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## Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness

Nicholas Gallo

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## Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness<sup>\*</sup>

*The North Carolina pistol-purchase permit system, originating in the Jim Crow Era, remains an obstruction for North Carolinians seeking to exercise their Second Amendment rights. The permit system requires that an individual possess a permit to purchase a handgun. Permits can only be obtained by applying to one's local county sheriff's office, assuming the applicant satisfies a myriad of conditions and pays the five-dollar per-permit fee.*

*Such a system directly implicates the core of the Second Amendment by posing a direct burden on the ability of one to acquire a handgun for possession in the home. Under the modern two-part test for the Second Amendment, the permitting system falls short of satisfying strict scrutiny, as well as intermediate scrutiny. In addition, the permitting system faces difficulties in the face of the Fourteenth Amendment.*

*As a whole, the system is largely redundant with federal law, adding cost, time, and frustration for handgun purchasers. Furthermore, the permitting system is ripe for abuse by allowing denials for subjective "good cause." This subjective criteria for denial is suspect since Black applicants are rejected at a rate near three times as high as White applicants. Finally, when compared to states without the permitting requirement, North Carolina's crime rates are within a few percentage points of theirs, indicating that the permitting system is not sensible policy.*

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## INTRODUCTION

While facially racist laws have mostly faded into the past, in North Carolina, gun-control laws from the Jim Crow era<sup>1</sup> stay on the books—more than one-hundred years after their inception.<sup>2</sup> The North Carolina pistol-purchase permit system (“North Carolina permit system” or “permit system”) is an antiquated gun-control law that requires the grant of a pistol-purchase permit for a citizen to purchase a handgun.<sup>3</sup> It is one of a host of similar state pistol-permit schemes, most of which have been repealed.<sup>4</sup>

The North Carolina permit system is unconstitutional under the Second and Fourteenth Amendments and is not sensible policy. The legislature should repeal the permit system and opt to follow existing federal gun control which achieves nearly identical results.

Part I of this Comment explores the origins and operations of the system, as well as the racialized history of gun control and its lingering presence today

1. See *A Brief History of Civil Rights in the United States: Jim Crow Era*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4172697> [<https://perma.cc/T57F-NMLB>] (July 29, 2020, 7:23 AM) [hereinafter *A Brief History*]. The Jim Crow era was a period of time in the early-to-late 1800s and early 1900s where southern Democrats enacted discriminatory legislation in an attempt to suppress minority populations—Black Americans in particular. *Id.* Much of the legislation focused on inhibiting Black Americans from voting, as well as from interacting with the White population. *Id.*

2. See *infra* Sections I.B.

3. See *infra* Sections I.A.

4. See *infra* notes 111–18 and accompanying text.

in the form of the permit system. Part II delves into the cornerstone Second Amendment cases, *District of Columbia v. Heller*<sup>5</sup> and *McDonald v. City of Chicago*.<sup>6</sup> Part III discusses lower court rulings post-*Heller/McDonald* and details the prominent two-part test modernly used for Second Amendment challenges. This part also explores the lesser used Kavanaugh Test. Part IV applies the two-part test to the North Carolina permit system, concluding that strict scrutiny is the appropriate level of review for assessing the constitutionality of the permit system.<sup>7</sup> This part also evaluates the permit system under the Kavanaugh test and the Fourteenth Amendment. Finally, this part compares the North Carolina permit system with existing federal gun-control laws and explores the overall efficacy of pistol-purchase permitting schemes. This Comment concludes with a recommendation that the North Carolina legislature repeal the permit system to instead rely on existing federal gun control.

## I. BACKGROUND INFORMATION

An analysis of the North Carolina permit system provides insight into both the motivations of post-Civil War state legislatures as well as the current state of Second Amendment jurisprudence. First, this Comment will discuss the origins and operations of the permit system and its underlying motivations. Second, it addresses the principal Second Amendment cases of *Heller* and *McDonald*. Lastly, this part will explore how lower courts have treated the Second Amendment since *Heller* and *McDonald* and discuss the modern tests employed.

### A. *Origins and Operation of the Law*

The North Carolina permit system dates back to 1905, when the state legislature considered the idea of having local governments enact restrictions on the sale of arms.<sup>8</sup> The North Carolina permit system, which was mandated statewide, came to life in 1919 with the requirement that, before transfer of a pistol, one must acquire a license or permit from the clerk of superior court.<sup>9</sup>

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

6. 561 U.S. 742 (2010).

7. This Comment assumes *Heller* is the law but acknowledges that many lower courts have resisted and even ignored the holding. See *infra* Part III. See generally Brittany Occhipinti, *We the Militia of the United States of America: A Reanalysis of the Second Amendment*, 53 WILLAMETTE L. REV. 431 (2017) (arguing that *Heller* should be read to support a militia-oriented interpretation of the Second Amendment).

8. An Act to Amend the Charter of the Town of Pine Bluff, in Moore County, Priv. L. No. 1905-35, ch. 188, § 6, 1905 N.C. Sess. Laws 545, 547 (1905).

9. An Act to Regulate the Sale of Concealed Weapons in North Carolina, ch. 197, § 1, 1919 N.C. Sess. Laws 397, 397 (codified as amended at N.C. GEN. STAT. § 14-402 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)).

Originally, each permit cost fifty cents.<sup>10</sup> The law required that the clerk of superior court find that the permit applicant possessed good moral character and desired to acquire the pistol for protection of their home.<sup>11</sup>

Presently, the sale of weapons in North Carolina is regulated under Article 52A of the General Statutes of North Carolina.<sup>12</sup> The permit system prohibits any person from selling, giving away, transferring, purchasing, or receiving, any pistol at any place within the state “unless: (i) a license or permit is first obtained under this Article by the purchaser or receiver from the sheriff of the county in which the purchaser or receiver resides; or (ii) a valid North Carolina concealed handgun permit is held.”<sup>13</sup> Permits received from the sheriff’s office are valid for five years and allow for one pistol per permit.<sup>14</sup>

To obtain a permit, an individual must submit an application electronically to the sheriff’s office in the applicant’s county of residence and satisfy three requirements.<sup>15</sup> First, the applicant must pass a criminal background check in which the sheriff checks with the State Bureau of Investigation and the Federal Bureau of Investigation by conducting a check through the National Instant Criminal Background Check System (“NICS”) and “a criminal history check through the Administrative Office of the Courts.”<sup>16</sup> Second, the applicant must “fully satisf[y]” the sheriff of their good moral character via affidavits, oral evidence, or otherwise.<sup>17</sup> Finally, the applicant must “fully satisf[y]” the sheriff that their desire to possess a handgun is for “(i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.”<sup>18</sup> Each permit application must include five dollars for each permit requested, a copy of government-issued identification, proof of residency, and a signed release form that authorizes and requires disclosure to the sheriff of any court orders concerning the mental health or capacity of the applicant.<sup>19</sup> In Wake County, this disclosure can only be effective if signed while physically present in the sheriff’s office. Compounding the difficulty of this requirement, applications are not considered “submitted” until the release form is signed.

After an application is submitted, the sheriff’s office has fourteen days to respond with a denial or approval of the permit.<sup>20</sup> The statute further lists

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10. *Id.* § 3, 1919 N.C. Sess. Laws at 398.

11. *Id.*

12. N.C. GEN. STAT. §§ 14-402 to 14-409 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

13. *Id.* § 14-402(a) (LEXIS).

14. *Id.* § 14-403 (LEXIS).

15. *Id.* § 14-404(a) (LEXIS).

16. *Id.* § 14-404(a)(1) (LEXIS).

17. *Id.* § 14-404(a)(2) (LEXIS).

18. *Id.* § 14-404(a)(3) (LEXIS).

19. *Id.* § 14-404(e1)(2)–(5) (LEXIS).

20. *Id.* § 14-404(f) (LEXIS).

conditions for automatic denials of permits,<sup>21</sup> which mirror the criteria of federally prohibited firearm possessors.<sup>22</sup> Furthermore, the statute allows the sheriff to decline permit issue “for good cause shown” if the requirements are not “fully satisfied.”<sup>23</sup> Overall, “good moral character” and “desire . . . [for] possession” are the only additional requirements posed by the North Carolina permit system when compared to federal law.<sup>24</sup> If the sheriff issues a denial, the sheriff must provide a written refusal containing the specific facts upon which the sheriff concluded that the applicant was not qualified.<sup>25</sup> Post-denial, the only available avenue for relief is an appeal to the superior court, where the court will evaluate the reasonableness of the sheriff’s refusal.<sup>26</sup>

In summary, any time an individual seeks to lawfully gain possession of a pistol—including purchasing, gifting, or transferring—one must apply to the sheriff’s office; pay five dollars; and satisfy all the statutory requirements, many of which are subjective in nature. These requirements, however, did not arise from concern for public safety but rather were motivated by a desire to inhibit minorities from arming themselves.

#### B. *Underlying Racial Motivations of Gun Control and Permitting Schemes*

Despite claims to the contrary,<sup>27</sup> the racial (and racist) history of the United States has directly influenced the development of modern gun-control laws.<sup>28</sup> In fact, the U.S. Supreme Court itself in its infamous *Scott v. Sanford*<sup>29</sup> decision denied citizenship to Black people, in part, because granting citizenship would “give to persons of the negro race . . . full liberty . . . to keep and carry arms wherever they went.”<sup>30</sup> In similar fashion, North Carolina began its

21. *See id.* § 14-404(c) (LEXIS).

22. 18 U.S.C. § 922(d).

23. N.C. GEN STAT. § 14-404(b) (LEXIS).

24. *Compare id.* § 14-404(a), (c) (LEXIS) (stating that a sheriff must be fully satisfied of an applicant’s good moral character before issuing a permit), *with* 18 U.S.C. § 922(g) (containing no moral character requirement for possession of a firearm).

25. *See* N.C. GEN STAT. § 14-404(b) (LEXIS).

26. *Id.* (LEXIS).

27. *See, e.g.,* Ladd Everitt, *Debunking the ‘Gun Control Is Racist’ Smear*, WAGING NONVIOLENCE (Sept. 16, 2010), <https://wagingnonviolence.org/2010/09/debunking-the-gun-control-is-racist-smear/> [<https://perma.cc/URW6-499F>] (arguing that gun control was enacted not to discriminate against minorities but instead to provide for the public’s safety).

28. Pratheepan Gulasekaram, *“The People” of The Second Amendment: Citizenship and the Right To Bear Arms*, 85 N.Y.U. L. REV. 1521, 1524–25 (2010) (documenting the United States’ lengthy history of withholding gun ownership rights from “non-American ‘others,’ including noncitizens, especially when citizenship is racially defined”).

29. 60 U.S. 393 (1856).

30. *Id.* at 404.

journey to disarm Black residents in an act of 1840,<sup>31</sup> under which free men of color were restricted from carrying firearms and from which White men were exempt.<sup>32</sup> Following a constitutional challenge, the Supreme Court of North Carolina upheld the act, finding no constitutional issue since (1) “free people of color cannot be considered as citizens” and (2) it is necessary to “preserve the peace and safety of the community from being disturbed by an indiscriminate use [of firearms] . . . by free men of color.”<sup>33</sup>

After the Civil War, “Blacks were routinely disarmed by Southern States.”<sup>34</sup> Many southern states enacted Black Codes, which contained provisions prohibiting freed slaves from possessing or carrying firearms.<sup>35</sup> These codes were found to violate the Fourteenth Amendment after its ratification in 1868 because the Constitution required that gun control laws be racially neutral.<sup>36</sup> States circumvented this requirement by enacting various discriminatory cost-based prohibitions, such as permitting schemes or by only allowing for the purchase of expensive handguns.<sup>37</sup> Some states banned handguns altogether, yet allowed exceptions for sheriffs and their “special deputies”—a euphemism for White men.<sup>38</sup> And “[a]s Jim Crow intensified, other Southern states enacted gun registration and handgun permit laws.”<sup>39</sup>

However, racially charged gun-control permitting schemes were not limited to the South. In 1911, in response to a brazen murder-suicide,<sup>40</sup> New

31. An Act to Prevent Free Persons of Colour from Carrying Fire-Arms, 1840–1841 N.C. Sess. Laws ch. 30, 61 (codified at N.C. REV. CODE ch. 107, § 66 (1855)), *repealed by* N.C. CONST. of 1868, art. IV, § 24; *State v. Newsom*, 27 N.C. (5 Ired.) 250, 252 (1844).

32. *See id.*

33. *Newsom*, 27 N.C. at 254–55.

34. *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008).

35. *See* David B. Kopel, *The Klan's Favorite Law*, REASON (Feb. 15, 2005), <https://reason.com/2005/02/15/the-klans-favorite-law/> [<https://perma.cc/U78U-TRWX>] [hereinafter Kopel, *Klan's Favorite Law*]. *See generally* JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REP. OF THE J. COMM. ON RECONSTRUCTION, at 229 (1st Sess. 1866) (noting that freedmen's weapons were being seized routinely in South Carolina); PARIS ANTI-SLAVERY CONF., SPECIAL REPORT OF THE PARIS ANTI-SLAVERY CONFERENCE, at 82 (1867) (stating that freedmen “were forbidden to own or bear fire-arms, and thus were rendered defenseless against assault”).

36. David Kopel & Joseph Greenlee, *The Racist Origin of Gun Control Laws*, HILL (Aug. 22, 2017, 11:00 AM), <https://thehill.com/blogs/pundits-blog/civil-rights/347324-the-racist-origin-of-gun-control-laws> [<https://perma.cc/6T5F-YT7F>].

37. *Id.*; Kopel, *Klan's Favorite Law*, *supra* note 35.

38. AM. C.R. UNION, THE TRUTH ABOUT GUN CONTROL, RACISM AND GENOCIDE 15 (1st ed. 2015) (noting “special deputies” was nothing but a euphemism for “company goons” and the Ku Klux Klan).

39. Kopel & Greenlee, *supra* note 36 (noting that permit schemes were passed in Missouri in 1919 and in Arkansas in 1923).

40. Michael A. Walsh, Opinion, *The Strange Birth of NY's Gun Laws*, N.Y. POST (Jan. 16, 2012, 5:00 AM), <https://nypost.com/2012/01/16/the-strange-birth-of-nys-gun-laws/> [<https://perma.cc/5BXR-KX6S>].

York passed the Sullivan Act,<sup>41</sup> which required a license to possess a concealed firearm.<sup>42</sup> Overall, enforcement of the Act was largely discriminatory,<sup>43</sup> and many questioned the sponsoring senator's motives given his extensive involvement in the New York crime world.<sup>44</sup>

Similar to North Carolina's permit system, Florida enacted a licensing scheme in 1893<sup>45</sup> that required a license to carry or possess a pistol or rifle ("the Florida permit system").<sup>46</sup> The Florida permit system subsequently became the focus of litigation.<sup>47</sup> Concurring in the dismissal of an alleged violation of the Florida permit system, Florida Supreme Court Justice Buford claimed the Florida permit system was unconstitutional, especially when considering its historical context.<sup>48</sup> Justice Buford noted that the main purpose of the Florida permit system was to "disarm[] the negro laborers . . . [and that t]he statute was never intended to be applied to the white population and in practice has never been so applied."<sup>49</sup>

Although many of these laws appear racially neutral on their face, often "selective enforcement made them racist in practice."<sup>50</sup> And while not the focus of this Comment, many propose that federal gun control enacted in the 1960s was also rooted in racism—indicating that not even federal gun control has escaped its racist roots.<sup>51</sup> Overall, despite the North Carolina permit system appearing racially neutral on its face, when taken in context with the actions of surrounding states and the attitudes regarding minorities at the time of

41. Act of July 20, 1965, 1965 N.Y. Laws 2343 (codified as amended in scattered codes of the N.Y. CONSOLIDATED LAWS).

42. *Id.* § 400.00, 1967 N.Y. Laws at 2472–77.

43. See AM. C.R. UNION, *supra* note 38, at 16; see also *The Rossi Pistol Case*, N.Y. TIMES (Sept. 29, 1911), <https://www.nytimes.com/1911/09/29/archives/the-rossi-pistol-case.html> [<https://perma.cc/8LMZ-K889> (dark archive)] (documenting how the judge presiding over the first conviction under the Sullivan Act made note of how "it was the custom of [Rossi, an Italian immigrant] and his hot-headed countrymen to have weapons concealed upon their persons").

44. Peter Duffy, *100 Years Ago, the Shot That Spurred New York's Gun-Control Law*, N.Y. TIMES (Jan. 23, 2011, 11:00 AM), <https://cityroom.blogs.nytimes.com/2011/01/23/100-years-ago-the-shot-that-spurred-new-yorks-gun-control-law/> [<https://perma.cc/XPF8-4KW3> (dark archive)].

45. An Act to Regulate the Carrying of Firearms, ch. 4147, 1893 Fla. Laws 71 (1893) (codified as amended at FLA. STAT. ANN. § 790.06 (Westlaw through Ch. 184 (End) of the 2020 2d Reg. Sess. of the 26th Leg.)).

46. *Id.*

47. *Watson v. Stone*, 4 So. 2d 700, 701 (Fla. 1941).

48. *Id.* at 703 (Buford, J., concurring).

49. *Id.*

50. AM. C.R. UNION, *supra* note 38, at 15.

51. See Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/92BF-C2GC> (dark archive)]. For example, the push to ban "Saturday-night specials" (selling cheaper guns often made of a lower quality metal alloy) was similarly rooted in racism with the aim of keeping poor Blacks from acquiring handguns. See T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764, 794–95 (1995).



enactment, the permit system's intention was to keep minorities from possessing handguns.<sup>52</sup>

That finding is unremarkable considering that even into the mid-to-late 1900s, gun control was routinely enacted to suppress minorities.<sup>53</sup> Professor Pratheepan Gulasekaram argues that gun control was a continued mark of “second-class or inferior citizenship” based upon discriminatory beliefs of perceived “danger to . . . citizen population[s] from immigrants.”<sup>54</sup> In fact, even the National Rifle Association supported gun-control legislation—in stark contrast to its position today—to disarm the Black Panthers in the 1960s.<sup>55</sup>

Compounding the impact of this treatment is the fact that Black Americans are disproportionately affected by gun violence.<sup>56</sup> As a result of discriminatory gun-control schemes, those most in need of adequate self-defense means are, and historically have been, those most inhibited from acquiring them.

## II. *HELLER* AND *MCDONALD*

The Second Amendment, ratified in 1791, secures the right of the “people to keep and bear arms.”<sup>57</sup> Key to any Second Amendment evaluation are the principles outlined in both *District of Columbia v. Heller*<sup>58</sup> and *McDonald v. City of Chicago*.<sup>59</sup> This section provides a thorough summary and review of both cases in order to set the background for evaluating the North Carolina permit system.

At issue in *Heller* was a District of Columbia code which generally prohibited the possession of handguns.<sup>60</sup> The Supreme Court, in striking down the code, held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>61</sup> Justice Scalia, writing

52. North Carolina's racist history is not limited to guns. During the Jim Crow era, major Ku Klux Klan riots occurred in Wilmington, Fayetteville, Winston Salem, and New Bern. Peter Bean, *Fellow Examines Life in North Carolina Under Jim Crow*, WILSON CTR. (June 3, 2004), <https://www.wilsoncenter.org/article/fellow-examines-life-north-carolina-under-jim-crow> [<https://perma.cc/5TYU-ZRZ2>]. In addition, North Carolina was firmly in the hands of Democrats who kept schools segregated until 1954. *See id.*

53. *See* Gulasekaram, *supra* note 28, at 1561.

54. *Id.*

55. Thad Morgan, *The NRA Supported Gun Control When the Black Panthers Had the Weapons*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act> [<https://perma.cc/DN4C-3Z6Y>].

56. Nick Cotter, *Black Communities Are Disproportionately Hurt by Gun Violence. We Can't Ignore Them*, PUB. SOURCE, <https://projects.publicsource.org/pittsburgh-gun-violence-1/> [<https://perma.cc/756M-WHYK>].

57. U.S. CONST. amend. II.

58. 554 U.S. 570 (2008).

59. 561 U.S. 742 (2010).

60. *Heller*, 554 U.S. at 574–75.

61. *Id.* at 592. Part of this analysis included a breakdown of both the prefatory and operative clause of the Second Amendment. *Id.* at 577–78. The Court determined that the right to keep and bear

for the majority, rejected the constitutionality of a total ban on the possession of handguns on the grounds that the ban amounted to “a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for . . . lawful purpose[s].”<sup>62</sup> In addition, the Court took issue with the handgun prohibition extending to the home, “where the need for defense of self, family, and property is most acute.”<sup>63</sup> While never directly stating a level of scrutiny to apply to future Second Amendment cases, the Court weighed indirectly on the issue:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>64</sup>

The Court went on to note that the right of law-abiding, responsible citizens to use arms in defense of hearth and home “surely elevates above all other interests.”<sup>65</sup> Finally, the Court noted that the opinion should not cast doubt on “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>66</sup> “Taken as a whole, . . . [*Heller* holds:] first, that individuals have a constitutional right to protect themselves with usable firearms, and that this right is at its strongest in the home; [and] second, that some burdens upon individual Second Amendment rights are presumptively lawful.”<sup>67</sup>

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arms—the operative clause—was not limited by the prefatory clause, but rather, the prefatory clause explained the function of the right. *Id.* at 577. While some argue that the Second Amendment only applies to the “militia,” elsewhere in the Constitution the use of “the people” . . . unambiguously refers to all members of the political community, not an unspecified subset.” *Id.* at 580. Furthermore, the “‘militia’ in colonial America consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range.” *Id.* As *Heller* makes patently clear, treating the right as only protecting arms in an organized militia “fits poorly with the operative clause’s description of the holder of that right as ‘the people.’” *Id.* at 580–81.

62. *Id.* at 628.

63. *Id.*

64. *Id.* at 634–35.

65. *Id.* at 635.

66. *Id.* at 626–27.

67. Lindsay Colvin, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 *FORDHAM URB. L.J.* 1041, 1052 (2014).

Only a few years later, in *McDonald*, the Supreme Court made clear that the Second Amendment applies to states via the Fourteenth Amendment.<sup>68</sup> The Court specifically rejected the view that the Second Amendment “should be singled out for special—and specially unfavorable—treatment.”<sup>69</sup> In addition, the Court also touched on the possible impact on states: as with any incorporated provision of the Bill of Rights, “[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table [for states].”<sup>70</sup> Overall, *McDonald* serves to reinforce the principles of *Heller*, but similarly falls short in establishing firm guidelines for lower courts to follow. What remains clear after both cases is that full-blown prohibitions, or laws with the effect of prohibition, are not constitutional.

Some courts understand *Heller* and *McDonald* to imply that Second Amendment cases should be evaluated using strict scrutiny,<sup>71</sup> while other courts use heightened scrutiny (falling somewhere between intermediate and strict).<sup>72</sup> Unfortunately, given the lack of clarity in both decisions, the Court has left lower courts mostly to their own devices in determining the proper standard of review.<sup>73</sup> While not overwhelmingly helpful, “[t]he *Heller* majority and *McDonald* plurality suggested that a historical inquiry could help determine the scope of the Second Amendment right.”<sup>74</sup> However, the implementation of this historical test varies dramatically by court. While many courts refuse altogether to state what level of scrutiny they are using, of those that do, the most common scrutiny level is intermediate.<sup>75</sup>

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68. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

69. *Id.* at 745–46.

70. *Id.* at 790.

71. *See, e.g., United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (“[W]here fundamental rights are at stake, strict scrutiny is to be applied.”). Under strict scrutiny, a law must be “narrowly tailored to achieve a compelling governmental interest.” *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

72. *See, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011) (“This necessarily means that the City bears the burden of justifying its action under *some* heightened standard of judicial review.”).

73. Colvin, *supra* note 67, at 1083.

74. Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1140 (2011).

75. *See* SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE 45–46 (2019); Kiehl, *supra* note 74, at 1145. Under intermediate scrutiny, the law must serve an important governmental objective and the means employed must be “substantially related to the achievement of those objectives.” *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982)).

III. POST-*HELLER*/*MCDONALD*

Generally, courts have adopted a two-part test to evaluate Second Amendment challenges post-*Heller/McDonald*.<sup>76</sup> First, “courts ask whether the challenged law burdens conduct protected by the Second Amendment.”<sup>77</sup> Second, courts ask whether, under some type of means-end scrutiny, the law is constitutional.<sup>78</sup> In evaluating the first prong, courts employ an “original meaning criteria,” focusing on the text and history of the right.<sup>79</sup> Part of this prong is an analysis regarding whether the challenged law is presumptively lawful.<sup>80</sup> Courts have struggled with how to interpret the “presumptively lawful” dicta from *Heller* over the years, leading to a variety of methods.<sup>81</sup>

Relevant to some courts’ analysis is whether laws are still in place; a law which is later repealed cannot be said to be long standing.<sup>82</sup> Furthermore, other courts have gone as far as to put the burden of proof on the government to show that the restriction was in effect “around 1791 and 1868,” when the Second Amendment was enacted and then made binding on the states.<sup>83</sup> Additionally, “[t]he only laws that the lower courts have held to be long-standing were initially enacted in the nineteenth century.”<sup>84</sup> Finally, even if a law is found to be long standing and presumptively lawful, a plaintiff may rebut this argument by showing the regulation has more than a “de minimis effect upon his right.”<sup>85</sup>

Courts struggle further under the second prong, unable to determine which level of scrutiny to apply given the lack of guidance in *Heller*.<sup>86</sup> For many courts, the distinction between strict and intermediate scrutiny turns on whether or not the challenged regulation inhibits the possession of arms within

76. PECK, *supra* note 75, at 12. Hereinafter this test will be referred to as the “two-part test.” The two-part test arose due to the lack of guidance post-*Heller/McDonald*. *Id.*

77. *Id.*

78. *Id.* at 13.

79. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701–02 (7th Cir. 2011).

80. PECK, *supra* note 75, at 14.

81. *Id.* at 13–15. For example, some courts look to the history discussed in *Heller* and attempt to draw parallels to the challenged regulation. *Id.* at 13. Other courts find the language in *Heller* relatively useless and focus more on *why* the Supreme Court designated certain restrictions as presumptively lawful. *See id.* at 15. Courts have struggled to determine whether presumptively lawful regulations are lawful because they withstand analysis under strict scrutiny (or any level of scrutiny) or because such regulations fall outside the scope of the Second Amendment entirely. *Id.* Finally, other courts reject the presumptively lawful portion of the test altogether, finding it too similar to the rational basis test. *Id.* at 14–15.

82. David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. ON LEGIS. 303, 335 (2016) [hereinafter Kopel, *Background Checks*].

83. *Id.* at 334 (quoting *Silvester v. Harris*, 41 F. Supp. 3d 927, 963 (E.D. Cal. 2014), *rev’d on other grounds*, 843 F.3d 816 (9th Cir. 2016)).

84. *Id.* at 335.

85. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

86. PECK, *supra* note 75, at 16.

the home.<sup>87</sup> For others, the distinction between strict and intermediate scrutiny is determined by “consider[ing] the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”<sup>88</sup> The Seventh Circuit employs yet another distinct approach, requiring that the government make a “rigorous showing” to justify the regulation when the firearm restriction implicates core Second Amendment rights, such as the ability to possess a handgun in the home.<sup>89</sup> Under this standard of review, the court evaluates “the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.”<sup>90</sup> This rigorous showing may be “something close to strict scrutiny,” if not strict scrutiny.<sup>91</sup>

Courts utilizing the intermediate scrutiny test seem to be doing exactly the kind of interest balancing that *Heller* prohibited.<sup>92</sup> For example, the Fourth Circuit justified its refusal to extend Second Amendment rights due to the court’s fears of being “minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.”<sup>93</sup> Unfortunately, this disregard for precedent in favor of more “likable” outcomes is not limited to the Fourth Circuit. Constitutional professor and scholar Allen Rostron contends that Justice Breyer’s balancing test has become the law of the land as lower courts routinely and regularly disregard *Heller*, which specifically rejected such a balancing test.<sup>94</sup> Professor Robert Cottrol contends that appellate courts are simply applying, at best, a weakened intermediate scrutiny and possibly even a rational-basis-plus standard.<sup>95</sup> In addition, the legitimacy of the two-part test as a whole

87. See Kiehl, *supra* note 74, at 1145–46.

88. *Kolbe v. Hogan*, 813 F.3d 160, 179 (4th Cir. 2016) (quoting *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)); see, e.g., *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). This distinction is largely pulled from First Amendment law, which is unsurprising given *Heller*’s comparisons between the rights. See PECK, *supra* note 75, at 16.

89. See *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

90. *Id.* at 703.

91. PECK, *supra* note 75, at 13.

92. *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari). While some might argue that *Heller* itself performed interest balancing in holding that certain long-standing regulations were acceptable, the rationale for that holding is found in the lengthy historical practice of the regulations, not their interests to society. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting) (per curiam) (discussing how history supported certain laws restricting the right to access firearms).

93. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

94. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 757 (2012); see also *Rogers*, 140 S. Ct. at 1867 (“With what other constitutional right would this Court allow such blatant defiance of its precedent?”).

95. Robert J. Cottrol, *Second Amendment, Constitutional Dysfunction or Necessary Safeguard?*, 94 B.U. L. REV. 837, 841 (2014).

has been called into question by multiple sitting Supreme Court Justices.<sup>96</sup> Dissenting from a denial of certiorari, Justice Thomas pointed out how lower courts are “minimiz[ing] . . . [*Heller* and *McDonald*’s] framework” by employing an “entirely made up” test that does not comport with any long-standing notion of constitutional law.<sup>97</sup> Furthermore, Justice Thomas noted that “[t]he Second Amendment provides no hierarchy of ‘core’ and peripheral rights,” nor do any precedents support the application of the binary test.<sup>98</sup>

While he was a judge for the D.C. Circuit, Justice Kavanaugh took issue with a similar, incorrect application of *Heller*’s principles.<sup>99</sup> In *Heller v. District of Columbia* (“*Heller II*”),<sup>100</sup> the majority used intermediate scrutiny to uphold a law requiring the registration of handguns as well as a prohibition on certain semi-automatic rifles.<sup>101</sup> Justice Kavanaugh, in dissent, opined that the proper test to apply is a “text, history, and tradition” standard.<sup>102</sup> In other words, “[t]he scope of the right is thus determined by ‘historical justifications’ . . . [a]nd tradition.”<sup>103</sup> Given Justice Kavanaugh’s recent appointment to the United States Supreme Court, there is a real possibility that this standard of review will be used in future Second Amendment challenges. Therefore, this Comment will apply both the common two-part test and the Kavanaugh test to North Carolina’s permitting scheme.

#### IV. NORTH CAROLINA SHOULD REPEAL ITS PISTOL-PURCHASE PERMIT SYSTEM AS IT IS UNCONSTITUTIONAL UNDER THE SECOND AND FOURTEENTH AMENDMENTS AND IS NOT A SENSIBLE POLICY

The North Carolina permit system does not pass constitutional muster under the Second Amendment, failing both the two-part test as well as the Kavanaugh test. This holds true under both intermediate and strict scrutiny. Furthermore, the permit system is unconstitutional under the Fourteenth Amendment as it violates the Equal Protection Clause of the Constitution. Finally, the permit system should be repealed because it is largely ineffective.

96. *Rogers*, 140 S. Ct. at 1867 (2020); see also *Rifle & Pistol Ass’n*, 140 S. Ct. at 1527 (per curiam) (Kavanaugh, J., concurring) (“I share Justice Alito’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.”).

97. *Rogers*, 140 S. Ct. at 1866–67.

98. *Id.* at 1867.

99. *Heller II*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

100. *Heller II*, 670 F.3d 1244 (D.C. Cir. 2011) (majority opinion).

101. *Id.* at 1257, 1262, 1264.

102. *Id.* at 1271 (Kavanaugh, J., dissenting) (rejecting an interest balancing approach where judges can “re-calibrate the scope of the Second Amendment”).

103. *Id.* at 1272.

A. *The North Carolina Pistol-Purchase Permit System Is Unconstitutional Under the Second Amendment as It Fails the Common Two-Part Test*

1. The North Carolina Pistol-Purchase Permit System Fails Prong One

The first prong of the test asks whether the law implicates the Second Amendment and whether it is presumptively lawful.<sup>104</sup> The pistol permitting scheme implicates the Second Amendment as it creates a waiting period through its approval process and medical release form signing period. For example, the Ninth Circuit has found that a ten-day waiting period alone implicates the Second Amendment.<sup>105</sup> Surely the combination of a permitting scheme that effectively creates a waiting period while waiting to sign medical release forms and while approval is pending also implicates the Second Amendment. In practice, the date from which one decides to purchase a handgun and the date of final approval of the permits could be *months* apart.<sup>106</sup> In addition, the permitting system directly affects one's ability to acquire a handgun. As "[o]ne cannot exercise the right to keep and bear arms without actually possessing a firearm,"<sup>107</sup> access to arms is a necessary precondition to exercising the right. Limiting access to a traditionally popular and accessible firearm directly implicates the Second Amendment.<sup>108</sup>

In applying the two-part test to determine whether the challenged regulation implicates the Second Amendment, courts will also ask if the regulation is presumptively lawful as a long-standing regulation.<sup>109</sup> To answer this, courts look to history and tradition, specifically as they relate to permitting systems.<sup>110</sup> Traditionally, systems requiring that a person receive permission from the government before buying or borrowing a firearm have been rare in the United States.<sup>111</sup> Leading up to the Civil War, several states enacted legislation prohibiting Black persons from possessing firearms without a

104. PECK, *supra* note 75, at 45.

105. See *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016).

106. See, e.g., *infra* notes 188–91 and accompanying text (describing delays of up to five weeks in Wake County).

107. *Silvester v. Harris*, 41 F. Supp. 3d, 927, 962 (E.D. Cal. 2014), *rev'd on other grounds*, 843 F.3d 816 (9th Cir. 2016).

108. See Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 460 (2014) (explaining that "*Heller* suggests that the Second Amendment protects weapons that are typically possessed by law-abiding citizens for lawful purposes").

109. *Heller II*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

110. See *id.* (upholding a registration requirement as presumptively lawful given the history). While I find the holding in this case to be an erroneous application of the standards described in *Heller*, it nevertheless acts as an example of how courts have typically justified a law as presumptively lawful by looking to history and tradition.

111. Kopel, *Background Checks*, *supra* note 82, at 304.

license.<sup>112</sup> In North Carolina, all free persons of color had to acquire an annual license in order to own or carry firearms.<sup>113</sup>

Following the Civil War and in the early twentieth century, isolated racially neutral permitting schemes came into effect to prevent freedmen from acquiring means to defend themselves—the North Carolina permit system among them.<sup>114</sup> Similarly, Missouri enacted a permitting system in 1921 for the sale of handguns, but it has since been repealed.<sup>115</sup> Overall handgun purchase permits were required by the following states: “New York (1911), Oregon (1913, repealed 1925), North Carolina (1919), Missouri (1921, repealed 2007), Connecticut (1923), Michigan (1927, partially repealed by several steps in early twenty-first century), Hawaii (1927), New Jersey (1927), and Texas (1931, later declared void).”<sup>116</sup> Thus, only a total of six states currently have permit systems in place as holdovers from the Jim Crow era.<sup>117</sup> The majority of state gun laws of the early 1900s were less restrictive than the permitting systems put in place in the minority of states listed above.<sup>118</sup>

There is little possibility that the North Carolina permit system is presumptively lawful as a long-standing regulation. The regulation came about in the twentieth century, and was not a common one at that.<sup>119</sup> “Permission laws were the exception, not the norm, in the early twentieth century.”<sup>120</sup> Both the timing of the regulation, and the fact that it was, and remains, uncommon are factors that cut against finding the permit system a traditional long-standing regulation. Furthermore, of the few states which have enacted such permitting schemes, over half have been repealed or partially repealed.<sup>121</sup> This further reduces the possibility that the permits are a long-standing regulation.<sup>122</sup> While the antiquated North Carolina permit system is still on the books, there is little support left for such permitting requirements. In addition, given the racial connotations of the permitting schemes discussed above in Section I.B, it is unlikely that any modern court would seek to uphold a system rooted in Jim Crow era discriminatory practices. Finally, the North Carolina permit system was enacted in 1919—well within the time frame that courts have found to be

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112. *Id.* at 337.

113. *Id.* at 338.

114. *See id.* at 342–46.

115. *Id.* at 345.

116. *Id.* at 360–61.

117. *Id.* at 361.

118. *See id.* at 362.

119. *See supra* notes 114–17.

120. Kopel, *Background Checks*, *supra* note 82, at 340.

121. *Id.* at 360–61.

122. *Id.* at 335.



too late to be established as long-standing.<sup>123</sup> Overall, the North Carolina permitting system satisfies the first prong of the common two-part test.

## 2. The North Carolina Pistol-Purchase Permit System Fails Prong Two

Next, under the second prong, the court must determine whether the pistol permit scheme is unconstitutional under some means-end scrutiny.<sup>124</sup> First, the court must determine the appropriate level of scrutiny to apply.<sup>125</sup> Generally, “[l]aws that neither implicate the core protections of the Second Amendment nor substantially burden their exercise do not receive heightened scrutiny.”<sup>126</sup> Rather, “[h]eighted scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”<sup>127</sup> The scope of the legislative restriction as well as the availability of alternative solutions factor into the analysis of determining the burden the challenged law places on the right.<sup>128</sup> However, strict scrutiny may not apply if the burden does not constrain the Second Amendment’s core area of protection.<sup>129</sup> As evidenced by *Heller*, rational basis is inapplicable.<sup>130</sup> Therefore, at a minimum, the court will employ intermediate scrutiny. However, *Heller* and *McDonald* strongly suggest that applying intermediate scrutiny to laws that categorically limit the Second Amendment is inappropriate.<sup>131</sup> Despite this, federal circuits routinely employ intermediate scrutiny to Second Amendment cases.<sup>132</sup>

To resolve these issues, courts should evaluate the North Carolina permit system under strict scrutiny. *Heller* and *McDonald* suggest that no interest-balancing approach should be used.<sup>133</sup> An inhibition on the ability to acquire a

123. See *Duncan v. Becerra*, 970 F.3d 1133, 1150–51 (9th Cir. 2020) (finding that regulation on large capacity magazines was not considered long-standing given that the regulation emerged in 1927 and had almost been entirely repealed); *Mance v. Holder*, 74 F. Supp. 3d 795, 805 (N.D. Tex. 2015) (finding a statute enacted in 1909 too recent to be considered long-standing); *Silvester v. Harris*, 41 F. Supp. 3d, 927, 963 (E.D. Cal. 2014) (finding a statute enacted in 1923 to be too late to be considered long-standing), *rev’d on other grounds*, 843 F.3d 816 (9th Cir. 2016).

124. PECK, *supra* note 75, at 13.

125. See *id.* at 15.

126. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 258 (2d Cir. 2015).

127. *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

128. *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 259.

129. *Id.* at 260. “If a law regulating arms adversely affects a law-abiding citizen’s right of defense of hearth and home, that law strikes at the core Second Amendment right.” *Duncan v. Becerra*, 970 F.3d 1133, 1152 (9th Cir. 2020); see also *Jackson v. City & County of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (finding that a challenged law “[o]n its face . . . implicates the core because it applies to law-abiding citizens and imposes restrictions on the use of handguns within the home”).

130. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

131. Adam P. Soloperto, *A Standard of Review for Gun Rights: The Second Amendment Question Hot as a Two-Dollar Pistol*, 47 SETON HALL L. REV. 225, 231 (2016).

132. PECK, *supra* note 75, at 45–46.

133. See *supra* Part II.

handgun for the defense of oneself in the home, which the North Carolina permit system does, hits at the very core of the Second Amendment. For example, under the Seventh Circuit's standards, rigorous scrutiny, which some equate to strict scrutiny, would be employed since the permit system directly affects one's ability to purchase a handgun for use in the home.<sup>134</sup> One must go through the burdensome process of applying to the sheriff's office, pay a fee for every permit, go to the sheriff's office to sign health release records, wait for approval, and return to the sheriff's office to pick up the permits to simply acquire a handgun. Therefore, without going through the time-consuming process, one is left defenseless in their home.<sup>135</sup> Furthermore, even when following the burdensome procedures to legally acquire a handgun, the significant delay caused by the archaic system means that an applicant is also left defenseless during the entire timeline of the application. "A burden on the core of [a] right undermines the very purpose for its codification."<sup>136</sup> The North Carolina permit system is a burden to the core of the Second Amendment. It poses a direct inhibition on the ability of North Carolinians to (1) acquire handguns, (2) exercise their fundamental right to self-defense, and (3) own and possess firearms inside their house.<sup>137</sup> As the system was likely enacted to deprive Black Americans of their core civil rights, the result of the analysis is unsurprising.<sup>138</sup> In addition, similar to the prohibition in *Heller*, the North Carolina permit system's impact is not limited to the public arena. Instead, the effects "extend[], moreover, to the home, where the need for defense of self, family, and property is most acute."<sup>139</sup>

Those in favor of intermediate scrutiny might argue that because long guns<sup>140</sup> are available without a permit, the core of the Second Amendment is not burdened since citizens still possess the ability to bear arms for defense in their homes. However, *Heller* indicated that the presence of alternatives will not excuse an infringement.<sup>141</sup> Furthermore, the government may not "treat the right recognized in *Heller* as a second-class right, subject to an entirely different

134. See *supra* Part III.

135. See *supra* Section I.A.

136. Klukowski, *supra* note 108, at 467.

137. See *Duncan v. Becerra*, 970 F.3d 1133, 1140 (9th Cir. 2020) (finding that a ban on large capacity magazines implicated the core of the Second Amendment protections because it restricted the ability to both buy and possess large capacity magazines in the home as well as limited the right of self-defense).

138. See *supra* Section I.B. For more information on statutes enacted to discriminate against Black Americans, see generally *A Brief History*, *supra* note 1.

139. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

140. Without delving into the intricate and often confusing definitions of various firearms under federal law, for purposes of this Comment, "long guns" refers to rifles and shotguns. In other words, guns readily available for purchase outside of the scope of the North Carolina permit system.

141. *Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.").

body of rules than the other Bill of Rights guarantees.<sup>142</sup> We also know that laws burdening fundamental rights are generally subject to strict scrutiny.<sup>143</sup> In addition, it is imperative that courts not define the Second Amendment so narrowly as to give inadequate effect to the right.<sup>144</sup> Any attempt to evaluate the permit system under intermediate scrutiny would be an attempt to subject the Second Amendment to second-class treatment compared to other rights.

That second-class treatment came to fruition in *Kwong v. Bloomberg*,<sup>145</sup> where the Second Circuit upheld a pistol licensing scheme in New York.<sup>146</sup> The licensing scheme, which prohibited ownership of handguns without a license and associated fee payment, was upheld by analogy to First Amendment fee jurisprudence.<sup>147</sup> However, in upholding the licensing scheme, the Second Circuit failed to acknowledge the crucial difference between possessing a handgun in the home and conducting a parade or a rally: handgun possession is conducted in the privacy of the home while parades and similar forms of expression are conducted in public spaces that often require police presence, public sanitation, and road closures.<sup>148</sup> The Second Circuit failed to recognize this distinction and even failed to reconcile the plethora of First Amendment activities that do not require a fee or license.<sup>149</sup> The court's comparison of a handgun purchase for the home, which has no relation to carrying arms in public or to parades and rallies is severely flawed. A more apt comparison to First Amendment activity would be an analogy to owning a book in the home or placing a sign on one's property.<sup>150</sup> Instead, the court's logic suggests that almost

142. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

143. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

144. *See Klukowski*, *supra* note 108, at 466.

145. 723 F.3d 160 (2d Cir. 2013).

146. *Id.* at 172.

147. *Id.* at 165 ("The Supreme Court's 'fee jurisprudence' has historically addressed the constitutionality of fees charged by governmental entities on expressive activities protected by the First Amendment—such as fees charged to hold a rally or parade. Two district court decisions that have considered the issue in the wake of *Heller* and *McDonald* have used the same analytical framework to consider similar claims involving the exercise of Second Amendment rights.").

148. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) ("The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.'").

149. There are many examples of First Amendment activities that do not require a fee or license. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). However, the *Kwong* court failed to acknowledge any of these examples.

150. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (recognizing that the First Amendment strongly protects the right of one to "read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home").

any fee in the Second Amendment context is constitutional because there are constitutional fees for *some* First Amendment activities.<sup>151</sup> Furthermore, the Second Circuit also failed to address wait times associated with the licensing system and instead chose to focus on the associated fee to determine that no substantial burden was imposed on the Second Amendment right.<sup>152</sup>

Overall, the application of *Kwong* today is relatively limited.<sup>153</sup> The decision primarily relied on First Amendment fee jurisprudence in the context of an undue burden analysis incorporated from abortion jurisprudence.<sup>154</sup> This undue burden analysis has been *rarely* used and fallen out of favor among the circuits for the more-developed two-part test described in this Comment.<sup>155</sup> Furthermore, it is unclear whether the court even used intermediate scrutiny.<sup>156</sup> At best, *Kwong* illustrates a flawed equivalence of protected activities under two different fundamental rights.

The undrawn distinction between public activity and private ownership in *Kwong* is implicated by the North Carolina permit system—the permit system is not related to regulating the carrying of arms in the public but instead regulates access to ownership generally and, by extension, in the home. Therefore, a lesser level of scrutiny is inappropriate.<sup>157</sup>

Support for this line of reasoning can be found in *Murdock v. Pennsylvania*,<sup>158</sup> where the Supreme Court struck down a paid licensing scheme for solicitors.<sup>159</sup> In doing so, the Court rejected the argument that the “provocative, abusive, and ill-mannered” nature of the literature being

151. See *Kwong*, 723 F.3d at 167–68 (“Indeed, the fact that the licensing regime makes the exercise of one’s Second Amendment rights more expensive does not necessarily mean that it ‘substantially burdens’ that right.”).

152. *Id.* at 165–66.

153. See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 259 n.92 (2d Cir. 2015) (declining to apply *Kwong* and instead applying heightened scrutiny to an assault weapons ban).

154. Some question the applicability of fee jurisprudence generally in the Second Amendment context. See, e.g., Genesa Cefali, *Is First Amendment Fee Jurisprudence the Right Approach to the Second Amendment?*, DUKE U. CTR. FOR FIREARMS L. SECOND THOUGHTS BLOG (July 15, 2019), <https://sites.law.duke.edu/secondthoughts/2019/07/15/is-first-amendment-fee-jurisprudence-the-right-approach-to-the-second-amendment/> [<https://perma.cc/WNG8-G744>] (suggesting that First Amendment fee jurisprudence may not be the proper approach to firearm license fees today given the Second Amendment’s own relevant history).

155. See *supra* Part III.

156. Cottrol, *supra* note 95, at 839–40 (criticizing the *Kwong* decision, among others, as an example of “[c]ourts . . . applying, at most, a somewhat weak intermediate scrutiny, perhaps even a rational basis plus standard” to firearm restrictions).

157. See Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What’s a Court To Do Post-McDonald*, 21 CORNELL J.L. & PUB. POL’Y 489, 511 (2012) (discussing how some courts have drawn the line between intermediate and strict scrutiny as whether the regulation addresses arms in the home or the public).

158. 319 U.S. 105 (1943).

159. *Id.* at 117.

distributed justified the license and associated fee.<sup>160</sup> It noted that the government may not suppress or tax the “dissemination of views because they are unpopular, annoying or distasteful.”<sup>161</sup> Similar to the content-based restrictions or justifications described above, these types of “*arms-based*,” discriminatory gun-control schemes seek to restrict and suppress politically disfavored weapons. The North Carolina permit system is an arms-based restriction since it only applies to handguns and therefore strict scrutiny *should* be used.

While federal circuit courts would seem to overwhelmingly disagree with the conclusion that strict scrutiny should be used, that is not necessarily surprising. There is an apparent double standard present when comparing the treatment of the Second Amendment to other constitutional rights.<sup>162</sup> Lower courts are defiantly resisting the Supreme Court’s decisions in *Heller* and *McDonald*, and “[c]ontinued refusal to hear Second Amendment cases [by the Supreme Court] only enables this kind of defiance.”<sup>163</sup> The Supreme Court has “not clarified the standard for assessing Second Amendment claims for almost 10 [years].”<sup>164</sup> The right to keep and bear arms is effectively the Supreme Court’s “constitutional orphan . . . [a]nd the lower courts seem to have gotten the message.”<sup>165</sup> Recently some lower courts have begun to fall more in line with Justice Thomas’s views, as seen in *Duncan v. Becerra*,<sup>166</sup> where a panel for the Ninth Circuit utilized strict scrutiny in striking down a large capacity magazine ban.<sup>167</sup>

Under strict scrutiny, the law must be “narrowly tailored to achieve a compelling governmental interest.”<sup>168</sup> In addition, the law must be no more restrictive than necessary to achieve the purported governmental interest.<sup>169</sup> For “almost every gun-control regulation . . . [the government’s] primary concern . . . [is] the safety and indeed the lives of its citizens.”<sup>170</sup> In addition, the government has an interest in preventing crime.<sup>171</sup> In order to assess whether the pistol permit scheme would fail under strict scrutiny, it is useful to

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160. *Id.* at 115–16.

161. *Id.* at 116.

162. *Silvester v. Becerra*, 138 S. Ct. 945, 950–51 (2018) (Thomas, J., dissenting from denial of certiorari).

163. *Id.*

164. *Id.* at 951.

165. *Id.* at 952.

166. 970 F.3d 1133 (9th Cir. 2020).

167. *Id.* at 1152.

168. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 82 (1997) (upholding the district court’s redistricting plan for Georgia’s congressional delegation).

169. Sobel, *supra* note 157, at 495.

170. *See District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

171. *See id.*

see what courts have struck down in other areas of constitutional rights law. “[T]he Ninth Circuit struck down a county’s 5-day waiting period for nude-dancing licenses because it ‘unreasonably prevent[ed] a dancer from exercising first amendment rights while an application [was] pending.’”<sup>172</sup> The Supreme Court has held that the First Amendment forbids a county from charging even a small permitting fee to offset the costs of providing security for a white-nationalist rally.<sup>173</sup> Overall, it seems that the Court provides much greater protection to other, more “favorable” rights than the Second Amendment.<sup>174</sup> Holding the Second Amendment to the same level of favor, the North Carolina pistol permit scheme falls short of constitutionality under the Second Amendment as it imposes a waiting period and fee to exercise the right.

While the government has compelling interests,<sup>175</sup> the permitting system is not narrowly tailored—or even effective—to achieve those interests since the permitting system is overwhelmingly redundant with existing federal regulations.<sup>176</sup> In fact, the sheriff’s office utilizes the *same exact* NICS background check as would be performed without the permitting system in place.<sup>177</sup> Some critics would argue that removing the permitting system would inhibit checking mental health records. However, in 2016, the Department of Health and Human Services modified the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)<sup>178</sup> Privacy Rule to expressly permit the disclosure of the identities of individuals to NICS who, for mental health reasons, are prohibited from having a firearm.<sup>179</sup> Therefore, the North Carolina permit system is redundant.

172. *Silvester v. Becerra*, 138 S. Ct. 945, 951 (Thomas, J., dissenting from denial of certiorari) (quoting *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1060 (1986)).

173. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992).

174. *Silvester*, 138 S. Ct. at 951.

175. Public safety and crime prevention, among other interests, would easily be touted by the government in defending the permitting system.

176. See *infra* Section IV.D.

177. See N.C. GEN. STAT. § 14-404(a)(1) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) (“The sheriff shall determine the criminal and background history of any applicant by . . . conducting a national criminal history records check, by conducting a check through [NICS] . . . and by conducting a criminal history check through the Administrative Office of the Courts.”). While some might argue that the added check of state level records is an additional safeguard, in practice, it is simply negligible if North Carolina responsibly reports criminal infractions to the FBI. Since state law disqualifiers mirror federal law disqualifiers, the federal system covers any *legal* disqualifiers, making the state-level check irrelevant. See *supra* notes 21–26 and accompanying text. Unless, of course, the state-level check was being used to deny permits based off of “good cause” founded on mere charges or accusations alone, further highlighting the dangers of such subjective qualifiers. See *infra* notes 180–84 and accompanying text.

178. Pub. L. No. 141-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

179. *HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)*, U.S. DEP’T HEALTH & HUM. SERVS. (June 16, 2017), <https://www.hhs.gov/hipaa/for-professionals/special-topics/nics/index.html> [<https://perma.cc/6934-UD7L>].

Furthermore, since implementation of the permit system varies by county, there is no single method of operation.<sup>180</sup> “The law is not uniformly followed . . . nor is it enforced at the same rate.”<sup>181</sup> County sheriffs also hold a large range of discretion, retaining the ability to deny one their constitutional right without substantial due process.<sup>182</sup> This excessive amount of discretion seems to place North Carolinians’ constitutional rights in the hands of their county sheriff based on a subjective system that is susceptible to abuse.<sup>183</sup> Such is the case in Henderson County, where Sheriff Charles McDonald openly admits he will sometimes deny a permit based off of criminal charges, despite the individual never being “convicted in court.”<sup>184</sup>

This inconsistent application of the permit system creates opportunities for discrimination. “Even now, in many jurisdictions in which police departments have wide discretion in issuing firearm permits, the effect is that permits are rarely issued to poor or minority citizens.”<sup>185</sup> When considering the racially charged past of gun control, especially in North Carolina, the potential for discriminatory implementation of the permit system is a real threat.

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180. Joel Burgess, *More Than 95 Percent of Local Pistol Permit Requests Approved*, CITIZEN TIMES (Feb. 7, 2016, 8:50 PM), <https://www.citizen-times.com/story/news/local/2016/02/07/permit-law-adding-more-gun-control/78755132/> [https://perma.cc/56J7-S832].

181. *Id.*

182. *See id.* (describing how Sheriff Charles McDonald will deny a permit based on an applicant’s criminal charges despite the applicant never being “convicted in court”).

183. For an example of how such a system could be abused, we can look to New York, where the licensing system became a bribery system. Kaja Whitehouse, *Ex-Cop: NYPD Gun License Division Was a Bribery Machine*, N.Y. POST (Apr. 17, 2018, 8:31 PM), <https://nypost.com/2018/04/17/ex-cop-nypd-gun-license-division-was-a-bribery-machine/> [https://perma.cc/X3A9-ETNT] (describing how gun licenses were exchanged for money, prostitutes, watches, sports memorabilia, and vacations). “New York City requires residents to have a pistol permit to own a handgun legally, but the law is administered so stringently that virtually no residents of New York City other than retired police officers are able to get a permit.” Gary Kleck, *Gun Control After Heller and McDonald: What Cannot Be Done and What Ought To Be Done*, 39 FORDHAM URB. L.J. 1383, 1385 (2012). Less than one percent of New York City residents have obtained a license to allow them to possess a handgun. *Id.* at 1386.

184. *See Burgess, supra* note 180 and accompanying text.

185. Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67, 67 (1991).

Table 1<sup>186</sup>

	Total Number of Applications	Number of Permit Approvals	Number of Permit Rejections
Black Permit Applicants	37,340	28,552	8,788
White Permit Applicants	65,900	60,381	5,519

Table 1 illustrates a breakdown of permit applications in Wake County by race from January 1, 2015, to December 3, 2020, and their associated approval or rejection rates.

In practice, the Wake County Sheriff's Office rejected 8.37% of White applicants, while rejecting 23.54% of Black applicants. This amounts to Black applicants experiencing a rejection rate of approximately three times the rate of White applicants. Given Wake County's similar racial composition to that of North Carolina as a whole,<sup>187</sup> Wake County potentially represents statewide trends. But while this data is certainly striking, the conclusions from it are limited. Without further research into the reasons for permit denials broken down by race, as well as data from all counties in North Carolina, definitive conclusions regarding racial biases present in the modern permit system are speculative. However, at a minimum, this data demonstrates the urgency for further investigation into this issue.

A more recent example of the wanton implementation of the North Carolina permit system is Wake County Sherriff Baker (seemingly independently) announcing that the sheriff's office would no longer be accepting applications due to backlog.<sup>188</sup> After several lawsuits were filed, Sherriff Baker ultimately reopened the application process, though more recent lawsuits have been filed over the significant delay in approving permits.<sup>189</sup> In

186. Although Wake County maintains this information and it is considered public record, the data is not accessible online. In December 2020, I submitted a North Carolina Public Records Request asking for the data on permit rejections within Wake County. Wake County then provided this information to me. The data is on file with the North Carolina Law Review.

187. *Compare Quick Facts: Wake County, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/wakecountynorthcarolina/RHI225219#RHI225219> [https://perma.cc/ZWD5-BFHB], with *Quick Facts: North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NC> [https://perma.cc/Z3DH-QP2Y].

188. *Wake County Receiving 'Unprecedented' Number of Requests for Gun Permits*, WRAL, <https://www.wral.com/coronavirus/group-files-third-lawsuit-against-wake-sheriff-over-gun-permits/19220600/> [https://perma.cc/36KL-GYLN (staff-uploaded archive)] (Aug. 5, 2020, 8:41 AM).

189. *See id.*



Wake County, permit approvals can take as long as five weeks.<sup>190</sup> By comparison, turnaround times for permits in Nash and Johnston Counties are “just a few days.”<sup>191</sup>

Mental health release forms compound this delay since permit applications are not considered complete until the release forms are signed during an appointment with the sheriff's office.<sup>192</sup> In Wake County, an applicant is left in limbo after completing the online portion of the permit application because they receive only a message that the sheriff's office will reach out to them to set up an appointment. While not the same application process, a concealed carry application appointment availability can be a useful gauge of backlog, as these appointments are handled by the same department within the sheriff's office. As of September 24, 2020, concealed carry application appointments were “fully booked” through January 2021.<sup>193</sup> Theoretically, one could submit the online application and spend months waiting for an appointment to sign the medical release forms and only *then*, would the fourteen-day statutory time limit start. One might be thankful just to start the clock on the time limit, but some sheriffs have little regard for state law. For example, Wake County Sheriff Baker readily admits he is not complying with the fourteen-day time limitation because of increased numbers of applications.<sup>194</sup> Despite violating state law, Sheriff Baker maintains he has not violated anyone's Second Amendment rights.<sup>195</sup> This exemplifies the problem: North Carolinians should not be stuck with their Second Amendment rights in limbo because of archaic, inefficient, and costly gun-control schemes.<sup>196</sup> Nor should the ability to exercise one's Second Amendment rights depend on one's county of residence.

190. *Id.*

191. *Id.* This difference in processing time very well may be a function of population differences. Even still, it exposes further flaws of the permit system that could be alleviated by simply following existing federal gun control. A citizen in Wake County should be able to enjoy their Second Amendment rights just as expeditiously as another citizen in Nash or Johnston County.

192. *See supra* note 19 and accompanying text.

193. A.P. Dillon, *Protest of Wake Sheriff over Continued Pistol Permit Delays Is Canceled*, N. ST. J. (Sept. 24, 2020), <http://nsjonline.com/article/2020/09/protest-wake-sheriff-continued-pistol-permit-delays-canceled/> [<https://perma.cc/R6FR-WSPE>].

194. *Id.*

195. *Id.*

196. In the course of writing this Comment, I applied for a pistol permit through the North Carolina permit system. On September 25, 2020, I submitted my application packet online to the Wake County Sheriff's Office. On October 27, 2020—thirty days later—my application was approved, and I was notified that I must call to make an appointment to show identification and sign the mental health waiver form to receive my pistol permit. When calling the Wake County Sheriff's Office on multiple occasions, an automated message played notifying me that the office was busy with other formalities. At the end of the automated message the call automatically disconnected with no option to remain on hold. As of December 2020, I have not yet been able to reach the Wake County Sheriff's Office to schedule an appointment, and I have not yet received my permit. However, my situation is not unique. Ashad Hajela, *Wake County Sheriff Cuts Wait Time for Pistol Permits After Gun Rights Group Sued*, NEWS & OBSERVER, <https://www.newsobserver.com/article247020792.html> [<https://perma.cc/9SRH->

While the goal of crime prevention is certainly compelling, the permit statute achieves nothing that federal law does not already cover—other than adding inconveniences and substantial burdens to the citizens of North Carolina who seek to exercise their Second Amendment rights. Furthermore, sheriff's offices are limited in their hours of operation, making it exceedingly difficult and burdensome for working citizens to find the time to stop in on two separate occasions in order to receive a permit.<sup>197</sup> In addition, citizens may even have to take unpaid time off from work in order to make multiple trips to accommodate the limited hours of operation.<sup>198</sup>

Moreover, the scope of the permitting system seems overly broad. For example, even if a grandfather wanted to gift his heirloom pistol to his grandson, his grandson would have to jump through the burdensome and unnecessary hoops of acquiring a pistol permit.<sup>199</sup>

Overall, the pistol purchase permit scheme falls short of satisfying strict scrutiny when challenged under the Second Amendment. This is mostly due to the scheme's redundancy with existing federal gun control laws. When viewed in light of existing laws, the critical flaws of the permitting scheme are apparent: (1) an inability to handle the volume of applications during periods of high demand; and (2) the lack of any significant, measurable advantage to accompany its increased burdens.<sup>200</sup> If federal law can achieve the same result with far less burden, without placing citizens in lengthy periods of backlog, and without the potential for racial biases to influence the process, the North Carolina permit system can hardly be said to be narrowly tailored.<sup>201</sup> Sheriff Baker himself

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R2WF (staff-uploaded dark archive)] (explaining that some applicants have waited up to “70 days” for the Wake County Sheriff's Office to process their applications).

197. For example, the Wake County Sheriff's Office is open on Monday through Friday from 8:30 AM to 5:00 PM. Stephen R. Walson, *Pistol Purchase Permits*, WAKEGOV (Oct. 28, 2020), <http://www.wakegov.com/sheriff/divisions/Pages/pistolpermits.aspx> [<https://perma.cc/VJ79-9ABM>].

198. As one can imagine, this burden is amplified for poorer applicants since every hour lost means missed wages. In addition, this disproportionately burdens people of color, who more often rely on public transportation in getting to and from work. See Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/> [<https://perma.cc/N5CQ-25CQ>].

199. Compare N.C. GEN. STAT. §§ 14-402 to 14-409 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.), with 18 U.S.C. § 922 (demonstrating that, unlike the North Carolina permit system, under federal law, individuals can accept gifted firearms without a permit).

200. See *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (striking down a law banning possession of handguns and other firearms outside of the home because Illinois failed to justify having more restrictive laws than any other state).

201. Looking back to the First Amendment, we can also see that the Supreme Court has been relatively hostile to content-based restrictions. For example, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court struck down a content-based restriction on signs for failing to satisfy strict scrutiny, reasoning that “[t]he Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.” *Id.* at 2231. Applying similar reasoning to the North Carolina permit system, it is arguable that rifles and shotguns both pose the same danger to the community as

admits the inadequacies of the permit system, saying “[y]ou can sue me all day but those numbers tell you it’s going to be almost impossible to service that number of applications with the processes in place, the background checks that are required in the 14-day period.”<sup>202</sup> Ironically enough, public officials across all of the United States have been steadily working with the NICS—despite high volume—to ensure citizens have access to firearms to exercise their Second Amendment rights.<sup>203</sup> In addition, less burdensome alternatives exist, such as community outreach programs, educational brochures with gun purchases, gun safety videos distributed by the sheriff’s department online, and so on.

Even if intermediate scrutiny were applied, the North Carolina permit system would still fail to pass muster. To survive intermediate scrutiny, the law must serve an important governmental objective and the means employed must be “substantially related to the achievement of those objectives.”<sup>204</sup> In addition, the “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations . . . .”<sup>205</sup> Here, the government has an interest in crime prevention and public safety. However, it is difficult to argue that those interests were at the forefront of the permit system because it was enacted during the Jim Crow era alongside explicit discriminatory laws.<sup>206</sup> And still today, we see strikingly different permit approval rates between Black and White applicants.<sup>207</sup> Moreover, in modern practice, the permit system fails to further public safety. The permit system undermines the federal background check system by allowing for the purchase and use of permits for up to five years in the future and obviating the need for any further background checks during the five-year period.<sup>208</sup> If North Carolina is concerned about public safety and crime prevention, it should prefer the most recent information available on permit holders.

Even if First Amendment fee jurisprudence were applied, it is unlikely the fees would survive intermediate scrutiny. Under the First Amendment, the fee must cover actual administrative costs.<sup>209</sup> Here, the price of each permit

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handguns yet are treated differently. It follows that North Carolina cannot claim that the strict limits on the handguns are necessary. In other words, the permit system fails to satisfy strict scrutiny.

202. Dillon, *supra* note 193.

203. In fact, NICS is able to provide an answer within minutes for ninety-one percent of the time. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS, U.S. D.O.J., at iii (2014).

204. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 150 (1980)).

205. *Id.*

206. *See supra* Section I.B.

207. *See supra* notes 185–88 and accompanying text.

208. *See infra* Section IV.D.

209. *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1942) (striking down a statute requiring a paid license to solicit literature, among other things, for failing to impose a regulatory measure calculated to defray a legitimate expense of the state).

remains five dollars, no matter how many, or how few, one purchases.<sup>210</sup> In addition, *Murdock* strongly warns against the nature of such “flat license tax[es],”<sup>211</sup> seemingly structured as if to grant the privilege of exercising a right,<sup>212</sup> not defraying legitimate administrative costs.<sup>213</sup>

For example, if an individual purchases five permits at once, they must pay twenty-five dollars, but the background and mental health check only happens once. Therefore, the number of checks and the administrative burden would not increase by the number of permits purchased. The only arguable difference would be the number of permits printed. If one permit and one background and mental health check cost five dollars in administrative fees, then five permits cannot each cost the same amount as the singular permit, as the additional four permits do not require the same administrative burden. Collectively, the permit system’s cost appears arbitrary as opposed to directly tied to administrative burdens. As a result, the permitting system falls short of satisfying intermediate scrutiny.

B. *The North Carolina Pistol-Purchase Permit System Is Unconstitutional Under the Second Amendment Using the Kavanaugh Test*

The North Carolina permit system also falls short of constitutionality under the Kavanaugh test. Under the Kavanaugh test, courts look to text, history, and tradition to see if a law implicating the Second Amendment is constitutional.<sup>214</sup> In other words, “[t]he scope of the right is thus determined by ‘historical justifications’ . . . [and] tradition.”<sup>215</sup> As previously discussed, the permitting system found in North Carolina was not common historically nor is it common today.<sup>216</sup> Furthermore, the concept of permit schemes originated in

210. N.C. DEP’T OF JUST., NORTH CAROLINA FIREARM LAWS 10 (2014), <https://ncdoj.gov/ncja/download/102/firearms/17352/north-carolina-firearms-laws.pdf> [<https://perma.cc/594M-K5EE>] (“There is no limit to the number or frequency of permit applications and the sheriff will charge \$5.00 for each permit requested.”).

211. See *Murdock*, 319 U.S. at 114 (“It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax.”).

212. See *id.* at 114 (“[A] person cannot be compelled ‘to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.’” quoting *Blue Island v. Kozul*, 41 N.E.2d 515, 519 (Ill. 1942))).

213. See *id.* at 115 (“This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed [to] the people by the Federal Constitution.”).

214. See *Heller II*, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). While this is a dissenting opinion, with Justice Kavanaugh now sitting on the Supreme Court, it is worthwhile to spend a portion of this Comment analyzing his test given the possibility that it could be adopted as the standard were he able to convince other Justices to side with him.

215. *Id.*

216. See Kopel, *Background Checks*, *supra* note 82, at 360–61.

the eighteenth century as a way to curtail gun ownership among freed slaves.<sup>217</sup> The only permit schemes active today are remnants from the Jim Crow era when a small collection of states, North Carolina included, enacted permit schemes governing handguns following in the footsteps of New York's Sullivan Act.<sup>218</sup> Seemingly, the only tradition present in these permit schemes is the tradition of racially charged, discriminatory laws in the United States.<sup>219</sup> Indeed, there is a common understanding that these types of permit schemes were never meant to apply to anyone other than minorities and, given their lack of universal application, these permit schemes would not qualify as any sort of tradition contemplated by the Kavanaugh test.<sup>220</sup> In addition to lacking tradition, the North Carolina permit system is also devoid of any valid historical justifications given its underlying racial motivations.<sup>221</sup> Therefore, the North Carolina permit system is unconstitutional under the Kavanaugh test.

C. *The North Carolina Pistol-Purchase Permit System Violates the Equal Protection Clause of the Fourteenth Amendment*

In *Harper v. Virginia State Board of Elections*,<sup>222</sup> the Supreme Court held that poll taxes are unconstitutional.<sup>223</sup> In that case, the Virginia Board of Elections instated a \$1.50 tax as a condition to obtaining a ballot.<sup>224</sup> The Court struck down the measure, reasoning that the right to vote has no relation to wealth nor to paying or not paying a fee, holding that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”<sup>225</sup> In addition, “[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.”<sup>226</sup> Thus, “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”<sup>227</sup>

Just as voting is a fundamental right, so too is the Second Amendment right to keep and bear arms. Therefore, applying the principles outlined in *Harper*, an individual’s right to keep and bear arms under the Second Amendment cannot be subject to a fee imposed as a condition for exercise of

217. *Id.* at 337–38.

218. *See supra* Section I.B.

219. *See generally* Tahmassebi, *supra* note 185 (describing the historical connection between racism and gun control policies).

220. *See supra* Section IV.B.

221. *Id.*

222. 383 U.S. 663 (1966).

223. *See id.* at 666 (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

224. *Id.* at 668.

225. *Id.*

226. *Id.* (internal citation omitted).

227. *Id.*

that right. The right to keep and bear arms, like the right to vote, has “no relation to wealth nor to paying or not paying a fee.”<sup>228</sup> Some might argue that the Second Amendment is related to wealth since one must purchase a gun to exercise the right. However, that argument fails to consider that the permit system also regulates gifted firearms or firearms transferred from one person to another. Others might argue a five-dollar fee required to obtain a pistol permit is insignificant considering the cost of handguns, but *Harper* makes clear that “degree of discrimination” (here, the cost) is irrelevant.<sup>229</sup> Still, some may contend that since individuals can obtain alternative arms without an associated fee, equal protection under the law is not violated. This contention, however, flies in the face of *Heller*. *Heller* indicated that handguns are the most popular and widely used arms for self-defense in the United States and that the existence of alternatives does not justify infringement.<sup>230</sup> Viewed under the Equal Protection framework, pistol permit fees under the North Carolina permit system discriminate against those with less means and severely inhibit them from accessing the most popular means of self-defense, allowing for only partial enjoyment of Second Amendment rights. Furthermore, poll taxes share a common history with gun control—a focus on disenfranchising Black Americans of fundamental rights as citizens.<sup>231</sup> The two rights have even intertwined at points. In the South in the 1950s and 1960s, Black American gun ownership was crucial for providing physical protection to enable voter registration efforts.<sup>232</sup> In conclusion, pistol purchase permit fees under the permit system are directly comparable to a poll tax and are therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

#### D. *Redundancy and Potential Flaws of the North Carolina Pistol-Purchase Permit System*

As previously discussed, there is significant overlap between the North Carolina permit system and federal law, making the permit system largely redundant.<sup>233</sup> Moreover, the permit system has a major flaw. North Carolina

228. *Id.* at 666.

229. *See id.* at 668 (“To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.”).

230. *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (“It is of no answer to say, as petitioners do, that it is permissible to ban the possession of handguns as long as the possession of other firearms (i.e., long guns) is allowed . . . [w]hatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

231. *See supra* Section I.B.

232. Cottrol, *supra* note 95, at 850.

233. *See supra* Section IV.D.

pistol permits are valid for five years.<sup>234</sup> During the period for which a permit is valid, no additional background checks are conducted. Therefore, one could apply for five permits and buy one pistol each year for five years without ever having another background check done. This is because under federal law, when a buyer has possession of a pistol purchase permit, federally licensed firearm dealers *do not* conduct an NICS background check.<sup>235</sup> As a result, there is a real possibility that “people who have become prohibited from possessing firearms may continue to hold state permits to purchase or permit firearms,” and may continue holding the permit without renewing their background check, “if the state fails to remove these permits in a timely fashion.”<sup>236</sup> This potentially dangerous loophole is yet another reason that the redundant and unconstitutional permit system should be repealed. Standardizing the process for gun purchases across the board by having federally licensed firearm dealers comply with federal law removes the weak point. And while some have concerns regarding mental health reporting, part of the repeal could include a mandate for reporting prohibited persons to NICS to make sure that no unauthorized persons are able to purchase firearms.

E. *The North Carolina Pistol-Purchase Permit System Is Ineffective*

Currently, Iowa, Maryland, Nebraska and New York City have similar systems to North Carolina, where only handguns require a permit to purchase.<sup>237</sup> The following states require no permit to buy a handgun: Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.<sup>238</sup> The following chart represents a collection of the violent crime rates in 2014 for the aforementioned states:

234. N.C. GEN. STAT. § 14-403 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

235. 18 U.S.C. § 922(t)(3); 27 C.F.R. § 478.102(d) (2019).

236. *Background Check Procedures: State by State*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/background-check-procedures-state-by-state/> [https://perma.cc/9RHJ-FJN3].

237. *See Licensing*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/licensing/> [https://perma.cc/D8W3-XBS8] (explaining that only Iowa, Maryland, Nebraska, North Carolina, New York City require permits, which expire after a specified period, for the purchase of handguns, but not any other types of firearms). Note that, due to the focus of this study, this statement excludes states in which a permit is required to purchase any type of firearm.

238. *The Easiest States To Buy a Gun*, HUFFPOST (May 13, 2016), [https://www.huffpost.com/entry/the-easiest-states-to-buy-a-gun\\_n\\_5735cfa8e4b08f96c182dc38](https://www.huffpost.com/entry/the-easiest-states-to-buy-a-gun_n_5735cfa8e4b08f96c182dc38) [https://perma.cc/99TK-WJSV]. Other states not listed implement a permit scheme for both long arms

Table 2

	State	Violent Crime Rate 2018 (Rate per 100,000) <sup>239</sup>	Percentage of Murders with Handguns 2018 <sup>240</sup>
Require Handgun Permit	Iowa	250.1	25 <sup>241</sup>
	Maryland	468.7	73.4
	Michigan	449.4	30.02
	Nebraska	284.8	51.16
	New York <sup>242</sup>	350.5	46.52
	North Carolina	377.6	48.23
Do Not Require Handgun Permit	Alabama <sup>243</sup>	519.6	N/A
	Alaska	885.0	14.89
	Arkansas	543.6	30.28
	California	447.4	47.95
	Colorado	397.2	47.82
	Delaware	423.6	29.17
	Florida <sup>244</sup>	384.9	N/A
	Georgia	326.6	72.18
	Idaho	227.1	43.75
	Indiana	382.3	36.66

(rifles and shotguns) and pistols. *Id.* While outside the scope of this Comment, it is unlikely such permitting systems are constitutional under strict scrutiny and have thus been excluded.

239. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *Table 4: Crime in the United States by Region, Geographic Division, and State, 2017–2018*, FED. BUREAU INVESTIGATION: UNIF. CRIME REPORTING (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-4> [<https://perma.cc/XYR6-9TMX>].

240. See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *Table 20: Crime in the United States, Murder by State, Types of Weapons, 2018*, FED. BUREAU INVESTIGATION: UNIF. CRIME REPORTING (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-20> [<https://perma.cc/3YTS-LAU3>] [hereinafter FED. BUREAU OF INVESTIGATION, *Murder by State*].

241. Data from 2017 was used because the FBI received only a partial report in 2018. *Id.*

242. Since direct data for New York City is not available, data for the entirety of New York is used for comparison. Theoretically, this should improve the rates since typically large population centers have higher rates of violent crime. *2017 National Crime Victims' Rights Week Resource Guide: Urban and Rural Victimization*, NAT'L CRIM. JUST. REFERENCE SERV. (2017), [https://www.ncjrs.gov/ovc\\_archives/ncvrrw/2017/images/en\\_artwork/Fact\\_Sheets/2017NCVRRW\\_UrbanRural\\_508.pdf](https://www.ncjrs.gov/ovc_archives/ncvrrw/2017/images/en_artwork/Fact_Sheets/2017NCVRRW_UrbanRural_508.pdf) [<https://perma.cc/8UTU-J5EJ>].

243. Alabama was excluded from the “Percentage of Murders with Handguns 2018” list as the FBI only received a partial homicide report of two murders. FED. BUREAU OF INVESTIGATION, *Murder by State*, *supra* note 240.

244. Florida did not report murder weapon statistics to the FBI and therefore was excluded from the “Percentage of Murders with Handguns 2018” calculation. FED. BUREAU OF INVESTIGATION, *Murder by State*, *supra* note 240.



Kansas	439.0	42.73
Kentucky	211.9	47.26
Louisiana	537.5	44.72
Maine	112.1	26.09
Mississippi	234.4	69.72
Missouri	502.1	42.34
Montana	374.1	26.47
Nevada	541.1	22.89
New Hampshire	173.2	28.57
New Mexico	856.6	28.47
North Dakota	280.6	50.0
Ohio	279.9	33.70
Oklahoma	466.1	47.03
Oregon	285.5	37.04
Pennsylvania	306.0	58.96
Rhode Island	219.1	6.25
South Carolina	488.3	48.7
South Dakota	404.7	38.46
Tennessee	623.7	49.40
Texas	410.9	40.12
Utah	233.1	28.81
Vermont	172.0	30.0
Virginia	200.0	36.06
Washington	311.5	32.76
West Virginia	289.9	36.84
Wisconsin	295.4	37.64
Wyoming	212.2	50.0

Table 2 shows a breakdown of each state based on its overall violent crime rates and percentages of murders committed with handguns.

From Table 2, we can calculate the average crime rates and average percentage of murders committed with handguns in states with permit schemes for handguns and from states without permit schemes for handguns:

Table 3

	Average Violent Crime Rate (Rate per 100,000)	Average Percentage of Murders Committed with Handguns
States <i>with</i> Handgun Purchase Permits Required	363.52	45.72
States <i>Without</i> Handgun Purchase Permit Requirement	378.33	38.96

Table 3 shows the average violent crime rate as well as the average percentage of murders committed with handguns.

As Table 3 demonstrates, states without any handgun permit schemes have almost 7% fewer murders committed with handguns compared to those states that have handgun permit schemes.<sup>245</sup> Furthermore, the average violent crime rate of states that have permit schemes is only a marginal 4.07% decrease over those states without the permit schemes. These statistics suggest that mandating handgun permits to reduce murders and violent crimes is ineffective. In addition, a recent Bureau of Justice Statistics study revealed that about 21% of all state and federal prisoners reported that they had *possessed or carried* a firearm when they committed the offense for which they were serving time in prison.<sup>246</sup> Fewer than 2% of those who *possessed* a firearm had obtained said firearm through a retail source.<sup>247</sup> Of those who specifically *used* a firearm in a crime, only 1.3% reported obtaining the gun from a retail source.<sup>248</sup> And while many express concerns for “gun show loopholes,” a mere 0.8% of those who *possessed* a firearm obtained it at a gun show, whether through private sale or through a dealer.<sup>249</sup>

Overwhelmingly, 56% of those who *possessed* a firearm had either stolen it, found it on the scene of a crime, or obtained it from the “underground market.”<sup>250</sup>

245. Admittedly, more research into this area would be beneficial, as different states have different socioeconomic factors that could contribute to the results. Furthermore, information about the status of the gun would be useful, such as stolen or legally acquired.

246. MARIEL ALPER & LAUREN GLAZE, U.S. DEPT OF JUST., BUREAU OF JUST. STAT., SOURCE AND USE OF FIREARMS INVOLVED IN CRIMES: SURVEY OF PRISON INMATES, 2016, at 1–2 (2019), <https://www.bjs.gov/content/pub/pdf/suficspi16.pdf> [<https://perma.cc/A2NB-QSXL>].

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* The “underground market” is a term used to refer to illegal sources of firearms such as markets for stolen goods, middlemen for stolen goods, criminals or criminal enterprises, or those involved in the illegal drug trade. *Id.*

Thus, the focus of state legislatures should be on reforming existing gun-control laws, which are being subverted with stolen guns and black markets, rather than enacting more hoops for law-abiding citizens to jump through.

Thus, the permit schemes do not appear to achieve their desired goal of reducing handgun violence as supported by (1) the average percent of murders committed with handguns, and (2) the statistics showing that overwhelmingly crime is committed with illegally acquired guns. When analyzing the combination of the ineffectiveness of the permit schemes with the fact that the permits are mostly redundant with existing federal gun control law, it becomes apparent that there is no reason to maintain pistol permit statutes on the books. North Carolina should eliminate its permit scheme and align itself with the majority of states by simply complying with existing federal gun-control laws.

Social science on gun violence lends further support for repealing the North Carolina permit system. North Carolina claims to have a vested interest in reducing gun violence,<sup>251</sup> however, focusing on the permitting system and gun purchases largely overlooks the leading causes of systemic gun violence. A recent study revealed that “the rich–poor gap, level of citizens’ trust in institutions, economic opportunity, and public welfare spending were all directly related to firearm homicide rates.”<sup>252</sup> If North Carolina is concerned about gun violence, the tax dollars wasted on an inefficient permit system could be better served in directing community outreach programs and social services to mitigate gun violence in at-risk communities.<sup>253</sup> That same logic extends to concerns about gun-related suicides, which have been linked to low income and increased unemployment rather than firearm prevalence.<sup>254</sup>

### CONCLUSION

North Carolina remains in the nineteenth century with an antiquated and largely ineffective permit system for the purchase of handguns. The North Carolina permit system has direct ties to the Jim Crow era and, like similar

251. See Ford Porter, *Governor Cooper Signs Gun Safety Executive Directive*, N.C. GOVERNOR ROY COOPER (Aug. 12, 2019), <https://governor.nc.gov/news/governor-cooper-signs-gun-safety-executive-directive> [https://perma.cc/2YKF-URFX] (“Wishing, praying, and sending condolences alone just aren’t enough to prevent [gun violence]. We have to take action.”).

252. Daniel Kim, *Social Determinants of Health in Relation to Firearm-Related Homicides in the United States: A Nationwide Multilevel Cross-Sectional Study*, PLOS MED. 2 (Dec. 17, 2019), <https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1002978&type=printable> [https://perma.cc/9G4E-MYDC].

253. For example, New Orleans implemented social and community services focusing on family, school, job training, reentry, and community and economic development and saw a 21.9% reduction in homicide from 2011 to 2014. ANDREW GUTHRIE FURGUSON, *THE RISE OF BIG DATA POLICING* 42 (2017). In addition, the city saw a 55% reduction in group or gang-involved murders. *Id.*

254. Caillin Langmann, *Effect of Firearms Legislation on Suicide and Homicide in Canada from 1981 to 2016*, PLOS ONE 15 (June 18, 2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0234457> [https://perma.cc/B858-ZH32].

permit schemes passed at the time, is rooted in a time of deep institutional racism.<sup>255</sup> While *Heller* and *McDonald* provide some insight as to the evaluation of laws implicating the Second Amendment, lower courts have incorrectly diluted the principles.<sup>256</sup> However, even under these watered-down principles, the North Carolina permit system must be analyzed under strict scrutiny due to: (1) its direct impact on the core of the Second Amendment, (2) the burden it places on the possession of a handgun in the home, and (3) its similarities to First Amendment content-based restrictions.<sup>257</sup> Under strict scrutiny, the permitting system fails because it is not narrowly tailored, and it does not achieve the government's goal in increasing public safety. Even under the *Kavanaugh* test, the North Carolina permit system fails to pass muster, as it lacks support in tradition and history.<sup>258</sup> Finally, the permit system is unconstitutional under the Fourteenth Amendment when compared to a poll tax.<sup>259</sup>

North Carolina should repeal its unconstitutional permit system and simply treat handguns and long guns the same way. Repealing the permit system will simplify the administrative burden on the government, as well as the process for citizens seeking to purchase handguns. Federally licensed firearm dealers are already equipped to run NICS background checks, which reduces the danger of errors when transitioning from the North Carolina permit system to the federal requirements for pistol permits.

Constitutional issues aside, evidence shows that the permit system is largely redundant with existing federal gun-control regulations.<sup>260</sup> Some even postulate that state permit schemes pose a greater danger than the federal system given the ability for permit holders to go for years without a background check.<sup>261</sup> Additionally, statistical evidence shows that handgun permit schemes are largely ineffective at achieving any governmental interests.<sup>262</sup> Other statistical analysis shows that permit denials disproportionately fall on Black applicants, who experience denials at roughly three times the rate of White applicants.<sup>263</sup>

The North Carolina legislature must act quickly in repealing the permit system to fully restore the rights of its citizens, who have been burdened by the pistol permit system for far too long. In doing so, North Carolina can attempt

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255. See *supra* Section I.B.

256. See *supra* Part III.

257. See *supra* Section IV.A.

258. See *supra* Section IV.B.

259. See *supra* Section IV.C.

260. See *supra* Section IV.D.

261. See *supra* Section IV.D.

262. See *supra* Section IV.E.

263. See *supra* notes 185–88 and accompanying text.

to right the wrongs of its racially charged gun control<sup>264</sup> and embark on a new, Second-Amendment-friendly journey.

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264. *See supra* Section I.B.

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