairs,"[63] but the Supreme Court did "not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public."[64]

Many railroads, moreover, had intimate connections to the governments that chartered them through generous assignments of board seats to state and local governments or public-private financing. For more than three decades, concluding in 1867, a majority of the board directors of the Baltimore & Ohio Railroad were appointed by the State of Maryland or the City of Baltimore.[65] The Pennsylvania Railroad's charter allowed each local government in Pennsylvania to purchase up to three seats on the board[66] and granted the state the right to take over the railroad after twenty years.[67] In New Haven, "[e]ach railroad was placed under the jurisdiction of three commissioners who were appointed by the State, but whose salaries were to be paid by the railroad," to oversee railroad business, report to the state, and regulate.[68]

This regulatory scheme typifies a broader nineteenth-century system of regulation that William J. Novak has termed "public-private governance."[69] Under this scheme, power was distributed between the public and private sectors to "guard against both the excessive publicization of private life as well as the

63. *Lake Shore*, 173 U.S. at 691.

64. *Id.* at 693.

65. Carter Goodrich & Harvey H. Segal, *Baltimore's Aid to Railroads: A Study in the Municipal Planning of Internal Improvements*, 13 J. ECON. HIST. 2, 25-26 (1953). The Baltimore & Susquehanna Railroad's directory was also primarily staffed by government appointees. *See id.* at 26.

66. LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 97 n.50 (1948).

67. *See* James A. Ward, *Power and Accountability on the Pennsylvania Railroad, 1846-1878*, 49 BUS. HIST. REV. 37, 38-39 (1975). The charter of the Camden & Atlantic Railroad Company, incorporated in New Jersey in 1852, contained a similar provision granting the state the privilege to take over the railroad fifty years after completion, should it so choose. *See* Charles L. Towle, *History of the Camden and Atlantic Railroad and Associated Railroads, 1852-1897*, 73 RY. & LOCOMOTIVE HIST. SOC'Y BULL. 16, 17-18 (1948).

68. Sidney Withington, *New Haven and Its Six Railroads*, 56 RY. & LOCOMOTIVE HIST. SOC'Y BULL. 10, 11 (1941).

69. *See generally* William J. Novak, *Public-Private Governance: A Historical Introduction*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009) (describing public-private governance as "a distinctive form of American policymaking with roots back to the . . . constitutional foundations of the republic" and characterized by the "tendency of policymakers to . . . rely on the private sector, through outsourcing, contracting, disinvestment, and the selling and leasing of governmental properties and resources, to meet obligations thought of as distinctly public").

privatization of public things," combatting the "twin evils of *both* public corruption and private coercion."[70] Novak cautions that this scheme "should not be confused with private government."[71] Railroad corporations were a prime example of this "mixed enterprise" scheme, where a legislature sought "partial guidance of corporate policy by the state" by, for example, selecting certain state board directors or, more so in the early nineteenth century, investing directly in corporations.[72]

Even as the nation's railroads were largely owned and operated by corporations, the public-private distinction familiar to U.S. law in the twentieth and twenty-first centuries fails to capture the quasi-public, quasi-private role of railroads in performing critical public functions in the nineteenth century. Consider two aspects of the nineteenth-century legal regime for railroads that rendered them distinct from purely private actors. First, corporate charters sometimes included means to continuously hold the railroad corporations accountable. The Pennsylvania Railroad's charter, passed in 1846 by the Pennsylvania legislature, is considered a "classic" of the period.[73] By statute, the legislature provided that stockholders could "request a meeting in writing to redress specific grievances" through a ten-percent vote.[74] Second, incorporation in the middle of the nineteenth century tended to include restrictions on the power of the corporation in the name of empowering the interests of the public. These incorporation papers often included limits on a corporation's life to "subject corporations to recurrent legislative scrutiny,"[75] though these provisions were likely meant both to achieve "social or political" goals and to protect creditors.[76]

The features enumerated in this Section granted supposedly private railroad companies in the nineteenth century with quasi-public authority. This may help explain why the statute books are bereft of much direct legislative regulation of passenger conduct on public transportation during this period. While private railroads' regulations did not completely displace traditional public law, state legislatures were careful to preserve state influence over the entities they created. When a railroad corporation enacted rules and regulations, it did so against the backdrop of state oversight—from constraints on its charter's duration to the

70. *Id.* at 39 (second emphasis omitted).

71. *Id.* at 40.

72. HARTZ, *supra* note 66, at 82, 96; *see supra* notes 65-68 and accompanying text.

73. *See* Ward, *supra* note 67, at 37.

74. *Id.* at 38 (citing Act of Incorporation of the Pennsylvania Railway Company, 1846 Pa. Laws 316).

75. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 45 (1970).

76. *Id.* at 46-47.

ability of state legislatures to alter the membership of its board of directors. Thus, the corporation's role had an explicitly public quality to it.

B. Limits on Gun Carriage in Passenger Cars

When corporations regulated the conduct of railroad passengers, they often did so through published rules and regulations, printed in a pamphlet or handbook. Railroad rules and regulations in this period provided guidance to conductors, baggagemen, and others on such tasks as admitting or ejecting passengers, handling luggage, obeying signals, and otherwise promoting safety on board. Across state courts in the nineteenth century, it went unquestioned that railroads had the authority to protect the safety of their passengers through regulation.[77]

This Section shows that at least six U.S. railroads between 1835 and 1900 – including at least three of the nation's dominant players[78] – acted pursuant to this authority to regulate firearm carriage in passenger cars. Generally, these rules barred passengers from carrying loaded or uncased firearms, or firearms not inspected by the company.[79]

Where appropriate, this Section offers context on the unique historical conditions surrounding the companies' operations, which could shed light on the rationales for their firearm regulations. Many of the rationales that have historically motivated firearm regulations in public spaces – such as reducing violence

77. Penn. R.R. Co. v. Langdon, 92 Pa. 21, 27 (1879) ("The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of passengers, has been repeatedly recognised."); Poole v. N. Pac. Ry. Co., 19 P. 107, 108 (Or. 1888) ("For its own safety and convenience, and that of the public, a railroad company may make reasonable rules and regulations for the management of its business, and the conduct of its passengers."); Brown v. Kan. City, Ft. S. & G. Ry. Co., 16 P. 942, 943 (Kan. 1888) ("Before a person can claim the rights of a passenger in a public conveyance, he must show that all the reasonable regulations and restrictions known to him, which the carrier has thrown around its business for the safety of the passenger or the convenience of the carrier, have been complied with . . . .").

78. This Section characterizes a railroad as dominant based on its total mileage and passenger volume.

79. The regulations that follow come from both online and archival print sources, several of which are stored in collections at the Beinecke Rare Book & Manuscript Library at Yale University and Yale University Library's Manuscripts & Archives. Yale University does not possess an exhaustive collection of railroad rules and regulations. And some of the rules and regulations unearthed from archival and online sources do not mention firearms at all. *See, e.g.*, THE TONOPAH & TIDEWATER R.R. CO., RULES OF THE TRANSPORTATION DEPARTMENT (1907). This study provides an overview of railroad regulations enacted by major market actors in three regions – the North, South, and West – but does not purport to analyze exhaustively all of the nation's major rail corporations in the relevant historical period.

and avoiding disputes in crowded spaces susceptible to conflict[80]—intuitively apply with equal force in this setting, which is typified by dense gatherings of people from various walks of life.

The story told by these regulations is not a unanimous consensus that railroad corporations enacted public-carry restrictions. But it shows that several of the nation's dominant rail corporations enacted, with apparent judicial acquiescence, firearm regulations that substantially interfered with passengers' ability to carry functional firearms. To tell this story, this Section describes firearm regulations enacted by six corporations in the nineteenth century. For each of the six corporations, this Section outlines the process by which it was incorporated, the regulations it enacted, and (when available) its market share or other evidence of nationwide significance, before turning to the various measures these corporations took to restrict firearm carriage in passenger cars. The process of incorporation sheds light on the extent to which a railroad acted in a quasi-public capacity. Market-share data can inform how broadly a corporation's regulations applied to U.S. passengers, and to what extent a corporation can be considered an "outlier."[81]

South Carolina Canal and Rail Road Company. The very first railroad in the United States to provide regularly scheduled, locomotive-powered passenger service was completed in 1833 by the South Carolina Canal and Rail Road Company.[82] The railroad extended for about 136 miles from Charleston, South Carolina, to Hamburg, South Carolina.[83] At the time, it was the world's longest stretch of railroad tracks under the management of a single company.[84] The state legislature authorized the formation of the company in 1827 and, under a revised version of the law enacted in 1828, delegated it the power to enact "all such regulations, rules and by-laws, for the government of the company and its direction, as they may find necessary and proper for the effecting of the ends and purposes

80. *See, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 134 (2015) (citing ADAM WINKLER, GUN FIGHT 171-73 (2011)); Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 121-22 (2016).

81. *Bruen* cautioned against giving great weight to "outlier" firearm regulations. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70 (2022). The Court refused to "stake [its] interpretation on a handful of temporary territorial laws," for example, that "governed less than 1% of the American population . . . ." *Id.* at 67-68.

82. Donald A. Grinde, Jr., *Building the South Carolina Railroad*, 77 S.C. HIST. MAG. 84, 90, 96 (1976). The railroad was chartered by the South Carolina legislature in 1827 and made tax-exempt in 1828. *Id.* at 85.

83. URLICH BONNELL PHILLIPS, A HISTORY OF TRANSPORTATION IN THE EASTERN COTTON BELT TO 1860, at 156, 159 (1908). Elsewhere, the line is described as 135 miles long. *Id.* at 160.

84. *Id.* at 159; Grinde, *supra* note 82, at 96.

intended by the association, and contemplated in this Act," so long as those rules did not violate state law.[85]

By 1835, the railroad constituted about seventeen percent of the nation's mileage stock.[86] That year, the company published its rules and regulations.[87] The rules read, in relevant part, "No Gun or Fowling Piece shall be permitted to enter the car unless examined by the Conductor."[88] Information on the precise contours of this examination is not readily available. But the requirement of inspection implies that some forms of gun carriage on the train were impermissible. Otherwise, inspection would have been unnecessary.

North Pennsylvania Railroad Company. The North Pennsylvania Railroad Company, which served Philadelphia and three adjacent counties, was incorporated in 1852[89] and opened in 1855.[90] In 1879, the North Pennsylvania Railroad was leased to the Philadelphia and Reading (P&R) railroad,[91] which carried the second-most passengers in the nation annually.[92] Prior to this lease, in 1875, the company promulgated rules and regulations pursuant to a state statute authorizing any incorporated railroad to establish "bylaws, ordinances, and regulations as shall appear necessary or convenient for the government of said corporation"

85. An Act to Amend an Act Entitled "An Act to Authorize the Formation of a Company for Constructing Rail Roads or Canals, from the City of Charleston, to the Towns of Columbia, Camden and Hamburgh," 15 S.C.L. (8 McCord) 355, 358 (1828).

86. *See Miles of Railroad Built for United States*, FED. RSRV. BANK ST. LOUIS (Aug. 16, 2012), https://fred.stlouisfed.org/series/A02F2AUSA374NNBR [https://perma.cc/9FBL-PQW2] (showing 798 miles of railroad track constructed cumulatively by 1835); PHILLIPS, *supra* note 83, at 159 (describing the South Carolina Canal and Rail Road Company's line as 136 miles long).

87. The railroad's early history was shaped by the institution of American enslavement. The 1835 passenger regulations set out that enslaved people not "having the care of Children" could only ride if white passengers agreed to permit them on board; they would sit in segregated seating if not accompanied by their white enslaver. PHILLIPS, *supra* note 83, at 165.

88. PHILLIPS, *supra* note 83, app. II at 165 (quoting a reproduction of "Passenger and Freight Regulations of the Charleston and Hamburg Railroad," which was originally published in a local almanac).

89. An Act to Incorporate the Philadelphia, Easton and Water-Gap Railroad Company, 1852 Pa. Laws 1.

90. 1 HENRY V. POOR, HISTORY OF THE RAILROADS AND CANALS OF THE UNITED STATES OF AMERICA 467 (New York, John H. Schultz & Co. 1860).

91. PHILADELPHIA & READING RAILROAD CO., REPORT OF THE PRESIDENT AND MANAGERS OF THE PHILADELPHIA & READING RAILROAD CO. TO THE STOCKHOLDERS, JANUARY 12TH, 1880, FOR THE YEAR ENDING NOVEMBER 30th, 1879, at 93 (Philadelphia, Allen, Lane & Scott 1880).

92. ARMIN E. SHUMAN, STATISTICAL REPORT OF THE RAILROADS OF THE UNITED STATES 15, 19 tbl.E (1883).

that do not violate federal or state law.[93] The second-listed regulation, after one requiring punctuality and strict adherence to the regulations that followed, pertained to firearms. It directed the passenger conductor to "see that no person passes the gate without a ticket, and that passengers do not take into the cars guns, dogs, valises, large bundles or baskets."[94]

Central Pacific and Union Pacific. In 1862, just months into the Civil War, the United States took its most ambitious step yet to galvanize the railroad industry when Congress passed the Pacific Railway Act.[95] The Act authorized the Central Pacific and Union Pacific Railway Companies to build the nation's transcontinental railroad.[96] The Act granted that the newly incorporated Union Pacific Railway Company, "at any regular meeting of the stockholders called for that purpose," could "make by-laws, rules, and regulations as they shall deem needful and proper, touching . . . all matters whatsoever which may appertain to the concerns of said company."[97] Central Pacific was a pillar of the nation's rail infrastructure. In the aforementioned 1880 Census report on the nation's "greatest" railroad lines, Central Pacific carried the fourth-most passengers, for the third-most aggregate mileage.[98] In 1882, it carried over seven million passengers, comprising 2.6 percent of all passenger traffic in the nation and earning 4.7 percent of passenger rail revenue nationwide.[99]

Just over a decade after the transcontinental railroad was completed,[100] in 1882, Central Pacific enacted rules that specified the manner in which passengers could bring firearms onto their trains: only guns "in cases and not loaded . . . may be carried in day or sleeping cars without charge."[101]

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93. An Act Regulating Railroad Companies § 2, 1849 Pa. Laws 79, 80.

94. Rules and Regulations for Running the Trains on the North Pennsylvania Railroad 13 (Philadelphia, 1875).

95. Ch. 120, 12 Stat. 489 (1862).

96. *Id.* at 490.

97. *Id.* at 491.

98. Shuman, *supra* note 92, at 19 tbl.E. Central Pacific's passenger total of 6,669,037 reflects 5,371,584 ferry passengers (in Oakland, California). *Id.*

99. *Reports of Railroad Companies for the Year 1882*, *in* Board of Railroad Commissioners of the State of California, Fifth Annual Report for the Year Ending December 31, 1884, at 61, 69 (Sacramento, James J. Ayres, Supt. State Prtg. 1885). About 289 million passengers were carried nationwide in 1882. *See* 2 U.S. Dep't of Com., Historical Statistics of the United States: Colonial Times to 1970, at 727 (1975).

100. *Completion of the Great Line Spanning the Continent*, N.Y. Times, May 11, 1869, at 1.

101. Central Pacific Railroad and Leased Lines: Rules, Regulations and Instructions for the Use of Agents, Conductors, etc. 204-05 (San Francisco, Cent. Pac. R.R. 1882).

Like Central Pacific, Union Pacific was among the top ten rail lines nationwide in terms of passenger revenue.[102] In 1884, Union Pacific enacted its own strict firearm regulations. Its rules set out, "Guns in cases may be carried by passengers in the coaches without charge," but passengers could *not* carry uncased guns in their cars.[103]

That said, the Union Pacific Railroad, which extended across the homelands of the Lakota people,[104] did permit firearm carriage by some employees. To try to thwart violent encroachments upon their treaty-granted land, Plains tribes attacked Union Pacific employees as they constructed rail lines and surveyed the land.[105] To protect the company, U.S. military officers transferred firearms to Union Pacific employees.[106] Regiments of captured Confederate soldiers, termed "Reconstructed Rebs," guarded construction.[107]

International & Great Northern Railroad Company. The International & Great Northern Railroad Company (I&GN) imposed similar restrictions in the 1880s. By 1890, the company had 775.4 miles of railroad track,[108] comprising just under eight percent of the total railroad mileage in the region encompassing Texas, Louisiana, and the eastern part of New Mexico.[109] Although I&GN was smaller on a national scale than Union Pacific or Central Pacific, it was an important regional player.

In 1886, John Folliard attempted to board a train operated by I&GN to travel from Palestine, Texas, to Long Lake, Texas.[110] Folliard carried a gun. Before boarding the train, "he was met at the door of the passenger coach by a servant of the company, and told that he could not take his gun into the coach, but must

102. SHUMAN, *supra* note 92, at 19.

103. UNION AND CENTRAL PACIFIC RAILROAD LINE 5 (Omaha, Omaha Republican Print 1884). The regulations read, "Guns uncased will be carried in baggage car only." *Id.*

104. MANU KARUKA, EMPIRE'S TRACKS: INDIGENOUS NATIONS, CHINESE WORKERS, AND THE TRANSCONTINENTAL RAILROAD 69 (2019).

105. *Id.* at 70-71, 74.

106. *Id.* at 71.

107. *Id.* at 72-73.

108. INTERSTATE COM. COMM'N, FOURTH ANNUAL REPORT ON THE STATISTICS OF RAILWAYS IN THE UNITED STATES FOR THE YEAR ENDING JUNE 30, 1891, at 220 (1892).

109. *Id.* at 14 (outlining the total railroad mileage in a geographic region termed "Group IX"); INTERSTATE COM. COMM'N, PRELIMINARY REPORT ON THE INCOME ACCOUNT OF RAILWAYS IN THE UNITED STATES FOR THE YEAR ENDING JUNE 30, 1893, at 10 (1894) (defining Group IX as a geographic region that "embraces the State of Louisiana, exclusive of the portion lying east of the Mississippi River, the State of Texas, exclusive of that portion lying west of Oklahoma, and the portion of New Mexico lying southeast of Santa Fe").

110. Int'l & Great N. R.R. Co. v. Folliard, 1 S.W 624, 625 (Tex. 1886).

place it in the baggage car."[111] Folliard did as he was instructed. He walked to the next car to deposit his gun. Upon disembarking, Folliard's gun fell, requiring him to walk across the trestle to retrieve it.[112] On his way back to the train, he slipped, fell on the cross-ties, and injured himself.[113] He sued the railroad company for damages. On appeal, the Supreme Court of Texas held that Folliard could recover from the railroad company. The court did not contest the permissibility of the railroad employee's command to Folliard that he was not permitted to carry his gun in coach. The "duty imposed upon" the carrier was to be "bound for [the gun's] delivery," but this duty did not necessarily encompass permitting a passenger to carry a gun on their person.[114] The right to bear arms was guaranteed by the Texas Constitution at the time,[115] but it went unmentioned in the opinion affirming the right of the railroad company to regulate firearm carry.

Albany Railway. The final public transportation company this Section will explore is the Albany Railway, which also enacted rules and regulations in the nineteenth century that were applied to bar certain forms of firearm carriage. Though smaller on a national scale, the link between Albany and New York was critical on a regional level.[116] Albany Railway differed from the foregoing companies in two respects. First, it operated a passenger trolley, rather than a traditional railroad.[117] Second, its regulations did not expressly mention firearms, though case law from the end of the nineteenth century shows its rules nonetheless were applied on at least one occasion to regulate passenger firearm carriage.

In the late nineteenth century, Albany Railway had a rule that "[p]assengers must not be permitted to take into the cars packages or goods that are cumbersome or dangerous."[118] When a prospective passenger named Patrick Dowd tried to board a streetcar of the Albany Railway, "carrying two rifles with bayonets attached," the conductor "informed him he could not ride with those guns, and requested him to get off."[119] The conductor apparently interpreted Dowd's weapons to be dangerous goods. But Dowd did not comply, and the conductor took him by his coat collar and pulled him off of the train. Dowd sued for damages. On appeal, a New York intermediate appeals court concluded "as a matter of law,

111. *Id.* at 625.
112. *Id.*
113. *Id.*
114. *Id.*
115. TEX. CONST. art. I, § 23 (1876).
116. GINO DICARLO, TROLLEYS OF THE CAPITAL DISTRICT 41-42 (2009).
117. *Id.* at 42.
118. Dowd v. Albany Ry., 62 N.Y.S. 179, 179 (N.Y. App. Div. 1900).
119. *Id.*

that this was a reasonable rule."[120] The two guns, as Dowd carried them, "were so obviously dangerous to others in the same car that it needed only the declaration of the conductor in charge to exclude the passenger proposing to ride so incumbered, and his declaration to that effect should have been conclusive."[121] *Dowd* raises the question of how many other railroads had rules on the books that, though they did not include the word "gun" or "firearm," were interpreted by conductors to implicitly bar certain passengers from entry on the basis of their carriage of arms.

Taken together, these six railroads—which controlled a significant share of the national railroad system and important regional routes—took various measures to restrict public carry for passengers while on board. That all said, some states recognized an affirmative ground for an individual to carry arms while on a journey: the "traveler's exception." Generally, these statutes clarified that more general prohibitions on concealed carry of firearms were inapplicable for those deemed a "traveler."[122] Though this text could have been interpreted to create a blanket exception to public carry restrictions for rail passengers—which might have invalidated the railroad regulations in this Section—courts instead opted to construe the exception narrowly. In *Stilly v. State*, a Texas intermediate appeals court cautioned against a broad reading of the word "traveler," as "[t]he practical result of such an interpretation of the statute would cause our cities and towns to be infested with armed men."[123] In *Impson v. State*, the Texas Court of Appeals applied *Stilly* to the case of an individual who was arrested after he was "seen on the railroad train with the pistol in his possession," while he was traveling from "the Indian Territory, about 60 miles from the city of Paris, in Lamar county, to which place he brought the pistol."[124] The court reversed his conviction, holding that this sixty-mile journey rendered the man "a person

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120. *Id.*

121. *Id.* at 180.

122. *See, e.g.*, An Act to Prevent Carrying Concealed or Dangerous Weapons, and to Provide Punishment Therefor, Feb. 23, 1859, *reprinted in* LAWS OF THE STATE OF INDIANA, PASSED AT THE FORTIETH SESSION OF THE GENERAL ASSEMBLY 129 (1859) ("[E]very person not being a traveler, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars."); 1871 Tex. Gen. Laws 25, An Act to Regulate the Keeping and Bearing of Deadly Weapons ("[T]his section shall not be so construed as to . . . prohibit persons traveling in the state from keeping or carrying arms with their baggage . . . ."); An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases, ch. 89, § 1, 1813 Ky. Acts 100.

123. 11 S.W. 458, 458 (Tex. Ct. App. 1889).

124. 19 S.W. 677, 678 (Tex. Ct. App. 1892).

traveling."[125] It was the great distance of the travel, rather than the fact of moving between towns or cities, that rendered Impson a traveler. In *Williams v. State*, a Texas appeals court reached a similar conclusion for a man traveling 150 miles.[126]

Similarly, in *Eslava v. State*, the Supreme Court of Alabama held that an Alabama statute's exception for those "travelling or setting out on a journey" did not apply to one who commuted from a home in the country to a business in the city, since this travel was "within the ordinary line of the person's duties, habits, or pleasure."[127] These cases from Texas and Alabama stand for the proposition that courts did not permit the traveler's exception to swallow broader rules barring public carry, but rather applied the exception to longer journeys or trips that did not occur regularly. There is no reason to believe that these statutes and judicial opinions would have, on their face, invalidated railroad firearm regulations like those in Section I.B.

C. *Limits on Firearms in Baggage*

The foregoing examples demonstrate that prominent railroad companies enshrined limits on firearm carriage in passenger cars in their rules and regulations. States delegated this regulatory responsibility to railroads, and courts upheld their rules for firearm carriage. Since gun carriage in passenger cars was so limited, the right to check firearms in baggage—and the ability to seek recovery in the event that checked firearms were lost, stolen, or damaged—was a battleground for traveling firearm owners. The regulations outlined in this Section illustrate that, just as railroads regulated gun carriage in passenger cars, so too did they restrict the circumstances in which passengers could check a firearm in baggage. Some companies required that firearms in baggage be cased, while others barred checked firearms altogether. What emerges from these various practices is a common understanding that railroads were not invariably obliged to permit passengers to check firearms as baggage.

Central Pacific Railroad, for example, had one of the strictest rules against checking guns as baggage: "Guns . . . are not baggage, and must not, under any circumstances, be checked."[128] Union Pacific's rule permitted cased guns to be "checked free by baggage-agents as part of the usual baggage allowance,"

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125. *Id.*

126. 72 S.W. 380, 381-82 (Tex. Crim. App. 1903).

127. 49 Ala. 355, 357 (1873).

128. CENTRAL PACIFIC RAILROAD AND LEASED LINES: RULES, REGULATIONS AND INSTRUCTIONS FOR THE USE OF AGENTS, CONDUCTORS, ETC. 196 (San Francisco, Central Pacific R.R. 1882).

whereas "[g]uns uncased [could] be carried in baggage car only."[129] On the other hand, the Oregon Short Line Railroad Company took a far more permissive line. It directed, "Baggagemen must not go into coaches to look for guns or dogs, nor shall they request that they be placed in their charge."[130]

When companies did not clarify whether guns were to be considered baggage, courts performed a fact-intensive inquiry into the circumstances of an individual's journey to determine their status. Courts generally deemed guns baggage when the weapons were "necessary" to the object of a trip or "usual" among similarly situated travelers. This inquiry turned on the purpose and distance of the trip, among other factors.

As context for how courts defined baggage for travelers, the case of steamboats is instructive. The first set of relevant cases to reach state high courts pertained to passengers traveling by boat on the Hudson River and the Illinois River. In 1852, the Illinois Supreme Court heard *Woods v. Devin*, the case of a man who, upon boarding a steamboat, delivered a carpet-bag that included "one case of dueling-pistols" and "one pocket-pistol" to the operator.[131] The court provided an account of the body of state-court precedent defining baggage, casting it as "such articles of necessity and convenience as are usually carried by passengers for their personal use, comfort, instruction, amusement or protection."[132] Courts considered "the object and length of the journey, the expenses attending it, and the habits and condition in life of the passenger."[133] Applying this rule, the court held that these firearms were properly considered baggage, and the steamboat was liable for their loss. The court's reasoning turned on its finding that "it is not unusual for such articles to be carried in the trunks of travelers."[134]

The Illinois Supreme Court cited *Devin* for the proposition that carrying a "revolver" is "unquestionably baggage."[135] But there was a limit to the number of revolvers a passenger could carry: one. In 1870, in *Chicago, R.I. & P.R. v. Collins*, the court concluded that a passenger who carried two revolvers as baggage on a car owned by the Chicago, Rock Island & Pacific Railroad Company "should

129. UNION & CENT. PAC. R.R. LINE, SPECIAL INFORMATION ALL SHOULD READ 5 (1884) (on file with author).

130. RULES AND REGULATIONS OF THE OPERATING DEPARTMENT: OREGON SHORT LINE RAILROAD COMPANY 99 (1902).

131. 13 Ill. 746, 747 (1852).

132. *Id.* at 750.

133. *Id.*

134. *Id.* at 751.

135. Davis v. Mich. S. & N.I.R. Co., 22 Ill. 278, 323 (1859).

not have been allowed more than one."[136] The passenger, who owned a grocery store in Chicago, traveled to Walcott, Illinois, to buy butter. On the train, he packed two revolvers in his baggage. The court's reasoning was simple: "His occupation or circumstances did not require that he should be furnished with any unusual store of deadly weapons, and we think he might have got along with one revolver."[137] Again, the court engaged in an inquiry into how commonplace it was for a similarly situated traveler to carry the weapons checked by the passenger.

In 1864, the New York Court of Appeals likewise limited the circumstances in which a gun would be considered baggage. In *Merrill v. Grinnell*, the court acknowledged that guns were to be regarded as baggage in the case of "[t]he sportsman who sets out on an excursion for amusement in his department of pleasure needs, in addition to his clothing, his gun and fishing apparatus," just as "the musician" needs "his favorite instrument" or "the man of letter his books."[138] The proper test was whether the passenger "cannot attain the object he is in pursuit of without them, and the object of his journey would be lost unless he was permitted to carry them with him."[139] For this reason, a carrier is not "bound to carry a box of guns," for example.[140]

Other state courts of last resort mirrored the language of *Merrill*, granting that baggage would encompass firearms in the case of a sportsman, but not making the same statement for nonsportsmen. Arkansas regarded "the gun or fishing tackle of the sportsman when on a hunting or fishing excursion" as baggage.[141] Oregon determined that the "gun-case or fishing apparatus of the sportsman" was baggage.[142] The same was true in Wisconsin of "the gun case or the fishing apparatus of the sportsman,"[143] and in New Jersey of a "gun case or fishing apparatus" for "a sportsman journeying for sport."[144]

This collection of cases stands for the proposition that the question of whether firearms could be properly deemed baggage turned on whether the firearm in a given case bore some relation to the object of the passenger's travel. To be sure, the question of whether firearms were to be deemed baggage—and whether railroads would then be responsible for their loss or theft—is different

136. 56 Ill. 212, 217 (1870).
137. *Id.*
138. 30 N.Y. 594, 619 (1864).
139. *Id.*
140. *Id.* at 620.
141. Kan. City, Ft. S. & M. Ry. Co. v. McGahey, 38 S.W. 659, 660 (Ark. 1897).
142. Oakes v. N. Pac. R. Co., 26 P. 230, 232 (Or. 1891).
143. Gleason v. Goodrich Transp. Co., 32 Wis. 85, 99 (1873).
144. Runyan v. Cent. R. Co. of N.J., 41 A. 367, 368 (N.J. 1898).

from whether passengers could store firearms in baggage at their own risk. But the rule that emerges from these cases suggests at the very least that courts did not view it as necessary—constitutionally or otherwise—for railroads to accommodate every form of passengers' gun carriage in baggage. Railroads could regulate firearms in baggage, just as they could regulate firearms carried on a passenger's person.

Across the examples in both Section II.B and Section II.C, it is important to note the difference between the regulations' promulgation and their enforcement. While this Note studies the history of these regulations' promulgation, it does not seek to address in great detail their enforcement. That the regulations in this Section were purportedly promulgated as uniform and generally applicable rules does not mean they were enforced evenhandedly. The regulations were enacted against a backdrop of racial subordination both particular to and far broader than the public transportation context. White enslavers feared the ability of enslaved people to use the railroad to escape from slavery.[145] After the end of slavery, Jim Crow laws perpetuated racial discrimination in public transportation.[146] In some cases, laws expressly empowered employees to carry arms in public transportation settings where white employees or passengers feared proximity to their Black neighbors.[147]

Scholars have debated how, and to what extent, courts should consider historical regulations tainted by racism when determining the nation's historical tradition of firearm regulation.[148] A comprehensive exposition of the

145. AARON W. MARRS, RAILROADS IN THE OLD SOUTH: PURSUING PROGRESS IN A SLAVE SOCIETY 155 (2009); FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS, WRITTEN BY HIMSELF 220 (Pathway Press 1941) (1881) (attributing his escape from slavery, in part, to the "jostle of the train, and the natural haste of the conductor in a train crowded with passengers," which led him to escape the railroad he was riding).

146. Among the most well-known of these laws and regulations, resisted by activists like Ida B. Wells in the nineteenth century, are those providing for separate accommodations for Black and white passengers. *See, e.g.*, Chesapeake, Ohio & Sw. R.R. Co. v. Wells, 4 S.W. 5, 5 (Tenn. 1887) (holding, in a challenge by Ida B. Wells to separate accommodations by race in a rail car, that the company was not at fault and Wells's object was "not in good faith to obtain a comfortable seat for the short ride," since "[t]he two coaches were alike in every respect").

147. *See* BLAIR L.M. KELLEY, RIGHT TO RIDE: STREETCAR BOYCOTTS AND AFRICAN AMERICAN CITIZENSHIP IN THE ERA OF *PLESSY V. FERGUSON* 124 (2010).

148. *See, e.g.*, Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30, 34-43 (2023); Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537, 547 (2022); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 124-28 (2015); Robert J. Cottrol & Raymond T. Diamond, *Never Intended to Be Applied to the White Population: Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1313-18 (1995); Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1858-60 (2023).

circumstances under which historical regulations with racist motivations or effects can be considered by courts in Second Amendment adjudication is beyond the scope of this Note. The important question of whether the regulations in this Section were the subject of racially disparate enforcement, which the Supreme Court in *Bruen* concluded is "simply one additional reason to discount the[] relevance" of a particular historical regulation in Second Amendment analysis,[149] is an important area for future study.[150]

II. PUBLIC TRANSPORTATION AS A SENSITIVE PLACE

This Part contends that the historical evidence in Part I provides states and localities with the constitutional basis to regulate firearms in sites of public transportation. To date, when states have successfully defended firearm regulations in public transportation in federal court, they have usually taken two approaches. First, they have analogized public transportation to other sites the Court has defined as sensitive places, like schools and government buildings. They have argued that subways, for example, are relevantly similar to (1) schools, in that they host significant numbers of children, who rely on them to travel to school,[151] and (2) government buildings, in that the government is the proprietor[152] or the subway is used to transport public-sector workers to government buildings.[153] Second, they have analogized public transportation to other sites where states and territories historically regulated firearms, like fairs, markets, and public

149. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 58 n.25 (2022).

150. Two studies that would be worth emulating are Andrew Willinger, Bruen*'s Enforcement Puzzle: Unearthing and Adjudicating the Historical Enforcement Record in Second Amendment Cases*, NOTRE DAME L. REV. (forthcoming) (manuscript at 5-6), https://ssrn.com/abstract=4612870 [https://perma.cc/F5M5-NN7F], which summarizes archival research on New Hanover County, North Carolina's enforcement of a statewide 1879 firearm regulation and "argu[es] that *Bruen*'s treatment of discriminatory taint is ill-suited to the painstaking work of historical enforcement research in important ways"; and Brennan Gardner Rivas, *Enforcement of Public Carry Restrictions: Texas as a Case Study*, 55 U.C. DAVIS L. REV. 2603, 2619-20 (2022), which collects data on the enforcement of Texas's 1871 public carry law and finds that "[w]hen Black disenfranchisement occurred in Texas, during the 1890s" racially disparate enforcement arose.

151. Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction and Motion for Summary Judgment at 27, Angelo v. Dist. of Columbia, 648 F. Supp. 3d 116 (D.D.C. Sept. 16, 2022).

152. Brief for State at 23, 24-28, Koons v. Platkin, No. 22-7464, 2023 WL 3478604 (D.N.J. May 16, 2023).

153. Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction and Motion for Summary Judgment at 24-25, Angelo v. Dist. of Columbia, 648 F. Supp. 3d 116 (D.D.C. Sept. 16, 2022).

gatherings.[154] At the appellate level, some states and localities have begun citing the history of railroad corporations,[155] but only one court has cited such a source approvingly.[156]

By largely ignoring the history of railroads' firearm regulations, and focusing instead on statutes, most judges have not yet contemplated the full range of tools *Bruen* grants them to discern the nation's historical tradition of firearm regulation. Section II.A argues that the absence of historical state statutes regulating firearm carriage in railroads[157] is not proof that no historical tradition of firearm regulation in these sites exists, as some have claimed.[158] Rather, a historical tradition of firearm regulation in sites of public transportation emerges from quasi-public railroads' rules and regulations. Section II.B argues that contemporary firearm regulations in the twentieth and twenty-first centuries, while perhaps insufficient on their own to establish a historical tradition of firearm regulation, are similar to their nineteenth-century precursors. This similarity provides confirmatory evidence that the regulations in Part I are representative of the nation's historical tradition and not outliers. Section II.C contends that states and localities can invoke this tradition to support contemporary regulations in public transportation that are analogous in "how" and "why" they burden the individual right to bear arms.

A. Defining a Historical Tradition of Firearm Regulation

The Court's demand that states marshal evidence of the nation's historical tradition of firearm regulation invites the question of what constitutes tradition

154. See, for example, laws banning public carry in "fair[s] or markets," 1786 Va. Acts 35, or at a "fair, race course, or other public assembly of the people," 1869-70 Tenn. Pub. Acts 23.

155. *See* Response/Reply Brief of Defendants-Appellants at 38-40, Koons v. Platkin, Nos. 23-1900, 23-2043 (3d Cir. Sept. 4, 2023); Brief for Appellee Steven Nigrelli at 43-45, Frey v. Nigrelli, No. 23-365 (2d Cir. Sept. 19, 2023); Brief for New York City Appellees at 48, Frey v. Nigrelli, No. 23-365 (2d Cir. Sept. 19, 2023).

156. *See* Frey v. Nigrelli, No. 21-CV-05334, 2023 WL 2473375, at *19 (S.D.N.Y. Mar. 13, 2023).

157. The only statutes regulating firearms in and around trains before World War II banned the *discharge* of firearms on or near trains. In Georgia, a 1905 statute established that "[a]ny person who shall throw a rock or other missile at, towards, or into any car of any passenger train upon any railroad or street railroad, or shoot any gun, pistol, or firearms of any kind at, towards, or into any such car, or shoot, while in such car, any gun, pistol, or other weapon of any kind, shall be punished." 1905 Ga. Laws 86, § 1. The Georgia Court of Appeals upheld the conviction of a man who discharged a pistol while in a passenger car on a Georgia & Florida Railway train. *See* Andrews v. State, 70 S.E. 111, 112 (Ga. Ct. App. 1911).

158. *See, e.g.*, Complaint at 17, Schoenthal v. Raoul, No. 22-cv-50326 (N.D. Ill. 2022) (noting that plaintiffs were "not aware of any historical evidence that carrying firearms was restricted on public transportation conveyances (e.g., ferries, riverboats, and stagecoaches)" in the relevant historical periods).

in the first place, a question that teems with subordinate questions about what sources to consult and how to interpret them.[159] *Bruen*, which at various points sounds in the registers of originalism, traditionalism, and living constitutionalism, has sparked fierce debate over proper interpretive methods.[160] The Court, for example, did not expressly decide the question of whether the ratification of the Second Amendment (1791) or the ratification of the Fourteenth Amendment (1868) is the proper hinge point for historical analysis.

Despite acknowledged uncertainty on the Court about this question,[161] Supreme Court precedent can best be read to privilege 1868 understandings. As the Court said in *Heller*, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them."[162] Justice Thomas's concurrence in *McDonald* similarly stressed "the meaning of the *Fourteenth* Amendment agreed upon by those who ratified it."[163] *Bruen* embraced this understanding, noting accurately that the people applied the right to keep and bear arms to the states via "the Fourteenth Amendment, not the Second."[164] In contexts outside of the Second Amendment, this view is accepted by legal scholars

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159. *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 696, 719 (2013) ("Tradition and cultural memory are not fixed. They are shaped by how people choose to argue, articulate, persuade, and remember."); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 6 (2019) ("[C]onstructing precedents and principles out of historical events requires a framework to tell us which events are relevant and why."); Reva B. Siegel, *Memory Games*: Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1192 (2023) ("A tradition consists in more than statutes . . . . To characterize the nation's history and traditions, one needs to know more about the conditions under which nineteenth-century abortion bans were enacted and enforced.").

160. *See, e.g.*, Barnett & Solum, *supra* note 25; Blocher & Siegel, *supra* note 27; Girgis, *supra* note 26; Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2024), https://ssrn.com/abstract=4205351 [https://perma.cc/646H-PKMG]; Michael P. O'Shea, *The Concrete Second Amendment: Traditionalist Interpretation and the Right to Keep and Bear Arms*, 26 TEX. REV. L. & POL. 103 (2022).

161. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 37 (2022) (noting "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)").

162. Dist. of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

163. McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part).

164. *Bruen*, 597 U.S. at 37.

from across the political spectrum.[165] In any event, both *Heller*[166] and *Bruen*[167] canvass nineteenth-century evidence, well after the Second Amendment's ratification, at length.

Moreover, post-ratification historical evidence, particularly before the twentieth century, can properly inform the meaning of the Fourteenth Amendment's protection of gun rights against the states.[168] The *Bruen* majority opinion itself considers such evidence. In the opinion, Justice Thomas contemplates two post-1868 statutes, which he ultimately found to be outliers for reasons unrelated to their dates of enactment.[169] The Court cautioned that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."[170] In the context of public transportation, which barely existed before the Founding,[171] and rail specifically, which emerged most substantially in the mid-to-late nineteenth century,[172] attending to late nineteenth-century evidence does not present issues of contradicting earlier understandings of the right to keep and bear arms on board.

Since *Bruen*, when judges have determined whether the nation's historical tradition furnishes proper analogues for contemporary gun laws, they have tended to reason only from statutes and court decisions.[173] Typically, states only offer those two kinds of evidence. When they have provided other forms of evidence, judges have responded inconsistently to the question of whether those sources are constitutive of the nation's historical tradition of firearm regulation.

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165. *See, e.g.*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 115-16 & 116 n.485 (2008); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992) ("[I]n the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed . . . .").

166. *Heller*, 554 U.S. at 605-28.

167. *Bruen*, 597 U.S. at 50-70.

168. O'Shea, *supra* note 160, at 112 ("[T]raditionalism focuses on post-ratification developments . . . .").

169. Barnett & Solum, *supra* note 25, at 468 (noting "Justice Thomas's discussion of two post-1868 statutes" that he ultimately found to be outliers for reasons unrelated to their dates of enactment).

170. *Bruen*, 597 U.S. at 66.

171. *See supra* notes 40-41 and accompanying text.

172. *See supra* notes 43-44, 50 and accompanying text.

173. The exception to this practice is *Frey v. Nigrelli*. No. 21-CV-05334, 2023 WL 2473375, at *19 (S.D.N.Y. Mar. 13, 2023).

In *Worth v. Harrington*, a federal judge in Minnesota concluded that only the handiwork of legislators could establish a historical tradition under *Bruen*.[174] At trial, expert witness Professor Saul Cornell provided evidence of firearm regulations at colleges and universities in the early republic to help justify the State's restrictions on eighteen-to-twenty-year-old residents possessing or carrying firearms.[175] He cited regulations by Yale College in 1800, the University of Georgia in 1811, and the University of North Carolina in 1838.[176] The court rejected this historical evidence as inapposite, concluding that only statutes can constitute evidence of the nation's "historical tradition" of firearm regulation.[177] The court found the evidence wanting because "none of these proposed analogues appears to be the product of a legislative body elected by Founding Era voters, but instead they are rules established by the institutions' boards of trustees or other leadership."[178]

This argument might rest on a few premises. First, one might contend that the plain meaning of "regulation" includes only enactments by the state. Second, the district court in Minnesota may have surmised that, since the Fourteenth Amendment regulates the conduct only of state actors, historical analogues must also be the product of state actors like legislatures. A similar argument was made by plaintiffs challenging the District of Columbia's Metro ban.[179] Third, a court might interpret the historical sources used in *Heller*, *McDonald*, and *Bruen* to suggest a preference for or requirement of state action, since these opinions do reason in large part—though not exclusively—from statutes.

The better argument, however, was first voiced by a federal judge in the Southern District of New York who ventured outside the statute books. In *Frey v. Nigrelli*, Judge Román denied a motion for a preliminary injunction that sought to block New York State from enforcing its ban on firearms in the New York City subway.[180] Román agreed with the State's contention that "there is historical support for firearm prohibition on trains," but not exclusively on the basis of statutes.[181] Rather, the MTA subway system and rails implicated

174. Worth v. Harrington, No. 21-cv-1348, 2023 WL 2745673, at *4-5, *13 (D. Minn. Mar. 31, 2023).

175. *Id.* at *12.

176. *Id.* at *12-13.

177. *Id.* at *13.

178. *Id.*

179. Memorandum of Points and Authorities in Reply to Oppositions to Application for Preliminary Injunction at 3, Angelo v. Dist. of Columbia, 648 F. Supp. 3d 116 (D.D.C. Oct. 30, 2022) ("[P]rivate actors are not governed by the Bill of Rights, so their actions, whatever they might have been during the relevant period, are irrelevant.").

180. *See* No. 21-CV-05334, 2023 WL 2473375, at *1 (S.D.N.Y. Mar. 13, 2023).

181. *Id.* at *18.

"unprecedented societal concerns or dramatic technological changes," permitting a "more nuanced approach."[182] Román reasoned,

> [A]n adequate[] analogy could be made between (i) the fact that historically, the rail systems were privately owned and that "[p]rivate transportation companies possessed the power to create their own reasonable customer/passenger rules, which in at least some instances included prohibitions against the presence of guns in passenger cars" and (ii) the fact the MTA subway and rails are government owned and operated, and therefore the government as proprietor can impose its own restrictions on gun-carrying upon its passengers.[183]

Nothing in *Heller*, *McDonald*, or *Bruen* suggests that Judge Román's approach, in analogizing from the history of railroad corporations, is misguided. In fact, at least five features of the Supreme Court's Second Amendment jurisprudence, when read together, suggest that *Bruen* contemplates the consideration of history outside the statute books. This Section will next explore each of these five factors: (1) *Bruen*'s silence on the question; (2) guidance from *Heller*; (3) the nuanced approach to analogical reasoning that *Bruen* permits; (4) the definition of action versus inaction in the historical record; and (5) the case study of schools as sensitive places.

1. Bruen*'s Silence on the Question*

In an opinion that is quick to dismiss certain other forms of history as inapposite for the purposes of analogical reasoning,[184] *Bruen* does *not* expressly narrow which categories of historical sources may count.[185] Rather, *Bruen* requires the government to simply show a regulation is consistent with "this Nation's

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182. *Id.* (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022)).

183. *Id.* at *19 (citation omitted).

184. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 41 (2022) (declaring the Statute of Northampton has "little bearing on the Second Amendment adopted in 1791"); *id.* at 67-68 (refusing to stake an interpretation of the Second Amendment on a "handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence" (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 632 (2008)).

185. *See Bruen*, 597 U.S. at 29 ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."). The source of the regulation—from a legislature or otherwise—is not mentioned in this nonexhaustive list.

historical tradition of firearm regulation,"[186] from wherever this tradition arises. The opinion's silence on the question of which particular sources can reveal the nation's historical tradition of firearm regulation is best read not to impose any nonobvious limitations.

2. *Guidance from* Heller

Reasoning from the practices of American society outside the halls of legislatures is not new in Second Amendment jurisprudence. In *Heller*, Justice Scalia concluded that the fact that a "handgun" is a class of arms "overwhelmingly chosen by American society"[187] is persuasive evidence against the constitutionality of a handgun ban. Likewise, he asserted that at the Founding, "men were expected to appear bearing arms . . . of the kind in common use at the time."[188] The choices of "society," not the choices of government, rendered a handgun ban unconstitutional.[189] Scalia's language suggests that tradition is divined not just from statute but also from societal institutions outside the state or individual that can inform an "expect[ation]" of how one is to present in public with arms.[190] Among the societal institutions mediating these expectations in the nineteenth century were corporations, given the unique public-private regulatory scheme that defined the era.

3. *A Nuanced Approach to Analogical Reasoning*

Third, the Court repeatedly instructs that analogical reasoning under *Bruen* is not a project of finding identical historical antecedents for contemporary regulations. In general, the decision directs judges not to require a "historical twin" for contemporary gun regulations.[191] And a "more nuanced approach" may be required in cases involving "unprecedented societal concerns or dramatic technological changes."[192] The current imperative of state involvement to protect passenger safety in public transportation constitutes an "unprecedented societal concern" spurred by "dramatic technological changes," given that sites of public transportation were not publicly owned and operated in the eighteenth and nineteenth centuries.

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186. *Id.* at 17.

187. Dist. of Columbia v. Heller, 554 U.S. 570, 628 (2008).

188. *Id.* at 624 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

189. *Id.* at 627-28.

190. *Id.* at 624.

191. *Bruen*, 597 U.S. at 30 (emphasis omitted).

192. *Id.* at 27.

A more nuanced form of analogical reasoning can account for the dramatic change in state capacity that arose during the twentieth century, which brought more public space in American life under the ownership of the state. Public transportation, to the extent it existed, was owned and operated by corporations and regulated by those corporations' rules.[193] Judge Román relied on this factor in his opinion in *Frey v. Nigrelli*, when he noted the imperative that the government be able to regulate firearm carriage at sites where it serves as proprietor, just as private companies did when they controlled vaster expanses of public space (including railroads) in the nineteenth century.[194]

Action, Not Inaction. The *Bruen* Court concludes that the "lack of a distinctly similar historical regulation" addressing a "general societal problem that has persisted since the 18th century" is "relevant evidence that the challenged regulation" is unconstitutional.[195] The court in *Worth* understood this language to mean that the lack of statutes regulating firearms for young adults in the eighteenth and nineteenth centuries was "relevant evidence" of the unconstitutionality of a similar contemporary statute.[196] But in the context of public transportation, despite the absence of statutes, the foregoing historical exposition shows regulatory *action*, not *in*action. The state created corporations to serve public ends, and these corporations proceeded to regulate firearms under state-delegated authority.

As Section I.A explains, the background legal regime governing railroads in this period was one that treated them as quasi-public actors.[197] The absence of passenger firearm regulation by statute is strong evidence that railroad corporations' regulations—enacted pursuant to delegations of authority from legislatures—displaced the need for statutory intervention. To read the supposed legislative silence on railroad firearm regulations as legislative inaction would be to contort the historical record. The relevant history should instead be interpreted as regulatory action, albeit via a form of public-private delegation and regulation that was common in the nineteenth century but less familiar to twentieth or twenty-first century observers.[198]

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193. *See supra* notes 54-57, 74-77 and accompanying text.

194. No. 21-CV-05334, 2023 WL 2473375, at *19 (S.D.N.Y. Mar. 13, 2023).

195. *Bruen*, 597 U.S. at 26.

196. Worth v. Harrington, No. 21-cv-1348, 2023 WL 2745673, at *15 (D. Minn. Mar. 31, 2023).

197. *See supra* Section I.A.

198. *See supra* notes 73-77 and accompanying text.

4. *The Case Study of Schools as Sensitive Places*

The Court's conclusion that *schools* are sensitive places relies on history from outside legislatures, which shows that the Court has already countenanced the use of this history in sensitive-places jurisprudence. In *Heller*, the majority "fail[ed] to cite any colonial analogues" for the proposition that schools are sensitive places.[199] The *Bruen* Court acknowledged that "the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited," but it cited an amicus brief from the Independent Institute and a law review article to conclude it was "aware of no disputes regarding the lawfulness of such prohibitions."[200] These two citations, which are the only reasoning *Heller* and *Bruen* offer for designating schools as sensitive places, suggest that the Court has blessed analogies from nonstatutory regulations.

The amicus brief cited nineteenth-century school rules that "prohibited *students* from carrying weapons while on campus (without the permission of school authorities)."[201] Among these schools were four private schools—Dickinson College, Waterville College, the University of Nashville, and La Grange College—and two public schools—the University of Virginia and the University of North Carolina.[202] The brief noted that these restrictions were not written by legislatures, but by the "universities themselves," though "in the case of some public universities," they were still the product of "the State,"[203] given the connection between public universities and the governments that establish them. Still, most of the examples cited in the amicus brief upon which the Court relied were private. The actions of the "universities themselves" furnished at least some evidence of a historical tradition of firearm regulation in schools.

The cited law review article, authored by David B. Kopel and Joseph G.S. Greenlee, analyzed a series of nineteenth-century statutes that limited, to varying degrees, the right of students to bear arms on and around campus. It explained that "[n]one of the above laws provides support for *Heller*'s designation of 'schools' as sensitive places where arms carrying may be banned,"[204] speculating that "[p]erhaps the first notable arms ban at an American university was at

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199. Dist. of Columbia v. Heller, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).

200. *Bruen*, 597 U.S. at 30 (citing Brief of Amicus Curiae the Independent Institute in Support of Petitioners at 11-17, *Bruen*, 597 U.S. 1 (No. 20-843) and David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 229-36, 244-47 (2018)).

201. *See* Brief of Amicus Curiae the Independent Institute in Support of Petitioners at 14, *Bruen*, 597 U.S. 1 (No. 20-843).

202. *Id.* at 14.

203. *Id.* at 15.

204. Kopel & Greenlee, *supra* note 200, at 252.

the University of Virginia in 1824."[205] The law review article concluded that "[b]ased on the above statutes, *Heller*'s mention of 'longstanding' laws against carrying guns in 'schools' or 'government buildings' has modest support in history and tradition," though "these were the minority approach."[206]

If one is to accept the Court's characterization that the sensitive nature of schools is settled, then historical statutes cannot be the exclusive basis for the claim. Rather, the amicus brief's list of *mostly private* universities that regulated firearms on campus, outside the ambit of state legislatures, must be at least in part the basis for concluding that firearm regulations in schools are presumptively constitutional.[207]

Outside the Second Amendment context, when the Court has drawn conclusions about the traditions of our nation's schools, it has looked to both public and private institutions from early American history.[208] It is for good reason that the Court would look to the practices of private schools to illuminate the meaning of constitutional provisions as applied to modern public schools. Like contemporary public transportation, the antecedents for contemporary public

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205. *Id.* at 249.

206. *Id.* at 263.

207. Nevertheless, some judges have either assumed that the actions of historical private schools carry less weight than public schools under *Bruen* or have left private schools out of their historical analysis entirely. *See, e.g.*, Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 22-CV-410, 2023 WL 3355339, at *21 n.43 (E.D. Va. May 10, 2023) ("In 1800, Yale College prohibited students from possessing guns and gun powder. This regulation provides even less support as Yale is a private, rather than public, institution."); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1327 (11th Cir. 2023) (discussing examples of the proposition that "[p]ublic universities have long prohibited students from possessing firearms on their campuses" but failing to provide examples from private universities), *vacated*, 72 F.4th 1346 (11th Cir. 2023) (en banc).

208. In his concurring opinion in *Morse v. Frederick*, Justice Thomas cited the harsh discipline typical of early American "private schools and tutors" where "teachers managed classrooms with an iron hand" to suggest there was no tradition of protecting student speech in American classrooms. 551 U.S. 393, 411 (2007) (Thomas, J., concurring) ("Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled 'a core of common values' in students and taught them self-control."). In *Mississippi University for Women v. Hogan*, Justice Powell's dissenting opinion cited the history of sex-segregated education in both public and private schools to contend that "the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities." 458 U.S. 718, 744 (1982) (Powell, J., dissenting).

schools—among the most important examples of "site-specific constitutional interpretation"[209]—were not entirely public.

The public-private distinction between schools that is commonly appreciated today was far from clear at the Founding or even well into the nineteenth century. By the end of the colonial period, the nation educated its children through secondary schools that were "a peculiar blend of public and private."[210] Though there was some state involvement in schools, the state often shared the task of administering schools with families and private entities.[211] Even in so-called "common schools," financing came from both public and private sources well into the mid-nineteenth century.[212] State-supported higher education institutions were also quite uncommon. In 1860, only seventeen of the nation's 246 colleges were state institutions.[213] As *Brown v. Board of Education* assessed, "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education," since by 1868, "the movement toward free common schools, supported by general taxation, had not yet taken hold" in the South.[214]

Similarly, incorporating the rules and regulations of railroad corporations in Second Amendment analysis is the most historically faithful approach, for otherwise courts would fail to capture the reality of nineteenth-century regulation. The regulation of railroads in this period—akin, in some ways, to the aforementioned regulation of education—reflected a broader phenomenon of "public-private governance."[215] The nation's regulatory apparatus in the eighteenth and nineteenth centuries was far different from what appears today: public-private distinctions were blurry, and the public and private sectors jointly administered crucial pillars of public space in American life. Requiring judges to neglect these facts would not vindicate history but silence it.

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209. Justin Driver, *Three Hail Marys*: Carson, Kennedy, *and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208, 215 (2022); *see also* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9 (2018) ("[P]ublic school has served as the single most significant site of constitutional interpretation within the nation's history.").

210. *See* Robert Middlekauff, *Before the Public School: Education in Colonial America*, 62 CURRENT HIST. 279, 307 (1972).

211. *See* BERNARD BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY 15-16 (1960).

212. *See* Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools to 1850*, 70 J. ECON. HIST. 1, 6 (2010) ("Parents and other private sources paid more than half of the cost of their children's schooling [in the State of New York] up to 1838-1840, when the common schools got a fresh infusion of state and federal money.").

213. Middlekauff, *supra* note 210, at 307.

214. *See* 347 U.S. 483, 489-90 (1954).

215. Novak, *supra* note 69, at 23, 31.

B. *Contemporary Analogues as Confirmatory Evidence of Tradition*

Bruen does not, on its face, encourage states to analogize present-day firearm restrictions to more recent examples. But the development of firearm law on public transportation since World War II reveals a salient finding: law here has closely mirrored the nineteenth-century rules explored above in two key respects. First, passengers have tended not to be permitted to carry arms while riding public transportation. Second, when passengers have had the opportunity to check baggage, they have been able to check firearms under certain tightly regulated circumstances, with particular solicitude paid to sportsmen.

Twentieth- and twenty-first-century examples do not, on their own, establish a historical tradition of firearm regulation. But they do reinforce that nineteenth-century railroad companies' regulations are far from outliers in the nation's history of firearm regulation. Rather, the firearm regulations of nineteenth-century railroads and contemporary public-transportation entities, along with successor regulations in the twentieth and twenty-first centuries, show an enduring practice across American history of regulating passengers' firearm carriage. The duration of this practice and its prevalence across regions and dominant market actors provide confirmatory evidence of the nation's historical tradition.[216]

This Section explores four case studies that show the consistency in practice between nineteenth-century railroad corporations and contemporary state and federal regulations: (1) Amtrak, (2) air travel, (3) rapid transit, and (4) interstate public carry generally.

Amtrak. By the mid-twentieth century, many of the nation's private railroads declared bankruptcy.[217] In 1970, the federal government took substantial control of the nation's rail network with the advent of Amtrak.[218] Before the September 11 terror attacks, passengers were permitted to check firearms on Amtrak trains as baggage, but not to take them in coach.[219] After September 11, Amtrak imposed tighter limits on firearms, barring them from checked baggage

216. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1135 (2020) (characterizing constitutional traditions as "when the Court believes there is a genuine political or cultural practice of long and consistent duration that is presumptively constitutive of the meaning of constitutional text").

217. Ralph Blumenthal, *7 Bankrupt Lines Blending into Biggest U.S. Railroad*, N.Y. TIMES, Nov. 30, 1975, at 1.

218. *See* Fed. R.R. Admin., *Amtrak*, U.S. DEP'T TRANSP. (Feb. 14, 2022), https://railroads.dot.gov/passenger-rail/amtrak/amtrak [https://perma.cc/RA6Z-EGBC].

219. *See Congress: Passengers Can Bring Guns on Amtrak Trains*, ABC NEWS (Dec. 9, 2009, 11:04 AM), https://abcnews.go.com/Blotter/congress-passengers-bring-guns-amtrak-trains/story?id=9290167 [https://perma.cc/QW5E-FPUN].

altogether.[220] In 2010, Congress all but required Amtrak to resume allowing passengers to check firearms in baggage, mandating that it devise a procedure to do so or else lose federal funding.[221] Amtrak's rules still bar passengers from carrying any firearms or ammunition in carry-on baggage, but they now once again permit them to keep firearms in their checked baggage. Such weapons must be unloaded and kept in an "approved, locked hard-sided container," and passengers must provide notice at least a day before departure.[222]

Air Travel. In 1961, Congress enacted the first legislation banning passengers from carrying accessible concealed weapons on aircraft.[223] The statute directed that, with the exception of certain law-enforcement officers and other authorized persons, criminal penalties would accrue to an air passenger who "has on or about his person a concealed deadly or dangerous weapon."[224] Debate in Congress over this legislation included Second Amendment concerns.[225] Pilots testified that among their greatest worries was the preponderance of sportsmen who carried firearms on board, which one pilot said resembled "a guerilla squadron of some sort."[226] Senators reassured skeptics that the bill would not apply to individuals' firearms that were checked in baggage, but it would apply to firearms

220. *Id.*

221. Bernie Becker, *Senate Votes to O.K. Checked Guns on Amtrak*, N.Y. TIMES (Sept. 16, 2009, 5:24 PM), https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2009/09/16/senate-votes-to-ok-guns-on-amtrak [https://perma.cc/V5MU-2KBU].

222. *Firearms in Checked Baggage*, AMTRAK, https://www.amtrak.com/firearms-in-checked-baggage [https://perma.cc/47F6-AZCF].

223. Act of Sept. 5, 1961, Pub. L. No. 87-197, § l, 75 Stat. 466, 466-67; *see* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 328 (2016) ("Prior to 1961, there were no specific federal prohibitions on carrying a loaded gun onto an airplane . . . ."). Earlier in 1961, the Federal Aviation Administration issued a regulation similarly barring concealed carry of firearms "on or about his person" on board aircraft, excluding checked baggage. Special Civil Air Regulation; Precautions to Prevent Hijacking of Air Carrier Aircraft and Interference with Crewmembers in Performance of Duties, 26 Fed. Reg. 9669, 9670 (Oct. 13, 1961).

224. § l, 75 Stat. at 467.

225. *See* Stephen P. Halbrook, *Firearms, the Fourth Amendment, and Air Carrier Security*, 52 J. AIR L. & COM. 585, 594-95 (1987).

226. *Crimes Aboard Aircraft in Air Commerce: Hearing on S. 2268, S. 2370, S. 2373, and S. 2374 Before the Aviation Subcomm. of the S. Comm. on Com.*, 87th Cong. 51-52 (1961) (statement of Captain John Carroll, First Vice President, Air Line Pilots Association).

carried on a passenger's person.[227] This bill passed before Congress required what we now consider airport-style security to screen for weapons.[228]

The distinction between firearms in coach and firearms in baggage was clarified in the Antihijacking Act of 1974, which prescribed that the bar on carrying a concealed weapon on aircraft "shall [not] apply to persons transporting weapons [other than loaded firearms] contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier."[229] Congress amended the Antihijacking Act to bar passengers from carrying a "loaded firearm" in "property not accessible to passengers in flight," thereby regulating the mode of carriage of firearms in baggage.[230]

Today, federal law bars passengers from carrying firearms on board an airplane.[231] Passengers can only transport firearms in checked baggage, and they must be unloaded and locked in a hard-sided container. (The Transportation Security Administration considers a firearm loaded when the firearm and the ammunition are accessible to the passenger.[232]) Unloaded firearms can only be transported if passengers declare before checking their baggage that they have a firearm in their bag, it is in a hard-sided container, and the container is locked.[233]

Rapid Transit. While Amtrak and airlines allow passengers to check baggage, many intracity or metropolitan-area rapid transit systems do not provide those opportunities. In these cases, many states, cities, and public transit systems bar firearms in vehicles or facilities entirely. The rapid transit systems in the United States with the highest ridership—the New York City subway, the Washington,

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227. 107 CONG. REC. 16550 (1961) (statement of Rep. Devine) ("[I]n the matter of carrying arms on airplanes . . . so long as the arms are not concealed on his person or in his carry-on luggage where he has easy access to them, they can be shipped.").

228. *See generally* 49 U.S.C. §§ 44901-44926 (2018) (outlining modern-day measures for security in airports and airplanes).

229. Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409, 418. The Senate report explained:

> We feel that the right to bear arms is also the right to transport arms for legitimate purposes and, accordingly, have set forth procedures to be followed. The bill provides that persons may transport weapons for sporting purposes if the presence of such weapons in luggage or baggage is publicly declared prior to the passengers boarding the aircraft and is checked as baggage and carried in the cargo hold of the aircraft.

S. REP. NO. 93-13, at 21 (1973).

230. 49 U.S.C. § 46505(b)(2) (2018).

231. *See id.* § 46505(b) (banning firearms on airplanes); 49 C.F.R. §§ 1540.111(a), 1540.5 (2022) (banning firearms in parts of airports).

232. 49 C.F.R. § 1540.111 (2022).

233. *Id.* § 1540.111(c)(2).

D.C. Metro, Chicago's "L," and Boston's "T"—each prohibit firearms.[234] Oregon's TriMet, serving the Portland metropolitan area, does the same.[235] Colorado bans loaded firearms in public-transportation vehicles and facilities, and Maryland prohibits concealed weapons in Maryland Transit Administration vehicles and facilities (including the Baltimore Metro SubwayLink).[236]

Interstate Carry. Finally, today's public-carry regulatory landscape is shaped by federal laws that provide some protection for interstate carry of firearms. The 1986 Firearm Owners' Protection Act imposes similar restrictions on the ability of firearm owners to carry functional firearms while in transit across state lines.[237] Preempting state laws to the contrary, the statute allows those who are otherwise legally authorized to transport a firearm to do so if "during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle."[238] This rule mirrors those of Union Pacific and Central Pacific in permitting firearm carriage only insofar as the firearms are incapable of ready use by passengers.[239]

C. *The How & the Why*

If we accept nineteenth-century railroad regulations as part of the nation's historical tradition of firearm regulation, which modern regulations in public transportation does *Bruen* permit? *Bruen* provides two nonexhaustive "metrics" to determine whether modern regulations are relevantly similar to those in the historical record: "how" and "why" those regulations burdened armed self-defense.[240]

Nineteenth-century railroads that regulated firearms did so through two primary mechanisms. First, they prohibited passengers from carrying arms in a manner that would render them ready in the event of confrontation, unless they

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234. *See* N.Y. PENAL LAW § 265.01-e(2)(n) (McKinney 2023); D.C. CODE § 7-2509.07(a)(6) (2023); 430 ILL. COMP. STAT. 66/65(a)(8) (2022); *Rider Rules and Regulations*, MASS. BAY TRANSP. AUTH., https://www.mbta.com/safety/rider-rules-and-regulations [https://perma.cc/HXN9-ETXX].

235. OR. TRIMET CODE § 28.15(D)(2) (2023).

236. COLO. REV. STAT. § 18-9-118 (2021); MD. CODE. ANN., TRANSP. § 7-705(b)(6) (West 2023).

237. Pub. L. No. 99-308, 100 Stat. 449 (1986) (current version at 18 U.S.C. § 921). When there is no compartment available besides the driver's compartment, "the firearm or ammunition shall be contained in a locked container other than the glove compartment or console." Pub. L. No. 99-360, § 1(a), 100 Stat. 766 (1986) (current version at 18 U.S.C. § 926A).

238. 18 U.S.C. § 926A (2018).

239. *See supra* notes 99-101 and accompanying text.

240. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022).

were traveling long distances.[241] Second, when the option to check baggage or otherwise store weapons with an employee was available, railroads either required passengers to transport their weapons through those mechanisms or permitted them to transport their weapons in baggage with fewer restrictions than in coach.[242]

States can analogize their firearm regulations in public transportation to these historical means. But judges have yet to uniformly appreciate this tradition or its applicability to firearm regulations today. In *Koons v. Platkin*, a federal judge in New Jersey concluded that plaintiffs were likely to prevail on the merits of their challenge to the state's prohibition on "functional firearms in vehicles," including public-transportation vehicles.[243] Judge Bumb was skeptical that the means of this prohibition—requiring gun owners to carry firearms unloaded and stored in a secure case while in a vehicle—was relevantly similar to the means used to regulate firearms throughout the nation's history. She reasoned that this restriction, which requires permit holders "in effect, to render their handguns inoperable"[244] in vehicles, was relevantly similar to that which was invalidated in *District of Columbia v. Heller*. In *Heller*, the Court struck down a regulation requiring that firearms in the home be inoperable through disassembly or placing a trigger lock on the gun.[245] Bumb concluded, "Just like the law in *Heller* violated the Second Amendment, so, too, does Chapter 131's restriction on functional firearms in vehicles."[246]

Though there may not have been historical justification to permit states to require gun owners to render their firearms inoperable at home, there are in fact historical grounds to enact this restriction in public transportation. (This

241. Central Pacific required guns in coach to be both unloaded and cased, *see supra* note 101, Union Pacific required guns in coach to be cased, *see supra* note 103, North Pennsylvania Railroad banned them entirely from coach, *see supra* note 94, and the International & Great Northern Railroad Company likewise appears to at least on some occasions have banned guns from passenger cars entirely, as demonstrated in *Folliard*, *see supra* notes 110-115. At least two other railroads restricted guns, but in apparently less restrictive ways. Albany Railway applied its proscription of "dangerous" goods to at least some categories of firearms, though it is not clear that this meant a requirement of unloading and casing, *see supra* notes 118-121, and Charleston & Hamburg required inspection, which would be unnecessary had the railroad not prohibited certain forms of firearm carriage, *see supra* note 88.

242. Central Pacific did not permit guns to be placed in baggage, *see supra* note 128, Union Pacific required uncased guns to be carried in baggage only, *see supra* note 129, and the International & Great Northern Railroad Company required Folliard to transport his firearms in baggage rather than in coach, *see supra* notes 110-115.

243. No. 22-7464, 2023 WL 3478604, at *95 (D.N.J. May 16, 2023).

244. *Id.*

245. Dist. of Columbia v. Heller, 554 U.S. 570, 635 (2008).

246. *Koons*, 2023 WL 3478604, at *94.

provision is similar to a prohibition enacted by the District of Columbia and challenged unsuccessfully in 2022.[247]) Judge Bumb did not appear to consider the foregoing history of railroad corporations' firearm regulations. Instead, she reasoned that while "by the mid- to late-19th century" passengers rode the nation's railroads, the state has been unable to show "well-established and representative firearm laws banning firearms on those transportation modes."[248]

By confining the universe of permissible historical analogues to "laws," the court defined *Bruen*'s requirement of a "regulation" too narrowly. The full breadth of the nation's historical tradition of firearm regulation provides the historical analogues that the court found wanting in *Koons*. Part of Judge Bumb's discomfort with this conclusion may have rested on the fact that the state's provision also extended to private-transportation vehicles. Nonetheless, her ruling swept more broadly, enjoining this restriction in public-transportation vehicles as well as private ones.

In forms of public transportation that do *not* allow checked baggage, such as subways, the nation's historical tradition still affords states the grounds to bar passengers from carrying functional firearms. The analogy between nineteenth-century railroads and twenty-first-century subways is necessarily more "nuanced"[249] than that between nineteenth-century railroads and twenty-first-century commuter and intercity rail. Among the relevant differences between these forms of transportation are the availability of baggage check, distance of travel, and crowdedness of the vehicles. But none of these distinctions counsels substantially in favor of greater permissiveness towards public carry.

First, the nation's historical tradition suggests that courts were far likelier to strike down restrictions on the right to bear arms on a train when passengers traveled *longer* distances, not shorter.[250] The traveler's exception, which permitted certain travelers to carry firearms notwithstanding state public-carry bans, was interpreted by courts to apply only to long distances or to trips that individuals did not take on a regular basis.[251] Subway trips, for commutes or grocery runs, would be unlikely to fall within this exception. The shorter distances traveled by passengers on subways and other forms of mass transit, compared to commuter or intercity rail, cut against any argument that subways should be *more* open to public carry. Second, the density of the subway—while perhaps not sufficient on its own to warrant a sensitive-place designation—counsels against

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247. *See* Angelo v. Dist. of Columbia, 648 F. Supp. 3d 116, 119 (D.D.C. 2022).

248. *Koons*, 2023 WL 3478604, at *95.

249. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

250. *See supra* notes 125-127 and accompanying text (indicating that the traveler's exception to firearm regulations applied to long-distance trips).

251. *See supra* notes 125-127 and accompanying text.

greater permissiveness towards firearms than what the nation's historical tradition reveals. Though archival research has not yet unearthed detailed reasoning for railroads' restrictions on firearms laws aside from protecting safety, it is not difficult to imagine that preventing accidental discharge was among their highest goals. After all, discharge of a firearm on or near a railroad was proscribed by some state statutes.[252] Advancing the goal of avoiding accidental discharges by requiring passengers to temporarily render their firearms nonfunctional while on board is even more urgent in the subway context, in light of the high density of subway cars.

The "why" of gun regulation on public transportation is also relevantly similar to that of historical gun regulations on railroads. As articulated in *Frey*, a state or city has a legitimate interest as a proprietor in protecting its property.[253] Just as railroad corporations sought to protect their property through firearm regulations in the nineteenth century, so too can governments protect their rail infrastructure in the twenty-first century through analogous firearm regulations.

Legislators may also reasonably assert that a wide array of societal challenges justifies the regulation of firearms in public: the increased frequency of mass shootings,[254] the increased lethality of gun violence more generally,[255] or the imperative to provide peace of mind to students, commuters, and other

252. *See, e.g.*, 1876 Iowa Acts 142, ch. 148, § 1 ("If any person shall throw any stone, or other substance of any nature whatever, or shall present or discharge any gun, pistol, or other fire arm at any railroad train, car, or locomotive engine he shall be deemed guilty of a misdemeanor and be punished accordingly."); *A Motorman's Pistol*, DAILY PICAYUNE, Nov. 17, 1896, at 8 ("Yesterday afternoon at 2:30 o'clock at the intersection of Canal and Front streets, Thomas Sweeney, motorman of car No. 45, of the Carrollton line, accidentally discharged his revolver, which he alleges he had in his coat pocket and which was struck by the brake of the car. The bullet injured no one. Sweeney was arrested for discharging firearms, and on his person was found the revolver and he was additionally charged with carrying a concealed weapon.").

253. *See* Frey v. Nigrelli, No. 21-CV-05334, 2023 WL 2473375, at *1 (S.D.N.Y. Mar. 13, 2023). States may also, of course, defend gun regulations in public transportation by analogizing to historical regulations of firearms in places other than railroads, like schools, government buildings, fairs, places of amusement, saloons, and taverns, but such analogies are not the focus of this Note.

254. Anastasia Valeeva, Wendy Ruderman, *What You Need to Know About the Rise in U.S. Mass Shootings*, MARSHALL PROJECT (July 6, 2022, 6:00 EDT), https://www.themarshallproject.org/2022/07/06/what-you-need-to-know-about-the-rise-in-u-s-mass-shootings [https://perma.cc/6KP3-86MU] ("There were more mass shootings in the past five years than in any other half-decade going back to 1966.").

255. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s [https://perma.cc/K7XG-59SJ] ("More Americans died of gun-related injuries in 2021 than in any other year on record . . . .").

passengers.[256] Alternatively, legislators may come to a judgment that asking residents to take public transportation amid fears of armed neighbors taxes residents' well-being[257] given the occurrence of both mass-shooting events[258] and low-level gun violence[259] on subways and trains, as well as the disproportionate impact of gun violence on communities of color.[260] That gun-safety policy is now inseparable from constitutional reasoning does not mean that legislators and activists must divert their rhetoric from the above concerns that likewise motivate their advocacy.[261] Those rationales all advance public safety, which motivated nineteenth-century railroads to enact rules and regulations protecting passengers.

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256. Press Release, Cal. Dep't of Just., Attorney General Bonta Urges Court to Uphold Prohibitions of Firearms on Public Transit (Sept. 26, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-urges-court-uphold-prohibitions-firearms-public-transit [https://perma.cc/9FT2-QHD2].

257. *See* Zara Abrams, *Stress of Mass Shootings Causing Cascade of Collective Traumas*, MONITOR ON PSYCH., Sept. 2022, at 20.

258. *See, e.g.*, Rebecca Davis O'Brien, *Frank James to Plead Guilty to Terror Counts in Brooklyn Subway Shooting*, N.Y. TIMES (Dec. 21, 2022), https://www.nytimes.com/2022/12/21/nyregion/brooklyn-subway-shooting-frank-james-guilty-plea.html [https://perma.cc/HQ6X-7VSV] (reporting ten wounded in the New York City subway); Allison Hageman & Maggie More, *Gunman Goes on Rampage at DC Metro Station Leaving Worker Dead and 3 Injured*, NBC4 WASH. (Feb. 1, 2023, 11:33 PM), https://www.nbcwashington.com/news/local/2-shot-at-potomac-ave-metro-station-train-service-suspended-officials/3268603 [https://perma.cc/Q2MN-JC7H] (reporting four shot, including one fatally, in the D.C. Metro).

259. *See, e.g.*, Andy Newman, *The N.Y.C. Subway Was Struggling to Rebound. Then the Brooklyn Shooting Happened.*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/nyregion/the-nyc-subway-was-struggling-to-rebound-then-the-brooklyn-shooting-happened.html [https://perma.cc/4EYC-CCRK]; Bill Hutchison, *Passenger Fatally Shot on Amtrak Train, Search Underway for Suspect*, ABC NEWS (Jan. 16, 2022, 4:52 PM), https://abcnews.go.com/US/passenger-fatally-shot-amtrak-train-search-underway-suspect/story?id=82294772 [https://perma.cc/B55Z-S6CK].

260. Alex Nguyen & Kelly Drane, *Gun Violence in Black Communities*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Feb. 23, 2023), https://giffords.org/lawcenter/memo/gun-violence-in-black-communities [https://perma.cc/XR9L-L8YZ] ("Black Americans die from gun violence at nearly 2.4 times the rate of white Americans. . . . The vast majority of gun deaths among Black Americans are gun homicides, and Black Americans make up the majority of gun homicide victims in the US.").

261. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 170 (2023) ("Despite *Bruen's* suggestion that its approach is purely historical, its test requires contemporary evidence to play a key role.").

III. IMPLICATIONS

This Part contends that the foregoing analysis points towards at least two important prescriptive implications for litigants, judges, scholars, and legislators engaged in the project of gun regulation and adjudication of gun regulation. First, it invites legislators and judges to respect *all* of this nation's historical tradition of gun regulation, including from outside legislatures. This approach can inform Second Amendment adjudication at sites outside public transportation. Though public transportation has historical analogues that were quasi-public in their operation, this Note's arguments should also apply to putative sensitive places with historical analogues that were purely private. Section III.A considers two case studies of places—casinos and zoos—where relevant historical precursors were privately owned and operated, but courts have not considered regulations enacted by those private entities when discerning the nation's historical tradition of firearm regulation at those sites.

Further, Section III.B argues that this Note's intervention presents opportunities for courts to flesh out the nascent sensitive-places doctrine and place it on more coherent footing. Once courts recognize public transportation as a sensitive place, litigants and courts can analogize from the features that make public transportation sensitive to demonstrate that similar places should also be deemed sensitive.

A. *Recognizing New Sensitive Places*

As courts have adjudicated whether sites other than those listed in *Heller* and *Bruen* can be deemed sensitive places, they have typically demanded that states proffer historical statutes justifying these designations. But, as in the case of public transportation, the historical record may reveal other now publicly owned sites that, though not historically government-owned or government-operated, still had a tradition of regulating firearms. Among the sites where governments have sought to regulate firearms after *Bruen*, and where antecedents were at least sometimes privately owned, are zoos and casinos.

First, consider prohibitions on firearms in zoos. In both New Jersey and New York, federal courts held the state responsible for finding a historical statute restricting firearms at zoos if they were to regulate firearms in zoos today. In *Koons*, a federal district court judge in New Jersey found plaintiffs were likely to prevail on their challenge to New Jersey's handgun ban at zoos on the ground that the state could not cite "laws establishing a historical tradition of banning firearms at zoos."[262] The state could find only "one law from New York City" regulating

262. *See* Koons v. Platkin, No. 22-7464, 2023 WL 3478604, at *81 (D.N.J. May 16, 2023).

firearms at zoos, despite the fact that "New York had multiple zoos throughout the state."[263] Likewise, in *Antonyuk v. Hochul*, a federal judge in New York concluded that a bar on firearms in zoos was unconstitutional because "[n]o historical statutes have been cited . . . expressly prohibiting firearms in 'zoos' from the late-19th century."[264]

Why, however, should we expect a putative historical tradition of firearm regulation in zoos to be found in statutes, rather than in zoos' own rules and regulations? The court in *Koons* cited the lack of a Massachusetts statute banning firearms at the Boston Aquarial and Zoological Gardens, a zoo first opened to the public in 1860, as evidence that there was no such historical tradition of gun regulation in zoos.[265] But the Boston Aquarial was privately owned by the showman P.T. Barnum.[266] The court did not inquire as to whether the private operators of that zoo regulated firearms in any way. If they did, and such operators turned out to have regulated firearms, litigants and courts could analyze whether these regulations should be regarded as part of the nation's historical tradition of firearm regulation at zoos.

As a second example, take casinos. The court in *Koons* found plaintiffs likely to prevail on their challenge to New Jersey's firearm prohibition in casinos. The court reasoned that the nation "has a long history of gambling establishments," but no examples of laws barring firearms at casinos.[267] It pointed to Louisiana's government-run casino, established in 1753 without an accompanying firearm-restrictive statute[268] (though Louisiana was, at the time, not part of the United States). One reason that there is no apparent tradition of statutes regulating firearms at casinos is that many colonies and states throughout the eighteenth and nineteenth centuries banned gambling.[269] A search for gun regulations in casinos in the statute books would be highly unlikely to turn up any such tradition, not just because casinos were often privately operated, but because these privately owned entities often operated outside the law entirely due to the ban.

Courts and litigants should take note of the evolving roles of the public and private sectors when they seek to regulate firearms in places that today fall under

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263. *Id.*

264. 639 F. Supp. 3d 232, 326-27 (N.D.N.Y. 2022).

265. *Koons*, 2023 WL 3478604, at *80 & n.59.

266. *See Sally Putnam Visits the Aquarial Gardens*, MASS. HIST. SOC'Y (Aug. 2006), https://www.masshist.org/object-of-the-month/objects/sally-putnam-visits-the-aquarial-gardens-2006-08-01 [https://perma.cc/3XT7-ZMJY].

267. *Koons*, 2023 WL 3478604, at *88.

268. *See id.*

269. *See* George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RSCH. & REV. J. 65, 66-68 (1996).

public ownership. First, they may draw analogies to places in American history at a high level of generality. They may search for historical examples of gun regulation in parks as grounds to support a contemporary restriction on firearms in aquaria because both of these places, say, are centers of public assembly and involve dense populations of children. This is the method that many states have taken to date, though it invites courts to find relevantly dissimilar or irrelevantly similar features between the two sets of places, which might invalidate an analogy. A second approach would mirror the reasoning in Parts I and II of this Note by incorporating historical sources from outside of statutory lawmaking to establish part of the nation's historical tradition of firearm regulation.

This approach need not be confined to the sensitive-places jurisprudence. If historical research reveals that gun manufacturers throughout American history had policies restricting sales to minors, might that inform a court's determination of whether the nation's historical tradition supports a state-imposed ban on firearm purchases by adults under age twenty-one? A federal judge in Virginia found the historical evidence inadequate for such an age-based restriction.[270] The judge considered antebellum state statutes and public universities' regulations that limited student possession of firearms on campus but found those regulations to be too far removed from a prohibition on firearm purchases for adults under twenty-one more generally.[271] The court did not consider where there might be relevant evidence other than statutes – say, a gun manufacturer's guidelines limiting sales to minors.

In neglecting to do so, this court mirrored the approach of all but one of the federal judges who have ruled on sensitive-place questions since *Bruen*. This crabbed approach to the nation's historical tradition is neither required by *Bruen*, nor reflective of the multifaceted regulatory regimes governing public carry throughout U.S. history.

B. Adding Coherence to the Sensitive-Places Doctrine

Once courts begin to appreciate that nonstatutory sources of evidence may illuminate the nation's historical tradition of firearm regulation, sensitive-places doctrine becomes more coherent. Doing so will offer important scaffolding to

270. *See* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 22-CV-410, 2023 WL 3355339, at *22-23 (E.D. Va. May 10, 2023).

271. *Id.* at *21. Private-school regulations, he concluded, receive even less weight. *Id.* at *21 n.43 ("In 1800, Yale College prohibited students from possessing guns and gun powder. This regulation provides even less support as Yale is a private, rather than public, institution.").

scholars' and judges' ongoing efforts to define "what features of these places are relevantly as opposed to trivially similar."[272]

To date, scholars and judges have tried to fill the gap created by the Supreme Court's choice to produce a short list of sensitive places but decline to provide much reasoning for it.[273] They have tried to discern what justifies treating schools, government buildings, legislative assemblies, polling places, and courthouses as sensitive. Divining a common "why" for location-based gun restrictions in the nation's historical tradition can inform efforts by states and localities today to regulate firearms in other places for similar purposes. Some argue that the "why" is to protect (a) "bonds of democratic community,"[274] (b) "commerce,"[275] (c) sites that "are the locus of the production of other kinds of public goods protected by other kinds of constitutional rights,"[276] (d) property for which the government is the proprietor,[277] or (e) places where the government serves as security guard.[278]

In making these claims, scholars and judges have had to reason from a limited pool of places, circumscribing the universe of potential rationales for modern gun regulations. Incorporating the history of railroad corporations may have the effect of illuminating new sites where the nation has historically regulated firearms in public. In turn, this may produce new analogical possibilities. When one draws analogies between a small group of things, one may derive certain

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272. Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller, *"A Map Is Not the Territory": The Theory and Future of Sensitive Places Doctrine*, 98 N.Y.U. L. REV. ONLINE 438, 451 (2023).

273. *See* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1296 (2009) (describing *Heller*'s conclusions about sensitive places as "not a rule of decision," but rather as "ipse dixit, 'in search of a theory'").

274. Blocher & Siegel, *supra* note 27, at 1823; *see also* Brief of the League of Women Voters as Amicus Curiae in Support of Respondents at 17, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843) (noting a basis for sensitive-place restrictions in "maintain[ing] the public's confidence in core governmental objectives").

275. Blocher & Siegel, *supra* note 27, at 1821. Blocher and Siegel suggest that this "why" may be an independent basis for sensitive-place restrictions *or* may be derived from a broader imperative of "creating and sustaining democratic community," given the importance of functioning markets to preserving the bonds of democratic life. *Id.* at 1799, 1821.

276. Darrell A.H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 466 (2019).

277. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1475 (2009); Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015); United States v. Class, 930 F.3d 460, 464 (D.C. Cir. 2019).

278. *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 292 (2018).

principles that do not ultimately apply when the universe of things expands.[279] Alternatively, new principles may emerge that bind an expanded collection of things.

What binds schools, government buildings, polling places, legislative assemblies, and courthouses to public transportation? For one, public transportation is, like schools and government buildings, essential to enable Americans to access the public square, a critical aspect of democratic community.[280] As Darrell A.H. Miller has described, "The idea of a right to peaceably assemble presumes two things: first, that there is an actual space for such an assembly to occur, and second, that such assemblages must be peaceable, as opposed to disorderly."[281] Many Americans rely on public transportation to access the public square. Particularly for low-income individuals and those living in dense urban areas where private transportation is not the norm, public transportation is essential to connecting communities across neighborhoods and building the bonds of civic life that make politics possible.[282] Today, public transportation is defined by the provision of a common space for those of various backgrounds to assemble for the purpose of accessing the public square.[283] In this way, recognizing public transportation as a sensitive place does not alter our previous understanding of what makes a place sensitive. Rather, it ratifies a prior understanding that what makes schools and government buildings sensitive places is, in part, that they are sites that build the "bonds of democratic community."[284] This observation may strengthen the claims of future litigants or conclusions of future courts that additional sites may be deemed sensitive if locational restrictions on firearm carriage there protect democratic community.

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279. *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 757 (1993) (noting that, in an example of analogical reasoning among three cases, "[m]any principles may cover the first two cases without also covering the third").

280. Miller, *supra* note 276, at 475.

281. *Id.*

282. Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), https://www.pewresearch.org/short-reads/2016/04/07/who-relies-on-public-transit-in-the-u-s [https://perma.cc/5N52-3WGT] ("Americans who are lower-income, black or Hispanic, immigrants or under 50 are especially likely to use public transportation on a regular basis . . . .").

283. *See* BEASTIE BOYS, *An Open Letter to NYC*, *on* TO THE 5 BOROUGHS (Oscilloscope Lab'ys 2004) ("Listen, All You New Yorkers / Brooklyn, Bronx, Queens and Staten / From the Battery to the top of Manhattan / Asian, Middle-Eastern, and Latin / Black, White, New York you make it happen / Brownstones, water towers, trees, skyscrapers / Writers, prize fighters, and Wall Street traders / We come together on the subway cars / Diversity unified, whoever you are.").

284. Blocher & Siegel, *supra* note 27, at 1823.

Second, all of these places can be understood as critical infrastructure. The federal government has described critical infrastructure as those institutions "that provide a reliable flow of products and services essential to the defense and economic security of the United States, the smooth functioning of government at all levels, and society as a whole."[285] Schools and government buildings are critical to the operation of representative government, and public transportation is critical to the maintenance of channels of commerce. Recognizing public transportation as a sensitive place could create new interpretive possibilities to recognize other critical infrastructure—like "public health" sites, airports, or energy production and distribution sites—as sensitive places as well.[286] Unsurprisingly, these are among the places in which several states moved quickly to regulate firearms after *Bruen*.[287]

By invoking schools and government buildings, *Heller* implicitly recognized that the protection of one component of critical infrastructure—places key to "the smooth functioning of government"[288]—is a permissible motivation to impose sensitive-place restrictions. Less ink has been spilled considering other elements of the critical-infrastructure definition, such as places essential to the economy. Scholars have only begun to pay substantial attention to this possibility after *Bruen*.[289] Recognizing that public transportation is a sensitive place offers litigants and courts yet another node from which to analogize to new places that fall within the category of critical infrastructure.

CONCLUSION

The nation's historical tradition of firearm regulation is not the exclusive province of statutes. To be faithful to *Bruen*'s history-and-tradition test, judges must consider *all* that the nation's historical tradition of firearm regulation

285. *See Critical Foundations: Protecting America's Infrastructures*, PRESIDENT'S COMM'N ON CRITICAL INFRASTRUCTURE PROT., at B-2 (Oct. 1997) [hereinafter *Critical Foundations*], https://sgp.fas.org/library/pccip.pdf [https://perma.cc/W35Q-JWKH]; *Critical Infrastructure Sectors*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors [https://perma.cc/3DZ7-C27G].

286. *Commercial Facilities Sector*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors/commercial-facilities-sector [https://perma.cc/39MK-NB7R].

287. *See, e.g.*, N.J. STAT. ANN. § 2C:58-4.6 (West 2022) (listing as sensitive places a "privately or publicly owned and operated entertainment facility," "plant or operation that produces, converts, distributes or stores energy," "airport," and "health care facility").

288. *See Critical Foundations*, *supra* note 285, at B-2.

289. *See* Siegel & Blocher, *supra* note 27, at 1820-23.

reveals. This Note proposes the following method: when a state seeks to regulate firearms in public spaces, the antecedents of which were private or quasi-public, the actions of those antecedent regulators are part of the nation's historical tradition.

This approach, when applied to the case study of public transportation, furnishes an independent ground to recognize trains, subways, and other forms of public transit as sensitive places. In so doing, it confirms and illuminates an array of common features that render a place sensitive for Second Amendment analysis, creating new interpretive possibilities for clarifying the map of sensitive places after *Bruen*. In an America in which states must permit public carry, state and local governments retain the democratic authority to chart the contours of this new regime. To do so, they must make full use of the nation's vast historical tradition of firearm regulation.