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"Might It Happen? Slaughterhouse Overruled?"

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For generations, lawyers, judges and constitutional scholars across the spectrum have debated whether the time would come for the Supreme Court to cast aside one of history's most controversial rulings — the 5-4 decision in 1873 in the *Slaughterhouse Cases*. In that ruling, the dissenters claimed — and modern critics still complain — that the Court had made the Fourteenth Amendment's Privileges or Immunities Clause into "a vain and idle enactment."

Despite a brief revival of the Clause as a curb on state power to restrict individual rights, in the 1999 decision in *Saenz v. Roe* involving "the right to travel," that part of the Fourteenth Amendment's Section 1 has remained close to a constitutional dead letter. (It reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

In 1873, the Court said the Clause only restricted state laws affecting rights of national citizenship, not those affecting the rights of state citizens. Among others who have argued in recent years that the Court should rethink the *Slaughterhouse Cases*, Justice Clarence Thomas is the most prominent. He did so in a dissent in *Saenz v. Roe*, saying that, "in an appropriate case," he would be open to reevaluating the meaning of the Clause.

Sometime this Fall, the Court will examine three cases that already are being pushed as "appropriate" ones for the Court to use for a reexamination of the Clause, and the *Slaughterhouse* precedent.

This is, in fact, a little-noticed part of the controversy already building around those new cases. The core issue, in all three, is whether the Court will expand the Second Amendment personal right to have a gun for self-defense, so that it restricts state and local government laws, not just those at the federal level (an issue that had a prominent role in the just-concluded nomination hearings for Justice-to-be Sonia Sotomayor. She will have a chance to vote on some of the new cases, it appears.)

Under constitutional theory, there are only three ways that the Court could interpret the Second Amendment as applying to the states. The Constitution's text rules out one of those, the *Slaughterhouse Cases* rules out a second, and the one remaining — "incorporation" of the Second Amendment into the Fourteenth Amendment so that it reaches states – is not an attractive option to constitutional conservatives. Thus, the impending challenge to the *Slaughterhouse* precedent.

The one federal appeals court that has ruled, so far, that the Second Amendment protects personal gun rights against state, county and city laws is the Ninth Circuit. It took the only option it said was open to it: the incorporation theory under the Fourteenth Amendment's Due Process Clause.

The text of the Constitution itself makes the Second Amendment apply only to federal laws; that has been the constitutional undersanding since 1833 (*Barron v. Baltimore*), the Ninth Circuit noted in *Nordyke v. King*, a ruling it issued in April and is still pondering whether to reconsider *en banc*.

It follows from the *Slaugherhouse Cases*, the Ninth Circuit added, "that the Privileges or Immunities Clause did not protect the right to keep and bear arms because it was not a right of citizens of the United States." That, it indicated, remains good law, even after the Supreme Court's decision in *Heller v. District of Columbia* in 2008 recognized a constitutional right to have a gun under the Second Amendment.

Only the Supreme Court would have the authority (absent a new constitutional amendment) to overturn the *Slaughterhouse Cases*. Two other Circuit Courts — the Second (in an opinion joined by Judge Sotomayor) and the Seventh — refused to extend the Second Amendment to the states, concluding that they were bound by Supreme Court precedents.

The Second and Seventh Circuit rulings are the ones now being challenged in the Supreme Court in three cases: *Maloney v. Rice* (08-1592) — the Second Circuit case — and *National Rifle Association v. Chicago* (08-1497) and *McDonald v. Chicago* (08-1521) — both from the Seventh Circuit. (Because Judge Sotomayor participated in the *Maloney* case at the Second Circuit, she probably would not take part in any action by the Justices on that case.)

In the *NRA* petition, its lawyers argue alternative points for applying the Second Amendment to the states — the "incorporation" method, and applying it through the Privileges or Immunities Clause. The petition does not include extensive argument on the *Slaughterhouse Cases*, though that precedent is mentioned.

The *McDonald* petition goes further, suggesting the reconsideration of *Slaughterhouse* if the Court is unwilling to use the other, incorporation method, to extend the Second Amendment. It argues: "The almost meaningless construction given this [Privileges or Immunities] provision in *Slaughterhouse* was wrong the day it was decided and today stands indefensible."

The *Maloney* petition takes a somewhat cautious approach. It suggests that the *Slaughterhouse Cases* need not be overruled directly, but should be reinterpreted. It makes an argument likely to appeal to conservative Justices and others: re-reading that old precedent to extend Second Amendment rights, but to do so in a way that keeps the Privileges or Immunities Clause from becoming as "open-ended" as it says other parts of the

Fourteenth Amendment have become.

A full exploration of the Clause and the *Slaughterhouse* precedent has been put before the Court in an *amicus* brief filed by the advocacy groups, Institute for Justice and the Cato Institute (filed in the Chicago cases; it can be downloaded here).

In a clear pitch to Justice Thomas, the brief quotes his dissent in *Saenz*, and comments: "Restoring the Privileges or Immunities Clause to its proper place in the constitutional structure would have the advantage of tethering this Court's rights-protecting jurisprudence much more closely to the Constitution's text and history" than other parts of the Fourteenth Amendment have.

One of the reasons that Justice Thomas has suggested a possible reexamination of *Slaughterhouse* is a concern, apparently shared by other Justices and conservative commentators, to rein in the use of other clauses in the Fourteenth Amendment in the Court's jurisprudence.

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