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Looking at the Text, History, and Tradition of the Second Amendment– "Steeped in Anti-Blackness"

Camila Blaha

LOOKING AT THE TEXT, HISTORY, AND TRADITION OF THE SECOND AMENDMENT – "STEEPED IN ANTI-BLACKNESS"[1]

CAMILA BLAHA*

INTRODUCTION

The Supreme Court heard oral arguments on November 3, 2021, for a Second Amendment case: *New York State Rifle and Pistol Association, Inc. v. Bruen*.[2] The New York law before the Supreme Court addressed individual Second Amendment rights to carry in the public sphere.[3] The question before the Court was whether New York's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.[4] This article will use the discriminatory history and implementation of gun control laws to tackle Second Amendment precedent and examine the ramifications of potential outcomes from *Bruen*.[5] In June the Supreme Court issued their opinion in *Bruen*, which emphasized the importance of the history and tradition surrounding the Second Amendment. In striking down New York's licensing regime, the Supreme Court held that the proper legal analysis of a regulation in the Second Amendment context uses text and historical tradition.[6]

PART I: THE SECOND AMENDMENT, GUN CONTROL, AND SUBJUGATION

The Second Amendment reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep

[1] CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 165 (2021).

* J.D. Candidate, 2023, University of Maryland Francis King Carey School of Law; Executive Symposium Editor, *University of Maryland Law Journal of Race, Religion, Gender, and Class*. She would like to thank all the members of the Journal who offered their input in the process of writing and editing this article.

[2] New York State Rifle & Pistol Ass'n v. Beach, 818 F. App'x 99 (2d Cir. 2020) (mem.), *rev'd sub nom.* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[3] *Bruen*, 142 S.Ct. at 2122-23.

[4] *Id.* at 2125.

[5] *See infra* Parts I-IV.

[6] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

and bear Arms, shall not be infringed."[7] Two parts of the Second Amendment are central to its analysis: (1) the militia, and (2) the right to keep and bear arms.[8]

A. The reference to the militia in the first clause of the Second Amendment demonstrates the pro-slavery intentions behind the Amendment's adoption

Why reference the militia? The often-romanticized concept of independent minutemen or armed citizenry as "the ultimate check on tyranny" "is largely [a] myth."[9] "Militiamen were never autonomous[.]"[10] As defined by Article 2, Section 8, Clauses 15 and 16 of the Constitution,[11] state militias had three potential purposes: "executing the laws of the nation, repelling…foreign invasions, and" suppressing insurrections.[12]

But militias had proven unreliable protectors of the law, especially after many militiamen joined the rebels in Shay's Rebellion to disrupt the law.[13] Moreover, the reputation of militias for repelling foreign invasion, most recently against the British, was stained by high levels of desertion and a lack of discipline.[14] Moreover, the Continental Army that came to win the Revolutionary War had increasingly relied on full-time soldiers, with militiamen constituting "barely a third of the victorious American forces."[15] However, there was one function militias were known and relied on for: slave control.[16]

Originally, militias were organized to defend against Indigenous attacks.[17] Over time, the fear of Indigenous attacks was replaced by the fear of slave uprisings, particularly in the South.[18] The "occasional" slave revolt fed these fears.[19] For example, the 1739 Stono Rebellion, led by Black slaves, amassed about 100 rebels, who stole guns and gun

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

[8] *See* Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554, 554 (1965).

[9] Carl T. Bogus, *Race, Riots, and Guns,* 66 S. CAL. L. REV. 1365, 1372-73 (1993).

[10] *Id.* at 1373.

[11] U.S. CONST. art. I, § 8, cl. 15-16.

[12] ANDERSON, *supra* note 1, at 32-33.

[13] *Id.* at 33.

[14] *See id.* at 34.

[15] David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 600 (2000).

[16] *See* Bogus, *supra* note 9, at 1371-74.

[17] *Id.* at 1371.

[18] *Id.*

[19] *Id.* at 1370.

powder in South Carolina, moved south, and burned down buildings.[20] Later revolts continued to feed fears of uprising, from the 1791 Haitian Revolution to the largest domestic slave insurrection in 1811 in New Orleans.[21] In 1811, militias responded, killing some eighty Black individuals during battle and "later by firing squad."[22] Militias also "oversaw…slave patrols and regularly searched the homes of the enslaved for weapons."[23] Thus, militias were seen as instrumental in responding to and preventing future rebellions.[24]

Southern states like South Carolina and Georgia made it clear at the 1787 Constitutional Convention that without nationwide protection for slavery they would "bolt."[25] Even after the Constitutional Convention, "threats to slavery worried ratification conventions in the South."[26] The resulting Anti-federalist push for the Bill of Rights sought a weak central government and emphasized states' rights to provide "pro-slavery safeguards."[27] Among the Anti-federalists, "George Mason of Virginia worried that Congress might render state militias useless by 'disarming them' [or] 'neglect[ing] to provide for arming and disciplining the militia."[28] Patrick Henry, another Virginian, predicted that if the federal government did not directly go after state militias, it would do so "by taxing the South's peculiar institution into oblivion."[29] Thus, it appears that by specifically providing for the protection of militias, the Second Amendment was adopted to "assure the southern states that they could maintain armed militia to control their slaves."[30]

B. Restrictions to the right to keep and bear arms have been historically used to control communities of color and poor communities

Next, we look to the right to keep and bear arms. Historically, the general right to keep and bear arms was not absolute.[31] The Second

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[20] *Id.*

[21] *Id.*; *see* Donald R. Hickey, *America's Response to the Slave Revolt in Haiti, 1791-1806*, 2 J. EARLY REPUBLIC 361, 368 (1982).

[22] Bogus, *supra* note 9, at 1370.

[23] ANDERSON, *supra* note 1, at 34-35.

[24] *See id.* at 35, 37.

[25] *Id.* at 26.

[26] *Id.* at 37.

[27] *Id.*

[28] Bogus, *supra* note 9, at 1373.

[29] ANDERSON, *supra* note 1, at 42.

[30] Bogus, *supra* note 9, 1387-88.

[31] Sprecher, *supra* note 8, at 556.

Amendment right to keep and bear arms legally has been scoped by the longstanding history of gun laws in the United States.[32] Legal scholars often point to the Statute of Northampton of 1328 and Blackstone's commentaries in recounting past gun control measures considered reasonable, which included laws prohibiting weapons from those "deemed dangerous"[33] and dangerous weapons that "terrif[ied] the good people of the land."[34] Perhaps aligned with the restriction of guns from those deemed dangerous, the history of gun control measures has been crucially defined by racial discrimination.[35] From slave codes at the time of the country's founding to "Black Codes" after the Civil War, gun control measures in the United States have long served as a tool of white control.[36]

Similar to militias developed to defend against Indigenous attacks, the first gun control laws in colonial America aimed at keeping guns out of the hands of the Indigenous population.[37] These gun control measures were passed on July 30, 1619, by the "first formal legislative body [of] European settlers" convened in the colony of Virginia.[38] One of some thirty enactments stated that "no man do sell or give any Indians any piece, shot, or powder" and its violation resulted in death.[39]

Slave codes codified "separate treatment and…rights on the basis of race[,]" defining who "the enslaved were, what they could not do, and equally important, what could be done to them."[40] In addition to the "well regulated Militia," southern whites viewed firearms as "the only thing that stood between them and Black people's freedom."[41] Foreshadowing slave codes, "the first recorded restrictive [regulation] concerning Blacks in Virginia" passed in 1640 and "excluded them from

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[32] Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 55-56 (2017); *see infra* Part II (discussing prong one of the two-step inquiry and long standing prohibitions described in *Heller*.)

[33] *Id.* at 72.

[34] Sprecher, *supra* note 8, at 556.

[35] ANDERSON, *supra* note 1, at 60; *see* Spitzer, *supra* note 32, at 72 (providing examples of gun control measures motivated by racial discrimination, such as laws preventing dangerous individuals from owning guns, which specifically referred to Native Americans which were deemed inherently dangerous).

[36] *See* Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting) (mem.); Bogus, *supra* note 9, at 1370.

[37] Spitzer, *supra* note 32, at 57-58.

[38] *Id*. at 57.

[39] *Id.* The author notes this terminology is only used to accurately quote the language of the enactment. Otherwise, it should be acknowledged that the preferred terminology is Indigenous or Native Americans.

[40] Stephan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON C.R. L. J. 67, 69 (1991); ANDERSON, *supra* note 1, at 16-17.

[41] U.S. CONST. amend. II; ANDERSON, *supra* note 1, at 59.

owning" firearms.[42] Then, the 1740 Negro Act of South Carolina, which served as a model for slave codes elsewhere, possessed as a core principle that "[n]egroes were 'absolute slaves' including those not even born yet."[43] Thus, in order to assure white control, slave codes "throughout North America" restricted access to firearms.[44] The violation of slave codes entailed heavy-handed punishment, including death.[45]

"In the later part of the 17th Century fear of slave uprisings in the South accelerated the [enactment] of laws" regarding Black gun possession.[46] Beyond the general prohibition on slaves possessing firearms, North Carolina, Louisiana, Georgia, and Florida added legislation banning the "sale or delivery of firearms to slaves."[47] In South Carolina and Louisiana, "no slave could even use a firearm unless [they had] the expressed permission of whites to hunt."[48] In Georgia, militias held a "'standing warrant to search any black's house enslaved *or* free, for 'offensive weapons and ammunition.'"[49] Similarly, patrols in Florida "searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process."[50]

The moments leading up to the Civil War made plain that the Second Amendment was intended to ensure white control.[51] Abolitionist Lysander Spooner pointed out "that the Second Amendment 'recognize[s] the natural right of all men "to keep and bear arms" for their personal defence,' which was "a right palpably inconsistent with the idea of his being a slave."[52] In the infamous 1857 *Dred Scott* opinion, Chief Justice Taney led the Supreme Court to reject Black citizenship, reasoning that "black citizenship [was] unthinkable because it would give blacks the right to 'keep and carry arms wherever they went.'"[53]

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[42] Tahmassebi, *supra* note 40, at 69-70.

[43] ANDERSON, *supra* note 1, at 17.

[44] *Id.* Slave codes also sought to ensure control by restricting the right to self-defense and movements of enslaved people. *Id*.

[45] *Id.*

[46] Tahmassebi, *supra* note 40, at 70.

[47] ANDERSON, *supra* note 1, at 60.

[48] *Id.*

[49] *Id.* at 35.

[50] Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting) (mem.).

[51] ANDERSON, *supra* note 1, at 81–82.

[52] Brief for *Amicus Curiae* National African American Gun Ass'n. in Support of Petitioners at 17, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843) [hereinafter Brief for National African American Gun Ass'n] (quoting LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 98 (1860)).

[53] *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting) (mem.) (quoting Dred Scott v. Sanford, 60 U.S. 393, 417 (1857)).

After the Civil War, Southern anxiety about Black gun ownership peaked with the nearly four million newly freed slaves.[54] Gun ownership continued to be a means of white control.[55] The defeated Confederacy responded with gruesome violence, forcible disarmament of newly freed men, and laws affronting emancipation.[56] Several southern states adopted comprehensive laws, known as Black Codes, which formally excluded new freed men from enjoying full rights, including Second Amendment rights.[57] "For example, a Mississippi law provided that 'no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.'"[58]

Southern defiance of Reconstruction and widespread violence against freed Blacks underscored the insufficiency of the Thirteenth Amendment protections, which only guaranteed the right not to be enslaved.[59] Looking for further support, freed Blacks petitioned "Congress and federal officials asking for help[.]"[60] In a letter to a Union Army Major General, "125 freedmen in Columbus, Georgia, begged federal troops to stay in the city: 'We wish to inform you that…A number of Freedmen have already been killed…we have every reason to fear that others will share a similar fate.'"[61] To address the Thirteenth Amendment's shortcomings, Congress responded by passing the Civil Rights Act in 1866, the Fourteenth Amendment in 1868, and the Fifteenth Amendment and Third Enforcement Act in 1870.[62]

Even after achieving constitutional change to address racism and equal protection, facially neutral gun control laws continued to disarm Blacks.[63] Some states passed laws that focused on the class of firearm, like Tennessee, Arkansas, and Florida.[64] They criminalized specific guns, like the Winchester rifle, which was described by Ida B. Wells as

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[54] ANDERSON, *supra* note 1, at 84, 86; McDonald v. City of Chicago, 561 U.S. 742, 835, 846 (2010) (Thomas, J., concurring).

[55] ANDERSON, *supra* note 1, at 86-87.

[56] *See* ANDERSON, *supra* note 1, at 84-87; *McDonald*, 561 U.S. at 847 (Thomas, J., concurring).

[57] Tahmassebi, *supra* note 40, at 71.

[58] *McDonald*, 561 U.S. at 771.

[59] ANDERSON, *supra* note 1, at 92.

[60] *Id.* at 86-87.

[61] *Id.* at 87.

[62] *Id.* at 93-94.

[63] Tahmassebi, *supra* note 40, at 73-74; Brief for National African American Gun Ass'n, *supra* note 52, at 27.

[64] Tahmassebi, *supra* note 40, at 74.

"hav[ing] a place of honor in every black home…used for that protection which the law refuses to give."[65] The also barred generally affordable guns in legislation like the "Saturday Night Special Laws," which limited the use of any pistols other than army or navy revolvers.[66]

Other states, like Virginia, Alabama, and Texas, imposed high business or sales taxes in an effort to make arms out of reach for Blacks or poor whites.[67] Finally, discretionary gun licenses facilitated Black disarmament.[68] Relevant to *Bruen*, New York adopted the infamous Sullivan Law in 1911, which made handgun ownership illegal without permits and intended to "strike hardest at the foreign-born element."[69]

In the 1950s and 1960s, state-sponsored violence and police actions underscored the rationale embedded in the Second Amendment, ensuring "a well-regulated militia to keep Black people in a state of rightlessness."[70] In the mid-1950s, the National Association for the Advancement of Colored People (NAACP) brought sixteen suits against the Los Angeles Police Department for "exceptional levels of brutality" against the community.[71] While the police brutality in California was not novel, the response by the Black Panther Party for Self Defense was.[72] Led by Huey Newton and Bobby Seal, the Black Panthers stated that "all Black people should arm themselves for self defense" and that Black self-defense groups were essential to defending the community from racist police brutality.[73] The mode of civil resistance: lawful gun bearing and carrying.[74] One headline warned "It's All Legal: Oakland's Black Panthers Wear Guns, Talk Revolution."[75] Noting the legality, police nevertheless determined that the Black Panthers represented a threat to every community that choose to appear.[76] In response to the Black Panthers legally carrying firearms, California's then-governor at the

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[65] Brief for National African American Gun Ass'n, *supra* note 52, at 27 (internal citation omitted).

[66] Tahmassebi, *supra* note 40, at 73-74.

[67] *Id.* at 74-75; Brief for National African American Gun Ass'n, *supra* note 52, at 29-30.

[68] *See* Brief for National African American Gun Ass'n, *supra* note 52, at 26-34.

[69] Tahmassebi, *supra* note 40, at 77 (quoting LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA 177-78 (1975)).

[70] ANDERSON, *supra* note 1, at 126-28.

[71] *Id.* at 127 (quoting SCOTT KURASHIGE, THE SHIFTING GROUNDS OF RACE: BLACK AND JAPANESE AMERICANS IN THE MAKING OF MULTIETHNIC LOS ANGELES, 270 (2008)).

[72] *Id.* at 128.

[73] *Id.* at 128-130 (quoting BLACK PANTHER PARTY FOR SELF DEFENSE, WHAT WE WANT WHAT WE BELIEVE, *in* MULFORD ACT FILES (Firearms Policy Coalition 1967) https://www.firearmspolicy.org/resources.

[74] *Id.* at 130-131.

[75] *Id*. at 133 n.30.

[76] *Id.* at 133.

time, Ronald Reagan, backed by the NRA, helped craft gun the Mulford Act in 1967, which banned the "carrying of loaded firearms in public."[77] With the Black Panthers explicitly in mind, Ronald Reagan did not hesitate to support such gun regulations.[78] Since the passage of the Mulford Act and continuing into 2021, gun control continues to be used as a tool of "anti-Blackness."[79]

The 2016 killing of Philando Castile illustrates the ever-present assault on Black gun possession.[80] After notifying the police officer who pulled his car over that he was carrying a legally permitted gun, Philando Castile, a Black man, was shot and killed by the officer.[81] While the killing of Philando Castile illustrates one case, you need only look at the data to see the same response reflected nationally.[82] Local, state, and national data continue to demonstrate the discriminatory implementation and disparate effects of gun control laws across the United States.[83] According to the American Civil Liberties Union (ACLU), in the mid-1970s, St. Louis police "made more than 25,000 illegal searches 'on the theory that any Black, driving a late model car has an illegal gun.'"[84] "However, these searches produced only 117 firearms."[85] In New York, the New York Police Department's (NYPD) infamous stop-and-frisk practice overtly targeted gun possession by minorities.[86] Former Mayor Bloomberg justified the practice as recently as 2020, stating that "95% of your murders…fit one M.O.…[t]hey are male minorities[.]"[87] In New York City from 2014 to 2017, 84% of the 60,583 frisks conducted by the NYPD were of Black or Latino people.[88]

In addition to discriminatory racist practices, seemingly neutral gun laws continue to be marred by their disparate effects on Black

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[77] *Id.* at 133-137.

[78] *Id.* at 136.

[79] ANDERSON, *supra* note 1 at 8-9, 164-65.

[80] *Id.* at 1, 3-4.

[81] *Id.* at 1.

[82] *See generally*, *id.* at 152-63.

[83] *See infra* notes 62-72.

[84] Tahmassebi, *supra* note 40, at 94 (quoting Don B. Kates, Jr., *Handgun Control: A Different View*, INQUIRY, Dec. 5, 1977, 20, 23.).

[85] *Id.*

[86] Brief for the Black Attorneys of Legal Aid, et al., as Amici Curiae, 12-13, Supporting Petitioners, New York State Rifle & Pistol Ass'n, v. Corlett, 141 S. Ct. 2566 (No. 20-843) (2021).

[87] *Id.* at 13 (quoting Bobby Allyn, *'Throw Them Against the Wall and Frisk Them': Bloomberg's 2015 Race Talk Stirs Debate*, Nat'l Pub. Radio (Feb. 11 2020, 11:52 AM), https://www.npr.org/2020/02/11/804795405/throw-them-against-the-wall-and-frisk-them-bloomberg-s-2015-race-talk-stirs-deba).

[88] *Id.* (citing CHRISTOPHER DUNN & MICHELLE SHAMES, STOP-AND-FRISK IN THE DE BLASIO ERA 17 (Diana Lee ed. 2019).

Americans, from bans on guns in public housing to restricting felons from possessing guns.[89] Data clearly shows racial discrepancies in the federal enforcement of gun laws.[90] In 2013, 47.3% "of those convicted for federal gun crimes were [B]lack[,]" reflecting the largest racial disparity from the general population "than any other class of federal crimes."[91] Moreover, an investigation by USA Today found that the federal gun enforcement agency, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), has "overwhelmingly targeted racial and ethnic minorities as it expanded its use of drug sting operations."[92] For example, "[a]t least 91% of people…locked up after stings were racial or ethnic minorities…far higher than" the rate of those arrested for other violent crimes or gun offenses.[93]

PART II: SECOND AMENDMENT CASE LAW

Leading up to 2008, federal courts largely understood the right recognized by the Second Amendment was tied to "military or militia use."[94] The last precedential words prior to 2008 offered by the Supreme Court seemed to support a military-related interpretation of the Second Amendment.[95] In the Supreme Court's 1939 opinion in *United States v. Miller*, the Court asked whether the relevant gun regulation "bore a 'reasonable relationship to the preservation or efficiency of a well regulated militia'" as to maintain Second Amendment protections.[96] Moreover, after referring to the potential purposes for the militia described in the Constitution, the Court in *Miller* stated, "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[97] The language in *Miller* ignited the debate about whether the Second Amendment was an individual right or a collective right related to militias. The

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89 ANDERSON, *supra* note 1, at 7.

90 Radley Balko, *Shaneen Allen, Race and Gun Control*, WASH. POST (July 22, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/07/22/shaneen-allen-race-and-gun-control/.

91 *Id.*

92 Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities,* USA TODAY (July 20, 2014), https://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/.

93 *Id.*

94 SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 1 (2019).

95 *Id.*

96 *Id.* (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

97 Miller, 307 U.S. at 178.

vast majority of courts upheld a collective right theory.[98] Nevertheless, the Fifth Circuit and other dissenting federal circuit judges maintained an individual rights theory.[99]

In response, two recent Supreme Court decisions shaped Second Amendment jurisprudence.[100] First, the 2008 Supreme Court's 5-4 decision in *District of Columbia v. Heller* guaranteed the individual exercise of the Second Amendment right to possess firearms for historically lawful purposes, including self-defense in the home.[101] However, the Court did not define "the full scope of the right."[102] Referencing militia laws excluding free Blacks, the Court cautioned that limiting arms to a congressionally defined militia "guarantees a select militia of the sort the Stuart kings found useful[.]"[103] Second, in a 4-1-4 opinion building on *Heller,* the Court incorporated the federally defined Second Amendment right to the States in *McDonald v. City of Chicago*.[104]

Heller offered "minimal guidance" regarding a doctrinal test to determine the constitutionality of laws where it deems that the Second Amendment was implicated.[105] However, courts have "drawn from the discussion in *Heller*" a two-step inquiry.[106] "First, courts asks whether the…law [at issue] burdens conduct protected by the Second Amendment."[107] To answer step one, courts generally conduct "a textual and historical inquiry into the original meaning" of the Second Amendment.[108] Moreover, some courts end the inquiry here if the challenged law is "presumptively lawful" as defined by the enumerated "longstanding" prohibitions by the majority in *Heller*.[109]

Second, if the law does target conduct within the scope of Second Amendment protections, then courts ask whether the law is constitutional "under some type of means-end scrutiny."[110] The Seventh

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[98] PECK, *supra* note 94, at 1.

[99] *See id.* (citing United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (holding that the Second Amendment protects the rights of an individual to possess and bear their own firearms)); Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003) (Pregerson, J., dissenting) (mem.) ("However, the panel misses the mark by interpreting the Second Amendment right. To keep and bear arms as a collective right, rather than as an individual right.").

[100] PECK, *supra* note 94, at 1-2.

[101] *Id*. at 1.

[102] *Id.* at 7.

[103] District of Columbia v. Heller, 554 U.S. 570, 600 (2008).

[104] McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

[105] PECK, *supra* note 94, at 12 n.113.

[106] *Id.* at 12.

[107] *Id.*

[108] *Id.* at 13.

[109] *Id.* at 14.

[110] *Id.* at 12-13.

Circuit has applied a slightly different question for step two, looking at the "strength of the government's justification for restricting or regulating" Second Amendment rights.[111] *Heller* left open the standard of review.[112] In opposition to the majority approach, Justice Breyer's dissent advocated an interest-balancing approach.[113] However, the majority seemed to reject applying rational basis review, and instead varied between applying intermediate or strict scrutiny depending on the extent to which the challenged law "encroaches on the core of the Second Amendment."[114] Accordingly, the Second, Fourth, and Tenth Circuits differentiated between protections involving the home, determining that strict scrutiny would apply to firearms in the home and that intermediate scrutiny would apply to firearms outside the home.[115]

The question of whether carrying arms outside the home implicates a "core Second Amendment" protection has brought about a circuit split in response to laws requiring a showing of "good cause" for a concealed-carry license.[116] The federal circuits differ on what level of scrutiny should be applied to laws regarding concealed carry.[117] On one hand, undermining the Second Amendment's protection for concealed carry licenses to extend to the general public, the Second and Ninth Circuits upheld laws requiring a showing of "good cause" or "proper cause."[118] For example, the case at hand, *New York State Rifle and Pistol Association, Inc. v. Bruen*, comes from the Second Circuit and relies on an earlier Second Circuit decision.[119] In *Kachalsky v. County of Westchester*, the Second Circuit (1) assumed that the Second Amendment applied to such laws, (2) found that New York's licensing law "was substantially related to the government's interests in public safety of crime prevention[,]" and thus (3) held that it passed intermediate scrutiny.[120] Similarly, the Ninth Circuit upheld a California law saying

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111 *Id.* at 13 (quoting Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011)).

112 *Id.* at 16.

113 *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting)).

114 *Id.*

115 *Id.* at 16-17. *See* United States v. Masciandaro, 638 F.3d 458, 470-71 (4th Cir. 2011) (citing *Heller*, 554 U.S. at 626, 628.); Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1126 (10th Cir. 2015) ("If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny."); Kachalsky v. County of Westchester, 701 F.3d 81, 89, 93-94 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home.").

116 PECK, *supra* note 94, at 32-34.

117 *Id.*

118 *Id.* at 33-34.

119 *Id.*

120 *Id.* at 33.

"[a]n officer 'may' issue a concealed carry" license upon the demonstration of "good moral character and good cause for the license."[121]

On the other hand, the D.C. Circuit struck down the District's "good cause" concealed carry law in *Wrenn v. District of Columbia*[122] and emphasized that the right of "law-abiding citizens to keep and bear arms for self-defense extends beyond the home" and is a core Second Amendment right.[123] Again, unlike the other two circuits, the D.C. Circuit did not apply a level of scrutiny and instead deemed the law "effectively a 'total ban' on the exercise of that core right and thus per se unconstitutional."[124] The Supreme Court took up this issue by granting review of New York's "proper cause" requirement for a concealed-carry license.[125]

PART III: NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC. V. BRUEN

A. Background

Plaintiffs New York State Rifle and Pistol Association, Inc., Robert Nash, and Brandon Koch, sued New York state officials[126] in a district court under 42 U.S.C. Section 1983, which provides for civil action in response to the deprivation of rights.[127] Plaintiffs asserted that

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[121] *Id.* at 33-34.

[122] 864 F.3d 650 (D.C. Cir. 2017).

[123] PECK, *supra* note 94, at 34.

[124] *Id.*; *Wrenn*, 864 F.3d at 667 ("In fact, the [Second] Amendment's core at minimum shields the typically situated citizen's ability to carry common arms generally. The District's good-reason law is necessarily a total ban on exercises of that constitutional right for most D.C. residents. That's enough to sink this law under *Heller I.*").

[125] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

[126] New York State Rifle & Pistol Ass'n v. Beach, 354 F. Supp. 3d 143 (N.D.N.Y 2018). The plaintiffs sued the Superintendent of the New York State Police, the Licensing Officer in the jurisdiction where plaintiffs filed their license applications, and the Justice of the New York Supreme Court, who found the plaintiff's application did not meet the "proper cause" standard. *Id.* at 143, 146-47.

[127] *Id.* at 145; 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

their Second Amendment rights were violated when they were refused licenses to carry "firearm[s] outside the home for self-defense."[128]

Plaintiffs Nash and Koch applied to New York Licensing Officers for handgun carry licenses.[129] To grant a license, a licensing officer must find that the applicant meets statutory requirements under New York Penal Law Section 400.00.[130] Particularly at issue is the "proper cause" requirement.[131] Under New York Penal Law Section 400.00(2)(f), the applicant must demonstrate that "proper cause exists for the issuance thereof."[132] Satisfaction of the "proper cause" standard allows for some discretion, which, in New York, lies with the licensing officer. Although, New York caselaw has read "proper cause" to require that the applicant "demonstrate a special need for self-protection distinguishable from that of the general community."[133]

Plaintiff Nash's request for a handgun carry license was granted on March 12, 2015, but "he was issued a license marked [for] 'Hunting, Target only.'"[134] Plaintiff Koch was granted a similarly limited license in 2008.[135] Both petitioned and were denied requests to have the hunting limitation removed, citing failure to demonstrate "proper cause."[136]

Defendants moved to dismiss for failure to state a claim.[137] Defendants argued that Plaintiffs' Second Amendment claims were contrary to Second Circuit precedent that directly upheld New York's licensing and proper cause requirement as consistent with the Second Amendment.[138] The district court granted New York's motion to dismiss Plaintiffs' claims for failure to state a claim.[139]

On appeal, the Second Circuit issued a summary order affirming the district court's dismissal for failure to state a claim.[140] Plaintiffs filed a petition for writ of certiorari.[141] The United States Supreme Court granted certiorari on April 26, 2021, but limited the question to "whether New York's denial of petitioners' license applications [for concealed-

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[128] *Beach*, 354 F. Supp. 3d at 145.
[129] *Id.* at 146.
[130] *Id.* at 145.
[131] *See id.* at 145, 148.
[132] *Id.* at 145.
[133] *Id.* at 146 (citations omitted).
[134] *Id.*
[135] *Id.*
[136] *Id.* at 146-47.
[137] *Id.* at 145.
[138] *Id.* at 147-48.
[139] *Id.* at 145.
[140] New York State Rifle & Pistol Ass'n v. Beach, 818 F. App'x 99, 100 (2d Cir. 2020) (mem.).
[141] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022).

carry licenses for self-defense] violated the Second Amendment."[142] Moreover, the Court heard oral arguments for the case on November 3, 2021.[143]

B. Summary of Arguments Before the Supreme Court

i. Petitioners: New York State Rifle & Pistol Association, Robert Nash, and Brandon Koch.

In their brief, Petitioners assert that the Second Amendment protects the right to carry arms outside the home *for self-defense* and that New York's regime "effectively criminalizes the exercise of a fundamental right."[144] The Petitioners took issue with the Second Circuit's application of intermediate scrutiny in *Kachalsky*.[145] Thus, Petitioners asked that the Court properly apply heightened scrutiny or focus on the history, text, and tradition of the Second Amendment to evaluate the constitutionality of New York's law.[146]

First, pointing to the text, Petitioners argued that the Second Amendment identifies two distinct rights, to "keep" and "bear" arms.[147] The Petitioners cited the Court's interpretation in *United States v. Heller* that "at the time of the founding, as now, to 'bear' meant to 'carry,' which typically…involves conduct outside the home."[148] Then, pointing to the history and tradition of the Second Amendment, Petitioners noted that "severe restrictions on the right to carry arms typically arose only in the context of efforts to disarm disfavored groups, like blacks."[149] Finally, Petitioners argued the "proper cause" requirement restricts the Second Amendment right to a small subset of people "distinguishable from … the general community."[150] Thus, Petitioners likened New York's "ban" on carrying arms for self-defense to the District of Columbia's "ban" on possessing handguns deemed unconstitutional in *Heller*.[151]

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142 New York State Rifle & Pistol Ass'n v. Corlett 141 S. Ct. 2566 (2021) (mem.).

143 Transcript of Oral Argument at 1, New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

144 Brief for Petitioners at 24, New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843).

145 *Id.* at 21-22.

146 *Id*. at 24-25.

147 *Id.* at 25. On two occasions, petitioners quote Thomas M. Cooley: "[T]o bear arms implies something more than the mere keeping." *Id.* at 22, 26.

148 *Id.* at 26 (citing District of Columbia v. Heller, 554 U.S. 570, 584 (2008)).

149 *Id.* at 2.

150 Brief for Petitioners, *supra* note 144, at 41 (quoting *Kachalsky*, 701 F.3d at 88).

151 *Id.*

ii. Respondent, Kevin P. Bruen, as Superintendent of the New York State Police, et al.

Respondents' brief argued that New York's restrictions on concealed-carry licenses were in line with the text, history, and tradition of the Second Amendment and satisfied intermediate scrutiny.[152] Respondents accepted that the Second Amendment embodies the right to carry arms outside the home, but instead contended that it is "not unlimited."[153] They pointed to permitted exceptions, like "sensitive places such as schools and government buildings."[154] Respondents also referenced history and tradition to support limitations on carry rights, like the tradition of leaving such regulations to "suit local needs and values" of each state.[155] Finally, Respondents made a counterargument challenging the notion that discretionary restrictions on public carry have discriminatory intent.[156] They instead argued that some of those restrictions were "critical for protecting freedmen" from racial violence.[157]

iii. Relevant Amice: The United States, New York public defenders, and anti-gun violence groups.

As amicus curiae for the Respondents, the United States filed a brief supporting New York's licensing regime.[158] The United States identified federal law as illustrative of constitutionally-permissible regulations of the Second Amendment, including prohibitions for felons-in-possession, individuals "who have been committed to mental institutions," domestic abusers, and minors.[159] The United States asked the Court to review the arms regulation at issue by looking at the text, history, and tradition of the Second Amendment.[160]

The amici curiae briefs in favor of the Petitioners made for an unusual mix of interests. From twenty-three Republican state attorneys general and 176 Republican House members to Black criminal defense

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[152] Brief for Respondents at 15-18, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

[153] *Id.* at 19 (quoting *Heller*, 544 U.S. at 626).

[154] *Id.* at 20 (quoting *Heller*, 544 U.S. at 626).

[155] *Id.* at 28. (quoting McDonald v. City of Chicago, 561 U.S. 742, 785 (2010) (plurality opinion)).

[156] *Id.* at 29-31.

[157] *Id*. at 30.

[158] Brief for the United States as Amicus Curiae Supporting Respondents, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

[159] *Id.* at 14.

[160] *Id.* at 10-11.

attorneys and public defender organizations, all pointed to the discriminatory history of gun control.[161]

In favor of Petitioners and arguing that the New York law violates the Second Amendment, the Black Attorneys of Legal Aid caucus, the Bronx Defenders, and Brooklyn Defender Services submitted an amicus brief.[162] The brief detailed the racist origins and discriminatory implementation of the law, providing data of disparate impact and problematic individual cases.[163] First, the brief connected the origin of the law at issue with New York's 1911 Sullivan Law and argued that New York's intent in enacting the licensing requirements was to "criminalize gun ownership by racial and ethnic minorities."[164] The 1911 Sullivan Law responded to "years of hysteria over violence . . . attributed to racial and ethnic minorities" and gave local police general discretion to issue licenses required to possess a firearm.[165] The brief pointed out the enduring obstacles for obtaining a license, particularly that the NYPD, infamously known for their stop-and-frisk practices, maintains control of licensing and "administratively adjudicate[s] on its own, the 'moral character' of applicants."[166] Obtaining a license also requires fees over $400[167] but waives fees for former NYPD officers.[168]

Next, the brief looked at the penal consequences of the licensing requirements.[169] It notes that in practice unlicensed firearm possession alone (inside or outside the home) is "almost always" charged as and considered "legally sufficient evidence to establish the heightened violent felony of second-degree criminal possession of a weapon," punishable by three and half to fifteen years in prison.[170] Moreover, when charging under NY Penal Law 265.03(3) for possession of a loaded firearm in 2020, 80% of people arraigned in New York were Black and only 5% were non-Hispanic white.[171] Similarly, in 2020, and consistently for thirteen years, more than 90% of arrests made in New York City for the

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[161] Darrell A.H. Miller, *Conservatives Sound Like Anti-Racists – When the Cause Is Gun Rights*, WASH. POST (Oct. 27, 2021), https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/.

[162] Brief of the Black Attorneys of Legal Aid, *supra* note 86 at 1, 6.

[163] *See generally,* Brief of the Black Attorneys of Legal Aid, *supra* note 86.

[164] *Id.* at 5, 9.

[165] *Id.* at 9.

[166] *Id.* at 8-9, 12-13.

[167] *Id.* at 8.

[168] *Id.* at 11.

[169] *Id.* at 14-15.

[170] *Id.* at 6-8.

[171] *Id.* at 15.

same law were of Black and Latino people.[172] The brief ends by noting that "New York effectively deprives its people of Second Amendment right[s]" by conditioning them on obtaining a license and asking the Court to hold Petitioners' denial of a license as a violation of Second Amendment protections.[173]

PART IV: ANALYSIS OF POTENTIAL APPROACHES THE JUSTICES MAY TAKE

There was an array of potential avenues that the Supreme Court's resulting opinion could have taken. This section will evaluate those potential outcomes, including their likelihood and considerations in favor of or against such outcome. As this article was being drafted, the Supreme Court released their opinion, which struck down a "proper cause" requirement for handgun licensing and rejected the application of means-ends scrutiny in Second Amendment analysis.[174] In line with predictions in this article that pointed to a test an analysis using text, history, and tradition, the Supreme Court's ruling rejected the application of means-ends scrutiny to Second Amendment analysis and instead upheld a test looking to the historical tradition surrounding the right to keep and bear arms.[175]

An extremely narrow ruling could have been specific to New York's license carry laws by telling New York to rewrite the law or return to the lower courts to reexamine for fact-finding.[176] Liberal justices seemed to argue on multiple occasions for additional proceedings at the lower court level to allow for fact-finding on the number or percentage of permits applied for and approved versus the number applied for and denied.[177] The liberal justices suggested that if such data showed that the New York permitting regime granted most applications, it would undermine the Petitioners' portrayal of New York's permitting regime as denying the ability to carry for self-defense.[178] This approach

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[172] *Id*. (footnotes omitted).

[173] *Id*. at 31-34.

[174] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

[175] *Id.*

[176] Jennifer Mascia, *The Supreme Court's Next Big Gun Case, Explained*, THE TRACE (May 18, 2021), https://www.thetrace.org/2021/05/supreme-court-gun-rights-concealed-carry-new-york-corlett/.

[177] Amy Howe, *Majority of Court Appears Dubious of New York Gun-Control Law, but Justices Mull Narrow Ruling*, SCOTUSBLOG (Nov. 3, 2021, 5:15 PM), https://www.scotusblog.com/2021/11/majority-of-court-appears-dubious-of-new-york-gun-control-law-but-justices-mull-narrow-ruling/.

[178] *Id*.

could potentially avoid a ruling on the merits pending fact-finding.[179] Yet, given the existence of other states with discretionary permitting laws and considering the circuit split on the issue,[180] this would seem to be an impractical outcome. Moreover, with liberal justices in the minority, it also appeared to be an unlikely outcome.[181]

A somewhat narrow ruling could provide that states "shall issue" a license if certain requirements are met, as opposed to discretionary permitting rules requiring "proper cause."[182] This approach seemed considerably more plausible for the conservative justices, especially given the questions during oral arguments.[183] In questioning, Justice Kavanaugh asked Petitioners' counsel to confirm: (1) that their "main problem" was the discretionary aspect of the regulation, and (2) that Petitioners would not object to "shall issue" regimes.[184] While Petitioners confirmed they would not object to "shall issue" regimes, they stressed, and other justices picked up on, their issue with not only the discretionary aspect of the regulation but also the atypicality requirement.[185]

By contrast, Justice Sotomayor, seemed to support good cause requirements.[186] After noting that discretionary laws had been used during the Civil War to "deny Black people the right to hold arms," she added that "we now have the Fourteenth Amendment to protect that."[187] She took it a step further by noting that she sees good cause requirements as fitting within the tradition for discretion to deny carrying of firearms to people deemed inappropriate, like "the mentally ill."[188]

Regardless of the test,[189] a broader ruling could find that licensing regimes are inconsistent with the Second Amendment. A question from Chief Justice Roberts potentially suggested that he would support such a ruling.[190] Chief Justice Roberts pointed out that "you can say that the right [to carry a handgun for self-defense] is limited in a particular way, just as First Amendment rights are limited, but the idea that you

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[179] *Id.*

[180] *Guns in Public: Concealed Carry*, GIFFORDS L. CTR.: TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Aug. 20, 2020) (listing the different state approaches to granting concealed-carry permits).

[181] Mascia, *supra* note 176.

[182] *Id.*

[183] Howe, *supra* note 177.

[184] Transcript of Oral Argument, *supra* note 143 at 50.

[185] *Id.* at 50-52.

[186] *Id.* at 17-20.

[187] *Id.* at 22.

[188] *Id.*

[189] *See supra* Part II (discussing previous tests used by lower courts).

[190] Transcript of Oral Argument, *supra* note 143, at 95.

need a license to exercise the right, I think, is unusual in the context of the Bill of Rights."[191] Such reasoning was consistent with the analysis in *Heller*, which relied on the analysis of First Amendment restrictions to shed light on Second Amendment restrictions.[192]

Given the discriminatory history behind the creation of New York's licensing law and the discriminatory implementation and policing of that law, there may be strong benefits of a ruling that found New York's licensing law unconstitutional.[193] Radley Balko of the Washington Post points out that "you enforce the gun laws with the institutions you have, not the institutions you want."[194] If gun control is defined by the discretion of the police and prosecutors, do we trust the institutions that exist to evenhandedly enforce such laws?[195]

The amicus brief submitted by Black Attorneys of Legal Aid, the Bronx Defenders, and Brooklyn Defender Services, challenges the assumption that the criminalization of gun possession is a tool for preventing violence.[196] Instead, their brief reinforced that the licensing requirements in New York have "controversial public safety implications."[197] In listing the unsafe and disparate effects of such criminalization, the licensing requirement puts those suspected of gun possession without a license in danger when they are approached by police or when police execute a search warrant on their home.[198] It also puts those charged with violating the licensing requirement in danger by branding them as violent felons, placing them in pretrial detention at Rikers Island, removing them from their children, and incarcerating them.[199] Others point out that such a challenge could have been brought as an equal protection claim had the standard for equal protection claims based on disparate impact not been set so unattainably high.[200]

Carol Anderson offers a strong counterargument.[201] She points out that as long as white fear of Blacks with guns is deemed legitimate, expanding Second Amendment rights on paper to all will not legitimize

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[191] *Id.* at 96.

[192] PECK, *supra* note 94 at 16.

[193] *See* Brief of the Black Attorneys of Legal Aid, *supra* note 86, at 6-15 (discussing full history of New York licensing law).

[194] Balko, *supra* note 90.

[195] *Id.*

[196] Brief of the Black Attorneys of Legal Aid, *supra* note 86, at 32.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 32-33.

[200] Strict Scrutiny, *That's Just Like, Your Opinion, Man*, CROOKED MEDIA (Nov. 1, 2021), *https://crooked.com/podcast-series/strict-scrutiny/#all-episodes*.

[201] ANDERSON, *supra* note 1, at 157-58.

those rights in effect.[202] Police officers and white men will continue to be validated in using deadly force in response to Black men with guns, even if Second Amendment rights are expanded to all. Moreover Darrell Miller, a Duke law professor points out that, "the focus on the purported disparate impacts of gun regulations on people of color overlooks the fact that racial minorities disproportionately suffer the negative effects of gun rights."[203] A "[y]oung Black man in the United States is 20 times as likely to die as a result of gun violence than his White counterpart."[204] An amicus brief by the NAACP Legal Defense and Educational Fund in support of Respondents invoked this argument to support deference to states' reasonable gun control, noting that "[r]esearch demonstrates that jurisdictions that limit handgun possession report fewer gun-related homicides and violent crimes."[205]

But, critical to a ruling that would find the licensing regime unconstitutional is the framework to do so. After the minimal guidance in *Heller* and *McDonald* beyond the two-part test, a Supreme Court holding could give clearer guidance on the framework for evaluating gun laws.[206] That could entail instruction as to what level of scrutiny to apply in step two of the *Heller* analysis, after determining that the law affects conduct protected by the Second Amendment.[207] Yet, given the two new additions to the Court, Justices Kavanaugh and Gorsuch, it is more likely that a majority of the conservative justices would disregard the levels of scrutiny and instead, apply a test that looks to the text, history, and tradition, leaving out a consideration of contemporary cost and benefits or whether the law is sufficiently tailored.[208] Justice Kavanaugh directly implied this when asking Petitioners' counsel, "to follow up on Justice Thomas's question and also Justice Gorsuch's, we should focus on American law and the text of the Constitution…correct?"[209] Moreover, after pointing out that "some courts have used intermediate scrutiny or strict scrutiny," Justice Kavanaugh stated "I don't know that you want to open that door."[210] Counsel for Petitioners agreed and pointed to the

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[202] *See id.*

[203] Miller, *supra* note 160.

[204] *Id.*

[205] Brief of the NAACP Legal Defense & Educational Fund, and the National Urban League as Amici Curiae Supporting Respondents at 4, New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

[206] Strict Scrutiny, *supra* note 200, at 37:57.

[207] *Id.* at 38:57.

[208] *Id.* at 39:15.

[209] Transcript of Oral Argument, *supra* note 143, at 52.

[210] *Id.* at 53-54.

thirteen years of jumbled lower court precedent to support an approach focused on the text, history, and tradition of the Second Amendment.[211]

Nevertheless, the conservative majority may splinter on the means of analysis and issue an opinion without enough votes to make one method the definitive means of analysis. Chief Justice Roberts' statement redirecting focus to *Heller* after other justices pointed to the Statute of Northampton may suggest such a divide.[212] Chief Justice Roberts stated, "the first thing I would look to in answering the question is not the Statute of Northampton, it's *Heller*…and its recognition that the Second Amendment…has its own limitations."[213] By pointing to *Heller*, which lacked a hard answer to the method of analysis in prong two of the two-step test, Chief Justice Roberts undermined the full adoption of a text, history, and tradition method of analysis.[214]

If conservative justices chose to redirect their analysis to the text, history, and tradition of the Second Amendment, such originalist analysis could take on a liberal stance by considering the Amendment's racist origins as argued by Carol Anderson.[215] Taking it a step further, Carol Anderson likens the idealized concept of the Second Amendment "akin to holding the three-fifths clause sacrosanct."[216] Similarly, Carl Bogus indicates that the Second Amendment's intent to serve as an instrument of slave control weighs "in favor of treating the Second Amendment as an anachronism," similar to the three-fifths clause.[217]

Yet, introducing such a drastic interpretation into jurisprudence may prove unrealistic. In redirecting the Court back to *Heller* during oral arguments, Chief Justice Roberts reminded the Court that in determining the appropriate analysis you "generally don't reinvent the wheel."[218] While Justice Alito likely would not support incorporating a strong focus on the racist history behind the Second Amendment into its analysis, he did point out the racist origins of New York's licensing regime which emanated from the Sullivan Law responding to fears of guns carried by Blacks and Italians.[219] The National African American Gun Association also responded to such invocations for considering the

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[211] *Id.* at 54-55.

[212] Strict Scrutiny, *Arbitration Rat*, CROOKED MEDIA, at 29:04 (Nov. 8, 2021), https://crooked.com/podcast-series/strict-scrutiny/#all-episodes [hereinafter *Arbitration Rat*].

[213] Transcript of Oral Argument, *supra* note 143, at 93-94.

[214] *Arbitration Rat*, *supra* note 212, at 33:55.

[215] *See generally supra* Part I; CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA (2021).

[216] ANDERSON, *supra* note 1, at 163-65.

[217] Bogus, *supra* note 9, at 1367.

[218] Transcript of Oral Argument, *supra* note 143, at 93.

[219] Transcript of Oral Argument, *supra* note 143, at 93-94.

racist history of the Second Amendment by asserting that the Reconstruction Amendments help secure "[t]he truism that 'the people' in the Second Amendment and other Bill of Rights guarantees really means all of the people[.]"[220]

PART V. CONCLUSION

To conclude, the Supreme Court issued an opinion in June 2022, which struck down New York's licensing law for concealed carry for self-defense. [221] In doing so, the Court established that the proper inquiry for Second Amendment analysis of firearms regulations looks to the text and historical understanding, as opposed to applying means-end scrutiny. Given the Court's conservative majority, such a broad ruling disfavoring New York's licensing regime seemed probable.[222]

Moreover, predictably, the conservative majority stuck to history of the Second Amendment found in *Heller*. The Supreme Court did not adopt a view of the Second Amendment that deems it akin to the three-fifths clause, as advocated by scholars like Carol Anderson and Carl Bogus.[223]

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[220] Brief for National African American Gun Association, Inc., *supra* note 52, at 18.

[221] New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[222] *See supra* Part IV.

[223] *See supra* Part IV.