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IS THERE A NEUTRAL JUSTIFICATION FOR REFUSING TO IMPLEMENT THE SECOND AMENDMENT OR IS THE SUPREME COURT JUST "GUN SHY"?

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Introduction

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.* [1]
>
> *[These words] reflect traditional English attitudes toward these three distinct, but intertwined, issues: the right of the individual to protect his life, the challenge to government of an armed citizenry, and the preference for a militia over a standing army. The framers' attempt to address all three in a single declarative sentence has contributed mightily to the subsequent confusion over the proper interpretation of the Second Amendment.* [2]

The Second Amendment to the United States Constitution, the "terrifying," [3] "embarrassing," [4] and "lost" [5] amendment, stands as the Rodney Dangerfield among the Bill of Rights. This simple twenty-seven word sentence cannot get any respect. It is ignored and disregarded by the American Bar Association, the American Civil Liberties Union, and the legal academy. For the most part, the legal community has down-played the Second Amendment by endorsing the view that the amendment protects only the right of states to maintain militias free from federal disarmament. [6] This view, to which both the ABA [7] and the ACLU [8] subscribe is known as the collective/state's right interpretation. Others, however, suggest an individual right interpretation, which views the amendment as guaranteeing the right of individual citizens to keep and bear arms. [9]

As constitutional law scholar Sanford Levinson notes, "the Second Amendment is not at the forefront of constitutional discussion, at least as registered in . . . law reviews, casebooks and other scholarly legal publications." [10] Echoing Levinson's observation is the assertion that "liberals have been guilty of result-oriented work as well. One particularly clear example is in the way that liberal scholars have ignored or wished away the Second Amendment without very much effort at rigor or consistency." [11] Yale Law School Professor Akhil Amar has likewise observed that "[i]n a typical law school curriculum," the Second Amendment is ignored; and

when it comes to legal scholarship, the amendment is "generally ignored by main-stream constitutional theorists." [12] Although the collective right interpretation has achieved a surprising level of respectability among academicians, [13] not all in the legal community view the Second Amendment in purely collectivist terms as is evinced by the recent formation of Academics For Second Amendment. [14]

In many parts of the United States, law-abiding citizens find it increasingly difficult to obtain firearms. Four states [15] and thirty cities [16] have banned so called "assault weapons." [17] Residents of six Chicago-area cities, [18] Friendship Heights, Maryland, [19] Washington, D.C., [20] and New York City [21] are prohibited from owning handguns. In addition to the 20,000 gun laws currently on the books, a myriad of new firearms restrictions are proposed at the local, state, and federal levels each year. [22] In 1993 alone, more than twenty-five "gun control" bills have been filed in Congress. [23] An equal or greater number of similar bills are usually pending in various state and local legislative bodies. The cumulative impact of enacting just the proposed federal legislation would be to legislate and tax individual firearms ownership out of existence. These efforts to eradicate private gun ownership--a constitutionally protected activity that has existed in America for nearly 400 years--will eventually require the United States Supreme Court to interpret the Second Amendment and perhaps incorporate it into the Fourteenth Amendment.

This article proceeds from the premise that the Second Amendment guarantees an individual right to keep and bear arms. [24] A tremendous amount of scholarship carefully scrutinizing the historical, political, philosophical, and common law background surrounding the Second Amendment makes it unnecessary to re-examine it anew in this article. Therefore, this article examines events occurring after the framing of the Second Amendment in 1791. [25] Part I explores the nineteenth century history relating to the Second Amendment and shows that courts and commentators uniformly viewed the Second Amendment as guaranteeing an individual right. Part II briefly analyzes the Reconstruction Congress' efforts to ensure to African-Americans the Second Amendment right to keep and bear arms. Part III examines the incorporation of the Bill of Rights and documents the plight of the Second Amendment in the pre-Fourteenth Amendment Due Process Clause Incorporation Era. Part IV discusses the twentieth century federal judicial interpretation of the Second Amendment and shows that the Supreme Court's failure to construe the amendment has allowed the lower federal courts to read the Second Amendment out of the Bill of Rights. Part V details the Supreme Court's inconsistent treatment of the Second Amendment and demonstrates that the Court has ignored normal rules of interpretation and construction.

I. Nineteenth Century Interpretation of the Second Amendment

A. *Antebellum Commentators*

Influential antebellum commentators, such as St. George Tucker, [26] William Rawle, [27] Henry St. George Tucker, [28] and United States Supreme Court Justice Joseph Story, [29] were "unanimous in the view of the right to keep and bear arms as an individual liberty which existed for a variety of purposes, from defense against foreign or domestic oppression to personal self-

defense." [30] An examination of these commentators' writings shows that they viewed the Second Amendment as securing an individual right to keep and bear arms. St. George Tucker, [31] a professor of law at William and Mary, a contemporary of the founding fathers, and a judge who served on three different courts, published his edition of Blackstone's Commentaries in 1803. [32] The first book in this five volume set dealt with "the rights of persons." In chapter one, which concerned "the absolute rights of individuals," [33] Tucker declares that the fifth right of the English subject "is that of having arms for their defence suitable to their condition and degree . . . ." [34] In a footnote, Tucker distinguished the right of the people to keep and bear arms under the Second Amendment from its antecedent English counterpart. Unlike the English version, the Second Amendment contains no qualification as to "condition or degree, as is the case in the British government." [35] Tucker further asserted that,

> [The Second Amendment] may be considered as the true palladium of liberty. . . . The right of self-defence is the first law of nature; in most governments *it has been the study of rulers to confine this right within the narrowest limits possible*. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. [36]

William Rawle released the second edition of his constitutional commentaries in 1829, in which he wrote:

> In the second article, it is declared, that *a well regulated militia is necessary to the security of a free state*; a proposition from which few will dissent . . . while peace prevails, . . . the militia form[s] the palladium of the country. They are ready to repel invasion, to suppress insurrection, and preserve the good order and peace of government.
>
> . . . .
>
> The corollary, from the first position, is that *the right of the people to keep and bear arms shall not be infringed.* The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people.
>
> . . . .
>
> In England, a country which boasts so much of its freedom, the right [to bear arms] . . . is cautiously described to be that of bearing arms for their defense, "suitable to their conditions, and as allowed by law." An arbitrary code for the preservation of game in that country has long disgraced them. A very small proportion of the people being permitted to kill it, though for their own subsistence; a gun or other instrument, used for that purpose by an unqualified person, may be seized and forfeited. Blackstone, in whom we regret that we cannot always trace the expanded principles of rational liberty, observes . . . that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed, by the makers of forest and game laws. [37]

Rawle's analysis is persuasive and insightful because he recognizes that the first part of the Second Amendment is declaratory in nature [38] and that the second part of the amendment is a corollary of the first proposition. Furthermore, the right of the people to keep and bear arms is a general prohibition denying Congress the power to disarm the *people*. If, as state's right advocates maintain, the Second Amendment was designed to prevent Congress from disarming state *militias*, why does Rawle assert that Congress lacks the power to disarm the *people* rather than state militias? Lastly, Rawle, like St. George Tucker and Henry St. George Tucker, [39] notes the disgraceful evisceration of the right to keep and bear arms in England, which unlike the American version, is cautiously described as being limited to their conditions, and as allowed by law.

In 1831, Henry St. George Tucker, [40] son of St. George Tucker, published his *Commentaries On the Laws of Virginia*, in which he made the following assertion:

> To secure their enjoyment, however, certain protections or barriers have been erected which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property. These may in America be said to be:
>
> 1. The bill of rights and written constitutions . . .
>
> 2. The right of bearing arms--which with us is not limited and restrained by an arbitrary system of game laws as in England; *but is particularly enjoyed by every citizen*, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation. [41]

Joseph Story [42] also viewed the Second Amendment as guaranteeing an individual right, the importance of which "will scarcely be doubted by any persons, who have duly reflected upon the subject." [43] For Story, it was clear that,

> [t]he militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers . . . . *The right of citizens to keep and bear arms* has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, *enable the people* to resist and triumph over them. [44]

Noticeably absent from these commentators' Second Amendment analyses is any discussion suggesting that they viewed the right to keep and bear arms in anything but individual terms. At no point in these commentaries do the writers condition the right to keep and bear arms on a state's right to maintain a militia. Instead, the commentators state that the people's right to keep and bear arms renders possible a self-armed citizen militia, which constitutes the "palladium of liberty" and serves as the ultimate check against domestic tyranny and foreign invasion. If these learned commentators had erred in their writings on the Second Amendment, certainly someone would have stepped forward to correct them. [45]

B. ***Antebellum Judicial Construction***

1. *State cases*

A handful of state and federal cases decided before the Civil War reflect the understanding that the Second Amendment provided an individual right to keep and bear arms. The earliest judicial pronouncement on the right to keep and bear arms in the United States is the Kentucky case of *Bliss v. Commonwealth*. [46] This case called upon the court to construe that state's constitutional provision regarding the right to keep and bear arms. [47] Bliss had been convicted for having carried a sword cane in violation of a state statute prohibiting the carrying of concealed weapons. Bliss appealed to the Kentucky Court of Appeals arguing that the law violated his right to keep and bear arms. The court reversed his conviction and held the law unconstitutional. [48]

Although *Bliss* did not directly involve the Second Amendment, its analysis of the right to keep and bear arms is both insightful and instructive. The *Bliss* court made an important historical observation when it noted that the right to keep and bear arms "existed at the adoption of the constitution" [49] and at that time it had "no limits short of the moral power of the citizens to exercise it." [50] Not only did the court give the right to bear arms a broad, absolutist construction, it did so in the context of reversing a private citizen's conviction for carrying a concealed weapon. Like the Second Amendment, the Kentucky Constitution constitutionalized right belonging to individuals.

The most extensive antebellum judicial consideration of the Second Amendment came from the Supreme Court of Georgia in *Nunn v. Georgia*. [51] There, the court reversed a conviction obtained under an 1837 statute prohibiting the carrying of deadly weapons, holding that the legislature could not prohibit individuals from exercising this right. [52] Noting a split of authority over whether prohibitions against the carrying of concealed weapons were permissible under state constitutional provisions securing the right to keep and bear arms, [53] the *Nunn* court sharply criticizing those decisions upholding statutes prohibiting the carrying of concealed weapons. [54] The court then discussed the Second Amendment, which,

> in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the [1689 English Bill of Rights], "to extend and secure the rights and liberties of English subjects"--whether living 3,000 or 300 miles from the royal palace. [55]

Despite the United States Supreme Court's decision holding that the Bill of Rights operated only against the federal government, [56] the court in *Nunn* considered the Second Amendment binding upon the states. The judges noted that they did not believe that, "because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confined to a republican legislature." [57]

Perhaps the most important aspect of the court's opinion is its observation that nothing in the language of the Second Amendment "restricts its meaning" [58] and that the right to keep and bear arms is not any less "comprehensive or valuable" than other individual rights contained in the First, Fourth, Fifth, and Sixth Amendments. [59] The court continued by noting that,

> [t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . . Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, reestablished by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Carta!* And Lexington [and] Concord . . . plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right. [60]

The court concluded by invoking the Second Amendment to void the statute in so far as it prohibited bearing arms openly. [61] As for prohibiting the "secret" carrying of arms, the court partially upheld the statute because it did not impair the citizen's natural right of self-defense, or his constitutional right to keep and bear arms. [62]

Two additional state supreme court decisions addressing the scope of the Second Amendment merit consideration. In *State v. Chandler*, [63] the Supreme Court of Louisiana, commenting on the Second Amendment, stated that it is "calculated to incite men to a manly and noble defence of *themselves*, if necessary, *and* of their country . . . ." [64] And, in *Cockrum v. State*, [65] the Supreme Court of Texas stated that the object of the Second Amendment was to perpetuate free government, and "is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed." [66]

2. ***Federal cases***

Riding circuit in 1833, Associate Justice Henry Baldwin charged the jury in a suit seeking recovery of damages for trespass *vi et armis* and false imprisonment. [67] Justice Baldwin's jury charge in this case provides further insight into early eighteenth century understanding of the Second Amendment. After listing three rights protected under the Pennsylvania Constitution, the Privileges and Immunities Clause, [68] the Contracts Clause, [69] the *second* part of the Second Amendment, [70] and the Fifth Amendment Due Process Clause of the United States Constitution, Justice Baldwin stated that "in addition to these rights, Mr. Johnson had one other important [right]." [71] It is clear from Justice Baldwin's charge that the plaintiff, Caleb Johnson, was not engaged in any militia activities, yet had a Second Amendment right to keep and bear arms. If the Second Amendment was intended to confer merely a "collective right" on states, why does Justice Baldwin list the amendment as a right belonging to Caleb Johnson (an individual), as opposed to the state militia?

The only pre-Civil War United States Supreme Court case to deal with the Second Amendment was the infamous *Dred Scott v. Sandford*, [72] in which the Court held unconstitutional the Missouri Compromise. *Dred Scott* represents a particularly important decision because it is the Supreme Court's first discussion of the Second Amendment. After examining the history of slavery, the Court held that the framers could not have intended to give African-Americans the rights and privileges enjoyed by whites because to do so would entitle African-Americans to "the

full liberty of speech in public and in private upon all subjects upon which . . . [white] citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." [73] Furthermore, because the powers of the Government and the rights and liberties of each citizen are plainly defined by the Constitution, [74] the Federal Government cannot exercise any power beyond the scope of that instrument. Nor may the government properly deny any right which the document has reserved. [75] In listing a few constitutional provisions to illustrate this proposition, the Court stated that,

> no one, we presume, will contend that Congress can make any law . . . respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people . . . peaceably to assemble, and to petition the Government for the redress of grievances.
>
> . . .
>
> . . . *Nor can Congress deny to the people the right to keep and bear arms*, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding. [76]

From this passage, the Court's position on the Second Amendment becomes unmistakably clear. The Court grouped the right to keep and bear arms with other rights belonging to individuals and listed rights from the First, Second, Fifth, and Sixth Amendments as examples of rights protected by the Constitution. Moreover, any language qualifying or confining the applicability of the right to keep and bear arms to state militias is completely absent. If the Second Amendment only protected the right of states to maintain militias, the Court would not have included the Second Amendment, in two separate discussions, among other individual rights. Although in this case the Court's discussion of the Second Amendment is dicta, it is nonetheless important because it stands as the High Court's first comments on the subject. From these words, it is clear that the Court unequivocally considered the right to keep and bear arms to be a personal right.

C. *State Judicial Construction of the Second Amendment in the Post-Civil War Period*

Only two cases decided in this period, one from the Supreme Court of Tennessee in 1871, and one from the Supreme Court of North Carolina in 1921, contain any extended treatment of the Second Amendment. In *Andrews v. State*, [77] the Supreme Court of Tennessee found that the Second Amendment and its state equivalent essentially spoke to the same rights, both of which had been provided for similar reasons. [78] The state attorney general argued that the right to keep and bear arms was political in nature and did not afford to citizens a civil right. [79] The court rejected this argument and held that the attorney general had failed to properly distinguish

> between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; *but the right to keep them*, with all that is implied fairly as an incident to this right, *is a private individual right, guaranteed to the citizen, not the soldier*. [80]

Lastly, the court quoted from Story's *Commentaries On The Constitution*, noting that, "[t]he passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights." [81]

The Supreme Court of North Carolina in *State v. Kerner* [82] characterized the right to keep and bear arms as "a sacred right based upon the experience of the ages," the purpose of which was to ensure "that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves." [83] The court's most lucid observations came from its exploration into the historical underpinnings of the right to keep and bear arms:

> [I]n the past this privilege was guaranteed for the sacred purpose of enabling the people to protect themselves against invasions of their liberties. Had not the people of the Colonies been accustomed to bear arms, and acquire effective skill in their use, the scene at Lexington in 1775 would have had a different result, and when "the embattled farmers fired the shot that was heard around the world," it would have been in vain. Had not the common people, the rank and file, those who "bore the burden of the battle" during our great Revolution, been accustomed to the use of arms, the victories for liberty would not have been won and American independence would have been an impossibility. [84]

II. Reconstruction and the Fourteenth Amendment

After the Civil War, a number of Southern states passed laws that sought to limit the rights of newly freed slaves. These "black codes" were nothing more than reincarnations of the former slave codes. The killings, hangings, beatings, and the denials of civil rights (including the right to keep and bear arms) committed by racist elements to keep newly freed black citizens shackled to their former slave status demanded federal intervention. [85] As a result of these oppressive state laws and civil rights violations, Congress passed the Civil Rights Act [86] and the Freedman's Bureau Act in 1866 [87] to secure the federal constitutional rights of African-Americans.

In 1868, the Fourteenth Amendment [88] became part of the United States Constitution. The disarming of African-American citizens and the interrelation of the Second Amendment's right to keep and bear arms with the Fourteenth Amendment has been cogently documented by a number of scholars, and, therefore, needs no further elaboration here. [89] In the words of Senator Jacob M. Howard (R-MI), one of the Fourteenth Amendment's major proponents, convincing proof can be found that the framers of the Fourteenth Amendment deemed the Second Amendment as safeguarding an individual right. In his famous speech cataloguing the personal rights that fell under the protection of the Fourteenth Amendment, Senator Howard gave express mention of the right to keep and bear arms. [90]

Apparently, several commentators in the Reconstruction Congress considered the Second Amendment's right to keep and bear arms an individual right. Indeed, Representative Roswell Hart of New York, defined a republican form of government as one whose citizens:

> shall be entitled to all privileges and immunities of other citizens;" where "no law shall be made prohibiting the free exercise of religion;" where "the right of the people to keep and bear arms shall not be infringed;" where "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law. [91]

Recalcitrant southern states continued to oppress the former slaves by every means and methods imaginable. Representative Sidney Clarke of Kansas pointed to a January 4, 1866 Alabama statute which made it unlawful for anyone of color to own or carry a firearm. [92] Angered by that incident and by the fact that ex-confederate Mississippi rebels had confiscated the private arms of former African-American Union soldiers and appropriated them for their own use, [93] Clarke argued against re-admittance of Mississippi to the Congress on the basis of that state's violation of the Second Amendment.

III. Incorporation

A. *From* Barron *to* Slaughter House: *Sowing the Seeds of Anti-Incorporation Precedent*

Early in this nation's history, the Supreme Court unanimously held that the Bill of Rights was not applicable to the states, but stood solely as a limit on the federal government. [94] From 1833 to 1894, the Court reaffirmed *Barron* in a series of cases involving the First, Second, and Fourth through Eighth Amendments. [95] From the date the Fourteenth Amendment passed, however, the issue of whether that amendment incorporated the Bill of Rights and thus applied to the states would become one of the most debated and profound issues in constitutional law. [96] Only two possible vehicles for incorporating the Bill of Rights existed, namely the Privileges and Immunities Clause [97] and the Due Process Clause. [98]

In the *Slaughter House Cases*, [99] the Court declined to incorporate the Bill of Rights through the Privileges and Immunities Clause, and instead interpreted the Clause so narrowly as to essentially render it a dead letter. By giving the Privileges and Immunities Clause such a restrictive interpretation, the Court eliminated "the provision which was both historically and logically the one most likely to have been intended to include within its protections the guarantees of the Bill of Rights." [100] As a result of *Slaughter House*, litigants were continually forced to argue that the Bill of Rights applied to the states directly or through the Fourteenth Amendment's Due Process Clause. The Court regularly dismissed the argument that the Bill of Rights applied directly to the states by merely citing to *Barron*. [101] The Court also continually rebuffed assertions that the liberties accorded under the Bill of Rights could apply to the states via the Fourteenth Amendment. [102] The Court reaffirmed the *Slaughter House* holding as late as the twentieth century. [103]

B. *The Court's Trilogy of Second Amendment Cases: Locking the Right to Keep and Bear Arms Into the Pre-Incorporation Era*

In *United States v. Cruikshank*, [104] three people had been convicted under the Enforcement Act of 1870 [105] for banding together to "hinder and prevent" two African-Americans from, inter alia, exercising their First Amendment right of peaceful assembly and their Second Amendment right to keep and bear arms. [106] In affirming the lower court, the Court explicitly relied on *Barron* and its progeny in holding that the First Amendment, like the other amendments, applied exclusively to the national government and was in no way intended to limit the states' rights. [107] After noting that this construction of the First Amendment was well settled, the Court dealt a similar blow to the Second Amendment:

> [The Second Amendment] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation . . . of the rights it recognizes, to what is called [a state's police powers]. [108]

At first blush, a reading of the "not a right granted by the Constitution" language appears to say more than it actually does. A careful reading of the *Cruikshank* decision confirms that this passage should be read in a rather limited context. Initially, the Court confronted the issue of whether the rights of assembly contained in the First Amendment and the right to keep and bear arms contained in the Second Amendment were rights granted or protected by the Constitution. In a somewhat fragmented fashion, the Court resolved that issue as follows. First, the Court correctly noted that the right of assembly, like other rights in the Bill of Rights, existed prior to the adoption of the Constitution, and as a result, did not represent a right granted to the people by the Constitution. In other words, the right was not created by the First Amendment. [109] Turning to the Second Amendment, the Court noted that the right to keep and bear arms was not a guarantee granted by the Constitution. [110] The Court thus reiterated a basic truth: the Bill of Rights did not grant or create any rights that did not previously exist prior to its framing. [111] By asserting that the right to keep and bear arms predated the Constitution, the Court appeared to adopt the same natural rights position as it had taken with the Assembly Clause. [112]

The last two points to be made of the Court's brief Second Amendment analysis are important ones. First, the defendants had been indicted and convicted of intending to hinder and prevent two African-Americans (private citizens) from exercising their right to keep and bear arms for a lawful purpose. [113] Aside from the obvious individual sense in which the Court considers the right to keep and bear arms, nothing in the record indicates that the two African-Americans were in any way associated with a militia. Nor is there a single militia reference in the Court's opinion. If the purpose of the Second Amendment was to confer a "collective right" on states to maintain militias, the Court could have simply rejected any claim to an individual right in the Second Amendment on those grounds. Second, the Court's holding that the Second Amendment, like the First Amendment, did not apply to the states clearly does nothing more than reaffirm *Barron* and its progeny. Properly viewed in that context, *Cruikshank* is just another link in the *Barron* chain.

The Court's refusal to apply a Bill of Rights provision to the states continued into the 1880's with *Presser v. Illinois*. [114] After leading approximately four-hundred armed members of a

paramilitary Organization [115] down the streets of Chicago, Herman Presser was convicted under an Illinois statute prohibiting bodies of men, other than the state militia or federal troops, from associating as a military organization, drilling, or parading with arms without obtaining a license from the governor. [116] In upholding the law, the Court held that the sections only forbade the men to associate together as military organizations without first obtaining a license, and as such did not infringe their rights." [117] Relying on *Cruikshank* and citing to *Barron*, the Court stated that the Second Amendment did not prohibit the legislation in question because that amendment limited only the power of Congress and the National government, and did not apply to the states. [118] The Court observed the following:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect. [119]

Six years after *Presser*, the Court decided *Miller v. Texas*. [120] *Miller* involved a Texas statute that forbade the carrying of weapons and authorized the warrantless arrest of anyone violating the law. At issue was whether the statute violated the Second and Fourth Amendments of the United States Constitution. Relying once again on *Barron*, as well as *Cruikshank*, the Court in *Miller* held that the Second and Fourth Amendments were limitations only upon the federal government. [121]

The century old *Miller* decision remains important today. It is the last case involving a challenge to a state or local firearms statute to have reached the Supreme Court. Seventy-five years passed before the Court was presented with and declined its first opportunity to address the Second Amendment's incorporation via the Fourteenth Amendment. [122] Nearly a century after *Miller*, the Court has refused to consider the issue. [123] Thus, *Cruikshank*, *Presser*, and *Miller* effectively locked the Second Amendment into a pre-Fourteenth Amendment Due Process Clause incorporation era. [124] Like a woolly mammoth entombed in a glacier, the Second Amendment remains frozen in time.

C. *Fourteenth Amendment Due Process Clause Incorporation: The Second Amendment Misses the Bus*

The first true Due Process Clause incorporation decision came in *Gitlow v. New York* [125] some thirty-one years after *Miller*. In *Gitlow*, the Court assumed that the First Amendment freedoms of free speech and press were among the "fundamental personal rights and 'liberties' protected" by the Fourteenth Amendment Due Process Clause against state impairment. [126] Even arch-conservative Robert Bork acknowledged that although the "controversy over the legitimacy of incorporation continues," it is settled "as a matter of judicial practice." [127] Given the reality of incorporation, the debate over its appropriateness is nothing more than academic. [128]

From 1927 to 1949, the Court began using the Fourteenth Amendment Due Process Clause to selectively incorporate all the First Amendment guarantees, [129] the Fourth Amendment, [130] and the Sixth Amendment's right to a public trial. [131] Twelve years later, in 1961, the Court resumed its process of selective incorporation by making applicable to the states the judicially created exclusionary rule, [132] the Eighth Amendment's Cruel and Unusual Punishment Clause, [133] the Fifth Amendment's guarantee against self-incrimination, [134] and double jeopardy, [135] the remainder of the then unincorporated Sixth Amendment, [136] and by implication, the Eighth Amendment Excessive Bail Clause. [137] Thus far, the Second Amendment, Third Amendment, [138] Fifth Amendment Grand Jury Clause, [139] Seventh Amendment, [140] Eighth Amendment Excessive Fines Clause, [141] Ninth Amendment, and Tenth Amendment [142] stand as the only provisions of the Bill of Rights not incorporated into the Fourteenth Amendment.

Once this list is parsed down and analyzed, it is evident that the Court has one piece of unfinished business: to incorporate the Second Amendment. So far, the Court has declined to address the issue, although it has addressed the incorporation debate for many of the other Bill of Rights provisions. [143] There is no reason to believe that the Court would not incorporate the Third Amendment if presented with the opportunity to do so. [144] As recently as the early 1970's, the Court declined to incorporate the Jury Clauses of the Fifth and Seventh Amendments. The Eighth Amendment Excessive Fines Clause for all practical purposes does apply to the states. The Ninth and Tenth Amendments, which are not specific guarantees of individual liberty, by their own terms "seem inapplicable to the states." [145] As a result, the Second Amendment remains the last Bill of Rights provision deserving of and requiring incorporation through the Due Process Clause.

D. *Standards Of Incorporation*

The Supreme Court has developed tests for determining whether a Bill of Rights provision should be incorporated into the Fourteenth Amendment and made binding on the states. [146] Generally speaking, the Court has enunciated three such tests. Justice Cardozo articulated the first two tests in *Palko v. Connecticut*. [147] Under Cardozo's first test, the Court asks whether a Bill of Rights provision is implicit in the concept of ordered liberty; if so, the provision is then absorbed into the Fourteenth Amendment. [148] Cardozo's second test, calls for the Court to ask whether the right is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [149] By the end of the 1960's, the Court had reformulated its incorporation test to ask whether a right is "fundamental to the American scheme of justice." [150] The Court has looked at various factors in considering the relationship between the Bill of Rights and the Fourteenth Amendment, including "the language of the amendment and the intent of its framers" [151] and the "broad protection of individual liberties against state systems too often willing to sacrifice those liberties." [152]

In determining whether a right is fundamental and thus deserving of incorporation, the Court looks to see if the right is rooted in Anglo-American common law and the extent to which the founders valued the right. This often has involved tracing the development of a particular right from its English origins to its subsequent evolution in America. [153] Of the twenty-six rights contained in the Bill of Rights, the right to keep and bear arms is one of only seven guarantees

that can be traced to a seminal English common law document. [154] It also appeared in approximately half of the early state bills of rights and was among the amendments proposed by three state ratifying conventions and by Madison himself. [155]

By far the most important factor is whether a right is present within the Bill of Rights. "[T]hat presence reflects a substantial body of opinion that viewed that right as essential to a common law system." [156] Similarly, the presence of a particular right in the state bills of rights also should be given considerable weight. For example, in *Duncan v. Louisiana*, [157] the Court emphasized the fact that the right to a jury trial was guaranteed in both the original state constitutions and in the constitutions of every state that had entered the Union after the framing of the federal Constitution. [158] Similarly, the right to keep and bear arms was guaranteed in the early state constitutions [159] and in practically every state constitution written prior to the Civil War. [160] This right is currently found in forty-three state constitutions. [161] The same weight accorded state jury trial provisions in *Duncan* should likewise be accorded to state provisions concerning the right to keep and bear arms. Certainly, one strains to understand how the right to keep and bear arms cannot be considered a fundamental right when it appears in the 1689 English Bill of Rights, state declarations of rights, the Second Amendment, and most state constitutions.

As has been demonstrated above, the right to keep and bear arms as embodied in the Second Amendment satisfies the Court's incorporation criterion. The bulk of modern scholarship clearly documents the historical, philosophical, and common law roots of the constitutional right to keep and bear arms. [162] Additionally, practical experience and logic militate in favor of a presumption that the founders valued the right to keep and bear arms for a number of reasons. First, the founding fathers had been exposed to firearms all their lives. [163] In addition, they lived during a time of near universal firearms ownership for militia purposes, hunting, recreation, and self-defense. [164] Our founders witnessed the attempted confiscation of private arms by the British [165] and were cognizant of the role that private arms played in defeating the British. Finally, the founders had made explicit endorsements of the value of private firearms ownership. [166]

E. *Justice Hugo Black's Adamson Dissent Comes to Fruition with the Court's Failure to Incorporate the Second Amendment*

In his dissent, Justice Black in *Adamson v. California* [167] feared the consequences that might result if the Court chose a selective incorporation process over one that would incorporate en masse the first eight amendments of the Bill of Rights.

> [T]he people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights . . . in interpreting and enforcing that Bill of Rights . . . . I would follow what I believe was the original purpose of the Fourteenth Amendment--to extend to all the people of the

> nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. [168]

Justice Black correctly perceived that some provisions might be left unincorporated as a byproduct of the selective incorporation process. Unfortunately, history has proven him right.

Given the reality of incorporation and the fact that most of the first eight amendments have been incorporated, the Second Amendment should not remain in a state of suspended animation. The Court did not hesitate to overrule pre-incorporation precedent when it was confronted with incorporating other Bill of Rights provisions. [169] It should do the same with the Second Amendment. The holding in *Cruikshank* that the First Amendment right of assembly does not apply to the states is no longer valid. [170] The holding in *Miller* that the Fourth Amendment does not apply to the states too is invalid. [171] Yet, *Cruikshank* and *Miller* remain in full force as applied to the Second Amendment. The Court has incorporated most of the Bill of Rights, save a few clauses which it has *explicitly* declined to incorporate. The Court, however, has neither incorporated nor explicitly declined to incorporate the Second Amendment. In fact, the Court has passed several opportunities to address the arguments in favor of the Second Amendment's incorporation. [172] Akhil Amar captured the Court's Second Amendment inaction best when he stated that by "refusing to discuss openly" why the right to keep and bear arms is somehow not "fundamental enough to justify incorporation, the Justices have seemed to plead no contest to the critics' charge that selective incorporation was unprincipled." [173] If Justice Black were alive today, he would likely point to the Court's treatment of the Second Amendment and say "I told you so."

IV. Twentieth Century Interpretation of the Second Amendment

A. *The Supreme Court*

The Supreme Court has only once in the twentieth century addressed the scope of the Second Amendment. [174] That occasion came in *United States v. Miller*. [175] The case began when Jack Miller and Frank Layton were indicted under the National Firearms Act ("NFA") [176] for transporting an unregistered shotgun having a barrel less than eighteen inches without the required stamp-affixed order. [177] The district court quashed the indictment and held the NFA unconstitutional as violative of the Second Amendment. [178] Although the United States appealed to the Supreme Court, no appearance (brief or oral argument) was made on behalf of Miller and Layton. [179] The Supreme Court reversed the district court and upheld the National Firearms Act against Second Amendment challenge. At the outset, the Court drew the following conclusions:

> 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" . . . 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 any part of the ordinary military equipment or that its use coul