

Bloomberg Law[®]

Thomas Bid to Revisit Touchstone Cases Gains Gorsuch Vote

Jordan S. Rubin and Kimberly Strawbridge Robinson

February 21, 2019

Justice Clarence Thomas is known for supporting legal ideas and theories that are outside of the mainstream, and he often champions them alone in dissents that seem unlikely to win over his colleagues.

But Thomas gained a partner Wednesday in support of a view of the Constitution that could be incredibly consequential were it to eventually find favor with a majority of justices.

Justice Neil Gorsuch joined Thomas in support of incorporating the Eighth Amendment's excessive fines clause to the states by way of the privileges or immunities clause instead of via the Fourteenth Amendment's due process clause.

But wait, we should back up.

On its face, the Bill of Rights applies exclusively to the federal government. But freedom of speech, the right to bear arms, and others have been "incorporated," or applied, to the states by relying on the Fourteenth Amendment. In particular, the part that says states can't deprive citizens of liberty without due process.

That same due process clause has been used to protect rights that aren't expressly guaranteed by the Constitution, such as the right to an abortion and a right to marry someone of the same sex.

The dual, concurring opinions by Gorsuch and Thomas yesterday, could—if taken to their logical conclusion—undermine much of the precedent that provides the foundation for "substantive due process" protecting those kinds of unenumerated rights.

It's all about the privileges or immunities clause.

Stare Decisis

Both Thomas—explicitly—and Gorsuch—more tentatively—suggested that the use of the due process clause to incorporate the Bill of Rights isn't supported by originalism—the method of constitutional interpretation that looks to the common understanding of those provisions at the time they were adopted.

But their point was probably a broader one, [Vikrant P. Reddy](#), of the Charles Koch Institute, told Bloomberg Law.

That point has to do with stare decisis, the idea that later courts should generally follow the decisions of earlier courts for consistency.

Thomas's opinion in particular seems to underscore that justices shouldn't blindly follow stare decisis, even if that's been the law of the land for decades, Ken Klukowski, of the conservative American Civil Rights Union, said.

If Gorsuch agrees, which he signaled in his concurring opinion, that would be significant, said Ilya Shapiro, of the libertarian Cato Institute.

He noted that other justices haven't gone along with that interpretation of stare decisis.

Justice Antonin Scalia, one of Thomas's closest ideological allies, didn't go along with his privileges or immunities analysis in the court's landmark ruling incorporating the Second Amendment to states, Shapiro noted.

That probably wasn't because Scalia had a "problem with Thomas's original analysis but probably felt that the Court had gone too far down" the path of the due process clause to change course now, Shapiro said.

No Substantive Difference

That broader interpretation is supported by the seemingly nonexistent consequences—at first glance—of incorporating the Bill of Rights under the privileges or immunities clause instead of the due process clause.

The particular vehicle to incorporation of the Bill of Rights doesn't make any substantive difference, Berkley's Erwin Chemerinsky said. Most of the Bill of Rights are already incorporated to the states and likely would have been under either the privileges or immunities clause or substantive due process clause, he said.

'Wildly Unlikely,' But Gaining Ground

But while the consequences for the rights listed in the Bill of Rights may be slight, Thomas's analysis could affect the court's interpretation of whether other unenumerated rights are deemed to be protected by the Constitution, Shapiro said.

Thomas himself said that the court's substantive due process analysis has led to some of the court's "most notoriously incorrect decisions." He provocatively cited the court's landmark abortion case *Roe v. Wade* alongside the court's *Dred Scott* decision, which enshrined racial inequality in the Constitution.

Ohio State University law professor Peter Shane cautioned against reading too much into Thomas's and Gorsuch's opinions. Undoing the court's substantive due process analysis is "wildly unlikely given how much Constitutional law has now been built on the foundation of the due process clause," Shane said.

But Gorsuch's agreement with Thomas signals that the idea is gaining ground on the court, Klukowski said.

And Thomas himself has explained elsewhere that "sometimes it takes decades for an idea that was correct all along to garner a majority on the Supreme Court," Klukowski said