Would Chicago Gun Rights Case Destroy Federalism?

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-By Warner Todd Huston

For the Family Research Council, Ken Blackwell and Ken Klukowski warned in a Washington Times op ed that a case on gun rights that will soon come before the Supreme Court could "trigger the unhinging of American culture." Not only do I think the pair went too far in their claim, I also think they missed several key reasons why their worst fear of the end of state's rights and federalism is misplaced, even as their warning is well taken.

What Blackwell and Klukowski are worried about is that the upcoming McDonald v City of Chicago case could open a "Pandora's box" of federal overreach to the point where any federal judge could override any state law and claim that it violates the Constitution's Privileges or Immunities Clause. The two feel that if this challenge succeeds it could "completely change American culture, with the court having a new basis upon which to declare constitutional rights to abortion, same-sex marriage, obscene material or a child's 'right' to a public-school education over his parents' objections."

The case is centered upon the legality of the City of Chicago to regulate away the rights of its citizens to own firearms and store them in their own homes. Of course anyone that cares about the Constitution should want McDonald to beat the City of Chicago and force the city to recognize its citizen's 2nd Amendment rights to self-protection. But, the op ed warns that they way the McDonald lawyers are going about their challenge to Chicago could lead to undesired consequences.

The key to the pair's point is the 1873 Slaughterhouse cases where some Louisiana butchers tried to get the federal courts to strike down Louisiana State slaughterhouse regulations. The butchers lost their bid at the Supreme Court. This outcome in 1873, the pair think, was a good thing.

> Had the court accepted the butchers' argument and struck down the Louisiana law, federal courts would have the power to declare anything they want to be a right of U.S. citizenship and strike down any state or local law they don't like.

They go on to warn that if this is overturned in McDonald, "then federal judges could use the Privileges or Immunities Clause to challenge state and local labor laws, commercial laws, employment laws and business regulations across the country."

First off, let me say that I understand their fear. We have for the last 100 years or more seen activist courts that have strayed from the realm of reading the law to inventing it out of whole cloth from the bench. From the false doctrine of "penumbras," to the assumption that abortion is a right, to bussing, and more we've seen federal judges make up the law out of their rear-ends instead of deciding cases based on the written law. It has only been over the last few years that we've started getting Justices that care a whit about original intent of the law, the best Republican legacy we have to date.

So, when the two Kens worry that a new interpretation of the Privileges or Immunities Clause could portend an ill wind coming, I can sympathize with their fears. Anything that gives left-wing activists on the bench more room to steal power from the states is a bad, bad thing.

But here's the deal. If that were to happen, if the Privileges or Immunities Clause were to suddenly be stretched to include just any old thing that a federal judge feels like using it for, it would be an entirely new direction never before taken. In other words, the pair have no reason to assume that this case will suddenly give federal judges license to gather more power unto themselves. The clause has never been thought of that way and there is no reason to expect that this case must change that. And, in fact, we don't even need the P & I clause overturned to give activist left-wing judges more excuses to destroy our system. They've been doing just fine without it.

Anyway, the P & I clause is not a license for federal power. As Illya Shapiro of the CATO Institute says:

> Neither the Privileges or Immunities Clause nor any other part of the Fourteenth Amendment empowers judges to impose their policy views. Instead, "privileges or immunities" was a term of art in 1868 (the year the Fourteenth Amendment was ratified) referring to a specific set of common law, pre-existing rights, including the right to keep and bear arms. The Privileges or Immunities Clause is thus no more a blank check for judges to impose their will than the Due Process Clause — the exact vehicle the Kens would use to "incorporate" the Second Amendment.

But there is another aspect of the whole discussion of out-of-control judges that I don't see discussed nearly enough and that is impeachment, removal from the bench and/or public pressure on judges.

There is absolutely no reason for we, the people, to sit about meekly accepting the often anti-American pronouncements of these left-wing

judges. We have the power to remove them despite that they've been given life-time tenure. Further, we always have the legislative option of *ignoring them*. As President Andrew Jackson so famously put it when he ignored a ruling of his own Supreme Court, "they have made their decision, now let them enforce it." By this, Jackson was recognizing the simple fact that the courts really don't have any way to enforce rulings unless we acquiesce to them.

Why the legislatures on both the federal and state level don't at least threaten to remove these out of touch, activist judges is a mystery to me as they do have the power in certain instances to do it and this threat could serve as a leash on judicial overreach if only it were used.

Don't get me wrong, I wouldn't want it to go so far as to threaten the autonomy of all judges, but on the other hand the free reign these people get to destroy our culture and traditions has been nearly as destructive as would a judiciary afraid of its own shadow! A happy medium of judges that have a free hand but understand that they, too, will face consequences for their decisions is warranted in this age of judicial activism.

So, while the two Kens are a bit hyperbolic in their Washington Times op ed, their fears shouldn't be wholly discounted. We do have a lot to fear from our out-of-control legal system and we should take the steps open to us to bring these power-mad demagogues on the bench back down to earth. On the other hand, this particular case, McDonald v. City of Chicago, might not be the opening of Pandora's box that the pair fear.

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"The only end of writing is to enable the reader better to enjoy life, or better to endure it."
–Samuel Johnson

Warner Todd Huston is a Chicago based freelance writer, has been writing opinion editorials and social criticism since early 2001 and is featured on many websites such as Andrew Breitbart's BigGovernment.com, RightWingNews.com, CanadaFreePress.com, StoptheACLU.com, TheRealityCheck.org, RedState.com, Human Events Magazine, AmericanDailyReview.com, and the New Media Journal, among many, many others. Additionally, he has been a frequent guest on talk-radio programs to discuss his opinion editorials and current events and is currently the co-host of "Life, Liberty, and the Pursuit of Conservatism" heard on BlogTalkRadio. Warner is also the editor of the Cook County Page for RedCounty.com.

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