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**THE SOUNDS OF THE SUPREMES:  
A REPLY TO PROFESSOR YASSKY**

DAVID B. KOPEL \*

I would like to thank David Yassky for his well-written response to my article.<sup>1</sup> Over the last few years, I have had the pleasure of debating Professor Yassky on several radio programs; his writing, like his discussions on the radio, is thought-provoking, concise, and gentlemanly.

In my article in this symposium, I suggested that readers who think that the 1939 *Miller* case<sup>2</sup> was the beginning and end of the Supreme Court's Second Amendment jurisprudence should broaden their view by studying *everything* that the Supreme Court has said about the Second Amendment.<sup>3</sup> David Yassky, in reply, gives both me and the Supreme Court too much credit for creativity, and for inventing novel approaches to the Second Amendment. Let's start by discussing the credit that I do not deserve.

I. WHAT'S A REVISIONIST AND WHAT DO THEY THINK?

Professor Yassky includes me in "a group of revisionist scholars" who are promoting a "new paradigm" trying to overthrow the "dominant view" of the Second Amendment.<sup>4</sup> Were the Yassky/Kopel dialogue taking place in *The Journal of Post-modern Deconstruction*, Professor Yassky's words would be high compliments, limited only by his failure to credit me with "transgressing boundaries" But since we are discussing law, which (unlike the writing of Jacques Derrida) is supposed to be intelligible, I must decline the honor of being a "revisionist." Along with other Standard Model scholars of the Second Amendment, I am merely continuing in a well-worn path of Second Amendment analysis.

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1. David Yassky, *The Sound Of Silence: The Supreme Court And the Second Amendment – A Response to Professor Kopel*, 18 ST. LOUIS U. PUB. L. REV. (1999) [hereinafter, "Yassky"].

2. *United States v. Miller*, 307 U.S. 174 (1939).

3. David B. Kopel, *The Supreme Court's Thirty-four Other Second Amendment Cases*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999) [hereinafter, "Kopel"].

4. Yassky, text at n. 2-4.

A. *Who are the Revisionists?*

The core of the Standard Model is that the Second Amendment guarantees a right of all Americans (not just militia members) to own and carry firearms. As to the contours of this right, the Standard Model is well-settled on some points, and unsettled on others, as I will detail in the next section.

The reason that “the Standard Model” is the standard model is that it has been in use for as long as legal scholars have been writing about the Second Amendment. Starting with St. George Tucker’s American edition of Blackstone in 1803, every legal scholar who wrote about the Second Amendment during the nineteenth century wrote within the Standard Model. (Indeed, there was no other model.) These scholars include St. George Tucker, William Rawle, Joseph Story, Henry St. George Tucker, Francis Lieber, Thomas Cooley, Joel Tiffany, Timothy Farrar, Joel Bishop, John Norton Pomeroy, Oliver Wendell Holmes, Jr., George Ticknor Curtis, John C. Ordononaux, Henry Campbell Black, James Schouler, and John Randolph Tucker. Nobody who wrote any surviving legal scholarship (whether in a treatise or a law journal article) even disputed that the Second Amendment guarantees a right of *all* American citizens—rather than a state’s right, or a right only of militia members.<sup>5</sup>

Legal scholars in the twentieth century, of course, were divided. From 1930 to 1970, there were fewer than two dozen law journal articles written about the Second Amendment, and those articles were sharply split on the meaning of the Second Amendment.<sup>6</sup>

During the last three decades of the twentieth century, there was much more legal scholarship published on the Second Amendment, and the large majority (but not all) of these articles were within the Standard Model tradition. By the end of the twentieth century, scholars as diverse as Laurence Tribe,<sup>7</sup> William Van Alstyne,<sup>8</sup> Akhil Amar,<sup>9</sup> Leonard Levy,<sup>10</sup> and Sanford Levinson<sup>11</sup> had published articles or treatises affirming the Standard Model. One would be hard-pressed to find many other important constitutional issues on which all five of these eminent scholars agree. Accordingly, it is the scholars such as Professor Yassky—who imply that everyone in the above two

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5. See David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359 (quoting every word that listed authors and other nineteenth century legal scholars wrote regarding the Second Amendment).

6. See David B. Kopel, *Comprehensive Bibliography of the Second Amendment in Law Reviews*, 11 J. FIREARMS & PUB. POL. 1 (1999).

7. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 902 (3d ed. 2000).

8. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

9. AKHIL AMAR, *THE BILL OF RIGHTS* (1998).

10. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 134 (1999).

11. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

paragraphs (from St. George Tucker in 1803 to Laurence Tribe in 2000) is wrong—who deserve the title “revisionist.”

*B. Who Thinks the Supreme Court is Wrong?*

According to Professor Yassky, the Standard Model scholars “heretofore conceded that the courts have rejected their approach.”<sup>12</sup> Standard Modelers, writes Professor Yassky, charge that “the courts (abetted by the academy) have all-but-nullified the Amendment.”<sup>13</sup> Thus, Professor Yassky gives me credit for opening up “a second front” in the Second Amendment argument.<sup>14</sup> I am hardly so deserving of credit. To say that I “seek[] to open a second front” is like saying that a G.I. who joined Patton’s Third Army in March 1945 was seeking “to open a second front” against the Germans. In fact, the so-called “second front” on the Second Amendment has been open for about 125 years.

Contrary to Professor Yassky’s (unfootnoted) assertion, the Standard Model scholars have always argued that the Supreme Court supports their model. The Supreme Court’s first major Second Amendment case was the 1876 *United States v. Cruikshank*.<sup>15</sup> After 1876, legal treatises on the Second Amendment continued to use the Standard Model, and began citing *Cruikshank* and (after 1886) *Presser*<sup>16</sup> as cases which showed the boundaries of the individual Second Amendment right (that the right was a limit on federal action only). Almost all of the nineteenth century authors who discussed the Supreme Court and the Second Amendment used the Supreme Court cases to support the authors’ position, and none of the Standard Model scholars suggested that the Supreme Court decisions were contrary to an individual right.<sup>17</sup> Among modern Standard Model scholarship, argument that the Supreme Court cases buttress the Standard Model are likewise ubiquitous.<sup>18</sup> Indeed, the only Standard Model article which claims that the Supreme Court disagrees with the Standard Model is a 1960 article in the *West Virginia Law Review*.<sup>19</sup>

I will take credit for being the author of the first law journal article to look at every Supreme Court case mentioning the Second Amendment; but to credit

12. Yassky, text at n. 8.

13. *Id.*

14. *Id.*

15. 92 U.S. 542 (1876).

16. *Presser v. Illinois*, 116 U.S. 252 (1886).

17. Kopel, *The Second Amendment in the Nineteenth Century*, *supra* note 5.

18. *E.g.*, STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS: 1866-1876 (1998); Don B. Kates, *Handgun Prohibition and the Origin of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Levinson, *supra*; L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311 (1997).

19. Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 W. VA. L. REV. 381 (1960).

me with inventing an entirely new argument is to grossly overstate my significance.

Standard Model scholars are also in agreement that since 1971, there have been a plethora of cases in the lower federal courts that are inconsistent with the Standard Model. And these lower courts are accused (sometimes in full-length articles, sometimes in long parts of other articles) of nullifying *both* the original intent of the Second Amendment *and* Supreme Court precedent.<sup>20</sup>

My immediate point is not about whether the Standard Model scholars are *correct* to think that the Supreme Court has always agreed with them. My point is that the Standard Model scholars have always *thought* that the Court did.

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20. *E.g.*, Brannon Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1995-96)(arguing that lower federal courts have misapplied *Miller*); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983)(criticizing some lower court decisions, while arguing that Supreme Court cases support an individual right); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POLITICS 157 (1999)(criticizing lower federal courts).

Professor Yassky observes that, if the Standard Model is accurate, then the lower federal court cases “are a shocking departure from the framer’s intentions.” Yassky, *supra* n. 1, text at n. 45. Yassky asks “Why.” *Id.* The answer is the same reason that the Equal Protection clause of the Fourteenth Amendment was judicially nullified in the late nineteenth and early twentieth centuries, why the Free Speech clause of the First Amendment was likewise nullified in the same period, and why Article I limits on Congress’s enumerated powers were nullified from the late New Deal until recently: judges believed that the constitutional provision in question was contrary to good policy, and so the judges invented specious rationales to evade the text and intent of the Constitution.

Professor Yassky explicitly rejects the “living Constitution” (a euphemism for a dead constitution) theory that judges can excise parts of the Constitution they do not like. Yassky, at n. 45. He writes that “amendments to one part of the Constitution can have ramifications for other parts.” *Id.* I think he is right. For example, as Akhil Amar writes, the Congress which wrote the Fourteenth Amendment was not much concerned with protecting state militias (which had just been defeated in the Civil War) from being disarmed; instead the Congress was intensely concerned with protecting Freedmen (who were under frequent assault by Ku Kluxers and other terrorists) from being disarmed by racist state governments. Hence, the Congressional discussions of the Fourteenth Amendment, the Civil Rights Act, and the Reconstruction Act contained explicit statements about the need for statutes and constitutional amendment to protect “the right to keep and bear arms” from state infringement. Thus, write Amar, “between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman.” AMAR, *supra* n. 9, at 266. The Fourteenth Amendment helped transform the Second Amendment into the form in which it is most familiar to most Americans today—involving a right to personal protection in the home (rather than a guarantee that militias could resist federal tyranny).

C. *What Would a Meaningful Second Amendment Mean?*

Professor Yassky writes that “the revisionists never quite specify just what a ‘personal’ Second Amendment would protect.”<sup>21</sup> This assertion is just as flatly wrong as Professor Yassky’s claim that Standard Model scholars are revisionists who think that the Supreme Court is against them. To find what the Second Amendment protects (under the Standard Model) one need only read Glenn Harlan Reynolds’ *Tennessee Law Review* article “A Critical Guide to the Second Amendment.” Since this is the article which coined the phrase “Standard Model,” the article may be taken as a reasonable explication of the contours of the Standard Model.<sup>22</sup>

The Standard Model scholars agree that the Second Amendment guarantees<sup>23</sup> a right of ordinary citizens to own and carry firearms. Almost all of the Standard Model scholars would include handguns, shotguns, and rifles within the scope of the protection, although Don Kates argues for rifle bans in urban areas.<sup>24</sup> With a few exceptions, most of the scholars have no Second Amendment objection to measures such as the federal instant background check for prospective gun buyers. The “Compelling State Interest” and “Least Restrictive Alternative” tests, which are well developed in Supreme Court jurisprudence, provide an easy template for preserving gun controls which make a genuine contribution to public safety without infringing the rights of the blameless.

There are still unsettled issues regarding the boundaries of the Second Amendment (are machine guns included?) and how much various degrees of licensing/registration/waiting periods might infringe the Second Amendment. But the existence of these unresolved issues at the edge of the Right to Arms does not mean that Standard Model scholars have failed to detail what is in the core. That First Amendment scholars in the 1930s or 1940s had not settled some issues (e.g., the boundary line for obscenity; exactly what requirements were appropriate for parade permits; how to treat non-verbal communication such as arm bands) does not mean that those scholars failed to “specify” what the First Amendment protects (most types of political and artistic speech, except for incitement, according to those First Amendment scholars).

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21. Yassky, *supra* n. 1, at n. 25.

22. Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995)(Second Amendment right is violated by gun bans, but not by regulations such as background checks, as long as the regulations are reasonably applied).

23. Not, as Yassky writes, “confers.” Yassky, *supra* n. 1, at 191. The Standard Model, like the *Cruikshank* case, sees the Second Amendment as protecting a pre-existing human right, rather than creating a new right. *United States v. Cruikshank*, *supra* n. 15 (right to arms and right to assemble are guaranteed but not created by the Constitution; they are found “found wherever civilization exists”), discussed in Kopel, *supra* n. 3 text at notes 325-27.

24. Kates, *Handgun Prohibition*, *supra* n. 18 .

Nor is Professor Yassky correct to claim that the Standard Model, if judicially implemented, would make it impossible to disarm people who are subject to restraining orders for domestic violence.<sup>25</sup> In the *Emerson* case, the federal district judge (whom Professor Yassky accurately calls a follower of the Standard Model) explicitly stated that it is not a Second Amendment violation to disarm a domestic violence perpetrator.<sup>26</sup> The problem with the statute in question, the judge explained, was that the statute did not require *any* finding that domestic violence had occurred, or might occur.<sup>27</sup> In an amicus brief filed to the Fifth Circuit, in support of the trial court's ruling, Academics for the Second Amendment (a Standard Model educational group) and the more than 100 professors who signed the brief explained that *if* a court made findings of danger based on sworn, credible evidence, then disarming the man (or woman) who created the danger would not violate the Second Amendment.<sup>28</sup> This 1999 amicus brief was squarely in line with Sam Adams' proposal, at the 1788 Massachusetts Ratifying Convention, that a Bill of Rights be added to the Constitution, specifying, that, *inter alia*, "the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are *peaceable* citizens, from keeping their own arms. . ."<sup>29</sup>

25. Yassky, *supra* n. 1, at n. 42.

26. *United States v. Emerson*, 46 F. Supp. 2d 598 (Tex. 1999).

27. *Id.*

28. Amicus Brief for Academics for the Second Amendment, *United States v. Emerson*, no. 99-10331 (5<sup>th</sup> Cir.) (the brief was filed in December 1999; the case has not been decided, as of the date that this article was written). The brief does not address the issue of whether Congress has power under the Interstate Commerce clause to ban the simple, non-commercial possession of a firearm by an individual. In a revisionist article, which claims that many prior Supreme Court and lower court cases were incorrectly decided, Glenn Reynolds and I suggest that the Interstate Commerce Clause, according to the logical implications of the *Lopez* case, and according to Constitutional plain language, should not be interpreted to allow Congress to prohibit purely intrastate non-commercial activities—such as possessing a firearm, cultivating marijuana for personal medical use, or having an abortion with one technique rather than another. David B. Kopel & Glenn Reynolds, *Taking Federalism Seriously*, 30 CONN. L. REV. 59 (1997).

29. Samuel Adams, Motion at the Massachusetts Convention, Feb. 6, 1788, reprinted in *THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787-1792*, at 260 (David E. Young, ed., 1995) (emphasis added). In modern usage, the comma after "United States" would make the reference to "peaceable citizens" a non-restrictive clause, so that "peaceable citizens" would be read as a compliment about "the people" rather than as a restriction on who may keep arms. But as a quick glance at the Third Amendment shows, writers in the Early Republic used commas in ways which are not always consistent with twenty-first century style. Adams, by the way, voted against his own call for a Bill of Rights, as part of the complex maneuvering around the issue of ratifying the Constitution. *ORIGIN*, at 263 n. 4.

D. *Who's the Real Revisionist?*

For decades, the scholarly Second Amendment debate has been between those who believe that the Second Amendment guarantees an individual right of all peaceable American citizens to possess firearms (the Standard Model) and those who believe that the Second Amendment grants a right to state governments, not to individuals (the “state’s rights” theory, most prominently advocated by Dennis Henigan and Carl Bogus).<sup>30</sup> This state’s rights theory has been popular in many, but not all, lower federal courts, since the early 1970s. The first paragraph of Professor Yassky’s article accurately quotes a 1971 case in which the Sixth Circuit sneered at an individual’s complaint about the federal Gun Control Act of 1968; for, wrote the Sixth Circuit, the Second Amendment “applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms. . .”<sup>31</sup>

Now, David Yassky suggests that this decades-long debate has posed a false dichotomy: the Second Amendment is intended to benefit states by letting them have militias; under Professor Yassky’s “instrumental” reading of the Second Amendment, individuals have Second Amendment rights if and only if those rights are exercised to benefit state militias.<sup>32</sup>

Professor Yassky’s amicus brief in the Emerson case sets forth this theory in more detail.<sup>33</sup> He acknowledges that, as a result of the Second Amendment, individuals have a right to “keep” firearms in their homes.<sup>34</sup> But what about the federal law which would send Dr. Emerson to jail, simply for possessing a firearm in his house? The Yassky brief argues that since Dr. Emerson was not a member of the Texas National Guard (even though Emerson is, by Texas statute, a member of the Texas militia) there is no Second Amendment problem with sending him (or, by implication, anyone else who is not a Guardsman) to federal prison for owning a gun.<sup>35</sup> And even if Dr. Emerson were in the National Guard, the Yassky brief continued, he could still be disarmed (since the Texas Guard could assign him to a non-gun job), and (by implication) many other Guardsmen could be disarmed, as long as the Texas Guard was still able to function.<sup>36</sup>

Thus, Professor Yassky’s highly constricted, “instrumental” interpretation of the Second Amendment bears some resemblance to the Ninth Circuit’s view of the Tenth Amendment: nothing the Congress does to the states can violate

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30. *E.g.*, Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991).

31. *Stevens v. United States*, 440 F.2d 144, 149 (6<sup>th</sup> Cir. 1971), quoted in Yassky, *supra* n. 1, text at n. 3.

32. Yassky, *supra* n. 1, text at n. 42.

33. Yassky Brief for Ad Hoc Coalition, *United States v. Emerson*, no. 99-10331 (5<sup>th</sup> Cir.).

34. *Id.*

35. *Id.*

36. *Id.*



the Tenth Amendment, unless Congress prevents state governments from functioning.<sup>37</sup>

From the creation of the Second Amendment until 1915, no scholar suggested that the Second Amendment meant what Professor Yassky says; in those days, the Standard Model was the only scholarly model. Then, a 1915 article in the *Harvard Law Review* took the first step in Professor Yassky's direction. Lucillius Emery suggested that the Second Amendment should be interpreted to allow the disarmament of everyone who was not eligible for militia service, including women and minors.<sup>38</sup> Emery was the first American legal scholar to suggest that the Second Amendment did not protect *all* Americans (militia-eligible or not) who were entitled to civil rights. Although the 1903 Dick Act, creating the modern National Guard, had enrolled only a small part of the adult male population in the National Guard, Emery acknowledged that the Second Amendment protected the *entire* militia-eligible population (most adult males), rather than just members of the National Guard.<sup>39</sup>

Emery's article, while provocative, never got much intellectual traction. For the next 80 years, articles in law reviews argued for either the Standard Model, or for a rule which would prohibit disarming the National Guard because the Second Amendment was a state's right, not an individual right.

Then, in 1995, a closer precursor of Professor Yassky's theory was published. Andrew Herz (a law professor at Touro, who has since departed the academy) argued in the *Boston University Law Review* for what he called a "narrow individual right" to join the National Guard.<sup>40</sup> In Herz's view, the Second Amendment did not guarantee an individual's right to possess a gun, but the Amendment did guarantee his right to join the National Guard, wherein the government would give him a gun.<sup>41</sup>

Herz's article was undermined by its vicious personal attacks on scholars who disagreed with him, and by a self-righteous, illogical tone so intense that he managed to condemn the National Rifle Association for encouraging blacks to be armed against white rioters *and* for not caring about the safety of

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37. *Printz v. United States*, 66 F.3d 1025 (9<sup>th</sup> Cir. 1996), *rev'd* 521 U.S. 898 (1997). This argument was, obviously, repudiated by the Supreme Court's majority decision reversing the Ninth Circuit. The Supreme Court dissenters, while disagreeing with the majority result, never argued in favor of the Ninth Circuit's extreme standard.

38. Lucillius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473 (1915).

39. *Id.*

40. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995).

41. *Id.*

blacks.<sup>42</sup> Moreover, Herz's theory, if seriously applied, would appear to deny the National Guard the ability to enroll Guardsmen selectively, rather than accepting all comers.

Professor Yassky's *Emerson* brief, even though it is a brief and not a law review article, is a major step forward from Lucillius Emery and Andrew Herz. He makes much more sophisticated use of original sources than do Emery and Herz; his writing style is somewhat better than Emery's, and vastly better than Herz's immature invective. When (I hope) Professor Yassky turns the brief into a law journal article, he will have produced a major new theory of the Second Amendment, and it will be a theory that demands a conscientious response from Standard Model writers. And being an article which attempts to explain why *both* major schools of thought on a constitutional subject are wrong, Professor Yassky's future article will merit being called "revisionist." It will be the kind of "fresh thinking" that tenure review committees and law journal editors like so much. My article in this symposium issue deserves no such honors; were a newspaper to summarize my article, the headline would read: "Supreme Court Opinions Generally Agree with Law Professor Opinions, Writer Says." Not much ground-breaking "revisionism" there.

## II. THE SUPREME COURT CASES

Almost all of Professor Yassky's comments about my analysis of particular Supreme Court cases involve Fourteenth Amendment cases.

In the 1886 *Presser* decision, the Supreme Court declined to make the Second Amendment directly enforceable against the states, and implied that the right to arms was not part of the Fourteenth Amendment's Privileges and Immunities.<sup>43</sup> The *Presser* decision was, arguably, a follow-up of some dicta from the 1876 *Cruikshank* case.<sup>44</sup> Professor Yassky writes that the Supreme Court's failure to incorporate the Second Amendment is "something of an embarrassment" to Standard Model advocates.<sup>45</sup> Annoying to some, perhaps, but not embarrassing.

The Supreme Court's failure to incorporate the Second Amendment is entirely consistent with a strong individual right to arms (protected against federal action only), just as the Supreme Court's failure to incorporate the grand jury clause of the Fifth Amendment is fully consistent with a strong individual right to grand jury indictment in federal court. Likewise, most of the criminal procedure Amendments of the Bill of Rights were not incorporated before the 1960s, but legal scholars before the 1960s did not claim that non-

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42. *Id.* For an analysis of Herz's mean-spirited article, see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

43. See Kopel *supra* n. 3, at 173.

44. Discussed in *id.*, at 172.

45. Yassky, *supra* n. 1, text at n. 34.

incorporation was some proof that these Amendments did not guarantee “personal” rights.

To be sure, most of the Standard Model authors argue that the Supreme Court should revisit *Presser*.<sup>46</sup> But Nelson Lund, an important Standard Model author, writes that *Presser* was rightly decided, and should be preserved.<sup>47</sup> The Supreme Court’s non-incorporation of the Second Amendment, so far, poses a serious problem for gun owners in the six states which have no right to arms in their state constitution, but non-incorporation does nothing to undercut the Standard Model of a Second Amendment protecting a strong individual right against federal infringement.

Professor Yassky takes issue with my treatment of Justice Harlan’s dissent in *Poe v. Ullman*. I had argued that Harlan’s use of the right to keep and bear arms in a list of individual rights, which *could* be incorporated against the states, showed that Harlan recognized the Second Amendment as an individual right.<sup>48</sup>

Professor Yassky points out that the Harlan quote tells us nothing about the “specific contours” of the Second Amendment.<sup>49</sup> Of course not. But it does tell us something about the core.

Let us keep Justice Harlan’s grammatical and logical structure, but change the subject matter:

The full scope of material to be consumed cannot be found in or limited by the precise terms of the specific items elsewhere provided in Smith’s list. This “material” is not a series of isolated things pricked out in terms such as apples, beefsteak, batatas, cherries, Madiera, prosciutto, Popsicles, parsley, sage, rosemary, thyme, sauerkraut, sushi, and so on.<sup>50</sup>

Most readers of the above paragraph have never used the word “batatas” in a sentence, and the paragraph hardly gives the reader enough information to discern the “specific contours” of “batatas.” But does the paragraph supply enough information to suggest the *essence* of “batatas”? Well, yes. Even though the list uses English words (beefsteak, Popsicle) and foreign words (prosciutto, sauerkraut, sushi), the reader can see that all of the other items on the list are things that can be eaten. Therefore, it is reasonable to infer that “batatas” are edible. And they are; “batatas” is Portuguese for “potatoes.”

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46. E.g., Levinson, *supra* n. 11.

47. Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1 (1996).

48. Kopel, *supra* n. 3, at 127.

49. Yassky, *supra* n. 1, text at n. 32.

50. This is the same as Harlan’s structure: The material in a thing (Fourteenth Amendment liberty) is not confined to the items in a list (the Bill of Rights) such as (enumeration of items on the list).

Likewise, on Justice Harlan's list, if everything else in the list is an individual right, then it is reasonable to conclude that "the right to keep and bear arms" is an individual right.

Professor Yassky is wrong to claim that Harlan's quote can be consistent with Yassky's "instrumental" (Guardsmen-only) theory. A Yassky Second Amendment would prevent the federal government from entirely disarming the State Guards, but a Yassky Second Amendment could do nothing to limit *state* disarmament of citizens; since the Yassky Second Amendment is meant to benefit official active state militias only, states can presumably do whatever they want with their militias, including disarm them.<sup>51</sup> Harlan's quote describes "the right to keep and bear arms" as a right which *could* (but in Harlan's view should not) be made enforceable against state governments. Harlan's Second Amendment is consistent only with the Standard Model. (Hardly a surprising result, given that Harlan's grandson, University of Tennessee law professor Glenn Harlan Reynolds, coined the term "Standard Model."<sup>52</sup>)

In the Yassky article, most of the Supreme Court cases cited in my article do not receive the kind detailed response which Professor Yassky provided on *Poe v. Ullman* and its progeny. He points out, quite correctly, that the Supreme Court cases for which I discuss standing (and the Court's allowing individuals to raise a Second Amendment claim) are consistent with both the Standard Model and with his Guardsmen-only theory; he likewise acknowledges that these cases are inconsistent with the state's-rights-only theory.<sup>53</sup>

Professor Yassky then brings the reader to the *Miller* case, and uses the case to argue for his "instrumental" and innovative reading of the Second Amendment.<sup>54</sup> I am not sure that the *Miller* opinion can shoulder this burden.<sup>55</sup> I cannot improve on the *Miller* summary by Professor Andrew McClurg:

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51. As Yassky writes a few paragraphs later, if "the purpose of the Amendment is to enable states maintain militia," then "states are certainly free to decline to take advantage of this opportunity." Yassky, *supra* n. 1, text at n. 34.

52. Reynolds, *supra* n. 22 (noting that "Standard Model" is a term of art in physics scholarship).

53. Yassky, text at notes 12-22.

I think Yassky understates how pervasive the state's-rights-only (as opposed to Yassky's narrow individual right) right theory has been in lower federal court decisions, and in the briefs filed by anti-gun groups and by U.S. Attorneys. But the quanta of state's-rights-only argumentation is not really crucial to my article, or to Yassky's reply; whatever the quantity of state's-rights arguments, it is sufficient (for this article) simply to observe that Yassky is right to point out that an important number of the Supreme Court cases which are inconsistent with a states' only theory are compatible with Yassky's own theory.

54. The National Firearms Act of 1934, which was at issue in *Miller*, was not, as Yassky writes, "the first federal gun control law." In 1927, as a result of the violence resulting from alcohol prohibition, Congress banned the mail order sale of handguns.

But when all is said and done, the only certainty about *Miller* is that it failed to give either side a clear-cut victory. Most modern scholars recognize this fact. For example Professor Eugene Volokh describes *Miller* as “deliciously and usefully ambiguous” in an article about using the Second Amendment as a teaching tool in constitutional law.<sup>56</sup>

Volokh follows the Standard Model, and signed the Academics for the Second Amendment brief in *Emerson*; McClurg disputes the Standard Model, and signed the Yassky brief in *Emerson*. As their agreement about *Miller* illustrates, the case is a good starting point for all kinds of theories, but it is hardly a conclusive, clear endorsement of any theory.

Any theory that starts with *Miller* needs to be tested in the broader world of the rest of the Supreme Court’s jurisprudence. My article in this symposium suggested that the Supreme Court’s other writings about the Second Amendment are much more consistent with a Second Amendment right that can be exercised by all peaceable citizens than with any other theory of the Second Amendment.

Finally, Professor Yassky suggests that the scarcity of Supreme Court cases directly addressing the Second Amendment deprives us of a vocabulary for meaningful thought about the Second Amendment. Yassky illustrates his “meaningful dialogue” point by showing how we discuss Equal Protection terms of *Brown v. Board of Education*, rather than *Plessey v. Ferguson*, or

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55. For example, Yassky points out, accurately, that “military usefulness is the linchpin of *Miller*’s reasoning.” Yassky, *supra* n. 1, text at n. 42. Thus, pursuant to *Miller*, Standard Model scholars acknowledge that a gun which had no militia utility but which was useful for recreational purposes (perhaps a hunting rifle that was extremely accurate, but so fragile as to be worthless under the rough handling typical of militiamen) would *not* be protected by the Second Amendment. But Yassky goes much further, and argues that *Miller* denies constitutional protection unless the *purpose* of the arms-bearing is for militia service. *Id.* *Miller* does not compel such a restrictive reading. For example, under *Miller*, the Beretta 92 pistol would be plainly protected, since it is the official sidearm of the U.S. Army (and thus, obviously, useful in a militia). But *Miller* does not necessarily deny protection to an individual who owns a Beretta 92 for hunting, target shooting, or personal defense. The boot-legging defendants in *Miller*, after all, were not possessing their sawed-off shotgun in order to serve in the militia. Yet the *Miller* Court focused on the type of gun, and the purposes of the possessors. The theory that the right to arms protects only guns with militia utility, and these guns may be possessed for any purpose by peaceable citizens, is precisely the theory adopted by the main line of nineteenth century state cases, several of which were cited with approval in *Miller*. See Kopel, *The Second Amendment in the Nineteenth Century*, at 1416-33 (discussing state cases); Kopel, *supra* n. 3 \_\_\_\_\_ (discussing *Miller*’s use of the nineteenth century cases).

56. Andrew J. McClurg, *Lotts’ More Guns and Other Fallacies Infecting the Gun Control Debate*, 11 J. FIREARMS & PUB. POL. 139, 149-150 (1999), citing Eugene Volokh, Robert J. Cottrol, Sanford Levinson, L.A. Powe, Jr., Glenn H. Reynolds, *The Second Amendment As Teaching Tool in Constitutional Law Classes*, 48 J. LEGAL EDUC. 591, 604 (1998)(each of the named authors in the *Journal of Legal Education* article wrote a separate essay, and the essays were combined under a single title; the quoted portion is from Volokh’s essay).

discuss the First Amendment in terms of *Brandenburg v. Ohio* rather than *Debs* and *Schenck*.<sup>57</sup> His point is that Second Amendment legal dialogue is unusual because it so often refers to first principles and original intent.

This point is overstated. Even in areas where the Supreme Court has extensive caselaw (e.g., First Amendment Establishment Clause cases), recurrence to fundamental principles and original intent is very common in Court decisions and in legal arguments.

Yet in regards to the majority of inferior federal courts from 1970 to the present, Professor Yassky is indisputably correct that the Supreme Court's failure to establish a large body of case law has prevented the development of meaningful dialogue.<sup>58</sup> As Brannon Denning has explained, the opinions consist of little more than lower courts quoting each other while making assertions about *Miller* that the case (no matter how imaginatively read) cannot support.<sup>59</sup>

Fortunately, other writers have not been rendered incapable of meaningful thought. The lively dialogue in the law reviews shows that legal scholars do not need Supreme Court leadership in order to think constructively about a topic. Zechariah Chaffee, Theodore Schroeder, and other scholars in the first decades of the twentieth century wrote meaningful thoughts about the First Amendment (thoughts which are today part of the First Amendment's Standard Model) even though the Supreme Court provided no useful leadership on the subject.

Today's scholars of the Second Amendment Standard Model are better off than were Chaffee and company; the Supreme Court's words about the Second Amendment have been generally supportive of (and almost never inconsistent with) the Standard Model, whereas Chaffee, Schroeder, and other First Amendment scholars had to contend with a series of cases in the first decades of the twentieth century that were directly opposed to a meaningful First Amendment.

The critiques of the Standard Model developed by David Yassky, Carl Bogus,<sup>60</sup> and David Williams<sup>61</sup> are thought-provoking; even though they are, I think, quite incorrect,<sup>62</sup> they force Standard Model scholars to refine and improve the model. Should the Supreme Court ever clarify *Miller*, and

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57. Yassky, *supra* n. 1, text at notes 46-54.

58. The same might be said of the Tenth Amendment, a subject on which Supreme Court case law has been sparse, until recently.

59. Denning, *supra* n. 20.

60. E.g., Carl Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998).

61. E.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

62. Kopel, *The Second Amendment in the Nineteenth Century*, *supra* n. 5, at 1512-29 (critiquing Bogus and Williams).

repudiate the Standard Model dicta from dozens of other cases before and after *Miller*, and announce that the Second Amendment is no barrier at all to federal gun prohibition (except for guns belonging to National Guardsmen), it is likely that David Yassky's sophisticated scholarship will play an important role in the decision.