

Guns, *Gitlow* and Dead Chickens: Does The Right To Bear Arms Apply To The States? W. DENNIS DUGGAN, FCJ

In *D.C. v. Heller*, the Supreme Court discovered that the 2nd Amendment guaranteed a personal right to bear arms. Why did it take 220 years to discover this right? First, the Amendment doesn't specifically mention it and second, we now have five justices who think it does. (In 1789, the Anti-Federalists proposed an amendment that included the right to bear arms "for the purpose of killing game.") Anyway, a personal right to bear arms is now the supreme law of the land. But does that law extend to the States? To answer to that question we must visit Benjamin Gitlow and the "incorporation doctrine." But before that, we should retrace the origins of the 14th Amendment.

The 14th Amendment is an elegant piece of prose but when it passed there was no agreement as to what it meant. Did it cover everyone or just Black people? Did it cover both political and civil rights? Did it protect all rights absolutely or did the police power allow reasonable restrictions? Most importantly, did it require the States to respect all the rights guaranteed by the Bill of Rights?

In *Baron v. Baltimore* [1833], the Supreme Court held that the Bill of Rights did not bind the States. So, why couldn't the one more paragraph to the 14th Amendment makes the first ten States?" Reconstruction politics is hold the supporting coalition some room to plausibly argue what

The rules for interpreting 1865. (The word "right" appears Constitution, in the copyright scrutiny/governmental interest analyze Constitutional rights, until it was suggested by Justice Footnote Four in the *Carolene* the constitutionality of a margarine). This approach was famous dissent in the *Lochner* case economic regulations need only a rational basis to support Congressional restrictions. The *Lochner* majority felt that there was a constitutional right to work as many hours as your employer wanted you to work.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

FOURTEENTH AMENDMENT

Second Founders have added just Amendment that said, "This amendments binding on the why. Vagueness was required to together and give the opponents it did not mean.

rights were not well developed in only once in the original clause.) The multi-tiered matrix, that we now use to would not begin its development Stone in his now famous *Products* case (which involved government regulation of presaged by Holmes in his [1905]. Holmes felt that

What became known as the "preferred freedoms" theory was advanced in *Palko v. Connecticut* [1938] but in an unusual way. *Palko* held that the Fifth Amendment's double jeopardy clause did not apply to the States through the 14th Amendment and it did not buy into a wholesale incorporation of the Bill of Rights into the 14th Amendment. In Cardozo's vaulted language, the Due Process clause protects those rights that represent the "very essence of a scheme of ordered liberty...principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." That's a mouthful and it tasks a judge with the job of historian, social scientist and psychologist. Some evidence that judges (or at least Cardozo) were not up to that task is that *Palko* was overruled in 1969 by *Benton v. Maryland*.

After *Baron v. Baltimore*, no one was writing on a clean slate on this subject. In *Hurtado v. California* [1884], the Court rejected out of hand the claim that the 14th Amendment required the States to prosecute serious crimes only by grand jury indictment. In *United States v. Cruikshank* [1876], the

Court reviewed the infamous Colfax Massacre prosecutions. In a decision that clearly reflected the temper of the times, they held that the 14th Amendment restricted only the actions of States not individuals.

It is some measure of the uncertain extent of 14th Amendment rights that the Second Founders felt that a XV Amendment was needed to guarantee Blacks the right to vote. Even that did not work so well. In *U.S. v. Reese* [1876], the Court held that federal enforcement did not extend to State and local elections. In *Williams v. Mississippi* [1896], literacy and poll taxes were upheld. Women fared ever worse than Black men. In *Bradwell v. Illinois* [1873], the Court held that the delicate nature of the weaker sex and God's plan for them to be pregnant and in the kitchen (but not necessarily barefoot) justified their exclusion from the legal profession. *Minor v. Happersett* [1875] held that it was obvious that the 14th Amendment did not give women the right to vote; why else would we have needed a 15th Amendment to give Blacks the right to vote?

This gets us back to 1873 and the *Slaughterhouse Cases*. Louisiana incorporated the *Crescent City Live-Stock and Slaughtering Company* and gave it a monopoly to handle the butchering of animals to be sold in the City of New Orleans. Excluded butchers claimed that the 14th Amendment's "privileges and immunities" provision guaranteed them the right to freely work in their profession. The Supreme Court disagreed. It enshrined a distinction in Constitutional law between the rights of a citizen of a State and a citizen of the United States. The 14th Amendment guaranteed the latter not the former. Killing chickens was a right of the former.

In the *Northern Securities* case [1903], Holmes said that, "Great cases, like hard cases, make bad law." The *Slaughterhouse Cases* also show that the opposite is true. Minor cases that are made to shoulder great Constitutional principles can make bad law. *Slaughterhouse* did not involve a newly freed slave denied some fundamental right. It was about who could butcher chickens. It got the 14th amendment off to a bad start and it would take almost one hundred year to get it back on track.

Next time, From Gitlow to Guns: Does a gun over your hearth represent the very essence of a scheme of ordered liberty? Is it a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?" Stay tuned. (Because of space limitations, footnotes and other sources appear on the web site version.)

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