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Gun case presents quandary for Supreme Court justices

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As a member of the Junior ROTC, teenager Antonin Scalia toted his rifle on the subway ride back and forth to Queens. As a hunter, he speaks lyrically of stalking wild turkeys. And as a justice, he may have reached the pinnacle of his more than two decades on the Supreme Court when he wrote the majority opinion that said the Second Amendment protects an individual's right to own a firearm.

But when the justices on Tuesday confront the question of whether the amendment applies to state and local governments -- not just the federal government and its enclaves, such as the District of Columbia -- the court's most prominent gun enthusiast faces something of a constitutional quandary.

The most likely path to recognizing gun ownership as a fundamental right is one that has been heavily criticized by Scalia and other conservative scholars, and it seems inconsistent with his belief that the Constitution should be interpreted in terms of its framers' "original meaning."

The alternative, one embraced by an unlikely coalition of libertarian, liberal and some conservative scholars and activists, would apply the Bill of Rights to the states in a way they say is more grounded in the Constitution. But it is also a route that could open what is invariably described as a Pandora's box of additional rights of citizenship -- health care, for instance, or housing.

The debate comes in *McDonald v. Chicago*, a case with great significance just on the gun-control front. A decision that states and cities may not infringe upon the right to own a firearm for self-defense could eventually call into question all manner of restrictions on gun ownership and registration, limits on who is eligible to own a gun and whether the carrying of weapons can be regulated.

On the surface, the issue would seem "easy as pie," as Scalia sometimes breezily dismisses constitutional decisions that cause other justices deep consternation. It is a challenge of handgun bans in Chicago and the suburb of Oak Park, Ill., that are nearly identical to Washington's restrictions struck by the court in 2008 in the landmark ruling *District of Columbia v. Heller*.

Most lawyers and scholars who follow the court think the cities have a losing hand; they say it is unlikely the five justices who made up the majority in *Heller* will decide that the right to own a firearm for self-protection exists only in a federal enclave. But the question of whether the Second Amendment applies to the states was specifically left unanswered in that case.

To most, it might seem illogical that the Bill of Rights would apply only to actions of the federal government, but that was its intent. Over the years, the court has said most of it applies -- or in the court's language is

"incorporated" -- through the 14th Amendment.

That post-Civil War amendment was meant to protect rights and outlaw discrimination. It forbade states to pass laws that abridged "the privileges or immunities of citizens of the United States." It said states may not "deprive any person of life, liberty, or property, without due process of law" and guaranteed "equal protection of the laws."

Mostly, the justices have used the "due process" clause to incorporate the majority of the Bill of Rights. The National Rifle Association and others have urged the court to continue to use it to incorporate the Second Amendment.

Reviving another clause

But others, notably scholars from the liberal Constitutional Accountability Center and the libertarian Cato Institute, have urged the court to revive another clause from the 14th Amendment, the one that protects the "privileges or immunities of citizens of the United States" -- 19th-century-speak for "rights." An 1873 Supreme Court decision has buried the "privileges or immunities clause" by saying it covered only a narrow range of national rights, such as traveling to the capital.

The justices said in taking the *McDonald* case they would decide whether either clause incorporated the Second Amendment. And the exercise will provide interesting revelations.

The liberal dissenters in *Heller* will decide whether to continue their protest that the Second Amendment does not convey an individual right, or endorse Chicago's position that federalism requires gun control decisions to be left to the states.

Justice Clarence Thomas, Scalia's fellow originalist and another opponent of substantive due process, has signaled he is open to revisiting the privileges or immunities clause. And Justice Sonia Sotomayor, deemed by gun rights organizations as an enemy during her confirmation hearings despite a scant record on the subject, will be casting the first of what could be many votes on gun restrictions.

But Scalia's situation is particularly interesting.

He is unquestionably the court's most outspoken proponent of gun rights. He has lamented in speeches that gun ownership is too often linked with criminal behavior and his hunting trip with then-Vice President Cheney caused a national controversy. His love of the sport goes back to childhood, and he recently waxed about the challenge and allure of turkey hunting to journalist Joan Biskupic for her Scalia biography, "American Original."

"Turkeys are very wily creatures. They have superb eyesight and they're very cautious," Scalia said. "You get one shot. If you miss, the whole day's ruined."

Scalia has been equally lethal on the subject of the due-process clause, which the court has invoked to protect substantive liberties, such as abortion rights and private relations between homosexuals. He protested as recently as last spring, when the court ruled that large campaign contributions to a judge could violate the due process rights of someone who had a case before that court.

"Divinely inspired text may contain the answers to all earthly questions," Scalia wrote in dissent, "but the due process clause most assuredly does not."

Such statements give heart to Doug Kendall of the Constitutional Accountability Center. "Justice Scalia has made a career out of promoting originalism and attacking substantive due process," Kendall said. "How can he possibly embrace the due-process clause when originalism points so overwhelmingly to the privileges-or-immunities clause?"

Kendall's group has submitted a brief that brings together constitutional theorists across the board, such as liberal Jack Balkin of Yale Law School and conservative Steven Calabresi of Northwestern, one of the founders of the Federalist Society. Alan Gura, the Alexandria lawyer who won the *Heller* case and represents the city residents and gun rights challengers in the current case, stresses the privileges or immunities clause as the proper place to locate Second Amendment rights.

'Rooted in history'

But even Calabresi notes that Scalia can justify recognizing the right under the due-process clause as one "deeply rooted in history and tradition." Scalia has described himself at times as a "faint-hearted originalist," and has said even mistaken doctrines of the court should be left in place when they are widely accepted and relied upon.

The NRA's brief notes that relying on the due process clause in this case would allow the court to avoid overruling several previous decisions. And it references Scalia's dissent from 1993 that says he is "willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights."

In a speech to Yale law students in 1996, Scalia was apparently more colorful, but no more conclusive. The idea of substantive due process was "babble," Scalia said, according to one report. On the other hand, the privileges-or-immunities clause was "flotsam," he said.