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The topic of "Second Amendment Limitations" might seem to be, in our President's frequently-used phrase, on the wrong side of history. The trend over the past couple of decades, after all, has been the expansion, not the limitation of Second Amendment rights. Nonetheless, the Second Amendment, like all provisions of the Bill of Rights, is not unlimited in its protections. Though the shape and extent of the Second Amendment's limits is still being defined by courts – and, perhaps significantly, by legislatures – I hope to offer a few thoughts here that may prove useful.

It seems that the greatest source of limitation in coming years is likely to be the courts. And, as Brannon Denning and I have noted in the past, there was (and to some degree remains) reason to believe that lower courts might adopt a crabbed and minimalist reading of the right to arms.[2] As we talk about limitations on the right to keep and bear arms, two especially important categories come to mind. First, there are limitations on what kind of arms may be kept and borne: Handguns? Rifles? "Assault Weapons?" Shotguns? Howitzers? Weapons of Mass Destruction? Second, there are limitations on who may keep and bear arms: To whom does the right apply – and, more importantly, to whom does it not apply? In this brief Essay, I will look at some judicial efforts relating to these categories, before venturing a few more general thoughts on the keeping and bearing of arms in 21st Century America.

What kind of arms?

It is a tedious affair, so late in the Second Amendment debate, to encounter individuals who believe that they have demonstrated the absurdity of a right to arms under the Constitution by raising the possibility, as a reductio ad absurdum, of private ownership of nuclear weapons. Likewise, people raise the possibility of cannon, tanks, etc. Such argumentation, however, serves mostly to illustrate the arguer's unfamiliarity with Second Amendment scholarship.

In fact, there is surprisingly little to add to Don Kates' treatment of this topic in his seminal article, Handgun Prohibition And The Original Meaning Of The Second Amendment, in which he wrote:

> The preceding sections of this Article demonstrate that, in general, the second amendment guarantees individuals a right to "keep" weapons in the home for self defense. Several limitations on this right have already been suggested, however. First

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[1] Beauchamp Brogan Distinguished Professor of Law, University of Tennessee College of Law.

[2] Glenn Harlan Reynolds & Brannon P. Denning, Heller's Future in the Lower Courts, 102 Nw. U. L. Rev. 406 (2008); Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms, 60 Hastings L.J. 1245 (2009); Five Takes on District of Columbia v. Heller, 69 Ohio St. L.J. 671 (2009).

and foremost are those implicit in *United States v. Miller*, suggesting that the amendment protects only such arms as are (1) "of the kind in common use" among law-abiding people and (2) provably "part of the ordinary military equipment" today. The analysis presented throughout this Article indicates that the "ordinary military equipment" criterion is infected by *Miller*'s conceptually flawed concentration on the amendment's militia purpose, to the exclusion of its other objectives. Decisions recognizing that concerns for individual self-protection and for law enforcement also underlie right to arms guarantees involve at once greater historical fidelity and more rigorous limitation upon the kinds of arms protected. These decisions suggest that only such arms as have utility for *all three* purposes and are lineally descended from the kinds of arms the Founders knew fall within the amendment's guarantee.

Reformulating *Miller*'s dual test in this way produces a triple test that anyone claiming the amendment's protection must satisfy as to the particular weapon he owns. That weapon must provably be (1) "of the kind in common use" among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders.

This triple test resolves the *ad absurdum* and *ad horribilus* results (to which *Miller*'s sketchy and flawed militia-centric discussion greatly contributed) sometimes viewed as flowing from an individual right interpretation of the amendment. Handguns, for example, clearly fall within the amendment's protection. That handguns are *per se* "in common use" among law-abiding people and combine utility for civilian, police and military activities is not only provable but judicially noticeable. . . . Likewise, the amendment does not protect the possession of fully automatic weapons, grenades, rocket launchers, flame throwers, artillery pieces, tanks, nuclear devices, and so on. Although such sophisticated devices of modern warfare do have military utility, they are not also useful for law enforcement or for self-protection, nor are they commonly possessed by law-abiding individuals. Moreover, many of them may not be lineally descended from the kinds of weapons known to the Founders.

In addition to the tripartite test, two further limiting principles would tend to exclude the sophisticated military technology of mass destruction--or, indeed, anything beyond ordinary small arms--from the amendment's protection. First, since the text refers to arms that the individual can "keep *and* bear," weapons too heavy or bulky for the ordinary person to carry are apparently not contemplated. Second, according to Blackstone and Hawkins, the common-law right did not extend to "dangerous or unusual weapons" whose mere possession or exhibition "are apt to terrify the people." Naturally, it would terrify the citizenry for unauthorized individuals to possess weapons that could not realistically be used even in self-defense without endangering innocent people in adjacent areas or buildings.[3]

[3] 82 Mich. L. Rev. 204, 258 (1983).

I apologize for this lengthy quotation, but include it to demonstrate that Kates' 1983 analysis makes clear that the "right to own an atomic bomb" objection is neither new nor well founded. One might argue that the Supreme Court's emphasis on self-defense, rather than collective protection against tyranny, supports a somewhat less militia-centric view of protected weaponry, perhaps including non-lethal weapons, but the basic outlines of Kates' analysis survive: The Second Amendment supports individual weapons of a type that is in common use among the citizenry, but not weapons that are too big to be borne by an individual, or weapons that, even when used properly, would unnecessarily endanger the surrounding community.

One somewhat novel limitation, suggested by Judge Frank Easterbrook in the Seventh Circuit's opinion in Friedman v. City of Highland Park, Illinois,[4] involves reading the above as "endanger the surrounding community's peace of mind." As evidence that Highland Park's municipal assault weapon ban furthered a substantial governmental purpose, Easterbrook wrote:

> If it has no other effect, Highland Park's ordinance may increase the public's sense of safety. Mass shootings are rare, but they are highly salient, and people tend to overestimate the likelihood of salient events. If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safter as a result, that's a substantial benefit.[5]

The notion of upholding an infringement on a constitutionally protected right because that infringement might soothe the irrational fears of some portion of the populace is a novel one. If taken seriously, it might have significant application beyond the jurisprudence of the Second Amendment. It is easy, at least, to imagine other rights whose infringement might reduce the irrational fears of some sectors of the populace, though I had thought that our abandonment of Jim Crow had put that approach behind us.

In an interesting contrast to Judge Easterbrook's treatment, the Michigan Court of Appeals, in People v. Yanna,[6] addressed the question of whether Tasers count as protected arms under the Second Amendment in a rather straightforward fashion, holding:

> Stun guns may be used bot for defense or "to cast at or strike another." Therefore MCL 750.224a does affect "arms." "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. The prosecution argues that Heller is strictly a gun-control case, but the broad nature of the language used in Heller's definition of "arms" clearly covers more than just firearms.[7] . . .

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4 784 F3d 406 (2015)

5 784 F3d at 412.

6 People v. Yanna 824 NW2d 241 (Mich. App. 2012).

7 824 NW2d at 244 (citations omitted).

> Hundreds of thousands of Tasers and stun guns have been sold to provate citizens, with many more in use by law enforcement officers. The prosecution fails to put forth evidence that would give the Court reason to doubt that the vast majority of Tasers and stun guns are possessed by law-abiding citizens for lawful purposes. . . .
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> The prosecution also argues that stun guns and Tasers are so dangerous that they are not protected by the Second Amendment. However, it is difficult to see how this is so since Heller concluded that handguns are not sufficiently dangerous to be banned. Tasers and stun guns, while plainly dangerous, are substantially less dangerous than handguns. Therefore, tasers and stun guns do not constitute dangerous weapons for purposes of Second Amendment inquiries.[8]

The court also rejected a claim that Tasers and stun guns are "unusual" and thus beyond the Second Amendment, noting that they are legal in 43 states and in Michigan are routinely used by law enforcement officers. It concluded:

> Because Tasers and stun guns do not fit any of the exceptions to the Second Amendment enumerated in Heller, we find that they are protected arms.[9]

A treatment that is simple, straightforward, and short. Judge Easterbrook might profit from its example.

So might the United States Court of Appeals for the Second Circuit, where in an opinion by Judge Jose Cabranes, the court upheld most of New York and Connecticut's deeply intrusive gun laws.[10] The court held that although the banned "assault weapons" and "large capacity magazines" were in common use, and were not commonly used in crimes, that was insufficient to bring them within the protection of the Second Amendment. Only two specific provisions – New York's seven-round magazine limit, and Connecticut's specific prohibition on the Remington 7615 – were overturned. Judge Cabranes held that since the legislation is "specifically targeted to prevent mass shootings like that in Newtown," it survives intermediate scrutiny. The passage, and indeed the entire opinion, exudes a deference to legislatures that is seldom found in cases involving, say, abortion.

Even here, however, we have come a long way from the pre-Heller era, when it was mainstream legal opinion that the Second Amendment produced nothing at all in the way of enforceable individual rights. If Judges Easterbrook and Cabranes represent an extreme outlying position among the Courts of Appeals, and I believe they do, even they nonetheless acknowledge that the Second Amendment imposes *some* limits on legislation.

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[8] 824 NW2d at 245 (citations omitted).

[9] 824 NW2d at 245-46.

[10] New York State Rifle & Pistol Assoc. v. Cuomo, ___ F.3d. ___, 2015 WL 6118288 (2d Cir., October 19, 2015)

Who May Keep And Bear Arms?

The right to bear arms under the English Bill of Rights was limited to Protestants, but in the American colonies, and in America at the time of the framing, it was more general.[11] And in the Militia Act of 1792, Congress made the right to bear arms also a duty under federal law, requiring "each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years" to possess "a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder."[12] This was a broader group than the electorate, since at the time property requirements for voting barred many white males from the franchise. Yet there is no suggestion that these were the only people allowed to possess arms, and in fact there is considerable evidence that women, and even, in many places, free blacks, had the right to bear arms.[13]

At this late date, of course, we are beyond limiting the enjoyment of constitutional rights to those of a particular race or sex, meaning that the right to arms is not limited by those characteristics. And federal law allows permanent residents who are not U.S. citizens to possess firearms, though not illegal aliens. 18 U.S.C. 922(g)(5) provides in relevant part:

> It shall be unlawful for any person . . .
> (5) who, being an alien –
> (A) is illegally or unlawfully in the United States; or
> (b) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa . . . to . . . possess in or affecting commerce, any firearm or ammunition.[14]

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[11] See generally Joyce Malcolm, To Keep and Bear Arms: The Origins of An Anglo-American Right (1994) (outlining history of right to arms in England and America); Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 464-488(1995) (same).

[12] Militia Act of 1792, Act of May 8, 1792, ch. XXXIII, 1 Stat. 271..

[13] In my own home state of Tennessee, the right to arms extended to everyone under the Constitution of 1796; as racial tensions increased with the growth of slavery, that right was limited to "free white men" under the Constitution of 1834. See Glenn Harlan Reynolds, The Right To Keep and Bear Arms Under The Tennessee Constitution: A Case Study In Civic Republican Thought, 61 Tenn. L. Rev. 647, 659 (1994) (discussing this change in context of similar national trend.)

[14] 18 U.S.C. 922(g)(5).

In the case of United States of America v. Mariano A. Meza-Rodriguez, however, the Seventh Circuit held that Second Amendment rights can, in some circumstances, attach to aliens illegally in the United States. Though noting that "some of Heller's language does link Second Amendment rights with the notions of 'law-abiding citizens' and 'members of the political community,'" Chief Judge Wood observed that the Heller opinion made no effort to define the term "people" under the Second Amendment, and that Heller did observe that the term "people" is used elsewhere in the Bill Of Rights in ways that are not limited to citizens.

Applying United States v. Verdugo-Urquidez[15] and I.N.S. v. Lopez-Mendoza,[16] Judge Wood concluded that the right to bear arms under the Second Amendment extends to non-citizens, even aliens who are here illegally, where those aliens have "substantial connections" with the United States. Looking at Meza-Rodriguez's background, he observed:

> Meza-Rodriguez was in the United States voluntarily; there is no debate on this point. He still has extensive ties with this country, having resided here from the time he arrived over 20 years ago at the age of four or five until his removal. He attended public schools in Milwaukee, developed close relationships with family members and other acquaintances, and worked (though sporadically) at various locations. . . .
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> We do not dispute that Meza-Rodriguez has fallen down on the job of performing as a responsible member of the community. But that is not the point. Many people, citizens and noncitizens alike, raising Fourth Amendment claims are likely to have a criminal record, but we see no hint in Verdugo-Urquidez that this is a relevant consideration. Such a test would require a case-by-case examination of the criminal history of every noncitizen (including a lawful permanent resident) who seeks to rely on her constitutional rights under the First, Second, or Fourth Amendment. . . .
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> In the post-Heller world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded. No language in the Amendment supports such a conclusion, nor, as we have said, does a broader consideration of the Bill of Rights.[17]

As the opinion admits, this conclusion puts the Seventh Circuit at odds with other courts of appeals who have held otherwise,[18] but I think the Seventh Circuit may have the better view. If the Second Amendment is viewed primarily through the lens of the militia – and seen as part of ensuring that we will have an armed citizenry capable of acting in concert to repel invasion or

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[15] 494 U.S. 259 (1990).

[16] 468 U.S. 1032 (1984).

[17] 793 F3d at 670-72.

[18] 798 F3d at 669 (citing United States v. Carpio-Leon, 701 F3d 974 (4th Cir. 2012), United States v. Flores, 663 F.3d 437 (8th Cir. 2011), and United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)).

overturn a tyrannical government – then limiting the right to arms to citizens, and perhaps legal permanent residents who are in some degree part of the polity makes sense. But although not repudiating this view, Heller and McDonald seem more focused on the Second Amendment as a guarantee of the right to individual self-defense. And while aliens who are in the country illegally may be less likely to serve the collective purposes of the Second Amendment, their lives, presumably, need and deserve defending against illicit violence just as much as anyone else's.

The Seventh Circuit managed to have its Second Amendment cake and eat it too, however, ultimately concluding that because illegal aliens live outside the law and are more likely to assume false identities, as well as having shown a willingness to violate the law by entering and remaining within the United States illegally, they may be barred from possessing weapons. Congress's interest in preventing such individuals from possessing guns, according to Judge Wood, is sufficiently substantial to override Meza-Rodriguez's Second Amendment rights.[19] Judge Flaum, in a concurring opinion, suggested that most of the majority's discussion of the Second Amendment and undocumented immigrants was unnecessary to the decision, and should have been avoided in the interest of not contributing to a split among the circuits, though as the parts he objects to are dictum it is not clear how serious a split this really represents.[20]

But what of felons and those adjudicated mentally defective? As the Supreme Court was careful to warn in this "safe harbor" passage in Heller:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[21]

But the Heller "safe harbor" appears to be showing signs of leakage. Or, at least, it is not transforming – as it might have – into a free pass for extensive limitations on firearms ownership. Though I doubt that the felons-and-the-insane limitation on Second Amendment rights is in any danger of abandonment, it is coming in for more judicial scrutiny. For example, in the Sixth Circuit case of *Tyler v. Hillsdale County Sheriff's Department,*[22] Judge Boggs produced an opinion subjecting the federal law forbidding those involuntarily committed to a mental institution from possessing firearms to strict scrutiny, and found it unconstitutional as applied to those not currently, in Heller's phrase, "mentally ill."

18 U.S.C. 922(g)(4) provides that

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19 793 F3d at 673.

20 793 F.3d at 673-74 (Flaum, J., concurring).

21 554 U.S. at 626-27.

22 775 F.3d 308 (6th Cir. 2014).

> It shall be unlawful for any person. . . who has been adjudicated as a mental defective or who has been transmitted to a mental institution. . . to ship or transport in interstate or foreign commerce, or possess in and affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[23]

As applied to Charles Tyler, the court found, this prohibition violates the Second Amendment. Tyler had suffered from a single episode of depression after an ugly divorce in 1985. In the almost 30 years subsequent to that episode, he had no mental problems, and no history of violence or trouble with the law. A 2012 psychological evaluation found him mentally competent and free from depression.

While keeping guns from the insane is a compelling state interest, the court found, the opinion noted a distinction between those who are "mentally defective" and those who, at some point, had been in a mental institution. Making things more complicated, Tyler would have been able to have his record cleared in many states, but a quirk of federal law meant that his state of residence would have to have its own program for doing so; Michigan had no such program, and Congress had eliminated funding for federal action to restore civil rights of those unable to possess firearms. According to the court:

> Based on Heller, a law forbidding possession of firearms by "the mentally ill" is most likely constitutional, and satisfies narrow tailoring. A law that captures only a small subset of that group, or a law that captures the entire group but also a significant number of non-mentally ill persons, would fail narrow tailoring. Section 922(g)(4)'s prohibition on gun possession by persons who have "been adjudicated as a mental defective" is so close to a prohibition on possession by "the mentally ill" that we suppose it, too, satisfies narrow tailoring. . . .
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> At issue here is only 922(g)(4)'s prohibition on possession by persons previously committed to a mental institution. Not all previously institutionalized persons are mentally ill at a later time, so the law is, at least somewhat, overbroad. But is it *impermissibly* so?[24]

Yes, said the court, because Congress had already legislatively determined that many previously institutionalized persons could safely possess firearms, but had then adopted a scheme that made restoration of rights a question of whether such persons' states had opted in to a federally-designed program: "His right would thus turn on whether his state has taken Congress's inducement to cooperate with federal authorities in order to avoid losing anti-crime funding. An individual's right to exercise a fundamental righ[t] necessary to our system of

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[23] 18 U.S.C. 922(g)(4).

[24] 775 F.3d at 332 (citations omitted).

ordered liberty cannot turn on such a distinction. Thus 922(g)(4) lacks narrow tailoring as the law is applied to Tyler."[25]

The Sixth Circuit, unlike many other circuits, applies strict scrutiny to Second Amendment claims, but both Judge Boggs' majority opinion[26] and a concurrence by Judge Julia Gibbons[27] suggest that the result would have been the same under intermediate scrutiny. Though the Heller safe harbor protects laws designed to keep guns out of the hands of the mentally ill, there must be significant protection for those who are not mentally ill anymore.

Likewise, though Heller offers a "safe harbor" for laws barring felons from possession of firearms, federal law goes beyond felonies, just as it goes beyond the "mentally ill." This became an issue in Suarez v. Holder, a district court case from Pennsylvania.[28] Mr. Suarez had a prior conviction for carrying a handgun without a license in Maryland, a misdemeanor punishable by a sentence of not less than 30 days nor more than 3 years imprisonment. Suarez received a suspended sentence of 180 days imprisonment, a $500 fine, and one year's probation.

According to the Department of Justice, this conviction rendered Suarez ineligible to possess a firearm under 18 U.S.C. 921(g)(1) which makes it unlawful for a person to possess a firearm if that person has been convicted "of a crime punishable by imprisonment for a term exceeding one year." However, 18 U.S.C. 921(a)(20)(B) provides that a crime punishable by imprisonment for a term exceeding one year does not include State misdemeanors that are "punishable by a term of imprisonment of two years or less."

The District Court agreed with the Department of Justice's construction: Although Suarez wasn't in fact punished by imprisonment for more than one year, or more than two years, the crime of which he was convicted was "punishable" by sufficient imprisonment to trigger the statute's ineligibility provision, not withstanding that it was a misdemeanor, not a felony.

However, the court went on to find that the statute, as applied, violated Suarez's Second Amendment rights:

> [I]f a challenger can demonstrate that his circumstances are different from those historically barred from Second Amendment protections, he establishes that his possession of firearms is conduct within the Second Amendment's protections . . . Said differently in the context of 922(g)(1), if a challenger can show that his circumstances place him outside the intended scope of 922(g)(1), he establishes, as we read Barton, that he is the 'law-abiding citizen' identified in Heller. And if he is a law-abiding citizen, the possession of a firearm for protection of hearth and home is not just conduct

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[25] 775 F.3d at 334 (citations omitted).

[26] 755 F.3d at 323.

[27] 775 F.3d at 344-45.

[28] Suarez v. Holder, ___ F.3d ___, 2015 WL 685889 (M.D. Pa., 2015).

> protected by the Second Amendment, it is the core of the Second Amendment's guarantee.[29]

The court noted that since his 1990 conviction, Suarez has become a married father of three, continuously employed by a technology company, and the holder of a Secret clearance from the Department of Defense. Furthermore, he had successfully obtained a removal of firearms disability under Pennsylvania law. Finding that "the traditional justification for 922(g)(1) was the disarmament of individuals likely to commit violent acts," the court concluded that "Plaintiff's background and circumstances in the years following his conviction establish that he is no more dangerous than a typical law-abiding citizen and poses no continuing threat to society."

The court continued: "We agree with Defendants that the circumstances of Plaintiff's arrest were dangerous. But the inquiry is whether the challenger, today, not at the time of arrest, is more dangerous than a typical law-abiding citizen or poses a continuing threat." Under these circumstances, the application of 922(g)(1) to Suarez violated his Second Amendment protections.

From these cases, it seems that the Heller "safe harbor" is safe within its terms – felons and the insane can be disarmed – but to the extent that federal statutes go beyond these categories, they are subject to judicial pruning, at least on an as-applied basis. The categories that Heller laid out as safe for regulation are not, it seems subject to judicial or legislative expansion willy-nilly. Instead, all such efforts must be evaluated on their own, and with a (somewhat) critical eye.

Conclusion

The above sampling of cases, while not by any means complete, is reasonably representative of two important points. The first, which I have addressed in the past, is that the Second Amendment – once a weird, neglected, perhaps even "embarrassing"[30] corner of the Bill of Rights, afflicted with a variety of farfetched "collective rights" theories that seemed (because they were) designed chiefly to ensure that it had no actual effect[31] – is now a working part of the Constitution. It establishes rights that can be invoked by individuals, and, when individuals do invoke those rights, courts will examine legislative actions against governing precedents and,

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[29] 2015 WL 685889 at 8. Citing United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010) and United States v. Barton, 633 F.3d 168 (3d Cir. 2011).

[30] See Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989) (describing Second Amendment as "embarrassing" to the elite bar and the legal academy, because taking it seriously might constrain desired gun control policies).

[31] See Brannon P. Denning, Can The Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment, 26 Cumb. L. Rev. 961 (1996).

when they think it appropriate, overturn those actions. It is, in short, now ordinary constitutional law.[32]

This is not to say that the courts always get it right, of course. Though we might wish otherwise, "ordinary constitutional law" is not ideal constitutional law. As any legal academic can attest, the courts – even the Supreme Court itself – sometimes get things wrong. Indeed, most law professors, if asked, could provide a surprisingly lengthy list of places where the courts have gotten things wrong. Ordinary constitutional law isn't perfect constitutional law. Under present circumstances, it may not even be especially *good* constitutional law. But it *is* law, which is more than could be said for the Second Amendment until recently.

The second point is that the Heller "safe harbor" provision, which many – perhaps even including me – thought would probably be used as a tool for undermining the key holding in Heller,[33] turns out not to stretch that far. "Felons and the mentally ill" does not mean "misdemeanants and those who have had emotional problems in the past." Courts appear willing, at least to some extent, to scrutinize limitations on firearms rights with this in mind.

This may not satisfy all critics, and there is something to Dave Kopel's claim that many federal courts are "straining to under-read Heller"[34] in order to limit firearms rights – the Easterbrook and Cabranes opinions discussed above are good examples, with an emphasis there on the "straining" part. Nonetheless, from a "glass half full" perspective, the above cases also make clear that not all federal courts are as hostile to Second Amendment rights. It is likely that we will see further guidance from the Supreme Court, as the circuits divide on the extent of Second Amendment protections. That, too, is part of ordinary constitutional law.

And, of course, it is worth remembering that the judiciary is not the only branch of government entrusted with enforcing the Constitution. Second Amendment rights may also be protected by

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[32] Glenn Harlan Reynolds, The Second Amendment as Ordinary Constitutional Law, 81 Tenn. L. Rev. 409 (2014) (describing this evolution). See also Glenn Harlan Reynolds, Second Amendment Penumbras: Some Preliminary Observations, 85 S. Cal. L. Rev. 247 (2012) (discussing penumbral aspects of the Second Amendment that may be applied by courts in the future).

[33] Heller and McDonald, for example, have fared far better in the lower courts than the Supreme Courts decision in United States v. Lopez. See Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253 (2003) (describing lower-court reluctance to apply holding in Lopez). See also, Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came? 2000 Wisc L. Rev. 369 (similar).

[34] David Kopel, 2nd Circuit upholds N.Y. and Conn. arms bans; contradicts Heller and McDonald, Volokh Conspiracy blog, October 21, 2015, available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/21/2nd-circuit-upholds-n-y-and-conn-arms-bans-contradicts-heller-mcdonald//

federal, and even state, legislation, and there is likely to be some movement on those fronts as well. Indeed, the Second Amendment is unusual among the provisions of the Bill of Rights in that most of the protections it has enjoyed have been legislative and political, rather than judicial. Though the courts have become somewhat more receptive to Second Amendment rights in recent years, that is unlikely to change.

There may be a useful lesson in that. Though courts and judges have their biases and foibles, and political tides can ebb and flow, over an extended period, the rights that are most protected are probably the rights that people most care about. The American people have largely stopped caring about the limitations on government power supplied by enumerated-powers doctrine; without such caring, it was easy for lower courts to eviscerate the Supreme Court's Lopez and Morrison decisions. On the other hand, many Americans care quite a lot about the rights protected by the Second Amendment, meaning that courts are less likely to engage in a successful judicial insurgency against Supreme Court doctrine – and, if they do, those judges may well find themselves overruled by popularly supported legislation.

It is unfortunate, of course, that the judiciary turns out to be less than willing, at times, to apply the constitution faithfully. But judges are human beings with human biases and failings. The lesson that civil rights supporters should take from the Second Amendment is that while judicial support for constitutional rights is a good thing, it is a far more robust thing when judicial support is backed by strong popular support. Perhaps, in the future, we will see other constitutional rights enjoy popular backing that is as strong as that enjoyed by the Second Amendment. Because, ultimately, that is what prevents unreasonable limitations from being placed on constitutional rights of any kind.