Search Blog or Docket
Blog | Docket

Editor's Note : This week, we are hosting a symposium before oral argument on December 2 in *New York State Rifle & Pistol Association v. City of New York*. Click here to read the contributions.

Breaking News : The Supreme Court released orders today from the November 22 conference. The justices added one new case, *FNU Tanzin v. Tanvir*, to their merits docket.

David Cohen *Guest*
Posted Fri, July 2nd, 2010 8:00 am

Email David
Bio & Post Archive »

The paradox of *McDonald v. City of Chicago*

David Cohen is a professor at Drexel University Earle Mack School of Law.

On one level, explaining the result of *McDonald v. City of Chicago* is easy: in a five-four decision, the Supreme Court held that the Second Amendment is incorporated against state and local governments. This is the sound-bite version of the decision, and for most purposes, it is in fact the important take-away. However, hidden by that description of the case is the fact that the route taken to get to that conclusion is a rare Supreme Court phenomenon called a voting paradox (or, as some scholars alternatively call it, a voting anomaly).

To illustrate this phenomenon, imagine explaining the result of the case in a different way. After stating the basic holding that the Second Amendment is incorporated, someone responds, "Interesting. How is it incorporated?" The answer to that question reveals the paradox.

Is it incorporated through the Due Process Clause? Well, no, it's not, as a majority of the Justices concluded that the Due Process Clause does not incorporate the Second Amendment. The four dissenters (in two separate opinions) rejected the right as fundamental under *Duncan v. Louisiana* (1968). Justice Thomas, in his separate concurrence, rejected Due Process incorporation for non-procedural rights altogether. To be sure, the four plurality Justices believed that the Due Process Clause incorporated the Second Amendment, but they were in the five-four minority on this point.

Is it incorporated through the Privileges or Immunities Clause? Again, no, it's not, as a majority of the Justices rejected that claim as well. The plurality of four refused to revisit the *Slaughter-House Cases* (1873) or *United States v. Cruikshank* (1876) (on the Privileges or Immunities question), and the four dissenters also rejected this claim. Only Justice Thomas endorsed overturning *Slaughter-House* and reinvigorating the Privileges or Immunities Clause as the mechanism for incorporation. However, he was in the eight-one minority on this issue.

Thus, even though, as we all now know, the Second Amendment is in fact incorporated against state and local governments, a majority of the Court rejected incorporating it through the Due Process Clause and a majority of the Court rejected incorporating it through the Privileges or Immunities Clause.

How can this be? The explanation lies in the voting paradox. The paradox occurs when, in a splintered opinion like *McDonald*, the resulting groups of Justices are split such that the outcome of the case is the opposite of the outcome that the resolution of the individual issues should lead to. This paradox has occurred roughly two dozen times in Supreme Court history and may have been behind the Court's voting alignment in *Bush v. Gore*.

The reason the paradox occurs is that the Court (and other appellate courts in this country) decides cases by voting on the outcome — whether to reverse or affirm the lower court's judgment. Yet, the Court reasons based on issue. When more than one issue is presented to the Court, the reasoning of the various opinions can create this paradox.

This paradox has resulted in a wide range of scholarship looking at the phenomenon. One recurring debate among scholars studying the paradox is whether the paradox justifies a change on the Court from outcome-based voting (as described above) to some form of issue-based voting. I have weighed in on this and argued that the paradox can be easily manipulated by judges and lawyers even in an issue-based voting system, but the debate is sure to be reinvigorated after *McDonald*. After all, in an issue-based voting world, Monday's headlines would have declared that Chicago won and the Second Amendment is applicable only to the federal government.

And that raises a bigger issue here. Is it legitimate that a landmark decision like *McDonald* turns, not on grand theories of constitutional law, history, or policy, but rather on the minutiae of Supreme Court vote counting?

This website may use cookies to improve your experience. We'll assume you're ok with this, but you can leave if you wish.

Accept Read More

Switch to mobile site

This website may use cookies to improve your experience. We'll assume you're ok with this, but you can leave if you wish.

Accept Read More