THE RELEVANCE OF "IN COMMON USE" AFTER *BRUEN*

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INTRODUCTION

The Supreme Court in *Bruen* clarified many of the issues plaguing post-*Heller* Second Amendment doctrine, most notably that the two-step interest balancing test previously accepted by the circuit courts that combined history and means-end scrutiny was contrary to the analysis performed in *Heller*.[1] Instead, the Court laid forth a different two-step analysis grounded in text and history: "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."[2] However, one remaining question is, post-*Bruen*, what is the relevance of *Heller*'s command that the Second Amendment only protects those weapons "in common use at the time"?[3]

The few courts that have tried to place the common use standard within *Bruen*'s framework have been largely consistent, with a few exceptions. Many courts cite the common use standard as a limitation on the amendment's plain text and what it "presumptively protects."[4] A recent case from the Ninth Circuit, however, has recognized that considerations of usual-ness belong to an analysis of historical laws,[5] which occurs *after* determining that the particular weapon being regulated is indeed covered by the plain text of the Second Amendment.[6] For its part, the Supreme Court has consistently maintained that the common use standard arises from the "historical tradition of prohibiting the carrying of dangerous and unusual weapons."[7] The Court in *Bruen* raised the common use standard in both the textual and historical steps, with relatively little

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[1] New York State Rifle and Pistol Association v. Bruen, 597 U.S. ___, 8 (2022) (slip opinion).

[2] *Id.* at 15.

[3] District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) (internal quotation marks omitted).

[4] *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 453 (5th Cir.), *cert. granted,* 143 S. Ct. 2688 (2023); *Young v. Hawaii*, 45 F.4th 1087, 1093 (9th Cir. 2022) (en banc) (O'Scannlain, J., dissenting).

[5] *See*, Teter v. Lopez, No. 20-15948, 2023 WL 5008203, n. 20 (9th Cir. Aug. 7, 2023) (surveying historical statutes to analyze whether regulation of butterfly knives was consistent with tradition of regulating dangerous and unusual weapons).

[6] Specifically, the *Teter* Court *first* determined that possession of butterfly knives is protected by the plain text of the Second Amendment and *only then* considered whether butterfly knives have been traditionally regulated as dangerous and unusual weapons (by reviewing historical statutes). *Id.* at *10.

[7] *Heller*, 554 U.S. at 627 (internal quotation marks omitted); *see also Bruen*, 597 U.S ___, at 38–39 (slip opinion).

language devoted to it in both instances. Yet the common use standard was born of history, not the text of the Second Amendment, and considerations of historical tradition arise at *Bruen*'s step two, not step one.

Part I of this essay tracks the evolution of the common use standard from *Miller* to post-*Bruen* lower court decisions. Part II then analyzes the relevance of the common use standard to the *Bruen* framework. Ultimately, based on the structure of *Bruen* and the origins of the common use standard, this essay concludes that the common use standard should be considered in *Bruen*'s second step as a part of the government's presentment of historical analogues.

I. A BRIEF HISTORY OF THE COMMON USE STANDARD

The common use standard has its roots in the 1939 Supreme Court case of *United States v. Miller*.[8] In *Miller*, the defendants were charged with possessing a short-barreled shotgun without registering it under the National Firearms Act ("NFA").[9] In the beginning of a series of procedural oddities, the government directly appealed the matter to the Supreme Court.[10] Thereafter, defendants' counsel received notice that the appeal had been accepted and, without even reading the government's brief,[11] suggested that the case be submitted without a brief or argument for the defendants.[12]

In a concise and at points summary opinion, the Court in *Miller* rejected the idea that the Second Amendment precluded the NFA's regulation of short-barreled shotguns.[13] In doing so, the Court relied heavily on a consideration of the types of weapons that were useful to a militia.[14] Because the Court was not under judicial notice that short-barreled shotguns were "any part of the ordinary military equipment or that its use could contribute to the common defense," it reasoned that they were not protected by the Second Amendment.[15] To analyze what types of arms would "contribute to the common defense," the Court first looked at *who* the militia was, and decided that at the founding, the militia was made up of ordinary citizens.[16] Next, the Court looked to the types of arms this citizenry-militia would bear—namely, "arms supplied by themselves and of the kind *in common use at the time*."[17]

[8] 307 U.S. 174 (1939).

[9] *Id.* at 175.

[10] *Id.*

[11] In fact, the defendants' counsel did not even receive a copy of the government's brief until two days after oral arguments. Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIB. 48, 67 (2008).

[12] The reason appears to be largely financial. The defendant's attorney was representing them pro bono and was unable to raise the funds to travel to the Supreme Court to argue the case. *Id.*

[13] *Miller*, 307 U.S. at 178 ("[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

[14] *Id.* at 178–79.

[15] *Id.* at 178.

[16] *Id.* at 179.

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

The Court in *District of Columbia v. Heller*[18] took this "common use" language from *Miller* and ran with it.[19] In *Heller*, the Court considered whether the Second Amendment protected private ownership of handguns in the home.[20] Relying on *Miller*, the Court rephrased the common use standard, writing that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."[21] One of these lawful purposes (and the one most relevant for purposes of that case) was self-defense.[22] Because handguns were "overwhelmingly chosen by American society for" self-defense, the Court reasoned that they were in common use and thus protected by the Second Amendment.[23] The Court in *Heller* grounded its common use understanding in "the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[24]

Heller left a number of questions relating to the common use standard unresolved. One issue—whether the common use standard was to be applied at the founding or at the time of judicial review[25]—has all but been resolved in favor of the latter.[26] Other issues remain salient, however. Some have suggested that the common use standard turns the Second Amendment into a popularity contest, with evolving standards changing the scope of the right.[27] Relatedly, the common use standard may make judicial review of laws circular. For example, the NFA regulates machine guns, and a court asked to consider the issue would likely uphold this restriction because machine guns are not in common use by the general public. However, given the extreme popularity of the AR-15, its fully automatic cousins the M16 and M4 are likely only not in common use *because they are already regulated* by the NFA. Thus, the regulation becomes self-approving over time.

Fourteen years after *Heller*, *New York State Rifle and Pistol Association v. Bruen* involved a challenge to New York's may-issue carry licensing regime.[28] In analyzing the issue, the Supreme Court expanded on *Heller*, clarifying that the appropriate analysis for Second Amendment challenges involves two steps: first, "when the Second Amendment's plain text covers an

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[18] 554 U.S. 570 (2008).

[19] Lindsay Colvin, *History,* Heller*, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges*, 41 FORDHAM URB. L.J. 1041, 1049 (2014) ("To honor the historical restriction on the possession of 'dangerous and unusual weapons,' the Court upheld the common use standard first described in *Miller*.").

[20] *Heller*, 554 U.S. at 573 ("We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

[21] *Id.* at 625.

[22] *Id.* at 599 (calling self-defense a "*central component* of the right itself").

[23] *Id.* at 628.

[24] *Id.* at 627 (internal quotations omitted).

[25] Enrique Schaerer, *What the Heller?: An Originalist Critique of Justice Scalia's Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 814-15 (2014) (describing *Heller*'s common use mandate as "vague as to time").

[26] *See* Caetano v. Massachusetts, 577 U.S. 411, 420 (2016) (Alito, J., concurring) ("[T]he pertinent Second Amendment inquiry is whether [the arms] are commonly possessed by law-abiding citizens for lawful purposes *today*."); Jamie G. McWilliam, *The Unconstitutionality of Unfinished Receiver Bans*, 2022 HARV. J.L. & PUB. POL'Y 9, 11 (2022) (describing how the "the relevant time is that of the judicial review"); Schaerer, *supra* note 25 at 814 ("The reason is that the relevant time in the common-use inquiry, as articulated in *Miller* and adopted by *Heller* (i.e., whether a weapon is 'in common use *at the time*'), appears to be *the present time*—rather than the time the Second Amendment (for federal gun laws) or the Fourteenth Amendment (for state and local gun laws) was adopted.").

[27] Schaerer, *supra* note 25 at 816.

[28] 597 U.S. ___, 38–39 (2022) (slip opinion).

individual's conduct, the Constitution presumptively protects that conduct"; and second, to overcome this presumption, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[29] Notably, "common use" is mentioned nowhere in *Bruen*'s general formulation of this test, so what consideration should courts give to the commonality of weapons subject to regulation?

While only a few appeals courts have provided explanations thus far as to how the common use standard fits into *Bruen*'s test, they generally suggest that it fits into the first step of *Bruen* (i.e., they suggest that the plain text of the Second Amendment only presumptively protects arms in common use). For example, in *United States v. Rahimi*, the Fifth Circuit considered whether the federal law prohibiting the possession of firearms by someone subject to a domestic violence restraining order violated the Second Amendment.[30] When faced with the question of whether the plain text covered the types of weapons Rahimi possessed, the Fifth Circuit wrote that the weapons were "in common use, such that they fall within the scope of the amendment."[31] Because they were in common use, the court found *Bruen*'s first step met.[32] The court then turned to *Bruen*'s second step, and ultimately found that the government failed to offer proper historical analogies to the challenged law.[33]

The Ninth Circuit case of *Young v. Hawaii* involved a challenge to Hawaii's may-issue carry licensing regime.[34] While the en banc majority remanded the case to the district court to conduct a *Bruen* analysis, the dissent argued that the court should have answered the question itself, and offered an analysis doing so.[35] The dissent gave only a brief consideration of *Bruen*'s first step, but importantly noted that "handguns are weapons 'in common use' today for self-defense" before deciding that the right to bear such arms in public was "presumptively guaranteed" by the Second Amendment.[36] The dissent went on to find that Hawaii would be unable to meet its burden of historically supporting the challenged licensing regime.[37]

Some federal district courts have also considered the common use standard during step one of *Bruen*. In *Renna v. Bonta*, the Southern District of California considered a challenge to California's handgun "roster" requirements, which prohibited the manufacturing and resale, within the state of California, of a large number of otherwise common handguns.[38] In concluding that the prohibited handguns fell within the plain text of the Second Amendment, the court rejected arguments that such arms were not in common use.[39] Only after considering the common use standard did the court turn to the historical analogies of the challenged law. Other district

[29] *Id.* at 8.
[30] 61 F.4th 443 (5th Cir.), *cert. granted,* 143 S. Ct. 2688 (2023).
[31] *Id.* at 454 (internal quotation marks omitted).
[32] *Id.*
[33] *Id.* at 460.
[34] 45 F.4th 1087, 1090 (9th Cir. 2022) (en banc) (O'Scannlain, J., dissenting).
[35] *Id.*
[36] *Id.* at 1093 (quoting *Bruen*, 597 U.S.___, 23–34 (2022) (slip opinion).
[37] *Id.* at 10–11.
[38] No. 20-cv-2190-DMS-DEB, 2023 WL 2846937, *1 (S.D. Cal. Apr. 3, 2023).
[39] *Id.* at *6.

courts have similarly tied the common use standard to the text of the amendment and the first step of *Bruen*.[40]

On the other hand, when Hawaii's restriction on butterfly knives was challenged in *Teter v. Lopez*, the Ninth Circuit rejected "Hawaii's argument that the purported 'dangerous and unusual' nature of butterfly knives means that they are not 'arms' as that term is used in the Second Amendment."[41] Instead, the court acknowledged that "*Heller* itself stated that the relevance of a weapon's dangerous and unusual character lies in the *historical tradition* of prohibiting the carrying of dangerous and unusual weapons."[42] Because Hawaii failed to provide evidence that butterfly knives were uniquely dangerous and were not "commonly owned for lawful purposes,"[43] or that they were analogous to any other historical laws, the court concluded that the law violated the Second Amendment.[44]

With the exception of *Teter*, courts appear to be settling into the idea that the common use standard applies at the first step of *Bruen*. It is worth noting, however, that in the cases cited above, the role of the common use test was not dispositive, and so the courts did not need to spend precious time on reasoning for their placement of the standard within *Bruen*'s framework. It was enough that the common use standard was satisfied, regardless of where such an inquiry belonged. Looking to the future, cases may not be quite so clear-cut. Whether the common use standard is a textual inquiry or an historical one may decide the case. With that in mind, the next section suggests that the common use standard is relevant not to a determination of what weapons are presumptively covered by the Second Amendment's text, but rather to the historical analysis conducted in step two of *Bruen*.

II. THE RELEVANCE OF "IN COMMON USE" TO *BRUEN*'S HISTORY AND TRADITION TEST

As described in Part I above, *Bruen* laid out a two-part test for reviewing Second Amendment challenges. First, conduct is presumptively protected if it is covered by the "plain text" of the amendment.[45] The government may then rebut that presumption by presenting analogous historical laws to show that the type of regulation is "consistent with the Nation's historical tradition of firearm regulation."[46] At the same time, *Bruen* acknowledged *Heller*'s finding that the Second Amendment protects weapons "in common use at the time," as opposed to "dangerous and unusual" weapons.[47] This presents two possible readings: first, that the plain text of the amendment only covers arms in common use; or second, that there is a tradition of regulating

[40] *See, e.g.*, Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec., Civil Action No. 22-951-RGA (Consolidated) (D. Del. Mar. 27, 2023) ("I therefore conclude that the prohibited assault long guns are in common use for self-defense, and therefore 'presumptively protect[ed]' by the Second Amendment."); United States v. Dixon, No. 22 CR 140, 2023 WL 2664076, *3 (N.D. Ill. Mar. 28, 2023) ("The text of the Second Amendment . . . protects the possession and use of weapons that are in *common use at the time*." (internal quotations omitted)).

[41] No. 20-15948, 2023 WL 50082039, *9 (9th Cir. Aug. 7, 2023).

[42] *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

[43] *Id.* at *9.

[44] *Id.* at *12.

[45] New York State Rifle and Pistol Association v. Bruen, 597 U.S. ___, 15 (2022) (slip opinion).

[46] *Id.*

[47] *Id.* at 38–39.

dangerous and unusual weapons such that only those weapons in common use can survive a showing by the government of such a tradition. Let us consider each in turn.

A. Common Use as a Limitation of the Second Amendment's Text

As discussed in Part I, above, some courts appear to be taking the position that the common use standard is a limitation on the types of arms presumptively protected by the Second Amendment. In other words, they interpret the "plain text" of the amendment as excluding arms not in common use. In doing so, they appear to be relying on a number of statements made in *Bruen* and *Heller*.

First, the Court in *Bruen* raised the common use standard at the beginning of its plain text analysis, writing that no party "dispute[s] that handguns are weapons 'in common use' today for self-defense."[48] Based on this, it could be inferred that the Court considered such weapons to be the only kinds of "arms" that the Second Amendment protects. Other than this one line, however, *Bruen* was unqualified in its description of the first step as one related to the amendment's *plain text*.[49] The text of the Second Amendment does not raise the issue of commonality. Instead, as discussed in more detail below, the common use standard arises from the tradition of regulating weapons that could be called "uncommon."

Next, some courts rely on the statement in *Bruen* that "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'"[50] In a vacuum, this statement, backed up by similarly sweeping statements in *Heller*,[51] supports the suggestion that the amendment *per se* lacks protection for uncommon arms. However, such a reading takes this statement out of its context in *Bruen*. This line is taken from the portion of *Bruen* that examines the historical analogues presented by the government. The sentence immediately prior discussed how "[a]t most, respondents can show that colonial legislatures sometimes prohibited the carrying of dangerous and unusual weapons."[52] The Court then wrote that "[d]rawing from this historical tradition," the Second Amendment protects weapons in common use, and not those that are highly unusual.[53] The rest of the paragraph continues with an analysis of historical laws regulating "dangerous and unusual" weapons.[54]

Another statement in *Bruen* that courts have pointed to says that *Heller* "demands a test rooted in the Second Amendment's text, as informed by history."[55] For example, in *Renna*, the court

[48] *Id.* at 23.

[49] *Id.* at 15. ("[T]he 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.") (emphases added).

[50] *Id* at 38. (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)). The Fifth Circuit appears to rely on this statement for its use of the common use standard. United States v. Rahimi, 61 F.4th 443, 454 (5th Cir.), *cert. granted,* 143 S. Ct. 2688 (2023).

[51] For example: "We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

[52] *Bruen*, 597 U.S. at 38.

[53] *Id.* at 38–39.

[54] *Id.* at 39.

[55] *Id.* at 10.

quoted this line, before writing that "[i]n *Bruen*, the Supreme Court interpreted the Second Amendment in light of 'historical tradition' and held the Amendment protects all arms 'in common use' . . . ."[56] Because the handguns regulated by the roster requirements were in common use, the court reasoned, they "categorically are 'Arms' covered by the Second Amendment."[57] This insertion of history into the first step of *Bruen*, however, renders the second step superfluous. If the text of the amendment (i.e., "Arms") does not cover weapons that were historically regulated, then the entire step two analysis is simply folded into the meaning of the amendment's "plain text." Instead, the description of the *Bruen* test as "rooted in the Second Amendment's text, as informed by history" better describes the test as a whole—it is first based in the plain text of the amendment, which is overcome only by history. This reading is textually supported by the fact that, in *Bruen*, the line is used to compare the proper test with the means-end scrutiny previously employed by the lower courts.[58]

B. Common Use as an Historical Analogue

The alternative role of the common use standard is as an historical analogue in step two of *Bruen*. More precisely, the tradition of regulating "dangerous and unusual weapons" may be an historical analogue to modern regulations. From its very inception, the common use standard was tied to this tradition. *Miller* involved the NFA, which "affects weapons which form the arsenal of the gangster and desperado,"[59] and is prototypical of regulations designed to cover dangerous and unusual weapons.[60] *Heller* found the common use standard "supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[61] *Bruen* also examined common use during its analysis of the relevant historical analogues, finding that historical laws regulating "dangerous and unusual" weapons could not be analogous to the licensing regime's restriction on carrying handguns, because handguns were "indisputably in common use."[62]

Under this conception, the Second Amendment would be initially applied according to its plain text, as *Bruen* demanded,[63] with "arms" meaning any bearable weapon. This is consistent with *Heller*'s acknowledgement that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the

[56] Renna v. Bonta, No. 20-cv-2190-DMS-DEB, 2023 WL 2846937, *6 (S.D. Cal. Apr. 3, 2023).

[57] *Id.*

[58] In *Bruen,* the Court wrote that: "Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 10.

[59] Frye, *supra* note 11 at 66 (internal quotation marks omitted).

[60] *See* Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICKINSON L. REV. 273, 287 (2022) ("In what must have been an allusion to the NFA, the Court found support for this common-use formulation by recognizing the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (internal quotation marks omitted)).

[61] *Heller*, 554 U.S. at 627 (internal quotation marks omitted).

[62] *Bruen*, 597 U.S. at 39.

[63] *Id.* at 15.

founding."[64] Then, the government could present historical analogues to rebut this prima facie presumption.[65] These historical analogues might take a number of forms, depending on the law at issue, one of which could be those historical laws regulating dangerous and unusual weapons.

It could be argued that the distinction argued for here would have little practical effect. After all, if a weapon is dangerous and unusual, it might be unprotected no matter which way the common use standard is folded into the *Bruen* test. Under the conception described in Part II.A., as used by the courts, it would be found not in common use, and thus not even entitled to a presumption of protection at step one. Under that put forth in Part II.B., the law could be found consistent with the tradition of regulating such arms. Either way, the challenged law survives.

There are, however, some key practical differences. The first is who bears the burden with respect to a weapon's commonality. If the common use standard arises at step one, then the challenger must show that the weapon is in common use, and thus covered by the amendment's plain text.[66] If it arises at step two, the government must show that the law is consistent with the historical laws that regulated dangerous and unusual weapons.[67] The Ninth Circuit illustrated this well in *Teter*, when it placed the burden of proof on Hawaii to show that butterfly knives were dangerous and unusual.[68] The second difference is in the actual analysis that is undertaken. When the common use standard is applied to limit the text of the amendment, courts generally undertake a quantitative analysis as to the popularity of the weapon.[69] When analogizing to laws

[64] *Heller*, 554 U.S. at 582. Interestingly, the Third Circuit Court of Appeals, sitting en banc in the case of *Range v. Att'y Gen. United States of Am.*, made an analogous argument. 69 F.4th 96, 101 (3d. Cir. 2023). There, the court considered the issue of felon disarmament. While the Supreme Court in *Heller* wrote that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, Judge Hardiman made the following observation: "In isolation, this language seems to support the Government's argument. But *Heller* said more; it explained that 'the people' as used throughout the Constitution 'unambiguously refers to all members of the political community, not an unspecified subset.' So the Second Amendment right, *Heller* said, presumptively 'belongs to all Americans.'" *Range*, 69 F.4th at 101 (internal citations omitted). The Third Circuit found that *Heller*'s specific claim about the scope of the people protected—all members of the political community—controlled over its general statement regarding law-abiding citizens. Similarly, *Heller*'s specific statement that "arms" refers to all bearable arms should control over its general one regarding weapons "typically possessed."

[65] *See Bruen*, 597 U.S. at 15.

[66] *See* Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec., Civil Action No. 22-951-RGA (Consolidated) (D. Del. Mar. 27, 2023) (positing that, because the Second Amendment only protects weapons in common use, "[p]laintiffs must also show that the statutes at issue regulate such arms"); Krawczyk, *supra* note 61 at 306 ("However, so long as NFA items remain unrecognized as protected 'arms' under *Heller*, the Government will not bear the heavy burden of justifying their regulation.").

[67] *Bruen*, 597 U.S. at 50, n.25 ("But again, the burden rests with the government to establish the relevant tradition of regulation . . ..").

[68] Teter v. Lopez, No. 20-15948, 2023 WL 5008203, *9 (9th Cir. Aug. 7, 2023) ("*Heller* itself stated that the relevance of a weapon's dangerous and unusual character lies in the *historical tradition* of prohibiting the carrying of dangerous and unusual weapons. It did not say that dangerous and unusual weapons are not *arms*. Thus, whether butterfly knives are dangerous and unusual is a contention as to which Hawaii bears the burden of proof in the second prong of the *Bruen* analysis." (internal quotation marks omitted).

[69] *See, e.g.*, *Heller*, 554 U.S. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."); *see also Schaerer*, *supra* note 26 at 816 ("If, for example, a generation of Americans were to stop buying, having, and using handguns for self-defense—such that even handguns were no longer typically used by law-abiding citizens for lawfully civilian purposes—then the right to use handguns for self-defense would therefore be extinguished for that generation.")

applied to dangerous and unusual weapons, on the other hand, the analysis should be more nuanced,[70] involving both the weapon's prevalence and its dangerousness.[71]

CONCLUSION

Bruen raised the common use standard in both its analysis of the Second Amendment's plain text and its review of analogous historical laws.[72] So what role does it play in a Second Amendment analysis after *Bruen*? Having reviewed the history of the common use standard and compared the alternative methods of placing it within *Bruen*'s two-step framework, this essay concludes that the proper method for evaluating restrictions on uncommon arms is the following. First, if the weapon is covered by the *plain text* of the Second Amendment—meaning any bearable arm[73]—then it is presumptively protected by the amendment. The government then bears the burden of showing that the challenged law fits within our historical tradition—namely, for these purposes, the "tradition of prohibiting the carrying of dangerous and unusual weapons."[74] This runs contrary to much post-*Bruen* caselaw at the circuit and district court levels, which finds that the plain text of the amendment only applies to weapons in common use. However, the interpretation advanced here better fits the language and analyses of *Bruen* and *Heller*, which tie the common use standard to the historical tradition of regulating dangerous and unusual weapons.

[70] *See* Krawczyk, *supra* note 61 at 292–93 (describing how "suggesting or assigning explicit numerical guidelines and focusing on models—rather than categories—could lead to absurd results in the future, when certain currently protected firearms might lose their Second Amendment protection simply for falling out of favor, rather than for belonging to a truly dangerous and unusual category"). The difference in analysis between step one and step two could be even larger if, as some have suggested, the category of prohibitions on dangerous and unusual weapons "referred to the carrying of certain arms in a manner that terrified the people, such as by creating an affray," rather than simply characteristics of the weapons themselves. Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 68 (2015). Others have suggested that *Heller*'s declaration that the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes" could provide guidance for analysis under the dangerous and unusual standard. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEG. 1, 164 (forthcoming, 2024).

[71] Caetano v. Massachusetts, 577 U.S. 411, 417 (2016) (Alito, J., concurring) (finding that the "dangerous and unusual weapons" category is a conjunctive one: "A weapon may not be banned unless it is *both* dangerous *and* unusual").

[72] *Compare Bruen*, 597 U.S. at 23 *with id.* at 38–39.

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

[74] *Id.* at 627 (internal quotation marks omitted).