THE ORANGE COUNTY BETA REGISTER

Editorial: Supremes ready to rumble?

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In the wake of the Supreme Court's decision in the *Citizens United*, or "Hillary the Movie," case to overturn two precedents and invalidate portions of the McCain-Feingold campaign finance regulation, observers are wondering whether the court is about to embark on a more aggressive, assertive course. Certainly the *Citizens United* case showed a degree of – depending on your viewpoint – either judicial activism or more aggressive defense of constitutional rights.

Citizens United, a conservative group that produced a documentary critical of Hillary Clinton while she was a Democratic presidential candidate in 2008 and tried to market it through the On Demand feature of cable TV systems, originally framed its case rather narrowly. The group argued that it wasn't covered by a provision of the McCain-Feingold law that forbade electioneering by corporations in the period immediately preceding an election. But the court in June asked the two sides to write new briefs covering broader issues and to argue the case again. The court's 5-4 decision issued Thursday reached the constitutional issue of freedom of speech and defended it.

So is the Roberts court about to embark on a bolder course, despite Chief Justice John Roberts' declaration during his 2005 confirmation hearings of his devotion to the doctrine of *stare decisis*, meaning previous court decisions should be left in place in the interest of having predictable law? A couple of pending cases might help us discern a pattern, if there is one.

Most observers expect a challenge to the congressional ban on large "soft money" campaign contributions, filed right after the November 2008 elections, to reach the high court eventually.

Before that, however, the case of *McDonald v. Chicago* should provide an idea about how aggressive the high court will be in enforcing individual rights.

Over the years, beginning in 1897, the high court has interpreted the due-process clause of the 14th Amendment as "incorporating" most of the freedoms embodied in the Bill of Rights against the states, meaning the states cannot trespass on free speech and other rights. But the high court has never ruled that the Second Amendment, which protects the right to keep and bear arms, was incorporated so as to prevent states from violating it. Indeed, until *District of Columbia v. Heller*, the 2008 ruling striking down the District of Columbia's gun ban, the court had never ruled that the right to keep and bear arms was an individual right rather than a collective right.

McDonald v. Chicago challenges Chicago's restrictive gun laws on Second Amendment grounds. The Seventh U.S. Circuit appellate court denied incorporation. In a separate case the San Francisco-based Ninth Circuit court affirmed that gun ownership is an individual right that states may not restrict unduly. So the Supreme Court has to settle the dispute between the lower courts.

Roger Pilon of the libertarian Cato Institute told us it could be even more interesting if the high court incorporates the Second amendment through the "privileges or immunities" clause of the 14th Amendment. In the 1873 *Slaughterhouse Cases*, the court ruled that the clause did not prevent the state of Louisiana from requiring all animals to be butchered at one slaughterhouse (owned by politically connected businessmen). This gutting of the "privileges or immunities" clause, which potentially covers a range of individual rights, has been widely criticized, but it still stands.

If the court revives privileges or immunities, that would be a bold step, indeed – and a welcome one.

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