bench memos

Tuesday, March 02, 2010

Supreme Court Misfires on *McDonald* Argument

In 1861, America began a war to end slavery. Shortly thereafter, we began another battle — Reconstruction — to end the incidents of slavery, culminating in the ratification of the Thirteen, Fourteenth, and Fifteenth Amendments. But from today's arguments in *McDonald v. City of Chicago*, you would never know any of that had ever occurred, let alone that the Fourteenth Amendment — including specifically its Privileges or Immunities Clause — was enacted for the specific purpose of putting an end to a Southern tyranny that included the systematic disarmament of newly free blacks and their white supporters in order to keep them in a state of servile terror.

McDonald involves a challenge to Chicago's decades-old handgun ban, which has shown itself to be no more effective at limiting violent crime than the one struck down by the Supreme Court two years ago in *District of Columbia v. Heller*. But it appears that any similarity between the two cases may end there.

Heller, in which I was co-counsel to the plaintiffs, was a milestone case because it represented the Supreme Court's first serious look at the question of gun rights, specifically whether the Second Amendment protects an individual's right to keep handguns at home for lawful self-defense. The Court correctly said yes to that question, rejecting the nonsensical idea that the Second Amendment only protects some sort of "collective" right on the part of states to arm their own militias. Notably, both Justice Scalia's majority opinion and the principal dissent authored by Justice Stevens were couched in overtly originalist terms. In other words, although the justices split 5–4 on the outcome of the case, all nine seemed to agree that their interpretation of the Second Amendment should be guided by an appreciation of the relevant historical context. And while the two sides disagreed significantly about key aspects of that history (including the prevalence of gun regulation during the Founding era), they certainly paid meticulous attention to it.

And that is where this morning's arguments in *McDonald* present such a jarring contrast to the justices' reasoning in *Heller*.

McDonald presents two questions, one easy and one a bit more difficult. The easy

question is whether the right to keep and bear arms applies not just to the federal government, which was the issue in *Heller*, but to state and local governments as well. The answer is yes, undoubtedly. The harder question is how.

#more#Unlike the federal government, states are not directly bound by the Bill of Rights. Instead, state and local governments are bound by the Fourteenth Amendment, which requires them to ensure that all people receive both due process and equal protection of the laws and forbids them from abridging "the privileges or immunities of citizens of the United States." Over the years, the Supreme Court has "incorporated" nearly all of the two-dozen or so discrete provisions in the Bill of Rights against the states, but it has done so through a controversial doctrine called "substantive due process." Lawyers for the would-be gun owners in *McDonald* argued, correctly, that a more originalist approach would be to take a fresh look at the text, history, and original public meaning of the Fourteenth Amendment and conclude, as have virtually all modern scholars and practitioners familiar with the issue, that the right to keep and bear arms is protected first and foremost by the Privileges or Immunities Clause — not the modern doctrine of substantive due process.

Powerful support for that approach comes not just from the congressional debates over the adoption of the Fourteenth Amendment and the extensive coverage those debates received in leading periodicals, but also from the abundant historical evidence about what prompted Congress to propose the Fourteenth Amendment in the first place. Simply put, it was the tyranny of Southern states and their brazen attempt to keep blacks in a state of constructive servitude while terrorizing anyone who presumed to stand in the way. The legislative record contains extensive reports of forced disarmaments and lynchings, often at the hands of militias and other officials acting under color of state law. Reconstruction Republicans were outraged by that conduct, as was the public. As a result, few (if any) rights were mentioned as regularly in connection with the Fourteenth Amendment as the right to keep and bear arms.

That history is stark, undisputed, and, if today's arguments are any indication, seemingly irrelevant to the Court's decision whether the Fourteenth Amendment protects the right to keep and bear arms. If so, that's a tragedy. Correction: the continuation of a tragedy.

— Clark Neily is a senior attorney with the Institute for Justice and was one of three attorneys who litigated on behalf of gun owners in District of Columbia v. Heller.

03/02 03:46 PM Share

A Tale of Two Editorials [Roger Pilon]

It's a rare day when the *New York Times* gets something right editorially while the *Wall Street Journal* gets it wrong — and on gun rights, no less. Yet that was the case today, when the Supreme Court heard oral arguments in *McDonald v. Chicago*, a challenge to Chicago's draconian gun-control law.

Not surprisingly, the *Times* opens with a shot against the Court's 2008 decision in *Heller v. District of Columbia*, which found for the first time that the Second Amendment protects an *individual's* right to keep and bear arms, quite apart from whether he's a member of a militia. The next step, at issue in *McDonald*, is whether that right was good not simply against the federal government (*Heller* decided that) but against states and municipalities as well. Both the *Times* and the *Journal* argue, correctly, that the Bill of Rights should apply against the states, and that's how the Court will likely rule. The difference is on the grounds for so ruling, and it's not a trivial matter.

The *Times* reviews very briefly the history that gives rise to that issue. In a nutshell, and filling in some blanks, the Bill of Rights applied originally only against the federal government (which is why slavery could exist under the original Constitution). With the ratification of the Fourteenth Amendment in 1868, however, U.S. citizenship was defined and elevated over state citizenship, and states were prohibited from abridging the privileges or immunities of citizens of the United States, from depriving any person of life, liberty, or property without due process of law, and from denying any person

within their jurisdiction of the equal protection of the laws. But five years later, in the infamous *Slaughterhouse Cases*, the Court eviscerated the Privileges or Immunities Clause, which was meant to be the principal font of substantive rights under the amendment. Thereafter the Court would gradually "incorporate" various provisions of the Bill of Rights under the less substantive Due Process Clause — an uneven and sometimes mischievous process, the Court finding "rights," from time to time, nowhere to be found in the Constitution. That's the "substantive due process" against which conservatives have often railed over the years, often rightly so, as part of their larger assault on "judicial activism."

Well the *Times* editorialists recognize that history and recognize also that scholars have long criticized the *Slaughterhouse* decision. Accordingly, they call on the Court to rectify its mistake of 1873 and to base its decision in *McDonald* on the Privileges or Immunities Clause. If the Court did, that "would be truer to the intent of the [framers of the Fourteenth Amendment], and it could open the door to a more robust constitutional jurisprudence that would be more protective of individual rights."

And that, precisely, is what concerns the editorialists at the *Journal*. They too review the history — more fully than does the *Times* — but argue that the Court should ground its decision on the Fourteenth Amendment's Due Process Clause. What they fear is that reviving the Privileges or Immunities Clause might lead to more judicial activism. But they offer no reason to believe that — which is all the more surprising since those of us who have long urged the Court to reverse *Slaughterhouse* and revive the Privileges or Immunities Clause have done so precisely to check that abuse.

As the *Times* rightly implies, the Due Process Clause has been the wrong clause all along for deciding most Fourteenth Amendment cases. Those cases should have been decided under the more substantive Privileges or Immunities Clause, the history of which would have better informed the Court and, accordingly, better checked the Court's occasional activism. It's less than clear, however, whether the editorialists at the *Times* appreciate that final point. Indeed, when they write, as just noted, that respecting the intent of the Fourteenth Amendment's framers "could open the door to a more robust constitutional jurisprudence that would be more protective of individual rights," flags go up. But if the Court did correct its mistake, the issue would then turn on what those framers meant by "privileges or immunities of citizens of the United States." And on that question there is a rich and fairly clear historical record, unlike with the much less definite idea of "substantive due process," the ground recommended by the *Journal*'s editorialists.

It appears, in short, that the *Journal*'s understandable concern to check judicial activism has led it to ignore the better check and, ironically, to leave the *Slaughterhouse* decision, the source of the problem, uncorrected. The irony is that that decision was a paradigmatic example of judicial activism, of a Court ignoring the law. Were the Court today to perpetuate that mistake, in a case that is primed for correcting it, that would amount to one more activist decision. After all, the text is there, staring the Court in the face. Yet the *Journal* urges the Court to ignore it. That's the very mark of judicial activism.

— Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

03/02 03:02 PM Share