Reviving Our Economic Liberties

On May 2, the Supreme Court heard oral arguments in *McDonald v. Chicago*, a case that is likely to extend the Second Amendment rights upheld in *District of Columbia v. Heller* to states and localities. Libertarians were hoping for more, however, seeing this as a chance to revive the debased Privileges or Immunities Clause of the Fourteenth Amendment. Unfortunately, the questions asked by the Justices during arguments indicated they wouldn't embrace this opportunity to expand protections of not just the right to bear arms, but also economic liberties. At a Capitol Hill Briefing the following day, Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, Clark Neily, senior attorney at the Institute for Justice, and Timothy Sandefur, principal attorney at the Pacific Legal Foundation, offered their reactions to the case and discussed the past, present, and future of the Privileges and Immunities Clause.

ILYA SHAPIRO: From a legal perspective, you can't just say "Oh, we'll just decide that the Second Amendment applies to the states." You can't do that because none of the Bill of Rights applied to the states until after the Civil War. The Civil War and the Reconstruction era effected a fundamental change in the relationship between the federal and state governments, and the federal and state governments respectively, with the individual. The Fourteenth Amendment, in particular, has three important sections: the Equal Protection Clause, which says that all laws must apply equally to all persons; the Due Process Clause, which insists you can't be deprived of your life, liberty, or property without the due process of law; and the Privileges or Immunities Clause, which says "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

You'd think that's a robust protection of our constitutional rights. *No state* shall deny the privileges or immunities. During the Reconstruction Era, "privileges or immunities" was a synonym for natural rights, as well as certain civil and political rights. (It is important, in evaluating what "privileges or immunities" means in the Fourteenth Amendment, to look at what it meant *during Reconstruction*, not in 1791 or during the Revolution or what have you.) Unfortunately, five years after the Fourteenth Amendment was ratified, the Supreme Court effectively decided, in the *Slaughterhouse Cases*, that the Privileges or Immunities Clause was a null set, protecting the very few things that *federal* citizenship protected (for example, no State shall accost you on the High Seas). The reactionary Court at the time did not want to reconcile itself to the fundamental change that Reconstruction wrought after the Civil War, so they effectively read the Privileges and Immunities Clause out of the Constitution.

Instead, when certain rights started to be "incorporated" against the States, the Court had to do so using the doctrinal contrivance of Substantive Due Process. Now that sounds like a misnomer. What is "substantive procedure"? Because the Privileges or Immunities Clause was read out, constitutional rights—to free speech, freedom of religion, freedom from search and seizure etc.—started to be protected by the Due Process Clause, a strange way of doing things when you have another clause (Privileges or Immunities) clearly meant to protect all these substantive rights.

Fast forward to *McDonald*. Gun owners are saying that their right to keep and bear arms is being infringed by Chicago. In this litigation Alan Gura raised both Due Process and Privileges or Immunities arguments. In oral argument, however, the Court didn't appear too interested in the Privileges or Immunities angle. Right off the bat, Chief Justice Roberts said that petitioner had a very high burden in trying to overturn the 140 year old *Slaughterhouse* precedents. And it looks like Justice Scalia, who had recently been quoted in the *Washington Post* as calling Substantive Due Process "babble" and Privileges or Immunities "flotsam," values babble over flotsam; he is likely to side with Substantive Due Process. While there are likely five votes in favor of incorporating the Second Amendment via Substantive Due Process, nobody was that favorable to Privileges or Immunities.

In short, while it was a good day for the right to keep and bear arms, it was not a good day for the Privileges or Immunities Clause. That's significant not just because legal scholars want to get the Constitution right, and it is more faithful to the Constitution to use Privileges or Immunities, but also because, if you care about liberty or originalism, Privileges or Immunities is important. This is because the tests applied under the Substantive Due Process Clause—tests of how "fundamental" the rights are—are easily manipulated. The Privileges or Immunities Clause, on the other hand, is tied directly into the text, history, and structure of the Constitution. There is evidence of exactly what it is supposed to cover and what it is supposed not to cover. At the very least, therefore, it would be no worse than Substantive Due Process, and at best it would prevent judges from inventing rights, and allow for the protection of freedom of contract, the right to earn an honest living, and other liberties.

CLARK NEILY: The good news first. If you love gun rights and you think they should apply against the States, then you're in luck: that's almost certainly going to happen. But if you love the Constitution, if you love the institution of the Supreme Court, if you love reasoned debate, then yesterday's arguments were a disgrace. None of the eight Justices who spoke (Clarence Thomas kept his customary silence) showed the slightest interest in the history of the Constitution. This is amazing in light of the fact that a year ago, in *Heller*, even the dissenting justices seemed to recognize that the history of the Second Amendment was relevant to the Court's interpretation of what the Second Amendment means.

That is an incredibly stark contrast to what happened in the *McDonald* arguments, where, as I said, all eight justices who asked questions showed literally no interest in the relevant constitutional text and history of the Fourteenth Amendment, ratified in 1868, and, specifically, no interest in the only provision in the Fourteenth Amendment that plausibly protects the right to keep and bear arms: the Privileges or Immunities Clause.

When you try to figure out what rights are protected by any part of the Constitution, to the extent the text is at all unclear (which, in a document with as broad a scope as the Constitution, is inevitable), you get a situation in which you have to bring your understanding of the relevant historical context to whatever provision of the Constitution is at issue. In the case of the Fourteenth Amendment, that is not nearly as hard as the Justices make it seem. There is no doubt that the whole point of the Fourteenth Amendment was to end Southern tyranny in the wake of the Civil War.

In the wake of the Civil War, blacks and white unionists were being systematically disarmed so they could be terrorized and, in some cases, lynched. The Congress that proposed the Fourteenth Amendment had abundant evidence of this, and it made them very angry. This tyranny is why we have the Fourteenth Amendment, and the part of it that was designed to put an end to that conduct was undoubtedly the Privileges or Immunities Clause. It was therefore extraordinary to sit in the Supreme Court during *McDonald* and listen to an hour-long argument in which eight Justices showed not the slightest interest in any of that history, or in the relevant text of the Fourteenth Amendment.

What I am supposed to talk about here is the future of gun rights. But, to be honest, I am at a loss. Had the Court shown some interest in the text and history of the Fourteenth Amendment, I would say that gun control laws should be held to a very high standard of constitutional review. Historically, people were being stripped of their arms after the Civil War, their guns were confiscated under pretext, and this was all to make lynching easier. In light of this history, were the Court to interpret the Fourteenth Amendment according to the relevant historical context, gun control laws would be held to a very high level of scrutiny.

Clark Neily

> "All eight justices who asked questions showed literally no interest in the relevant constitutional text and history of the Fourteenth Amendment."

Protection of other rights specifically identified as needing protection during the Reconstruction era would also come from a rehabilitation of the Privileges or Immunities Clause. For example, the Civil Rights Act of 1866 contained protections of the right to contract, to testify in court, to give evidence, and so forth.

One of the most important rights that would be protected, which the Court in the *McDonald* arguments gave short shrift, is the guarantee of economic liberty: the ability to go out and earn a living so that you can be economically self-sufficient. In the Reconstruction South, States were trying to keep newly freed black people in a state of constructive servitude, which they did by depriving them of the ability to earn a living and participate meaningfully in economic life. For example, some states made it illegal to be off your employer's property without a note from your employer.

Another example is property rights. Those of you familiar with the Supreme Court's decision in *Kelo v. New London*, in which the Supreme Court effectively deleted the Public Use Clause from the Fifth Amendment, giving to the government virtually unbounded powers of eminent domain, should know that *Kelo* is incompatible with the Fourteenth Amendment. The right to own property was another example of the kind of right being interfered with and taken away from both freed blacks and their white supporters.

These are examples of very bright road signs for the modern Supreme Court to determine what the scope of the Fourteenth Amendment is. If you have doubts about what the Fourteenth Amendment protects, why not go look at the sorts of rights that were being violated at the time it was enacted, and what seems to have prompted and motivated it, and that can help guide you.

Instead, what we've got is a Court that appears determined to continue another hundred years looking at any proposed right and having what amounts to a French salon, in which they sit around and discuss how "fundamental" they think the right is, in complete disregard of text and history. I don't get that, and I'm discouraged by it. But, hopefully, people will realize how unprincipled this approach is to our rights, and demand that either this Court, or new

Justices, use an approach more respectful of history and the text enacted by the people of this country, not just the Justices' personal sentiments.

TIMOTHY SANDEFUR: I want to talk about how this case goes beyond the right to possess firearms to involve a conflict between the values of individual liberty and democracy, which was set in place mainly by the Progressive Movement that created the New Deal and the modern administrative state.

The first sentence of the Constitution says, unambiguously, that liberty is a blessing. The word "democracy" is nowhere to be found in the Constitution. The Constitution exists, in fact, for the purpose of limiting democracy: it places all sorts of procedural and substantive restrictions on democracy in order to protect liberty. Unfortunately, the Progressive Movement, which began in the 1880s and reached its height in 1934, with *Nebbia v. New York*, replaced that value with democracy. Thus it is that, today, most intellectuals regard liberty as a *function* of democracy. Your rights aren't *rights*, but privileges, or permissions, that are given you by the government, for the government's own purposes.

The Privileges or Immunities Clause of the Fourteenth Amendment, of course, was written from the opposite perspective. It was written by the early Republican Party, which consisted of classical liberal opponents of slavery who wanted to ensure that, henceforth, there would be no question but that the Constitution protected *liberty*. Among the rights protected by the Privileges or Immunities Clause was, of course, the right to possess firearms for personal protection. But another protected right was the right to earn a living: to engage in trade and support yourself and your family free from government interference. This right had been guaranteed in common law as long ago as 1602, when, in *Darcy v. Allein*, the English Court of King's Bench held that a royal monopoly that gave a trade to one business only, and forbade others from competing, was a violation of Magna Carta.

By the time of the *Slaughterhouse Cases* in the 1870s, the idea that you had a right to earn an honest living, and that government could not create monopolies and make it illegal to compete against them, was part of the prevailing intellectual atmosphere. But in 1868, the State of Louisiana passed a law saying that if you want to slaughter cattle you had to do it at one, privately owned, slaughterhouse. This put hundreds of butchers out of business overnight. You'd have to imagine if the California legislature

Timothy Sandefur

> "What this country needs is a new Civil Rights Act, which makes explicit reference to economic liberty and the right to own a business."

said that all cars had to be repaired at Aamco—it would put all the other garages out of business. So the competing butchers sued and the case made its way to the Supreme Court. The butchers argued that their right to earn a living without monopoly interference from the government was one of the privileges or immunities of citizenship, but in a 5-4 decision the Supreme Court disagreed, limiting the number of protected rights to a ridiculous degree, while completely ignoring the intellectual triumph—creating federal protection against abuses by state government—that accompanied Union victory in the Civil War.

Unfortunately, because of *Slaughterhouse*, the Court largely switched to using the Substantive Due Process doctrine to protect liberty. Now, Substantive Due Process is something conservatives attack, but let me explain what it actually means. "Substantive Due Process" is a bad term because it leaves out the most important part of the phrase. The Constitution says that you can't be deprived of life, liberty or property without due process *of law*.

Now, let's say Congress was to pass a law saying that Scientology is the official religion of the United States, and you are required to attend its church. And you decide you don't want to. And the policeman shows up and arrests you for disobeying the law. You might reply, "You can't do this because Congress doesn't have the power to pass this Scientology law. You can't even call it a law, for the First Amendment says that 'Congress shall make no law' on this subject." It might be a "command" or a "*diktat*," but it can't be a "law." Thus, for you to be deprived of liberty pursuant to this invalid legislative enactment is to be deprived of liberty without due process *of law*.

If you take another step back you can see there are certain things law simply is not allowed to do to you. For example, until the New Deal it was widely believed that government had no power to take one person's property away and give it to another, simply because it liked the other person or group better. Now, of course, that's primarily what government does, but in those days it was held to be an arbitrary action of government, and arbitrariness is the opposite of law. Substantive Due Process barred government from extending economic favors to groups simply because they exercised greater political power than others, or burdening other groups that lacked political influence.

Although it doesn't cover as many bases as Privileges or Immunities, Substantive Due Process is as valid a part of the Constitution as the dormant commerce clause or separation of powers. But, of course, during the New Deal, the Court backed away from that and said, basically, that government can do whatever it wants when it comes to economic freedom and

Continued on page 17

The failure—and future—of counterterrorism policy

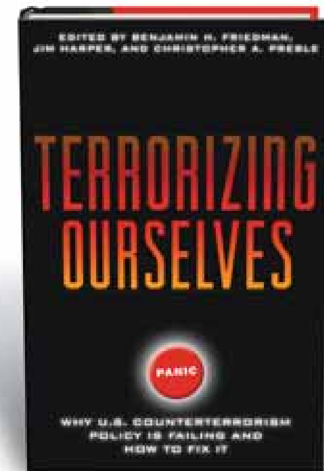
Not Letting Terrorism Terrify Us

Terrorism's greatest impact is the terror it creates. Responding rationally to attacks—and the threat of attacks—demands eschewing irrational fears, a feat often at odds with politics. In their new book, *Terrorizing Ourselves: Why U.S. Counterterrorism Policy Is Failing and How to Fix It*, editors Benjamin H. Friedman, Jim Harper, and Christopher A. Preble have assembled a dozen essays by major counterterrorism scholars. Taken together, the articles are an antidote to the common problem that, "rather than dispassionately addressing true threats, our national leaders often hype implausible threats and jockey for political advantage in anticipation of terrorist strikes."

Among the essays is "Don't You Know There's a War On? Assessing the Military's Role in Counterterrorism" by Paul Pillar, a 25-year veteran of the CIA, and Christopher Preble, the Cato Institute's director of foreign policy studies. Pillar and Preble examine the possible military responses to terrorism and conclude "that the risks of military action outweigh its benefits." They also criticize the metaphor of "war" behind our ongoing War on Terror. "Given the need to carefully manage public expectations, and to calm anxiety, we conclude that it is inappropriate to cast such efforts as synonymous with warfare," they write.

Benjamin H. Friedman writes that "Americans want more homeland security than they need" in "Managing Fear: The Politics of Homeland Security." In the essay, Friedman proceeds to show why this is the case and how more careful cost-benefit analysis can improve the wisdom of our policies. "Fear of terrorism," Friedman writes, "is a bigger problem than terrorism." He offers specific policy suggestions for better handling the irrational fear terrorism breeds.

The book also contains a fascinating article from Priscilla Lewis, "The Impact of Fear on Public Thinking about Counterterrorism Policy: Implications for Communicators," which uses psychological findings about the response of the brain to frightening thoughts and situations to predict how people are likely to react when faced with various counterterrorism policies. "Morality reminders," as she calls them, "seem to trigger disdain for other races, religions, and nations; a preference for strong, traditional leaders and for authoritarian rather than pragmatic leadership; a heightened fidelity to one's own group; and increased stereotyping and suspicion of other groups."



Also included are articles by James J. F. Forest, Mia Bloom, James A. Lewis, John Mueller, Veronique de Rugy, Milton Leitenberg, and William Burns.

Lewis's article neatly summarizes why a book like *Terrorizing Ourselves* is so important: the threat of terrorism and the impact of terrorist attacks have effects far beyond the violence they entail. Terrorism often leads to irrational responses, both by citizens and their governments, and so thoughtful and impartial analysis is needed here at home perhaps more than anywhere else.

Visit www.catostore.org or dial 800-767-1241 to get your copy of *Terrorizing Ourselves* today; $24.95 hardcover.

Continued from page 11

private property rights.

Let me give you an example of the kind of cases that we have seen as a result of the currently existing judicial paradigm. I represented a guy named Alan Merrifield. He was in the pest control business in California, putting up spikes on roofs to keep pigeons from landing on them. He didn't use pesticides, preferring, instead, structural devices like spikes and screens. In California, in order to do what he did, you had to get a "Branch 2 Structural Pest Control Operator" license. And to get such a license requires two years of training learning how to handle *pesticides*. And then you have to take a 200-question multiple-choice exam testing your knowledge of pesticide use. This despite the fact that my client didn't use pesticides. And the law gets even better, because it only applies to pigeons. If you put the exact same spikes on the exact same building to keep seagulls off it you don't need any license at all. So we went to court, and we lost. The state's expert witness even admitted *under oath* that the law was irrational, designed only as a barrier to entering the profession, and we still lost the case because the law is currently tilted so dramatically against businesses, economic freedom, and private property rights.

Fortunately, we won on appeal in the Ninth Circuit. The Court of Appeals said government may not use occupational licensing laws simply to create these kinds of monopolies. That's very gratifying, but that's only the *second* court that's ever said this. The Tenth Circuit, by contrast, has said it is perfectly fine to use occupational licensing laws purely for protectionist purposes. This, needless to say, is the kind of nonsense that would not go on if the Court overturned *Slaughterhouse* and enforced the Fourteenth Amendment as it is written.

Whether or not the Court overturns *Slaughterhouse* in *McDonald*, what this country needs is a new Civil Rights Act, which makes explicit reference to economic liberty and the right to own a business. These are fundamental human rights that are ignored and violated by state and local governments every day. And the people who hurt the most are the low class, immigrants, and inner-city residents, who don't have the political power they need to defend themselves. That's why they rely on the Constitution. When courts refuse to uphold the Constitution, these people are left at the mercy of a capricious political process.