# THE THIRD RAILS OF SECOND AMENDMENT JURISPRUDENCE: GUIDANCE ON DERIVING HISTORICAL PRINCIPLES POST-*BRUEN*

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This article proposes a method by which courts and litigants can resolve recurring questions presented in litigation over the right to keep and bear arms.

Three Supreme Court cases, *District of Columbia v. Heller* (2008),[2] *New York State Rifle & Pistol Association v. Bruen* (2022),[3] and *United States v. Rahimi* (2024)[4] established a text-first, history-second methodology for deciding whether a present-day law affecting the right to keep and bear arms passes muster under the Second Amendment.

If the conduct prohibited by such a law is covered by the plain text of the Second Amendment, a court must then determine whether the law is "consistent with this Nation's historical tradition of firearm regulation," by examining relevant historical analogue laws at or near the time of the Founding. By examining whether modern and historical regulations "impose a comparable burden on the right of armed self-defense" (the "how"), and whether "that burden is comparably justified" (the "why"), a "principle" may be distilled from the analogues to define the contours of the right. A modern regulation that is consistent with a principle thus derived is consistent with the Second Amendment. A modern regulation that is inconsistent with such a principle is unconstitutional.

A key issue, flagged by Justice Barrett in her *Rahimi* concurrence, is the appropriate level of generality at which to derive a principle from the historical analysis described by *Bruen*. In *Rahimi*, the Court criticized the Fifth Circuit for requiring a "historical twin" and searching for a historical "principle" that was too specific. But the Court likewise rejected a principle proffered by the United States—that the government may disarm any citizen who is not "responsible"—as being pitched at too high a level of generality.

Though it instructed courts to find the right level of generality and eschew rules that are either overbroad or too specific, *Rahimi* did not make explicit how lower courts should know whether

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[2] 554 U.S. 570 (2008).

[3] 597 U.S. 1 (2022).

[4] 602 U.S. 680 (2024).

the rule they embrace fits into this Goldilocks zone of just right. This article proposes a way to test whether derived principles are appropriate by identifying certain "disqualifiers."

This article identifies five disqualifiers or "third rails" that indicate when a court's analysis is wrong. First, the derived historical principle cannot violate precedents or constitutional principles already established by the Supreme Court. Second, a historical principle cannot be justified by reference to the misuse of firearms by criminals as opposed to the lawful use of firearms by the law-abiding. Third, a historical principle must not undermine the purposes of the Second Amendment. Fourth, a historical principle must not restrict or prohibit firearms-related activities that were common at the Founding. Fifth, a historical principle that denies Second Amendment rights to most Americans is invalid.

This is not an exhaustive list—rather, it is an attempt to kick off a conversation. There are surely other relevant disqualifiers not discussed here, but a principle that runs afoul of any of these disqualifiers is incorrect and must be rejected as a basis for assessing the constitutionality of a modern gun law.

## I. A QUICK REFRESHER: APPLYING THE *HELLER*/*BRUEN* METHODOLOGY

Before addressing the disqualifiers, it is helpful to review the *Bruen* methodology.[5] The Supreme Court explains:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." Konigsberg v. State Bar of Cal., 366 U. S. 36, 50, n. 10 (1961).[6]

As the Supreme Court taught in *Bruen* and *Rahimi*, the historical work of understanding the Second Amendment involves examining laws that restricted the right to keep and bear arms historically by asking both "how" and "why" those laws limited the right. Then, as *Rahimi* makes clear, the question is whether the "principle" to be derived from those historical laws—the

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[5] My recent scholarly work discusses the application of the Heller/Bruen methodology: *See generally* Mark W. Smith, *Dangerous, but not Unusual: Mistakes Commonly Made by Courts in Post-Bruen Litigation*, 22 GEO. J.L. & PUB. POL'Y 599 (2024) available at https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2024/10/GT-GLPP240029.pdf [https://perma.cc/TK8A-GZ3K] (detailing the Bruen methodology as applied to modern Second Amendment lawsuits); Mark W. Smith, *What Part Of "In Common Use" Don't You Understand? How Courts Have Defied Heller In Arms-Ban Cases – Again*, 41 HARV. J.L. & PUB. POL'Y Per Curiam (Fall 2023) (explaining how arms-ban cases are to be decided under Heller precedent), available at https://journals.law.harvard.edu/jlpp/what-part-of-in-common-use-dont-you-understand-how-courts-have-defed-heller-in-arms-ban-cases-again-mark-w-smith/ [https://perma.cc/N6HS-CKAS]; Mark W. Smith, *Much Ado About Nothing: Rahimi Reinforces Bruen And Heller*, 26 HARV. J.L. & PUB. POL'Y Per Curiam (Summer 2024), available at https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/07/Smith-Much-Ado-About-Nothing-vf2.pdf [https://perma.cc/97WH-SQGJ] (explaining that the Rahimi decision is an ordinary and routine application of the pre-existing Bruen methodology); Mark W. Smith, NYSRPA v. Bruen: *A Supreme Court Victory For The Right To Keep And Bear Arms—And A Strong Rebuke to "Inferior Courts,"* 24 HARV. J.L. & PUB. POL'Y Per Curiam (Summer 2022), available at https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2022/08/Smith-Bruen-vF1.pdf [https://perma.cc/G3N4-TS8C] (summarizing Supreme Court's Bruen decision).

[6] *Bruen*, 597 U.S. at 17 (2022).

synthesis of "how" and "why" they regulated the right while remaining consistent with it—would, today, justify (or not justify) whatever modern firearm law is being challenged as unconstitutional.[7]

The notion of underlying or historical principles is not novel in Second Amendment jurisprudence. In *Heller,* the Court found two historical principles to be case determinative. The first was the historical tradition at common law of regulating "dangerous and unusual weapons."[8] The second was that arms "'in common use' . . . for lawful purposes" are categorically protected.[9] Because handguns are the "quintessential self-defense" weapons chosen by millions of Americans for that purpose, Washington, D.C.'s handgun ban was unconstitutional.[10]

In *Bruen,* the Court analyzed the "how" and the "why" of historical analogues to adduce a historical principle by which to assess New York's "proper cause" requirement for handgun licenses.[11] The historical principle derived from analogues that made it illegal to carry handguns concealed was that legislatures could regulate the mode of carriage, but they could not ban carriage entirely.[12] Applying that historical principle, the New York law was unconstitutional.[13]

In *Rahimi,* the Court examined two different sets of historical laws: (a) surety laws, that required an individual who was suspected of causing trouble to find sureties before carrying arms in public, and (b) the "going armed" laws, which made it unlawful to go armed in public "to the [t]error of the [p]eople."[14] *Rahimi* treated these laws together because they had the same "why"—they were both aimed at preventing future violence with firearms.[15] They also had similar "hows."[16] To be sure, as Justice Thomas pointed out in his dissent, they were not perfectly aligned on this point,[17] but as the majority emphasized, they frequently targeted the same behavior and were used somewhat interchangeably.[18]

The historical principle *Rahimi* derived from these laws was that the government could disarm an individual temporarily where he "present[ed] a credible threat to the physical safety

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[7] Before a court can even consider deriving a principle, the government must identify a basket of suitable historical analogue laws. To be valid, a proposed historical analogue must be an actual law, including the common law, from the Founding era. Mark W. Smith, *"Not All History Is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868* (Oct. 1, 2022) (working paper) (available at https://ssrn.com/abstract=4248297 or http://dx.doi.org/10.2139/ssrn.4248297 [https://perma.cc/TSZ5-RY2Z]); Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 31 HARV. J.L. & PUB. POL'Y Per Curiam (Fall 2022). Historical laws with racist or otherwise unconstitutional foundations cannot be considered as analogues. As Justice Kavanaugh stated in his *Rahimi* concurrence, "courts must exercise care" not to rely on "the history that the Constitution left behind." United States v. Rahimi, 144 S. Ct. 1889, 1915 (2024) (Kavanaugh, J., concurring). Analogues must also be "well-established" and "representative." *Bruen*, 597 U.S. at 21. A handful of outliers that either existed for only a short time, or did not affect substantial swaths of the national population, cannot establish a historical tradition.

[8] District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[9] *Id.* at 624.

[10] *Id.* at 629.

[11] *Bruen*, 597 U.S. at 29.

[12] *Id.* at 70.

[13] *Id.* at 71.

[14] United States v. Rahimi, 602 U.S. 680, 697 (2024).

[15] *Id.* at 682.

[16] *Id.*

[17] *Id*. at 767 (Thomas, J., dissenting).

[18] *Id.* at 681 (majority opinion).

of others."[19] Applying that principle, the Court held that the temporary prohibition by 18 U.S.C 922(g)(8), which prohibits the possession of a firearm by someone subject to a domestic violence restraining order, who had been found to pose a physical danger to another, was constitutional.[20]

*Rahimi* did not provide lower courts with a formula to test if a derived principle passes muster under the Second Amendment. Here, the key issue is the level of generality of the principle underlying, or derived from, historical analogues. As Justice Barrett recognized in her *Rahimi* concurrence:

> Courts have struggled with this use of history in the wake of *Bruen*. One difficulty is a level of generality problem: Must the government produce a founding-era relative of the challenged regulation—if not a twin, a cousin? Or do founding-era gun regulations yield concrete principles that mark the borders of the right?[21]

So, what level of generality is the right one to derive these principles? *Rahimi* itself shows that error lies on either extreme—the Fifth Circuit drew its analogies too narrowly and required a "historical twin," while the government in *Rahimi* pushed for a rule that would swallow the Amendment whole in permitting the government to bar firearm possession by anyone it judged to be "[ir]responsible."[22] It is clear that the Court is looking for a Goldilocks principle: one that does not embrace a principle that is too extreme, but is instead "just right." As part of the examination of historical analogues to determine the principles that underlie our national tradition of firearms regulation, it is crucial that the principles be applied at the appropriate level of generality and in the correct manner.

## II. Deriving The Historical Legal Principle

Identifying an underlying historical principle serves at least two purposes. First, it brings coherence to a proposed basket of analogues and informs the meaning of those historical laws. Second, and most importantly, it explains how those laws were consistent with the contours of the Second Amendment. The best way to think about how to derive or formulate a historical legal principle is by ensuring that the "why" and the "how" of the suitable historical analogues are encompassed in the proposed historical principle. In essence, all derived historical legal principles can be written in the following manner: The government may regulate conduct within the plain text of the Second Amendment by [insert the how] because history demonstrates that society has well-founded concerns about [insert the why] that have been embodied in historical analogue laws that meet *Bruen*'s standards.

## III. The Second Amendment Disqualifiers Test Whether A Proffered Principle Derived From History is Correct

In *Rahimi*, Justice Barrett made two astute observations. First, "a court must be careful not to read a principle at such a high level of generality that it waters down the right" and, second,

[19] *Id*. at 700.
[20] *Id.* at 701.
[21] *Id*. at 739 (Barrett, J., concurring).
[22] *Id*. at 701 (majority opinion).

"reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[23] This is hardly a concern unique to the Second Amendment. The Supreme Court has wrestled with how to instruct lower courts to pitch their analyses at the appropriate level of generality in all manner of constitutional contexts. In the abortion context, for example, the Court criticized its own precedent "appeal[ing] to a broader right to autonomy and to define one's 'concept of existence'" as operating at such "a high level of generality" that they could equally well "license fundamental rights to illicit drug use, prostitution, and the like";[24] in qualified immunity cases, it frequently admonishes lower courts that "clearly established law" must not be defined "at a high level of generality" but rather must be "particularized to the facts of the case";[25] and in the family law context, Justice Scalia warned that in assessing the historical scope of familial rights, courts should "consult[] the most specific tradition available" given that more "general traditions provide such imprecise guidance [that] they permit judges to dictate rather than discern the society's views."[26] These concerns should sound very familiar to students of the Second Amendment.

Perhaps the clearest example of this in the Court's caselaw can be found in *Washington v. Glucksberg*, where the Court assessed whether there was a constitutional right to assisted suicide. *Glucksberg* was essentially *Bruen* in reverse; because the right to assisted suicide is not found in the Constitution's text, the plaintiff bore the burden to demonstrate from a historical tradition that the alleged right existed and should be protected. In assessing the claim, the Court wrestled with the appropriate level of generality at which to define the asserted right based on history. The Ninth Circuit below had asked "'whether there is a liberty interest in determining the time and manner of one's death,' or, in other words, '[i]s there a right to die?'"[27] Glucksberg had asserted a right "to choose how to die," to be in "control of one's final days," or "the liberty to shape death."[28] But the Court criticized these questions as too broadly formulated, noting that in the past it had been much more careful in "formulating the interest at stake in substantive-due-process cases," and rejected the notion that it had previously recognized a "right to die," and had, instead, found a much more limited right of "competent persons" to "refuse lifesaving hydration and nutrition."[29] Properly characterized, the question before the Court in *Glucksberg* was much narrower: whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide, which itself includes a right to assistance in doing so.[30]

Insisting on a careful description of the right in question is one of the "guideposts for responsible decision making" the Court uses to avoid removing too much from "the area of public debate and legislative action" in substantive due process cases.[31] Similarly, ensuring the proper definition of the limiting principles helps to avoid watering down rights textually protected by the Constitution.

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[23] United States v. Rahimi, 144 S. Ct. 1889, 1926 (2024) (Barrett, J., concurring).

[24] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256–57 (2022).

[25] White v. Pauly, 580 U.S. 73, 79 (2017).

[26] Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (Scalia, J.) (plurality opinion).

[27] Washington v. Glucksberg, 521 U.S. 702, 722–23 (1997).

[28] *Id.*

[29] *Id.* (quoting Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990)).

[30] *Id.*

[31] *Id.* at 720–21.

In the Second Amendment context, the underlying principle of regulation, if any, is derived from the synthesis of "how" and "why" historical analogues regulated the Second Amendment right while remaining consistent with the Second Amendment. Whereas the risk in *Glucksberg* was acknowledging an overbroad right. Given that the *Bruen* analysis uses history to find *limitations* on the right, the risk of drawing historical principles at too high a level of generality is that a principle so derived could swallow the rule. We can see this in the way courts ask "why" historical laws limited the right to keep and bear arms. At a high level of generality, some erroneously argue that virtually every historical law existed to promote "public safety" or the "protection against harm from firearms," so that any similar laws are justified today.

*Heller* itself made the point about *what specific threat* is being protected against. It dismissed Justice Breyer's citation of a 1783 Boston law that prohibited depositing loaded firearms in dwellings and other buildings.[32] Justice Scalia noted that the statute's text and its prologue made it clear "that the purpose of the prohibition was to eliminate the danger to firefighters" posed by those arms being held there.[33] But the handgun ban in the District was enacted not to protect firefighters but to combat the alleged "drastic increase in gun-related violence."[34] Both rationales have something to do with "public safety," but there is a gross mismatch between why the Boston ordinance was enacted and why the District's law was passed; *Heller* found no support for the District's handgun ban in the early law regarding depositing loaded firearms in dwellings.[35]

Two salient and recent examples where the Supreme Court has compared principles proffered by the government and rejected those formulated at a high level of generality are the Court's discussion of "sensitive places" in *Bruen,* and the Court's findings in *Rahimi* regarding when an individual may be temporarily disarmed from publicly carrying a concealed firearm. In *Bruen*, the Court rejected the "principle" allegedly ascertained from historical analogues that "'sensitive places' where the government may lawfully disarm law-abiding citizens include all "places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available."[36] The Court rightly concluded that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense . . . ."[37]

In government-mandated gun free zone ("sensitive place") cases, a better principle might be that the government can restrict Second Amendment rights by banning possession of firearms in discrete locations so long as the government provides comprehensive security for individuals within those locations so that individual self-defense is no longer needed.[38] That is a narrowly-

[32] *See* District of Columbia v. Heller, 554 U.S. 570, 631 (2008).

[33] *Id.*

[34] *Id.* at 694 (Breyer, J., dissenting).

[35] *Id*. at 631 (majority opinion); *see also id.* at 632–33 (citing colonial-era laws penalizing shooting off guns on New Year's Eve, firing guns in city streets and taverns, or within the Town of Boston). The danger to be guarded against was stray bullets, not using firearms to commit violent crime as with the District's handgun ban. The "whys" simply did not add up, and the "public safety" rationales were not at all comparable.

[36] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30–31 (2022).

[37] *Id.* at 31.

[38] *Id.* at 30–31.

drafted principle. Compare it to the wildly overgeneralized test proposed by New York and rejected by the Court in *Bruen*, and one can see the difference between a narrow principle that reflects the "how" and the "why" of a proposed principle, and one that is posited at too high a level of generality.

*Rahimi* provides an excellent example of the proper level of generality. *Rahimi* reviewed both surety statutes and laws against "affrays" or going armed "to the Terror of the People."[39] From those, *Rahimi* distilled the historical legal principle that if an individual has been adjudicated to pose a credible threat of physical violence to another, the threatening individual may be temporarily disarmed.[40] *Rahimi* rejected the government's claim that it could disarm those who were not "law-abiding" or "responsible."[41] Chief Justice Roberts objected to the Solicitor General's argument when she asserted that Rahimi could be disarmed because he was "irresponsible." The Chief Justice observed that this proposed principle was vague and overbroad.[42] Indeed, a principle operating at this high a level of generality would disarm a vaguely defined, but undeniably large, swath of the population with ordinary self-defense needs.

## IV. THE SECOND AMENDMENT DISQUALIFIERS

As illustrated above, the Supreme Court has furnished some examples of levels of generality that are improper or too high, but so far it has not articulated a general test for levels of generality. This article proposes several rules (I call them "disqualifiers" or "third rails," because, like the third rail on a train, it is fatal for a historical principle to touch one of these disqualifiers) that flow naturally from the Supreme Court's caselaw, and that will help ensure that any principle so derived will be at the proper level of generality. If the principle derived from a basket of historical analogues touches a third rail, then it fails. In addition, I've proposed one disqualifier (No. 2 below) that is not tied to the level-of-generality problem but offers a response to courts that have taken the wrong perspective in analyzing Second Amendment history.

These disqualifiers do not replace the detailed historical methodologies exemplified in *Heller*, elaborated in *Bruen*, and applied in *Rahimi*, but are meant to "test" whether a principle derived from a basket of suitable historical analogues is sufficiently narrow. The disqualifiers thus function as a confirming or disqualifying analytic.

### Disqualifier No. 1: A Derived Historical Legal Principle Cannot Violate Supreme Court Precedent

A derived historical legal principle cannot contravene Supreme Court precedent. For example, *Heller* teaches that arms "in common use" for lawful purposes are protected.[43] So, if a lower court derives a principle that would permit banning arms in common use, then the principle being advocated by the government fails.

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[39] United States v. Rahimi, 602 U.S. 680, 697 (2024).
[40] *Id*. at 702.
[41] *Id*. at 701.
[42] *Id*. at 701–02.
[43] District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

Today, so-called "assault weapon" bans and bans on "large capacity" (actually, *standard* capacity) magazines are being challenged around the country.[44] Any derived principle, which would supposedly justify a ban on the most popular rifle in U.S. history, or on magazines possessed in the hundreds of millions, ought to be dead on arrival as violative of Supreme Court precedent.[45]

**Disqualifier No. 2: A Derived Historical Legal Principle Must Not Be Based on the Misuse of Firearms by Criminals**

Another disqualifier requires lower courts to reject any derived historical legal principle which rests on the potential misuse of firearms by criminals. The Supreme Court's Second Amendment jurisprudence focuses on the lawful use of firearms by the law-abiding—not criminal misuse. *Heller* described handguns as "the quintessential self-defense weapon" and held that they were protected as arms "typically possessed by law-abiding citizens for lawful purposes"—notwithstanding Justice Breyer's assertion in dissent that handguns were "the overwhelmingly favorite weapon of armed criminals."[46] While *Heller* acknowledged "the problem of handgun violence in this country," it explained that the Second Amendment "necessarily takes certain policy choices off the table"—specifically, in that case, bans on arms in common use by the law-abiding.[47] This focus on the law-abiding is not unusual. For example, while the internet is an important medium for the exercise of the First Amendment right of free speech, some people use the internet for illegal acts like distributing illegal pornography or violating copyright protections. Yet, this unlawful use of the internet may not be used to support banning (or heavily regulating) internet use for everyone, including law-abiding citizens.[48]

Another example of this is the frequent (and improper) recitation by courts of the use of AR-15 semi-automatic rifles in mass shootings. ARs have indeed been criminally misused in some highly-publicized mass shootings—although not as often as handguns, which are the most common weapon of mass shooters.[49] Regardless, like misuse in crime generally, misuse in mass shootings cannot be a basis to ban a firearm that is in common use by law-abiding citizens for lawful purposes. Any derived principle that would justify a ban on semi-automatic rifles would violate, at a minimum, the Supreme-Court-precedent disqualifier (Disqualifier No. 1), and the criminal-misuse disqualifier (Disqualifier No. 2).

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[44] *See* discussion in Part IV, below.

[45] *See generally* Smith, *supra* note 5 *Dangerous, but not Unusual: Mistakes Commonly Made by Courts in Post-Bruen Litigation*, at 606, 619–20, 624–39; Smith, *supra* note 5 *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-Ban Cases — Again*, at 3–5.

[46] *Heller*, 554 U.S. at 629, 625; *id.* at 682 (Breyer, J., dissenting).

[47] *See id*. at 636 (majority opinion).

[48] *See generally* Mark W. Smith, *A Judicial Teaching Point: The Lesson of the Late Justice John Paul Stevens in Sony v. Universal City Studios as a Response to Civil Lawfare*, 1 ARIZONA STATE UNIV. CORPORATE AND BUSINESS L.J. Issue 2, 71, 72–75 (June 2020) (discussing Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (the misuse of VCR equipment for unlawful purposes is not a basis to ban the widespread use of VCRs for legitimate, unobjectionable purposes)) available at https://cablj.org/wp-content/uploads/2020/06/Final-Smith.pdf.

[49] *Weapon types used in mass shootings in the United States between 1982 and September 2024, by number of weapons and incidents*, STATISTA.COM (Dec. 9, 2024), https://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/ [https://perma.cc/9THT-TXQ8].

**Disqualifier No. 3: A Derived Historical Legal Principle Must Not Contradict the Purposes Advanced by the Second Amendment**

The third disqualifier rules out principles that undermine the purposes of the Second Amendment. A primary purpose is the right of law-abiding citizens to be armed to defend themselves and to resist tyranny.[50] Because *Heller* confirmed that the Second Amendment protects the right to be "armed and ready for offensive or defensive action in case of conflict with another person,"[51] it is unlikely that the Founders would have approved, for instance, of a regulatory tradition making it difficult for law-abiding citizens to train with firearms. After all, as the Seventh Circuit explained in *Ezell v. Chicago*,[52] "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice to make it effective."[53]

In addition to the right to maintain proficiency in the use of arms, the right to acquire and possess the firearms themselves must be protected in order to vindicate the Second Amendment's purposes of self-defense, repelling invasions, resisting tyranny, and collective defense.

**Disqualifier No. 4: A Derived Historical Legal Principle Must Not Restrict or Prohibit Firearm-Related Activities that were Common at the Founding**

The fourth disqualifier protects firearm-related activities that were common at the Founding. Thus, if a purported principle, if applied historically at the Founding, would have banned or restricted a common activity of that era, the principle must be rejected. As *Bruen* explained, "when a challenged regulation addresses a general societal problem that has persisted since the eighteenth century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[54] In *Bruen*, arguments were advanced that there was no right to public carry at the Founding and that public carriage was a crime. In reality, carrying firearms in public was ubiquitous and a common practice of our most illustrious Founders, including the first several presidents. Any historical principle that would transform the leading members of the Founding generation into criminals cannot be correct.

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[50] Story, Joseph, Commentaries on the Constitution 3:§ 1890 ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them") (available at https://press-pubs.uchicago.edu/founders/documents/amendIIs10.html#:~:text=The%20right%20of%20the%20citizens,the%20people%20to%20resist%20and). During oral argument in *Heller*, Justice Kennedy asked counsel for the District, somewhat skeptically, if the right to keep and bear arms "had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?" Transcript of Oral Argument at 14, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290). Justice Kennedy's inquiry is informative because it identifies the many threats the early settlers faced at the Founding.

[51] *Heller*, 554 U.S. at 584.

[52] 651 F.3d 684 (7th Cir. 2011).

[53] *Id.* at 704.

[54] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26 (2022).

**Disqualifier No. 5: A Derived Historical Legal Principle Cannot, In Effect, Deny Second Amendment Rights to Most Americans**.

Any proffered principle that means to support a present-day firearms regulation that prohibits the general population, *i.e.*, "the people" from exercising their Second Amendment rights is improper. An example of such a regulation is the "proper cause" requirement struck down in *Bruen*. That was limited to carry, but no principle can be countenanced that does not allow "all Americans" the right to possess a firearm.[55] Examples include "premises licenses" in New York, and "permit to purchase" laws in other states. Although certain specific people can be disarmed (*e.g.*, violent felons), those are exceptions, not the rule. Anything that debars significant swaths of the general public from having arms would be a huge overgeneralization that touches a third rail. A similar principle applies to "sensitive places" legislation that ostensibly allows concealed carry, but then outlaws it in most public places. This includes laws, such as those in New York and New Jersey, that reverse the usual presumption that an owner of property accessible to the public can ban carry, but the burden is on the property owner to do so. The burden cannot be on the citizen-carrier to affirmatively get permission in advance. As Judge VanDyke explained in criticizing a Ninth Circuit decision blessing many of these locational restrictions, the only way the panel could uphold them was to "extract[ ] very broad principles from the historical record that could support the constitutionality of almost any firearms restriction."[56]

## V. APPLYING THE SECOND AMENDMENT DISQUALIFIERS

In any Second Amendment case, except those in which the Supreme Court has already decided the issue (*i.e.*, arm ban cases), lower courts must perform the *Bruen* text-first, history-second analysis to determine whether the challenged law is "consistent with this Nation's historical tradition of firearm regulation."[57] The disqualifiers perform a different function. They are designed to catch errors *after* the *Heller*/*Bruen* analysis has been initially performed and to indicate when historical lines have been drawn with too broad a brush. As shown below, this is where many lower courts go astray.

Fortunately, the disqualifiers are often easy to apply when considered in good faith, and do not require a deep dive into historical analogues. Much of the work has already been done by the Supreme Court. In *Heller*, the Court told us what historical principle will support an arms ban.[58] In *Bruen*, it told us what historical principles govern the right to carry firearms.[59] And in *Rahimi* it explained the historical principles that permit temporarily disarming those who have been judicially found to pose a credible threat of physical harm to another.[60] Those three holdings

[55] *Id.* at 70.

[56] Wolford v. Lopez, --- F.4th ---, 2025 WL 98026, at *12 (9th Cir. 2025) (VanDyke, J., dissenting from denial of rehearing en banc).

[57] *Id.* at 17.

[58] District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[59] *Bruen*, 597 U.S. at 70.

[60] United States v. Rahimi, 602 U.S. 680, 695–97 (2024).

alone resolve the lion's share of Second Amendment issues percolating today, and the lower courts in most cases simply need to faithfully follow Supreme Court precedent.

*A. Semiautomatic Rifles ("Assault Weapons") and Magazines*

Several states ban certain ordinary semi-automatic firearms, which they label "assault weapons." Those states often pair that ban with a ban on so-called "large capacity magazines."

Courts have offered several "principles" to justify such bans. Take, for example, *Bevis v. Naperville*,[61] where the Seventh Circuit recognized the "principle" that arms that are especially useful in military service can be banned.[62] In *Bianchi v. Brown*,[63] the Fourth Circuit recognized a historical principle of regulating "excessively dangerous" weapons.[64] In *Hanson v. District of Columbia*,[65] the D.C. Circuit found an ostensible tradition of banning arms capable of "unprecedented lethality."[66] And the First Circuit in *Ocean State Tactical, LLC v. Rhode Island*,[67] wrongly recognized a tradition to protect against the greater dangers posed by "more dangerous" weapons.[68] Along these same lines, in *Vermont Federation of Sportsmen's Clubs v. Birmingham*,[69] the district court found that our country had a "history of regulating mass threats to public safety."[70]

Each of these purported principles runs afoul of a disqualifier. *Heller* already did the historical homework and derived the rule of decision to determine what types of arms the Second Amendment protects. The Court first noted that there was a tradition of banning the carrying of "dangerous and unusual weapons."[71] As the flipside of this, the tradition at the Founding was that men enrolled in the militia would bring with them the sorts of arms typically possessed by law-abiding citizens for lawful purposes.[72] Taken together, this gives us the "principle" announced in *Heller* that an arm "in common use" cannot be "dangerous and unusual," and thus cannot be banned.[73]

If we compare that principle, against the principles announced by lower courts in recent "assault weapon" ban cases, we find a conflict. Those purported principles *would* allow bans on "common" arms, provided, for example, that the lower court was convinced that those common arms were "excessively dangerous."[74] Because the lower courts have no authority to deviate from the Supreme Court's precedent, each of these principles violates Disqualifier No. 1, and cannot be the controlling rule.

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[61] 85 F.4th 1175 (7th Cir. 2023).

[62] *Id.* at 1202.

[63] 111 F.4th 438 (4th Cir. 2024).

[64] *Id.* at 446.

[65] 120 F.4th 223 (D.C. Cir. 2024).

[66] *Id.* at 237.

[67] 95 F.4th 38 (1st Cir. 2024).

[68] *Id.* at 48.

[69] No. 2:23-cv-710, 2024 WL 3466482, at *1 (D. Vt. July 18, 2024).

[70] *Id.* at *30.

[71] District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[72] *Id.* at 624–25.

[73] *See generally* Smith, *supra* note 5 *Dangerous, but not Unusual: Mistakes Commonly Made by Courts in Post-Bruen Litigation*, at 606, 619–20, 624–39; Smith, *supra* note 5 *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied Heller in Arms-Ban Cases — Again*, at 3–5.

[74] Bianchi v. Brown, 111 F.4th 438, 446 (4th Cir. 2024).

These purported principles also violate Disqualifier No. 2, which prohibits recognition of a principle that focuses on criminal misuse of a weapon instead of lawful use, and Disqualifier No. 3, which renders infirm any principle that is contrary to the purposes of the Second Amendment. One critical purpose of the Second Amendment, as courts have repeatedly recognized since *Heller*, is self-defense. Self-defense is hampered by laws that require law-abiding citizens to eschew common, effective arms that their attackers can readily obtain.

*B. Prohibited Persons (Violent Felons)*

There are many lower court cases addressing which persons may be prohibited from possessing a firearm. *Rahimi* distilled the historical legal principle that if an individual has been adjudicated to pose a credible threat of physical violence to another, the threatening individual may be temporarily disarmed.[75] That principle violates no third rail because it promotes individual self-defense and burdens the right only for those specific individuals who pose an unacceptable danger of criminally misusing firearms. *Rahimi* rejected the government's much broader prohibition, operating at a high level of generality, that it could disarm those who were not "law-abiding" or "responsible."[76]

Despite *Rahimi's* rejection of the notion that persons who are not "responsible" may be disarmed, at least two courts after *Rahimi* have adopted principles that are at least as broad and overgeneralized. The principle arrived at by the Eighth Circuit in *United States v. Jackson*[77] was that our history "prohibit[s] possession of firearms by persons who have demonstrated disrespect for legal norms of society."[78] Similarly, the district court in *United States v. Gutierrez*[79] purported to find a "historical tradition of categorically disarming groups perceived as not 'dependable adherents to the rule of law' . . . ."[80] Such vague, meaningless standards were rejected as a matter of principle in *Rahimi*, and the Court found they "did not derive from our case law."[81]

*C. Age Restrictions on Adults*

Under the laws of several states, while adults generally can own and carry firearms for self-defense, the rights of adults between 18 and 21 years old are truncated. Often states make it impossible for them to carry handguns for self-defense. And while federal law does not forbid them from owning a handgun, it forecloses them from buying one in the regulated commercial marketplace.[82]

In defending such laws, governments frequently make two arguments for why they should nevertheless be treated differently than the rest of "the people": (1) at the Founding, 18-year-olds were generally not considered adults, but were allegedly "minors" for most purposes and could

[75] United States v. Rahimi, 602 U.S. 680, 702 (2024).

[76] *Id*. at 701.

[77] 110 F.4th 1120 (8th Cir. 2024).

[78] *Id.* at 1127.

[79] No. 1:22-CR-00329, 2024 WL 4041321, at *1 (N.D. Ill. Sept. 4, 2024).

[80] *Id.* at *8.

[81] *Rahimi*, 602 U.S. at 701.

[82] Federal law is bizarre and perverse because it pushes 18-year-olds into the unregulated secondary market—an 18-year-old cannot buy a handgun at a sporting goods store (which would require a background check), yet he can buy one out of someone's trunk in the parking lot.

have their rights truncated accordingly,[83] and (2) in the latter half of the nineteenth century, several states (though less than a majority) passed laws limiting the ability of minors under 21 to acquire certain weapons (generally, handguns, Bowie knives and dirks).[84] But neither of these arguments adduces a *principle*, which permits disarming 18-year-olds today.

This case is even easier than the *Heller*/*Bruen* analysis itself. Disqualifier No. 4 provides that the derived principle must not restrict or prohibit firearm-related activities that were common at the Founding. For 18 to 20-year-olds, there were no laws on the books disarming them. On the contrary, before, during, and after the ratification of the Second Amendment, every state had a militia statute requiring 18-year-olds to enroll and participate in their state's militia; and the federal Militia Act of 1792 also required 18 to 20 year-olds to serve.[85] As part of that duty, they were required to acquire and own firearms and bring them to militia muster. Any purported principle that would prohibit those common "firearm-related activities" violates Disqualifier No. 4 and cannot be used to justify present-day statutes.

*D. Sensitive Places a/k/a Government-mandated Gun Free Zones*

Following *Bruen*, many traditionally anti-gun states, which now must respect the right to carry a handgun, responded by passing laws preventing a person from carrying in "sensitive places."

In *Antonyuk v. James*,[86] the Second Circuit erroneously derived the principle that vulnerable populations need to be protected and, based on that principle, deemed places "sensitive" where vulnerable populations gather."[87] But this principle violates Disqualifier No. 3 because it disregards the purpose of the Amendment to protect the right of self-defense,[88] and violates Disqualifier No. 4 because it would be contrary to Founding-era practice.

In *Wolford v. Lopez*,[89] the Ninth Circuit declared that stadiums and museums were "sensitive places," but public transit facilities and hospitals were not.[90] It also held that firearms could be presumptively banned at businesses in Hawaii, but not businesses in California. In a sure sign that something was amiss, the panel itself, even as it reached this nonsensical result, complained that its conclusion "appear[s] arbitrary" and that the places where firearms could and could not be banned "lack[ed] . . . an apparent logical connection."[91] What was missing was a relevant

[83] Worth v. Jacobson, 108 F.4th 677, 690 (8th Cir. 2024); Lara v. Comm'r Pa. State Police, 91 F.4th 122, 131–32 (3d Cir. 2024), *cert. granted, judgment vacated*, 2024 WL 4486348 (U.S. Oct. 15, 2024); *see also* Hirschfeld v. BATFE, 5 F.4th 407, 422–23, 435–36 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021) (Although *Hirschfeld* was decided pre-*Bruen*, its mode of analysis anticipated much of what *Bruen* would establish.)

[84] *Worth*, 108 F.4th at 696–98; *Hirschfeld*, 5 F.4th at 437–40; *see also Lara*, 91 F.4th at 134 & n.15 (recognizing the argument but declining to consider such laws as too late in time entirely).

[85] *See* Militia Act of 1792, Art. I (May 2, 1792), CONSTITUTION.ORG, https://www.constitution.org/1-Activism/mil/mil_act_1792.htm [https://perma.cc/D4DQ-UUM3]; NRA v. BATFE, 714 F.3d 334, 340 n.8 (5th Cir. 2013) (Jones, J., dissenting) (collecting ratification-era militia laws).

[86] No. 22-2908, 2023 WL 11963034, at *1 (2d Cir. Oct. 24, 2024).

[87] *Id.* at *48–49.

[88] Disarming people who most benefit from the ability to engage in self-defense makes no sense.

[89] 116 F.4th 959 (9th Cir. 2024).

[90] *Id.* at 1003.

[91] *Id.*

*principle* that would support the challenged legislation. But *Bruen* gives us very strong hints about what that principle should be.

In *Bruen*, the Court suggested that there were certain "sensitive" places where arms could be banned, and it pointed to laws from the Founding that treated three places as sensitive: courthouses, legislative assemblies, and polling places.[92] Properly analyzing these laws means asking what *principle* permitted firearms to be banned there consistent with the Second Amendment. There is one common thread running through these places, yielding a principle that conforms to the Second Amendment's function: at the Founding, the government provided security at these locations thus ensuring the safety of the public.[93] So, where the government provides comprehensive security and adequately protects its citizens in a discrete location, like a courthouse or the secure area of an airport today, it does not violate the Second Amendment to permit the government to ban firearm possession or carriage there. But where the government does not provide comprehensive security, it has no right to forbid law-abiding citizens from carrying there (after all, if a person intends to commit murder, he will not flinch at violating a gun-free zone law).

Historically speaking, where the government feared an attack but was not able or willing to provide comprehensive security itself, its response was not to ban firearms but to *require them*. At the Founding, as today, places of worship were unfortunately places where enemies of society would attempt to commit crimes, which is why, at the Founding, many states *required* churchgoers to arm themselves.[94]

## CONCLUSION

The Supreme Court cautions that the principles derived from our historical tradition of firearm regulation must not be extracted at such a high level of generality that they eviscerate the fundamental right to bear arms. In addressing the level of generality, courts and litigants must check their work. Separately, courts must focus their analysis on the proper, legal use, of firearms, not on their misuse by criminals. The "third rails" or disqualifiers help assess whether the principles derived from the government's basket of allegedly suitable historical analogues are drawn too broadly or are otherwise invalid. A principle touches a "third rail" if:

1. The asserted principle would violate existing Supreme Court precedent, such as the holding that arms in common use by Americans for lawful purposes are protected.

2. The asserted principle would be based on a concern for criminal misuse rather the rights of the law-abiding.

3. The asserted principle would disregard the purpose of the Amendment to protect the right of self-defense and thwart tyranny, invasion, and criminality.

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[92] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 31 (2022).

[93] *See* Smith, *supra* note 5 *Dangerous, but not Unusual: Mistakes Commonly Made by Courts in Post-Bruen Litigation*, at 644–53 (detailing the *Bruen* methodology as applied to modern Second Amendment lawsuits).

[94] *See generally* Benjamin Boyd, *Take Your Guns to Church: The Second Amendment and Church Autonomy*, 8 LIBERTY UNIV. L. REV. 653, 697–99 (2014) (collecting colonial- and Founding-era historical law for requiring firearms at church services).

4. The asserted principle would permit restrictions on what were common firearms-related activities at the Founding. In other words, if the Founders engaged in a practice, courts should not endorse a principle that would let the government turn the Founders into felons.

5. The asserted principle cannot, in effect, deny Second Amendment rights to most Americans.

Incorporating these disqualifiers into the constitutional analysis, the *Bruen*/*Heller* methodology breaks down as follows:

**Step one**: Determine whether the conduct being regulated by the challenged firearms law implicates the Second Amendment's text.

**Step two**: If yes, then the burden shifts to the government to demonstrate the existence of a longstanding historical tradition of firearms regulation dating back to the Founding. The government must do so by supplying the court with a sufficient quantum of well-established, representative historical analogue laws.

**Step three**: The court must assess "why" and "how" those analogues burden a law-abiding citizen's right to armed self-defense, while discarding any historical laws that are improper to be considered as analogues. More formally, the questions are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" and "whether that burden is comparably justified."[95]

**Step four**: From the remaining suitable analogues, the courts must extract a relevant historical legal principle (the "derived principle"). That principle must be derived from the why and the how of those analogues.

**Step five**: The derived historical legal principle must not violate the Second Amendment's third rails.

**Step six**: If the derived historical legal principle passes muster (*i.e.*, it does not violate any of the third rails), the court must then determine whether the modern firearms law is consistent with that legal principle.

[95] *Bruen*, 597 U.S. at 29.