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SHAPIRO & BLACKMAN: Using guns to protect liberty

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In the landmark case *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment protects an individual right to keep and bear arms. Because the District is a federal enclave, however, the court stopped short of deciding whether the Second Amendment applies to the states - and whether individuals can assert its protections against gun regulations in places like Chicago, New York and San Francisco.

In March, the Supreme Court will begin to answer this unresolved question - already answered affirmatively just last week by Washington state's Supreme Court - when it hears arguments in *McDonald v. Chicago*, a challenge to Chicago's handgun ban - in which the final briefs were filed earlier this month.

One of the things many people don't realize is that the case is much more about the 14th Amendment than the second, because the original conception of the Bill of Rights - including the Second Amendment - only applied its protections to the federal government. It was not until the post-Civil War 14th Amendment that the Constitution protected individual rights against state tyranny, guaranteeing that no state could, for example, "deprive any person of life, liberty, or property without due process of law."

Using this due-process clause, the Supreme Court has selectively applied almost all of the Bill of Rights against the states. Through this "incorporation," as it is called, individuals gained the ability to challenge state violations of the freedom of speech, the right to be secure against unreasonable searches and a host of other rights. Based on such precedents, the Second Amendment could easily be incorporated against the states through the due process

clause.

A different 14th Amendment clause, however, forbidding states from passing "any law which shall abridge the privileges or immunities of citizens of the United States," is a better way of extending the right to keep and bear arms. This privileges or immunities clause provides an approach that not only is more historically accurate, but prevents some of the judicial overreach legal observers of all stripes deride.

But what are these "privileges or immunities," and why haven't we heard much about them? In 1868, when the 14th Amendment was ratified, "privileges or immunities" was a term of art referring to a specific set of common-law rights that all free people possess and the government cannot abridge. Think of the Declaration of Independence's "certain unalienable rights," but a century later.

The 14th Amendment's framers recognized that the right to keep and bear arms for defense of person and property was an essential liberty inherent in all free citizens. This right was understood in 1868 to be among the privileges or immunities individuals would retain even if the Bill of Rights had never been ratified (as it almost wasn't).

Unfortunately, the privileges or immunities clause was strangled in its crib by a Supreme Court refusing to acknowledge the Reconstruction-era change in federal-state relations. In a set of 1873 cases on the regulation of Louisiana abattoirs - appropriately known as the Slaughterhouse Cases - the court virtually erased the privileges or immunities clause, reducing its contents to a risible set of federal rights.

Later courts that wanted to protect fundamental rights had to warp the doctrine of "substantive" due process. The due-process clause thus became an empty vessel into which judges could pour their personal policy preferences.

But it need not be this way. McDonald provides the perfect opportunity not just to allow people to protect themselves against oppressive state laws but to revive the privileges or immunities clause. If done right, extending the right to bear arms by overturning Slaughterhouse - which almost all scholars agree was incorrectly decided - would enhance liberty while limiting judicial overreach.

That is, unlike the current open-ended due-process clause, privileges or immunities are by definition limited to rights deeply rooted in our nation's history. Perhaps most important, they include the freedom of contract and the right to earn an honest living - liberties that

courts denigrate and legislators ignore. But they don't include the Pandora's box of positive rights - "rights" to health care, housing and others that imply coercion of some people to provide for others.

The court will likely strike down Chicago's handgun ban. If it does so using the privileges or immunities clause - or at least opens the door for future challenges that invoke it - it will be faithful to the Constitution, keep Pandora's box sealed and thereby do far more for the cause of freedom than merely extend the right to keep and bear arms.

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