

CHAINING THE  
SECOND AMENDMENT  
IN CHICAGO:

# What Good Is An Individual Right If Your State Won't Enforce It?



Should state and local governments be allowed to ban handguns? Yes, says the U.S. Court of Appeals for the 7th Circuit, because it is important that governments be able to prohibit self-defense.

by DAVE KOPEL

Already the National Rifle Association has asked the United States Supreme Court to review the case in order to issue a definitive ruling about whether state and local governments must obey the Second Amendment.

Last year, the Supreme Court's decision in *District of Columbia v. Heller* said that the Second Amendment protects a broad individual right (not militia-only), and that the core of the right includes the possession of a handgun in the home for self-defense. Like all of the amendments in the Bill of Rights, the Second Amendment is a direct limit on actions of the federal government, including subordinate entities, such as the D.C. City Council, whose powers are only those delegated by Congress.

Most, but not all, provisions of the Bill of Rights have been made applicable to the states via the 14th Amendment, which was ratified in 1868, and which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The due process provision applies to local governments as well, since their powers come from state governments, and it has been interpreted to mean that states may not violate essential liberties. Supreme Court decisions have ruled that most of the Bill of Rights is "incorporated" into the 14th Amendment via the doctrine of "substantive due process."

The high court has never ruled on whether the Second Amendment is incorporated. Earlier this year, however, the U.S. Court of Appeals for the 9th Circuit, which covers the nine westernmost states, held that the Second Amendment is incorporated into the 14th, and therefore state and local governments in the 9th Circuit must not violate the Right to Keep and Bear Arms.

In early June, the 7th Circuit (which covers Illinois, Indiana and Wisconsin) ruled the opposite way. The case was *National Rifle Association v. City of Chicago & Village of Oak Park*. That case was filed the day after the *Heller* decision was announced. Chicago and its suburb of Oak Park are the only municipalities in the United States that still have total handgun bans.

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The 7th Circuit claimed that it was foreclosed from considering 14th Amendment due process incorporation because of three Supreme Court cases from the 19th century: *United States v. Cruikshank*, *Presser v. Illinois* and *Miller v. Texas*. However, those cases only involved the direct application of the Second Amendment to the states. None of them addressed the question of whether the 14th Amendment's due process clause makes the Second Amendment enforceable against the states.

The 7th Circuit put enormous weight on the principle that lower courts should not presume that a still-valid Supreme Court precedent is going to be overruled. As an illustration, the 7th Circuit pointed to the history of the 1997 Supreme Court decision in *State Oil Co. v. Khan*, which overruled the 1968 Supreme Court decision *Albrecht v. Herald Co.* In *Albrecht*, the court had interpreted section 1 of the Sherman Antitrust Act, which forbids "Every contract, combination ... or conspiracy, in restraint of trade," to mean that manufacturers are forbidden to set maximum prices that their retailers can charge. (This is called "vertical price fixing.") By 1996, economists had proven—and several Supreme Court cases had seemed to agree—that *Albrecht's* rationale was entirely wrong. Yet *Albrecht* had not been overruled, and so the 7th Circuit obeyed it.

When the Supreme Court in *State Oil Co. v. Khan* overruled *Albrecht* in 1997, the Supreme Court praised the 7th Circuit for having adhered to *Albrecht*, since *Albrecht* had not yet been overruled, even though almost everyone had correctly predicted that its days were numbered.

In the handgun ban cases, the 7th Circuit congratulates itself for its treatment of *Albrecht*, and says that a similar approach is required on the question of whether states must respect the Right to Keep and Bear Arms.

The 7th Circuit's claim, however, is founded on a rather obvious logical error. *Albrecht's* 1968 judicial rule against vertical price fixing was an

interpretation of one phrase in one federal statute, and the 1997 *State Oil* case was a reinterpretation of that very same phrase. However, the plaintiffs in *NRA v. Chicago* were asking the court to rule on a constitutional provision that none of the 19th century cases had addressed.

The 19th century cases had decided that the Second Amendment does not, by its own force, apply to the states, and that the right to arms is not protected by the "privileges or immunities" clause of the 14th Amendment. However, none of the three cases involved a decision about incorporation under the "due process" clause.

Contrary to what the 7th Circuit implied, the fact that the Supreme Court rejects a claim based on one constitutional clause does not prevent a lower court from ruling in favor of a claim based on a separate constitutional clause. For example, if a local government does something concerning religion, and the Supreme Court rules that the government action does not violate the First Amendment clause which forbids a government "establishment of religion," then the plaintiff can file another lawsuit alleging that the very same government action violates the separate clause in the First Amendment that forbids "prohibiting the free exercise" of religion.

Unfortunately, the 7th Circuit's decision was a foregone conclusion once the three-judge panel was picked. Chief Judge Frank Easterbrook and Judge Richard Posner have well-deserved reputations for seriousness of thought and outstanding writing.

But they have equally well-deserved reputations as statist who are generally hostile to individual rights.

Indeed, Posner penned an article last summer in *The New Republic* that castigated the *Heller* decision and expressed his own preference for a "thin Constitution." Actually, an "emaciated Constitution" would have been the more accurate term for Posner's view that if there is an ambiguity in a constitutional provision, the provision should be interpreted in favor of the government and against individual liberty.

At the November 2008 annual meeting of the Federalist Society in Washington, D.C., Posner announced that over the course of American history, the Supreme Court has found dozens of federal laws to be unconstitutional, but Posner would have upheld all but one of those laws.

The third judge, William Bauer, had written the 1982 decision upholding a local handgun ban in *Quilici v. Morton Grove*. More recently, he had repeatedly cast aside federal privacy laws in order to rule in favor of Chicago Mayor Richard Daley's efforts to obtain private data about firearm owners from the

Bureau of Alcohol, Tobacco, Firearms and Explosives, to support Daley's abusive lawsuit against firearm companies. Daley finally lost when Congress passed legislation further strengthening the privacy laws.

It was an impressively lucky trifecta for gun-ban advocates to get such a three-judge panel, considering that panels are supposed to be randomly selected.

Judge Easterbrook's opinion did much more than adhere (ostensibly) to Supreme Court

precedent. The opinion also argued that the current Supreme Court should reject Second Amendment incorporation.

One reason was that "Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon."

That's nonsense. The case was about home possession, not carrying, and it was not about any "particular" arm, but about a comprehensive ban on all handguns.

More generally, federalism is an excellent political principle and, as an American tradition, it is as old as the Constitution and the Articles of Confederation. But the right to arms is far older, pre-dating any form of government. It is, as *Heller* stated, an "inherent" and "natural" right. As *Cruikshank* said in 1875, and *Heller* explicitly affirmed in 2008, the right to arms was already in existence before the Constitution was written. Indeed, *Cruikshank* observed that the right to arms "is found wherever civilization exists."

Judges Easterbrook, Posner and Bauer, however, warned that handgun prohibition must be allowed so that self-defense could be banned: "Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the Second Amendment protects only the interests of law-abiding citizens ... Our hypothetical is not as far-fetched as it sounds."

The day after the 7th Circuit ruled against the Second Amendment, NRA attorney Stephen Halbrook filed an appeal to the U.S. Supreme Court. The Supreme Court will decide this fall whether to hear *NRA v. Chicago*. While it is too early to predict the outcome, it is time that our nation's highest court address this issue involving one of our most fundamental rights.

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