Progressives vs. "Progressive Originalism"

Damon W. Root | January 26, 2011

The Constitutional Accountability Center (CAC) is a liberal think tank and law firm "dedicated to fulfilling the progressive promise of our Constitution's text and history." That might sound like a recipe for predictable left-wing politics, but in fact CAC surprised many observers by supporting libertarian attorney Alan Gura in his two successful Supreme Court challenges on behalf of the Second Amendment. In the most recent of those cases, last year's McDonald v. Chicago, the CAC assembled an all-star group of liberal, conservative, and libertarian legal scholars who submitted a friend of the court brief championing Gura's argument that the Privileges or Immunities Clause of the 14th Amendment requires Chicago (and all other local and state governments) to respect the Second Amendment. Contrast that with Chicago's repeated assertions that it could ignore the Second Amendment entirely in the name of gun control. So the CAC has clearly proven itself a principled liberal organization willing to cross partisan lines.

Unfortunately, not everyone on the left appreciates such consistency. Over at his superb legal affairs blog, the Harlan Institute's Josh Blackman highlights a major new article from NAACP Legal Defense Fund attorney Dale Ho that warns the left against adopting CAC-style "progressive originalism." Here's a snippet from Ho's article "Dodging a Bullet":

Although progressive originalists have made valuable contributions to constitutional discourse, McDonald illustrates that a conscious decision by progressives to adopt the language of originalism wholesale is unlikely to be a winning strategy in the long-term. More than any other area of constitutional law, the Court's Fourteenth Amendment jurisprudence demonstrates the tremendous value of modes of interpretation other than originalism. Progressives should not shy away from a tradition of constitutional interpretation that has produced the finest moments in the Court's history.

What's Ho so afraid of? Judicial protection of economic liberty, for one thing:

An originalist understanding of the Privileges or Immunities Clause could raise the specter of Lochner, by providing conservatives with a new weapon to strike down economic regulations as an infringement upon freedom of contract.

It certainly could. More importantly, it should—at least if we care about following the text and history of the Constitution. Sadly, Ho's results-oriented approach has some very powerful allies on the bench, including "faint-hearted" originalist Justice Antonin Scalia. As I explain in "Conservatives v. Libertarians," Scalia has long rejected the idea that the 14th Amendment protects economic rights. Speaking at a Cato Institute conference on this very topic in 1984, for example, Scalia told the audience, "in my view the position the Supreme Court has arrived at is good, or at least the suggestion that it change its position is even worse." That view reappeared during oral arguments in the McDonald case, where Scalia openly mocked Alan Gura for seeking to revive the Privileges or

Immunities Clause. “What you argue is the darling of the professioriate, for sure,” Scalia quipped.

To put all of that in a different, more depressing way, consider this: Justice Antonin Scalia and the NAACP Legal Defense Fund—two very powerful forces in American law—are in perfect agreement that we should ignore the Privileges or Immunities Clause entirely lest the courts end up protecting economic liberty.