

## OPINION

# Revive 'privileges or immunities'

**14th Amendment clause ought to protect against state red tape limiting economic freedom.**

**Timothy Sandefur**

March 1, 2010

One of the biggest cases the U.S. Supreme Court will decide this year involves the right to bear arms. But in the long run, its decision in *McDonald v. Chicago* may be far more important to America's entrepreneurs. It all depends on whether the justices decide to revive a constitutional provision it has neglected for more than a century.

When it was ratified in 1868, the 14th Amendment added several revolutionary new provisions to the Constitution, barring states from violating the "privileges or immunities" of citizens, or taking anyone's life, liberty or property without "due process of law," or depriving people of the "equal protection of the laws." But the first time it heard a case under that amendment — in the 1873 Slaughterhouse Cases — the Supreme Court basically erased the privileges or immunities clause, dramatically limiting the way the federal government would protect people against wrongful acts by state officials.

That case began when Louisiana passed a law forbidding butchers from slaughtering cattle anywhere in New Orleans except a single, privately owned facility. The beef industry was big business in New Orleans, and the new law put hundreds of butchers out of business overnight. The butchers sued, arguing that the law violated their right to earn a living without unreasonable government interference. Judges had recognized that right as far back as 1602, when England's highest court declared government-created monopolies illegal under the Magna Carta. The right to earn an honest living came to be recognized as one of the fundamental rights — or "privileges and immunities" — in the common law.

Yet in Slaughterhouse, the Court ruled against the butchers, holding, 5-4, that despite the new amendment's language, federal courts would not guarantee traditional rights against interference by states. With only minor exceptions, the Court declared, those rights were "left to the State governments for security and protection."

The decision's ramifications were profound. In the years after the Civil War, Americans — particularly in the South — needed protection against abusive state legislatures. That was the protection the privileges or immunities clause promised, and that the Slaughterhouse decision eliminated. During the next decade, federal authorities abandoned Reconstruction efforts to protect former slaves, and black Americans were condemned to another century of segregation and oppression.

## THE 'RATIONAL BASIS' DOCTRINE

The Court later backed away from the extreme states' rights position it took in *Slaughterhouse*. Relying on the 14th Amendment's due process and equal protection clauses instead, it built the "incorporation" doctrine that requires states to respect the Bill of Rights. But although these clauses bar states from violating some freedoms or discriminating against citizens in certain ways, states remain free to intrude on the rights of entrepreneurs and property owners thanks to the "rational basis" doctrine that the Court devised in the 1930s. That doctrine holds that certain rights — like freedom of speech or religion — are accorded strong judicial protection, but other rights, including the right to earn a living, receive almost none. Thus bureaucrats have nearly free rein to impose restrictions at will on a person's economic freedom, even when those restrictions have no realistic connection to protecting public safety.

That's where the gun cases come in. Last year, in *Heller v. District of Columbia*, the Court declared for the first time that the Second Amendment guarantees an individual's right to possess firearms. That case only applied to the federal government, because it involved a Washington ordinance, but it was quickly followed by the McDonald case, which asks the justices to decide whether the 14th Amendment requires states to respect that right also. The justices have also agreed to consider whether that right should be protected by the privileges or immunities clause. A decision reviving that dormant clause would signal a return to the amendment's original purpose. Better still, it would give entrepreneurs a chance to defend themselves from the often burdensome and abusive regulations that states now enforce with impunity.

That would be good news for people like Portland, Ore., businessman Adam Sweet, who started a small moving business, only to discover that Oregon law required him to get a license first — and that getting a license would require him to get approval from the existing moving companies. Unsurprisingly, established businesses routinely blocked new competition, meaning that the state had not issued a new license in two years. Such a law does nothing to protect the public — it only creates a cartel that violates freedom, hinders fair competition and raises costs to consumers. Although Sweet challenged the constitutionality of the restriction, the *Slaughterhouse* precedent meant he could only ask for "rational basis" protection — that is, virtually no protection at all. Fortunately, the legislature repealed the law before the court ruled. But similar laws remain in most of America's major cities.

In his dissenting opinion in *Slaughterhouse*, Justice Stephen Field wrote that economic freedom "is the fundamental idea upon which our institutions rest." But thanks to the elimination of the privileges or immunities clause, hardworking entrepreneurs like Sweet have almost no constitutional protection against state and local bureaucrats. At a time when America needs a resurgence of its entrepreneurial spirit, a decision to restore the 14th Amendment's protections for economic liberty would be a welcome change.

*Timothy Sandefur is a principal attorney at the Pacific Legal Foundation. His book, The Right to Earn A Living, will be published in September by the Cato Institute.*

