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The McDonald Case: Adhering to the Constitution

The high-profile Chicago case should be viewed through the prism of the original intent of the Constitution. The nearly 1,000 state lawmakers, 38 Attorneys General, numerous academics and overwhelming, bipartisan majority of members of the U.S. House of Representatives and the U.S. Senate who have signed amicus curiae *briefs supporting the case are upholding the idea that the United States Constitution applies to all levels of government and every individual, as intended by the Founders.*

By David T. Hardy, Esq.

Foundations of the Union

In 1775 the American Revolution began, a struggle fueled by belief that the British government was depriving the colonists of their rights as Englishmen – the right to vote on taxation, to be tried by jury and to be protected against random search and seizure. The conflict ignited when the British tried to seize militia arsenals in Massachusetts and in Virginia – to the Americans, this made it clear they were to be made powerless and enslaved.

The new States fought almost all the Revolution with a Continental Congress but no formal agreement. The first such agreement, the Articles of Confederation, was not ratified until 1781. The Articles provided for a weak central government. Each State got one vote in Congress, and any major decision took a 2/3 majority. Budgets were met by asking money or supplies from the States, which often refused, leaving American armies unpaid and unfed for extended periods.

A Proposed Constitution

The Articles had no enforcement provisions, and so States did as they willed – refusing to contribute funds, or violating treaties, or taxing imports. Congress eventually agreed to summon a convention to propose strengthening amendments to the Articles.

This 1787 convention instead drafted an entirely new constitution, enormously increasing Federal powers to tax and spend, to regulate interstate and foreign commerce, to negotiate treaties and to establish an army and navy. It had federal courts and an executive branch to enforce decisions. State conventions were asked to ratify the agreement; once nine agreed, it would bind them, and others if they later ratified.

George Mason of Virginia proposed to add a bill of rights to the new charter, but the convention, in its greatest mistake, rejected the idea. Mason and others refused to sign the constitution and returned home to oppose its ratification. (Those supporting ratification are today called federalists, and those opposing it, antifederalists).

Antifederalists argued that Americans had just thrown off a distant, powerful central government – King George and his Parliament – which had ignored their rights. This new, untried, national government might go down the same path, especially since it had no bill of rights. Why had the convention spent so much effort giving power to government, without putting limits on it, or protecting their natural rights? When the Constitution got its required 9th vote, from New Hampshire, it came with a compromise: the State ratified but demanded that a national bill of rights be added on.

The Constitution now bound the States that had signed on, but several (including powerful Virginia and New York) still had not ratified. Both States followed the New Hampshire pattern, ratifying while providing a list of amendments that they demanded Congress adopt.

The Bill of Rights

In the ratifying debates, and in his contributions to the Federalist Papers, James Madison had argued that no bill of rights was necessary, since Congress would only have what powers were delegated, and nothing in the Constitution said it could suppress free speech, establish a church, etc. (Madison probably knew this was a weak argument; the spending power could create a church, powers over interstate commerce could suppress newspapers). He also argued that bills of rights were just "parchment barriers" which legislatures would violate at will.

As a Representative in the First Congress, however, Madison became the champion of a bill of rights. Madison had probably pledged to work for a bill of rights in the Virginia ratifying convention; he had clearly promised to do so during his election campaign, and he was an honorable man. He and Jefferson had also debated the question in correspondence, and Jefferson had argued that even a "parchment barrier" is useful; if the people are to resist invasions of their rights, by voting or by more direct means, they should start with a written agreement as to what those rights were.

The First Congress, though, resisted. It was busy creating a new government – taxes, a treasury, courts, an army and navy, a post office, and a bill of rights seemed a low priority. At one point, Madison protested that they could have drafted a bill of rights in less time than they had spent debating whether to draft one! Eventually, Madison won out and the First Congress did vote out a Bill of Rights, in the form of 12 amendments, 10 of which were ratified by the States and became known as the Bill of Rights. Antifederalists had predicted the new government would violate Americans' rights; Madison had it prove its good faith by swearing off any power to infringe freedom of speech, press, or religion, or to establish a church, to infringe the right to arms, or make unreasonable searches, and so on.

Applying the National Bill of Rights to the States

In 1833, the U.S. Supreme Court ruled that the Federal Bill of Rights only restricted Federal action, not action by States (some State courts later disagreed, reasoning that a right is a right).

After the Civil War, Congress proposed, and the States ratified, the 14th Amendment. This forbade States to abridge the "privileges or immunities of citizens of the United States," or to deprive anyone of "due process of law." (In the 1860s and before, "privileges" were commonly used to describe "rights.").

There is strong evidence that "privileges or immunities of citizens of the United States" was meant to describe (at the bare minimum) the Federal Bill of Rights. But the Supreme Court was hostile to this, and in 1870s decisions played a complicated word game that made "privileges or immunities" almost meaningless.

In the 20th century, though, the Supreme Court thought better of applying the Federal Bill of Rights to the States. Rather than admitting it was wrong in the 1870s, it instead used the 14th Amendment's "due process clause" for this, ruling that infringing this or that right deprived Americans of due process of law. Because the Court could pick and choose rights for this, this was called "selective incorporation." As of this writing, all Bill of Rights liberties have been applied to the States except for the right to arms (whose application to the States is now before the Supreme Court), the right to jury trial in civil suits, and the requirement that felony prosecutions be approved by a grand jury rather than a judge.

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