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HOW GUN LITIGATION CAN RESTORE ECONOMIC LIBERTIES

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A CENTRAL MISSION OF BOTH THE CATO INSTITUTE AND THE Institute for Justice has been restoration of rights to earn an honest living, make binding contracts, and enjoy private property. Regrettably, courts have routinely rubber-stamped legislative restrictions on economic liberties. Who would have imagined, however, that the Second Amendment—the right to keep and bear arms—could provide the battlefield on which to reinvigorate judicial review of economic regulations? Yet that might be the outcome in *McDonald v. Chicago*, a challenge to Chicago's gun laws, in which Cato and IJ filed a joint brief with the U.S. Supreme Court. Here's the story: how gun rights and economic liberties intersect.

First, the bad news. In 1873, five years after ratification of the Fourteenth Amendment, the Supreme Court upheld a Louisiana law that required all butchering of animals in New Orleans to be done by one private corporation—owned, of course, by politically connected businessmen.[1] Justice Samuel Miller, writing for a 5-4 majority in the *Slaughter-House Cases*, ruled that the law was a valid public health measure and did not violate the right of butchers "to exercise their trade."[2] Along the way, the Court effectively erased the Fourteenth Amendment's Privileges or Immunities Clause from the Constitution. According to Miller, that clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens"—protected only rights of national citizenship, such as access to navigable

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* Chairman, Cato Institute. The text of this article originally appeared in CATO POL'Y REP., Sept.–Oct. 2009, at 2.

[1] 83 U.S. 36 (1873).

[2] *Id.* at 60.

waterways, not the right to earn a living in a marketplace free of state-chartered monopolies.[3]

Without the Privileges or Immunities Clause, courts turned to other provisions of the Constitution—notably the Due Process Clause of the Fourteenth Amendment—to defend rights from government encroachment. But that doctrine, known as substantive due process, rests on shaky ground. Appellate judge Frank Easterbrook put it this way: "[W]e have spent some time looking through the Constitution for the . . . 'due substance' clause [but the] word that follows 'due' is 'process.'"[4] In other words, the Due Process Clause is better suited to guaranteeing procedural rather than substantive rights.

Fast forward to the New Deal. That's when use of substantive due process to secure economic liberties came to a crashing halt. A mere footnote in *United States v. Carolene Products Co.*,[5] did much of the damage. *Carolene* validated a ban on interstate shipment of "filled milk"—a healthful variety of evaporated milk that threatened vested interests in the dairy industry. The Court, in its infamous footnote four, declared that only those rights specifically enumerated in the Bill of Rights, plus selected rights associated with the political process (e.g., voting) or with protection of minorities, would be judicially safeguarded.[6] The innumerable remainder of our rights, including the right to pursue an honest occupation, would be vindicated or not, at the pleasure of the legislature. Essentially, no legislative infringement of economic liberties, however egregious, would be subject to meaningful constitutional review by the courts.

That's roughly where things stood until June of last year when the Supreme Court in *District of Columbia v. Heller* overturned Washington, D.C.'s, gun ban on constitutional grounds.[7] And that brings us to the good news.

Because *Heller* affirmed that individuals, not just militia members, have a right to bear arms, the Court will now have to decide whether the Second Amendment can be enforced against state governments. Washington, D.C., is not a state; it is a federal enclave where Congress exercises plenary legislative power. Until the Fourteenth Amendment was ratified, the Bill of Rights applied only to the federal government,

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3 *Id.* at 74–80.
4 Nat'l Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124, 1129 (7th Cir. 1995).
5 304 U.S. 144 (1938).
6 *Id.* at 152 n.4.
7 128 S. Ct. 2783 (2008).

not to states. Indeed, in two post-ratification cases—*United States v. Cruikshank*[8] and *Presser v. Illinois*[9]—the Supreme Court reiterated that the Second Amendment did not bind the states. But then, beginning in 1897, in a series of so-called incorporation cases, the Court held that the Due Process Clause of the Fourteenth Amendment was intended to "incorporate" most of the Bill of Rights in order to hold state governments accountable for violations.[10] Interestingly, however, the Court has never ruled that the Second Amendment has been incorporated.

We should know fairly soon where the Supreme Court stands. In a June 2009 case, *McDonald v. Chicago*, the U.S. Court of Appeals for the Seventh Circuit denied incorporation of the Second Amendment, stating that *Cruikshank* and *Presser* govern unless and until the Supreme Court holds otherwise.[11] Two months earlier, in *Nordyke v. King*,[12] a three-judge panel of the Ninth Circuit had unanimously ruled that the Supreme Court's incorporation cases superseded *Cruikshank* and *Presser*. Therefore, said the panel, the Second Amendment applied to the states through the Due Process Clause.[13] The Ninth Circuit decision will be reconsidered, however, by a larger contingent of 11 judges.[14]

In the end, the Second Amendment will very likely constrain state governments as well as the national government. The dual criteria under substantive due process are whether the right is implicit in our Anglo-American system of ordered liberty or deeply rooted in our nation's history and tradition. The Second Amendment surely qualifies. Perhaps the more interesting question is whether the Court will expand its selective incorporation via the Due Process Clause, or overturn *Slaughter-House*, as Cato and IJ argue in their brief, and declare that the right to keep and bear arms is one of the privileges or immunities of U.S. citizenship that—along with many other liberties, ultimately including economic liberties—may not be abridged by the states.

Justice Clarence Thomas, for one, has declared that he would be

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8 92 U.S. 542 (1875).

9 116 U.S. 252 (1886).

10 *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 147–50 (1968).

11 Nat'l Rifle Ass'n of America, Inc. v. Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. Chicago, 130 S. Ct. 48 (Sept. 30, 2009) (No. 08-1521).

12 563 F.3d 439 (9th Cir. 2009).

13 *Id.* at 457.

14 Nordyke v. King, 575 F.3d 890 (9th Cir. 2009) ("Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc . . . . The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.").

open to reevaluating the meaning of the Privileges or Immunities Clause "in an appropriate case."[15] *McDonald v. Chicago* may be that case. Harvard law professor Laurence Tribe, a liberal icon, writes that "the *Slaughter-House Cases* incorrectly gutted the Privileges or Immunities Clause."[16] Yale law professor Akhil Amar agrees: "Virtually no serious modern scholar—left, right, and center—thinks that [Slaughter-House] is a plausible reading of the [Fourteenth] Amendment."[17]

It's time for the Supreme Court to restore full status to economic liberty. The Constitution demands no less.

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15 Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting).

16 Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995); *see also* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7.2–7.4 (3d ed. 2000).

17 Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).