

## **Chicago gun case takes aim at broader constitutional issues, creating an engaging -- and complex -- legal tussle**

Last year, the Supreme Court's *District of Columbia v. Heller* decision struck down Washington, D.C.'s 32-year-old handgun ban, and changed the legal landscape for firearm regulations in America. In its opinion, the court clearly recognized that the federal Constitution's Second Amendment protects an individual right to keep and bear firearms.

The ruling clarified an area of law infrequently examined by the Supreme Court, and proved to be a watershed Constitutional decision. However, its immediate ramifications were somewhat more limited. In *Heller*, the court only dealt with the matter directly before it, which was the application of the Second Amendment to the actions of the District of Columbia — an entity of the federal government. Given the scope of the facts in the case, the court was unable to examine whether the amendment was applicable to state or local gun regulations.

Immediately after the *Heller* decision was handed down, new litigation was initiated to address just that question. Alan Gura, lead counsel in *Heller*, and Illinois attorney David Sigale filed suit on behalf of four Chicago residents who had run afoul of Chicago's strict gun laws. In many respects, these regulations were similar to those struck down by the U.S. Supreme Court in *Heller*. After two losses in the lower federal courts, the case recently arrived at the U.S. Supreme Court, which is scheduled to hear oral arguments in the *McDonald* case early next year.

### **A much more sweeping set of issues**

In the press, *McDonald* will largely be discussed in terms of its impact on gun regulations. However, the briefs in the case suggest that a much more sweeping set of constitutional issues will be in play.

The *McDonald* litigation seeks to have the Supreme Court recognize that the Second Amendment binds states in the same way that it binds the federal government. In legal terms, the petitioners in *McDonald* seek to have the amendment "incorporated" against the states. If the Supreme Court does, in fact, incorporate the Second Amendment, then state and local laws would

have to follow the court's interpretation of the "right to keep and bear arms." No municipal law could stand, for instance, that mimicked the Washington, D.C., handgun ban struck down by Heller.

The legal concept of incorporation had its roots in post-Civil War America, when the Constitution was amended to reflect the prevailing themes that had underscored that conflict. Due to concerns that southern states might punish freed persons by instituting pernicious, race-based laws, Congress passed — and the states ratified — a set of three constitutional amendments. These amendments banned slavery, guaranteed race-neutral voting rights, and provided due process of law to all. One amendment in particular — No. 14 — also recognized certain "privileges and immunities" of national citizenship, which the states could not intrude upon.

Since the passage of the 14th Amendment, the Supreme Court has gradually applied the protections of the federal Bill of Rights to state governments, setting a legal floor below which no state can legislate. However, the way in which the court has done this has been circuitous, due to the nature of court rulings issued in the aftermath of the Civil War.

### **Privileges and immunities or due process?**

Soon after the 14th Amendment was ratified, the Supreme Court took up the matter of the *Slaughterhouse Cases*. At issue was a Louisiana monopoly on the rendering industry, which had been challenged by competitors on a variety of grounds, including due-process violations and the abridgement of "privileges and immunities" (P&I).

In this early interpretation of the meaning of the 14th Amendment, the court set out its reading of the amendment's P&I Clause. According to the majority opinion, the "privileges and immunities" of national citizenship did not include the liberties found in the Bill of Rights, but were instead made up of a more irregular list, such as the rights to visit "federal treasuries, petition the federal government, access federal sea-ports ... and travel among the states."

The court opined that reading the amendment more broadly would radically alter the federal-state arrangement set out at the nation's founding, and would reach beyond the intentions of the amendment's authors. Interestingly, several of those authors were openly critical of the court's

interpretation of their intentions in the aftermath of the *Slaughterhouse* ruling.

In the decades that followed *Slaughterhouse*, the Supreme Court eventually changed course, and moved to incorporate many of the protections found in the Bill of Rights. However, it did so by developing a separate rationale — a doctrine known as "selective incorporation." The court used the 14th Amendment's due-process clause to incorporate rights that it viewed as "implicit in the concept of ordered liberty." This doctrine did not represent a wholesale adoption of the Bill of Rights; rather, it incorporated rights on a case-by-case basis, as issues arose before the court.

### **Making a bid for the entire Bill of Rights**

In *McDonald*, the Supreme Court will once again confront the question of whether to incorporate a portion of the Bill of Rights. As noted above, modern legal convention would argue that the Second Amendment should be incorporated via the due-process clause. Indeed, most previous incorporation cases have taken this approach.

However, the petitioners' brief in the *McDonald* case does not stress this proposition. Attorneys Alan Gura and David Sigale spend much time making the case that the court should fundamentally change its method of incorporation, and instead apply the Second Amendment to the states through the Privileges and Immunities Clause, effectively overturning court precedent.

This approach is an interesting departure from Gura's strategy in *Heller*. While *Heller* pursued a narrower line of argumentation, *McDonald's* aspirations are more ambitious. *Heller*, for instance, declined to ask the court to overturn *United States v. Miller*, the Supreme Court's most substantive prior Second Amendment case. Over several decades, federal courts had read *Miller* to preclude an individual Second Amendment right. For years, many in the Second Amendment community had argued that it been wrongly decided.

Instead of attacking *Miller* head-on, Gura asked the court to read the case in the spirit of the individual-rights approach that he was advocating. This tactic worked, and the court ultimately adopted an individual-rights view of the Second Amendment.

### **A change in strategy**

In *McDonald*, however, the court is asked to overturn existing precedent not once, but three times. The petitioner's brief in *McDonald* urges the overturning of *Slaughterhouse* and two related cases — *Presser v. Illinois* and *United States v. Cruikshank*. Like *Slaughterhouse*, these cases also declined to extend the protections of the Bill of Rights to the states.

If *McDonald's* P&I argument prevails, then the entire substance of the Bill of Rights would be incorporated against the states. At the moment, most of these rights have already been incorporated, but there are certain remaining elements that the court has not addressed — including the right to a jury trial in civil proceedings.

In large part, the *McDonald* brief seems to push hard on the P&I angle because it has a more conventional back-up argument — that of selective incorporation. This argument is discussed only briefly by Gura and Sigale, but it is examined at much greater length in an accompanying brief filed by the National Rifle Association.

### **Setting the stage for future legal battles?**

The most intriguing aspect of the petitioner's brief in *McDonald* is the way that it might lay the groundwork for future Supreme Court decisions — decisions that could reach far beyond either incorporation or Second Amendment issues.

Gura and Sigale spend much time on the history of the Privileges and Immunities Clause, and they compile historical evidence intended to show that the clause was meant to protect not only the "enumerated" (or listed) rights of the Bill of Rights, but also a variety of unenumerated, "natural law" rights. According to their brief, "It does not logically follow that American citizenship fails to secure pre-existing natural rights. With the Privileges or Immunities Clause, the Framers sought to protect rights that attach to citizenship in all free Governments."

This kind of language seems to indicate a desire to generate a court decision that gives a nod toward the existence of such rights. Even if the majority opinion does not mention natural rights in its holding, having contemporary references in a major court decision would aid the cause of those who advocate for natural rights.

## **The debate over unenumerated and natural rights**

Some libertarian constitutional theorists have long sought more legal recognition for unenumerated, natural rights. Over the course of the last few decades, this concept has proven to be highly controversial, and there have been relatively few Supreme Court cases that have dealt with such matters.

"Unenumerated" rights are obliquely referenced in the Ninth Amendment to the federal Constitution, but that amendment has generated little case law. When the court has addressed unenumerated rights, it has largely done so through the 14th Amendment's due-process clause, via a doctrine known as "substantive due process." The basic idea of this doctrine is that the "due process" referenced in the 14th Amendment is not merely a procedural protection; it also protects other, substantive rights.

An early use of substantive due process was found in the 1905 decision *Lochner v. New York*. In *Lochner*, the court struck down a New York state law that limited the hours that bakers could work. This economic regulation was curtailed by the court's recognition of a pre-existing "liberty of contract" emanating from the due-process clause.

The Supreme Court pursued this line of reasoning into the early 20th century, but the court's shake-up during the Roosevelt administration halted — and then reversed — its move in this direction. The substantive due-process doctrine survived, but only in its application to reproductive issues (*Roe v. Wade*), and not in the area of economic activity.

## **Pursuing economic liberties**

The substantive due-process concept has proven to be controversial, even among advocates of limited government. It has tended to separate those who seek libertarian policy solutions through the legislative process from those who seek judicial recognition of a wider set of constitutionally guaranteed rights.

On the latter side, some libertarian legal institutions have actively pursued the revitalization of a doctrine of unenumerated economic rights. Among these is the Pacific Legal Foundation (PLF), which filed a friend of the court brief in the *McDonald* case along with the Cato Institute. Since 1973, the PLF has sponsored litigation meant to narrow the scope of state and federal economic regulations. The main goal of the PLF/Cato brief is to support a rehabilitation of the Privileges and Immunities Clause. In its brief, the PLF

notes that it has long sought the overturning of *Slaughterhouse* as part of its "institutional mission to protect economic choice."

Notably, while the PLF/Cato brief devotes most of its attention to the Privileges and Immunities Clause, it also takes care to note that the court's revival of that clause should not eliminate the substantive due-process doctrine. This doctrine has been utilized to strike down economic regulations in the past, and the Pacific Legal Foundation seems to believe that it might serve this purpose once again.

### **The likely response of the court**

In the immediate future, the Supreme Court will have to decide whether to apply the Second Amendment to the states. Given the court's track record of incorporating other elements of the Bill of Rights, it seems highly plausible that the majority will vote for incorporation. Notably, many others seem to agree. *McDonald* is supported by an amicus brief filed by the attorneys general of 38 states, including Minnesota's own Lori Swanson — all of whom argue for incorporation.

Given the state of existing case law, incorporation via the "selective incorporation" doctrine seems to be the most likely outcome. Reinvigorating the P&I Clause by overturning *Slaughterhouse* may prove to be a more daunting task. However, the strong historical evidence that indicates that the P&I Clause was meant to bind states to the Bill of Rights might sway some of the court's originalists.

At the same time, the natural-rights undercurrent found in key *McDonald* briefs could make reviving the P&I doctrine politically unpalatable to many justices. Legal theories featuring unenumerated rights have been strongly resisted by both conservatives (due to *Roe v. Wade*), and by liberals who fear a return to *Lochner*-era deregulation.

Whatever its outcome, *McDonald* will prove to be one of the decade's most engaging and complex tussles over constitutional doctrine.

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