The Volokh Conspiracy

Cato brief in McDonald v. Chicago

David Kopel • November 23, 2009 2:02 am

Available here. An outstanding brief, as one might expect. The bulk of the brief (21 pages, comprising Part I) shows that from the Founding Era into through the framing of the Fourteenth Amendment, national citizenship was paramount to state citizenship. Part II briefly argues that *Slaughterhouse* violated canons of constitutional construction–such as by interpreting the Privileges or Immunities Clause to make it nothing more than a reiteration of the Supremacy Clause.

Finally, Part III (pp. 27–33) argues that enforcing the Privileges or Immunities Clause will not undermine the Court's prior so-called "substantive due process" jurisprudence. The brief shows that long before the 14th Amendment, "due process" was understood to mean that certain inherently unfair government actions were beyond the scope of lawful government powers–even if the government had followed proper procedures, such as public hearings. In the Supreme Court, the doctrine is as old as Daniel Webster's argument in the 1819 *Dartmouth College* case, was always solidly established in American understanding of "due process," and was so understood by the Framers of the Fourteenth Amendment.

Lead author on the brief is Timothy Sandefur of the Pacific Legal Foundation, which is also a party on the brief. You can listen to a podcast with Sandefur discussing the brief. The PLF's Liberty Blog has some very interesting posts on the historical background of the *Slaughterhouse* cases.

United States v. Cruikshank, which was decided a few years later, finished off the job of judicial nullification of the Privileges or Immunities clause. Since that Court allowed some white domestic terrorists get away with mass murder of armed blacks who had assembled in a Louisiana courthouse, *Cruikshank* might appropriately have been captioned *Slaughterhouse II*.

Categories: Civil Rights, Constitutional History, Constitutional Theory, Fifth Amendment, Fourteenth Amendment

32 Comments

1. ***sitzpinkler* says:**

   Rule: If you read the Constitution wrong enough times, the reading becomes right.

   Quote

   November 23, 2009, 2:09 am

2. ***JasonF* says:**

   Forgive me if this is spelled out in the brief (which I have not read), but what is the practical effect of overruling the Slaughterhouse Cases? Suppose the Court agrees that they were wrongly decided, and that rights are incorporated against the states through the privileges and immunities clause rather than the due process clause. So what? Is there anything states would be unable to do after such a ruling that they are able to do now (or vice versa)?

   Quote

   November 23, 2009, 2:43 am

3. ***Orin Kerr* says:**

   It's interesting to me that the Cato brief is based on original intent originalism rather than original public meaning originalism. That is, it is based on what the drafters wanted the 14th Amendment to do, rather than what the 14th Amendment was understood by the public to mean (or perhaps more specifically, what the words of the 14th Amendment were understood to mean by the public at the time). Do we have any good historical sources on what the public understood the P or I clause to mean at the time? If so, what do they suggest? If not, do we have reason to believe that the public knew what the authors of the 14th Amendment intended? I don't know how widely the debates over the meaning of P or I were distributed around the country at the time. Does anyone know?

   Quote

   November 23, 2009, 2:59 am

4. ***sitzpinkler* says:**

   > DATED: November, 2009.

   No day?

   Quote

   November 23, 2009, 3:02 am

***jellis58* says:**

Orin,

I know this does not really answer your question (ok actually it doesnt answer is at all) but I thought is was worthwhile to note that original meaning originalists would still give great weight to oringinal intent (but not treat it as determinative) beacause the intent of the drafters is strong evidence of what the words they chose to use would have been understood to mean. Im not sure we would actually need evidence that the public knew of the bingham and co.‘s intent to make the inference that the drafters would have relized the best way of making their intent understood was to use language that would be understood by the public to mean what they intended.

Quote

November 23, 2009, 3:53 am

6. ***jellis58* says:**

opps change the first two ”is“s to ”it“s

Quote

November 23, 2009, 4:05 am

7. ***Shag from Brookline* says:**

Overruling the Slaughterhouse cases to accommodate the expansion of Heller may result in the creation of slaughterhouses.

Quote

November 23, 2009, 5:04 am

8. ***Brett Bellmore* says:**

I’ve always figured that the distinction between original intent and original meaning was overblown: Assuming that the drafters wanted to be understood, and weren’t hopelessly opaque, the two should converge in almost every case.

Quote

November 23, 2009, 5:53 am

9. ***Shag from Brookline* says:**

The Fall 2009 issue of Constitutional Commentary includes a lead article ”Originalism’s Misplaced Fidelity: ‘Original’ Meaning Is Not Objective” by

Tara Smith. (I haven't checked to see if this article is available via SSRN.) Smith discusses the various forms of originalism. Her conclusion includes the following, page 56:

"The Public Understanding school, unfortunately, chains us to the closed conceptions of words' meanings that have been held by particular individuals. It attempts to reduce what is fundamentally a conceptual question (about the meaning of words) into a historical one (what did earlier people believe?). By reducing the judge's task from interpretation to imitation, Originalism, in practice, replaces its coveted rule of law with the rule of men — earlier men."

Quote

November 23, 2009, 6:54 am

10. ***David Newton*** **says:**

> **Shag from Brookline**: Overruling the Slaughterhouse cases to accommodate the expansion of Heller may result in the creation of slaughterhouses.

Really? I had no idea that Heller had any impact on the meat-processing industry. Please enlighten us as to how the second amendment affects beef, lamb, and all other meats?

I suppose that the most concrete connection could be Chicago's most prominent industry and its early days and the fact of who one of the parties in the McDonald case is. Got anything better?

Quote

November 23, 2009, 8:40 am

11. ***DjDiverDan*** **says:**

> **Shag from Brookline**: By reducing the judge's task from interpretation to imitation, Originalism, in practice, replaces its coveted rule of law with the rule of men — earlier men

Well, yes, that is true. But it ignores the fact that the understanding we are talking about is the understanding of those who ratified the Constitution — or those who ratified the amendments. Construing the Constitution according to its plain meaning and the objective understanding of those who ratified the Constitution is no more revolutionary than construing a written contract according to the plain meaning and objective understanding of the persons who executed the contract, intending to be bound thereby. And to those "living Constitutionalists" who reject the notion of being governed by the understanding of people living two hundred years ago, the Constitution is not cast in stone, and it provides a perfect mechanism for revising and adapting to changing conditions — Amendments proposed and ratified as provided in Article V. Yes, the process of *legitimately*

amending the Constitution is difficult and time consuming (especially when compared to the *illegitimate* process of Constitutional amendment by Judicial fiat), but it was designed to be that way to ensure that no rights or liberties granted or preserved in the Constitution would be taken away or limited without a strong need and a broad consensus for such action.

Quote

November 23, 2009, 8:53 am

12. ***Cornellian* says:**

I've always figured that the distinction between original intent and original meaning was overblown: Assuming that the drafters wanted to be understood, and weren't hopelessly opaque, the two should converge in almost every case.

They do converge in almost every case, it's just that the rare case where they don't is disproportionately likely to reach the Supreme Court.

Quote

November 23, 2009, 9:14 am

13. ***Allan* says:**

So, if I could find contemporary evidence that the framers thought falsely yelling "fire" in a crowded theater was to be protected by the 1st Amendment, I could conclude that Justice Holmes was wrong?

Quote

November 23, 2009, 9:56 am

14. ***Gabriel McCall* says:**

There's a sizable body of legal argument– starting at least as early as Holmes through Hugo Black to Thomas and Scalia– which takes a contrary view on substantive due process, arguing that due process as properly understood and as understood in the time of the founders referred specifically and exclusively to procedural due process, and that the concept we now know as substantive due process was an invention of the courts.

Is it Cato's and Kopel's stance that the correct historical meaning of "due process" is a settled question and that anyone who disagrees is objectively wrong, or is there room for reasonable people to disagree on this issue?

Quote

November 23, 2009, 9:58 am

***Brennan* says:**

Without having looked too deeply into it, the law at issue in the Slaughterhouse Cases seems like a reasonable approach to a serious problem. Do any of the briefs arguing that Slaughterhouse was wrongly decided take the position that the limiting interpretation of the P&I clause taken by the majority was unnecessary to uphold the law or otherwise explain how similar health and safety regulation can pass muster under the Plaintiff's proposed reading of the P&I clause?

Quote

November 23, 2009, 10:02 am

16. ***Joe* says:**

The Fourteenth Amendment was written and ratified in a time of great public debate, including the President publicly promoting a different view, so the public understanding should be something we can examine, probably more so than the BOR original public understanding. I don't know how useful it will be, but that's a different question.

BTW, is there any reason or clear effect to the fact that the 14A altered the conjunction of the original Art. IV use of privileges/immunities — "and" vs. "or" ... or is it just in place so people like me can mistakenly use the wrong word when citing it?

Quote

November 23, 2009, 10:13 am

17. ***Joe* says:**

Holmes through Hugo Black to Thomas and Scalia– which takes a contrary view on substantive due process, arguing that due process as properly understood and as understood in the time of the founders referred specifically and exclusively to procedural due process

In *Lochner*, Holmes noted:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

He later thought that this included freedom of speech. This is not "procedural" is it? Black also was never totally clear on how he 'incorporated' the BOR into the 14A. He did not merely rest on the P/I Clause. Again, not procedural only.

Cato has various members who promote a substantive due process viewpoint (an originalist argument cited in one of the briefs, as this blog noted recently). The Cato Supreme Court series has a note on each volume about its concern for the natural law tradition, which SDP in part reflects. But, I'd be surprised if they made it some "settled question" where debate is not "reasonable."

Quote

November 23, 2009, 10:23 am

18. ***Instapundit » Blog Archive » CATO'S BRIEF FILED in McDonald v. Chicago.... says:***

[...] CATO'S BRIEF FILED in McDonald v. Chicago. [...]

November 23, 2009, 10:28 am

19. ***Allan Walstad says:***

From the brief:

> The theory of paramount national citizenship had two components. First, the Republican authors of the Fourteenth Amendment believed that the whole people of the United States made up a single, sovereign nation....

Well shoot–must every silver lining have a cloud? The Constitution created a federal government with strictly limited powers. 14A, as stated, does not increase federal authority except to enforce its provisions–mainly, and obviously, extending the Bill of Rights to apply to the states as well as the feds. All this verbiage (from CATO) about a single, sovereign nation is extraneous and lends itself to the insidious notion that the federal government somehow thereby escapes its Constitutional bounds. More in a couple hours after class.

Quote

November 23, 2009, 10:58 am

20. ***Allende says:***

In law school the professors always taught that the P & I Clause was dead letter, due to the USSC. Could never believe that it wouldn't get around to reviving, depending on the Court and times.

Quote

November 23, 2009, 12:16 pm

21. ***Clayton E. Cramer says:***

Allan: So, if I could find contemporary evidence that the framers

> thought falsely yelling "fire" in a crowded theater was to be protected by the 1st Amendment, I could conclude that Justice Holmes was wrong?

You could, but you might have some serious trouble finding such contemporary evidence. Everything that I can find demonstrates that the original public meaning was that prior restraint was not allowed, but that one could be punished for scandalous, libelous, or obscene publications. As late as 1834, a lawyer defending his client on a blasphemy charge knew better than to argue that the freedom of the press protected blasphemy. Instead, he argued that it violated the religion clauses of the First Amendment.

Quote

November 23, 2009, 12:58 pm

22. ***Timothy Sandefur* says:**

As the author of the brief, I'd like to answer Prof. Kerr's question about original intent versus original public meaning. The brief was drafted in the knowledge that there will be perhaps 35 or 40 amici on this side, and I expect these amici to address the original public meaning. (In particular, I suspect Prof. Barnett's brief will talk about that.) Nor is the brief, of course, intended to be exhausting about *Slaughter-House*'s flaws or the academic consensus that it was wrongly decided. I wanted instead to address an aspect–a more global aspect–of the question: the ideological commitments from which the amendment originated.

As I've been explaining this week in a series of posts at the *PLF Liberty Blog,* I see *Slaughter-House* as encapsulating an epic story in the philosophical history of the American Constitution.

The Fourteenth Amendment was a triumph of a particular conception of the Constitution–of federalism and individual rights–that Jacobus tenBroek called "paramount national citizenship." Understanding that ideology, of course, requires us to understand what the intellectual leaders of that movement were thinking and saying. Of course that's a different question from what the words meant in a public sense at the time of ratification. (In this case, I don't believe the two diverge in any significant way, but that's not an issue I chose to address.) I wanted to tell the story of the clashing states' rights and paramount national citizenship ideologies, and how although the Fourteenth Amendment ought to have signified the constitutional triumph of the latter, it was essentiall destroyed by the *Slaughter-House* majority, thanks in no small part to one particular attorney, Jeremiah Sullivan Black.

So the bottom line is that the brief is not supposed to be comprehensive–no single brief could be, particularly given the word limit, which we were starting to push–but is intended to describe as best as possible, an ideological conflict that is much too big for any single explanation; indeed, an ideological conflict that generated the Civil War.

Quote

November 23, 2009, 1:05 pm

23. ***Shag from Brookline* says:**

Perhaps my comment was too subtle as Mr. Newton asks:

"I had no idea that Heller had any impact on the meat-processing industry. Please enlighten us as to how the second amendment affects beef, lamb, and all other meats?"

I had in mind the human animal. See Nicholas J. Johnson's Symposium contribution "Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique" (60 Hastings L. J. 1285, June 2009), available via SSRN at:

http://ssrn.com/abstract=1494634

making the argument that assault weapons should pass muster under Justice Scalia's opinion in Heller as less deadly than handguns and automatic rifles. With incorporation of the Second Amendment highly anticipated and with recognition that self-defense principles should not be limited to the home, assault weapons may become commonplace, perhaps even more so than handguns.

Quote

November 23, 2009, 1:20 pm

24. ***J. Aldridge*** **says:**

Bingham, House Report No. 22, January 30, 1871: "The words 'citizens of the United States,' and 'citizens of the States,' as employed in the Fourteenth Amendment, did not change or modify the relations of citizens of the State and the nation as they existed under the original Constitution."

New York Times, November 15, 1866: We concluded the first number with the quotation of the First Section of the proposed Amending of the Constitution that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' **This is intended for the enforcement of the Second Section of the Fourth Article of the Constitution**, which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States.'"

Bingham, House Report No. 22, January 30, 1871: "The clause of the Fourteenth Amendment, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article four, section two."

Bingham, House Report No. 22, January 30, 1871: "It had been judicially determined that the first Eight Amendments of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article."

Bingham, 1866 & 1870: "This guarantee is of the privileges and immunities of citizens of the United States in, **not of**, the several States."

Bingham, January 9, 1866: "I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution (Art. IV, Sec. II) in any State of the Union. And how? By simply adding an amendment to the Constitution to operate on all the States of this Union alike, giving to Congress the power to pass all laws necessary and proper to secure to all persons—which includes every citizen of every State—their equal personal rights; **and if the tribunals of South Carolina will not respect the rights of the citizens of Massachusetts under the**

Constitution of their common country, I desire to see the Federal judiciary clothed with the power to take cognizance of the question ..."

Bingham: "The gentleman will pardon me. The amendment is exactly in the language of the Constitution; that is to say, it secures to the citizens of each of the States all the privileges and immunities of citizens of the several States. It is not to transfer the laws of one State to another State at all. It is to secure to the citizens of each State all the privileges and immunities of citizens of the United States in the several States. If the State laws do not interfere, those immunities follow under the Constitution."

Rep. Samuel Shellabarger of Ohio on the P&I's clause: "It protects no one except such as seek to or are attempting to go either temporarily or for abode from their own State into some other. It does not attempt to enforce the enjoyment of the rights of a citizen within his own State against the wrongs of his fellow-citizens or his own State after the injured party has become or when he is a citizen of the State where the injury is done."

Bingham to Rep. Robert Hale (NY): "I respectfully ask him [Hale] to inform us whence he derives the authority for supposing, if he does suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?"

Quote

November 23, 2009, 1:41 pm

25. ***J. Aldridge*** **says:**

Cato needs to do its homework.

Quote

November 23, 2009, 1:42 pm

26. ***Timothy Sandefur*** **says:**

I have no idea what Mr. Aldridge is trying to prove. Congressman Bingham's commitment to the principle of paramount national citizenship is unquestionable, and he believed the Amendment would not be *creating* that principle, but *enforcing* that principle, which he believed to have always been constitutional law. Nothing in Mr. Aldridge's quotes from Bingham contradicts that; on the contrary, they support the argument made in the brief. Bingham was always a nationalist, and always believed that individual rights appertain to one's national citizenship–and that the states were violating that principle up to and including the Civil War era. Thus when he argued the Amendment would do 'nothing new,' he meant it–the Amendment would simply, for the first time, fulfill

what he believed to be the original promise of protection for individual rights against states. That's why he said the Amendment didn't create new rights–and why states' rights partisans believed that it did. In his view, but not in theirs, all Americans were already entitled to have states respect their natural and common law rights.

Quote

November 23, 2009, 1:57 pm

27. ***Timothy Sandefur* says:**

See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2542 (1866), where Bingham says,

> There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstiutional acts of any state.... [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy....

That seems to be exactly the argument the brief makes. Certainly that was the intent.

Quote

November 23, 2009, 2:02 pm

28. ***Anonymous* says:**

Prof Kerr, the Petitioners' Brief has a great deal of evidence as to how the privileges or immunities clause was understood by the ratifying public

Quote

November 23, 2009, 2:12 pm

29. ***Allan Walstad* says:**

From CATO:

> The framers of the Constitution left a long trail ofevidence that they indeed meant for the Constitution to create a new national identity. Alexander Hamilton observed in The Federalist...

Whatever Hamilton may have said, he was surely not one of the framers of the Constitution. He left the Convention when it became clear that it would not create the national government he favored. He returned to sign it and propagandize in its favor only because he thought it better than the Articles of Confederation.

> James Madison echoed this point when he explained that while under the Articles of Confederation, Congress's power proceeded from "the dependent derivative authority of the legislatures of the states," while under the Constitution it would come "from the superior power of the people."

Notice that Madison says nothing of a "new national identity" in the quote. If the authority of the Constitution comes from the people, it does not thereby generate anything beyond an entity with specific, limited powers. Note also that ratification was via representative conventions, and it was state-by-state. "We the people" comes across, unfortunately, as a bit of a propaganda term.

Quote

November 23, 2009, 2:14 pm

30. ***J. Aldridge*** **says:**

> **Timothy Sandefur**: Bingham was always a nationalist, and always believed that individual rights appertain to one's national citizenship–and that the states were violating that principle up to and including the Civil War era.

No he wasn't. He always proclaimed himself a states right man. That is why he liked quoting Calhoun.

> **Timothy Sandefur**:
> Thus when he argued the Amendment would do 'nothing new,' he meant it–the Amendment would simply, for the first time, fulfill what he believed to be the original promise of protection for individual rights against states.

But doesn't Cato want it fulfilled between citizens of a state and their own state and not citizens of the United States in another state?

Quote

November 23, 2009, 2:17 pm

31. ***J. Gray*** **says:**

SHAG:

Can you please describe for us the difference between an assault weapon and an automatic rifle? Further, can you elaborate on why "assault weapons" pose more of a threat than handguns?

Quote

November 23, 2009, 2:22 pm

32. ***Allan Walstad*** **says:**

More from CATO:

> This nationalist conception of the Constitution was widely accepted at the time of ratification, but beginning in 1798 with the Virginia and Kentucky Resolutions, and again during the Nullification Crisis of the 1830s, southern political leaders began to formulate a competing, states' rights theory of the Constitution.

So it was just those damned Southerners (Madison and Jefferson in 1798, by the way)? Not quite. According to Wikipedia, the Massachusetts general court had this to say about a trade embargo passed in 1813:

> A power to regulate commerce is abused, when employed to destroy it; and a manifest and voluntary abuse of power sanctions the right of resistance, as much as a direct and palpable usurpation. The sovereignty reserved to the states, was reserved to protect the citizens from acts of violence by the United States, as well as for purposes of domestic regulation. We spurn the idea that the free, sovereign and independent State of Massachusetts is reduced to a mere municipal corporation, without power to protect its people, and to defend them from oppression, from whatever quarter it comes. Whenever the national compact is violated, and the citizens of this State are oppressed by cruel and unauthorized laws, this Legislature is bound to interpose its power, and wrest from the oppressor its victim.

Quote

November 23, 2009, 2:26 pm