NEW YORK STATE RIFLE & PISTOL ASSOCIATION INC. V. BRUEN—AND THE PREDICTIVE QUALITIES OF CLARENCE THOMAS'S POST-*HELLER* DISSENTS FROM DENIALS OF CERTIORARI

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I. INTRODUCTION

The Supreme Court issued its opinion *District of Columbia v. Heller*[1] in 2008. *Heller* was a landmark decision in which the Court held that the Second Amendment[2] protects an individual citizen's right to keep arms that are "in common use" for traditionally lawful purposes, such as self-defense within the home.[3] The court also confirmed that this right is not connected to nor dependent upon service in an organized militia.[4] In 2010, the Court followed *Heller* with another Second Amendment decision, *McDonald v. City of Chicago*.[5] The *McDonald* Court held that the Fourteenth Amendment makes the rights articulated in *Heller* fully applicable to the states.[6]

Despite opportunities to do so—and despite granting certiorari in a number of other Bill of Rights cases—the Supreme Court declined to hear another firearms case until granting certiorari eleven years later in *New York State Rifle & Pistol Association Inc. v. Bruen*.[7] The Court's refusal to hear Second Amendment cases in this interim drew the ire of certain justices, in particular Clarence

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1. District of Columbia v. Heller, 554 U.S. 570 (2008).

2. This Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

3. *Heller*, 554 U.S. at 627–29, 635.

4. *See id.* at 600.

5. *See* McDonald v. City of Chi., 561 U.S. 742 (2010).

6. *Id.* at 791.

7. N.Y. State Rifle & Pistol Ass'n v. Bruen, 141 S. Ct. 2566 (2021).

Thomas.[8] In dissents from denials of certiorari, Justice Thomas opined on a number of lower court decisions that in his view ran afoul of or simply disregarded *Heller* or *McDonald*.[9] Justice Thomas also expressed frustration with the Supreme Court's reluctance to correct lower courts' refusals to comply with its precedent. He asserted that the Court would have granted review and insisted on compliance had the cases involved some of the Court's more-favored rights, such as those protected by the First or Fourth Amendments.[10]

This article first posits that in the wake of *Bruen*, Justice Thomas's dissents from denials of certiorari after *Heller* and *McDonald* will be useful to anticipate the Supreme Court's direction in future Second Amendment cases. This article compares Justice Thomas's dissents to *Heller* and determines that—though observant of *Heller*—the dissents also ventured beyond *Heller*'s holding in significant ways. Material parts of this extra-*Heller* reasoning informed the majority result in *Bruen*—particularly on the issues of publicly carrying arms and self-defense outside the home.[11]

Second, by examining *Bruen* and comparing it to Justice Thomas's extra-*Heller* reasoning in his dissents from denial of certiorari, this article determines that the correlation between those dissents and the result in *Bruen* is so strong as to indicate that the dissents will be useful in efforts to predict the Court's direction in future Second Amendment cases.

Third, this article notes that in dissents from denials of certiorari, like *Peruta v. California* in 2017,[12] Justice Thomas persuasively argued that the Supreme Court had discriminated against the Second Amendment by refusing to grant certiorari in firearms cases with the same frequency as cases involving the Court's "more-favored" rights, such as those protected by the First

8. *See, e.g.*, Jackson v. City & Cnty. of S.F., 576 U.S. 1013 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

9. *See id.* at 1014 ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.").

10. *See, e.g*, Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari) ("abortion, speech, and the Fourth Amendment are three of [the Court's] favored rights. The right to keep arms is apparently this Court's constitutional orphan.").

11. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843, slip op. at 24 (U.S. June 23, 2022); *Jackson*, 576 U.S. at 1015.

12. *See* Peruta v. California, 137 S. Ct. 1995 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

and Fourth Amendments.[13] However, factors such as changes to the court's composition beginning with Neil Gorsuch's 2017 confirmation, the Court's granting certiorari in a firearms case like *Bruen*, and the ultimate 6-3 ruling in that case[14] now may herald an increased willingness on the Court's part to hear Second Amendment issues. If this is the case, then Justice Thomas's dissents will become proportionally more useful as a review of Second Amendment issues in the Supreme Court becomes more frequent.

Finally, this article selects a few issues from Justice Thomas's dissents that in the author's view may be ripe for further development in future case law. These include whether *Bruen*'s "text, history, and tradition" test should apply to restrictions on a citizen's amassing additional arms after that citizen already has arms of a sufficient type and quantity to secure his or her Second Amendment rights or whether some other test, such as a balancing inquiry, should apply instead. These issues also include whether there exists a "core" versus "non-core" distinction or hierarchy of rights within the Second Amendment and if so, what tests properly apply to restrictions on "non-core rights" as compared to the *Bruen* test applicable to "core rights."

II. JUSTICE THOMAS'S POST-*HELLER* DISSENTS FROM DENIALS OF CERTIORARI

A. Heller*'s Clarity on Three Principles*

Commentators have differing views on the public safety implications of *Heller*. Regardless of one's policy preferences, one would be hard-pressed to deny this decision's clarity on three matters. First, the Second Amendment grants citizens an individual right—independent of service in an organized militia—to keep arms that are "in common use."[15] Arms that are "in common use" include modern firearms which were not yet developed or in use at the time of the founding.[16] Second, the amendment includes among its "core" protections the right to defend one's self and one's family in the home (and to use firearms that are "in common

13. *See id.* at 1999.
14. *See Bruen*, slip op. at 6.
15. *See* District of Columbia v. Heller, 554 U.S. 570, 624, 627 (2008).
16. *Id.* at 582.

use" for this purpose).[17] Third, restrictions that have the effect of eliminating a citizen's ability to employ arms that are "in common use" to defend hearth and home are unconstitutional—and no level-of-scrutiny or balancing tests need be applied to so hold.[18]

Justice Thomas consistently invoked *Heller*'s principles as the basis for his pre-*Bruen* dissents from denials of petitions for certiorari.[19] As noted, however, he also opined beyond the precise factual and legal bounds of *Heller* on a number of issues.[20] These include, e.g., the extent to which a certain type of firearm is owned by the United States population as a measure of whether the firearm is in "common use," the ability to carry firearms outside the home or in public places, and the inapplicability of balancing or tiers-of-scrutiny tests in determining the rights of those who already own guns to obtain additional weapons.[21] Some of Justice Thomas's observations are simply mechanical applications of *Heller* to different facts. Other observations—had they been part of a majority decision—would have constituted newly articulated principles of Second Amendment jurisprudence.[22]

Analyses comparing Justice Thomas's dissents from denials of certiorari to the four corners of the *Heller* decision are set out below.

B. 2015—Jackson v. City and County of San

17. *Id.* at 634–35.

18. *Id.*

19. *See, e.g.*, Peruta v. California, 137 S. Ct. 1995, 1996, 1998 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari); Silvester v. Becerra, 138 S. Ct. 945, 945, 950 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari).

20. *See, e.g.*, *Peruta*, 137 S. Ct. 1995, 1997–1999; Friedman v. City of Highland Park, 136 S. Ct. 447, 448 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari).

21. *See* Peruta v. California, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., dissenting from denial of certiorari) (pertaining to whether there is a right to carry firearms in public for self-defense); Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of certiorari) (pertaining to whether there is a right to own "AR-style semiautomatic rifles" and noting the number of people who own such weapons); Jackson v. City and County of S.F., 576 U.S. 1013, 1014–15 (2015) (Thomas, J., dissenting from denial of certiorari) (pertaining to the propriety of a circuit court's decision to use intermediate scrutiny in assessing a city's firearm law).

22. *See Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of certiorari) (contending that a right to own "AR-style semiautomatic rifles" exists under the Second Amendment because approximately five million Americans own such weapons and a majority use them "for lawful purposes").

Francisco*: Immediate Access to a Firearm When It Is Not Carried on the Person and No Intermediate Scrutiny Test for Self-Defense with a Gun in the Home*

In *Jackson v. City and County of San Francisco*, the Ninth Circuit affirmed the denial of a preliminary injunction directed at preventing enforcement of a San Francisco city code that prohibited keeping a handgun in a residence unless the handgun (1) was stored in a locked container or disabled by a trigger lock or (2) was carried on the person of an individual more than eighteen years old or was under the control of a peace officer.[23]

In terms of the need for "immediate self-defense" or other emergency situations, there existed material differences between the San Francisco code in *Jackson* and the District of Columbia statute at issue in *Heller*.[24] In addition to making handgun possession in the home completely unlawful, the statute in *Heller* also required that any lawful firearm in the home (e.g., a long gun) be rendered inoperable for purposes of immediate self-defense.[25] Although not addressing lawful long guns (at the time)[26] , the code at issue in *Jackson* only required that handguns (the type of firearm that *Heller* identified as the "most popular weapon" selected by Americans for self-defense in the home)[27] be rendered inoperable in the home unless carried on the person of an adult or under the control of a peace officer.[28]

In practical effect, the statute in *Heller* was more restrictive than the code in *Jackson*. Both provisions made it impossible to immediately access a handgun for purposes of self-defense while the owner was at home and "sleeping, bathing, changing clothes, or

23. Jackson v. City and Cnty. of S.F., 746 F.3d 953, 958 (9th Cir. 2014), *cert. denied*, 576 U.S. 1013 (2015).

24. *See id.* at 964 (distinguishing the San Francisco Code at issue because it "does not impose the sort of severe burden imposed by the handgun ban at issue in *Heller* . . . [or] substantially prevent law-abiding citizens from using firearms to defend themselves in the home").

25. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

26. This section of the San Francisco Police Code was later amended to include all firearms. *See* S.F., Cal., Bd. of Supervisors Ordinance No. 97-16, § 1 (June 17, 2016) (amending the Police Code to prohibit any person from keeping a firearm within any residence unless the firearm is stored in a locked container or disabled with a trigger lock).

27. *Heller*, 554 U.S. at 629.

28. *Jackson*, 746 F.3d at 958.

otherwise indisposed" and consequently, "most vulnerable."[29] But unlike the statute in *Heller*, the code in *Jackson* did not prohibit an individual more than eighteen years of age from carrying an operable handgun *on his or her person* while in the home.[30]

The Ninth Circuit in *Jackson* upheld the challenged code section by applying an intermediate scrutiny standard.[31] The court concluded the ordinance served a significant government interest by reducing gun-related injuries and deaths resulting from an unlocked gun in the home and the ordinance was substantially related to that interest.[32] The Supreme Court in *Heller*, in contrast, stated that the level-of-scrutiny or balancing tests were not properly applied to core protections of an "enumerated constitutional right" that the Court determined to include "handgun possession in the home" and the ability to have lawful firearms "in the home [and] operable for the purpose of immediate self-defense."[33]

i. Immediate Access to a Handgun for Self-Defense in the Home

Joined by Justice Antonin Scalia, Justice Thomas dissented from the denial of certiorari in *Jackson*.[34] Justice Thomas reasoned that in allowing the San Francisco code to prevent a citizen's immediate access to a handgun in the home when the citizen was sleeping, bathing, changing clothes, or otherwise indisposed,[35] the Ninth Circuit in *Jackson* disregarded *Heller*'s holding that a citizen has a Second Amendment right to access a lawful firearm for "the purpose of immediate self-defense" in the home.[36]

ii. Disapproval of Level-of-Scrutiny Tests, Including Intermediate Scrutiny

Justice Thomas also pointed out that in applying a level-of-scrutiny test, i.e., intermediate scrutiny, to the San Francisco code,

29. Jackson v. City and Cnty. of S.F., 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting from denial of certiorari); *cf. Heller*, 554 U.S. at 630 (noting that the District of Columbia Statute required "firearms in the home be rendered and kept inoperable").

30. *Compare Heller*, 554 U.S. at 573–75, *with Jackson*, 746 F.3d at 958.

31. *Jackson*, 746 F.3d at 965–66.

32. *Id.*

33. *Heller*, 554 U.S. at 634–35.

34. *Jackson*, 576 U.S. at 1013 (Thomas, J., dissenting from denial of certiorari).

35. *Id.* at 1015.

36. *Id.* at 1015–16.

Jackson likely ran afoul of *Heller* a second time.[37] Per *Heller*, the ability to access a lawful firearm "for the purpose of immediate self-defense" in the home is a "core protection" of the Second Amendment.[38] Consequently, no level-of-scrutiny or balancing test was required to rule that this denial of core protection of an enumerated right is unconstitutional.[39]

iii. Takeaway Points and Predictive Considerations

In *Jackson*, Justice Thomas was likely correct to assert the Ninth Circuit decision disregarded *Heller* in at least two ways: first, in applying an incorrect substantive rule on the scope of the Second Amendment in light of *Heller* and, second, in applying an incorrect standard of review. The takeaway points from Justice Thomas's *Jackson* dissent would be that under *Heller*, (1) the Second Amendment assures citizens of the right to immediately access an operable handgun for purposes of self-defense in the home, and (2) intermediate scrutiny is a balancing test that cannot be properly applied in reviewing restrictions on the right of citizens to keep and use handguns for self-defense in the home.

Nevertheless, important factual distinctions exist between *Jackson* and *Heller*. These distinctions indicate that Justice Thomas would extend Second Amendment rights slightly beyond the facts of *Heller*. That decision involved a complete ban on handgun possession in the home and required that any lawful long gun in the home be disassembled or rendered inoperable by a trigger lock.[40] The *Heller* Court also held that the District of Columbia must permit the petitioner "to register his handgun and must issue him a license to carry it in the home."[41] Justice Thomas's dissent in *Jackson* makes clear that even when the gun is <u>not</u> carried on the person in the home, *Heller*'s determination that the Second Amendment protects immediate access to an operable handgun for purposes of self-defense prohibits requirements that when not

37. *See id.* at 1016 ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

38. *See Heller*, 554 U.S. 634–35.

39. *See id.* at 628–29, 634–35.

40. *See id.* at 628.

41. *Id.* at 635.

carried on one's person, fully assembled guns in the home be kept in a locked container or disabled by a trigger lock.[42]

C. 2015—Friedman v. City of Highland Park*: Reaffirmation of* Heller*'s Three Principles, Plus a Possible Extent-Of-Ownership Metric for Determining Whether a Firearm Is "In Common Use"*

Again joined by Justice Scalia, Justice Thomas dissented from the denial of certiorari of the Seventh Circuit's decision *Friedman v. City of Highland Park*.[43] At issue in *Freidman* was a city code banning possession of many "commonly owned semiautomatic firearms," such as AR-15-style semiautomatic weapons that "the city branded 'Assault Weapons.'"[44] The code also prohibited "Large Capacity Magazines," by which the city meant "nearly all ammunition feeding devices that 'accept more than ten rounds.' "[45]

The first portion of Justice Thomas's dissent criticized the Seventh Circuit's test for whether the code offended the Second Amendment.[46] Justice Thomas disapproved of the Seventh Circuit's limiting "*Heller* to its facts" by reading the decision "to forbid only total bans on handguns used for self-defense in the home" and pronounced that all other questions about the Second Amendment "should be defined by 'the political process and scholarly debate.'"[47] Based on this "crabbed reading," he continued, the Seventh Circuit felt at liberty to adopt a test asking whether the banned firearms were common at the time of ratification of the Bill of Rights in 1791, or alternatively whether the banned firearms relate to the preservation or efficiency of the militia and then also asking whether despite the ban, citizens retain adequate means of self-defense.[48]

42. *Jackson*, 576 U.S. at 1013–14. (Thomas, J., dissenting from denial of certiorari).

43. Friedman v. City of Highland Park, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari).

44. *Id.* at 447.

45. *Id.*

46. *Id.* at 448.

47. *Id.* (quoting Freidman v. City of Highland Park, 784 F.3d 407, 412 (7th Cir. 2015)).

48. *Id.* at 448–49.

i. The Right to Keep and Bear Arms "In Common Use" for Lawful Purposes Such as Self-Defense Independent of Service in an Organized Militia

Fairly viewed, the Seventh Circuit's asking "whether a regulation bans firearms that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well-regulated militia . . . and whether law-abiding citizens retain adequate means of self-defense"[49] appears impossible to reconcile with *Heller*. In the first portion of his analysis, Justice Thomas explained why all three of these inquiries run afoul of the Supreme Court's precedent.[50]

First, asking whether a banned weapon was common at the time the Second Amendment was ratified is at odds with *Heller*'s determination that such inquiries border "on the frivolous."[51] This is because, just as the First Amendment protects "modern forms of communication" and the Fourth Amendment applies to "modern forms of search," the Second Amendment protects arms "not in existence at the time of the founding."[52]

Second, *Friedman*'s statement that the preservation or efficiency of a well-regulated militia was not negatively impacted by the code provision because "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms"[53] could not be correct given *Heller*'s determination that the right to keep and bear arms is an independent, individual right "not defined by what the militia needs" but "by what private citizens commonly possess."[54] In addition, Justice Thomas noted, "*Congress* retains plenary authority to organize the militia" contemplated in the Second Amendment, not the States.[55]

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49. *Id.* (quoting *Friedman*, 784 F.3d at 410) (internal quotation marks omitted).

50. *Id.*

51. *Heller*, 554 U.S. at 582.

52. *Friedman*, 136 S. Ct. at 448 (quoting *Heller*, 554 U.S. at 582).

53. *Id.* at 448–49 (quoting *Friedman*, 784 F.3d at 410) (internal quotation marks omitted). The Seventh Circuit appears factually mistaken in asserting that a semi-automatic AR-15 rifle constitutes a "military-grade firearm." The military version of the AR-15 rifle, known as the M16, is unlike the AR-15 in that the M16 can be fired in fully automatic mode. *See, e.g.*, *M16 rifle*, WIKIPEDIA, https://en.wikipedia.org/wiki/M16_rifle (last visited Oct. 30, 2022).

54. *Id.* at 449.

55. *Id.* (emphasis original) (quoting *Heller*, 554 U.S. at 600).

Third, *Friedman*'s asking whether law-abiding citizens retain adequate means of self-defense[56] was the wrong inquiry because "*Heller* asks whether the law bans types of firearms commonly used for lawful purposes—regardless of whether alternatives exist."[57] Justice Thomas also noted "[r]oughly five million Americans own AR-style semiautomatic rifles" and the "overwhelming majority of citizens who own and use such rifles do so for lawful purposes," such as self-defense and target shooting.[58] Under *Heller* and *McDonald*, Justice Thomas stated, this number of citizens owning or using the AR-style rifle for lawful purposes was "all that is needed for citizens to have a Second Amendment right to keep such weapons."[59]

ii. Rejection of Balancing Approaches

Justice Thomas directed the second portion of his analysis to reject the Seventh Circuit's interest balancing test. The Seventh Circuit wrote that the ban "'may increase the public's sense of safety,' which alone is a 'substantial benefit.' "[60] Here, Justice Thomas reminded courts that *Heller* "forbids subjecting the Second Amendment's 'core protection . . . to a freestanding "interest-balancing" approach.' "[61] Contrary to this admonition, the Seventh Circuit upheld the city code by balancing the benefits of so-called "assault weapons" against the salutary effects of the challenged code section.[62] The court of appeals conceded that the prohibited weapons "can be beneficial for self-defense because they are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers."[63] However, balancing this benefit against the city's prohibition, the court of appeals reasoned,

> [i]f it has no other effect, Highland Park's ordinance may increase the public's sense of safety . . . . If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and

56. *Id.*
57. *Id.* (citing *Heller*, 554 U.S. at 627–29).
58. *Id.* (citing *Friedman*, 784 F.3d at 415 n.3).
59. *Id.* (citing McDonald v. City of Chi., 561 U.S. 742, 767-68 (2010); *Heller,* 554 U.S. at 628–29).
60. *Id.* (quoting *Friedman*, 784 F.3d at 412).
61. *Id.* (quoting *Heller*, 554 U.S. at 634).
62. *See id.* (citing *Friedman*, 784 F.3d at 411–12).
63. *Id.* at 447 (quoting *Friedman*, 784 F.3d at 411) (internal quotation marks omitted).

> makes the public feel safer as a result, that's a substantial benefit.[64]

Justice Thomas dismissed this rationale, noting *Heller* makes clear that interest-balancing is an improper standard when a core protection of the Second Amendment such as self-defense is at issue.[65]

iii. Takeaway points and predictive considerations

Compared to *Heller*, most (though not all) points in the first part of Justice Thomas's dissent appear quite sound. First, *Heller* rejected the argument that the Second Amendment only protects arms in existence at the time of the Bill of Rights ratification (almost to the point of mocking it).[66] Second, *Heller* confirmed the Second Amendment grants individual citizens the right to keep arms in common use for purposes of self-defense,[67] and it emphasized that Congress has the plenary power to call forth and organize the militia.[68] Third, Justice Thomas's point that the scope of the individual right to keep arms is defined "not by what the militia needs, but by what private citizens commonly possess" is also well-grounded in *Heller*'s language.[69] The *Friedman* prohibition extended to homes located within the city limits,[70] and preventing citizens from using an arm in common use for self-defense in the home would plainly impinge on a core protection of the Second Amendment under *Heller*.[71]

But on this third point, it does not necessarily follow from *Heller* that ownership and use of a certain type of firearm by five million citizens suffice to show that type of arm is "in common use" for purposes of *Heller*'s analysis. Justice Thomas seems to have assumed that in a nation of roughly 258 million adults,[72] five million

64. *Friedman*, 784 F.3d at 412.
65. *Friedman*, 136 S. Ct. at 449 (citing *Heller*, 554 U.S. at 634).
66. *See Heller*, 554 U.S. at 582.
67. *Id.* at 628–29.
68. *See id.* at 596.
69. *Friedman*, 136 S. Ct. at 449 (citing *Heller*, 554 U.S. at 592, 627–29).
70. *Id.* at 447; *see Friedman*, 784 F.3d at 407.
71. *See Heller*, 554 U.S. at 624, 634, 636.
72. *See* Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts and Zoe Caplan, *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021),

Americans' possession and use of AR-style semiautomatic rifles for lawful purposes demonstrates this rifle is in common use for purposes of *Heller*.[73] Five million owners in a population of 258 million translates to a national ownership rate of only about 2 percent.

Heller did not rely on a numerical yardstick or "percentage-of-the-population-who-own" type of metric to determine if a given type of arm is in common use.[74] *Heller* simply observed that "handguns are the most popular weapon chosen by Americans for self-defense in the home" such that a "complete prohibition of their use is invalid."[75] But by way of comparison, a 2017 Gallup poll found that 42 percent of U.S. households reported owning a gun.[76] In the same year, the Pew Research Center found that among all gun owners, 72 percent stated that they own a handgun.[77] While gun ownership rates may have increased since 2017, looking at these numbers together suggests roughly 30 percent of the U.S. adult population may own a handgun. Obviously, there is a difference between a roughly thirty-percent ownership rate for handguns and a 2 percent ownership rate for AR-style rifles. Justice Thomas may not have given this difference due consideration in concluding that five million law-abiding owners (roughly a 2 percent ownership rate) make the AR-style rifle sufficiently in common use to fall under *Heller*'s protections.[78]

In the second part of his analysis, Justice Thomas was plainly correct to observe that *Heller* had disapproved of balancing tests for

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https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html.

73. *See Heller*, 554 U.S. at 627. "Common" is defined as "occurring or appearing frequently." *Common*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/common (last visited Oct. 25, 2022).

74. *See generally Heller*, 554 U.S. at 624–28 (discussing what types of weapons are considered "in common use").

75. *Id.* at 629.

76. *See* Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 19, 2018, 10:31 AM), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership.

77. *See* Kim Parker et al., *America's Complex Relationship With Guns, No. 1: The Demographics of Gun Ownership*, PEW RSCH. CTR. (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership.

78. *See generally Heller*, 554 U.S. at 624–28.

determining whether restrictions on citizens possessing arms in common use for defense in the home are constitutional.[79]

At bottom, a comparison to the facts and language in *Heller* shows three of the four points in Justice Thomas's *Friedman* dissent are well-grounded in the four corners of *Heller*. Where Justice Thomas appears to want to expand *Heller* is by using some type of numerical metric for gauging whether a firearm is sufficiently in common use to warrant Second Amendment protection as well as using a lower numerical threshold for protection that might be suggested in *Heller*.

D. 2017—Peruta v. California*: A Portending of* Bruen*'s Holding of a Right to Public Carry and Criticism of the Court's Failure to Grant Certiorari in Second Amendment Cases with the Same Frequency as Cases Involving Other Amendments*

In *Peruta v. California*, Justice Thomas, joined by Justice Gorsuch, dissented from the denial of certiorari in a Ninth Circuit case upholding restrictions on the public carry of firearms.[80] At issue was a California statute generally prohibiting citizens from openly carrying firearms and also prohibiting concealed carry unless a citizen could demonstrate the "good cause" required to obtain a concealed-carry permit.[81] The county sheriff where the petitioners resided interpreted "good cause" to mean that the applicant must "show a set of circumstances that distinguish the applicant from the mainstream and cause him to be placed in harm's way."[82] The sheriff's policy specified that "'concern for one's personal safety' does not 'alone' satisfy this requirement."[83] This formulation meant that the "typical citizen fearing for his personal safety—by definition—cannot distinguish himself from the

79. *Compare* Friedman v. City of Highland Park,136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) (noting *Heller* forbids subjecting Second Amendment core protections to balancing tests) *with Heller*, 554 U.S. at 634 (noting core protections of Second Amendment, like core protections of other enumerated rights, are not subject to a freestanding "interest-balancing" approach).

80. Peruta v. California, 137 S. Ct. 1995 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

81. *Id.* at 1996 (citing CAL. PENAL CODE §§ 25850, 26150, 26155, 26160, 26350).

82. *Id.* (quoting Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1169 (9th Cir. 2014) (internal quotation marks and alterations omitted)).

83. *Id.* (quoting *Peruta*, 742 F.3d at 1148).

mainstream."[84] As a consequence, ordinary law-abiding citizens could not obtain a concealed carry permit.[85]

The petitioners were San Diego County residents who were unable to qualify for concealed-carry permits, and because California generally banned the open carry of firearms, they were also unable to "bear firearms in public in any manner."[86] The district court granted summary judgment in favor of the state, and the petitioners appealed.[87] The Ninth Circuit reversed, holding that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense . . . constitutes 'bear[ing] Arms' within the meaning of the Second Amendment."[88]

The Ninth Circuit sua sponte granted rehearing en banc.[89] But on rehearing, the court declined to "answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public."[90] Instead, the en banc court held only that "the Second Amendment does not preserve or protect a right of a member of the general public to carry *concealed* firearms in public" and reversed the panel decision on those grounds.[91]

Much of Justice Thomas's criticism of the Ninth Circuit en banc decision was directed to the court of appeals dodging the real issue. In limiting its decision to whether the Second Amendment protected a right of concealed carry, the Ninth Circuit avoided the petitioners' actual challenge.[92] That challenge was whether the Second Amendment protects a "general right to public carry"—whether open *or* concealed—not a right to concealed carry alone.[93] Had the en banc court addressed the true issue, i.e., "the right to carry firearms in public in some fashion,"[94] Justice Thomas opined, "it likely would have been compelled to reach the opposite result."[95]

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84. *Id.* (quoting *Peruta*, 742 F.3d at 1169) (alterations omitted) (emphasis omitted) (internal quotation marks omitted).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1997 (quoting *Peruta*, 742 F.3d at 1166).

89. *See id.*

90. *Id.*(quoting Peruta v. Cnty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016)(en banc)).

91. *Id.* (quoting *Peruta*, 824 F.3d at 924) (emphasis added).

92. *Id.*

93. *Id.*

94. *Id.* at 1998.

95. *Id.*

i. A Portending of the Right to Public Carry

Justice Thomas's dissent plainly finds some support in *Heller*'s language. In *Heller*, the Court determined that the phrase "bear Arms" as used in the Second Amendment means "to wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person."[96] And as Justice Thomas wryly remarked, it was "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen."[97] Quoting a Third Circuit dissent, Justice Thomas also reasoned that to "speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping' in derogation of the [*Heller*] Court's holding that the verbs codified distinct rights but would also be awkward usage given the meaning assigned the terms by the Supreme Court."[98]

Turning to historical sources, Justice Thomas noted that the earlier panel opinion had pointed to many cases and secondary sources from England, the founding era, the antebellum period, and Reconstruction that taken together strongly suggest that the right to bear arms includes the right to publicly bear arms in some manner.[99] *Heller* had credited one case in particular, *Nunn v. State*,[100] with "perfectly captur[ing] the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause."[101] In *Nunn*, the Georgia Supreme Court struck down a ban on open carry, though it upheld a ban on concealed carry—thus suggesting that while some regulation on public carry is permissible, a complete ban is not.[102]

Justice Thomas also reminded the court that *Heller* emphasized self-defense as "the *central component*" of the Second Amendment right and noted that while that purpose may be "most

96. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 584 (2008) (citation omitted) (quotation marks omitted).

97. *Id.*

98. *Id.* (quoting Drake v. Filko, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting)).

99. *Id.*

100. Nunn v. State, 1 Ga. 243, 251 (1846).

101. *Heller*, 554 U.S. at 612.

102. *Peruta*, 137 S. Ct. at 1998 (citing *Nunn*, 1 Ga. at 251).

acute" in the home, it should not be limited to the home.[103] Rather, "'[s]elf-defense has to take place wherever the person happens to be,' and in some circumstances, a person may be more vulnerable in a public place than in his own house."[104]

To be fair to the Ninth Circuit's en banc opinion, one must note that Justice Thomas directed much of his dissent to suggest that some right to carry firearms outside the home must be protected under the Second Amendment's "bear Arms" language when the right to carry or bear arms outside the home was not at issue in *Heller*. The Supreme Court in *Heller* did determine that self-defense is a central component of the Second Amendment and that the need to exercise this right is most acute in the home.[105] Although a right to carry arms outside the home for purposes of self-defense finds support in the text and non-Supreme Court authorities that *Heller* cited, the issue was not presented in that case.

To be fair to Justice Thomas, one should realize his dissent acknowledges that public carry was not the issue in *Heller*. This appears to be why Justice Thomas posited his frustration with the Court's declining to grant certiorari, not, as in *Friedman*, on the lower court's flouting the black-letter law of *Heller*.[106] Rather, Justice Thomas pointedly criticized the Court's repeated refusals to grant certiorari on the gun-carry issue. With straightforward math, he demonstrated a large discrepancy in the court's granting certiorari in many cases involving the First and Fourth Amendments while at the same time refusing to grant review in Second Amendment cases despite numerous opportunities to do so.[107] Describing the discrepancy as "inexcusable," Justice Thomas concluded, "[t]he Court's decision to deny certiorari . . . reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."[108]

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103. *Id.* (quoting *Heller*, 554 U.S. at 599, 628) (emphasis original).

104. *Id.* at 1998–99 (citation omitted).

105. *Heller*, 554 U.S. at 599.

106. *See* Friedman v. City of Highland Park, 136 S. Ct. 447, 449–50 (2015) (Thomas, J., dissenting from denial of certiorari).

107. *Peruta*, 137 S. Ct. at 1999 (noting that at the time, twenty-six states had asked the Court to resolve the issue and at least four federal Courts of Appeal and three state courts had decided cases addressing public carry with results on both sides of the issue; further noting that the Court had not heard argument in a Second Amendment case in seven years, while in this same period, the Court had heard thirty-five cases turning on the meaning of the First Amendment and twenty-five turning on the meaning of the Fourth Amendment).

108. *Id.*

ii. One Takeaway Point Predictive of the Result in *Bruen* and Another That May Be Predictive of an Increased Willingness in the Court to Hear Second Amendment Issues

Of the two principal takeaways from this dissent, the first was plainly predictive. Justice Thomas signaled his view that the reasoning—albeit not the holding—of *Heller* indicates the Second Amendment protects some type of right to bear or carry firearms outside the home. As discussed below, the Supreme Court in *Bruen* subsequently ruled in favor of a right to public carry.[109] The *Bruen* Court's 6-3 ruling in favor of public carry demonstrates that Justice Thomas's positions in his earlier dissents from denials of certiorari were predictive of the direction of the current Court on the meaning of the Second Amendment.[110]

Second, comparing the number of opportunities the court took to grant certiorari in cases involving other amendments to declined opportunities in Second Amendment cases suggests the court was avoiding Second Amendment issues. Justice Thomas was uncomfortable with what he viewed as a type of discrimination against the Second Amendment. Given the 6-3 ruling in *Bruen* and the Court's current composition, other justices may also be of the view that the Court's avoidance of Second Amendment issues cannot be excused. This may foreshadow a more active Second Amendment docket in the Supreme Court.

E. 2018—Silvester v. Becerra*: The Additional Rejection of Balancing Tests and Lower Courts' Refusal to Follow Precedent; Tentative Endorsement of a Text, History, and Tradition Approach; and Disapproval of Balancing Tests for Subsequent Purchasers*

The Supreme Court again denied certiorari on a Ninth Circuit case and Justice Thomas again dissented in *Silvester v. Becerra*.[111] At issue was a California Penal Code provision requiring citizens who were not peace officers or special permit holders to

109. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

110. *Id.* at 2111.

111. Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari).

wait ten days after initiating the purchase of a firearm before taking delivery of the gun.[112] The prohibition applied to all types of firearms, whether handguns, rifles, or shotguns.[113] The petitioners challenged the code provision "as applied to 'subsequent purchasers'—individuals who already own a firearm according to California's [Automated Firearms Systems] database and individuals who have a valid concealed-carry license."[114]

i. More Rejection of Balancing Tests or Tiers-of-Scrutiny

Justice Thomas's dissent in *Becerra* primarily focused on the standard of review that the Ninth Circuit and other courts of appeals applied in Second Amendment cases post-*Heller*.[115] Courts of appeals generally had evaluated Second Amendment claims "under intermediate scrutiny."[116] As Justice Thomas explained, several jurists disagreed with this approach, "suggesting that courts should instead ask whether the challenged law complies with the text, history, and tradition of the Second Amendment."[117]

Though acknowledging *Heller* "did not definitively resolve the standard for evaluating Second Amendment claims," Justice Thomas affirmed that *Heller* had "rejected two proposed standards."[118] The first rejected standard was the "freestanding interest-balancing approach, which would have weighed a law's burdens on Second Amendment rights against the government interests it promotes."[119] The second was "rational basis scrutiny."[120] This standard would make the Second Amendment "redundant

112. *Id.*

113. *See id.*

114. *Id.* at 946.

115. *Id.* at 945.

116. *Id.* at 947.

117. *Id.* at 947–48 (citing Tyler v. Hillsdale County Sheriff's Dept., 837 F.3d 678, 702–03 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment); Houston v. City of New Orleans, 675 F.3d 441, 451–52 (5th Cir. 2012) (Elrod, J., dissenting), *opinion withdrawn and superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Justice Thomas acknowledged that he also had questioned this tiers-of-scrutiny jurisprudence. *Id.* at 948 n.4 (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2335–42 (2016) (Thomas, J., dissenting)).

118. *Id.* at 948.

119. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)) (internal quotation marks omitted).

120. *Id.* (quoting *Heller*, 554 U.S. at 628 n.27) (internal quotation marks omitted).

with the separate constitutional prohibitions on irrational laws" in that the amendment "would have no effect."[121]

Justice Thomas also found fault in the Ninth Circuit's purporting to apply "intermediate scrutiny" to California's ten-day waiting period when in reality, the court's approach did not "resemble anything approaching that standard."[122] "[I]ntermediate scrutiny requires a reasonable fit between the law's ends and means."[123] Justice Thomas concluded that the Ninth Circuit's analysis more closely resembled a "rational-basis review that requires only that a law be rational at a class-based level."[124] Opining that the Ninth Circuit would not have applied this standard to "any other constitutional right,"[125] Justice Thomas then rebutted the court's reasoning on three grounds.[126]

First, the state's evidence in support of the waiting period was no more than rational speculation unsupported by evidence or data.[127] The state's sole response to the argument that the waiting period would not deter a subsequent purchaser contemplating violence because that purchaser could simply use the gun he already possessed was that the subsequent purchaser might want a "larger capacity weapon that would do more damage when fired into a crowd."[128] But the state presented no evidence to support this position.[129] The state's showing in the district court consisted of one anecdotal example of a subsequent firearm purchaser who committed an act of gun violence, given by an expert who conceded that a waiting period would have done nothing to deter that individual.[130] In Justice Thomas's view, this showing amounted to no evidence (there were not even anecdotes supporting a waiting period) and could not suffice under an intermediate scrutiny standard.[131]

Second, even had the state presented more than "'speculation and conjecture' to substantiate its concern about high-capacity weapons," the Ninth Circuit did not explain why the

121. *Id.*
122. *Id.*
123. *Id.* (citation omitted); *see also id.* at 949–50.
124. *Id.*
125. *Id.*
126. *Id.* at 948–50.
127. *Id.* at 948.
128. *See id.* at 949 (citation omitted) (internal quotation marks omitted).
129. *Id.*
130. *Id.*
131. *Id.*

ten-day waiting period was "sufficiently tailored to [this] goal."[132] The waiting period was not limited to high-capacity weapons but all kinds of firearms.[133] It also included exceptions for peace officers and special permit holders who, like subsequent purchasers, had demonstrated a history of responsible gun ownership.[134] In the past, California's waiting period had also been shorter and limited to handguns; the state presented no evidence as to why the longer waiting period was needed versus the older scheme.[135] Hence, while purporting to address the first part of intermediate scrutiny by insisting that its test "requires only that the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,"[136] the Ninth Circuit abdicated on the second part. That is, the Ninth Circuit failed to ensure that the "law not 'burden substantially more [protected activity] than is necessary to further [the government's] interest.' "[137]

Third, Justice Thomas criticized the Ninth Circuit's failure to defer to the district court's factual findings, as appellate courts must do in applying intermediate scrutiny.[138] That the district court's findings pertained to physical or documentary evidence as opposed to credibility determinations did not diminish the requirement that the Ninth Circuit review the findings for clear error only.[139] The Ninth Circuit failed to observe this standard.[140]

ii. Criticism of Lower Courts' Treatment of the Second Amendment as a Second-Class Right

Addressing the Ninth Circuit judges' perceived policy leanings, Justice Thomas expressed skepticism as to whether, had the appeal instead involved a waiting period on the exercise of other constitutional rights, such as a delay for women seeking an

132. *Id.* (citations omitted).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 949–50.
137. *Id.* at 950 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 214 (1997) (internal quotation marks omitted).
138. *Id.*
139. *Id.*
140. *Id.*

abortion[141] or a five-day waiting period before one could a obtain a license to exercise one's First Amendment rights by nude-dancing,[142] the Ninth Circuit would have applied a standard that it labeled "intermediate scrutiny" but in reality was only rational-basis review.[143] Criticizing this "double standard," Justice Thomas did not shy from forceful language, stating "in the Ninth Circuit, it seems, rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text."[144]

iii. Additional Criticism of the Supreme Court's Failure to Insist on Compliance with Precedent

Justice Thomas also again voiced frustration with other members of the Supreme Court. The Court had declared in *McDonald* that "the Second Amendment is not a 'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' "[145] But since that time, he asserted, the Court's "continued refusal to hear Second Amendment cases only enables this kind of defiance" in the lower courts.[146] "If this case involved one of the Court's more favored rights," such as abortion, speech, or the Fourth Amendment, he continued, "I sincerely doubt we would have denied certiorari." Justice Thomas concluded, "[t]he right to keep and bear arms is apparently this Court's constitutional orphan.[147] And the lower courts seem to have gotten the message."[148]

iv. Takeaway Points, Including the Issue of Whether Balancing Tests Are Appropriate in the Case of Subsequent Purchasers

A synopsis of Justice Thomas's dissent in *Silvester* would include three points. First, *Heller* indicates that balancing tests are

141. *Id.* at 951 (citing Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 917 (9th Cir. 2014)).
142. *Id.* (citing Kev, Inc. v. Kitsap Cnty., 793 F.2d 1053, 1060 (9th Cir. 1986)).
143. *See id.* at 951.
144. *Id.*
145. *Id.* at 952 (quoting McDonald v. City of Chi., 561 U.S. 742, 780 (2010)).
146. *Id.* at 951.
147. *Id.* at 952.
148. *Id.*

improper in evaluating restrictions on enumerated rights like those in the Second Amendment. Second, even if balancing tests were proper, the Ninth Circuit's purported intermediate scrutiny analysis appeared almost deliberately incomplete in that the court failed to explain how the waiting period was narrowly tailored to achieve its goal. Third, the Supreme Court had demonstrated a pattern of failing to correct deviations from *Heller*—and given this inaction, lower courts were misapplying the law or ignoring precedent. Justice Thomas suggests that this inaction resulted from members of the Court being hostile to the Second Amendment in a way they would not be hostile to more favored rights.[149]

On the first point, Justice Thomas is correct that the Supreme Court precedent has stated the Bill of Rights' enshrinement of enumerated rights in the Second Amendment prevents courts from using interest-balancing tests to deprive citizens of the right to use firearms—including handguns—for self-defense in the home (and perhaps for lawful purposes elsewhere).[150] Nevertheless, the Ninth Circuit's upholding of the waiting period in *Silvester* did not deprive the petitioners of the right to use all firearms to defend themselves in the home or for other lawful purposes.[151] The petitioners were "subsequent purchasers" who presumably already owned firearms adequate to this task.[152] *Heller* did not address the right of a citizen who already owns a handgun or other firearm in common use to acquire additional firearms after her right to defend herself in the home or against state tyranny had presumably been secured by already owned firearm(s). It is not clear from *Heller* if a balancing or tiers-of-scrutiny test would be improper when it does not affect a citizen's already secured Second Amendment rights.

Without a showing of what type of firearm(s) the petitioners in *Silvester* already owned, Justice Thomas's suggestion that a balancing test would always be improper under *Heller* may be hasty.

149. *See id.* at 951 (suggesting that certiorari would not have been denied had the case involved "one of the Court's more favored rights").

150. *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008); *See also Heller*, 554 U.S. at 634–35 (stating that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms," including handguns, "in defense of hearth and home."); McDonald v. City of Chi., 561 U.S. 742, 780 (2010) (noting that the personal right to keep and bear arms was protected for "lawful purposes, most notably for self-defense within the home"—but not limiting that right to self-defense within the home).

151. *See Silvester*, 138 S. Ct. at 946.

152. *See id.* (noting that "petitioners allege that the waiting period is unconstitutional as applied to subsequent purchasers").

If a citizen's ability to defend herself is already secured because of her ownership and possession of, e.g., a 9 mm semi-automatic pistol, a 20-gauge semi-automatic shotgun, and a scoped AR-15 semi-automatic rifle, then applying some type of balancing test to the citizen's acquisition of *additional* firearms might not run afoul of *Heller*. Whether due to inadequate factual development in the district court or other reasons, neither Justice Thomas nor the Ninth Circuit touched on this issue.

At bottom, a categorical rejection of balancing or tiers-of-scrutiny tests as applied to citizens who already own firearms both in common use and adequate to the tasks of self-defense and resisting tyranny may not be required under *Heller*. But it may not be inconsistent with *Heller*, either.

On the second point, Justice Thomas's criticisms of the speculative and incomplete nature of the Ninth Circuit's balancing analysis are articulate and responsible.[153] The best that can be said of the Ninth Circuit's balancing test is that there is a slight possibility that reasonable minds might disagree on whether the test was so loosely applied that it constituted a rational-basis review.

As for Justice Thomas's third point, the figures he previously cited in *Peruta* on the number of times the Court declined to grant review in Second Amendment cases—while during the same time granting review in many First and Fourth Amendment cases—[154] likely would not have changed greatly between the time of his 2017 dissent in *Peruta* and the 2018 dissent in *Silvester*. The third point also appears well-grounded.

v. Predictive Considerations

Under *Heller*, interest-balancing or level-of-scrutiny tests should not be applied to laws that deprive citizens of core Second Amendment rights.[155] But *Heller* did not foreclose applying levels-of-scrutiny tests to laws that place limits on a citizen's access to additional arms after that citizen's Second Amendment rights are secured by arms that he already possesses.[156] Justice Thomas's

153. *See id.* at 949–50.

154. Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (mem.) (Thomas, J., dissenting from denial of certiorari).

155. *See Silvester*, 138 S. Ct. at 948.

156. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (stating that "the Constitution leaves the District of Columbia a variety of tools for combating [gun violence], including some measures regulating handguns").

dissent suggests that he supports prohibiting the use of balancing or level-of-scrutiny tests in that situation also.[157] In addition, Justice Thomas indicated his preference for adopting a test that asks whether a challenged law complies with the text, history, and tradition of the Second Amendment.[158]

Both points concretely illustrate Justice Thomas's support for moving beyond the precise bounds of *Heller* and holding that Second Amendment challenges must be reviewed by asking whether a challenged law complies with the text, history, and tradition of that amendment. And as explained below, *Bruen* adopted a text, history, and tradition approach to analyzing the Second Amendment—again confirming that certain of Justice Thomas's dissents were predictive of the Supreme Court's direction on the Second Amendment.[159]

F. 2020—Rogers v. Grewal*: Endorsement of the Text, History, and Tradition Approach as Consistent with Heller's Rejection of Two-Step Balancing, Apparent Discomfort with "Core" vs. "Non-Core" Distinctions under the Second Amendment, and a Structure for Viewing Public Carry as a "Core" Protection in Any Event*

Joined by Justice Brett Kavanaugh in two of three parts of the opinion, Justice Thomas dissented from the denial of certiorari in the Third Circuit decision *Rogers v. Grewal*.[160] At issue in *Rogers* was a New Jersey statute requiring that to obtain a permit to carry a handgun, a private citizen must "demonstrate 'that he has a justifiable need to carry a handgun.' "[161] That is, the applicant was required to "specify in detail the urgent necessity for self-protection as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than the issuance of a permit to carry a handgun."[162]

157. *See Silvester*, 138 S. Ct. at 947–48 n.4.

158. *See id.*

159. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

160. Rogers v. Grewal, 140 S. Ct. 1865 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

161. *Id.* at 1865 (quoting N.J. STAT. ANN. § 2C:58-4(c) (West 2019)).

162. *Id.* (citation omitted) (internal quotation marks omitted).

The petitioner sought a permit because his employment required him to service automated teller machines in high-risk neighborhoods, but he could not make the required showing and his application was denied.[163] The petitioner sought review on the issue of whether New Jersey's "near-total prohibition on carrying a firearm in public" violated the Second Amendment, made applicable to the states by the Fourteenth Amendment.[164]

i. The Text, History, and Tradition Test; Rejection of Two-Step Balancing

Again acknowledging that *Heller* did not provide a "precise standard for evaluating all Second Amendment claims," Justice Thomas nevertheless insisted that the decision "did provide a general framework to guide lower courts."[165] "Consistent with [*Heller*'s] guidance," he continued, "many jurists have concluded that text, history, and tradition are dispositive in determining whether a challenged law violates the right to keep and bear arms."[166]

In Justice Thomas's view, some courts had claimed that *Heller* lacked clarity on how to analyze future cases and used this "self-created" analytical vacuum to create a "two-step inquiry" applying "tiers of scrutiny on a sliding scale."[167] These courts first asked "whether the challenged law burdens conduct protected by the Second Amendment."[168] If so, those courts proceeded to their second step, i.e., determining the appropriate level of scrutiny.[169] These courts generally "consider 'how close the law comes to the core of the Second Amendment right' and the 'severity of the law's burden on the right.' "[170] Depending on their analysis of these two factors, those courts then applied what purports to be either intermediate or strict scrutiny—"at least recognizing that *Heller* barred the application of rational basis review."[171]

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163. *Id.*
164. *Id.* at 1866 (citing McDonald v. City of Chi., 561 U.S. 742, 750 (2010)).
165. *Id.*
166. *Id.* (citation omitted).
167. *Id.* (citation omitted).
168. *Id.* at 1867 (quoting United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) (internal quotation marks omitted)).
169. *Id.*
170. *Id.* (quoting *Chovan*, 735 F.3d at 1138).
171. *Id.* (citing *Chovan*, 735 F.3d at 1137).

Rejecting these two-step tests as "entirely made up,"[172] Justice Thomas expressed multiple concerns. His first was that the Second Amendment itself provides "no hierarchy" of rights in which "core" rights cannot be subjected to level-of-scrutiny or balancing tests, but "peripheral rights" are subject to such tests.[173]

Second, Justice Thomas opined that nothing in the Supreme Court's precedent supported this type of two-step inquiry, which had been described as a "tripartite binary test with a sliding scale and a reasonable fit."[174] Justice Thomas protested that—despite *Heller*'s rejection of interest-balancing tests that place the Second Amendment on one side and government interests on the other[175]—so many courts of appeals had adopted interest-balancing schemes that one scholar had contended the "interest balancing approach has ultimately carried the day, as lower courts systematically ignore the Court's actual holding in *Heller*."[176]

Elaborating on the history of public carry issues and other concerns later in the dissent, Justice Thomas asserted third that there was a split of authority among courts on whether "good cause" or "justifiable need" restrictions on public carry violate the Second Amendment. The majority of states that regulated public carry in varying degrees had not imposed such a restriction, but a handful had.[177] Federal courts of appeals were divided on the issue. For example, the D.C. Circuit held that a law limiting public carry to those with a "good reason to fear injury to [their] person or property" violates the Second Amendment.[178] In contrast, the First, Second, Third, and Fourth Circuits have upheld the constitutionality of licensing schemes with "justifiable need" or "good reason" requirements, applying an intermediate scrutiny standard.[179] From Justice Thomas's perspective, granting certiorari

172. *Id.*

173. *Id.*

174. *Id.* (quoting Duncan v. Becerra, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017)) (internal quotation marks omitted).

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

176. *Id.* (citing Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012); *see also Rogers*, 140 S. Ct. at 1867 (stating that "with what other constitutional right would this Court allow such blatant defiance of its precedent?").

177. *Id.* at 1874.

178. *Id.* (citing Wrenn v. District of Columbia, 864 F.3d 650, 655 (D.C. Cir. 2017)).

179. *Id.* at 1875 (citing Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018)); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); United States v. Masciandaro, 638 F.3d 458, 460 (4th Cir. 2011)).

presented the opportunity to provide "much-needed guidance" to lower courts, ensure adherence to Supreme Court precedent, and resolve a split of authority among lower courts.[180]

ii. The Question of "Core" vs. "Non-Core" Protections or a Hierarchy within the Second Amendment

Analyzing the first of Justice Thomas's concerns helps evaluate the second and third. On the first concern, the point may not be as clear as Justice Thomas indicated. *Heller* stated that the Court knew of "no other enumerated constitutional right whose core protection has been subjected to a free-standing 'interest-balancing' approach."[181] This statement indicates that applying balancing tests to "core protections" of constitutional rights is improper.[182] However, it also may beg the question of what exactly constitutes a "core protection" of the Second Amendment per *Heller*—as compared to protections that might be "non-core."

As discussed above, one core protection of the Second Amendment under *Heller* is the individual right to possess and maintain arms that are in common use in an immediately operable condition for use in the defense of "hearth and home."[183] Under *Heller*, this "core protection" might include also a right to bear arms for purposes of self-defense outside the home.[184] But that point was not expressly made in the four corners of the *Heller* opinion because the facts there were confined to the petitioner's "seeking the right to render a firearm," including a handgun, "operable and carry it about his home only when necessary for self-defense."[185]

iii. Viewing Public Carry as a Core Right

On the other hand, *Heller* is explicit that at the time of ratification of the Second Amendment in 1791, the phrase "bear arms" was "unambiguously used to refer to the carrying of arms outside of an organized militia."[186] Given that citizens would not

180. *Id.*
181. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).
182. *See id.* at 634–35.
183. *Id.* at 635.
184. *See, e.g.*, *id.* at 584–85.
185. *Id.* at 576.
186. *Id.* at 584.

have confined their activities to the home, the fact that the right to "bear arms" exists separately from service in an organized militia suggests that citizens would have the right to carry arms outside the home (subject to the requirement that such arms be of a type in common use).[187]

In addition, the Supreme Court's post-*Heller* decision in *McDonald* stated that the "central holding in *Heller*" was that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."[188] This language suggests two things. First, it indicates that the Second Amendment protects the right to keep and bear arms for several lawful purposes. Second, the phrase "most notably" indicates that the right to keep and bear arms for self-defense in the home may enjoy some type of elevated status versus other Second Amendment rights. *McDonald* thus may be consistent with some type of "soft" hierarchy of rights, despite Justice Thomas's objections.[189]

Nevertheless, a hierarchy—or the existence of both "core" and "non-core" rights—within the Second Amendment does not necessarily require that the right to keep and bear arms in the home be more protected than, e.g., the right to keep and bear arms outside the home. It also does not require that "core" rights be immune to levels-of-scrutiny or balancing tests while "non-core" rights are subject to such tests. Stated another way, keeping and bearing arms for purposes of self-defense may be a core protection not subject to balancing tests, regardless of whether those arms are kept or carried inside or outside the home.

A post-*McDonald* decision helps illustrate this point. Quoting *Heller*, the Supreme Court in *Caetano v. Massachusetts* stated the "Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those not in existence at the time of the founding."[190] *Caetano* accordingly held that a Massachusetts law prohibiting possession of a stun gun was "inconsistent with *Heller*" when applied to a woman carrying a stun gun not in her home but outside her workplace where she had been threatened by an abusive

187. *Id.* at 627.

188. McDonald v. City of Chi., 561 U.S. 742, 780 (2010).

189. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

190. Caetano v. Massachusetts, 577 U.S. 411, 411 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582) (internal quotation marks omitted).

ex-boyfriend.[191] Making no reference to balancing tests, the Court vacated the state supreme court decision affirming the woman's conviction under the Massachusetts law and remanded the case for proceedings that did not "contradict[] this Court's precedent."[192]

Caetano dealt with stun guns, not firearms. Yet, *Caetano* emphatically states—in a context outside the home—that the Second Amendment prima facie applies "to all instruments that constitute bearable arms."[193] This lends support to the view that while core and non-core protections might exist under the Second Amendment, carrying arms outside the home for purposes of self-protection may be a core right or may at least rank at the top of any hierarchy.

iv. Takeaway issues—Whether There Exists a Core versus Non-Core Distinction and What Test Controls

At a minimum, there may be support in *Heller* for a core vs. non-core hierarchy of rights within the Second Amendment. But there also may be support in precedent such as *Caetano* for the view that—however any hierarchy may be calibrated—the right to carry arms outside the home for purposes of self-defense ranks at or near the top of this hierarchy or it is a core right. In that sense, Justice Thomas could be incorrect in asserting that the Court's Second Amendment jurisprudence includes no hierarchy of core vs. non-core rights—though he may also be correct in the view that the right to carry arms in common use for self-defense outside the home is sufficiently core that no balancing test can be applied to it.

Justice Thomas thus may have been off base on his first concern, but he is likely spot on with his second: interest-balancing or level-of-scrutiny tests cannot be applied to uphold good cause or justifiable need restrictions on carrying commonly used firearms outside the home for purposes of self-defense. Rather, those restrictions need to be judged per the text, history, and tradition test used in *Heller*.[194]

This view would also mean that Justice Thomas was correct on his third concern—a split of authority exists among the federal

191. *See id.* at 412–13 (Alito, J., concurring).
192. *Id.* at 412.
193. *Id.* at 411.
194. *See Rogers*, 140 S. Ct. at 1866 (citing *Heller*, 554 U.S. at 635).

courts of appeals—with at least one court using a standard consistent with *Heller* to determine that "good reason" requirements for public carry violate the Second Amendment and others deviating from *Heller* by applying the intermediate level of scrutiny to validate such requirements.[195] A circuit split and circuit courts' failure to observe Supreme Court precedent both constitute proper bases for the court to grant certiorari,[196] and Justice Thomas was on solid ground in pointing these out as bases for his dissent.

v. Predictive Considerations

Predictions stemming from Justice Thomas's dissent in *Grewal* would begin first with the observation that he would reject balancing tests in favor of a text, history, and tradition approach. He would also reject any hierarchy of core versus non-core rights within the Second Amendment. But in rejecting a core vs. non-core distinction, Justice Thomas might skirt the precise language of *Heller* that stated keeping operable, in-common-use firearms for purposes of immediate self-defense in the home was a core protection.[197] Such language suggests that non-core protections may also exist under the Second Amendment.

However, that core and non-core protections exist within the Second Amendment would not necessarily mean that the right to carry in-common-use firearms outside the home is not a "core" protection. On the contrary, Justice Thomas is correct in interpreting *Heller* to confirm that, at the time of the founding, "bear" arms meant to "carry" arms outside the home for use in defense against violence by the state or private individuals.[198] In addition, *Caetano* supports the view that carrying outside the home for purposes of self-defense is a "core" protection.[199]

In sum, Justice Thomas might technically be incorrect under *Heller*'s language to reject the existence of any hierarchy of rights within the Second Amendment. Nevertheless, his analysis in *Rogers* exhibits a willingness to take this position.[200] Also, as discussed below—in addition to validating Justice Thomas's position on the

195. *See id.* at 1874–75.
196. *Id.*; *see also Caetano*, 577 U.S. at 412.
197. *See Rogers*, 140 S. Ct. at 1867 (quoting *Heller*, 554 U.S. at 634).
198. *Heller*, 554 U.S. at 584, 594.
199. *See Caetano*, 577 U.S. at 411.
200. *See Rogers*, 140 S. Ct. at 1868.

text, history, and tradition approach—*Bruen* showed that even if a core vs. non-core distinction exists, Justice Thomas was correct that public carry for self-defense purposes is a core protection.[201]

III. THE DECISION IN *BRUEN*

Finally, after an eleven-year hiatus, the Supreme Court granted certiorari in the Second Amendment case *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*[202] in 2021. In *Bruen*, the petitioners challenged a New York statute requiring that an individual who wants to carry a firearm outside his home or place of business for purposes of self-defense obtain a license to "have and carry" a concealed "pistol or revolver."[203] To obtain this license, the applicant was required to prove that "proper cause exists" to issue it.[204] The statute did not define "proper cause," but courts held that to make the required showing, the applicant must "demonstrate a special need for self-protection distinguishable from the general community."[205] Living in an area noted for criminal activity did not suffice; New York courts required "evidence 'of particular threats, attacks, or other extraordinary danger to personal safety.' "[206]

The petitioners who challenged the New York statute were law-abiding adults.[207] They faced no special dangers but wanted to carry a handgun for general self-defense purposes.[208] Their applications were denied—though one petitioner was issued a permit that would allow him to carry a concealed gun for purpose of outdoor activities like hunting, fishing, hiking, and camping; another was allowed a permit to carry a weapon to and from work.[209] The petitioners' challenge was dismissed in the district court, and that dismissal was affirmed by the Second Circuit.[210] The Supreme Court granted review.[211]

201. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).
202. *Id.* at 2125.
203. *Id.* at 2123 (citing N.Y. Penal Law Ann. § 400.00(2)(f) (West 2022).
204. *Id.*
205. *Id.*
206. *Id.* (citing *In re* Martinek, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002)).
207. *Id.* at 2124–25.
208. *Id.* at 2125.
209. *Id.*
210. *Id.*
211. *Id.*

A. Acknowledgment of Prevalence in Lower Courts of a Two-Step Test Viewing the Core Self-Defense Right as Limited to the Home

This time authoring a majority opinion, Justice Thomas acknowledged that the courts of appeals had generally coalesced around a two-step framework.[212] Justice Thomas previously discussed this approach in his *Rogers v. Grewal* dissent.[213] He again addressed it in *Bruen*, noting that at the first step, the courts of appeals generally held the government may justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood."[214] The courts of appeals purported to ascertain the original scope of the right based on its historical meaning.[215] If the government could prove that the regulated conduct fell beyond the Second Amendment's original scope, "then the analysis can stop there; the regulated activity [wa]s categorically unprotected."[216] If, however, the historical evidence at that step was "inconclusive or suggests that the regulated activity is *not* categorically unprotected," the courts generally proceeded to step two.[217]

At the second step, courts often analyzed "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."[218] The courts of appeals applying this two-step test usually maintained "that the core Second Amendment right is limited to self-defense *in the home*."[219] If a core Second Amendment right were burdened, some courts applied "strict scrutiny" and asked whether the government can prove that the law is "narrowly tailored to achieve a compelling governmental interest."[220] Otherwise, they applied intermediate scrutiny and considered whether the government had shown that the regulation is "substantially related to the achievement of an important

212. *Id.*

213. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

214. *Bruen*, 142 S. Ct. at 2126 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).

215. *Id.* (citing United States v. Focia, 869 F.3d 1269, 1285 (11th Cir. 2017)).

216. *Id.* (quoting United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012)).

217. *Id.* (emphasis original) (quoting *Kanter*, 919 F.3d at 441).

218. *Id.*

219. *Id.* (emphasis original) (quoting Gould v. Morgan, 907 F.3d 659, 671 (1st Cir. 2018)).

220. *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)).

governmental interest."[221] The respondents and the United States as amicus curiae largely agreed with this approach, arguing that intermediate scrutiny is appropriate when text and history are unclear in attempting to delineate the scope of the right.[222]

B. Rejecting the Lower Courts' Two-Step Approach

The *Bruen* Court categorically rejected this two-step approach as "one step too many."[223] The Court acknowledged that the first step was "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."[224] Nonetheless, the second step of the courts of appeals' framework was inconsistent with *Heller* or *McDonald* that do not support applying means-end scrutiny in the Second Amendment context.[225] Instead, this precedent demonstrated 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."[226]

The *Bruen* Court also noted that *Heller* had examined analogous arms-bearing rights in state constitution contemporaries of the Second Amendment, the work of founding-era scholars who interpreted the Second Amendment in their writings, discussions of the Second Amendment in Congress and public discourse after the Civil War, post-Civil War commentary, and understandings of arms-bearing rights in sources ranging from 4 William Blackstone, Commentaries on the Law of England 148–49 (1769) to early twentieth century Supreme Court authority.[227] *Heller* showed the Court focused on constitutional text and history and it "did not invoke any means-end test such as intermediate or strict scrutiny."[228] To the contrary, *Heller* and *McDonald* "expressly rejected the application of any 'judge empowering' interest-balancing inquiry that 'asks whether the statute burdens the protected interest in a way or to an extent that is out of proportion to the statute's salutary

221. *Id.* (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).
222. *Id.* at 2127.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 2128.
228. *Id.*

effects upon other important governmental interests.' "[229] And "[n]ot only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test that respondents and the United States" urged the Court to adopt in *Bruen*.[230]

C. A Test for Protected Activity Based on Text and History, Subject to Rebuttal by a Historical Tradition Allowing the Restriction

After confirming *Heller*'s rejection of two-step tests, the Court spelled out the standard articulated in *Bruen*:

> 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. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[231]

D. Validation from the Standards Applied to Other Amendments

Justice Thomas further validated this standard by noting it accords with approaches that the Court uses to protect other constitutional rights, such as restraints of freedom of speech under the First Amendment, the right of criminal defendants to be confronted with witnesses against them under the Sixth Amendment, and claimed violations of the Establishment Clause of

229. *Id.* at 2129 (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (quotation marks and citations omitted).

230. *Id.* Per Justice Thomas, the intermediate scrutiny test, *i.e.*, "ask[ing] whether [a] statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," simply expressed a classic formulation of intermediate scrutiny in a slightly different way. *Id.* (quoting *Heller*, 554 U.S. at 689–90 (Bryer, J., dissenting) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988) (asking whether the challenged law is "substantially related to an important government objective")).

231. *Id.* at 2129–30 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)).

the First Amendment.[232] The *Bruen* Court acknowledged this test "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[233] In some cases, "that inquiry will be straightforward."[234] "[O]ther cases implicating unprecedented societal concerns and dramatic technological changes may require a more nuanced approach."[235]

E. Protected Arms Are Bearable Arms, Including Those Not in Existence at the Time of the Founding

Justice Thomas also set out helpful principles for courts in their future analyses, including the definition of "Arms" as used in the Second Amendment. Citing *Heller* and *Caetano*, he reminded jurists that the definition of "Arms" extends prima facie to all instruments that constitute bearable arms, even those not in existence at the time of the founding.[236] "Arms" also means non-firearm modern instruments facilitating self-defense, such as stun guns.[237]

F. Reasoning by Analogy and Two Metrics: How and Why a Restriction Burdens the Right to Self Defense

Bruen also confirmed that in addressing present-day firearms regulations, the historical inquiry would often entail reasoning by analogy. Determining whether a historical regulation is a proper analog for modern firearm regulation requires analyzing "whether the two regulations are 'relevantly similar.' "[238] Without surveying all factors making regulations relevantly similar, Justice Thomas advised that *Heller* and *McDonald* consider "at least two metrics: how and why the regulations burden a law-abiding citizen's right to self-defense."[239]

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232. *Id.* at 2130.
233. *Id.* at 2131.
234. *Id.*
235. *Id.* at 2132.
236. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 582 (2008)).
237. *Id.* (citing Caetano v. Massachusetts, 577 U.S. 411, 411–12 (2016)).
238. *Id.* (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).
239. *Id.* at 2132–33.

G. The Mechanics of Applying the Test in Bruen

In *Bruen*, the inquiry proved relatively straightforward. As law-abiding adults, the two petitioners were plainly part of "the people" whom the Second Amendment protects.[240] It was also indisputable after *Heller* that handguns are weapons "in common use" for self-defense purposes.[241] Under *Heller*, this left the question of whether the Second Amendment protected the conduct denied to the petitioners by the New York statute—carrying handguns publicly for self-defense.[242]

i. The Text Protects Public Carry

The Court in *Bruen* had little trouble concluding that the Second Amendment protects public carry. In *Heller*, the Court had determined that the right to bear arms refers to the right to "wear, bear, carry . . . upon the person or in the clothing or in the pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[243] "Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms."[244] Rather, "the definition of 'bear' naturally encompasses public carry."[245]

Echoing his dissent in *Peruta*, Justice Thomas wrote, "[m]ost gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table."[246] Instead, "[a]lthough individuals often 'keep' firearms in their home . . . most do not 'bear' (i.e., carry) them in the home beyond moments of actual confrontation" so that to "confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections."[247]

Though acknowledging that *Heller* stated the need for self-defense is "perhaps 'most acute' " in the home, Justice Thomas clarified that *Heller* "did not suggest that the need was insignificant

240. *Id.* at 2134.
241. *Id.*
242. *Id.*
243. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 584 (2008)).
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 2134–35.

elsewhere."[248] On the contrary, "[m]any Americans hazard greater danger outside the home than in it."[249] The Court accordingly concluded that the Second Amendment's plain text presumptively guarantees petitioners a right to bear arms in public for self-defense.[250]

ii. The State's Inability to Show the Restriction Was Consistent with the Nation's Historical Tradition of Firearm Regulation

The respondents in *Bruen* conceded the Second Amendment guarantees a general right to public carry.[251] But they argued that the amendment permits a state to condition handgun carrying in areas frequented by the general public on a showing of non-speculative need for armed self-defense in those areas.[252] To support that position, the *Bruen* Court determined the respondents were required to show that New York's proper-cause requirement is consistent with the United States' historical tradition of firearm regulation.[253] In attempting to carry that burden, the respondents pointed to a variety of historical sources from periods beginning in the 1200s to the early 1900s. The court categorized these offered periods as (1) medieval to early modern England, (2) the American colonies and early Republic, (3) antebellum America, (4) Reconstruction, and (5) the late 19th and early 20th centuries.[254]

a. The Linchpin—Rights Have the Scope That the People Understood Them to Have When They Were Adopted.

The Court made two observations before beginning its examination of the respondents' historical references. First, the linchpin principle for analyzing amendments is that "constitutional rights are enshrined with the scope they were understood to have

248. *Id.* at 2135 (quoting *Heller*, 554 U.S. at 628).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 2135–36.

when the people adopted them."[255] The Second Amendment was adopted in 1791, and the Fourteenth was adopted in 1868. Accordingly, "[h]istorical evidence that long pre-dates either date may not illuminate the scope of the right."[256]

Similarly, courts must be careful not to give "post-enactment history more weight than it can rightly bear."[257] Where a governmental practice has been open, widespread, and unchallenged since the early days of the republic, that practice should guide the interpretation of ambiguous constitutional provisions.[258] "But to the extent later history contradicts what the text says, the text controls."[259] In *Heller*, for example, the Court noted that because post-Civil War discussions "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."[260]

b. The People's Understanding of the Right to Keep and Bear Arms Was the Same at the Adoption of the Fourteenth Amendment as at the Time of the Bill of Rights.

Second—because a state statute was at issue—New York was bound by the right to keep and bear arms under the Fourteenth Amendment, not the Second Amendment.[261] Under the Fourteenth Amendment, rights enumerated in the Bill of Rights have the same effect against the states as against the federal government.[262] The Court in *Bruen* acknowledged that there exists some scholarly debate as to whether courts should rely on the understanding of the Bill of Rights in 1868 when the Fourteenth Amendment was ratified, rather than in 1791 when the Bill of Rights was ratified.[263] *Bruen* did not address this issue because the public's understanding of the right to keep and bear arms as it

255. *Id.* at 2136 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (emphasis added) (internal quotation marks omitted)).
256. *Id.*
257. *Id.*
258. *Id.* at 2137 (internal quotation marks and citations omitted).
259. *Id.*
260. *Id.* (quoting *Heller*, 554 U.S. at 614) (internal quotation marks omitted).
261. *Id.*
262. *Id.*
263. *Id.* at 2138.

pertained to carry outside the home was the same in 1791 as in 1868.[264]

c. The State's Inadequate Showing of Historical Tradition

This article will not address in detail the *Bruen* Court's analysis of the respondents' sources from each of the above five periods. Nevertheless, a summary of the Court's views on the sources from each of these periods follows.

Medieval to Early Modern England – The Court found these references ambiguous in nature[265]—as well as too old to have persuasive force given that they dated as early as 1285, 1327, or 1328.[266]

The Colonies and Early Republic – The Court found the respondent's colonial references contained insufficient evidence of any recognized practice of regulating public carry.[267] What few statutory restrictions existed on public carry were directed to "unusual" weapons (a historical fact acknowledged in *Heller*)[268] and concealed carry.[269] Late eighteenth- and early nineteenth-century statutes paralleled earlier statutes or simply prohibited bearing arms in a manner that was intended to spread "fear" or "terror" among the people.[270]

Antebellum America – Post-ratification restrictions proliferated but generally fell into three categories: common-law offenses, statutory prohibitions, or "surety" statutes.[271] Common-law offenses typically included "affray" or going about armed "to the terror of the people," but there was no evidence that such limitations were meant to impair the right of peaceable public carry.[272] Statutory restrictions may have prohibited concealed carry but indicated that prohibitions on open carry would conflict with

264. *Id.*

265. *See, e.g.*, *id.* at 2140 ("Henry VIII's displeasure with handguns arose not primarily from concerns about their safety but rather their inefficacy . . . handguns threatened Englishmen's proficiency with the longbow.").

266. *See id.* at 2139.

267. *Id.* at 2142.

268. *Id.* at 2143 (citing District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

269. *Id.*

270. *Id.* at 2144.

271. *Id.* at 2145.

272. *Id.*

the Constitution.[273] All told, antebellum state court decisions evinced a consensus that states could not statutorily prohibit all public carry.[274] Surety statutes required certain individuals to post bonds before carrying weapons in public.[275] But these statutes were conditioned upon a satisfactory showing by another citizen of a "reasonable cause to fear injury" "or breach of the peace" from the person required to post the bond.[276]

The Court summarized antebellum laws: "[u]nder the common law, individuals could not carry deadly weapons in a manner likely to terrorize others."[277] Though "surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying.[278] Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly."[279]

Reconstruction – Here, the Court discussed historical sources showing that freed Black Americans possessed and exercised "the *same* right to own and carry arms that *other* citizens have."[280] That Black Americans had this right allowed them to "publicly carr[y] weapons to defend themselves and their communities."[281]

The Court also acknowledged that two Texas cases from the 1870s had upheld statutory prohibitions on carrying pistols other than "holster pistols," pistols useful and proper to an armed militia, or pistols not adapted to being carried in a concealed manner without "reasonable grounds for fearing an unlawful attack on his person."[282] Similarly, a West Virginia case upheld a prohibition on the public carry of handguns, reasoning that no handguns of any kind were protected by the Second Amendment.[283] Although acknowledging these cases provided some support for the respondents' arguments on New York's proper-cause requirement,

273. *Id.* at 2146.
274. *Id.*
275. *Id.* at 2148.
276. *Id.* (quoting MASS. REV. STAT., ch. 134, § 16 (1836)).
277. *Id.* at 2150.
278. *Id.*
279. *Id.*
280. *Id.* at 2152 (emphasis original).
281. *Id.* at 2151.
282. *Id.* at 2153 (quoting 1871 TEX. GEN. L. § 1) (internal quotation marks omitted).
283. *Id.* (citing W. VA. CODE § 148-7 (1887); State v. Workman, 14 S.E. 9, 11 (W. Va. 1891)).

the court was unwilling to give these isolated state court decisions "disproportionate weight."[284]

The Nineteenth and Early Twentieth Centuries – Due to their "temporal distance from the founding," Justice Thomas wrote, gun regulation laws in the late nineteenth century "cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."[285] Moreover, the respondents' use of nineteenth-century laws was flawed. First, the respondents largely relied on restrictions in pre-state, western territories that were localized, few in number, and presented little counterweight to "overwhelming evidence of an otherwise enduring American tradition permitting public carry."[286] The territorial system was a transitional structure that employed legislative improvisations which might not be tolerated as a permanent setup.[287] Accordingly, the territories' laws are not instructive.[288] The handful of temporary territorial laws cited "governed less than 1% of the population" and thus were irrelevant to the norms of more than 99 percent of the American population.[289] Second, because territorial laws rarely were subject to judicial scrutiny, there was no basis to judge their perceived legality.[290] Lastly, the territorial laws were short-lived as some that were challenged were held unconstitutional; others did not survive the territory's admission to the Union as a state.[291]

The respondents also identified one state law in Kansas that directed cities with populations of more than fifteen thousand to pass ordinances prohibiting public carry.[292] The Court reasoned that even if the three affected cities had enacted the prohibitions, the law would have reached only 6.5% of Kansas's total population.[293] In the Court's view, these figures could not demonstrate that Kansas meaningfully restricted public carry, let alone that states generally had a tradition of doing so.[294]

After reviewing these five categories of historical sources, the Court concluded the respondents had "not met their burden to

284. *Id.* at 2153.
285. *Id.* at 2154.
286. *Id.*
287. *Id.*
288. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 614 (2008)).
289. *Id.* at 2155.
290. *Id.*
291. *Id.*
292. *Id.* at 2155.
293. *Id.* at 2156.
294. *Id.*

identify an American tradition justifying [New York's] proper-cause requirement."[295]

H. The Second Amendment's Status as Co-equal with Other Bill of Rights Guarantees

The *Bruen* Court took pains to emphasize that the Second Amendment is "not a second-class right, subject to an entirely different body of rules than other Bill of Rights guarantees."[296] In holding the New York proper-cause requirement violated the amendment, the Court remarked:

> We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.[297]

IV. POINTS FROM JUSTICE THOMAS'S DISSENTS THAT BECAME PART OF *BRUEN*—AND ISSUES WHICH MAY ARISE IN A POST-*BRUEN* ENVIRONMENT

Justice Thomas made several points in his post-*Heller*, post-*McDonald* dissents that found a home in *Bruen*.[298] Other significant issues arising from those dissents, though left unaddressed in *Bruen*, may become important to Second Amendment jurisprudence going forward. Addressing the dissents in chronological order, one should note the following:

Jackson: *Bruen* confirmed Justice Thomas's view that the Ninth Circuit had applied an incorrect standard of review (essentially, intermediate scrutiny) in the context of restrictions on

295. *Id.*

296. *Id.* at 2121 (quoting McDonald v. City of Chi., 561 U.S. 742, 780 (2010)).

297. *Id.* at 2156.

298. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2118 (affirming that balancing tests are not properly applied in the Second Amendment context).

handguns in the home for purposes of self-defense.[299] Although not at issue in the case, *Bruen*'s conclusion that the Second Amendment protects a right to public carry for self-defense means that a right to carry exists in one's home.[300] *Bruen* confirmed Justice Thomas's positions in *Jackson*.

Friedman: *Bruen* validated Justice Thomas's insistence that lower courts comply with *Heller*'s determinations for the Second Amendment—just as lower courts must comply with Supreme Court precedent governing other Bill of Rights guarantees. One point in particular from *Friedman* was cemented in *Bruen*—balancing tests are not proper to determine whether restrictions on keeping and bearing arms for either self-defense or resistance to a tyrannical government pass constitutional muster.[301]

However, *Bruen* had no occasion to address whether some type of numerical yardstick, e.g., the percentage of the population owning a type of arm, could be applied to determine if that type of arm is sufficiently in common use to qualify for Second Amendment protection.

***Peruta*:** This dissent was plainly predictive of the *Bruen* Court's determination that the right to bear arms set out in the Second Amendment included the right to the public carry of arms in common use for purposes of self-defense.[302] The dissent was also predictive of the fact that because Second Amendment cases were historically underrepresented on the Supreme Court's docket, the Court, if for no other reason than to avoid the appearance of discriminating against the Second Amendment, would at some point need to address the public-carry issue.[303]

The 6-3 ruling in *Bruen* with the reality of the Supreme Court's current composition also suggests that Justice Thomas's *Peruta* dissent may be a harbinger of an increased willingness on the part of the Court for hearing Second Amendment cases with a frequency more closely resembling that for cases involving other amendments.[304]

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299. *See, e.g.*, Jackson v. City & Cnty. of S.F., 576 U.S. 1013, 1015 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2156.

300. *See Bruen*, 142 S. Ct. at 2156.

301. *See Friedman*, 136 S. Ct. at 449; *see also Bruen*, 142 S. Ct. at 2118.

302. *See* Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

303. *Id.*

304. *Id.*

***Silvester*:** As in *Peruta*, Justice Thomas's dissent rejected interest-balancing tests, in particular intermediate scrutiny.[305] Justice Thomas also expressly rejected rational-basis review, confirming his position that tiers-of-scrutiny tests are improper in Second Amendment jurisprudence.[306] In addition, Justice Thomas demonstrated a positive view of a test asking whether the challenged law complies with the text, history, and tradition of the Second Amendment. All of these positions found permanent footing in *Bruen*.

Using forceful language, Justice Thomas also did not hesitate to criticize the lower court's treatment of the Second Amendment as effectively giving an enumerated right less regard than rights with no textual basis in the Constitution, and he again criticized the Supreme Court for failing to correct lower courts' deviations from the court's precedents.[307] Given the Court's granting certiorari in *Bruen*, the 6-3 result in that case, and the court's current composition, *Silvester* reinforces the view that the court may be more willing to grant review in future Second Amendment cases—and correct federal courts of appeals' or state supreme courts' deviation from precedent.

Left open is the question of whether Justice Thomas and other justices in the *Bruen* majority would apply the text, history, and tradition test to restrictions on a citizen's ability to obtain additional arms after the citizen already has arms of a sufficient quantity and type to protect his or her Second Amendment rights. The issue of what limits on subsequent purchaser's rights are proper in a post-*Bruen* world may be so unique that they may not be addressed by the Supreme Court going forward. However, most gun owners state they possess more than one firearm.[308] The question of what limits may be placed on a citizen's amassing firearms beyond those reasonably needed to secure the citizen's Second Amendment rights is not so unusual that it would not be raised in the future. Here again, the positions that Justice Thomas voiced in

305. *See* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari).

306. *Id.*

307. *Id.*

308. Two-thirds of gun owners say they own more than one gun, including twenty-nine percent who own five or more guns. Parker et al., *supra* note 77.

his dissents could guide lower courts wishing to address the issue in a manner consistent with *Heller*, *McDonald*, and *Bruen*.[309]

***Rogers*:** By the time of his *Rogers* dissent, Justice Thomas was vocally in the camp of jurists advocating text, history, and tradition as the framework indicated by *Heller* for evaluating Second Amendment claims. He decried the courts of appeals' intermediate or strict scrutiny balancing tests as entirely made up. As noted, both of these positions bore fruit in *Bruen*.[310] On the other hand, although *Heller* may support some type of core versus non-core distinction within the Second Amendment, Justice Thomas appears dismissive of any such hierarchy.

Bruen demonstrated that, even if a core versus non-core hierarchy can be said to exist, the "keep and bear" language in the Second Amendment means the right to carry in public is a core protection on the same level as the right to keep arms articulated in *Heller*. Whether a gradation of core vs. non-core rights exists within the Second Amendment and if so what protections might fall into each of these categories are issues left for future decisions.

V. CONCLUSION

Bruen incorporated into Second Amendment jurisprudence the following positions from Justice Thomas's post-*Heller* dissents from denials of certiorari: (1) in evaluating restrictions on citizens' ability to keep and bear arms sufficient for self-defense against public or private violence, balancing or levels-of-scrutiny tests employing strict or intermediate scrutiny (or rational-basis review) cannot be applied; rather, the restrictions are to be judged with a text, history, and tradition test to determine if the restriction is consistent with the nation's history of firearm regulation; (2) lower courts' defiance of Supreme Court precedent on the Second Amendment should not be tolerated; (3) the Second Amendment is on par with other amendments, such as the First and Sixth Amendments—and the Supreme Court should protect it with the same zeal and frequency it applies to other Bill of Rights guarantees; and (4) the right to bear arms as stated in the Second

309. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *see also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2118 (2022).

310. *See* Rogers v. Grewal, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari); *see also Bruen*, 142 S. Ct. at 2118.

Amendment includes the right to carry arms that are in common use for general self-defense purposes.

The predictive nature of Justice Thomas's dissents on these issues suggests that his dissents will be predictive of other Second Amendment issues coming before the Court in the future. Also, given its current composition, the Court may demonstrate an increased appetite for granting review in Second Amendment cases.

Two issues suggested by Justice Thomas's dissents for future examination are: (1) whether *Bruen*'s text, history, and tradition test applies to restrictions on a citizen's amassing additional arms after that citizen already has arms of a sufficient type and quantity to secure his or her Second Amendment rights or whether some other test, such as a balancing inquiry, should apply, and (2) whether there exists a core versus non-core distinction or hierarchy of rights within the Second Amendment and, if so, what tests properly apply to restrictions on non-core rights as compared to the *Bruen* test applicable to core rights. Regardless of whether these precise issues are raised in the future, the Second Amendment bar will benefit from an understanding of Justice Thomas's post-*Heller* dissents from denials of certiorari as Second Amendment challenges to firearm restrictions will likely become more frequent.