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## Upholding Longstanding Prohibitions on Firearm Possession Under *Bruen*

Mitchell Gordon\*

### Introduction

The Second Amendment has only recently been interpreted as describing an individual right.<sup>1</sup> The prevailing understanding of Second Amendment rights throughout the twentieth century connected at least in some way to militia service was illustrated in *Miller*.<sup>2</sup> This understanding changed in 2008 with the *Heller* decision, which established through extensive historical review that the nation's history, the text of the Second Amendment, and national tradition all showed that Second Amendment rights include an individual right to possess a handgun in one's home.<sup>3</sup> Roughly two years later in *McDonald*, this understanding of the individual gun possession rights described contained in the Second Amendment was expanded to preclude state laws from infringing under the Fourteenth Amendment's Due Process clause.<sup>4</sup> After *Heller* and *McDonald*, lower courts grappled with how to apply the analysis to the various levels of federal and state firearm restrictions, with many using Justice Breyer's reasoning from his dissent in *Heller* and means-end scrutiny to evaluate federal and state firearm restrictions.<sup>5</sup>

The means-ends scrutiny used for over a decade after *Heller* was emphatically rejected in 2022 by *Bruen*.<sup>6</sup> Justice Thomas's opinion clearly stated that the only way that a governmental restriction on Second Amendment rights was if the restriction had a basis in the text of the

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<sup>1</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (Establishing that Second Amendment rights include the right of an individual possess a handgun within one's own home).

<sup>2</sup> *United States v. Miller*, 307 U.S. 174, 179 (1939).

<sup>3</sup> *Heller*, 307 U.S. at 595.

<sup>4</sup> *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010).

<sup>5</sup> See Allen Rostron, *Justice Breyer's Triumph*, 80 GEO. WASH. L. REV. 703 (2012).

<sup>6</sup> *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

amendment, in the history of the country, or in national tradition.<sup>7</sup> Time and future litigation will tell which sorts of firearm restrictions can be upheld under this test. In the short-term, recent federal court litigation has shown that several federal firearm possession restrictions can be upheld through historical analysis, as well as analogy to other amendments.<sup>8</sup>

In understanding what sorts of restrictions on firearms are permissible after *Bruen*, many courts, including the *Bruen* Court, reference the *Heller* recognition that the Second Amendment is not all-encompassing.<sup>9</sup> Justice Scalia in his majority opinion in *Heller* noted that the Court's understanding of the Second Amendment should not be read to cast doubt on longstanding prohibitions on firearm possession by felons and the mentally ill.<sup>10</sup> Justice Alito in his opinion for the Court in *McDonald* endorsed *Heller's* note that the Court's decision should not be read to preclude the longstanding prohibitions on firearm possession by felons and mentally ill.<sup>11</sup> However, when Justice Thomas stated in *Bruen* that Second Amendment restrictions can only be upheld through text history and tradition, the future of these longstanding prohibitions has been cast into some doubt.<sup>12</sup>

### **Part I: Federal Restrictions on Felon Firearm Possession**

Gun Control Act (GCA) of 1968 established a prohibition on “any person who is under indictment for, or who has been convicted ... of a crime punishable by imprisonment for a term exceeding one year” from shipping or transporting any firearm or ammunition in interstate or foreign commerce.<sup>13</sup> Even though the statute text is aimed at possession and transport in interstate commerce, the practical effect and common

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<sup>7</sup> *Id.* at 2129-30.

<sup>8</sup> *United States v. Charles*, 2022 WL 4913900, 11 (W.D. Tex. Oct. 3, 2022).

<sup>9</sup> *Bruen*, 142 S. Ct. at 2133.

<sup>10</sup> *Heller*, 554 U.S. at 626.

<sup>11</sup> *McDonald*, 561 U.S. at 786.

<sup>12</sup> *Bruen*, 142 S. Ct. at 2129-30.

<sup>13</sup> GCA 1968 (Pub Law 90-618) § 922(g)(1) (§ 922(d)(1) also included a prohibition on the sale of firearms or ammunition to those under indictment for or convicted of a crime punishable by imprisonment for more than a year).

understanding is general prohibition on felon firearm possession.<sup>14</sup> Since these laws cause a forfeiture of firearm possession rights by felons and implicate Second Amendment rights, courts facing constitutional challenges to these laws must use *Bruen's* test to pass on their constitutionality.<sup>15</sup>

The Western District of Texas has already seen several challenges this year to Section 922(g)(1) in the wake of *Bruen*.<sup>16</sup> The *Charles* case involved knowing possession of a firearm by a felon, conduct plainly covered by section 922(g)(1).<sup>17</sup> The defendant argued that the statute was incompatible with the Court's opinion in *Bruen*.<sup>18</sup> The district court used a two-step *Bruen* analysis to evaluate whether the statute should stand.<sup>19</sup> Step One was whether the defendant's possession of a firearm implicated the Second Amendment.<sup>20</sup> The court easily found that the right to "keep ... arms" includes possession of firearms, and thus, this statute implicated the Second Amendment.<sup>21</sup> Since the conduct fell within the rights described by the Second Amendment, the conduct was presumptively protected and the constitutionality of the statute "hinge[d] on whether regulations prohibiting felons from possessing a firearm are consistent with the Nation's historical tradition of firearm regulation."<sup>22</sup> To answer this question, the court turned to Step Two, which was determining if text, history, or tradition support this governmental regulation on firearm possession.<sup>23</sup> The court explained that the prohibition was for those convicted of a "crime of violence" and characterized the FFA as designed to combat criminals crossing state lines, then noted that the GCA of 1968

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<sup>14</sup> Giffords Law Center, *Gun Law Policy*, <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/firearm-prohibitions> (last visited Mar. 6, 2023).

<sup>15</sup> *Bruen*, 142 S. Ct. at 2129-30.

<sup>16</sup> *Charles*, 2022 WL 4913900 at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2-3.

expanded the prohibition to what we understand today as felons.<sup>24</sup> Therefore, the court concluded that “as of 2022, prohibiting felons from possessing firearms at the federal level is less than 65 years old.”<sup>25</sup>

In summarizing its reasoning in the case, the court reiterated that both *Heller* and *Bruen* used analogy to form a syllogism, as this court did here.<sup>26</sup> In further defense of its conclusion, the court explained that there is historical tradition of excluding felons from the rights of “the people” as evidenced by the Constitution’s structure that gave the rights of “the people” to those that do not abuse the rights, and removed them from those who abuse them.<sup>27</sup> Therefore, those that abuse the rights are not included in “the people” as described by the Constitution.<sup>28</sup>

Put more simply, this court in determining the constitutionality of Section 922(g)(1) first looked to the practical effect of the law and whether this effect fell within the ambit of the Second Amendment, then analogized to other rights to see if there is a historical tradition on restricting who can possess a firearm based on that person’s commission of a crime.<sup>29</sup> After finding the conduct within the protections of the Second Amendment, the law infringing on that protection is presumptively unconstitutional.<sup>30</sup> To overcome the presumption, the law must have basis in text, history or tradition.<sup>31</sup> This court determined that the history of this federal regulation was only 65 years old, insufficiently old to overcome the presumption of unconstitutionality.<sup>32</sup> Therefore, if there is historical practice and tradition of restricting the rights of “the people” or removing certain persons from those contemplated in “the people” with other rights with the same

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<sup>24</sup> *Id.* (Expanding the prohibition to those convicted of a crime punishable by imprisonment for a term exceeding one year).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 4-5.

meaning of the term, the same could be done in the Second Amendment.<sup>33</sup> Finding the term consistent with voting rights and assembly rights, the court looked to whether unlawful acts or crimes have historically removed those people from the protection of those rights.<sup>34</sup> With historical support found by analogy to other rights, the court concluded that Section 922(g)(1) was constitutional.<sup>35</sup>

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<sup>33</sup> *Id.* at 5-6.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.* at 11-12.