

SECOND AMENDMENT

Does the Fourteenth Amendment Protect the Second Amendment Right to Keep and Bear Arms Against Infringement by State and Local Governments?

CASE AT A GLANCE

Two years ago, the Supreme Court held that the Second Amendment precludes the federal government from banning the possession of handguns in the home. This case will determine whether the Fourteenth Amendment forbids state and local governments from enacting similar gun control regulations.

McDonald et al. v. City of Chicago et al.
Docket No. 08-1521

Argument Date: March 2, 2010
From: The Seventh Circuit

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ISSUES

Is the Second Amendment right to keep and bear arms incorporated in the Fourteenth Amendment's Privileges or Immunities Clause or in its Due Process Clause and thus made applicable to state and local governments?

FACTS

The City of Chicago forbids most of its residents from possessing a handgun. Two years ago, in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the U.S. Supreme Court held that a similar handgun ban violated the Second Amendment when imposed by federal law in Washington, D.C. This landmark Supreme Court decision was the first in history to strike down a law under the Second Amendment. Immediately after *Heller* was announced, several Chicago residents filed this lawsuit. They claimed that Chicago's law violates the Fourteenth Amendment, which they maintain makes the Second Amendment applicable to state and local governments.

Citing Seventh Circuit and Supreme Court precedents, the district court held that the Second Amendment right is protected against federal infringement only. The Seventh Circuit affirmed on the same ground, holding that it was bound by Supreme Court precedent. The Ninth Circuit had reached a contrary conclusion in *Nordyke v. King*, 563 F.3d 439 (9th Cir.), *reh'g en banc granted*, 575 F.3d 890 (2009). On September 30, 2009, the Supreme Court agreed to review the Seventh Circuit's decision.

CASE ANALYSIS

The Bill of Rights originally applied only to the federal government. With the adoption of the Fourteenth Amendment in 1868, the Constitution put new restrictions on the states, including the two limitations at issue in this case: "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."

In the *Slaughter House Cases*, 83 U.S. 36 (1873), the Supreme Court read the first provision narrowly, holding that it protects only those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." In three subsequent cases, *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), the Court found that the right to keep and bear arms (and other elements of the Bill of Rights as well) pre-existed the federal Constitution; accordingly, such rights were not protected by the Privileges or Immunities Clause.

Beginning in the late nineteenth century, the Supreme Court began making some of the rights listed in the Bill of Rights (but not others) applicable to the states under the Fourteenth Amendment's Due Process Clause. The theory underlying this process of "selective incorporation" is that the Due Process Clause imposes substantive limits on the government's discretion to interfere with "fundamental" rights. Most of the individual rights listed in the Bill of Rights have by now been incorporated through substantive due process, and a very few have been held to be insufficiently fundamental. The case now before the Court is the first in which the Justices have agreed to consider whether the Second Amendment right to arms is sufficiently fundamental to justify incorporating it under the doctrine of substantive due process.

Petitioners, with the support of several amici curiae, present detailed historical evidence about the original meaning of the Privileges or Immunities Clause. They conclude that this provision of the Constitution protects both (1) a broad array of natural rights, and (2) all of the individual rights listed in the Bill of Rights. Petitioners strongly urge the Court to overrule *Slaughter House*, *Cruikshank*, *Presser*, and *Miller*

v. Texas on the ground that all of these cases clearly and seriously misconstrued the Constitution.

One amicus brief, filed by the American Civil Rights Union, urges the Court to take a narrower approach: incorporating the Second Amendment right to arms under the Privileges or Immunities Clause, but leaving *Slaughter House* untouched. According to this argument, *Slaughter House* properly rejected the proposition that courts should find a broad array of natural rights protected by the Fourteenth Amendment but did not decide whether the rights specifically listed in the Bill of Rights are protected by the Privileges or Immunities Clause.

Petitioners also briefly argue that the Court's substantive due process precedents support incorporation of the Second Amendment. An amicus brief filed on behalf of majorities in both Houses of Congress offers a much more detailed analysis, based on history and case law. The congressional brief concludes that the right to arms is unquestionably "fundamental" in the sense given to that term by the Court's selective incorporation cases and emphasizes that deciding this case under the Due Process Clause would not require the Court to overrule any of its precedents.

Respondent City of Chicago argues that the Court's precedents foreclose incorporation under either the Privileges or Immunities Clause or the Due Process Clause. Chicago also argues that the historical record shows that the ratifiers of the Fourteenth Amendment had no reason to suspect either (1) that the new constitutional provision would make the Bill of Rights in general, or the Second Amendment in particular, applicable to the states, or (2) that the Fourteenth Amendment would cover a vast array of unenumerated natural rights. Rather, argues Chicago, the Fourteenth Amendment was generally understood to prohibit *discriminatory* infringements of certain rights, as, for example, the selective disarmament of the freed slaves by some southern states during Reconstruction. While acknowledging that there are some statements in the legislative history pointing in other directions, Chicago maintains that petitioners and their amici have not even come close to making the kind of conclusive interpretive argument that would justify overturning more than a century of settled precedents.

SIGNIFICANCE

Much of the argumentation in this case involves competing readings of the very complex legislative history of the Fourteenth Amendment. There is a fairly strong academic consensus that *Slaughter House* misconstrued the Privileges or Immunities Clause, but there is substantially less agreement on which of several competing interpretations—all with some support in the historical record—is correct.

If the Court decides to overrule *Slaughter House*, as petitioners vigorously argue it should, either five justices must agree on one of these alternative interpretations or the Court will issue a splintered rationale for its decision, potentially creating significant legal uncertainties. Either of these outcomes is possible, but both seem unlikely.

If the Court does overrule *Slaughter House* and also accepts petitioners' invitation to hold that the Privileges or Immunities Clause protects a broad and undefined array of natural rights, a great deal

of existing constitutional law will become unsettled. The courts will then face innumerable new challenges to well-established governmental regulations, many of which will involve politically controversial issues. The Roberts Court has thus far displayed no inclination to precipitate such revolutions in the law.

The Court could hold that the Privileges or Immunities Clause incorporates all of the individual rights listed in the Bill of Rights, but nothing more. While this would be considerably narrower than the sweeping revolution advocated by petitioners, it would still overturn prior decisions holding that some provisions of the Bill of Rights do not apply to the states. This particular reading of the Fourteenth Amendment has relatively weak support in the legislative history. It would, moreover, impose some significant new constraints on the state judicial systems, such as requiring them to use civil juries and criminal grand juries. It is difficult, though not impossible, to imagine that five justices would vote for this approach.

The position advocated by the City of Chicago, which would essentially preserve the status quo, is likely to be adopted by at least some of the justices who dissented in *Heller*. But it seems unlikely that any of the five members of the *Heller* majority (all of whom remain on the Court) will now decide that the right to possess a handgun in the home exists only in a few federal enclaves such as Washington, D.C.

A likelier outcome is a decision holding that the Second Amendment right to arms is protected under the doctrine of substantive due process. This step would not require the Court to overrule any of its precedents, and there is an abundance of language in prior cases that could easily be read to justify such a decision. The *Heller* opinion, moreover, contains some forceful dicta endorsing a wide range of legislative restrictions on the possession and use of firearms. For that reason, extending *Heller*'s Second Amendment approach to the states would not appear particularly radical.

Some justices from the *Heller* majority may regard the doctrine of substantive due process itself as an illegitimate judicial invention and may therefore write separately to endorse Second Amendment incorporation under the Privileges or Immunities Clause. It nonetheless seems likely that there will be at least five votes for imposing Second Amendment constraints on the states under substantive due process.

If this last position is adopted, thousands of gun control regulations throughout the nation will be subject to scrutiny under the Second Amendment, and future litigation will focus on working out the exact contours of the right. Although *Heller* identified some important regulations that the Court can be expected to uphold, a great many line-drawing questions will have to be resolved in future cases. Thus, for example, *Heller* endorsed bans on the carrying of concealed weapons but said nothing about carrying weapons openly. Similarly, *Heller* endorsed bans on carrying weapons in "sensitive places" but articulated no clear test for identifying such locations. State and local jurisdictions, moreover, frequently place onerous administrative obstacles in the path of those who desire to keep or carry firearms, and courts will surely face numerous challenges from citizens who claim that such obstacles impermissibly burden the underlying substantive right.



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