COMMON USE IS NOT A PLAIN-TEXT QUESTION

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The Supreme Court recently denied the petition for writ of certiorari in *Snope v. Brown*.[1] That case squarely presented the question of whether the Second Amendment allows the government to ban the AR-15, "the most popular rifle in the country."[2] There were three votes to grant cert in *Snope*. Justice Kavanaugh, who could have been the necessary fourth vote, did not vote to grant cert but indicated that the Court "should and presumably will address the AR-15 issue soon, in the next Term or two."[3]

Under *New York State Rifle & Pistol Ass'n v. Bruen*,[4] the Second Amendment analysis proceeds in two steps: first, whether the conduct in question is covered by the plain text of the Second Amendment; and if so, second, whether the government can demonstrate that the challenged law is consistent with this Nation's history of firearm regulation. And the distinction between steps one and two is important, because if the first step is satisfied, the challenged law is presumptively unconstitutional. Then, the burden of justification lies with the government to demonstrate that the challenged law is consistent with the Nation's history of firearm regulation. When the Court does take up the issue of AR-15 bans, a contested question almost certainly will be where in the analysis, either the initial plain text step or the subsequent historical step, to evaluate whether AR-15 rifles are in common use. Under *District of Columbia v. Heller*,[5] the answer should be straightforward. In that case, the Court began by assessing the plain-text meaning of "arms." Founding-era sources generally defined arms to include all weapons, and even the most restrictive definition identified by the Court "stated that all firearms constituted 'arms.'"[6] "Putting all of th[e] textual elements together," the Court accordingly found "that they guarantee the individual right to possess and carry *weapons* in case of confrontation."[7] The Court only discussed common use, on the other hand, when addressing historical limitations on the scope of the right: "*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the *historical tradition* of prohibiting the carrying of 'dangerous and unusual weapons.'"[8]

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[1] 145 S. Ct. 1534 (2025).

[2] Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos, 145 S. Ct. 1556, 1569 (2025).

[3] *Snope*, 145 S. Ct. at 1534 (2025) (statement of Kavanaugh, J., respecting the denial of certiorari).

[4] 597 U.S. 1 (2022)

[5] 554 U.S. 570 (2008).

[6] *Id*. at 581.

[7] *Id.* at 592 (emphasis added).

[8] *Id*. at 627 (citations omitted) (emphasis added).

Under *Heller*, therefore, all firearms, including AR-15s, are covered by the plain text of the Second Amendment and thus presumptively protected. This makes sense, as there is nothing in the plain text of "arms" that would allow for exclusion of certain types of firearms. It is only in the historical part of the analysis that the question of common use is relevant.

Of course, *Heller* is not the Court's last word on the Second Amendment. Some have contended that *New York State Rifle & Pistol Association v. Bruen*[9] supports a contrary conclusion or at least introduces uncertainly about where the "common use" question fits into the analysis.[10]

The passage in *Bruen* that courts and commenters have contended arguably puts common use in the plain-text part of the analysis reads, in relevant part, as follows:

> "Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement. . . . It is undisputed that . . . handguns are weapons 'in common use' today for self-defense. We therefore turn to whether the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense."[11]

While this passage uses the phrases "common use" and "plain text" in the same paragraph, it does not in any way indicate that common use is a plain-text issue. In fact, it *refutes* that very argument because the Court resolved entirely the question of whether the arms at issue in the case were protected by the Second Amendment, not just presumptively protected by the plain text, before moving on to evaluate the meaning of the word "bear." The Court in this brief passage "appl[ied]" "the constitutional standard endorsed in *Heller*" and made "more explicit" in *Bruen* to the arms the plaintiffs in the case sought to carry.[12] And because the parties agreed that the arms at issue, handguns, are in common use, the Court concluded that they are protected, *period*—i.e., not just *presumptively* as a matter of plain text at step one, but *conclusively* with respect to text and history, *i.e.*, steps one *and* two. Having concluded the constitutional analysis with respect to the arms at issue, the Court then "turn[ed]" to evaluate whether the Second Amendment covered the *activity* the plaintiffs wanted to engage in with those arms—"carrying [them] publicly for self-defense."[13] And it began that analysis with the first part of the *Bruen* analysis for the relevant constitutional term, the plain text of "bear."

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[9] 597 U.S. 1 (2022).

[10] *See, e.g.*, *Duncan v. Bonta*, 133 F.4th 852, 900 (9th Cir. 2025) (en banc) (Bumatay, J., dissenting) (In *Bruen*, "common use" is "mentioned in both the historical and textual steps of the analysis."); *Antonyuk v. James*, 120 F.4th 941, 981 (2nd Cir. 2024) (The "threshold [plain-text] inquiry requires courts to consider … whether the weapon concerned is 'in common use' " because *Bruen* "resolv[ed]" that question "before proceeding to historical analysis."); *Hanson v. District of Columbia*, 120 F.4th 223, 232 n.3 (D.C. Cir. 2024) ("We assume, without deciding, this [common-use] issue falls under *Bruen* step one because the *Bruen* Court determined that handguns are in common use before conducting its historical analysis."); *Bianchi v. Brown*, 111 F.4th 438, 501 (4th Cir. 2024) (en banc) (Richardson, J., dissenting) ("*Bruen* is somewhat ambiguous on this point."); *United States v. Price*, 111 F.4th 392, 400 (4th Cir. 2024) ("[T]o resolve this [plain-text] inquiry[,]" *Bruen* "asked … whether the weapons regulated by the challenged regulation were 'in common use.' "); *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) ("*Bruen* step one involves a threshold inquiry" that includes "whether the weapon at issue is 'in common use today for self-defense' " (quoting *Bruen*, 597 U.S. at 32)); Jamie G. McWilliam, *The Relevance of 'Common Use' after* Bruen, 37 J. HARV. L. & PUB. POL'Y PER CURIAM 1, 6 (Fall 2023) ("[T]he Court in *Bruen* raised the common use standard at the beginning of its plain text analysis. . . .").

[11] *Bruen*, 597 U.S. at 31–32.

[12] *Id.* at 31.

[13] *Id.* at 32.

This reading of *Bruen* is confirmed by the rest of the opinion. For example, the Court quotes *Heller* for the proposition that "the Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms,"[14] a proposition that is inconsistent with presumptive textual protection only for arms in common use. And the Court makes clear that the "common use" standard is the product of *Heller*'s evaluation of "historical tradition" and therefore is part of "the historical understanding" that "demark[s] the limits on the exercise of" the "individual right to armed self-defense."[15]

In sum, read properly, *Heller* and *Bruen* establish that *all* firearms are covered by the plain text of the Second Amendment. The common-use test thus derives not from plain text but rather from *Heller*'s evaluation of the historical limitations on the scope of the right.

[14] *Id*. at 28 (quoting *Heller*, 554 U.S. at 582) (emphasis added).

[15] *Id*. at 21, 46.