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Guns to Protect, or Guns to Kill?

The following four questions have obvious answers in the customary debate concerning the Constitution of the United States in the post-World War II period, except where the issue of guns is involved. Take the test yourself.

1. Is it liberals or conservatives who want to require the states to abide by the Federal Bill of Rights?

2. Is it liberals or conservatives who want to preserve state's rights in connection with the Bill of Rights so that the states can experiment with their own version of fundamental liberties?

3. Is it liberals or conservatives who want an expansive definition of "liberty interest" in the Fourteenth Amendment?

4. What one word issue would change all of your answers?

The answers follow:

1. Liberals
2. Conservatives
3. Liberals
4. Guns

I predict that every law school in America will adopt as required reading the decision in *McDonald v. City of Chicago, Illinois*, 130 S.Ct. 3012 (2010) which announces a plurality opinion already widely reported in the press; the Second Amendment to the United States Constitution shall be fully applicable to the states-meaning that the right to keep a loaded handgun at home is a fundamental liberty interest.

The Court was not writing on a blank slate. In the case of *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) the Court decided that the Second Amendment protects the right to "keep and bear arms for the purpose of self-defense…." The Court, therefore, found unconstitutional the District of Columbia statute that banned the possession of handguns in the home.

The village of Oak Park, a Chicago suburb, has a similar law to that in the District of Columbia but the city and state argued that their laws are constitutional because the Second Amendment contained within the federal Constitution has no application to the states.

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

District of Columbia v. Heller rejected the previously existing view that the Second Amendment was concerned only with the need to maintain a "well regulated Militia." *Heller* extended the Second Amendment to the personal right to bear arms.

The question in *McDonald* was whether that newly minted right, which conservatives claim lays dormant in the Second Amendment, must be imposed on the states through the federal Constitution. This raises a more thorny problem for conservatives who must now rely upon the hated "excesses" of the Warren court in order to force their pro-gun views on the states. The conservatives on the Court did not hesitate to leap at the opportunity to embrace the methods used by the Warren Court to expand the reach of the Bill of Rights.

Justice Alito announced the judgment of the Court in *McDonald* with respect to many of the issues and was joined by the Chief Justice, Justice Scalia, Justice Kennedy and of course, Justice Thomas. Justice Alito acknowledged that the Bill of Rights, including the Second Amendment, originally applied only to the Federal Government. However, the Civil War changed all of that. The Fourteenth Amendment, one of the Amendments to the Federal Constitution to remedy the problems which brought about that bloody conflict, provides that a state shall not abridge the "privileges or immunities" of the citizens of the United States or deprive "any person of life, liberty or property without due process of law."

After the Fourteenth Amendment became the law of the land, the United States Supreme Court was required to decide whether the Fourteenth Amendment's reference to the privileges or immunities of the citizens of the United States applied the Bill of Rights to the states. The famous *Slaughter-House Cases* challenged a Louisiana law permitting the creation of a state-permitted monopoly on the butchering of animals in New Orleans. The high court ruled that Privileges or Immunities Clauses only protected those rights which "owe their existence to the Federal Government, its National character, its Constitution or its laws." In other words, not all of the Bill of Rights automatically applied to the state governments.

In the 60's and 70's advocates for the proposition that the Bill of Rights would be a sword in the hands of civil rights advocates, found the earlier Supreme Court cases disquieting. Justice Scalia admitted that many legal scholars dispute the correctness of the narrow *Slaughter-House Cases* interpretation.

More modern decisions, starting in the late 1800's, reviewed the reach of the Federal Bill of Rights by asking the question as to whether the particular right at issue was "of such a nature that they are included in the conception of due process of law."

Justice Scalia noted that some justices such as the legendary Justice Hugo Black, advocated a "total incorporation" theory. It was Black's view that the Due Process Clause of the Fourteenth Amendment mandated that the Bill of Rights in their entirety be imposed upon the states. What the Supreme Court did, under the aegis of Justice Warren, was move in Justice Black's direction by adopting a process of "selective incorporation." In other words, the Court began to hold that the Due Process Clause incorporates only certain rights contained in the first eight Amendments. How did that test work?

The Supreme Court of the United States would inquire whether a particular Bill of Rights guarantee is so fundamental to the scheme of ordered liberty and our system of justice that it is part of the Bill of Rights which the states are required to observe. By this process, the Supreme Court eventually incorporated virtually all of the provisions of the Bill of Rights.

Interestingly, it is pointed out in Footnote 13 that some of the rights not fully incorporated are:

1. The Third Amendment's protection against quartering of soldiers.
2. The Fifth Amendment's grand jury indictment requirement.
3. The Seventh Amendment's right to a jury trial in civil cases
4. The Eighth Amendment's prohibition on excessive fines.

The failure to obligate states to follow the Seventh Amendment's right to trial by jury in civil cases predate the case law on "selective incorporation" and therefore may be revisited in the future as a result of the *McDonald* decision.

The plurality of the court, by virtue of the Scalia language, undertook a lengthy and very interesting historical analysis of the right to bear arms in this country. The Court wrote at length how the Fourteenth Amendment came to be adopted and the violent abuse that southerners heaped upon freed African-Americans in the aftermath of the Civil War. Blacks were stripped of their right to own guns by many states and were hunted down like animals. The federal government totally abdicated its responsibility for the people the Union Army fought to free in the Civil War.

Just as passionate in the *McDonald* gun case was Justice John Paul Stevens, who took a strong states' rights position and accused the plurality of trampling the right of states and municipalities to experiment with gun control laws. Stevens took the position that the Second Amendment clearly only applies to militia rights and has virtually never been applied to individual gun use in order to control problems of crime in a free society. In order to support this point of view, Stevens argued strenuously that the Due Process Clause cannot claim to be the source of our basic freedoms. In Stevens' view, the Fourteenth Amendment requires the states to follow the Bill of Rights only where "liberty" is implicated. Those liberty interests typically involve personal conduct, family decisions and rights to free speech and religion. Stevens also expressed upset with the plurality which used historical "pedigree" to determine whether a particular right contained within the Bill of Rights must be followed by the states. The reading of history, Stevens pointed out, can be very ambiguous and subject to great debate.

Old time liberals would be shocked at Stevens' defense of state legislative prerogative. The Justice attempted to build a case for the fact that regulation of firearms has been part of our history both before and after the Civil War and is best relegated to elected state bodies. The states best know their own crime problems, their militia needs and how guns are utilized in their cities. "In my view, the Court badly misconstrued the Second Amendment by linking it to the value of personal self-defense above and beyond the functioning of state militias…." It

is also clear that Judge Stevens was very unhappy with the *Heller* decision which, in his view, enhances the right of gun owners over the rights of potential victims without any constitutional predicate.

Stevens also took a strong swipe at gun advocates by noting that approximately one million Americans have been wounded or killed by gunfire in the last decade. Firearms, says the Justice, have a fundamentally "ambivalent relationship to liberty." Handguns have been used in more than four/fifths of firearm murders and more than half of all murders nationwide. "*Your* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence."

At the heart of the debate between Justice Scalia and Justice Stevens, both Republican appointees, is a view as to how intrusive federal control should be over states' rights and the importance of guns in keeping a society free. "Stevens says "the handgun is itself a tool for crime; the handgun's bullets *are* the violence."

Stevens' last point is that the opinion of the plurality may have unintended consequences. What other rights must now automatically be imposed on the states because they are contained within the Bill of Rights and therefore must be considered fundamental liberty interests guaranteed by the Fourteenth Amendment? One of the first should be the right to trial by jury.

The right to trial by jury has been so seriously eroded that scholars have referred to the "disappearing jury trial." Some judges in locations throughout the United States are virtually out of work because of the lack of jury trials. Where have all those cases gone? Forced arbitration has frequently prevented consumers from going to court and instead they must litigate before people who are frequently handpicked by major corporations, hospital medical centers and insurance companies. Those arbitration courts are often not as fast and inexpensive as promised but they always limit damages to levels so low that there is little or no incentive for major economic players to treat their customers or patients fairly.

Justice Stevens pointed out that even gun advocates may be harmed by the decision they now celebrate. If the federal government is now going to have to establish a standard, through court decisions, as to what gun rights can be controlled, the federal decisions are likely to water down the right so that it may have application throughout the country at every level of local, municipal and state control. In other words, if the federal courts are going to have to legislate gun control for the entire nation, they are likely to erect a low barrier.

With the deaths of classrooms of children in Connecticut and other heinous acts of gun violence, we once again revisit these important Supreme Court decisions with respect to the true meaning of the Second Amendment. The interpretation of the Second Amendment is every bit as complex as the minds of the authors of our federal charter.

It seems clear that the Founders had absolutely no desire to protect individuals who wanted to own military weapons for the purpose of individual self-protection or to kill others.

Guns are in fact regulated all the time by punishing people who use those weapons during crimes. That is a form of gun regulation.

Reading the constitutional history, not selectively but rather honestly, it is clear that individual gun use licensing and gun registration would not run afoul of the purpose of the Second Amendment, which was simply to make sure that guns were available to protect individual rights and freedoms. That is a far cry from anyone using assault weapons for purposes unrelated to the national interest.

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