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## Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen

F. Lee Francis

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# **ARMED AND UNDER THE INFLUENCE: THE SECOND AMENDMENT AND THE INTOXICANT RULE AFTER *BRUEN***

F. LEE FRANCIS\*

*In 2001, the Michigan Legislature passed a law prohibiting the possession or use of a firearm by a person under the influence of alcoholic liquor or a controlled substance. Presumably the legislature thought it necessary to prevent individuals from possessing a firearm while under the influence of drugs or alcohol. One study has indicated that alcohol misuse is keenly associated with firearm ownership, risk behaviors involving firearms as well as risk for perpetrating harm to one's self or others. Researchers also found that an estimated 8.9 to 11.7 million firearm owners binge drink in an average month. In an attempt to combat gun violence and alcohol use, researchers have suggested restricting firearms for those who misuse alcohol or drugs.*

*In light of the data, it is not unreasonable to think that the Michigan Legislature sought to prevent gun violence in connection with alcohol and drug use. However, such policies are clearly at odds with the original understanding of the Second Amendment.*

*This Article argues that the intoxicant rule as a limitation on one's Second Amendment rights is antithetical to the original public meaning of the Constitution. More simply, this Article argues that laws criminalizing and further restricting an individual's right to bear arms due to intoxication are unconstitutional and directly contradict the original public meaning and tradition of the Second Amendment. Thus, this Article undertakes to explain that the foundational case on point, *New York State Rifle & Pistol Ass'n v. Bruen*, provides a clear basis for overturning the intoxication rule as an impermissible burden on the right to bear arms as protected by the Second Amendment.*

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\* Assistant Professor of Law, Widener Commonwealth Law School (Designate). Previously, Assistant Professor of Law and Director of the Litigation and Alternative Dispute Resolution Center, Mississippi College School of Law. The Author thanks the editorial staff and members of the *Marquette Law Review* for their insightful and constructive feedback.

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#### I. INTRODUCTION

In 2001, the Michigan Legislature passed a law prohibiting the possession or use of a firearm by a person under the influence of alcoholic liquor or a controlled substance.<sup>1</sup> Presumably the legislature thought it necessary to prevent individuals from possessing a firearm while under the influence of drugs or alcohol. One study has indicated that “[a]cute and chronic alcohol misuse is positively associated with firearm ownership, risk behaviors involving firearms, and risk for perpetrating both interpersonal and self-directed firearm violence.”<sup>2</sup> Researchers also found that “[i]n an average month, an estimated 8.9 to 11.7 million firearm owners binge drink.”<sup>3</sup> In an attempt to combat gun violence and alcohol use, researchers have suggested restricting firearms for those who misuse alcohol or drugs.<sup>4</sup>

In light of the data, it is not unreasonable to think that the Michigan Legislature sought to prevent gun violence in connection with alcohol and drug use. However, such policies are clearly at odds with the original understanding of the Second Amendment.<sup>5</sup>

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1. MICH. COMP. LAWS § 750.237 (2023); *see also* 2001 Mich. Pub. Acts 71.

2. Garen J. Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, 79 PREVENTIVE MED. 15, 15 (2015).

3. *Id.*

4. *Id.* (“The evidence suggests that restricting access to firearms for persons with a documented history of alcohol misuse would be an effective violence prevention measure.”).

5. *See infra* Part IV.

This Article argues that the intoxicant rule as a limitation on one's Second Amendment rights is antithetical to the original public meaning of the Constitution. More simply, this Article argues that laws criminalizing and further restricting an individual's right to bear arms due to intoxication are unconstitutional and directly contradict the original public meaning and tradition of the Second Amendment. Thus, this Article undertakes to explain that the foundational case on point, *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>6</sup> provides a clear basis for overturning the intoxication rule as an impermissible burden on the right to bear arms as protected by the Second Amendment.

Part II traces the common law understanding and tradition of the Second Amendment. The purpose, here, is to determine to what extent were limits placed on an individual's right to bear arms. Furthermore, Part II also examines relevant legislative action relating to firearm possession, use, and control while intoxicated prior to the ratification of the Second Amendment. Following an examination of the relevant history and precedent, Part III considers the role and applicability of three principal Second Amendment cases. Namely, *District of Columbia v. Heller*,<sup>7</sup> *McDonald v. City of Chicago*,<sup>8</sup> and *New York State Rifle & Pistol Ass'n v. Bruen*.<sup>9</sup> The essential claim from Parts II and III contends that laws restricting the possession of a firearm while drinking or under the influence are positively unconstitutional. Part IV focuses on Wisconsin, Ohio, and Michigan statutes criminalizing the possession of firearms while under the influence. Part V, then, addresses the future analytical framework as well as potential challenges to 18 U.S.C. § 922(g)(3).

## II. THE HISTORY AND TRADITION OF THE SECOND AMENDMENT

The Second Amendment of the United States Constitution declares that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>10</sup> To be clear, the right is not unlimited, but such limits must comport with the historical traditions of the Second Amendment.<sup>11</sup> Indeed, to fully apprehend the scope of the Second Amendment, one must first appreciate the historical basis and traditions from

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6. 142 S. Ct. 2111 (2022).

7. 554 U.S. 570 (2008).

8. 561 U.S. 742 (2010).

9. 142 S. Ct. 2111 (2022).

10. U.S. CONST. amend. II.

11. *Heller*, 554 U.S. at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited.”).

which this right flows.<sup>12</sup> Our Founding Fathers were quite concerned about the overreach of government in the living of individual citizens and, by extension, the looming specter of tyranny.<sup>13</sup> Yet, such a foundational right was not fully accepted until 2008, more than two hundred years after the Constitution was ratified.<sup>14</sup>

From before the enactment of the Second Amendment through the early nineteenth century, legislatures did not limit the individual right to keep *or* bear arms merely because one sometimes used an intoxicant.<sup>15</sup> Of those statutes that limited possession or use while intoxicated, only a few are responsive to this inquiry.<sup>16</sup>

Of the first statute, the Virginia colony enacted a law that prohibited any person from “shoot[ing] any gunns [sic] at drinkeing [sic] (marriages and ffuneralls [sic] onely [sic] excepted,) that such person or persons so offending shall forfeit 100 lb. of tobacco.”<sup>17</sup> Notably, the law did not prohibit carrying or

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12. The intent here is not to opine on every tome and article written on the subject. Indeed, with such a vast history and scholarship, it would be virtually impossible to do so well in this format. This Part is merely to provide a survey of interesting and notable Second Amendment cases, laws, and the like as it pertains to the intoxicant rule.

13. THE FEDERALIST NO. 46, at 254 (James Madison) (Gideon ed., 2001) (“Besides the advantage of being armed, which . . . Americans possess over the people of almost every other nation, the existence of subordinate governments . . . forms a barrier against the enterprises of ambition . . . . Notwithstanding the military establishments in the several kingdoms of Europe . . . governments are afraid to trust the people with arms.”); *Heller*, 554 U.S. at 599 (“But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.”).

14. See *Heller*, 554 U.S. at 636; see also Christopher M. Johnson, *Second-Class: Heller, Age, and the Prodigal Amendment*, 117 COLUM. L. REV. 1585, 1590 (2017).

15. See *infra* note 61.

16. See, e.g., Act of Mar. 6, 1655 (Act XII), in 1 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401–02 (William W. Hening ed., 1809); New Amsterdam, N.Y., Ordinance of the Director General and Council of New Netherland to Prevent Firing of Guns, Planting May Poles and Other Irregularities Within This Province (1655), in LAWS AND ORDINANCES OF NEW NETHERLAND 1638–1674, at 205 (E.B. O’Callaghan trans., Weed, Parsons & Co. 1808); An Act for the More Effectual Prevention of Fires in the City of New York (1769), in 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 11–12 (Albany, J.B. Lyon 1894); An Act for the Preservation of Deer and Other Game and to Prevent Trespassing with Guns (1771), in ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 343 (Samuel Allinson ed., 1776).

17. Act of Mar. 6, 1655 (Act XII), in 1 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401–02 (William W. Hening ed., 1809).

possessing a firearm *while* drinking. The purpose of the statute was to avoid the false alarm of an Indian attack.<sup>18</sup>

A trio of laws passed between 1761 and 1775 in New York and New Jersey restricted the discharge of firearms on certain occasions.<sup>19</sup> These laws, however, did not prevent the *carrying* while intoxicated, nor was intoxication an element of the offense.<sup>20</sup> What is more, the New York ordinance clearly permitted the use of a firearm *while* drinking, save for only two days out of the year.<sup>21</sup> Therefore, there was a strong tradition of permitting drinking *while* shooting.

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18. Ann E. Tweedy, “*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?*” *How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 698 (2011) (“[P]rior to the formation of the Republic, British colonies, such as those in Pennsylvania, Virginia, and Massachusetts, appear to have been predominantly concerned with what they perceived as defending themselves against unjustified attacks by Indians. Virginia, for instance, passed a statute in 1655–56 that outlawed the ‘shoot[ing] of any guns at drinkeing (marriages and ffuneralls onely excepted) [sic].’ The reason for the law was that ‘gunshots were the common alarm of Indian attack,’ ‘of which no certainty can be had in respect of the frequent shooting of guns in drinking.’”).

19. New Amsterdam, N.Y., Ordinance of the Director General and Council of New Netherland to prevent Firing of Guns, Planting May Poles and Other Irregularities Within this Province (1655), *in* LAWS AND ORDINANCES OF NEW NETHERLAND 1638–1674 205 (E.B. O’Callaghan trans., Weed, Parsons & Co. 1808) (“Whereas experience hath demonstrated and taught that . . . much Drunkenness and other insolence prevail on New Years and May days, by firing of Guns, . . . [leading to] deplorable accidents such as wounding, . . . [T]he Director General . . . expressly forbid from this time forth all firing of Guns . . .”); An Act for the More Effectual Prevention of Fires in the City of New York (1769), *in* 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 11–12 (Albany, J.B. Lyon 1894) (prohibiting any person from “[f]ir[ing] and discharg[ing] any Gun . . . in any Street, Lane or Alley, Garden, or other Inclosure [sic] or from any House or in any other Place where Persons frequently walk”); An Act for the Preservation of Deer and Other Game and to Prevent Trespassing with Guns (1771), *in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 343, 346 (Samuel Allinson ed., 1776) (prohibiting any person from setting “any loaded Gun in [s]uch Manner as that the [s]ame [s]hall be intended to go off or di[s]charge it[s]elf”).

20. *See* An Act for the More Effectual Prevention of Fires in the City of New York (1769), *in* 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 11–12 (Albany, J.B. Lyon 1894); An Act for the Preservation of Deer and Other Game and to Prevent Trespassing with Guns (1771), *in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 343 (Samuel Allinson ed., 1776); *see also* New Amsterdam, N.Y., Ordinance to Prevent Firing of Guns (1655), *in* LAWS AND ORDINANCES OF NEW NETHERLAND 1638–1674, at 205 (E. B. O’Callaghan trans., Weed, Parsons & Co. 1808).

21. New Amsterdam, N.Y., Ordinance of the Director General and Council of New Netherland to Prevent Firing of Guns, Planting May Poles and Other Irregularities Within this Province (1655), *in* LAWS AND ORDINANCES OF NEW NETHERLAND 1638–1674, at 205 (E.B. O’Callaghan trans., Weed, Parsons & Co. 1808) (“Whereas experience hath demonstrated and taught that . . . much Drunkenness

These laws might lead one to argue, then, that there is a clear tradition of pre-ratification limits on the active use of intoxicants while *using* a firearm. This presupposition is yet misguided.<sup>22</sup> This Article argues, pursuant to the original public meaning of the Second Amendment, that the Second Amendment also protects one's right to bear and, by extension, use a firearm while under the influence. Thus, a law restricting using a firearm while an individual is under the influence would be unconstitutional in light of the relevant history, tradition, and text of the Second Amendment.

### III. THE SUPREME COURT SPEAKS: *HELLER*, *MCDONALD*, AND *BRUEN*

#### A. *District of Columbia v. Heller*

While the right to bear arms was not fully recognized until 2008,<sup>23</sup> this Part endeavors to trace and analyze the Supreme Court Second Amendment jurisprudence from *Heller* to *Bruen*.

In *Heller*, the Court answered whether a District of Columbia prohibition<sup>24</sup> on the possession of usable handguns in the home violated the Second Amendment.<sup>25</sup> Here are the facts: Special police officer Dick Heller was authorized to carry a firearm while on duty at the Thurgood Marshall Judiciary Building.<sup>26</sup> Wishing to have a firearm in his home for personal use and protection, Heller applied for a license, was denied, and filed suit thereafter.<sup>27</sup> In dismissing Heller's complaint, the district court explained that there was no individual right to bear arms outside of a militia.<sup>28</sup>

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and other insolence prevail on New Years and May days, by firing of Guns, . . . [leading to] deplorable accidents such as wounding . . . [T]he Director General . . . expressly forbid[s] from this time forth all firing of Guns . . .").

22. *See id.*

23. *See* *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008); Johnson, *supra* note 14, at 1585.

24. D.C. CODE §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2023).

25. *Heller*, 554 U.S. at 573.

26. *Id.* at 575 ("Respondent Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building.").

27. *Id.* at 575-76.

28. *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004) ("Because this Court rejects the notion that there is an individual right to bear arms separate and apart from service in the Militia and because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment of the United States Constitution.").

Prior to 2008,<sup>29</sup> the prevailing interpretation of the Second Amendment was narrow and limited possession or use within the context of a militia:

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia-civilians primarily, soldiers on occasion . . . [W]hen called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.<sup>30</sup>

The important point here is that *Miller* is not dispositive; it did not definitively address the individual right to bear arms.<sup>31</sup> Therefore, to conclude that *Miller* stands for the proposition that there is no individual right to bear arms amounts to nothing more than judicial quackery.<sup>32</sup> Accordingly, the Court in *Heller* held that there is an individual right to bear arms.<sup>33</sup>

#### *B. McDonald v. City of Chicago*

If *Heller* guarantees an individual right to bear arms, then *McDonald* is best understood as incorporating that right against the states under the Fourteenth

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29. To be clear, there were some courts that held the individual right did exist under the Second Amendment, but this was far from commonplace in the judiciary. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (“Second Amendment protects individual Americans in their right to keep and bear arms.”); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *Parker*, 311 F. Supp. 2d at 109; *see also* *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971).

30. *United States v. Miller*, 307 U.S. 174, 178–79 (1939). Logically speaking, then, men needed to have possession of arms prior to being called into service.

31. *Parker*, 311 F. Supp. 2d at 105 (“[T]here has . . . been some debate concerning whether *Miller* should be construed as interpreting the Second Amendment to guarantee either: (1) a collective right of the states to arm the Militia; or (2) a limited individual right to bear arms but only as a member of a state Militia; or (3) an individual right to bear arms for non-Militia use.”).

32. *See Heller*, 554 U.S. at 625 (“We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”).

33. *Id.* at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).



Amendment.<sup>34</sup> In *McDonald*, the Court answered whether “the right to keep and bear arms applies to the States under the Due Process Clause.”<sup>35</sup>

Petitioners Otis McDonald, Adam Orlov, Colleen Lawson, and David Lawson each wanted to purchase and keep handguns in their respective homes for self-defense but were prohibited from doing so pursuant to a Chicago ordinance.<sup>36</sup> The challenged ordinance stated that “[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm,” and further limited registration of most handguns.<sup>37</sup>

Finding the ordinance unconstitutional, the Court explained that not only does an individual have the right to keep and bear arms, but such a right is also applicable to the states pursuant to the Fourteenth Amendment.<sup>38</sup>

### *C. New York State Rifle & Pistol Ass’n v. Bruen*

I now turn to the Court’s most recent pronouncement on the scope and protections of the Second Amendment. Decided in 2022, the Court undertook to clarify some questions left open in *Heller*, and additional questions and issues raised in the circuits.<sup>39</sup>

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34. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”). While this Article does not opine on the Court’s placement of the right—namely, whether the right is protected under the Due Process Clause or Privileges or Immunities Clause—it is reasonable, however, to conclude that the right is best sourced to the Privileges or Immunities Clause instead of the Court’s substantive due process jurisprudence. *See id.* at 806 (Thomas, J., concurring in judgment) (“I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to ‘process.’ Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”).

35. *Id.* at 759.

36. *Id.* at 750.

37. *Id.* (“The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City.”). “Like Chicago, Oak Park makes it ‘unlawful for any person to possess . . . any firearm,’ a term that includes ‘pistols, revolvers, guns and small arms . . . commonly known as handguns.’” *Id.* (quoting Oak Park, Ill., Village Code §§ 27-2-1 (2007), 27-1-1 (2009)).

38. *Id.* at 791.

39. *See New York State Rifle & Pistol Ass’n v. Bruen*, 142 Ct. 2111 (2022).

At issue here is whether a New York law requiring a show of proper cause or “special need” for a license to carry publicly for self-defense was valid under the Second Amendment.<sup>40</sup> The special need requirement, while not defined in any state statute, compelled a rigorous analysis.<sup>41</sup>

Petitioners in this case did not claim a special or unique danger but sought a license for general self-defense.<sup>42</sup>

Writing for the majority, Justice Thomas held that New York’s proper cause scheme violated the Second Amendment of the Constitution:

The constitutional right to bear arms in public for self-defense is not “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant’s right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense. New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.<sup>43</sup>

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40. *Id.* at 2122 (“[W]hether New York’s licensing regime respects the constitutional right to carry handguns publicly for self-defense. In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen’s showing of some additional special need.”).

41. *Id.* at 2123 (“No New York statute defines ‘proper cause.’ But New York courts have held that an applicant shows proper cause only if he can ‘demonstrate a special need for self-protection distinguishable from that of the general community.’ This ‘special need’ standard is demanding. For example, living or working in an area ‘noted for criminal activity’ does not suffice. Rather, New York courts generally require evidence ‘of particular threats, attacks or other extraordinary danger to personal safety.’”) (citation omitted).

42. *Id.* at 2125 (“In 2014, Nash applied for an unrestricted license to carry a handgun in public. Nash did not claim any unique danger to his personal safety; he simply wanted to carry a handgun for self-defense. . . . Between 2008 and 2017, Koch was in the same position as Nash: He faced no special dangers, wanted a handgun for general self-defense, and had only a restricted license permitting him to carry a handgun outside the home for hunting and target shooting.”).

43. *Id.* at 2156 (quoting *McDonald*, 561 U.S. at 780).

Of the many issues *Bruen* elucidates, the Court makes clear that the Second Amendment is not a subordinate right but is one that ought to be respected.<sup>44</sup> Indeed, the Court makes clear that discretion in who may exercise the right to bear arms is prohibited under the Second Amendment.<sup>45</sup>

#### IV. MODERN CONTROVERSIES

More than half of the states have enacted laws restricting firearm possession while under the influence of an intoxicant.<sup>46</sup> This Part will review how state and federal courts have applied the intoxicant rule as a limit on one's right to possess a firearm.<sup>47</sup>

##### A. Wisconsin

Mitchell Christen was convicted of operating or going armed with a firearm while under the influence of an intoxicant.<sup>48</sup> The statute prohibited, in part, “[o]perat[ing] or go[ing] armed with a firearm while he or she is under the influence of an intoxicant.”<sup>49</sup> Consider the facts of the instant case: During the course of one evening, Christen consumed four beers and a shot.<sup>50</sup> The same evening, after drinking, Christen began arguing with his roommate and guests.<sup>51</sup>

44. It is worth noting that nowhere in the many opinions does the majority, concurrence, or dissent reference the proper sourcing of the right to bear and keep arms. Justice Thomas's concurring opinion in *McDonald* does make reference to the Privileges or Immunities Clause, but only finds that the New York scheme violates the Fourteenth Amendment. This is significant because it would seem that the proper placement of the right is the Privilege or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. *See McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in judgment) (“I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to ‘process.’ Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”).

45. *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

46. *Legal & Second Amendment, In Which States Can You Concealed Carry and Drink Alcohol?*, USSCA (Dec. 29, 2019), <https://www.usconcealedcarry.com/blog/in-which-states-can-you-concealed-carry-and-drink-alcohol/> [<https://perma.cc/U46J-5KSU>].

47. This Part strictly focuses on the constitutional analysis of the intoxicant rule as applied. While the cases in this Part spend a significant amount of time on the issues surrounding the appropriate standard of review, those questions are addressed in the next Part.

48. *State v. Christen*, 2020 WI App 19, ¶ 1, 391 Wis. 2d 650, 943 N.W.2d 357.

49. WIS. STAT. § 941.20(1)(b) (2021–22).

50. *Christen*, 2020 WI App 19, ¶ 3 (“According to Christen’s own summary in his appellate brief, evidence at trial included the following account, which features him handling two firearms in the course of disputes in his apartment after substantial drinking: (1) during the course of one evening, Christen ‘consumed four beers and one shot. . . .’”).

51. *Id.*

In the course of the argument, Christen picked up a pistol and told someone trying to enter his room to get out of his room; immediately thereafter, for his own protection, Christen put his firearm into his waistband.<sup>52</sup> Later in the evening, Christen was physically assaulted when someone hit him in the chest and grabbed his firearm.<sup>53</sup> At this, Christen quickly retreated to his room, closed the door, retrieved his secondary weapon, and called 911.<sup>54</sup> Later, in a scant opinion, the intermediate state appellate court upheld the conviction.<sup>55</sup>

In a 6–1 decision, the state supreme court affirmed the decision of the court of appeals.<sup>56</sup> To reach this outcome, the court applied a two-step inquiry.<sup>57</sup> The majority determined that Wisconsin’s history of criminalizing the possession of a firearm while intoxicated, along with a few select statutes passed prior to the drafting of the Second Amendment and during Reconstruction, were critically persuasive to the decision to uphold the conviction.<sup>58</sup>

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52. *Id.* (“Christen ‘picked up his handgun,’ and told someone trying to enter his room to get out of the room. . . .”).

53. *Id.* (noting that “after a physical interaction in which someone ‘hit’ him in the chest and ‘grabbed’ his handgun”).

54. *Id.* (“Christen ‘quickly retreated to his room, closed the door, retrieved his secondary weapon, and called 911.’”).

55. *Id.* ¶ 7 (“Christen fails to explain why, *based on the facts of this case*, [Wis. Stat.] § 941.20(1)(b) actually violated his Second Amendment rights. Indeed, after the statement of facts and the case, Christen’s brief makes only passing references to his own conduct as proven at trial and does not come close to applying pertinent legal principles to that conduct. This failure is so complete that I do not need to address the standard of review or other points referenced in his brief.”).

56. *State v. Christen*, 2021 WI 39, ¶ 63, 396 Wis. 2d 705, 958 N.W.2d 746 (“[W]e conclude Wis. Stat. § 941.20(1)(b) does not strike at the core right of the Second Amendment because he did not act in self-defense. Moreover, we conclude that § 941.20(1)(b) does not severely burden his Second Amendment right.”).

57. *Id.* ¶ 34. “As explained in *Roundtree*, ‘[g]enerally, Second Amendment challenges require this court to undertake a two-step approach.’” *Id.* (quoting *State v. Roundtree*, 2021 WI 1, ¶ 39, 395 Wis. 2d 94, 952 N.W.2d 765). Under this two-step approach, the courts first consider “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *State v. Herrmann*, 2015 WI App 97, ¶ 9, 366 Wis. 2d 312, 873 N.W.2d 257. “If the answer is no, then the inquiry ends.” *Roundtree*, 2021 WI 1, ¶ 39. “If the first inquiry is answered in the affirmative, then the court proceeds to inquire into ‘the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.’” *Id.* ¶ 40 (quoting *Herrmann*, 2015 WI App 97, ¶ 9, 366 Wis. 2d 312, 873 N.W.2d 257). “[Courts] conduct this second inquiry through a means-end analysis and application of a heightened level of scrutiny.” *Christen*, 2021 WI 39, ¶ 34. This Article will address the second prong of this inquiry.

58. *Christen*, 2021 WI 39, ¶¶ 37–38 (“We recognize that Wisconsin has a long tradition of criminalizing the use and carrying of a firearm while intoxicated. A similar tradition of laws regulating firearms and alcohol also existed in some form at the time of the founding. . . . [T]hese statutes provide a relevant, perhaps even persuasive backdrop that shows a long history of criminalizing the use and carrying of firearms while intoxicated . . . .”) (citation omitted).

The court's reliance on statutes so far removed from the Second Amendment's nexus clearly indicated the court's first analytical error. This point was splendidly articulated in Justice Rebecca Grassl Bradley's dissenting opinion:

Contrary to the majority's mode of analysis, "*Heller* signals that courts should approach challenges to statutes infringing the Second Amendment right with a *rigorous review of history*, rather than the inherently subjective consideration of whether the government's interest in curtailing the right outweighs the individual's interest in exercising it." From before the enactment of the Second Amendment through the late-18th and early-19th centuries, legislatures did not limit the individual right to bear arms while under the influence of an intoxicant. Indeed, few colonial-era laws even regulated the *use* of firearms while consuming alcohol, and none dealt with *carrying* while intoxicated.<sup>59</sup>

Although writing for the minority, Justice Bradley correctly determined that the challenged statute is indeed unconstitutional.<sup>60</sup> The court's decision here is a clear attack on an individual's right to bear arms.<sup>61</sup>

In spite of the vast history, the majority neglected to heed the historical tradition of the Second Amendment and reasoned, rather contrarily, that the law's "limited application" did not suffice as an assault on Christen's Second Amendment rights—the court's second analytical error.<sup>62</sup> The court found that

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59. *Id.* ¶ 107 (R.G. Bradley, J., dissenting) (quoting *Roundtree*, 2021 WI 1, ¶ 75 (R.G. Bradley, J., dissenting)).

60. *Id.* ¶ 106 (R.G. Bradley, J., dissenting) ("A review of the text and history of the Second Amendment establishes that Wis. Stat. § 941.20(1)(b) is unconstitutional as applied to Christen. The Second Amendment does not countenance restricting Christen's fundamental right to go armed *in his own home*, even while under the influence of an intoxicant. Historically, legislatures did not limit the ability of individuals to carry firearms while under the influence of an intoxicant, and the Second Amendment affords heightened protections of the right as exercised in the home. Accordingly, Wis. Stat. § 941.20(1)(b) unconstitutionally infringed Christen's right to bear arms within his own home.").

61. *Id.* ¶ 87 (R.G. Bradley, J., dissenting) ("The majority also misapprehends the difference between operating a firearm in self-defense and going armed in case of confrontation. The fact that Christen did not *act* in self-defense has nothing to do with his Second Amendment right to go armed *in case of* confrontation. While many readers may not be troubled by the outcome of this case in light of Christen's threatening behavior toward his roommates and their guests, the majority's decision erodes a fundamental freedom, the 'true palladium of liberty' for all Americans.").

62. *Id.* ¶ 51 ("Wis. Stat. § 941.20(1)(b) has limited application. The statute does not strip the intoxicated individual of the right to self-defense—the statute does not strip firearm owners of the right to own and possess the firearm. Section 941.20(1)(b) also does not prohibit a firearm from being in a

the statute at issue “[did] not strike at the core right of the Second Amendment, due to the jury’s determination that Christen did not act in self-defense, and any burden it does impose on that core right is slight in this case.”<sup>63</sup> The court also found the state’s important interests were appropriately tethered to the intoxicant restriction.<sup>64</sup>

The court’s third strike comes from their reliance on social science to reach their decision:

“Research shows that ‘people who abuse alcohol or illicit drugs are at an increased risk of committing acts of violence.’” Beyond even a general risk of violence, “[s]tudies show that there is a strong correlation between heavy drinking and self-inflicted injury, including suicide, from a firearm.” Horrifically, “[f]or men, deaths from alcohol-related firearm violence equal those from alcohol-related motor vehicle crashes.” These data support a substantial relationship between intoxicated use of firearms and public safety, preventing gun violence, and the protection of human life.<sup>65</sup>

At this, Justice Bradley rightly calls foul as the court deferred its judicial responsibility and sacrificed the Constitution in favor of the whims of unreliable bias of social scientists:

The majority’s reliance upon social science research to buoy its means-end analysis illuminates the problem. To support the State’s proffered “substantial interest” in prohibiting intoxicated individuals from carrying firearms, the majority cites “studies show[ing] that there is a strong correlation between heavy drinking and self-inflicted injury” due to a firearm. Because the results of social science studies are unavoidably imbued with the biases of their authors and their interpretation subject to society’s evolving sensitivities, courts

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home or provide that the gun be rendered inoperable if someone in the home is intoxicated. Rather, it limits the circumstances under which the lawful firearm owner may use or carry the firearm, specifically while intoxicated. But this restriction is even more limited, as it does not apply when the intoxicated individual uses or carries the firearm in self-defense.”)

63. *Id.* ¶ 52.

64. *Id.* ¶ 60 (“[T]he State has important governmental interests in public safety, preventing gun violence, protecting human life, and protecting people from the harm the combination of firearms and alcohol causes. The means the legislature chose to further these important objectives, Wis. Stat. § 941.20(1)(b), is substantially related to the important governmental objectives.”). “Indeed, ‘[i]t is difficult to understand how the government could have attempted to further that interest in any other viable manner.’” *Id.* (quoting *State v. Weber*, 168 N.E.3d 468, 478 (Ohio 2020)).

65. *Id.* ¶ 58 (quoting *Weber*, 168 N.E.3d at 477) (citations omitted).

should never “consult social science research to interpret the Constitution.” “Only the Constitution can serve as a reliable bulwark of the rights and liberty of the people.” In the majority’s estimation, if social science dictates that the State’s interest in regulating firearms is “substantial,” then it may circumscribe constitutional rights in conformance with the research of the day.<sup>66</sup>

True, *Christen* was decided the year before *Bruen*. In light of *Bruen*’s holding, it is reasonable to conclude that the majority in *Christen* would have found the statute at issue unconstitutional.<sup>67</sup> However, as Justice Bradley clearly explained in her keen dissent, the Wisconsin law was unconstitutional without *Bruen*, and is positively unconstitutional after *Bruen*.<sup>68</sup>

### B. Ohio

One year prior to the *Christen* decision, the Ohio Supreme Court decided *State v. Weber*.<sup>69</sup> At issue here is whether the Second Amendment extends to individuals who carry a firearm while intoxicated.<sup>70</sup> Over the dissent of three justices, the majority answered the question in the negative.<sup>71</sup>

Consider the relevant facts of *Weber*: Officers were dispatched to Weber’s house after his wife telephoned the police during a domestic dispute.<sup>72</sup> Two officers responded to the home and found Weber in the house with an unloaded

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66. *Id.* ¶ 102 (quoting *State v. Roberson*, 2019 WI 102, ¶ 84–86, 389 Wis. 2d 190, 935 N.W.2d 813 (R.G. Bradley, J., concurring)).

67. *See State v. Philpotts*, 209 N.E.3d 696, 696 (Ohio 2022).

68. *Christen*, 2021 WI 39, ¶ 106 (R.G. Bradley, J., dissenting).

69. 168 N.E.3d 468 (Ohio 2020).

70. *Id.* at 470 (“This case presents the question whether the right to bear arms contained in the Second Amendment to the United States Constitution includes the right to carry a firearm while intoxicated, making Ohio’s statute unconstitutional.”).

71. *Id.* (“It has been illegal to carry a firearm while intoxicated in Ohio since 1974. This case presents the question whether the right to bear arms contained in the Second Amendment to the United States Constitution includes the right to carry a firearm while intoxicated, making Ohio’s statute unconstitutional. We hold that it does not. We therefore affirm the judgment of the Twelfth District Court of Appeals.”) (citation omitted).

72. *Id.* (“At 4:00 a.m. on February 17, 2018, appellant, Frederick Weber, was very intoxicated and holding a shotgun. His wife called 9-1-1. Deputy Christopher Shouse and Sergeant Mark Jarman were dispatched to Weber’s house.”).

shotgun.<sup>73</sup> Subsequently, Weber was charged and convicted of carrying a firearm while intoxicated.<sup>74</sup>

After some discussion of *Heller*, the court determined that nothing in *Heller* addressed the scope of the right as applied to “other” regulations or restrictions—namely, those not otherwise considered therein.<sup>75</sup>

The majority, like several other courts,<sup>76</sup> applied the two-step test for Second Amendment challenges.<sup>77</sup> Under step one, the government argued that the statute at issue did not place a burden on activity within the scope of the Second Amendment.<sup>78</sup> Relying on statutes far removed from the Second Amendment’s founding nexus, the state, as in *Christen*, erroneously pointed to

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73. *Id.* (“[W]hen Shouse stepped inside the house, he encountered Weber still holding the shotgun by the stock with one hand. Shouse ordered him to drop the gun. Shouse also heard Weber say, in slurred speech, that the firearm was not loaded.”).

74. *Id.* (“Weber admitted several times that he was drunk. According to Shouse, Weber was ‘very intoxicated.’ When Shouse asked Weber why he had the shotgun, Weber seemed confused and could not give a definitive answer. Shouse picked the shotgun up and determined that it was unloaded. Weber later claimed that he was *unloading* the shotgun to wipe it down. . . . Weber was charged with violating R.C. 2923.15(A), which provides that ‘[n]o person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance.’ A violation of this provision is a first-degree misdemeanor.”).

75. *Id.* at 472 (“The decision therefore did not conclusively determine ‘applications of the right’ to *other* regulations or provide ‘extensive historical justification for those regulations of the right that [it] describe[d] as permissible.’”).

76. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *see also Kolbe v. Hogan*, 849 F.3d 114, 132–33 (4th Cir. 2017) (noting that, “[l]ike most of our sister courts of appeals,” “a two-part approach to Second Amendment claims seems appropriate under *Heller*”), *abrogated by New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 253–54 (2d Cir. 2015).

77. *Weber*, 168 N.E.3d at 473 (“We believe that the two-step framework provides the appropriate test for Second Amendment challenges to firearm regulations, and we therefore apply it. The two-step framework also leaves room for us to consider Weber’s arguments that strict scrutiny should be applied to his claim and that intoxication is not a ‘legal disqualification’ from the protections of the Second Amendment.”).

78. *Id.* (“The state argues that R.C. 2923.15 does not place a burden on activity within the scope of the Second Amendment.”).



seventeenth-century and Reconstruction firearm laws.<sup>79</sup> Under prong two of the analysis, the court rejected Weber's argument for strict scrutiny, reasoning that the "limited" restriction did not hit at the core of the right.<sup>80</sup> Accordingly, the court applied intermediate scrutiny, holding that the law was constitutional.<sup>81</sup>

In dissent, Justice Fischer rightly challenged the majority's two-step analysis and opined that the court's use of the two-step method was in direct conflict with the key test and holding of *Heller*.<sup>82</sup> Because the appropriate test was not employed in this case, Justice Fischer would have remanded the case without further analysis.<sup>83</sup> What is more, Justice Fischer opined on the misuse

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79. *Id.* at 473–74 (“In support, the state and its amici curiae cities of Columbus, Cincinnati, Akron, Dayton, Lima, and Toledo cite a number of historical statutes regulating the clear dangers presented by firearms and alcohol. For example, they point to a law from 1677 that imposed a fine on anyone that ‘shoot[s] any guns at drinking.’ They point to laws from four states passed within years of the ratification of the Fourteenth Amendment that criminalized carrying a gun while drunk. They also point to state laws designed to prevent intoxicated people from obtaining guns in the first place by making the sale of guns to an intoxicated person illegal. Overall, the state and its amici curiae cities argue that these laws show that carrying or using a firearm while intoxicated is not a protected activity and does not fall within the original understanding of the right to bear arms.”) (citation omitted).

80. *Id.* at 474–75 (“Weber argues that R.C. 2923.15 should be judged under the strict-scrutiny standard because the right to bear arms is a fundamental right. He points to our statement in *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 39, that ‘[i]f the challenged legislation impinges upon a fundamental constitutional right, courts must review the statutes under the strict-scrutiny standard.’ We are not persuaded by this argument. *Harrold* did not involve a Second Amendment challenge to a firearm regulation. . . . R.C. 2923.15 does not come close to the core of the right and imposes, at most, only a slight burden on Weber’s Second Amendment right. The reason is plain: intoxication impairs cognitive functions and motor skills, so an intoxicated person who attempts to carry or use a gun in an otherwise lawful manner is less likely to be able to do so safely and effectively and instead presents a greater risk of harm to innocent persons in the area as well as himself or herself. By applying only to persons who are ‘under the influence of alcohol or any drug of abuse,’ R.C. 2923.15 therefore regulates only the conduct of a person whose ability to carry or use a gun safely and effectively has already been undermined because of intoxication.”).

81. *Id.* at 476 (“Under intermediate scrutiny, a statute is constitutional so long as it furthers an important governmental interest and does so by means that are substantially related to that interest. R.C. 2923.15 passes this test.”) (citation omitted).

82. *Id.* at 496 (Fischer, J. dissenting) (“In this case, we are asked to decide whether the application of R.C. 2923.15(A) to a defendant charged with carrying a firearm in his home while under the influence of alcohol is unconstitutional in light of the Second Amendment to the United States Constitution. We are also asked to decide what the appropriate method of review is in such a case. The answer to the latter of these questions is that laws and regulations challenged under the Second Amendment must be judged according to the text, history, and tradition of the Second Amendment.”).

83. *Id.* (“Because [*Heller*’s text, history, and tradition test] was not the standard applied below, there is no need to go any further in the analysis, and this cause should be remanded to the Twelfth District Court of Appeals for further proceedings on the constitutionality of R.C. 2923.15 under that test.”).

of language in *Heller* leading to the creation of a shortcut that various courts have employed to decide Second Amendment questions instead of the text, history, and tradition test:

Another word of caution is appropriate here about some language in *Heller* that has given courts and litigants alike some trouble over the years. Toward the end of *Heller*, the court stated that its decision was limited to the law before it and was not intended to cast doubt on any other restrictions, including “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.” A number of courts, including this court and the court of appeals in this case, have used that language as a shortcut to upholding other laws challenged under the Second Amendment. That very clearly was not the point of that passage, however. In fact, as mentioned above, the court in *Heller* was quite explicit that the validity of those and other restrictions should be evaluated in future cases based on the text, history, and tradition of the Second Amendment. . . . Courts and litigants should therefore exercise caution before relying on that language in *Heller* and should still focus on the text of the Second Amendment and the applicable history and tradition of the right.<sup>84</sup>

Contrary to the majority’s conclusion, the Ohio statute, and those similar, were not expressly or implicitly included in *Heller*’s language regarding the “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>85</sup> Nothing in Weber’s trial indicated that he was a convicted felon, had been certified as mentally ill, carried to a sensitive or forbidden place, or attempted to engage in a commercial transaction of a firearm.<sup>86</sup> Therefore, the majority’s reliance on *Heller* was clearly flawed.<sup>87</sup>

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84. *Id.* at 499–500 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)) (citations omitted).

85. *Heller*, 554 U.S. at 626–27.

86. *Weber*, 168 N.E.3d at 470.

87. *Id.* at 500 (“Courts and litigants should therefore exercise caution before relying on that language in *Heller* and should still focus on the text of the Second Amendment and the applicable history and tradition of the right.”).

While *Weber* was decided two years before *Bruen*, *Philpotts* was decided after,<sup>88</sup> with Justice Fischer in the majority.<sup>89</sup> In *Philpotts*, Delvonte Philpotts was charged with violating an Ohio statute that “prohibit[ed] a person under indictment for a felony offense of violence from acquiring, having, carrying, or using any firearm.”<sup>90</sup> While out on bond for an unrelated rape indictment, Philpotts posted photos on social media of him handling a firearm.<sup>91</sup> Subsequently, the state’s rape case against Philpotts was dismissed; however, the state still charged him with illegal possession of a firearm.<sup>92</sup> Philpotts pleaded no contest to possession of weapons while under disability.<sup>93</sup> Philpotts appealed his conviction to the state court of appeals.<sup>94</sup>

Relying on the *Heller* shortcut Justice Fischer cautioned against, the intermediate court upheld the challenged statute:

*Heller* recognizes that an individual’s right under the Second Amendment is qualified and the government retains an ability to regulate the gun ownership of those who pose a risk to public safety. The Court cautioned that its opinion “should not be taken to cast doubt on longstanding prohibitions on the

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88. State v. Philpotts, 209 N.E. 3d 696 (Ohio 2022).

89. *Id.* at 697.

90. State v. Philpotts, 132 N.E.3d 743, 746 (Ohio Ct. App. 2019) (“Delvonte Philpotts appeals from his conviction of having weapons while under disability. R.C. 2923.13(A)(2) prohibits a person under indictment for a felony offense of violence from acquiring, having, carrying, or using any firearm.”).

91. *Id.* at 747 (“On March 10, 2017, Philpotts was indicted by the grand jury for rape, kidnapping, and assault. The rape and kidnapping counts were accompanied with one- and three-year firearm specifications. On March 15, 2017, Philpotts appeared for arraignment and pleaded not guilty. The court subsequently set a bond for \$25,000, and as a condition of his bond, he was subject to GPS electronic home detention monitoring. On April 17, 2017, Philpotts posted the bond and was released from the county jail. Three months later, the Cleveland Police Department’s Gang Impact Unit discovered that, while out on bond, Philpotts posted pictures of himself on his social media page showing him standing outside of his home with a handgun; his GPS home monitoring ankle bracelet was visible in some of the pictures, indicating the pictures were taken while he was out on bond.”).

92. *Id.* (“On August 4, 2017, Philpotts was indicted by the grand jury for having a weapon while under a disability pursuant to R.C. 2923.13(A)(2). Subsequently, on November 27, 2017, the state dismissed the rape case without prejudice. Thereafter, on January 3, 2018, Philpotts moved to dismiss the indictment in the weapons-while-under-disability case, arguing R.C. 2923.13(A)(2) was unconstitutional. On March 14, 2018, the trial court held a hearing on the motion. On April 19, 2018, the court denied the motion.”).

93. *Id.* (“Philpotts subsequently pleaded no contest in the weapons-while-under-disability case but pleaded guilty to the charge of improperly handling firearms in a motor vehicle. The trial court sentenced him to three years of community control sanctions for his convictions in these two cases.”).

94. *Id.* at 746 (“Delvonte Philpotts appeals from his conviction of having weapons while under disability.”).

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>95</sup>

Here, the court of appeals, like the *Weber* court, misapplies the language in *Heller*.<sup>96</sup> While restrictions may be permitted for violent felonies, Philpotts was merely indicted, not convicted.<sup>97</sup> Therefore, *Heller*’s language is not responsive to the issue at hand.<sup>98</sup>

Following the intermediate court’s decision, Philpotts appealed to the state supreme court.<sup>99</sup> In a one-page opinion, the state’s high court vacated and remanded the judgment back to the intermediate court in light of the *Bruen* decision.<sup>100</sup> Notably, the high court failed to declare the statute unconstitutional—a move clearly required after *Bruen*.<sup>101</sup>

### C. Michigan

In 2012, the Michigan Court of Appeals heard the matter of *People v. Deroche*.<sup>102</sup> There, the court was tasked with determining whether constructive

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95. *Id.* at 750 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)).

96. *Heller*, 554 U.S. at 626–27.

97. *See Philpotts*, 132 N.E.3d at 747.

98. *Heller*, 554 U.S. 570 at 626–27.

99. *State v. Philpotts*, 209 N.E.3d 696, 697 (Ohio 2022) (Donnelly, J., dissenting) (“The court of appeals affirmed, rejecting Philpott’s Second Amendment challenges. Philpotts appealed the Eighth District’s judgment to this court. . . . And on September 8, 2022, we ordered the parties to submit supplemental briefing addressing ‘the impact, if any,’ on this case of the United States Supreme Court’s decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*.”).

100. *Id.* at 696 (ruling that the “judgment of the court of appeals is vacated, and the cause is remanded to the court of appeals for reconsideration in light of *New York State Rifle & Pistol Assn., Inc. v. Bruen*”).

101. *Id.* at 697 (Donnelly, J., dissenting) (“I would decide this case on the merits. Instead, we will wait for the court of appeals or, even more time-consumingly, the trial court (if the court of appeals remands to that court) to render a decision. Ultimately, we will likely accept jurisdiction of an appeal on the constitutional issue. Only then, perhaps years from now, will we determine whether R.C. 2923.13(A)(2) violates the constitutional right to bear arms. In the meantime, Philpotts and similarly situated individuals will continue to be indicted and punished, possibly even imprisoned, for violating R.C. 2923.13(A)(2), which might be unconstitutional. Justice delayed is justice denied. I dissent.”).

102. 829 N.W.2d 891 (Mich. Ct. App. 2013).

possession was sufficient for prosecution under a state law that prohibited the possession of a firearm while intoxicated.<sup>103</sup>

The facts of *Deroche* are as follows: Two officers were dispatched to a call involving a domestic dispute.<sup>104</sup> However, when the officers arrived at the scene, they were informed that Deroche, who was intoxicated, had left.<sup>105</sup> Hours later, officers responded to a second call involving Deroche at a home.<sup>106</sup> This time he was present, and the officers were informed that a firearm was present in the home.<sup>107</sup> Upon entry, the officers were notified that the firearm was not in the physical possession of Deroche and had been hidden in a separate room.<sup>108</sup> Notwithstanding, the trial court dismissed the charge, relying on the Second Amendment.<sup>109</sup> The government appealed.<sup>110</sup>

Accordingly, the majority held that the law, as applied to Deroche, was unconstitutionally burdensome to this right to bear arms under the Second Amendment:

While preventing intoxicated individuals from committing crimes involving handguns is an important governmental objective, the infringement on defendant's right in the instant

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103. *Id.* at 893 (“[W]hether the Second Amendment of the United States Constitution precludes a prosecution for possession or use of a firearm by a person under the influence of alcoholic liquor . . . when the prosecution’s theory is one of constructive possession in the defendant’s own home.”).

104. *Id.* (“Two Novi police officers were dispatched to a call involving a verbal altercation.”).

105. *Id.* (“When they arrived at the scene, they were informed by a man identified as James Hamlin (a friend of defendant) that defendant had run off into the woods, that there had been an argument, and that defendant had been drinking. The officers searched the area for defendant to do a welfare check, but they were unable to locate him and ended their search.”).

106. *Id.* (“Approximately two hours later, one of those officers, Officer Shea, along with other officers, was dispatched to a disturbance call at a home.”).

107. *Id.* (“Hamlin was again present, outside the home, and informed the officers that defendant was inside the house with a gun. But he also told Officer Shea that he could see defendant in the house, but did not see a gun.”).

108. *Id.* (“The officers approached the house and spoke with defendant’s mother-in-law at the door. The mother-in-law stated that defendant no longer had a gun and that she had taken it and hidden it in the house. She let the officers in and showed them the gun that she had hidden in the bottom of a garbage can in the laundry room; the clip was found next to the gun. Officer Shea indicated that he wished to speak with defendant and was informed that defendant was upstairs.”).

109. *Id.* (“Defendant moved in the district court both to suppress evidence on the basis of an unlawful entry into his home and to dismiss the charge under the Second Amendment. The district court conducted an evidentiary hearing, concluding that while there was evidence based on a blood alcohol test that defendant was intoxicated, no evidence was introduced to show that defendant was in actual physical possession of the gun. The district court dismissed the charge, primarily relying on the Second Amendment argument.”).

110. *Id.* (“The prosecution now appeals and defendant cross-appeals by leave granted.”).

case was not substantially related to that objective. We initially note that at the time of the officers' entry into the home, and at the time they were actually able to establish the level of defendant's intoxication, defendant's possession was constructive rather than actual. Thus, to allow application of this statute to defendant under these circumstances, we would in essence be forcing a person to choose between possessing a firearm in his or her home and consuming alcohol. But to force such a choice is unreasonable.<sup>111</sup>

While the court's analysis is partially correct, it is also proper to conclude that the law *does* require an individual to choose between drinking and possessing a firearm, regardless of whether possession was actual or constructive. Thus, on its face, the law violates the Second Amendment's guarantees.<sup>112</sup>

Two years after *Deroche*, the court of appeals decided the case of Rebecca Wilder, who was convicted of possession of a firearm while intoxicated.<sup>113</sup> Here are the relevant facts: Wilder testified that she and her domestic partner were having a dispute, and both were intoxicated; however, her possession of the firearm occurred when she attempted to relocate the weapon, fearing her domestic partner would find it during the heated dispute.<sup>114</sup> Nevertheless, the jury found her guilty of possessing a firearm while intoxicated.<sup>115</sup>

Following the trend of applying the two-step framework, the court affirmed the conviction and held the state's important interest was sufficient to restrict Wilder's right to bear arms.<sup>116</sup> Distinguishing *Wilder* from *Deroche*, the court

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111. *Id.* at 897.

112. *State v. Weber*, 168 N.E.3d 468, 496 (Ohio 2020).

113. *People v. Wilder*, 861 N.W.2d 645 (Mich. Ct. App. 2014).

114. *Id.* at 646 ("At trial, defendant herself testified that she had been intoxicated and that she had briefly possessed a firearm. According to defendant, however, the possession was solely for the purpose of moving the gun for personal safety or precautionary reasons, so that it would not be readily accessible to her domestic partner who was angry at defendant, was familiar with the gun's location, and was also intoxicated.").

115. *Id.* at 645 ("We granted defendant's delayed application for leave to appeal her jury-trial conviction of possession of a firearm while intoxicated . . .").

116. *Id.* at 654 ("On the basis of the undisputed facts and even assuming that the claims made by defendant in her testimony were true, we cannot conclude that defendant is entitled to a new trial on the ground that her state and federal constitutional right to keep and bear arms was violated. Any impairment of defendant's constitutional right resulting from outlawing her movement of the gun was substantially related to the important governmental interest in preventing intoxicated individuals from possessing firearms. Therefore, convicting defendant under MCL 750.237 and the circumstances presented survives or satisfies intermediate scrutiny. Reversal is unwarranted.").

explained that *Wilder* was a case of “actual” possession rather than “constructive” possession, as was the case in *Deroche*.<sup>117</sup>

In the end, the court’s clear aggression towards the Second Amendment and improper activism led to a direct assault on the right to bear arms:

In weighing the possible harm or danger posed by the two situations, we conclude as a matter of law that it was defendant’s act of handling the firearm while intoxicated that presented the greater threat to safety, as opposed to the hypothetical situation in which defendant did not move the firearm. There can be no reasonable dispute given the record that defendant was more intoxicated than the complainant, which was reflected in the PBTs, and defendant’s level of intoxication was significant; she had been drinking all day and into the night. Additionally, even under defendant’s account of the events that transpired, emotions were running exceptionally high on the part of both defendant and the complainant. Handling a firearm in a highly drunken and highly emotional state, even if briefly, posed a substantial danger to defendant herself, let alone the complainant who was nearby, of an accidental discharge or even an intentional discharge clouded by the alcohol. While it may be arguable that the danger in moving the gun as a precautionary measure was not so great, we conclude that the danger posed had the firearm not been moved was negligible; defendant’s safety was not meaningfully increased by moving the gun.<sup>118</sup>

The court, here, stretches to reach a decision not based on the law or the history, tradition, and text of the Second Amendment, but one reflective of their own hostile predilections toward the right to bear arms.<sup>119</sup>

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117. *Id.* at 653 (“[U]nder defendant’s version of the events, she was not engaged in any unlawful behavior, but, as opposed to the facts in *Deroche*, defendant actually possessed the gun, albeit for a brief time. The prosecution’s case was not predicated on constructive possession, and the jury was never instructed that possession could be constructive. However, we do not read *Deroche* to suggest that actual possession will defeat a Second Amendment claim in every conceivable circumstance.”).

118. *Id.* at 654.

119. *Id.*; see also *State v. Christen*, 2021 WI 39, ¶¶ 101–02, 369 Wis. 2d 705, 958 N.W.2d 746 (R.G. Bradley, J., dissenting) (“Under the majority’s approach, Second Amendment analysis becomes a ‘system in which . . . judges always get their way’: if the court’s ‘balancing’ weighs in favor of stripping individuals of protected rights, then so it shall be. Ungrounded in text or history, the majority’s approach subjects a fundamental constitutional right to the will, rather than the judgment, of the judiciary. Using a balancing test in Second Amendment cases facilitates judicial contortions utterly untethered to the original meaning of the Constitution.”) (citation omitted).

The statutes at issue in the Wisconsin, Ohio, and Michigan cases were all enacted after the ratification of the Second Amendment. As such, the *Bruen* Court explained that a “historical twin” is not a necessary requirement in order to sustain a modern firearm regulation.<sup>120</sup> These laws still run afoul of the Second Amendment because there is no historical analogue limiting one from possessing a firearm while under the influence.<sup>121</sup>

#### V. APPLYING THE LAW: A NOTE ON THE PAST AND FUTURE ANALYTICAL FRAMEWORKS<sup>122</sup>

Prior to the decision in *Bruen*, and as noted above, several circuits<sup>123</sup> and many state courts<sup>124</sup> took to applying a two-step test to analyze Second Amendment challenges.<sup>125</sup> I contend, here, that the two-step method was created as an end run around the true and clear protections of the Second Amendment. The *Bruen* Court declared that step one was sufficiently tethered to the central holding of *Heller*.<sup>126</sup> However, nothing in *Heller* opined on the necessity of an ends-means analysis.<sup>127</sup> Clarifying in *Bruen*, the Court makes

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120. *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

121. *See Christen*, 2021 WI 39, ¶ 87 (R.G. Bradley, J., dissenting).

122. I intentionally saved this Part for the end because discussing how the *Heller* and *McDonald* decisions were applied in state and circuit courts provides essential context. Such a discussion aids in understanding the precedent’s application in lower courts and how the Supreme Court aimed to address the use of the two-step scheme in *Bruen*.

123. *See supra* note 80.

124. *See supra* note 61.

125. *Bruen*, 142 S. Ct. at 2125–26 (“In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. . . . At the first step, the government may justify its regulation by ‘establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood. . . . At the second step, courts often analyze ‘how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.’”) (citation omitted).

126. *Id.* at 2127 (“Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.”).

127. *Id.* (“But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.”).



clear the rule for analyzing Second Amendment challenges is one based on the Amendment's text, history, and tradition.<sup>128</sup>

Next, I turn briefly to the lower courts' application of the *Heller* shortcut. As explained above, courts that have applied this method relied on the latter portion of *Heller*, where the Court explains that the opinion was not exhaustive of all the relevant Second Amendment history and that the opinion should not be understood to cast down certain longstanding prohibitions.<sup>129</sup>

While the Court has signaled some support for prohibitions relating to sensitive places, violent felons, and those individuals with mental illness, the Court has not acquiesced to extending the prohibitions to include an intoxicant rule.<sup>130</sup>

## VI. UNLAWFUL USERS AND THE RIGHT TO BEAR ARMS

Title 18 U.S.C. § 922(g)(3) prohibits an individual from possessing a firearm if he or she is an "unlawful user" of a controlled substance. An "unlawful user" is one who someone who "uses illegal drugs regularly and in some temporal proximity to the gun possession."<sup>131</sup> I argue that 18 U.S.C. § 922(g)(3)'s restriction on the right to bear arms based on past use is distinctly at odds with the history and tradition of the Second Amendment. In this Part, I reference two recent post-*Bruen* cases where courts found that § 922(g)(3)'s unlawful user restriction violates the Second Amendment.

In August 2023, the United States Court of Appeals for the Fifth Circuit found that § 922(g)(3) violated a defendant's right to bear arms.<sup>132</sup> In April 2022, Patrick Daniels was stopped by police for driving without a license plate.<sup>133</sup> Upon approach, an officer detected the odor of marijuana in Daniels' vehicle.<sup>134</sup> Following a search of the car, officers found a trace amount of

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128. *Id.* at 2129–30 ("We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

129. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

130. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

131. *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023).

132. *Id.* at 355.

133. *Id.* at 340 ("In April 2022, two law enforcement officers pulled Daniels over for driving without a license plate.").

134. *Id.* ("One of the officers—an agent with the Drug Enforcement Administration ("DEA")—approached the vehicle and recognized the smell of marihuana.").

marijuana and two loaded firearms.<sup>135</sup> Officers did not administer a drug test to determine whether Daniels was under the influence of an impairing substance.<sup>136</sup> However, Daniels did admit to using marijuana in the past.<sup>137</sup> Based on his admission, the government charged Daniels with violating § 922(g)(3).<sup>138</sup>

The traditional test for determining when an individual ought to be disarmed is dangerousness.<sup>139</sup> In this case, Daniels did not have a violent criminal history, and there was no evidence presented that he was under the influence of an intoxicant.<sup>140</sup> I assert that a proper showing of dangerousness requires evidence separate from past intoxicant use. An intoxicated individual with an unloaded firearm poses no more of a danger than one who is intoxicated without a firearm. The relevant inquiry centers on illicit use and imminent

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135. *Id.* (“[Officers] searched the cabin and found several marihuana cigarette butts in the ashtray. In addition to the drugs, the officers found two loaded firearms: a 9mm pistol and a semi-automatic rifle.”).

136. *Id.* (“At no point that night did the DEA administer a drug test or ask Daniels whether he was under the influence; nor did the officers note or testify that he appeared intoxicated.”).

137. *Id.* (“But after Daniels was Mirandized at the station, he admitted that he had smoked marihuana since high school and was still a regular user. When asked how often he smoked, he confirmed he used marihuana ‘approximately fourteen days out of a month.’”).

138. *Id.* (“Based on his admission, Daniels was charged with violating 18 U.S.C. § 922(g)(3), which makes it illegal for any person ‘who is an unlawful user of or addicted to any controlled substance . . . to . . . possess . . . any firearm.’”).

139. *See* *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*.”); *Folajtar v. Att’y Gen.*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) (“Stripping the right to bear arms does have ancient origins. In England, royal officers could seize arms from those who were ‘dangerous to the Peace of the Kingdom.’ And they could seize arms from and imprison ‘people who [went] armed to terrify the King’s subjects.’ Both sources authorized disarming the dangerous. The American colonies had similar laws. They were particularly fearful of the disloyal, who were potentially violent and thus dangerous.”) (citations omitted); *Binderup v. Att’y Gen.*, 836 F.3d 336, 357 (3d Cir. 2016) (Hardiman, J. concurring) (“The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.”); Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 271–72 (2020) (“When the *Heller* Court interpreted the Second Amendment, it reviewed history and tradition from England, the colonial and founding periods, and the nineteenth century to determine how that history and tradition informed or reflected the founding-era understanding of the Second Amendment. Examining similar sources to identify the historical justification for felon bans reveals one controlling principal that applies to each historical period: violent or otherwise dangerous persons could be disarmed. Peaceable persons, conversely, could not.”) (footnote omitted).

140. Brief of Defendant-Appellant at 6–8, 14, *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (No. 22-60596).

danger.<sup>141</sup> That is, do the facts and circumstances prove that an unlawful user is, in fact, a danger? Some additional factors to consider in assessing dangerousness are whether the individual possesses the intent and ability to harm.

In early 2023, a federal district court in Oklahoma undertook to determine the constitutionality of 18 U.S.C. § 922(g)(3).<sup>142</sup> The law at issue criminalized the possession of a firearm with knowledge that the accused was an unlawful user of marijuana.<sup>143</sup>

Consider the facts: Jared Michael Harrison was stopped for running a red light.<sup>144</sup> Upon approach of the vehicle, an officer detected the odor of marijuana emitting from Harrison's person.<sup>145</sup> Officers did not find any contraband on Harrison's person; however, officers did find marijuana-derived products inside the vehicle.<sup>146</sup> Subsequently, Harrison was arrested and indicted for violating § 922(g)(3).<sup>147</sup>

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141. *Binderup*, 836 F.3d at 357 (Hardiman, J. concurring) (“The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.”).

142. *United States v. Harrison*, 654 F. Supp. 3d 1191, 1193 (W.D. Okla. 2023).

143. *Id.* at 1196 (“The question here is thus whether stripping someone of their right to possess a firearm solely because they use marijuana is consistent with the Nation’s historical tradition of firearm regulation.”).

144. *Id.* at 1194 (“Harrison was pulled over by an officer of the Lawton Police Department for failing to stop at a red light.”).

145. *Id.* (“When Harrison rolled down his window to speak to the officer, the officer smelled marijuana and questioned Harrison about the source of the smell. Harrison told the officer that he was on his way to work at a medical marijuana dispensary, but that he did not have a state-issued medical-marijuana card.”).

146. *Id.* (“The officer asked Harrison to step out of his car. When he did, the officer noticed that Harrison was wearing an ankle monitor. Harrison told the officer that he was on probation in Texas for an aggravated assault. The officer searched Harrison and found no contraband. The officer did not conduct a field sobriety test, nor did he request a blood draw to determine if Harrison was under the influence of marijuana or some other unlawful substance. Another officer arrived, and the two officers searched Harrison’s car. They found a loaded revolver on the driver’s side floorboard; two prescription bottles in the driver’s side door, one empty and one containing partially smoked marijuana cigarettes; and a backpack in the passenger seat. The backpack contained marijuana, THC gummies, two THC vape cartridges, and a pre-rolled marijuana cigarette and marijuana stems in a tray.”) (footnote omitted).

147. *Id.* (“Harrison was arrested at the scene. The next day, the State of Oklahoma charged Harrison with possession of marijuana, possession of paraphernalia, and failure to obey a traffic signal. Harrison is awaiting trial on those charges. Then, on August 17, 2022, a federal grand jury returned an indictment charging Harrison with possessing a firearm with knowledge that he was an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3).”).

At the district court, Harrison argued the law was unconstitutional and burdened his rights under the Second Amendment.<sup>148</sup> Harrison contended that the plain language of *Bruen* and the Second Amendment prohibited the state from restricting his rights by enforcing § 922(g)(3).<sup>149</sup> In contrast, the United States' argument was twofold. First, the United States argued that Harrison was not in the class of law-abiding citizens the Second Amendment endeavored to protect because he had broken the law.<sup>150</sup> Next, the United States asserted that there was evidence to support the fact that "risky" people were prevented from possessing firearms and that Harrison fell within that class because he was "unvirtuous."<sup>151</sup>

At the threshold, the court noted that other courts' use of the two-step method was directly incompatible with the rule established in *Heller*.<sup>152</sup> Further still, the Supreme Court in *Bruen* expressly rejected the use of the two-step method in Second Amendment cases:

In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for

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148. *Id.* ("Harrison argues that the indictment should be dismissed for both Due Process Clause and Second Amendment reasons. Because the Court resolves the motion on Second Amendment grounds, the Court won't reach Harrison's Due Process claim or describe Harrison's argument in that regard.").

149. *Id.* ("Harrison argues he has the right to possess a firearm and that § 922(g)(3) infringes upon that right. Relying primarily on *New York State Rifle & Pistol Association v. Bruen*, Harrison argues that the Second Amendment's plain text covers his conduct (possessing a handgun), and that the government cannot affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms.") (footnote omitted).

150. *Id.* at 1195 ("First, it argues, Harrison is not part of 'the people' protected by the Second Amendment because he is not 'a law-abiding citizen.' This being so, the government argues, the burden never shifts to it to affirmatively prove that restrictions like § 922(g)(3) are part of the historical traditions that define the outer bounds of the right to keep and bear arms.").

151. *Id.* ("[T]here is a historical tradition of preventing 'presumptively risky' people like felons and the mentally ill from possessing firearms, and for purposes of the Second Amendment, concludes the government, marijuana users are no different from those because they are similarly 'unvirtuous.'").

152. *Id.* at 1195–96 ("[T]he Second Amendment guarantees an individual's right to keep and bear arms for self-defense, a conclusion the Supreme Court reached after examining the text and history of the Second Amendment in *District of Columbia v. Heller*. But after *Heller*, federal courts strayed from that textual and historical approach and 'coalesced around a "two-step" framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny.'") (footnotes omitted).

analyzing Second Amendment challenges that combines history with means-end scrutiny. . . . [W]e decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."<sup>153</sup>

The district court properly abandoned the two-step method in favor of the rule first declared in *Heller*.<sup>154</sup>

At the top, the United States offered a series of laws passed in the seventeenth and late-nineteenth centuries in an effort to show similarity to the now challenged law, 18 U.S.C. § 922(g)(3).<sup>155</sup> Upon closer review, the court concluded that none of the statutes were remotely akin to the deprivation of law at issue here.<sup>156</sup> Harkening back to *Christen*, *Weber*, and *Wilder*, I contend

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153. *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2125 (2022).

154. *Harrison*, 654 F. Supp. 3d at 1198–99 (“[The government] must identify a historical tradition of laws that are sufficiently analogous, and that turns on whether the historical laws ‘impose[d] a comparable burden on the right of armed self-defense’ and were ‘comparably justified.’ Because ‘[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,’ historical analogues in existence near the time the Second Amendment was adopted in 1791 are of primary relevance.”) (footnotes omitted).

155. *Id.* at 1199–1200 (“To begin, the United States points to seven laws—one 1655 law from colonial Virginia and six state or territorial laws enacted between 1868 and 1899—that it argues ‘categorically prohibit[ed]’ the intoxicated ‘from possessing firearms.’”).

156. *Id.* at 1200–01 (“Start with comparing the burden each of these laws placed on the right of armed self-defense vis-à-vis the burden imposed by § 922(g)(3). The seven laws the United States identifies imposed a far narrower burden and, as a result, left ample room for the exercise of the core right to armed self-defense. First, the restrictions imposed by each law only applied while an individual was actively intoxicated or actively using intoxicants. Under these laws, no one’s right to armed self-defense was restricted based on the mere fact that he or she was a user of intoxicants. Second, none of the laws appear to have prohibited the mere possession of a firearm. Third, far from being a total prohibition applicable to all intoxicated persons in all places, all the laws appear to have applied to public places or activities (or even a narrow subset of public places), and one only applied to a narrow subset of intoxicated persons. Importantly, none appear to have prohibited the possession of a firearm in the home for purposes of self-defense.”) (footnotes omitted).

that each of the respective laws at issue in those cases would still be unconstitutional in light of the decisions in *Bruen* and *Harrison*.<sup>157</sup>

For its second argument, the United States claimed *Harrison* was excluded from the protections of the Second Amendment because he lacked virtue.<sup>158</sup> Making light work of the United States' position, the court rejected the United States' characterization of the virtuous-citizenry scholarship.<sup>159</sup> What is more, *Heller* impliedly rejected the application of the virtuous-citizenry formulation as inconsistent with the tradition of the Second Amendment:

Although courts, scholars, and litigants have cited this supposed limitation, this virtuous-citizens-only conception of the right to keep and bear arms is closely associated with pre-*Heller* interpretations of the Second Amendment by proponents of the “sophisticated collective rights model” who rejected the view that the Amendment confers an individual right and instead characterized the right as a “civic right . . . exercised by citizens, not individuals . . . who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia.”<sup>160</sup>

The *Harrison* court makes clear that the proper test is not one of virtue but of dangerousness.<sup>161</sup>

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157. See *State v. Philpotts*, 209 N.E.3d 696, 697 (Ohio 2022) (Donnelly, J., dissenting); see also *State v. Christen*, 2021 WI 39, ¶ 106, 369 Wis. 2d 705, 958 N.W.2d 746 (R.G. Bradley, J., dissenting).

158. *Harrison*, 654 F. Supp. 3d at 1215 (“The United States also argues that ‘ample historical scholarship has established that the Second Amendment right to bear arms was closely tied to the concept of a virtuous citizenry and to the notion that the government could disarm lawbreaking or otherwise unvirtuous citizens who posed a risk to public safety.’ And since Congress could view marijuana users as ‘unvirtuous,’ § 922(g)(3) falls within that historical tradition.”) (footnote omitted).

159. *Id.* “First, under the United States’ own conception of the historical tradition, such restrictions would only apply to those who are both unvirtuous and dangerous.” *Id.* “And as explained above, because the mere use of marijuana does not involve violent, forceful, or threatening conduct, a user of marijuana does not automatically fall within that group.” *Id.* “Second, the idea that the Second Amendment incorporates some ‘vague “virtue” requirement’ is ‘belied by the historical record . . . .’” *Id.* (quoting *Binderup v. Att’y Gen. of the U.S.*, 836 F.3d 336, 358 (3d Cir. 2016) (Hardiman, J., concurring)).

160. *Binderup*, 836 F.3d at 371 (Hardiman, J., concurring) (quoting Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 491–92 (2004)); see also *id.* at 372 n.18; *Kanter v. Barr*, 919 F.3d 437, 462–64 (7th Cir. 2019) (Barrett, J., dissenting); *Folajtar v. Att’y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting).

161. *Harrison*, 654 F. Supp. 3d at 1215–16. “[T]he limits on the right protected by the Second Amendment ‘are not defined’ by a person’s ‘lack of virtue or good character.’” *Id.* (quoting *Kanter*, 919 F.3d at 462–64). “‘The right historical test is not virtue, but dangerousness’ as exhibited by past violent, forceful, or threatening conduct.” *Id.* (quoting *Folajtar*, 980 F.3d at 913).

## VII. CONCLUSION

With each case, the Second Amendment becomes more settled, and the rights enumerated therein better protected. Following the Supreme Court's decisions in *Heller*, *McDonald*, and now *Bruen*, there are still questions likely to arise in the context of the Second Amendment. Indeed, one of the likely challenges will pertain to laws that prohibit the use of intoxicants and being under the influence while *using* a firearm. While the area is generally untested, this Article contends that such laws are not only in conflict with the Court's most recent declaration in *Bruen*, but run directly afoul of the text, history, and tradition of the Second Amendment and should be struck down.