WHAT PART OF "IN COMMON USE" DON'T YOU UNDERSTAND?: HOW COURTS HAVE DEFIED *HELLER* IN ARMS-BAN CASES—AGAIN

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INTRODUCTION

In the year since *New York State Rifle & Pistol Association v. Bruen*[1] was decided, a line of argument has developed in the lower courts that effectively seeks to relitigate and nullify *District of Columbia v. Heller*.[2]

Heller established the constitutional test to determine what arms are protected by the Second Amendment. After examining the text of the Second Amendment, as illuminated by history, *Heller* determined that bearable arms that are "in common use" today are constitutionally protected and cannot be banned.[3]

To circumvent *Heller*, government litigants, their amici, and some lower courts have seized upon a single sentence in *Bruen* that states that "[w]hile the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating *unprecedented societal concerns* or *dramatic technological changes* may require a *more nuanced* approach."[4] Gun-control proponents claim that improvements in firearms technology, such as the development of semiautomatic weapons, are "dramatic technological changes" and that mass shootings are "unprecedented societal concerns" that did not exist at the Founding. According to some courts, these changes and concerns justify bans on so-called "assault weapons" and what are mislabeled "large capacity magazines."[5]

That contention is wrong because *Heller*'s "in common use" test governs in all arms-ban cases including "assault weapon" bans, "large capacity magazine" bans, and non-roster handgun bans. The language from *Bruen* regarding technological changes and societal concerns is not a legal *test* that governs decisions either in arms-ban cases or in non-arms-ban cases. It is part of a description of the *methodology* that *Bruen* lays out for lower courts in deciding "other cases" not governed by

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[1] 142 S.Ct. 2111 (2022).

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

[3] *Id.* at 627.

[4] *Bruen*, 142 S.Ct. at 2132 (emphasis added).

[5] *See, e.g.*, Herrera v. Raoul, No. 1:23-cv-00532, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023) (discussed below in detail).

Heller's "in common use" test or by *Bruen*'s actual decision regarding restrictive, discretionary licensing systems regulating the public carry of arms.

Just as generations of Latin students learned that "All Gaul is divided into three parts,"[6] all Second Amendment cases after *Heller* and *Bruen* are divided into two categories: 1) laws that ban the possession or sale of particular arms (or the components required for them to function),[7] or 2) laws that otherwise regulate the sale or use of arms without banning particular weapons.[8] Cases in the first category are directly controlled by *Heller* and its test for arms bans. Cases in the second category are not.

In arms-ban cases, *Heller*'s "in common use" constitutional *test* controls, and there is nothing for the lower courts to do except apply that *test* to the facts at issue. In other, non-ban cases, the *methodology* described in *Bruen* must be followed to arrive at a *test* that provides the rule for deciding that case and similar cases.[9] It is only in the second, non-arms ban category of cases that "unprecedented societal concerns" and "dramatic technological changes" might have some application. But that language is not itself a *test*, and it is irrelevant in arms-ban cases.

The *Heller* test looks at what arms are "in common use" today, not in the past. If semiautomatic rifles and handguns that accept detachable magazines are in common use today, they are protected. Their ubiquity, and their being "in common use," confirms their protected status under the Second Amendment.

Such arms cannot be banned simply because they employ technology that some legislators or judges think is too dangerous. When *Heller* was before the Court, the parties and their amici presented arguments concerning the alleged exceptional "dangerousness" of modern firearms (in that case, handguns).[10] After considering these arguments, the Supreme Court adopted the "in common use" test without any exceptions for weapons that are allegedly too dangerous.

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[6] JULIUS CAESAR, THE GALLIC WARS, Book 1, Ch. 1 (Trans W. A. McDevitte and W. S. Bohn).

[7] The Second Amendment's protection of the right to possess ("keep") arms logically and necessarily entails the right to *come into possession* of the protected arms, by sale or manufacture, since possession presupposes acquisition. It is for that reason that it would be absurd for a State to say after *Heller*, for example, that people can *keep* whatever handguns they have, but ban all sales, manufacture, and import of handguns. After all, constitutional rights "implicitly protect those closely related acts necessary to their exercise." Luis v. United States, 578 U.S. 5, 26 (2016) (Thomas, J., concurring). Similarly, the right to keep and bear arms also necessarily entails the right to keep and bear the components of protected arms that make them what they are—triggers, magazines, barrels, etc. *are all protected.* Furthermore, all these components are themselves "modern instruments that facilitate armed self-defense" that *Bruen* clarified are protected as a matter of text. *Bruen*, 142 S.Ct. at 2132.

[8] Such laws concern the age at which young people can acquire or possess arms, where and under what conditions arms can be carried, restrictions on gun ranges or training, and other issues that do not involve the question of whether an arm or class of arms is protected.

[9] For example, after a review of alleged historical analogues to New York's restrictive licensing regime for public carry, *Bruen* concluded that a licensing scheme that "prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" is unconstitutional. *Bruen,* 142 S.Ct. at 2156. That articulates the rule applied in *Bruen* and that may be applied in other cases relating to the carrying of arms.

[10] *See generally* Brief for Petitioner, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290); *see also* Brief for Violence Pol'y Ctr. et. al. as Amicus Curiae Supporting Petitioner at 2, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) ("The handgun ban is a reasonable restriction, because handguns constitute a unique class of firearm that have an unmatched ability to cause violence and kill human beings.").

Likewise, parties also presented arguments concerning "unprecedented societal concerns" to the *Heller* Court.[11] The Court adopted the "in common use" test without any limitation based on these allegedly unprecedented concerns.

Nevertheless, some post-*Bruen* courts have utterly disregarded the Supreme Court's binding precedent in *Heller* governing what arms are protected. Having lifted language about "unprecedented societal concerns" and "dramatic technological changes" from *Bruen*'s description of the *methodology* for non-arms-ban cases, some courts, as discussed below, have refused to apply *Heller*'s binding test. Instead, these courts conduct their own historical analyses to determine what arms are protected and formulate new tests that are contrary to *Heller*. Under such tests, lower courts have held that arms that are "exceptionally dangerous" or "particularly dangerous"—such as "assault weapons"—may be banned, even though they are unquestionably "in common use."[12] In doing so, these courts have not only refused to apply binding Supreme Court precedent but have also resurrected the discredited "interest balancing tests" rejected in *Heller* and expressly abrogated in *Bruen*.

I. *HELLER'S* "IN COMMON USE" TEST WAS REAFFIRMED IN *BRUEN* AND GOVERNS IN ARMS-BAN CASES.

Heller was an arms-ban case. The District of Columbia had imposed a ban on the possession of handguns, with only minor exceptions.[13] The *Heller* Court, therefore, had to decide whether handguns fell within the scope of the Second Amendment's protection of "arms," and thus could not be banned. To do that, the Court first had to decide the constitutional test for determining whether a class of arms is protected by the Second Amendment, and then determine whether that protection extended to the kind of arm at issue in the case.

The *Heller* Court applied the methodology later explicitly spelled out in *Bruen* to decide the appropriate constitutional test.[14] That methodology starts with evaluating the plain text of the Second Amendment. The plain text of the Second Amendment is clear—it protects the right to "keep and bear arms."[15] Because it is the right to keep *and bear* arms, that implies one limitation of the right—the arms it protects must be "bearable."[16] And what are arms? "Weapons of offence, or armour of defence"; in other words, "any thing that a man wears for his defence, or takes into his hands or useth in wrath to cast at or strike another."[17] The plain text of the Second Amendment thus has an expansive scope: "the Second Amendment extends, *prima facie*, to all instruments that

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[11] *Id*.

[12] *See, e.g.*, Hartford v. Ferguson, No. 3:23-cv-05364-RJB, 2023 WL 3853011(W.D. Wa. June 6, 2023) (order denying motion for preliminary injunction).

[13] *Heller*, 554 U.S. at 574.

[14] *Bruen*, 142 S.Ct. at 2127–28.

[15] U.S. CONST. amend. II.

[16] *Heller*, 554 U.S. at 581.

[17] *See Heller, 554 U.S. at 581.* In *Heller*, the phrase "weapons of offense, or armour of defense" is from SAMUEL JOHNSON, 1 DICTIONARY OF THE ENGLISH LANGUAGE 107 (4th ed. 1773). The phrase "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another" is from TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW DICTIONARY (1771).

constitute bearable arms, even those that were not in existence at the time of the founding."[18] Moreover, the term "arms" includes "modern instruments that facilitate armed self-defense."[19]

Heller also indicated that the Second Amendment's protection, like that of other constitutional rights, is "not unlimited."[20] Although those in support of arms bans quote that language as a talisman, the statement is really an unremarkable observation about constitutional law. The Court read *United States v. Miller*[21] as recognizing that "the Second Amendment extends only to certain types of weapons."[22] When it came to consider "what types of weapons *Miller* permits," the Court noted that "*Miller* said … that the sorts of weapons protected were those 'in common use at the time.'"[23] The Court identified one and only one historical tradition that could fairly support a ban on possession of a type of arm: "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[24] This limitation dovetailed with the historical practice of the militia bringing "the sorts of lawful weapons that they possessed at home to militia duty"; *i.e.*, weapons that were "in common use at the time."[25]

These passages, taken together, established a *constitutional test* for determining what kinds of arms are protected under the Second Amendment. In more formal language, *Heller* established the *rule of decision* for arms-ban cases: that is, the legal principle governing judicial decision-making in cases of a particular kind.[26] The general rule of decision embraced in *Heller* is that arms "in common use" are protected by the Second Amendment and cannot be banned. That is the legal test in a Second Amendment challenge to an arms ban. The Court then applied that constitutional test or rule of decision to the facts presented by *Heller* and held that because handguns are "in common use," handguns cannot be banned.

Heller remains good law and provides the binding rule of decision in arms-ban cases.[27] When the modern-day regulation seeks to ban a type of arm, the *Heller* test controls. Far from undermining or altering *Heller*, *Bruen* reinforced it, stating expressly that *Heller* found that "the Second Amendment protects the possession and use of weapons that are in common use."[28] And

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[18] *Id.* at 582 (emphasis added).

[19] *Bruen*, 142 S.Ct. at 2132.

[20] *Heller*, 554 U.S at 594.

[21] United States v. Miller, 307 U.S. 174 (1939).

[22] *Heller*, 554 U.S. at 623.

[23] *Id.* at 627.

[24] *Id*.

[25] *Id.* (quoting *Miller*, 307 U.S. at 179).

[26] The words "test" and "rule of decision" are used interchangeably here. As Karl Llewellyn put it in his classic work, the "rule of the case" may be equated with "the *ratio decidendi*, the rule *the court tells you* is the rule of the case, the ground, as the phrase goes, upon which the court itself has rested its decision." K. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 42 (Oxford University Press 2008) (reprint of THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 1930) (emphasis in original). However expressed, the rule *applied* by a court in its deliberations, and set forth in an ultimate decision, is very different from a *description* of the methodology for analyzing historical evidence using an originalist approach.

[27] *Bruen* did not overrule *Heller*. When the Supreme Court overrules a precedent, it usually leaves no doubt as to the effect of its decision. *See*, *e.g.*, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2284 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."). *Bruen* cites *Heller* many times, generally favorably and never negatively.

[28] *Bruen*, 142 S.Ct. at 2128 (quotation marks omitted).

Bruen added that "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense."[29]

In its discussion of historical analogues, *Bruen* was merely describing, for the benefit of litigants and lower courts, the *methodology* that should be followed in future *non*-arms-ban cases, so that courts could perform the proper analysis in those cases. Only in non-arms-ban cases might the societal concerns and technological changes have some relevance. But such concerns and changes do not create an exception to *Heller*'s "in common use" test or allow that test to be cast aside. The *Heller* test is not an exception to the *Bruen* methodology, but rather the *result* of the Court's application of that same "text and historical tradition" methodology to the facts in *Heller*. *Bruen* merely described for lower courts how to apply that methodology in types of Second Amendment cases yet to be decided. Arms-ban cases are not such cases, for *Heller* already has decided that the "in common use" test governs.

Straightforward application of the "in common use" test should lead courts to strike down bans on "assault weapons" and on "large capacity magazines" because those arms and magazines are unquestionably in common use.

II. *BRUEN* DESCRIBED THE METHODOLOGY TO BE FOLLOWED IN CASES IN WHICH *HELLER* DOES NOT ESTABLISH THE RULE OF DECISION.

Heller's "in common use" test is of little, if any, relevance in Second Amendment cases in which the question presented is not whether a particular arm is protected, but some other issue regarding the possession or use of arms.

Because the lower courts had largely misapplied *Heller* for fourteen years, the *Bruen* Court felt compelled to explain exactly how an originalist approach should proceed in non-arms-ban cases in the future. The Supreme Court used *Bruen* as a teaching tool for lower courts that failed to follow the clear originalist methodology demonstrated in *Heller*. But *Bruen* first had to clear away the underlying mistakes made by the lower courts. No, *Bruen* said, there is no two-step test, in which Second Amendment rights could be, and nearly always were, eliminated by intermediate scrutiny "interest balancing."[30] No, *Bruen* said, addressing the specific issue before the Court, Second Amendment rights are not a privilege that can be denied to almost everyone through a restrictive, discretionary licensing system that requires a showing of "proper cause" (that is, a special need) to obtain a license.[31]

Having done away with these past errors, *Bruen* then outlined how lower courts should conduct an originalist analysis in non-arms-ban cases. Courts should begin with an examination of the plain text of the Second Amendment as it bears on the question under consideration.

> In keeping with *Heller*, we hold that when 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

[29] *Id.* at 2132.
[30] *Id.* at 2131.
[31] *Id.* at 2125.

> 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."[32]

Note that this is not itself a test or a rule of decision. This is instead a *description* of a *methodology* that a court must employ to *arrive at* a *rule of decision* comparable to the "in common use" test that *Heller* ultimately arrived at for arms-ban cases. *Bruen* expressly tied this methodology to the approach the Court had followed in *Heller*; hence, *Bruen*'s phrase "in keeping with *Heller*." In explaining why the two-step approach previously employed by the lower courts must be rejected, the *Bruen* court "summarize[d] *Heller*'s methodological approach to the Second Amendment."[33] That summary showed that *Heller*'s methodological approach, even though not made so explicit, was the same as the methodology described in *Bruen*. Indeed, in explaining and exemplifying a methodology for Second Amendment cases to come, *Bruen* bolstered *Heller*'s approach and constitutional test. *Bruen* not only described the methodology to be applied, but also served as its own example of how the text-and-historical-tradition methodology is to be applied by the lower courts—i.e., *Bruen* showed by practice how to do what it and *Heller* preached.

Having explained the ways in which the lower courts had gone wrong under *Heller*, *Bruen* then went on to prescribe in detail how *Heller*'s methodology should be implemented in other cases by use of historical analogues. That methodology for the future included observations about three situations in which the presence or absence of analogues might suggest the unconstitutionality of a present-day law,[34] a discussion of reasoning by analogy and when two laws may be "relevantly similar,"[35] two important "metrics" for comparing analogues,[36] and related matters.

It is deep within this discussion of analogues that *Bruen* noted that, unlike the relatively straightforward analogues in *Heller* and in *Bruen* itself, there might be circumstances in "*other cases*" in which "*unprecedented societal concerns* or *dramatic technological changes* may require a *more nuanced* approach."[37] But this consideration comes into play only when a court is engaged in examining analogues in non-arms-ban cases for which *Heller* does not provide the binding rule of decision. *Bruen* acknowledges that in these "other," non-arms-ban cases some questions may require a "more nuanced" approach to the use of historical analogues than the relatively easy questions presented in *Heller* and *Bruen.* Because *Bruen*'s discussion of societal concerns and technological changes applies only in non-arms-ban cases, arguments about alleged societal concerns and technological changes are not relevant in arms-ban cases because *Heller* provides the relevant legal test.

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[32] *Id.* at 2126.
[33] *Id.* at 2127.
[34] *Id.* at 2131.
[35] *Id.*
[36] *Id.* at 2133.
[37] *Id.* at 2132 (emphasis added).

III. THE *HELLER* "IN COMMON USE" TEST ALREADY ACCOUNTS FOR TECHNOLOGICAL CHANGES AND SOCIETAL CONCERNS ARISING FROM THOSE CHANGES BY PROVIDING SECOND AMENDMENT PROTECTION TO ARMS "IN COMMON USE" TODAY.

A common argument raised in support of "assault weapon" bans is that due to alleged "dramatic technological changes" so-called "assault weapons" and "large capacity magazines" are more lethal than previous kinds of firearms, and lead to increased mortality in mass shootings. But that argument is misplaced for many reasons.

First, the Supreme Court has been aware of such contentions throughout the development of its Second Amendment jurisprudence. In the 2010 *McDonald* case, some respondents had urged that the "Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety."

But the Supreme Court dismissed this assertion by correctly noting that:

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.[38]

Second, briefing in *Heller* pointed out the alleged exceptionally dangerous nature of handguns, the rise of mass shootings, and similar concerns about violence and public safety. Ironically, when *Heller* was briefed in 2008, the District of Columbia and its amici argued that *handguns* were particularly dangerous and lethal, while there were few, if any, mentions of *rifles* such as "assault weapons" being "especially dangerous." In *Heller*, the District argued that its handgun ban "do[es] not disarm the District's citizens, who may still possess operational rifles and shotguns."[39] It further argued that "the [D.C.] Council . . . adopted a focused statute that continues to allow private home possession of shotguns and rifles, which some gun rights' proponents contend are actually the weapons of choice for home defense."[40] Today, gun ban advocates argue that so-called "assault rifles" are unusually dangerous and must be banned.

While the public policy arguments based on "dangerousness" that were briefed in *Heller* cannot be listed comprehensively here, the following are a few examples:

- "In the recent Virginia Tech shooting, a single student with two handguns discharged over 170 rounds in nine minutes, killing 32 people and wounding 25 more."[41]
- "When more rounds are fired and guns can be more quickly reloaded, the likelihood of inflicting wounds, and the severity of the resulting injuries, increases.

[38] McDonald v. City of Chicago, 561 U.S. 742, 782–83 (2010) (listing numerous examples, including the exclusionary rule sometimes setting the guilty free, speedy trial requirements resulting in dangerous criminals being released, and the requirement of *Miranda* warnings that may "return a killer, a rapist or other criminal to the streets ... to repeat his crime.").

[39] Brief for Petitioner at 11, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[40] *Id*. at 54.

[41] *Id.* at 53.

This unfortunate fact is illustrated all too often in mass shootings in America's schools, malls, places of worship, and other public arenas."[42]

- "Handguns also are used in an extraordinary percentage of this country's well-publicized shootings, including the large majority of mass shootings. A review of 50 high-profile shootings over the past four decades revealed that from 1980 onward the bulk of such incidents (39) were mass shootings. A handgun was used in 74 percent of these mass shootings as the only or primary weapon."[43]
- "The [D.C.] Council targeted handguns because they are disproportionately linked to violent and deadly crime.... [The Council found that] 'handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials.' Handguns were also particularly deadly in other contexts: 'A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon.'"[44]
- "The District considered evidence indicating that murders, robberies, and assaults were more likely to be committed with a handgun. Based on this evidence, the District concluded that handguns were *uniquely dangerous* and that it was necessary to prohibit the possession and use of such guns, while still permitting access to other weaponry if licensed and stored safely."[45]
- "Handguns for the civilian market now fire ammunition capable of piercing *body armor*—the last line of defense responsible for saving thousands of police officers' lives."[46]

Arguments that certain firearms must be banned because of alleged technological changes or social problems are not new. As illustrated above, those same arguments were made to the Supreme Court about handguns in *Heller*. Parties supporting the District of Columbia's handgun ban in *Heller* focused a great deal on societal problems such as the criminal misuse of the firearms, mass shootings, and the allegedly dramatic technological developments in firearms that supposedly created or exacerbated these problems. The only difference between those arguments in *Heller* and the arguments today is that those made in 2008 concerned the "uniquely" dangerous nature of modern handguns in relation to societal problems. Now, those very arguments are being advanced against modern rifles and magazines, *i.e.*, so-called "assault rifles" and "large capacity magazines," with no substantive difference. In short, arms-ban advocates switched their pre-*Heller* strategy of "rifles good, handguns bad" to a post-*Heller* strategy of "handguns good, rifles bad." If those arguments failed to persuade the Supreme Court in *Heller* to rule against handguns, they can't work against rifles—the criminal misuse of handguns is orders of magnitude higher than the criminal misuse of rifles.

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[42] Brief of Violence Pol'y Ctr. et al. as Amicus Curiae Supporting Petitioner at 16–17, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (citations omitted).

[43] *Id.* at 24.

[44] Brief for Petitioner at 4, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

[45] Brief of D.C. Appleseed Ctr. et al. as Amicus Curiae Supporting Petitioner at 22, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (emphasis added and citations omitted).

[46] Brief of Violence Pol'y Ctr. *et al.* as Amicus Curiae Supporting Petitioner at 18, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

After *Heller*, these arguments against "assault weapons" and "large capacity magazines" were again advanced under the now-discredited two-step interest balancing test that was erroneously adopted by many courts post-*Heller*.[47] The *Heller* test does not involve weighing the dangers and benefits of weapons, but instead asks only whether they are "in common use" at the present time.[48]

Recent decisions by courts post-*Bruen* seek to get around *Heller*'s "in common use" test by ignoring *Heller* and then smuggling in dangerousness arguments under the guise of historical analogues. Arguments about "dramatic technological changes" cannot affect the "in common use" test mandated by *Heller*. That is because the "in common use" test looks at arms that are in common use by Americans *now,* and that necessarily includes any modern or new technology which those firearms use. Even though technology may have changed or improved over time, any form of modern firearm technology that is currently "in common use" is constitutionally protected.[49]

As the *Bruen* Court explained, even if a state could identify historical "laws [that] prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons'" at that time, that would "provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today."[50] With this language, *Bruen* reaffirmed the test *Heller* prescribes for identifying protected arms, which already and necessarily accounts for technological changes and societal concerns allegedly caused by those changes; it does this by ensuring that the Second Amendment's protection extends to all firearms that are in common use at the time a court conducts the "in common use" analysis—even if such firearms or such firearms technology were not in common use at some time in the past.

Because the "in common use" test looks at contemporary firearms and thus firearms technology in existence today,[51] there is no justification for trying to limit the technology[52] available to civilian possession of arms to some indefinite point in the past. *Heller* made this point explicitly, stating that "[s]ome have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment."[53] By classifying ordinary semiautomatic rifles as "assault weapons," legislatures in some states have

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[47] *See Bruen*, 142 S.Ct. 2125–27.

[48] *Heller*, 554 U.S. at 634–35.

[49] Because the "in common use" test automatically protects today's existing firearms technology, it is unclear that *Bruen*'s "dramatic technological changes" language has any relevance to *firearms* technology at all. It might be relevant to other kinds of technological changes, such as airplanes and airports, which might be considered "sensitive places" today even though ships and coaches during the Founding period might have had no restrictions on the carrying of weapons.

[50] *Bruen*, 142 S.Ct. at 2143.

[51] *Id.* at 2134, 2143.

[52] There have been no dramatic technological changes to firearms in the past century. The big changes were in the 19th century, not recent decades. By the end of the 19th century and often well before, the elements that make up modern firearms were in place (guns that fire by percussion on a cap or primer; self-contained metallic cartridges that combine powder, bullet, and ignition source; repeating firearms including semiautomatics; smokeless powder). Bolt actions, lever actions, revolvers, and semiautomatic actions were all developed in the 19th century, and those are the main types in use today. Modern firearms today function in essentially the same way as at the turn of the 20th century with no breakthrough changes in technology.

[53] *Heller*, 554 U.S. at 582.

sought to limit Second Amendment protection only to firearms technology that existed at some point in the past. That, too, "borders on the frivolous."

Underlying the "in common use" test is the premise that the American people—not the government—get to choose their desired firearms technology. It is "the American people [who] have considered the handgun to be the quintessential self-defense weapon," and since "handguns are the most popular weapon chosen by Americans for self-defense in the home, … a complete prohibition of their use is invalid."[54] Likewise, Americans choose modern-day rifles for any number of lawful purposes including for self-defense, and under *Heller*'s test the courts must defer to their choices.

IV. LOWER COURTS HAVE IMPROPERLY DISREGARDED *HELLER*'S "IN COMMON USE" TEST IN ARMS-BAN CASES AND REPLACED IT WITH A "DANGEROUSNESS" TEST OF THEIR OWN.

Confusion on the part of courts between the *rule of decision* announced in *Heller* and the *methodology* described in *Bruen* has led to erroneous results in firearms-ban cases. For example, three consolidated lawsuits in Delaware challenged that state's newly enacted bans on so-called "assault weapons" and "large capacity magazines," and sought a preliminary injunction against their enforcement.[55] The plaintiffs, relying on *Heller* as providing the rule of decision, correctly argued that "once a weapon is found to be 'in common use' it cannot be regulated, and no historical analysis is necessary."[56] The district court responded:

> I disagree. As the Supreme Court made clear in *Bruen*, "the standard for applying the Second Amendment is as follows: 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."[57]

That would be true if a court was analyzing a non-arms-ban firearms law *ab initio*. But the Delaware court was not analyzing a Second Amendment question anew. The issue in that case was whether so-called "assault weapons" and "large capacity magazines" are protected arms under the Second Amendment. *Heller* had already done the historical analysis to determine what kinds of arms are protected by the Second Amendment and had determined that the test is whether they are "in common use" today. Lower courts are not permitted to do their own historical analysis and invent their own new test in cases where the Supreme Court has already done the work and provided the test that lower courts must apply. The only question presented in an arms-ban case is whether the arms in question meet the "in common use" test. The Delaware district court continued:

> If the standard were as Plaintiffs propose, then *Bruen* need not have proceeded beyond the first step of the analysis. Instead, however, after concluding that the Second Amendment's plain

[54] *Id.* at 629.

[55] Del. State Sportsmen's Ass'n v. Del. Dep't of Safety and Homeland Sec., No. 22-951-RGA, 2023 WL 2655150 (D. Del. Mar. 27, 2023) ("DSSA").

[56] *DSSA* at 17–18.

[57] *DSSA* at 18 (citation omitted and emphasis added).

> text "presumptively guarantee[d]" the plaintiffs a right to bear arms in public for self-defense, the Supreme Court turned to the question of historical tradition. Thus, so do I.[58]

That is simply incorrect. The reason *Bruen* proceeded to examine the historical tradition is because the question in *Bruen did not involve an arms ban* and could not be resolved by applying *Heller*'s rule of decision. The question in *Bruen*, for which it performed a historical review, was whether New York's highly restrictive licensing system for the public carry of firearms was justified by historical analogues. That and related issues had never been addressed by the Supreme Court using historical methodology, whereas the question of what arms are protected had been addressed and settled in *Heller.*

As illustrated above, this passage from the Delaware district court's decision deeply confuses the *rule of decision* or *constitutional test* that *Heller* mandates in arms-ban cases, with the description of the *methodology* to be applied in non-ban cases that are not controlled by *Heller*, as described in *Bruen.* The district court did not understand that *Bruen* proceeded beyond the first step because *Bruen* was not an arms-ban case controlled by *Heller.* As a result, that court erroneously strayed off into its own historical analysis for bans on arms that are unquestionably in common use by Americans today.

That took the district court right back into the interest balancing rejected in *Bruen.* "Defendants argue that the instant regulations implicate 'unprecedented societal concerns' and 'dramatic technological changes.' I agree."[59] The court then adopted defendants' view of the history of semiautomatic technology, arguing that "assault long guns and LCMs represent recent advances in technology."[60] The opinion then goes on to address "unprecedented societal concerns," allegedly due to the rise in public mass shootings over the past four decades.[61]

The district court concluded that defendants had "sufficiently established that assault long guns and LCMs implicate dramatic technological change and unprecedented societal concerns for public safety."[62] The court found that defendants had demonstrated that "assault rifles and LCMs are exceptionally dangerous."[63]

These "societal" and "technological" arguments are precisely the same types of arguments advanced by the gun-ban advocates in *Heller* and pushed for years under intermediate scrutiny before *Bruen*. These are merely interest-balancing arguments dressed up as "dramatic technological change" and "unprecedented societal concerns." But those changes and concerns were never presented by *Bruen* as forming a separate test or rule of decision. They were merely an acknowledgment that in cases not involving arms bans the examination of analogues might need to be "more nuanced."[64] There is nothing in *Bruen* or in any other Supreme Court case that indicates that the rule of decision in arms-ban cases—the "in common use" test announced in *Heller*—has been overruled, replaced, or modified.

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[58] *Id.*
[59] *Id.* at 20.
[60] *Id.* at 10.
[61] *Id.*
[62] *Id.* at 23.
[63] *Id.* at 21.
[64] *Bruen*, 142 S.Ct. at 2132.

Several other post-*Bruen* "assault weapon" ban cases and litigants have employed a similarly confused approach. First, they ignore *Heller* and the binding, applicable test concerning what arms are constitutionally protected. Then they perform an idiosyncratic historical analysis of what weapons are protected, generally finding that weapons that are particularly or exceptionally dangerous can be banned, regardless of whether they are "in common use."

For example, a group of law professors purporting to be Second Amendment experts recently submitted an amicus brief in support of the United States in *United States v. Rahimi*, a case the Supreme Court will hear this term. *Rahimi* will consider the constitutionality of the federal ban on firearm possession by anyone subject to a domestic violence restraining order. In their brief, the professors (unnecessarily) expounded on the test applicable to arms-ban cases but twisted it, asserting that "[i]f a firearm is in 'common use' and can facilitate armed self-defense,' then it is relevantly similar to the arms protected by the Second Amendment at the time of its adoption and the right to bear that weapon warrants constitutional protection."[65]

Seeking to unnecessarily complicate the straightforward test prescribed by *Heller*, these professors attempt to create a conjunctive test requiring *not just* common use, but also that the arm be shown to "facilitate armed self-defense." As explained in detail above, this second requirement is *not* part of the rule of decision in arms ban cases, but in the wake of *Bruen* the professors have again sought to create a test that is "one step too many."[66] Rather, it acts as an open invitation to courts to assess whether individuals really need the banned firearms, or whether their features are, in the judgment of experts and the courts, well-suited to the self-defense needs of Americans. But *Heller* made clear that such questions are not for expert or even court decision. Rather, it is the judgment of the American people that matters and "whatever the reason" that they choose certain weapons, that they choose them is enough.[67]

In a federal district court case from Washington State,[68] the court performed a similar distortion of *Heller's* "in common use" test. There, plaintiffs properly relied on the "in common use" test to urge that the weapons at issue in that case could not be banned. The district court responded:

> The Plaintiffs misread *Heller* and *Bruen. Heller* noted that the right to keep and bear arms protected under the Second Amendment is limited to the sorts of weapons "in common use at the time." *Heller* at 627. It found that this limitation is "supported by the historical tradition of prohibiting 'dangerous and unusual weapons.'" *Id. Heller* does not hold that access to all weapons "in common use" are *automatically* entitled to Second Amendment protection *without limitation.*[69]

But, yes, *Heller* does so hold. Where did this "automatically" and "without limitation" language come from? *Heller* did not create any exceptions to the "in common use" test, and

[65] Brief for Second Amendment Law Scholars as Amicus Curiae Supporting Petitioner at 10, United States v. Rahimi (2023) (No. 22-915).

[66] *Bruen*, 142 S. Ct. at 2127.

[67] *Heller*, 554 U.S. at 629.

[68] Hartford v. Ferguson, No. 3:23-cv-05364-RJB, 2023 WL 3836230, at *3 (W.D. Wash. Jun. 6, 2023).

[69] *Id.* (emphasis added).

nothing in *Heller* or *Bruen* permits lower courts to create exceptions to that test. The court then continued:

> Further, under *Bruen,* if Plaintiffs demonstrate that their proposed conduct, that of buying and selling weapons regulated by HB1240, is covered by the Second Amendment, the "Constitution **presumptively** protects that conduct." *Bruen* at 2126, 2129-2130 (*emphasis added*). This presumption can be overcome. *Id.*[70]

But that language about presumptions is just the first part of *Bruen*'s methodology description. In short, the court shrugs off *Heller*, and then launches into its own historical analysis, *contra Heller*, of which arms are not protected by the Second Amendment. It concludes that "[t]hese weapons are exceptionally dangerous," and that there is a tradition of "exceptionally dangerous arms regulation."[71] But that is not the test. And this is yet another instance of improper interest balancing in another guise.

Another federal district court case that gets it wrong, albeit through more convoluted reasoning, is *Bevis v. City of Naperville.*[72] The district court there denied a preliminary injunction against the enforcement of city and state-wide "assault weapon" and "large capacity magazine" bans. In doing so, it erroneously considered the challenged regulations "on a *tabula rasa*," concluded that "*Bruen* is now the starting point," and substituted its own dangerousness test for *Heller*'s "in common use" test. [73] But "dangerousness" alone is not the test. To be banned, a weapon must be "unusual" (by definition, *not* "in common use") as well as dangerous.[74]

Another case from the Northern District of Illinois, *Herrera v. Raoul*,[75] applied the "dangerousness" test devised by the *Bevis* court. But it also leaned heavily on the "dramatic technological changes" and "unprecedented societal concerns" language from *Bruen*. According to the court, this language allows "local and state governments to respond to "'dramatic technological changes' and 'unprecedented societal concerns' of increasing mass shootings by regulating the sale of weapons and magazines used to perpetrate them."[76] Once again, the flagrant conflict between the "in common use" test and the *ad hoc* determination that any weapon that is "particularly dangerous" can be banned was not addressed.

A case from the District of Connecticut, *National Association for Gun Rights v. Lamont*,[77] misconceived *Heller* and *Bruen* on two fronts. There, the district court began by fabricating a "common use" test requiring Plaintiffs to show that "assault weapons" are commonly used specifically for self-defense.[78] But there is no such mandate in *Heller* or *Bruen*. After finding that Plaintiffs failed to meet their newly created burden, the district court doubled down, concluding

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[70] Hartford v. Ferguson, No. 3:23-cv-05364-RJB, 2023 WL 3836230, at 5 (W.D. Wash. Jun. 6, 2023).

[71] *Id*.

[72] No. 22 C 4775, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023).

[73] *Id.* at 17.

[74] *See* Caetano v. Massachusetts, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (stating that "As the per curiam opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are 'unusual,' it does not need to consider the lower court's conclusion that they are also 'dangerous.'").

[75] No. 23 CV 532, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023).

[76] *Id.* at 15 (citations omitted).

[77] No. 22 CV 1118, WL 4975979 (D. Conn. Aug. 3, 2023).

[78] *Id.* at 29.

that *Bruen* permits bans on "new and dangerous weapon technology" that underpins "unprecedented societal concerns"—which, according to the district court, encompasses "assault weapons."[79] Again, this is plainly wrong. *Bruen*'s language concerns only non-arms-ban cases, and the whole point of the "common use" test is that it inherently accounts for changes in firearm technology.

Fortunately, the district court in *Barnett v. Raoul* got it right when it preliminarily enjoined enforcement of the Illinois "assault weapon" and "large capacity magazine" bans.[80] Regarding the probability of success on the merits of the preliminary injunction, he noted that "Plaintiffs rely on recent Supreme Court decisions that made it clear that the Second Amendment protects the possession and use of weapons that are in common use."[81] Plaintiffs contend there can be no question regarding the likelihood of success because the items banned under [the Illinois statute] are in common use today."[82] The court agreed.[83] And while the district court did consider Defendants' analogues, the court concluded that "the commonality of 'arms' banned under [the Illinois act] is *dispositive*."[84]

CONCLUSION

Many lower courts have made fundamental legal errors in "assault weapon" and "large capacity magazine" ban cases. They have failed to recognize that *Heller*'s "in common use" test governs in arms-ban cases and have wrongly relied on a single sentence in *Bruen* describing the methodology to be applied in non-arms-ban cases. Those courts have treated the "dramatic technological changes" and "unprecedented societal concerns" language from *Bruen*'s methodological description as if it formed part of the governing test for determining which arms are protected by the Second Amendment, when that language has no role whatsoever in arms-ban cases. Because the "in common use" test looks to arms that are in common use today, that test automatically and necessarily protects existing technology, and addresses any contemporary societal concerns stemming from such modern technology. Lower courts are not free to disregard *Heller*'s "in common use" test and instead substitute a "dangerousness" test of their own devising. Doing so is merely "interest balancing" in a different guise, which is prohibited by both *Heller* and *Bruen* in Second Amendment challenges to gun-control laws.

[79] *Id.* at 63.

[80] Barnett v. Raoul, No. 3:23-cv-00209-SPM, 2023 WL 3160285, at *12 (S.D. Ill. Apr. 28, 2023), *appeal of preliminary injunction pending*, No. 23-1825 (7th Cir. 2023).

[81] *Id.* (quoting *Heller*, 554 U.S. at 627).

[82] *Id*.

[83] *Id*.

[84] *Id.* (emphasis added).