Does the Second Amendment Apply to State Laws?

by William Freivogel

On March 2, the U.S. Supreme Court will hear arguments in an Illinois gun case that could end up pleasing liberals and conservatives and gun ownersof all political stripes.

The often-conservative members of the National Rifle Association will be happy if the court forces the states to abide by the Second Amendment and allow people to have handguns in their homes. Liberal and libertarian constitutional scholars will be happy if the court resurrects the "privileges or immunities" clause of the 14th Amendment and uses it as the reason to force states to recognize gun rights.

The decision also could also please Otis McDonald, the septuagenarian who is the named plaintiff. He told reporters he already has two shotguns but needs a handgun too to protect his Chicago apartment from hooligans.

The issue in McDonald v. City of Chicago is whether the Second Amendment right to have a gun for self-protection applies to state laws. Two years ago, in Heller v. District of Columbia, the U.S. Supreme Court threw out a D.C. law that kept people from keeping handguns in the home for self-protection. Chicago and the Village of Oak Park have similar laws and the Supreme Court now has to decide whether they have to abide by the Second Amendment in the same way that the federal capital does.

Most people don't realize that the Bill of Rights didn't applied to the No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. deral government until the 14th Amendment was adopted at the end of the Civil War. Even then, it took the U.S. Supreme Court another half century to decide that the 14th Amendment's promise of due process included key freedoms in the Bill of Rights. Phrase by phrase, amendment by amendment, most of the freedoms in the Bill of Rights were "incorporated" to apply to state law.

One reason the process took so long is that the U.S. Supreme Court read the life out of the 14th Amendment's most obvious protection of the freedoms associated with citizenship – the privileges or immunities clause. In the Slaughterhouse Cases of 1873, the court said that the amendment gave people the rights of national citizenship, but not state citizenship. For a number of decades, that decision made African-Americans subject to state laws that took away their freedoms.

Now, the lawyer who is challenging the Chicago law, Alan Gura, is arguing what law professors have told their students for decades - that the Slaughterhouse decision was wrong and should be tossed out. One of the privileges or immunities granted by the 14th Amendment, he argues, is the right to bear arms guaranteed by the Second Amendment.

The argument has generated friction among those arguing against the Chicago law. The NRA asked for, and received part of the time Gura was scheduled to have to make his case. The NRA will argue the more conventional position that the due process clause of the 14th Amendment should include the Second Amendment as one of the freedoms incorporated against the states.

Ilya Shapiro, a scholar at the libertarian Cato Institute, wrote in a Cato publication that the "NRA prefers to seek glory for itself rather than presenting the strongest case for its purported constituency of gun owners." The NRA's decision to seek time at oral arguments March 2 was "about fundraising, not lawyering," he wrote. Gura is a friend of

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