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The Sound of Silence: The Supreme Court and the Second Amendment - A Response to Professor Kopel

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**THE SOUND OF SILENCE: THE SUPREME COURT AND THE
SECOND AMENDMENT – A RESPONSE TO PROFESSOR KOPEL**

DAVID YASSKY*

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David Kopel's article "The Supreme Court's Thirty-Five *Other* Gun Cases: What the Supreme Court Has Said About the Second Amendment"¹ adds to the growing literature by scholars seeking to establish a new paradigm for the Second Amendment. Under existing doctrine, which has been in place since at least 1939 (when the Supreme Court issued its only major Second Amendment decision, *United States v. Miller*²), the Second Amendment has posed virtually no impediment to either state or federal gun control laws. Suits challenging state laws have failed for the simple reason that the Second Amendment does not apply to the states; unlike most other Bill of Rights guarantees, the Court has never "incorporated" the right to keep and bear arms into Fourteenth Amendment restrictions on state conduct. Suits challenging federal enactments have failed because, under the dominant view: "Since the Second Amendment 'right to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."³

Beginning in the 1980s, however, and with accelerating speed in the past decade, a group of revisionist scholars has advocated a broader, individual-rights oriented approach to the Amendment.⁴ These revisionists have now achieved some notable accomplishments. In the first place, the sheer volume of revisionist scholarship has succeeded in placing the Second Amendment on the scholarly agenda, and leading casebooks now acknowledge the revisionist perspective.⁵

More important, in April of 1999 a federal District Court in Texas held that a federal law prohibiting persons subject to restraining orders from possessing firearms violated the Second Amendment.⁶ The court relied heavily on revisionist scholarship. If the Texas decision stands – the case, *United States*

1. David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court has Said About the Second Amendment*, 18 ST. LOUIS PUB. L. REV. 99 (1999).

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

3. *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971).

4. See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED* (1984); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Professor Kopel gives a full bibliography, KOPEL, *supra* note 1, at 101, footnote 9, although I do not agree that every publication cited by Professor Kopel is properly placed in the revisionist camp.

5. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* at 287 (1998 Supplement).

6. *United States v. Emerson*, 46 F.Supp.2d 598 (N.D. Tex. 1999). I should note that I authored an *amicus curiae* brief on behalf of law professors and historians arguing that the Fifth Circuit should reverse the *Emerson* decision.

v. Emerson,⁷ is now on appeal to the Fifth Circuit – it will work a major upheaval in Second Amendment doctrine. Even if not, it represents an impressive achievement for a group of scholars self-consciously aiming to move the law in a direction they favor.

Until now, the revisionists have based their argument entirely on claims about the intentions of those who framed and ratified the Second Amendment. Revisionists have heretofore conceded that the courts have rejected their approach; indeed, the basic structure of the revisionist argument has been: The Founders intended an individual right to firearm possession; the courts (abetted by the academy) have all but nullified the Amendment by treating it as a mere safeguard for militia; the courts should recognize their error and strike down gun control laws.

With his latest contribution, Professor Kopel seeks to open a second front⁸ in the conflict over the Second Amendment by arguing that the Supreme Court has in fact been quite sympathetic to the individual rights approach advocated by the revisionists. To this end, he has collected all 35 of the Supreme Court cases mentioning the Second Amendment or the “right to keep and bear arms.”⁹

Reviewing these cases is certainly instructive, but I do not agree with Professor Kopel about their meaning – at least not with the strong version of his argument. Kopel’s main claim is that it is “well-settled” that the Second Amendment confers “an individual right.”¹⁰ Supreme Court case law simply cannot support that claim. Rather, the few well-known cases, chiefly *Miller*, that deal with the Second Amendment at some length tell us that the Second Amendment is not an “individual right” (as Professor Kopel is using that term), and the rest of the cases canvassed by Professor Kopel tell us nothing at all about the Second Amendment.

This finding itself is noteworthy, however, and it suggests a weaker version of Kopel’s argument that can be supported: Contemporary Second Amendment doctrine, which imposes very little restriction on efforts to regulate private possession of firearms, has been elaborated mostly by lower federal courts, not by the Supreme Court.¹¹ This fact has some important

7. *Id.*

8. I take this point from my colleague Susan Herman.

9. Some readers may be wondering, “How did I miss all these Second Amendment cases?” The answer is that only a handful of the cases discussed by Kopel deal with actual Second Amendment claims made by litigants. The remainder refer to the Second Amendment in the course of an argument on some other doctrine.

10. KOPEL, *supra* note 1, at 99. (See 1st paragraph)

11. See, e.g., *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974); *Eckert v. Pennsylvania*, 331 F. Supp. 1361 (E.D. Pa. 1971); *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942); *United States v. Warin*, 530 F.3d 103 (6th Cir.), *cert. Denied*, 426 U.S. 948 (1976); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982); *United States v. Synnes*, 438 F.2d 764 (8th Cir.

implications for the Second Amendment, and indeed for constitutional interpretation generally.

I will suggest some of those implications below, but first I want to explain my disagreement with Professor Kopel. I dispute his conclusion about the case law for two reasons. First, his presentation of the question to be addressed – does the Second Amendment confer an “individual” right or a “collective” right? – is confused. Second, I challenge his treatment of the individual cases mentioning the Second Amendment.

I. THE “INDIVIDUAL RIGHTS” VS. “MILITIA-FOCUSED” DICHOTOMY

Kopel’s methodology is to identify two competing approaches to the Second Amendment, and then to examine statements in Supreme Court opinions to see which of the two approaches better makes sense of the statements. Kopel identifies the two competing approaches as one which “argues that the Amendment was meant to restrict the Congressional powers over the militia”¹² (I will call this the “militia-focused approach”) and one contending that “the Amendment guarantees a right of individual Americans to own and carry guns”¹³ (I will call this the “individual rights approach”).¹⁴

The first task is to define precisely what claims are being made by these two approaches. Kopel characterizes the militia-focused approach in at least two different ways:

“By the State’s Rights theory, the possession of a gun by any individual has no constitutional protection; the Second Amendment applies only to persons actively on duty in official state militias.”¹⁵

“If Henigan and Bogus are correct, then the [Supreme Court] should treat the Second Amendment as a right which belongs to state governments, not to American citizens.”¹⁶

1971); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997); *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999).

12. KOPEL, *supra* note 1, at 100.

13. *Id.* at 101. (STANDARD MODEL IN KOPEL)

14. Kopel calls these approaches the “Henigan/Bogus theory” (after two scholars) and the “Standard Model” – so named because, according to Kopel, it expresses the “consensus of most modern legal scholarship.” KOPEL, *supra* note 1, at 101. As I do not believe that most scholars either do or should accept the individual rights approach, *see, e.g.*, Carl Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) (citing sources); *Id.* at 317 n.34 (citing sources); Dennis Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991); John Dwight Ingram & Allison Ann Ray, *The Right(?) to Keep and Bear Arms*, 27 N.M. L. REV. 491 (1997), and indeed courts have uniformly rejected it, *see cases cited supra* note 12. I have adopted a more neutral shorthand.

15. KOPEL, *supra* note 1, at 106.

16. *Id.* at 109.

Note the difference between these two descriptions of the militia-focused approach: The first quotation focuses on the *scope of the right at issue* – does it protect all instances of gun possession against government interference, or only possession by an on-duty militiaman, or something in the middle. The second quotation, by contrast, focuses on *who can invoke the right in a judicial proceeding*.

In this latter understanding, the militia-focused approach holds that only states have the ability to challenge federal statutes or regulations under the Second Amendment – it turns the militia-focused approach into an argument about standing, rather than about the merits of the claim. This would be a very odd way to understand the Second Amendment. All constitutional rights – even those most obviously concerned with government structure rather than individual freedom – ultimately “belong” to individuals in the sense that individual citizens can sue to vindicate them. In *I.N.S. v. Chadha*,¹⁷ the Supreme Court vindicated Jagdish Chadha’s claim that congressional action harming him violated the bicameral passage and presentment requirements of Article I of the Constitution¹⁸ – does that mean that these basic separation of powers provisions are “individual rights”? The enumeration of powers in Article I, Section 8, and the 10th Amendment, which reinforces that enumeration, are plainly “federalism” provisions in the sense that they are intended to protect a certain allocation of authority between the federal government and the states. Yet Alfonso Lopez, when he was convicted under the federal Gun Free School Zones Act,¹⁹ was of course able to challenge that statute as impermissible under the Commerce Clause.²⁰ This does not mean that the Commerce Clause or the 10th Amendment creates rights that are “individual” in any sense other than that individuals may rely on them in legal disputes – it certainly tells us nothing about the scope of the right available to such individuals.

The position that only states have standing to challenge laws under the Second Amendment, then, is a pure straw opponent.²¹ Unfortunately, it is

17. *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

18. U.S. Const., Art. I, § 7, cl. 2.

19. 18 U.S.C. §922(q).

20. *United States v. Lopez*, 514 U.S. 549 (1995).

21. Well, maybe not a *pure* straw opponent. At least one federal court has employed the militia-focused approach as a standing argument: *Hickman v. Bock*, 81 F.3d 98, 102 (9th Cir. 1995), (“Because the Second Amendment guarantees the rights of the states to maintain armed militia, the states alone stand in the position to show legal injury when this right is infringed.”) Perhaps *Hickman* simply demonstrates that critics of standing doctrine are right to claim that its injury requirement is circular, and that court decisions dismissing complaints for lack of standing are equivalent to dismissals for failure to state a claim. But to those who do distinguish standing requirements and the other elements a plaintiff must demonstrate in order to obtain relief, I suggest that *Hickman* was incorrect, and that accepting a militia-focused approach to the Second

precisely this understanding that Kopel most often attributes to the militia-focused school.

For example, the very first case Kopel discusses is *Spencer v. Kemna*,²² in which Justice Stevens, in dissent, notes that “An official determination that a person has committed a crime may . . . result in tangible harms such as imprisonment [or] loss of the right to vote or to bear arms.”²³ (Like most of the cases Kopel discusses, *Spencer v. Kemna* has nothing to do with the Second Amendment or with restrictions on firearms. The case decides whether a habeas corpus petition is mooted by the prisoner’s release. Moreover, there is no reason to think that Justice Stevens was referring to the *constitutional* right to bear arms; he was probably noting that a criminal conviction may trigger federal and state *statutory* prohibitions on owning guns – that the convict will lose a statutory “right” to own guns. But no matter – let’s assume for the sake of argument that Stevens is referring to the Second Amendment right.)

Kopel comments on this quotation thus: “A person can only lose a right upon conviction of a crime if a person had the right before conviction. Hence, if an individual can lose his right ‘to bear arms,’ he must possess such a right.”²⁴ Kopel appears to believe that the excerpt from *Spencer v. Kemna* is consistent only with the individual-rights approach and not with the militia-focused approach. But that is true only if the militia-focused approach means that only States can insist on the vindication of Second Amendment rights. The *Spencer v. Kemna* excerpt is perfectly consistent with a more sensible version of the militia-focused approach which focuses on the scope of the right.

Suppose, for example, a Militia-focused Scholar who believes that the Second Amendment was intended solely to ensure the continuation of state militia as the primary locus of military power in the United States, and who therefore believes that the Amendment protects only the right of a member of a state militia to possess a gun required for service in such militia. (Not that this second claim follows necessarily from the first; those just happen to be the beliefs of this particular Militia-focused Scholar.) The *Spencer v. Kemna* quotation could easily come from the pen of this Militia-focused Scholar. Even though this Militia-focused Scholar is concerned only to protect the vitality of the militia, she of course understands that one fine way to further this purpose is to empower individuals who are harmed by some federal law to sue on the ground that the law violates the Second Amendment.

Amendment does not entail dismissing any suit brought by an individual citizen under the Second Amendment for lack of standing.

22. *Spencer v. Kemna*, 421 U.S. 1(1998).

23. *Id.* at 36.

24. KOPEL, *supra* note 1, at 114.

II. SUPREME COURT CASES MENTIONING THE SECOND AMENDMENT

Let me be clear: I am not denying that there is a choice to be made among interpretations of the Second Amendment, including a strong individual-rights approach, a strong militia-focused approach, and various positions in the middle. I am simply trying to clarify the nature of that choice. What is really at stake is the scope of the constitutional right to keep and bear arms: Does the Second Amendment prohibit Congress from banning assault weapons? Does it prohibit a ban on all handguns? Does it restrict States' ability to regulate guns at all? These are the urgent questions, and the competing approaches Kopel is attempting to evaluate would indeed lead to different answers.²⁵ Unfortunately, the cases discussed by Professor Kopel do not tell us much about the Justices' views on the merits of these competing approaches – unless they are woefully overread.

A. *The Chaff*

Start with *Poe v. Ullman*.²⁶ Readers are no doubt familiar with this case and will be surprised to see it on a list of “Second Amendment” cases. *Poe* of course was the precursor to *Griswold v. Connecticut*,²⁷ it was the Supreme Court's first brush with the constitutionality of laws forbidding contraception. A majority of the Court in *Poe* rejected a challenge to such a law on justiciability grounds. In dissent, Justice Harlan opined that the question was justiciable, and on the merits he argued that the statute was unconstitutional. Harlan articulates a broad right to privacy based in the Due Process Clause, an analysis developed to fruition in *Griswold* and *Roe v. Wade*.²⁸ His opinion contains the following passage:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and

25. It is worth noting here that the revisionists never quite specify just what a “personal” Second Amendment would protect. The revisionists do not, for example, consider what level of government interest (“reasonable” “compelling”?) would be required to justify infringing on an individual's Second Amendment interests (as they understand such interests). A court considering an actual Second Amendment case would have to confront this issue (although the *Emerson* court, which adopted the revisionists' analysis, also omitted this crucial step; it leapt without explanation from a judgment that the Second Amendment protects an “individual right” to a holding that the statute at issue was unconstitutional, see *Emerson*, *supra* note 7. The tone of the revisionists' work suggests a belief that the Second Amendment, properly understood, would invalidate much contemporary gun control legislation, but individual revisionist scholars may not in fact be committed to this position.

26. 366 U.S. 497 (1961).

27. 381 U.S. 479 (1965).

28. 410 U.S. 113 (1973).

religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures, and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .²⁹

This passage has been quite influential. I doubt, though, that it has ever before been understood as saying anything meaningful about the Second Amendment. Remarkably, Kopel reads this passage as implicitly endorsing an individual-rights as opposed to a militia-focused view of the Second Amendment. Indeed, he states: "It is impossible to read Justice Harlan's words as anything other than a recognition that the Second Amendment protects the right of individual Americans to possess firearms."³⁰

But the Harlan quotation says nothing of the sort. Kopel's only rationale for his interpretation is that Harlan lists the right to keep and bear arms along with other rights, such as free speech, that are obviously held by "individuals." Thus Kopel says: "The due process clause of the Fourteenth Amendment, obviously, protects a right of individuals against governments; it does not protect governments, nor is it some kind of 'collective' right."³¹ True enough, but that is only meaningful if the Second Amendment debate centers on who can claim the right rather than the scope of the right. Again, Kopel is misled by his caricature of the militia-focused position.

Moreover, Kopel entirely misses the context of Harlan's reference to the right to keep and bear arms. Harlan's whole point is that the Due Process right is more than simply the sum of the specific provisions of the Bill of Rights. Whatever the content of the right to keep and bear arms, Harlan is saying, we must go beyond that right in enforcing the Due Process Clause. The very structure of Harlan's argument disclaims any intention to inquire into the specific contours of the Second Amendment right – and makes any inference about Harlan's view as to the content of that right unsustainable. Yet *Poe*, along with four other cases in which the only reference to the Second Amendment is a quotation of the above passage from *Poe*,³² accounts for a large chunk of the evidence relied on by Kopel.

In fact, *Spencer* and *Poe* are quite typical of almost all the cases canvassed by Professor Kopel. Most of these cases mention the Second Amendment in passing, usually along with other Bill of Rights provisions. Some refer to the "liberty" protected by the Amendment, providing an excuse for speculation about what that liberty must entail. But on close analysis, these cases are no more enlightening than *Spencer* or *Poe*.

29. *Poe*, *supra* note 27, at 542-43.

30. KOPPEL, *supra* note 1, at 149.

31. *Id.*

32. *Poe*, *supra* note 27.

B. *The Incorporation Cases*

OK, so *Spencer* and *Poe* don't really say anything about the Second Amendment. Maybe Kopel overreaches on these cases – but can his argument be saved by cases that address the Second Amendment more directly?

Nope. Apart from *Miller* (which I will discuss shortly), the only Supreme court cases that actually decide a genuine issue of Second Amendment doctrine are a line of cases, beginning with *United States v. Cruikshank*³³ in 1875, holding that the Amendment, unlike most other Bill of Rights provisions, does not apply to the states. These cases are something of an embarrassment for the revisionists; if the right to bear arms is truly a “personal” right like the right to free speech or the right to be free of unreasonable searches, then one would expect the Supreme Court to have “incorporated” the Second Amendment’s protections into the Fourteenth Amendment’s due process guarantee. By contrast, the Court’s failure to incorporate the Second Amendment is perfectly consistent with the view that the purpose of the Amendment is to enable states to maintain militia; states are certainly free to decline to take advantage of this opportunity.

Kopel’s response to the challenge posed by these incorporation cases is to suggest that the incorporation issue remains open – that the Supreme Court may yet decide that the Second Amendment binds the states.³⁴ Maybe so – it is true that the main cases holding that states are not bound by the Second Amendment (*Cruikshank* and the 1886 case *Presser v. Illinois*³⁵) were decided before the Supreme Court developed the notion of “incorporation” – but the Court has had ample opportunity to revisit these decisions, and has declined to do so.³⁶ In any event, it would seem that from the revisionists point of view, the best that can be said about these cases – and fully nine of Kopel’s [35] cases deal with incorporation, either of the Second Amendment itself or of another Bill of Rights provision – is that they are outdated. And yet, Kopel actually counts them as supporting his argument, because, as he puts it, the Court is treating the Second Amendment “*in pari materia*” with other Bill of Rights provisions.³⁷ But of course this ignores the fact that this parity has long since evaporated.

33. *United States v. Cruikshank*, 92 U.S. 542 (1875).

34. KOPEL, *supra* note 1, at 99.

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

36. *See* *Burton v. Sills*, 394 U.S. 812 (1969) and *Love v. Peppersack*, 47 F.3d 120 (4th Cir.), *cert. Denied*, 516 U.S. 813 (1995).

37. KOPEL, *supra* note 2, at 172.

C. *The Miller Opinion*

There is of course one Supreme Court decision – *United States v. Miller* – squarely addressing the scope of the “right to keep and bear Arms.”³⁸ *Miller* involved a prosecution under the National Firearms Act of 1934³⁹ for unlicensed possession of a short-barreled shotgun. The District Court dismissed the indictment on the grounds that the Act violated the Second Amendment, but the Supreme Court reversed, holding that:

In the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is part of the ordinary military equipment or that its use could contribute to the common defense.⁴⁰

Kopel reads this passage narrowly as holding simply that the Second Amendment permits regulation of short-barreled shotguns because they are not military weapons – they are not, in other words, “Arms” within the meaning of the Second Amendment. Based on this reading, Kopel insists that *Miller* is perfectly consistent with the revisionists’ view of the Second Amendment; as long as weapons are militarily useful (i.e., as long as they constitute “Arms”), the Second Amendment provides a broad guarantee of an individual’s rights of possession. (To be clear: Kopel does not claim that *Miller* compels a revisionist approach; rather, he reads *Miller* as a narrow holding that begs the fundamental issues.⁴¹)

This reading, however, suggests ambiguities in the revisionist conception of a “personal” right. Just as with Kopel’s treatment of the militia-focused approach, it is not clear whether his claim that the Second Amendment creates an “individual” right to gun possession is a claim about standing or a claim about the scope of the Second Amendment guarantee. If Kopel means simply that individuals have standing to assert Second Amendment claims, then his claim is of course true; as discussed above, in this sense the Second Amendment right is obviously and trivially “individual.”

It seems clear that Kopel and other revisionists intend to go beyond this standing claim to make a stronger claim about the types of gun possession that are protected. Again, though, the precise nature of the claim is ambiguous. For example, Kopel’s “personal” right may mean that an individual American citizen is entitled to own a gun for any lawful purpose he or she chooses. But

38. *Miller*, *supra* note 3.

39. 26 U.S.C. §1132 (1934).

40. *Miller*, *supra* note 3, at 177 (quoting 26 U.S.C. §1132).

41. KOPEL, *supra* note 2, at 104, (the *Miller* decision does not foreclose either the Standard Model or the State’s Rights theory.)

if this is the revisionist position, it is flatly inconsistent with *Miller*. If an individual is entitled to own a gun for self-defense, hunting, recreation or any other reason, then the military usefulness of a particular weapon should be irrelevant to Second Amendment analysis – yet military usefulness is the linchpin of *Miller's* reasoning.

Kopel's claim that *Miller* is consistent with the revisionist approach, then, indicates that the revisionist view of the Second Amendment right may in fact be considerably more limited than their rhetoric would suggest. The revisionist argument might be, for example, that the purpose of the Second Amendment was to protect the states' ability to maintain organized militia – but that in order for states to have this ability, they must have available a populace armed with militarily useful weapons, and that any law denying states access to such an armed populace violates the Second Amendment. In this view, individual gun possession is a Second Amendment value, but for essentially instrumental purposes – and presumably the Amendment would protect only instances of possession that further those purposes.⁴²

If this is what revisionists mean by an “individual” right, then Kopel is on firmer ground in claiming that *Miller* is consistent with the revisionist approach. I ultimately do not accept this claim – I still contend that *Miller* should be read as defining the Second Amendment right even more narrowly than the instrumental approach just outlined – but I concede that Kopel's reading of the passage quoted above (and this is certainly *Miller's* key language) is plausible.

But even accepting Kopel's reading of *Miller* leaves us with virtually no Supreme Court doctrine on the Second Amendment. *Miller* says very little, the incorporation cases say very little, and all the in-passing mentions of the Second Amendment say nothing at all. In the face of this silence, Kopel's effort to open a second front in the Second Amendment debate must be judged a failure. The conventional wisdom that “the Supreme Court's guidance [on the Second Amendment] has been notoriously scant”⁴³ is correct.

III. THE SECOND AMENDMENT AND CONSTITUTIONAL CHANGE

Which brings us back to the first and still primary battleground staked by the revisionists: the framers' intent. I think the revisionists' account of the framing and ratification of the Second Amendment is incomplete in some very

42. The revisionists' failure to distinguish between a robust, “self-actualization” version of the individual rights approach and a more limited, instrumental vision had unfortunate consequences in the *Emerson* case. See *Emerson, supra* note 7. The court in *Emerson* understood the revisionist scholarship as arguing that the “amendment protects an individual right inherent in the concept of ordered liberty” and relied on that understanding to strike down a federal statute that undoubtedly would have survived review based on the more modest, instrumental understanding. *Id.* at 600.

43. *Fraternal Order of Police, supra* note 12.

important respects, but let's assume for the sake of argument that the revisionists are right that the framers intended every American to have the right to own a gun, unimpeded by federal regulation.

If so, then the puzzle becomes explaining modern Second Amendment jurisprudence. For even if *Miller* is read narrowly, the fact remains that lower federal courts since *Miller* have – uniformly, until *Emerson* – adopted a strong militia-focused approach to the Second Amendment.⁴⁴ If the revisionists' history is accurate, these cases are a shocking departure from the framers' intentions. The important question suggested by Professor Kopel's article – a question never addressed by the revisionists – is: Why? If it is true that Second Amendment jurisprudence in 1999 is different from the Founders' understandings in 1791, how do we explain – and justify – the change?⁴⁵

It is here that Professor Kopel's article points us toward true insight. The dearth of case law makes the Second Amendment unlike virtually any other constitutional provision that people still care about. This makes it very difficult to talk about how the meaning and function of the Second Amendment have changed over time. It is obvious that First Amendment or separation of powers or commerce clause jurisprudence has changed since 1791, and that equal protection jurisprudence has changed since 1868 – but lawyers and judges rarely need to resort to a First Principles discussion of the constitutional meta-jurisprudence that underlies these changes (they leave that to law professors). Instead, they simply talk about *New York Times v. Sullivan*⁴⁶ and *Brandenburg v. Ohio*⁴⁷ (instead of *Schenck v. United States*⁴⁸ and *Debs v. United States*⁴⁹), or *NLRB v. Jones & Laughlin*⁵⁰ and *Yakus v. United States*⁵¹ (instead of *A.L.A. Schechter Poultry Corp. v. United States*⁵²),

44. See *infra*, notes 47-55; cf. Bradford 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) (revisionist article claiming that lower federal courts have created doctrine going well beyond *Miller*).

45. I do not wish to be misunderstood as endorsing a notion of a "living Constitution," or the view that changed social circumstances should prompt judges to change constitutional doctrine. To the contrary, I believe that constitutional interpretation must respect the intentions of those who framed and ratified the Constitution. I also believe, however, that constitutional interpretation must treat the Constitution as an organic whole and must respect its integrity – meaning that amendments to one part of the Constitution can have ramifications for other parts.

46. 376 U.S. 254 (1964) (requiring showing of "actual malice" to sustain libel claim by public figure).

47. 395 U.S. 44 (1969) (holding seditious libel statute unconstitutional).

48. 249 U.S. 47 (1919) (upholding conviction for seditious libel).

49. 249 U.S. 211 (1919) (upholding conviction for seditious libel).

50. 301 U.S. 1, 31 (1937) (upholding congressional delegation to administrative agency).

51. 321 U.S. 414, 430 (1944) (upholding congressional delegation to administrative agency).

52. 295 U.S. 495, 551 (1935) (striking down National Industrial recovery Act as excessive delegation).

or *Brown v. Board of Education*⁵³ (instead of *Plessy v. Ferguson*⁵⁴), or . . . you get the point. The stark example of the Second Amendment highlights the role case law typically plays in mediating changes in constitutional doctrine over time – and the lack of a vocabulary other than case law for talking about such changes.

To start developing this vocabulary, scholars will have to broaden their inquiry beyond the narrow confines of the Amendment itself; they must stop looking at the Amendment in isolation, and see it in the context of the entire constitutional plan. While the text of the Second Amendment is unchanged since 1791, other parts of the Constitution have of course been amended dramatically. If it is true that Second Amendment doctrine has changed since 1791, one obvious place to look for an explanation is in the relationship between the Second Amendment and the rest of the Constitution. For example: The Second Amendment is not the only constitutional provision dealing with the militia and other military issues. How has the meaning of the Raise Armies Clause, and of Article I's militia clauses, changed since 1791 – and how do changes in the meaning of these provisions affect the Second Amendment? Questions like these should be the central focus of Second Amendment scholarship.

53. 347 U.S. 483, 495 (1954) (holding segregation in public elementary schools unconstitutional).

54. 163 U.S. 537, 553 (1896) (approving statutory segregation of railroad cars).