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McDonald v. Chicago: Opening the Door to More Liberty

By Staff Reports

BY ILYA SHAPIRO and JOSH BLACKMAN The Supreme Court's decision in McDonald v. Chicago is of course a big win for gun rights -- but it's an even bigger victory for civil rights generally. In the wake of its prior ruling in the Heller gun rights case, it was not surprising that the Supreme Court rejected Chicago's far-reaching prohibition on private gun ownership. Legal scholars and even lay people widely anticipated that outcome all term.

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The real surprise lay elsewhere: in signals that the court may be inching toward a legal doctrine that offers stronger blanket protections of individual rights than this country has seen in almost 140 years.

Many people don't realize that the McDonald case is much more about the 14th Amendment than the Second.

Originally, the Bill of Rights -- including the Second Amendment right to bear arms at issue in McDonald -- applied only to the federal government. The 14th Amendment was ratified in the wake of the Civil War to expand the reach of the Bill of Rights, mainly so that individual states could not pass laws depriving blacks of their civil rights. McDonald examined the question of whether the 14th Amendment binds states -- and their political subdivisions, such as cities -- to the rights protected by the Second Amendment, and concluded that the answer is yes.

Over the past century, the Supreme Court has relied on the 14th Amendment's Due Process Clause to selectively apply various rights, instead of directly employing the much more appropriate Privileges or Immunities Clause. And this is what the plurality did in McDonald, in a tight opinion by Justice Samuel Alito, joined by Chief Justice Roberts and Justices Antonin Scalia and Anthony Kennedy.

The Privileges or Immunities Clause forbids the states from passing "any law which shall abridge the privileges or immunities of citizens of the United States" -- a term of art meaning the rights that all free people possess and that the government cannot abridge.

Unfortunately, the Privileges or Immunities Clause was strangled in its crib by a recalcitrant Reconstruction-era Supreme Court that refused to acknowledge the sea change in federal-state relations after the Civil War.

In a set of 1873 cases on the regulation of Louisiana abattoirs -- appropriately known as the Slaughterhouse Cases -- the court virtually erased the Privileges or Immunities Clause, reducing its contents to a risible set of federal rights.

While the majority of the Supreme Court chose to utilize the Due Process Clause, in a groundbreaking concurring opinion, Justice Clarence Thomas found that the right to keep and bear arms is protected by the Privileges or Immunities Clause. This stunning opinion corrects 140 years of flawed jurisprudence.

Of the Due Process Clause itself, Thomas wrote: "I cannot accept a theory of constitutional interpretation that rests on such tenuous footing" -- robust criticism from a sitting justice of such a longstanding precedent.

Instead, Thomas wrote, "I believe this case presents an opportunity to re-examine, and begin the process of restoring, the meaning of the Fourteenth Amendment agreed upon by those who ratified it." Justice Thomas thus found the right to keep and bear arms to be protected by the Privileges or Immunities Clause.

Although Justice Alito did not adopt Justice Thomas' approach, his opinion took great pains not to reject or criticize it. The plurality simply did not feel the time was right to bring the Privileges or Immunities Clause back into the forefront of constitutional jurisprudence. Due to prudential concerns for precedent, the court took what it saw was a simpler route instead of revisiting an older debate.

McDonald thus paints a bright picture for the future of constitutional liberty, and opens the door to reviving a long-ignored but powerful provision of our Constitution. Thomas' clarion call for a liberty-focused originalism provides a step on which to build in the future.

In the annals of Supreme Court history, solo opinions that introduce novel ideas often start a trickle of discussions. These arguments swirl and strengthen -- and over time flow into a paradigm shift in constitutional law. Look no further than the monumental significance of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*, which argued that separate is not equal. Harlan's lone voice was crucial in starting the court on a jurisprudential crescendo culminating in *Brown v. Board of Education*.

Thomas' opinion in *McDonald v. Chicago* -- even more noteworthy, because he was the decisive fifth vote for the majority opinion rather than a dissenter -- has planted a similar seed, paving the way for the Privileges or Immunities Clause to protect our most basic freedoms.

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