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The Second Amendment and the States

In oral argument yesterday, the Justices seemed afraid of the plain language of the Constitution.

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Imagine you are a visitor from another planet reading the U.S. Constitution. You come to the 14th Amendment, where it says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Might you not think this must be a pretty important provision?

Now suppose you are told that, for over 135 years, the Supreme Court has, with one exception, entirely ignored that language. Might you question whether Supreme Court justices were bound by the written Constitution? Had you been seated in the Supreme Court yesterday to hear oral arguments in *McDonald v. Chicago*, your suspicions might well have been confirmed.

McDonald is a constitutional challenge to a ban on handguns in the City of Chicago that resembles the gun ban in the District of Columbia that the Supreme Court struck down two years ago. In *D.C. v. Heller*, the Court held that banning all handguns violated an individual right to right to keep and bear arms protected by the Second Amendment. Because the Second Amendment only applies directly to the federal government, however, *Heller* was just the first shoe to drop. The next question was whether the individual right to arms also applies to the states.

Since the 1890s, the Supreme Court has been "selectively incorporating" the Bill of Rights piecemeal into the 14th Amendment via that amendment's Due Process Clause. So that would be the most obvious way to apply the right to keep and bear arms to the states. But that poses a challenge.

The Due Process Clause reads: "nor shall any state deprive any person of life, liberty, or property, without due process of law." Using this language to protect substantive rights has long been controversial.

First of all, "due process" sounds procedural not substantive. The Court has also used "substantive due process" to protect unenumerated rights it deems to be fundamental, such as the right to privacy. Just where in the text of the Due Process Clause is this right? For this reason, "due process" has long been criticized by conservatives as a route to unfettered judicial discretion.

But what about the clause protecting the "privileges or immunities of citizens of the United States"? The language was made part of the 14th Amendment (adopted in 1868) to deal with the problem of Southern states egregiously violating the rights of freed black slaves and white unionists—including disarming returning soldiers and any other blacks who sought to protect themselves from the terrorist violence being unleashed against them. Actually, the right to keep and bear arms was among the most frequently mentioned privilege of citizens when the amendment was being considered in Congress.

The evidence is clear that the privileges or immunities of citizens included those rights in the Bill of Rights. As Michigan's Sen. Jacob Howard explained to the Senate, these privileges or immunities included, among others, "the personal rights guarantied and secured by the first eight amendments of the Constitution; such as . . . the right to keep and to bear arms."

In contrast, no one thought the language of the Due Process Clause included a right to arms. On this point there is consensus among constitutional scholars whether left, right or libertarian. Nevertheless, in the 1873 Slaughter-House Cases, the Reconstruction-era Supreme Court essentially eliminated the Privileges or Immunities Clause from the Constitution by holding it only protected purely national rights, like the right to be protected while on the high seas. Since then, other than a case involving a right to interstate travel, the Court has never used the Privileges or Immunities Clause.

Judging by yesterday's oral argument, the Supreme Court is afraid to revisit that 1873 decision for fear of opening a can of worms. Chief Justice John Roberts began the questioning by invoking the heavy burden on anyone seeking to reverse Slaughter-House. Justice Antonin Scalia referred to the Privileges or Immunities Clause as the "darling of the professoriate," a reference not intended as a compliment.

Noticeably absent was any question—not one—by any justice challenging the historical evidence that the right to keep and bear arms was among those included in the Privileges or Immunities Clause. For that matter, no justice seemed at all interested in the original meaning of any aspect of the 14th Amendment. (As is his practice, Justice Clarence Thomas, the one justice who has expressed sympathy for reviving the Privileges or Immunities Clause, asked no questions.)

So what did the justices discuss? In a revealing early question, Justice Scalia asked whether it isn't "easier" just to use the Due Process Clause.

What followed was nearly an hour-long discussion between the Court and lawyers about whether or not a right to arms was "implicit in the concept of ordered liberty" and whether something else should be the test of whether a right is "fundamental." Should rights spelled out in the Constitution's text be treated differently from unenumerated ones? How much of the right to keep and bear arms is applicable to the states? The entire colloquy was unmoored from the text and history of the 14th Amendment.

In other words, the justices became lost amid their own formulations, demonstrating by their wandering discussion that using substantive due process as a way of deciding what rights in the Bill of Rights get protection against the states ("incorporated") is really, really hard. Not only do they have to decide, all on their own, what is in or out, they also have to adopt the criteria by which to make this decision.

In response, Justice Scalia insisted that the right to keep and bear arms is right there in the text, which of course is true. But so too is the Privileges or Immunities Clause, which, unlike the Court's due process jurisprudence, has a historical meaning that helps define and limit the rights it was meant to protect.

For example, apart from personal liberties in the Bill of Rights, we know that the Civil War-era congressional Republicans were trying to constitutionally protect the rights enumerated in their Civil Rights Bill of 1866. This legislation listed the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." Yet these are now considered "economic" liberties, which the Court has been loath to protect since the New Deal. This may also explain why yesterday it wanted to ignore text and history.

At the *McDonald* argument, it seemed obvious that five or more justices will vote to apply the

Second Amendment to the states. This would be a great victory for gun rights—one that until a few years ago would have been unimaginable. But it was also obvious that most were deeply afraid of following a text whose original meaning might lead them where they do not want to go. When it came to following the written Constitution, a visitor from another planet would not, I suspect, have been very impressed.

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