Gun Case Could Broaden Legal Basis for Wide Range of Rights

Scholars Hope New Take on 14th Amendment Emerges From Chicago Handgun Decision

By Daphne Eviatar 10/2/09 4:38 PM

Supreme Court (WDCpix)

In announcing on Wednesday that it would review a case that asks whether individuals have a fundamental right to bear arms under the U.S. Constitution, the Supreme Court did more than just step into a heated debate over gun control. Although *McDonald v. City of Chicago* is on its face about Chicago's ban on handguns, legal experts say it also raises a far broader question of constitutional interpretation that bears on how and whether the Constitution protects a wide range of rights from state infringement. A finding that the Second Amendment protects individuals' right to own a gun could therefore have the unexpected outcome of also providing more solid ground for recognition of the right to abortion, to sexual privacy, to gay marriage, and to a wide variety of other rights that conservative justices on the court and "originalist" constitutional scholars have long opposed.

The issue in the Chicago case, as defined in the petition to the court, is "[w]hether the Second Amendment is incorporated into the Due Process Clause or the Privileges or Immunities Clause of the Fourteenth Amendment so as to be applicable to the States, thereby invalidating ordinances prohibiting possession of handguns in the home."

Illustration by: Matt Mahurin

The court's decision to take the case and consider whether the Second Amendment might be "incorporated" – applicable to the states – by the "privileges or immunities clause" of the Fourteenth Amendment suggests that the court is open to reconsidering a long line of cases dating back to 1873 that read that clause narrowly and thereby restricted the ability of the Fourteenth Amendment to protect fundamental rights. Although the Supreme Court has acknowledged many rights under the Fourteenth Amendment since then, it has done so based on the more tenuous argument that they're protected by the more limited "due process" clause, which says that the State shall not "deprive any person of life, liberty, or property, without due process of law". Lawyers and judges have at times resorted to complicated legal gymnastics to make the argument that a newly-recognized right falls under "substantive due process."

That argument has left those rights vulnerable to an increasingly aggressive attack by conservatives who claim judges are engaging in "judicial activism" by recognizing rights not specifically enumerated in the Constitution. The "privileges and immunities clause", which states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" has the potential to be read much more broadly.

The Privileges or Immunities Clause "was written to forbid state and local governments from trampling on the substantive fundamental rights of all Americans, thus securing the 'unalienable rights' to which the Declaration referred," argues David Gans, Director of the Constitutional Accountability Center's Human Rights, Civil Rights & Citizenship Program in a post at Balkinization.

Scholars from across the political spectrum appear to agree with him, and many joined in a brief submitted to the court in this case urging the justices to reverse the court's longstanding precedent. In a "friend-of-the-court" brief drafted by the Constitutional Accountability Center, six constitutional law professors urged the Supreme Court to review the Chicago case and restore the original meaning of the Fourteenth Amendment, as protecting all "privileges and immunities" not enumerated in the Constitution.

"In discussing the fundamental rights of citizenship, the framers regularly included a long list of fundamental rights – such as the right of access to the courts, the right to freedom of movement, the right to bodily integrity, and the right to have a family and direct the upbringing of one's children – that have no obvious textual basis in the Bill of Rights," says the brief. "These were core rights of personal liberty and personal security that belong to 'citizens of all free governments;' it did not matter that they were not enumerated elsewhere in the Constitution."

The libertarian Cato Institute and Institute for Justice similarly wrote in an amicus brief to the court: "the issue of the Second Amendment's 'incorporation' implicates not only the right to keep and bear arms – important enough by itself – but the larger debate over the origin, nature, and extent of all our natural rights and how the Constitution protects them."

While the language of the privileges and immunities clause seems clear, shortly after its adoption, in 1873, in a set of cases known as the Slaughterhouse Cases (affirming Louisiana's right to regulate

slaughterhouses), the Supreme Court narrowly read the Fourteenth Amendment to protect only "privileges or immunities" conferred by federal citizenship, not by state citizenship. It specifically did not limit the state's police powers, the court ruled. The effect of that ruling was to gut the "privileges or immunities" clause, scholars have argued, and it's led to serious questions and confusion over when and how states can regulate rights that are thought to be fundamental but are neither specifically conferred by the federal government nor mentioned in the constitution — often called "unenumerated" rights.

Whether the constitution protects such unenumerated rights remains one of the most hotly-debated matters of constitutional interpretation, and has sharply divided the conservative and liberal wings on the court. Justice Antonin Scalia, for example, has long criticized the notion that rights such as the right to an abortion or to privacy deserves protection by the U.S. Constitution. Although the Supreme Court has recognized some of these rights, based on its interpretation of the "due process clause" of the 14th Amendment, those cases have been increasingly attacked by the conservative members of the court, and by conservative scholars, as not being grounded in the original text of the Constitution.

"You have this assault on Roe [v. Wade] from the Right, claims of judicial activism from the right, saying judges shouldn't be doing this," explained Doug Kendall, President of the Constitutional Accountability Center. "There's been an aggressive assault on the entire idea that there is incorporation and that judges should have a role in protecting liberties," said Kendall, who organized the law professors' submission of their amicus brief. "That's fueled the conservative rise over the last 30 years in the courts." In response, "there's been a flowering of scholarship that goes back to the original debates and makes an overwhelming, compelling case for the proposition that the privileges or immunities clause was intended to protect a robust set of human and civil rights."

Constitutional scholars ranging from Akhil Reed Amar, a liberal law professor at Yale Law School, to Randy Barnett, a conservative libertarian at Georgetown University Law School, have argued in books and articles that the "privileges or immunities clause" means what it says – that the states cannot infringe on a broad range of unenumerated civil rights of citizens. As the constitutional law professors write in their brief to the Supreme Court, "the Slaughterhouse cases read the Privileges or Immunities clause so narrowly as to essentially read it out of the Amendment," but as Amar wrote in a 2001 Yale Law Review article the brief cites: "[v]irtually no serious modern scholar – left, right and center – thinks that this is a plausible reading of the Amendment."

Of course, if the court does decide to breathe new life into the privileges or immunities clause, it will ignite a new debate about what those rights are. But their defenders argue those rights are vast. The Ninth Amendment specifically says that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The privileges and immunities clause of the 14th Amendment, the constitutional scholars argue in their brief, "is the textual hook in the Fourteenth Amendment for protection of unenumerated fundamental rights, as well those substantive fundamental rights articulated in the Bill of Rights, including the Second Amendment right to keep and bear arms."

The law professors quote the 1866 report of the Joint Committee on Reconstruction, which interpreted the Privileges or Immunities Clause to "afford broad protections to substantive liberty, encompassing all 'fundamental' rights enjoyed by 'citizens of all free Governments': 'protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.'"

Because the Fourteenth Amendment was focused on giving newly freed slaves the rights of citizens, says Kendall, it focused on protecting "the rights of heart and home. Your ability to control your family, your children's education, reproductive choice and sexual intimacy."

Not that everyone agrees with that view. A group of legal historians, for instance, filed a brief with the Seventh Circuit Court of Appeals in the McDonald case arguing that Congress's intent in passing the Fourteenth Amendment was unclear. But until now, the Supreme Court has never agreed to hear a case that

directly raised this issue.

Even if the court wants to find that the Second Amendment's right to bear arms applies to the states, it might still sidestep the broader issue raised by this case and avoid overturning more than a hundred years' worth of precedent. Liberals have invoked the due process clause of the Fourteenth Amendment to argue for other fundamental rights, and the court could find the right to bear arms is similarly protected by the due process clause, rather than by the privileges and immunities clause. But even that would be a victory of sort for progressives, Kendall said.

"It would force Justice Scalia to utilize substantive due process" — an idea he has long criticized in the context of abortion and other controversial rights – "to achieve the results he wants in the guns case," said Kendall. "As long as the court finds incorporation" — that the Bill of Rights applies against the states — "it will provide a basis for undercutting Justice Scalia's argument against it."

For some conservatives, then, winning the right to carry a gun could turn out to by a Pyrrhic victory.