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The Supreme Court's Gun Showdown

Thanks to five Justices, the right to keep and bear arms is now protected from state interference. Thanks to Clarence Thomas, an important clause in the Constitution has risen from the grave.

By RANDY BARNETT

There is a remarkable academic consensus that the original meaning of the 14th Amendment protected an individual right to keep and bear arms against interference by state governments. Yesterday's Supreme Court decision in *McDonald v. Chicago* affirmed that this is indeed the case. It is, therefore, a great victory for enforcing the original meaning of the Constitution. Thankfully for the rights of Americans, the Chicago gun ban at issue will soon be consigned to the dust bin of history.

Since the Supreme Court acknowledged in *D.C. v. Heller* (2008) that the Second Amendment protects an individual right to arms, it was expected that it would eventually enforce that right against state interference. The big debate among observers was how the court would do so.

Would it use the 14th Amendment's Privileges or Immunities Clause that says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"? Or would it use the Amendment's Due Process Clause that says: "nor shall any state deprive any person of life, liberty, or property, without due process of law"?

The Privileges or Immunities Clause has been virtually a dead letter since 1873, when the court in *The Slaughter-House Cases* limited its scope to rights of a purely national scope, such as the right to access a foreign embassy or to be protected when traveling on the high seas. It was a preposterous interpretation—these were hardly the rights congressional Republicans in the aftermath of the Civil War were most concerned to protect in the wake of the terrible abuses of free blacks and white unionists by Southern states.

In oral argument last March, several conservative justices expressed skepticism that the scope of the Privileges or Immunities Clause could be sufficiently limited to avoid judicial abuses. This was a strong signal that the court would "incorporate" the right to keep and bear arms against state interference via the 14th Amendment's Due Process Clause—the way it protects most other rights enumerated in the Bill of Rights. And yesterday this was exactly what four justices chose to do.

But this too should be a headline of *McDonald*: Only a plurality of the Court relied on the Due Process Clause. The deciding vote was cast by Justice Clarence Thomas, whose concurring opinion rested solely on the Privileges or Immunities Clause. While agreeing "with the Court that the Second Amendment is fully applicable to the States," he

did so "because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."

Furthermore, nothing in the plurality opinion by Justice Samuel Alito cast any doubt on Justice Thomas's analysis. Instead, in three terse sentences, Justice Alito simply "decline[d]" to revisit *Slaughter-House* or even address the original meaning of the Privileges or Immunities Clause.

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Justice Thomas's analysis summarizes and reflects a consensus of legal scholarship that the Privileges or Immunities Clause does protect at least the rights enumerated in the Bill of Rights against state interference. Because his interpretation of the clause was necessary to reach the outcome in *McDonald v. Chicago*, it is now very much alive. Put another way, there is no longer a majority of the court willing to use the Due Process Clause in a case in which the Privileges or Immunities Clause is the right clause on which to rest its decision.

To appreciate how significant this is, recall the famous 1978 case of *Regents of the University of California v. Bakke* in which the court struck down the affirmative action program that excluded Alan Bakke from the University of California medical school. In that case, while a majority of five justices found the program unconstitutional, only a plurality of four justices concluded that all race-based admissions policies were unconstitutional. Justice Powell thought that some affirmative action admissions programs could be constitutional if they were needed to provide "diversity" in the classroom.

Based on Justice Powell's lone opinion, "diversity" became the watchword by which affirmative action programs in education were justified in lower courts. It took 25 years for a majority of the court to finally adopted Powell's "diversity" rationale in the 2003 case of *Grutter v. Bollinger. But adopted it was.*

Unlike *Bakke*, lower courts will not have to follow Justice Thomas's reasoning as they did Justice Powell, whose theory provided the swing vote to decide whether an affirmative action program survived or failed. Nevertheless, the fact that there was only a plurality for using the Due Process Clause means that the original meaning of the Privileges or Immunities Clause is now a part of constitutional law. Justice Thomas's uncontradicted analysis will enter into the casebooks from which all law students and future justices study the 14th Amendment.

In addition to the Bill of Rights, the privileges or immunities of citizens clearly included fundamental rights protected by the Civil Rights Act of 1866: "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property. . . . " After all, it was President Andrew Johnson's veto of this act as unconstitutional that helped motivate passage of the 14th Amendment.

To the conservative fear that the full scope of the Privileges or Immunities Clause was uncertain, Justice Thomas countered that the only "question presented in this case is . . . whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here." With this narrower focus, Justice Thomas presented an extensive and detailed analysis of the original meaning of the Clause in the belief that "this case presents an opportunity to reexamine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it." While conceding that "interpreting the Privileges or Immunities Clause may produce hard questions," Justice Thomas countered that "they will have the advantage of being questions the Constitution asks us to answer."

By declining to take issue with Justice Thomas's impressive 56-page originalist analysis, the other justices in effect conceded what legal scholars have for some time maintained—that the court's cramped reading of the clause in 1873

was inconsistent with its original meaning. Yesterday the lost Privileges or Immunities Clause was suddenly found. And some day it may be fully restored to its proper place as the means by which fundamental individual rights are protected under the Constitution against abuses by states.

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