

# The Tell-Tale Privileges or Immunities Clause

*Alan Gura,\* Ilya Shapiro,\*\* and Josh Blackman\*\*\**

Help is on the way! That's the Supreme Court's most readily obvious message for those Americans living in the handful of states that don't respect the right to keep and bear arms. It should not have been a surprise. Two years ago, in striking down the District of Columbia's handgun and functional firearms bans, the high court provided a none-too-subtle message to recalcitrant politicians unwilling to obey national civil rights standards. Ancient cases refusing to apply the right to arms against the states, said the Court, had also failed to apply the First Amendment and were based on obsolete thinking.<sup>1</sup> This term, in *McDonald v. City of Chicago*,<sup>2</sup> *Heller's* wink-and-nudge became a shove, finally dragging anti-gun politicians into the late-19th century.

\* Member, Gura & Possessky, PLLC; Counsel for Petitioners in *McDonald v. City of Chicago* and for Respondents in *District of Columbia v. Heller*; J.D., Georgetown University Law Center; B.A., Cornell University.

\*\* Senior Fellow in Constitutional Studies, Cato Institute, and Editor-in-Chief, *Cato Supreme Court Review*; J.D., University of Chicago Law School; M.Sc., London School of Economics; A.B., Princeton University; signatory to Cato's amicus brief in *McDonald*.

\*\*\* Teaching Fellow, Pennsylvania State University Dickinson School of Law; Law Clerk to the Hon. Kim R. Gibson, U.S. District Court for the Western District of Pennsylvania; President, Harlan Institute; J.D., George Mason University School of Law; B.S., Pennsylvania State University. The authors would like to thank Bob Levy for his helpful comments and suggestions. This article—and especially its expedited publication—would not have been possible without the assistance of Trevor Burrus. We dedicate this article to John Bingham.

<sup>1</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008) (“With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser v. Illinois*, 116 U. S. 252, 265 (1886) and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.”) (referencing *United States v. Cruikshank*, 92 U.S. 542 (1876)).

<sup>2</sup> *McDonald v. City of Chicago*, 561 U.S. \_\_\_\_; 130 S. Ct. 3020 (2010).

But at exactly what part of the late-19th century have they arrived? The heady days of the Fourteenth Amendment's first five years, when it was understood that states were actually bound to respect Americans' basic rights?<sup>3</sup> Or the century's last three years, with the Fourteenth Amendment's central guarantee of freedom having been parodied into a dead letter, the Supreme Court picking and choosing which rights are worth securing, and to what extent?<sup>4</sup> It is the answer to that question, more than the result applying the right to arms, that promises to make *McDonald* an enduring landmark of American liberty for years to come.

## I. The Second Amendment Returns to the Supreme Court

### A. *Heller* Begets *McDonald*

In its landmark 2008 opinion, *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment protects an individual right to keep and bear arms unconnected to service in a militia.<sup>5</sup> The Court accordingly struck down D.C. laws banning the keeping of handguns, and the keeping of all functional firearms within the home. The *Heller* decision was "everything a Second Amendment supporter could realistically have hoped for,"<sup>6</sup> but for one inherent limitation. The case having arisen as a challenge to the law of the federal capital, the Court could not reach the question of whether, and to what extent, the right to keep and bear arms applies to the states and their units of local government. Justice Antonin Scalia's opinion for the Court did, however, observe that its 19th-century precedent declining to apply the Second Amendment right against the states "also said that the First Amendment did not apply

<sup>3</sup> See, e.g., *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870); *United States v. Hall*, 26 F. Cas. 79, 81–82 (C.C. S.D. Ala. 1871).

<sup>4</sup> See, e.g., *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). See also *Cruikshank*, 92 U.S. 542, and *Presser*, 116 U.S. 252 (declining to incorporate the First and Second Amendments, respectively against the states).

<sup>5</sup> *Heller*, 128 S. Ct. at 2821–22. For a thorough and insightful look at the story behind *District of Columbia v. Heller*, see Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby!*, 2007–2008 *Cato Sup. Ct. Rev.* 127 (2008).

<sup>6</sup> Neily, *supra* note 5, at 147.

against the states and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”<sup>7</sup>

Ancient precedent from a dark time in American history, precedent that deprived people of basic rights, was still technically on the books. But much had happened since the days when the Supreme Court turned a blind eye to the rise of Jim Crow, and was congratulated by the Civil War’s losers for having “dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment.”<sup>8</sup> The Court had spent the past century repairing its Reconstruction-era damage, selectively applying additional rights as against the states. Would the Second Amendment follow the same path, marking merely the latest step in the long piecemeal “incorporation” process?

Within minutes of the Supreme Court’s decision in *Heller*, petitioners in *McDonald v. City of Chicago* brought suit challenging the city’s handgun ban and several overly burdensome features of its gun registration system.<sup>9</sup> The following day, the National Rifle Association filed suits challenging the Chicago ordinances, as well as ordinances in the suburb of Oak Park.

Chicago residents face one of the highest murder rates in the United States, and rates of violent crime far exceeding the average for comparably sized cities.<sup>10</sup> Yet since 1982, Chicago’s firearm laws effectively banned the possession of handguns by almost all city residents.<sup>11</sup> Despite enactment of the handgun ban, the murder rate in Chicago had increased.<sup>12</sup> Several of the petitioners had been the

<sup>7</sup> *Heller*, 128 S. Ct. at 2783 n.23.

<sup>8</sup> Christopher G. Tiedeman, *The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law* 102–03 (1890).

<sup>9</sup> The plaintiffs (later petitioners) were Otis McDonald, Adam Orlov, Colleen Lawson, David Lawson, the Illinois State Rifle Association, and the Second Amendment Foundation. Contrary to the facts recited by Justice Alito, *McDonald*, 130 S. Ct. at 3027 n.4, the Illinois State Rifle Association and the Second Amendment Foundation were indeed petitioners in this case.

<sup>10</sup> *McDonald*, 130 S. Ct. at 3026.

<sup>11</sup> The ordinance provided that “[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.” Chicago, Ill., Municipal Code § 8-20-040(a) (2009), Chicago, Ill., Municipal Code § 8-20-050(c) barred the registration of handguns.

<sup>12</sup> *McDonald*, 130 S. Ct. at 3026.

targets of violence. Otis McDonald, a retiree from a rough neighborhood in Chicago, had been threatened by drug dealers, and the Lawsons had been targeted by burglars in their home.

*B. Lower Court Opinions*

The district court, considering all three cases, rejected the plaintiffs' arguments, noting that the Seventh Circuit Court of Appeals had "squarely upheld the constitutionality of a ban on handguns a quarter century ago."<sup>13</sup> *Heller* had refrained from "opin[ing] on the subject of incorporation" of the Second Amendment,<sup>14</sup> and the district court judge in *McDonald* noted that he had a "duty to follow established precedent in the Court of Appeals . . . even though the logic of more recent caselaw may point in a different direction."<sup>15</sup>

The Seventh Circuit affirmed, deciding against Second Amendment incorporation because of three prior cases.<sup>16</sup> Although the court noted that the rationales of the restrictive 19th-century precedents were "defunct," it did not consider whether the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment, and declined to predict how the right to keep and bear arms would fare under the Court's modern "selective incorporation" jurisprudence.<sup>17</sup>

In so holding, the Seventh Circuit pointed to *Heller's* discussion of Reconstruction-era precedents but carefully avoided quoting the Supreme Court's caveat that those decisions "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." Only by tip-toeing around this rather obvious admonition to conduct an incorporation analysis could the court of appeals claim fidelity to the Supreme Court's precedents. In this manner, the Seventh Circuit agreed with the 19th-century Supreme Court regarding application of the Second Amendment to the states—but the court was

<sup>13</sup> *NRA, Inc. v. Vill. of Oak Park*, 617 F.Supp.2d 752, 753 (N.D.Ill. 2008) (citing *Quilici v. Vill. of Morton Grove*, 695 F.2d 261 (7th Cir. 1982)).

<sup>14</sup> *Oak Park*, 617 F.Supp.2d at 754.

<sup>15</sup> *Id.* at 753.

<sup>16</sup> *NRA, Inc. v. City of Chicago*, 567 F.3d 856, 857 (2009) (citing *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894)).

<sup>17</sup> *NRA*, 567 F.3d at 857–58.

unfaithful to the century of case law that followed, culminating with *Heller's* instruction to perform a modern due process analysis.

The Seventh Circuit asserted that precedent having direct application must be followed even if it “rest[s] on reasons rejected in some other line of decisions.”<sup>18</sup> But the Supreme Court’s Reconstruction-era decisions hadn’t applied the due process incorporation doctrine at all. Indeed, that doctrine would not be invoked by the Supreme Court in securing individual rights for decades following the ratification of the Fourteenth Amendment.<sup>19</sup> The earlier cases thus had no direct application to this question. “[C]ases cannot be read as foreclosing an argument that they never dealt with.”<sup>20</sup> “[W]hen a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.”<sup>21</sup> As the Seventh Circuit itself once acknowledged, “[a] court need not blindly follow decisions that have been undercut by subsequent cases . . . .”<sup>22</sup>

Or, as that same court recognized nearly 30 years ago,

sometimes later decisions, though not explicitly overruling or even mentioning an earlier decision, indicate that the Court very probably will not decide the issue the same way the next time. In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law.<sup>23</sup>

Time and again, courts have rejected a result under one theory, only to adopt the same result under another. For example, the Supreme Court rejected a challenge to the mandatory federal sentencing

<sup>18</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

<sup>19</sup> See, e.g., Josh Blackman & Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 *Geo. J.L. & Pub. Pol’y* 1, 57–59 (2010) (“Indeed, the concept of [selective due process] ‘incorporation’ was anachronistically inserted into our Constitutional jurisprudence decades after the ratification of the Fourteenth Amendment.”).

<sup>20</sup> *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citation omitted).

<sup>21</sup> *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 218 (2d Cir. 1942), *aff’d*, 317 U.S. 501 (1943) (footnotes omitted).

<sup>22</sup> *United States v. Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (citations omitted).

<sup>23</sup> *Norris v. United States*, 687 F.2d 899, 904 (7th Cir. 1982).

guidelines under separation of powers and non-delegation theories,<sup>24</sup> but that did not stop the Seventh Circuit from sustaining a similar challenge under the Sixth Amendment right to a jury trial—and the Supreme Court affirmed.<sup>25</sup>

This has been the history of due process incorporation. Virtually all rights selectively incorporated under the Due Process Clause had at one point been denied incorporation or application against the states under other theories.<sup>26</sup> And the lower federal courts had a leading role in incorporating some of these rights, without awaiting a green light from the Supreme Court.<sup>27</sup>

Instead, the Seventh Circuit followed a non-binding line of cases, ignored *Heller's* directive to apply later cases, and excluded the Second Amendment from the broad application given other rights. By contrast, the Ninth Circuit—in a case that may yet come before the Supreme Court—recognized *Heller's* pro-incorporation signal and found that the Second Amendment secured fundamental rights incorporated through the Due Process Clause.<sup>28</sup> Presaging the framework that Justice Samuel Alito would use in *McDonald*, the Ninth Circuit applied *Washington v. Glucksberg* and determined that because the right to keep and bear arms is a fundamental right, “meaning, ‘necessary to an Anglo-American regime of ordered liberty’” and “deeply rooted in this Nation’s history and tradition,” the Fourteenth Amendment incorporates the Second Amendment.<sup>29</sup>

<sup>24</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>25</sup> *Booker v. United States*, 375 F.3d 508 (7th Cir. 2004), *aff’d*, 543 U.S. 220 (2005).

<sup>26</sup> Compare, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876) (First Amendment not directly applicable to the states) with *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment incorporated), and *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) (Fifth Amendment’s Double Jeopardy Clause not directly applicable to the states) with *Benton v. Maryland*, 395 U.S. 784 (1969) (Double Jeopardy Clause incorporated).

<sup>27</sup> See, e.g., *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965) (incorporating Fifth Amendment Double Jeopardy Clause); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969) (en banc) (incorporating Sixth Amendment public trial right).

<sup>28</sup> *Nordyke v. King*, 563 F.3d 439, 457 n.16 (9th Cir. 2009) (“Because, as *Heller* itself points out, 128 S. Ct. at 2813 n.23, *Cruikshank* and *Presser* did not discuss selective incorporation through the Due Process Clause, there is no Supreme Court precedent directly on point that bars us from heeding *Heller's* suggestions.”).

<sup>29</sup> *Id.* at 449 (citing *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)).

*C. Seeking Supreme Court Review*

*McDonald* took a curious path to the Supreme Court. The Seventh Circuit had consolidated the NRA and *McDonald* appeals but the Supreme Court granted only *McDonald*'s petition; the NRA's petition would be held pending the outcome in *McDonald*, which would necessarily control the NRA case.

As petitioners, *McDonald* and company got the first crack at framing the "question presented," which controls the scope of the briefing on the merits. They posed the following question: "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's *Privileges or Immunities or Due Process Clauses*."<sup>30</sup> That meant, not only would "incorporation" via the Fourteenth Amendment be at issue, but the *manner* of incorporation would be as well.

Stated another way, had the Seventh Circuit incorporated the Second Amendment through the Due Process Clause—as did the Ninth Circuit in *Nordyke*—the validity of that analysis would have likely been the primary question on review. But the Seventh Circuit rejected incorporation altogether, so the *McDonald* petitioners had a blank slate on which to make their case. And logically, the full weight of constitutional text, structure, and history called for application of the Privileges and Immunities Clause. In accepting *McDonald*'s formulation of the question, the Supreme Court agreed to decide both whether and how to incorporate.

Recall that *Heller* had just decided the basic Second Amendment issue on originalist grounds: "We are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."<sup>31</sup> Even the *Heller* dissenters adopted a version of originalism, but focused more on legislative intent.<sup>32</sup> Following either approach, *McDonald* should have relied on

<sup>30</sup> Petition for Writ of Certiorari, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) (emphasis added).

<sup>31</sup> *Heller*, 128 S. Ct. at 2788 (citations and internal quotation marks omitted).

<sup>32</sup> *Id.* at 2822 (Stevens, J., dissenting). See also Josh Blackman, *Originalism for Dummies, Pragmatic Unoriginalism, and Passive Liberty*, available at <http://ssrn.com/abstract=1318387> ("Rather than ascertaining the original public meaning, [Justice Stevens] focuses almost exclusively on the drafting history, and improperly attempts to guess the intentions of our framers.").

the Privileges or Immunities Clause—which was understood and intended to bind the states to national civil rights standards—to extend the Second Amendment to the states.

To be sure, there may have been a technical conception of “substantive” due process among some 19th-century legal scholars.<sup>33</sup> But there was no evidence—none—that the ratifiers of the Fourteenth Amendment understood the Due Process Clause to transmit substantive rights (beyond the bare minimum needed to prevent “due process of law” from becoming a kangaroo court). Nor was there any evidence that the clause’s authors believed it contained such powers.

Thus, the original understanding of the Fourteenth Amendment plainly favored applying Privileges or Immunities, not “substantive” due process. That should have mattered to the Court and, therefore, to the litigants. Justice Antonin Scalia recently put it this way:

Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers. By and large, counsel did not know I was an originalist—and indeed, probably did not know what an originalist was. In their briefs and oral arguments on constitutional issues they generally discussed only the most recent Supreme Court cases and policy considerations; not a word about what the text was thought to mean when the people adopted it. If any light was to be shed on the latter question, it would be through research by me and my law clerks. Today, the secret is out that I am an originalist, and there is even a second one sitting with me, Justice Clarence Thomas. *Rarely, nowadays, does counsel fritter away two out of nine votes by failing to address what Justice Thomas and I consider dispositive. Originalism is in the game, even if it does not always prevail.*<sup>34</sup>

And quite apart from the originalist sympathies of some justices, there was the practical aspect of litigating before a Supreme Court on which sit intractable opponents of substantive due process—

<sup>33</sup> See Timothy Sandefur, Privileges, Immunities, and Substantive Due Process, 5 N.Y.U. J. L. & Liberty 115 (2009); Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 Emory L.J. 585 (2009).

<sup>34</sup> Justice Antonin Scalia, Foreword, 31 Harv. J. L. & Pub. Pol’y 871, 871 (2008) (emphasis added).



including, most notably, *Heller's* author. In the last major civil rights case reaching the Court from Chicago, Justice Scalia famously derided substantive due process as an “atrocious” and an act of “judicial usurpation.”<sup>35</sup> It would have been folly to assume that this Court had on it five votes for substantive due process incorporation.

Indeed, ultimately, as we all now know, there were not five votes.

Whatever its merits or ultimate level of acceptance among the justices, substantive due process incorporation had one unique feature: it was familiar. The Court had been down this well-worn path many times before. The Seventh Circuit avoided incorporating the Second Amendment on due process grounds only by avoiding the question. For the Supreme Court, the question of whether to incorporate the Second Amendment on due process grounds would merely be a test of the justices’ commitment to existing incorporation principles. Either they believed in it, or they didn’t; they would either apply the familiar standards to the Second Amendment or alter those familiar standards to make an anti-gun exception. Either way, it would be a poor use of litigation resources to beat the drum on a theory where every justice’s vote, whatever it might be, was a foregone conclusion.

Or was it? Maybe those justices unwilling to carry originalism to its logical result—defining the right to bear arms as one of the privileges or immunities of citizenship—would nonetheless utilize originalist grounds in an exercise of substantive due process nose-holding. That is, some faint-hearted originalist justices generally hostile to substantive due process might vote for due process incorporation if they could be convinced that the outcome was historically correct. There is strong evidence that this occurred among the *McDonald* plurality.<sup>36</sup>

Accordingly, the failure to make a strong originalist case could have seriously jeopardized the outcome. Justices unrepentantly hostile to substantive due process might not have forged their own

<sup>35</sup> *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting). See also *Stop the Beach Renourishment v. Fla. Dep’t. of Env’tl. Prot.*, 130 S. Ct. 2592, 2607–08 (2010) (Scalia, J., plurality opinion) (attacking as vague and undefined Justice Anthony Kennedy’s use of substantive due process to protect against judicial takings).

<sup>36</sup> *McDonald*, 130 S. Ct. at 3033 n.9 (Alito, J., plurality opinion) (referencing Privileges or Immunities sources); *id.* at 3050–51 (Scalia, J., concurring).

originalist path unless meaningfully asked to do so by the petitioners. In *Gonzales v. Carhart*, for example, the Supreme Court upheld the federal partial-birth abortion ban against a substantive due process challenge.<sup>37</sup> Justices Scalia and Clarence Thomas, predictably, were not enthusiastic about the doctors' due process abortion-rights claim. But this pair was also skeptical of congressional power to regulate abortion under the Commerce Clause—Justice Thomas having endorsed the idea that “health laws of every description” were “not surrendered to a general government.”<sup>38</sup> *Carhart* proved to be a 5–4 decision, in which Justice Thomas, joined by Justice Scalia (two of the five), “note[d] that whether the Act constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.”<sup>39</sup> Had the abortion-rights lawyers raised an originalist Commerce Clause challenge—arguing that Congress lacked the power to enact this law—they might well have prevailed 6–3.<sup>40</sup>

In the end none of the Court’s more “liberal” justices voted in *McDonald*’s favor, but the case’s reception among self-described progressives and others normally unenthusiastic about gun rights was quite positive. At the petition stage, liberal academic luminaries including Yale’s Jack Balkin and UCLA’s Adam Winkler joined a brief by the Constitutional Accountability Center endorsing the originalist arguments for incorporation via the Privileges or Immunities Clause.<sup>41</sup> On the eve of argument, even the *New York Times* editorial page—no friend of the Second Amendment—opined that *McDonald* should prevail on that same basis.<sup>42</sup>

Chicago’s attorneys understood at least some if not all of this dynamic. The city’s lawyers had reason to believe they might prevail

<sup>37</sup> 550 U.S. 124 (2007).

<sup>38</sup> *United States v. Lopez*, 514 U.S. 549, 594 (1995) (Thomas, J., concurring) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

<sup>39</sup> *Carhart*, 550 U.S. at 169 (Thomas, J., concurring) (citation omitted).

<sup>40</sup> See David S. Cohen, *The Paradox of McDonald v. City of Chicago*, *Geo. Wash. L. Rev. Arguendo* (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1653524](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653524).

<sup>41</sup> See Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>42</sup> Editorial, *The Second Amendment’s Reach*, *N.Y. Times*, March 1, 2010, at A22.

on the substantive due process question, but wished to avoid arguing their case on originalist grounds.<sup>43</sup> And so, in opposition to McDonald's petition for certiorari, Chicago offered, "If the Court believes the time is right to address whether the Second Amendment restrains state and local governments under the Due Process Clause, the petitions should be granted to address this issue only [but t]his Court should decline to address whether the Second Amendment is incorporated under the Privileges or Immunities Clause."<sup>44</sup>

*McDonald* petitioners replied that there was no way to divorce the historical record of the Fourteenth Amendment's ratification from the case. Arguing that the Supreme Court had erred in its basic approach to the Fourteenth Amendment, *McDonald* petitioners' reply brief on petition for certiorari contained section headings entitled, "The Privileges or Immunities Clause Cannot Be Avoided" and "Overruling *Slaughterhouse* Remains Imperative."<sup>45</sup>

The Supreme Court accepted the *McDonald* case, only the *McDonald* case and—over Chicago's objections—accepted McDonald's framing of the question. Anyone surprised by the subsequent emphasis on originalist (that is, Privileges or Immunities Clause) arguments was not paying attention to the petition process.<sup>46</sup>

<sup>43</sup> On the merits, Chicago indeed offered argument as to why it believed the Due Process Clause does not incorporate the Second Amendment. But as to the originalist Privileges or Immunities argument, Chicago offered only that the Privileges or Immunities Clause is indeterminate or duplicative of other guarantees, and should not be revisited.

<sup>44</sup> Brief for Respondents in Opposition to Petition for Writ of Certiorari at 6, *NRA of Am., Inc. v. City of Chicago & Oak Park*, 567 F.3d 856 (7th Cir. 2009), rev'd sub nom. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

<sup>45</sup> Reply Brief on Petition for Writ of Certiorari at 7, 10, *McDonald*, 130 S. Ct. 3020 (No. 08-1521). *Slaughterhouse*, of course, is the set of 1873 cases that all but erased the Privileges or Immunities Clause from the Constitution. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

<sup>46</sup> *McDonald*'s counsel repeatedly and emphatically explained to certain conservative lawyers (1) the concerns—validated by the case's outcome—about the potential lack of five votes for substantive due process incorporation; (2) the utility—also demonstrated by the result—of an originalist argument in swaying votes even for due process incorporation; and (3) the benefits—realized—of attracting support to the case from non-traditional allies. Regrettably, political hostility to restoring the Fourteenth Amendment's original meaning and irrational fears about the consequences of doing so could not always be overcome. For further commentary, see, e.g., Ilya Shapiro, *Heller Counsel Argues for an Originalist Revolution*, *Cato-at-Liberty*, <http://www.cato-at-liberty.org/2009/11/17/heller-counsel-argues-for-an-originalist-revolution/> (Nov. 17, 2009, 8:54 EST).

## II. Split Decision

The Supreme Court reversed the Seventh Circuit and held in a 4–1–4 split that the Constitution guarantees the right to keep and bear arms for all individuals regardless of where in the country they live. How the Court got there is a little more complicated.

Justice Alito, writing for the plurality on behalf of Chief Justice John Roberts, Justice Scalia, and Justice Anthony Kennedy, held that the Second Amendment was incorporated through the Fourteenth Amendment’s Due Process Clause. Justice Scalia concurred and also wrote separately to dispute much of Justice John Paul Stevens’s dissent (much as he had in the term’s other big case, *Citizens United*<sup>47</sup>). Justice Thomas did not join in most of Justice Alito’s opinion, but he concurred in the judgment, thereby providing the all-important fifth vote for incorporation. While Thomas agreed that the right to keep and bear arms should be applied to the states, and agreed that the right is “fundamental,” he found that this fundamental right was properly extended to the states by the Privileges or Immunities Clause. Justice Stevens dissented. No one else joined his opinion. Stevens found that the Second Amendment should not be incorporated and, even if it were, it need not provide as much protection to people of the states as it provides to people in federal enclaves. Justice Stephen Breyer also dissented, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor. Breyer argued that (1) *Heller* was wrongly decided; (2) the Second Amendment should not be incorporated; and (3) *McDonald* would result in more crime and violence.

### A. Justice Alito’s Plurality Opinion

The bulk of Justice Alito’s opinion focused on the history of the right to keep and bear arms from revolutionary times to Reconstruction and attempted to apply that history—and what it says about the nature of the right—to incorporation doctrine. Justice Alito observed that the Court had never embraced the “total incorporation” theory advanced by Justice Hugo Black, who argued that “[Section] 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights,”<sup>48</sup> but Alito took “no position with respect

<sup>47</sup> *Citizens United v. FEC*, 558 U.S. —, 130 S. Ct. 876, 925 (2010) (Scalia, J., concurring).

<sup>48</sup> *McDonald*, 130 S. Ct. at 3033 (citing *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring)).

to [the] academic debate” over this theory.<sup>49</sup> He continued to sketch the evolution of the Court’s disjointed due process jurisprudence and noted that the Warren Court—the Court under Chief Justice Earl Warren in the 1950s and ‘60s—initiated “what has been called a process of ‘selective incorporation’” wherein the Court held that the “Due Process Clause fully incorporates particular rights contained in the first eight Amendments.”<sup>50</sup> These opinions “inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice.”<sup>51</sup> Alito proceeded to list all the rights that had been incorporated under the Due Process Clause and the rights that had not been incorporated—most importantly, the Second Amendment.<sup>52</sup>

In order to reconcile the hodgepodge incorporation jurisprudence of the Supreme Court during the early-20th century, Justice Alito compiled “[f]ive features of the approaches taken.”<sup>53</sup> First, “the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship.”<sup>54</sup> Second, the Court explained that the only rights protected against state infringement were those rights “of such a nature that they are included in the conception of due process of law,”<sup>55</sup> and that their protection was not due solely to their “enumerat[ion] in the first eight Amendments.”<sup>56</sup> Alito listed several different formulations relied on by the Court to “describ[e] the boundaries of [rights protected by] due process,” including the “famous[.]” *Palko v. Connecticut* version, which protected rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.”<sup>57</sup>

Third, citing the standard from *Duncan v. Louisiana*, Justice Alito remarked that “during this era the Court ‘can be seen as having

<sup>49</sup> McDonald, 130 S. Ct., at 3033 n.10.

<sup>50</sup> *Id.* at 3034 (citations omitted).

<sup>51</sup> *Duncan*, 391 U.S. at 149 n.14.

<sup>52</sup> McDonald, 130 S. Ct. at 3034–35 n.12.

<sup>53</sup> *Id.* at 3031.

<sup>54</sup> *Id.* (citing *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 3032 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.”<sup>58</sup> By accepting this broader rationale of due process, the Court was able to reconcile the precedent of *Chicago, Burlington & Quincy Railroad*, which held that states cannot violate the Takings Clause of the Fifth Amendment, even though the provision was never explicitly “incorporated.”<sup>59</sup> Fourth, the Court found that some rights had “failed to meet the test for inclusion”; the rights of freedom of speech and press, assistance of counsel in capital cases, freedom of assembly, and free exercise “qualified,” while others, such as to grand jury indictment, “did not” qualify.<sup>60</sup>

Fifth, even for rights in the Bill of Rights that “f[ell] within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies” provided against federal infringement.<sup>61</sup> However, the two examples Justice Alito gave of rights applying differently to the state and federal governments—the right of appointed counsel<sup>62</sup> and the exclusionary rule<sup>63</sup>—were subsequently overruled by Warren Court precedents.<sup>64</sup> The only extant precedent that supports this “watered-down” version of rights, *Apodaca v. Oregon*<sup>65</sup>—which held

<sup>58</sup> *Id.* (citing *Duncan*, 391 U.S. at 149, n.14).

<sup>59</sup> *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (opinion by Harlan, J.) (due process prohibits states from taking private property for public use without just compensation).

<sup>60</sup> *McDonald*, 130 S. Ct. at 3032 (citations omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Betts v. Brady*, 316 U.S. 455, 462 (1942) (holding that the Due Process Clause required appointment of counsel in state criminal proceedings only where “want of counsel in [the] particular case . . . result[ed] in a conviction lacking in . . . fundamental fairness”), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>63</sup> *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (holding that while the Fourth Amendment is “implicit in the concept of ordered liberty” and “enforceable against the States through the Due Process Clause,” the exclusionary rule does not apply to the states), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>64</sup> *Malloy v. Hogan*, 378 U.S. 1, 10 (holding that the Bill of Rights provisions incorporated “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment”).

<sup>65</sup> 406 U.S. 404 (1972).

that the “Due Process Clause does not require unanimous jury verdicts in state criminal trials”—was “the result of an unusual division among the Justices” and does not endorse the “two-track approach to incorporation.”<sup>66</sup> Alito noted that it is “far too late to exhume what Justice Brennan . . . derided as ‘the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.’”<sup>67</sup>

After considering this century-long train of precedents, Justice Alito concluded that the Court “must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>68</sup>

According to the plurality, the Court’s “decision in *Heller* points unmistakably to the answer”: yes.<sup>69</sup> Repeating *Heller*’s holding, Justice Alito recounted that “individual self-defense is ‘the central component’ of the Second Amendment” and “citizens must be permitted ‘to use [handguns] for the core lawful purpose of self-defense.’”<sup>70</sup> He then recited that the right described in *Heller* is “deeply rooted in this Nation’s history and traditions”<sup>71</sup>

The plurality’s treatment of the Privileges or Immunities Clause, meanwhile, was uncharacteristically curt. First, the plurality acknowledged that “many legal scholars dispute the correctness of the narrow *Slaughterhouse* interpretation.”<sup>72</sup> Second, the Court noted that petitioners wanted the Court to overrule *Slaughterhouse* and “hold that the right to keep and bear arms is one of the ‘privileges or immunities of citizens of the United States.’”<sup>73</sup> Third, the Court remarked that while the petitioners contend that the “Privileges or

<sup>66</sup> McDonald, 130 S. Ct. at 3035 n.14.

<sup>67</sup> *Id.* at 3047 (citing Malloy, 378 U.S. at 10–11) (internal quotation marks omitted).

<sup>68</sup> *Id.* at 3036 (citing Duncan, 391 U.S. at 149, and *Wash. v. Glucksberg*, 521 U.S. 702, 721) (internal citations and quotation marks omitted).

<sup>69</sup> McDonald, 130 S. Ct. at 3036.

<sup>70</sup> *Id.* (citing *Heller*, 128 S. Ct. at 2081–82, 2818).

<sup>71</sup> *Glucksberg*, 521 U.S. at 720.

<sup>72</sup> McDonald, 130 S. Ct. at 3029. This is an understatement akin to noting that “many” astrophysicists believe the Earth is essentially round and revolves around the Sun—but nevertheless an important first step in overcoming the *Slaughterhouse* Court’s medieval view, as it were, of the Privileges or Immunities Clause.

<sup>73</sup> *Id.* at 3030 (quoting U.S. Const. amend. XIV § 1, cl. 2).

Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others”—that is, unenumerated rights—“petitioners are unable to identify the Clause’s full scope.”<sup>74</sup> Similarly, scholars who think *Slaughterhouse* was wrong are also unable to arrive at a “consensus on th[e] question” about the scope of unenumerated rights.<sup>75</sup> Without any substantive discussion, the plurality thus saw no need to reconsider *Slaughterhouse*—not that it would have had to demarcate there and then the full panoply of protected unenumerated rights to decide whether this particular (enumerated) right was covered by a properly interpreted Privileges or Immunities Clause. The Court merely noted that “for decades, the question of the rights”—both enumerated, and unenumerated—“protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.”<sup>76</sup> Accordingly, the plurality “decline[d] to disturb the *Slaughterhouse* holding.”<sup>77</sup> That’s all, folks.

This short treatment is indeed remarkable. Regardless of the unknowable politics behind the adoption of petitioners’ question presented, the Court did take that question. To exert merely 172 words on such a profound topic, barely acknowledging the proverbial elephant in the room in light of Justice Thomas’s lengthy, historic concurrence seems odd.

Furthermore, that nobody can agree on the Privileges or Immunities Clause’s full scope is hardly a reason to ignore it. The Fourteenth Amendment’s authors refused to define its full scope, too. Introducing the amendment on the Senate floor, Michigan’s Jacob Howard declared,

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Of course, to continue the metaphor from note 72, *supra*, astrophysicists adopting the Copernican view rather than the Ptolemaic still disagree among themselves regarding, for example, whether Pluto is a planet.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 3031.



## *The Tell-Tale Privileges or Immunities Clause*

amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . .<sup>78</sup>

If the amendment's framers were not bothered by the inability to fully delineate the clause's scope, why should the Supreme Court be? Justice Robert Jackson had already replied to the *McDonald* plurality's concern nearly 70 years ago:

[T]he difficulty of the task does not excuse us from giving these general and abstract words whatever of specific content and concreteness they will bear as we mark out their application, case by case. That is the method of the common law, and it has been the method of this Court with other no less general statements in our fundamental law.<sup>79</sup>

The argument would have quickly devolved into a circus had petitioners attempted to do what the Fourteenth Amendment's framers believed impossible and sought to offer a complete litany of rights included and excluded from the Privileges or Immunities Clause. The petitioners themselves had never considered, never mind agreed on, the full scope of the liberty protected by the amendment. Indeed, whether a particular right is or is not within the amendment is always a serious question warranting careful examination and deliberation; no Supreme Court case considering an unenumerated right has ever been a casual exercise.

Moreover, the fact that the Supreme Court happily announces new rules, including on occasion heretofore unknown rights, while never taking such opportunity to *fully* describe the scope of the relevant constitutional text, renders the sudden insistence on learning the Privileges or Immunities Clause's full catalog incongruent with the Court's approach to constitutional interpretation. "[The] Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases as 'due process,' 'general welfare,' 'equal protection,' or even 'commerce among the several States.'"<sup>80</sup>

<sup>78</sup> Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

<sup>79</sup> *Edwards v. California*, 314 U.S. 160, 183 (1941) (Jackson, J., concurring).

<sup>80</sup> *Id.* at 183 (Jackson, J., concurring). As the Fifth and Fourteenth Amendment Due Process Clauses illustrate, not all rights must be specifically described. Cf. U.S. Const. amend. IX.

Refusing to interpret the relevant constitutional text in reaching as groundbreaking a decision as the application of the right to bear arms against the states takes a jarring leap of logic. As Professor Mark Tushnet observed in *Heller's* wake:

The debates over the Fourteenth Amendment's adoption are replete with comments that one of the Amendment's benefits would be to ensure that the South's freedmen would be able to protect themselves from marauding whites by guaranteeing their own right to arm themselves. The only embarrassment is a doctrinal one: *all these references described the right to keep and bear arms as one of the privileges of the citizenship that the Fourteenth Amendment guaranteed*, and contemporary incorporation doctrine rests not on the privileges or immunities clause of the Fourteenth Amendment, but rather on its due process clause.<sup>81</sup>

Indeed, the Privileges or Immunities Clause leaves quite a lump brushed under the constitutional carpet. Witness this remarkable passage from Justice Alito's plurality:

Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of "the personal rights guaranteed and secured by the first eight amendments of the Constitution."<sup>82</sup>

No. Senator Howard did not state that "the Amendment" protected these rights. As shown in the fuller quote of the same speech above, the subject of Howard's speech was *the Privileges or Immunities Clause*. But Justice Alito continues:

After ratification of the Amendment, Bingham maintained the view that the rights guaranteed by § 1 of the *Fourteenth Amendment* "are chiefly defined in the first eight amendments to the Constitution of the United States."<sup>83</sup>

<sup>81</sup> Mark Tushnet, *The Future of the Second Amendment*, 1 Alb. Gov't L. Rev. 354, 355 n.4 (2008) (emphasis added).

<sup>82</sup> McDonald, 130 S. Ct. at 3033 n.9 (citing Cong. Globe, 39th Cong., 1st Sess., 2765 (1866)).

<sup>83</sup> *Id.* (quoting Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871)) (emphasis added).

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No. Representative Bingham, author of Section 1, did *not* maintain the view that “the rights guaranteed by § 1 of the Fourteenth Amendment” are so chiefly defined. Here is what Bingham stated on that particular page of the *Congressional Globe*:

[P]ermit me to say that the *privileges or immunities of citizens of the United States*, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.<sup>84</sup>

The nation’s leading Fourteenth Amendment scholars stand in good company, likewise suffering the same gloss on their words. Justice Alito describes their brief as collecting authorities in stating that “[n]ot a single senator or representative disputed [the incorporationist] understanding’ of the *Fourteenth Amendment*.”<sup>85</sup> Well, not quite. The entire point of the law professors’ brief was “to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights, including the individual right to keep and bear arms at issue in this case.”<sup>86</sup> And so, here is the sentence of the professors’ brief immediately preceding that quoted by Justice Alito:

[T]he most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment—and, in most instances, the Privileges or Immunities Clause specifically—protected against state infringement of fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights.<sup>87</sup>

The professors’ brief explains, “Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard the substantive liberties set out in the Bill of Rights, and that,

<sup>84</sup> Cong. Globe, 42d Cong., 1st Sess., App. 84 (1871).

<sup>85</sup> McDonald, 130 S. Ct. at 3033 n.9 (quoting Brief of Constitutional Law Professors as Amici Curiae, *supra* note 41, at 20) (emphasis added).

<sup>86</sup> Brief of Constitutional Law Professors as Amici Curiae, *supra* note 41, at 1.

<sup>87</sup> *Id.* at 20.

in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.<sup>88</sup>

And some people wonder why the Privileges or Immunities Clause was argued by petitioners. A better question, left unanswered, is why the plurality obfuscated the text it claimed to be interpreting. The *Slaughterhouse* majority might have (temporarily) gotten away with killing the Privileges or Immunities Clause, but Justice Alito's plurality suggests that like Poe's tell-tale heart, the Fourteenth Amendment's central guarantee of liberty is beating loudly under the floorboards.

*B. Justice Scalia's Quixotic Concurrence*

Justice Scalia's concurring opinion is perhaps most noteworthy for what he did not say—and what he attempted to sweep under the rug in a mere 55 words and a citation:

Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited." *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.<sup>89</sup>

Justice Scalia's acquiescence in a theory he has recently termed "babble," "usurpation," and even an "atrocity," as part of his veritable holy war on behalf of originalism is startling enough. We now learn that Justice Scalia only has "misgivings" about substantive due process as an original matter and it is suddenly acceptable to "acquiesce" in the theory because it is "long established"? Imagine a hypothetical Supreme Court in the year 2073, with *Roe v. Wade* on the docket for reconsideration, and Justice Scalia, perhaps by virtue of the recent health care reform law, still advocating originalism from the bench. Would he acquiesce in *Roe* on its 100th birthday—coincidentally the 200th birthday of *Slaughterhouse*—because it

<sup>88</sup> *Id.* at 1.

<sup>89</sup> McDonald, 130 S. Ct. at 3050 (Scalia, J., concurring).

would by then be as long established as substantive due process is today?

After a 2008 speech in which Justice Scalia suggested that “maybe the original meaning of the Constitution is back,”<sup>90</sup> he was asked, “What rule or rules do you apply when deciding to set aside a precedent when reviewing a case that you feel was wrongly decided?”<sup>91</sup> Justice Scalia’s response partly predicted his vote in favor of substantive due process incorporation, but it made his avoidance of *McDonald*’s originalist issues all the more perplexing.

“I believe in *stare decisis*,” he said. “[T]he vast majority of that [wrongly decided] stuff is water under the bridge and I wouldn’t go back and revise it. . . . I am a textualist, I am an originalist, I am not a nut.”<sup>92</sup> But, he added: “There are some opinions that I do not accept. I think the most important criteria for me are, probably in ascending order, number one, how wrong was it? I mean there are some of them that are blatantly and maliciously wrong.”<sup>93</sup>

This is an apt description of *Slaughterhouse*. Just five years after the 39th Congress labored to pass the Fourteenth Amendment, *Slaughterhouse* eviscerated the intent and purpose of the central part of that amendment, the Privileges or Immunities Clause. As the preponderance of modern scholarship shows, this interpretation was at least “blatantly” wrong, if not indeed “malicious,” as were the decision’s original propounders.<sup>94</sup> In *McDonald*, as we discuss below, Justice Thomas reviewed this scholarship and concluded that the

<sup>90</sup> Hon. Antonin Scalia, United States Supreme Court, Address to Federalist Society National Lawyers Convention at 9:40 (Nov. 22, 2008), video available at [http://www.fed-soc.org/publications/pubid.1193/pub\\_detail.asp](http://www.fed-soc.org/publications/pubid.1193/pub_detail.asp).

<sup>91</sup> *Id.* at 36:00.

<sup>92</sup> *Id.* at 36:32.

<sup>93</sup> *Id.* at 36:50.

<sup>94</sup> See generally Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1990); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 161–70 (1995); Brief of the Constitutional Law Professors as Amici Curiae Supporting Petitioners at 3, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) (“[*Slaughterhouse*] read the Privileges or Immunities Clause so narrowly as to render it practically meaningless—completely ignoring the contrary text, history and purpose of the Fourteenth Amendment.”); see generally Brief for the Institute for Justice and the Cato Institute as Amici Curiae Supporting Petitioners, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

*Slaughterhouse Cases* had been wrongly decided and should be overruled.<sup>95</sup> In *his* opinion, however, Justice Scalia ignored Justice Thomas's able recounting of the errors of *Slaughterhouse*. But Scalia has another consideration when choosing *stare decisis* over originalism: the second point in his speech was, "how well has it been accepted?"<sup>96</sup> As an example, Scalia offers the incorporation doctrine, which he thinks is "probably wrong, but I wouldn't go back."<sup>97</sup>

That was clearly a harbinger of his "acquiescence" in *McDonald* to the "usurpative atrocity" of substantive due process. It does not, however, explain his silence regarding the Privileges or Immunities Clause. *Slaughterhouse* may be on the books, but "[v]irtually no serious modern scholar—left, right, and center—thinks that it is a plausible reading of the [Fourteenth] Amendment."<sup>98</sup> Indeed, one notable scholar described *Slaughterhouse* as "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court."<sup>99</sup>

The *Slaughterhouse* decision is so poorly accepted that Chicago's lawyers in *McDonald* would not explicitly defend its rationale. Yet Justice Scalia casually dismissed criticism of *Slaughterhouse* as mere academic concerns.<sup>100</sup> Apparently, he has forgotten his own advice in *Payne v. Tennessee*: "[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."<sup>101</sup> And

<sup>95</sup> *McDonald*, 130 S. Ct. at 3058–88 (Thomas, J., concurring).

<sup>96</sup> Hon. Antonin Scalia, Address to the Federalist Society, *supra* note 90, at 37:16.

<sup>97</sup> *Id.* at 37:35.

<sup>98</sup> Akhil Amar, Substance and Method in the Year 2000, 28 Pepp. L. Rev. 601, 631 n.178 (2001).

<sup>99</sup> Charles Black Jr., A New Birth of Freedom: Human Rights, Named and Unnamed 55 (1997).

<sup>100</sup> Transcript of Oral Argument at 7–8, *McDonald*, 130 S. Ct. 3020 ("JUSTICE SCALIA: [W]hy are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due I mean, you know, unless you're *bucking for a—a place on some law school faculty* . . . JUSTICE SCALIA: Well, I mean, what you argue is the *darling of the professoriate*, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it.") (emphasis added).

<sup>101</sup> *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (emphasis in original).

this admonition in *Planned Parenthood v. Casey*: “But in their [the plurality] exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention ‘how wrong was the decision on its face?’”<sup>102</sup> Chief Justice John Roberts recently made a similar point about the virtues and limitations of *stare decisis* in *Citizens United v. FEC*: “When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.”<sup>103</sup>

Scalia’s third “and probably . . . most important” question in weighing *stare decisis* is whether “that prior decision allow[s] me to behave like a judge”—that is, does the decision provide an adequate basis for judicial decisionmaking.<sup>104</sup> At oral argument, Scalia asked petitioners’ counsel whether he was troubled that the Privileges or Immunities Clause would allow judges to enforce unenumerated rights. Counsel answered that the Court has already enforced some unenumerated rights, suggesting that reinvigorating the Privileges or Immunities Clause would not threaten the Court’s established practices.<sup>105</sup> Scalia was not comforted.

More critically, of course, the enforcement of unenumerated rights would not have troubled the Framers. To the contrary, the Framers would have been disappointed in a timid judiciary that bends to the will of the political branches and shies from the trust placed in it by Article III to safeguard the Constitution.<sup>106</sup> The Framers of the original Constitution and the Bill of Rights explicitly endorsed—in the Ninth Amendment—the idea that some rights could not be enumerated. The Fourteenth Amendment’s framers similarly codified language they understood to encompass a range of rights that could not be fully cataloged.<sup>107</sup>

<sup>102</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 982–83 (1992) (Scalia, J., dissenting).

<sup>103</sup> *Citizens United*, 130 S. Ct. at 920 (Roberts, C.J., concurring) (emphasis in original).

<sup>104</sup> Hon. Antonin Scalia, Address to the Federalist Society, *supra* note 90 at 37:53.

<sup>105</sup> Transcript of Oral Argument at 7–8, *McDonald*, 130 S. Ct. 3020.

<sup>106</sup> See, e.g., Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson* 56 *UCLA L. Rev.* 1129, 1136–42 (2009).

<sup>107</sup> See Senator Jacob Howard’s speech during ratification debates, *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866) (arguing that the Privileges or Immunities Clause of the Fourteenth Amendment gives protections to substantive liberty and fundamental rights enjoyed by “citizens of all free Governments”: “protection by the government,

This is where Justice Scalia steps off the originalist bus.<sup>108</sup> Regardless of how “blatantly and maliciously wrong” a precedent might be, or how poorly accepted it is, Justice Scalia seems unwilling to bury its pernicious doctrine—perhaps because that process would call on him to engage in an historical exploration of which rights are to be enforced, rather than merely how rights are to be enforced.

Moreover, *McDonald* did not supply the only occasion during the 2009–10 term that Justice Scalia dealt with the scope and meaning of substantive due process. In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, Justice Scalia wrote for a plurality that chided Justice Kennedy’s use of substantive due process to protect against judicial takings.<sup>109</sup> While holding that the Florida Supreme Court did not commit a judicial taking when it ruled that beachfront property owners did not have the right for their property to contact the waterline, Scalia rightly chose the Takings Clause as the proper clause under which takings—judicial or otherwise—should be reviewed. He also gave an accurate critique of substantive due process as a “wonderfully malleable” concept to which the “firm commitment to apply it would be a firm commitment to nothing in particular.”<sup>110</sup> Instead, Scalia argues, textual provisions should be followed if germane textual provisions are available.<sup>111</sup> Indeed they should, and the same reasoning applies to Justice Scalia’s dismissal of the germane textual provision—the Privileges or Immunities Clause—at issue in *McDonald*.<sup>112</sup>

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the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole”) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823)).

<sup>108</sup> See Ilya Shapiro & Josh Blackman, *Is Justice Scalia Abandoning Originalism?*, Wash. Exam’r, March 8, 2010.

<sup>109</sup> *Stop the Beach Renourishment v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. \_\_\_\_, 130 S. Ct. 2592, 2606–08 (2010) (Scalia, J., plurality opinion).

<sup>110</sup> *Id.* at 2608.

<sup>111</sup> *Id.* at 2606 (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’” (citations omitted)).

<sup>112</sup> For more on this contrast in Justice Scalia’s reasoning see Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia’s Shifting Sands*, 35 Vt. L. Rev. \_\_\_\_ (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1652293](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652293).



The remainder of Justice Scalia's opinion addresses the philosophy advanced by Justice Stevens's dissent—"a broad condemnation of the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount."<sup>113</sup> Scalia criticizes Stevens for excluding the right to keep and bear arms from incorporation, despite its being as "deeply rooted in this Nation's history and tradition as a right can be," while including other rights lacking historical grounding, simply because he "deeply believes it should be out."<sup>114</sup> Scalia also disparages Stevens's "subjective" conception of the Due Process Clause, which gives the court a "prerogative" and "duty" to update the Constitution "so that it encompasses new freedoms the Framers were too narrow-minded to imagine."<sup>115</sup>

Justice Scalia thus revisits the debate between the "living Constitution" approach to jurisprudence and originalism. He concludes that the issue "is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world."<sup>116</sup> In other words, originalism is the least worst option because it is "much less subjective, and intrudes much less upon the democratic process."<sup>117</sup>

But ultimately, Justice Scalia's familiar observations ring hollow, coming as they do as a lengthy postscript to his declaration preferring application of substantive due process—a doctrine requiring him to apply those rights, and only those rights that *he* believes are fundamental—while scorning an originalist approach based on historical analysis of how the Fourteenth Amendment's framers understood the text they ratified. Justice Scalia could have demonstrated fidelity to the judicial method he would use to attack Justice Stevens by joining Justice Thomas's concurrence.

### *C. Justice Thomas's Pivotal Concurrence*

"I believe this case presents an opportunity to re-examine, and begin the process of restoring, the meaning of the Fourteenth

<sup>113</sup> McDonald, 130 S. Ct. at 3050 (Scalia, J., concurring).

<sup>114</sup> *Id.* at 3051 (quoting Glucksberg, 521 U.S. at 721).

<sup>115</sup> *Id.* at 3051.

<sup>116</sup> *Id.* at 3057–58.

<sup>117</sup> *Id.* at 3058.

Amendment agreed upon by those who ratified it.”<sup>118</sup> With these words, Justice Thomas broke with the plurality, turned to face the stark reality of the Fourteenth Amendment’s central text, and launched an analysis that promises to fundamentally restore the proper relationship between Americans and their state governments.

Justice Thomas “agree[d] with the Court that the Fourteenth Amendment makes the right to keep and bear arms” applicable to the states, but “wr[ote] separately because I believe there is a more straightforward path to this conclusion, one that is more *faithful to the Fourteenth Amendment’s text and history*.”<sup>119</sup> Though Thomas concurred with the result reached by the plurality, he argued that the right to keep and bear arms cannot be enforceable against the states through a clause that “speaks only to ‘process.’”<sup>120</sup> Rather, “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”<sup>121</sup>

Justice Thomas’s opinion explores the right to keep and bear arms through the prism of the expansive notions of freedom, liberty, and equality vindicated by the Reconstruction amendments, “which were adopted to repair the Nation from the damage slavery had caused.”<sup>122</sup> The Privileges or Immunities Clause, which provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” appears to secure to the persons just made U.S. citizens (freed slaves) a certain collection of rights—“privileges or immunities” in the parlance of the time—attributable to that status. This broad notion of freedom recognized certain fundamental freedoms that inhered in the newly ratified definition of citizenship.

Thomas noted that the Supreme Court’s “marginalization” of the Privileges or Immunities Clause in the *Slaughterhouse Cases*, and the “circular” reasoning of *United States v. Cruikshank* constituted the “Court’s last word” for over a century, and “in the intervening years” the Court held that the clause protected “only a handful of

<sup>118</sup> McDonald, 130 S. Ct. at 3063 (Thomas, J., concurring).

<sup>119</sup> *Id.* at 3058–59 (emphasis added).

<sup>120</sup> *Id.* at 3059.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 3060.

rights . . . that are not readily described as essential to liberty.<sup>123</sup> Following these flawed precedents, “litigants seeking federal protection of fundamental rights turned to” the Due Process Clause—a “most curious place”—in order to find “an alternative fount of such rights.”<sup>124</sup> Over time, the Court “conclude[d] that certain Bill of Rights guarantees,” both substantive and procedural rights, “were sufficiently *fundamental* to fall within § 1’s guarantee of ‘due process’”—though the Court “has long struggled to define” the term “*fundamental*.”<sup>125</sup> Justice Thomas criticized the disparate standard the Court has used to recognize “*fundamental*” rights, spanning from the *Glucksberg* “deeply rooted” test to the “less measurable range of criteria” of *Lawrence v. Texas* that recognized the nebulous protection of “liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>126</sup>

Taking an intrinsically originalist perspective, Thomas noted that neither the plurality nor the dissents even bother “argu[ing] the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.”<sup>127</sup> Refusing to “accept a theory of constitutional interpretation that rests on such tenuous footing,” Thomas opined that the “original meaning of the . . . [Privileges or Immunities Clause] offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.”<sup>128</sup>

Acknowledging the “importance of *stare decisis*,” Justice Thomas noted that while significant number of cases have “been built upon the substantive due process framework,” *stare decisis* is not “an

<sup>123</sup> McDonald, 130 S. Ct. at 3060–61 (Thomas, J., concurring) (“In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution’s adoption—was the very reason citizens could not enforce it against States through the Fourteenth.”). See also Saenz v. Roe, 526 U. S. 489, 503 (1999).

<sup>124</sup> McDonald, 130 S. Ct. at 3061 (Thomas, J., concurring).

<sup>125</sup> *Id.* (emphasis added).

<sup>126</sup> *Id.* at 3062 (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)).

<sup>127</sup> *Id.* at 3062.

<sup>128</sup> *Id.*

inexorable command.”<sup>129</sup> Neither *McDonald* generally nor the originalist arguments propounded by petitioners’ counsel called for reconsidering the entire Fourteenth Amendment. Rather, the “question in this case is only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here.”<sup>130</sup>

Starting with the presumption that no clause in the Constitution could be “intended to be without effect,”<sup>131</sup> Thomas begins by inquiring what “‘ordinary citizens’ at the time of ratification would have understood” the Privileges or Immunities Clause to mean.<sup>132</sup> Gleaning from contemporary historical sources, Thomas makes three observations about the Privileges or Immunities Clause. First, the term “privileges or immunities” was a term of art, synonymous with “right[s],” “libert[ies],” or “freedom[s],” or in the words of William Blackstone, the “inalienable rights of individuals.”<sup>133</sup> Second, “both the States and the Federal Government had long recognized the *inalienable rights* of their citizens.”<sup>134</sup> Third, the “public’s understanding of [the clause] was informed by its understanding of the [Privileges and Immunities Clause in Article IV],” as “famously” articulated by Justice Bushrod Washington in *Corfield v. Coryell*.<sup>135</sup>

Relying on an impressive array of historical sources, including popular and widely disseminated speeches by amendment sponsors Representative John Bingham<sup>136</sup> and Senator Jacob Howard,<sup>137</sup> as well

<sup>129</sup> *Id.* at 3063.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.)).

<sup>132</sup> *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring) (citing *Heller*, 128 S. Ct. at 2788).

<sup>133</sup> *Id.* at 3064 (citing 1 William Blackstone, *Commentaries* \*129).

<sup>134</sup> *Id.* at 3068 (emphasis added).

<sup>135</sup> *Id.* at 3066–67 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (finding that the Privileges and Immunities Clause protects those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments”).

<sup>136</sup> *Id.* at 3072 (“Bingham emphasized that §1 was designed to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It ‘hath that extent—no more.’) (quoting *Cong. Globe*, 39th Cong., 1st Sess. 2542–43 (1866)).

<sup>137</sup> See Senator Jacob Howard’s speech introducing the new draft on the floor of the Senate, *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1866) (explaining that the Constitution recognized “a mass of privileges, immunities, and rights, some of them secured by

*The Tell-Tale Privileges or Immunities Clause*

as the Civil Rights Act of 1866<sup>138</sup> and the Freedmen's Bureau Act,<sup>139</sup> Thomas concluded that the "right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause."<sup>140</sup> The Privileges or Immunities Clause is not a mere anti-discrimination principle, but "establishes a minimum baseline of federal rights, and the constitutional right to keep and bear arms plainly was among them."<sup>141</sup>

Justice Thomas conceded that while his understanding is "contrary to this Court's precedents," "*stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means," and so considered whether "*stare decisis* requires retention of those precedents."<sup>142</sup> He also cabined his analysis to the right to keep and bear arms—and expressly declined to evaluate the larger scope of the Privileges or Immunities Clause. Further, "the right to keep and bear arms was essential to the preservation of liberty" and the Framers and the ratifying-era public "deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery."<sup>143</sup>

As to *Slaughterhouse*, Thomas criticized the case for "interpreting the rights of state and federal citizenship as mutually exclusive." The *Slaughterhouse* majority had limited federal rights to a "handful" of rights that excluded rights of state citizenship.<sup>144</sup> But those latter,

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the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution," and that "there is no power given in the Constitution to enforce and to carry out any of these guarantees" against the states).

<sup>138</sup> McDonald, 130 S. Ct. at 3084 (Thomas, J., concurring) ("Both proponents and opponents of this Act described it as providing the 'privileges' of citizenship to freedmen, and defined those privileges to include constitutional rights, such as the right to keep and bear arms.").

<sup>139</sup> *Id.* at 3084 (The Freedmen's Bureau Act "entitled all citizens to the 'full and equal benefit of all laws and proceedings concerning personal liberty' and 'personal security.' The Act stated expressly that the rights of personal liberty and security protected by the Act 'includ[ed] the constitutional right to bear arms.'") (citing Act of July 16, 1866, ch. 200, §14, 14 Stat. 176).

<sup>140</sup> McDonald, 130 S. Ct. at 3076–77 (Thomas, J., concurring).

<sup>141</sup> *Id.* at 3083.

<sup>142</sup> *Id.* at 3084.

<sup>143</sup> *Id.* at 3063 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part)).

<sup>144</sup> *Id.* at 3084–85.

broader rights “embraced nearly every civil right for the establishment and protection of which organized government is instituted”—that is, all those rights listed in *Corfield*.<sup>145</sup>

The artificial distinction between federal and state rights “led the Court in future cases to conclude that constitutionally enumerated rights were excluded from the Privileges or Immunities Clause’s scope”—an understanding Justice Thomas “reject[ed].”<sup>146</sup> The Privileges or Immunities Clause was not meant to “protect every conceivable civil right from state abridgement,” but “the privileges and immunities of state and federal citizenship overlap.”<sup>147</sup> Thomas also found that “*Cruikshank* is not a precedent entitled to any respect” because it relied on the discredited *Slaughterhouse*.<sup>148</sup>

But does the Privileges or Immunities Clause protect certain rights beyond those enumerated in the Constitution—that is, unenumerated rights like the right of the *Slaughterhouse* butchers to “exercise their trade”?<sup>149</sup> Justice Thomas noted that the four dissenting justices in *Slaughterhouse*—whose view he generally supports—would have held the clause to protect the right to earn an honest living.<sup>150</sup> Of course the right to earn a living was not at issue in *McDonald*, but Justice Thomas was aware that his opinion would have broader application.<sup>151</sup>

“The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application.”<sup>152</sup> Fears about the “risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts” apply equally whether those rights are recognized under the substantive due process doctrine or the Privileges or Immunities Clause.<sup>153</sup> Moreover, by employing an originalist

<sup>145</sup> *Id.* at 3084 (citing *Slaughterhouse*, 83 U.S. (16 Wall.) at 76).

<sup>146</sup> *Id.* at 3085.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 3086.

<sup>149</sup> *Slaughterhouse*, 83 U.S. (16 Wall.) at 60.

<sup>150</sup> *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring).

<sup>151</sup> *Id.* at 3077 n.15 (Thomas, J., concurring) (“I address the coverage of the Privileges or Immunities Clause only as it applies to the Second Amendment right presented here, but I do so with the understanding that my conclusion may have implications for the broader argument.”).

<sup>152</sup> *Id.* at 3086.

<sup>153</sup> *Id.* at 3089–90, 3096, 3099.

framework that seeks to learn “what the ratifying era understood the Privileges or Immunities Clause to mean,” the interpretation of unenumerated rights “should be no more ‘hazardous’ than interpreting” other ambiguous clauses, such as the Necessary and Proper Clause.<sup>154</sup>

*D. Justice Stevens’s Valedictory Dissent*

Justice Stevens, in one of his last public acts as a member of the Court, found that the Second Amendment did not protect a fundamental right, that even if it were fundamental it should not be incorporated, and that even if it were incorporated, it need not be protected equally at the state and federal levels. Stevens, who described incorporation as a “misnomer,”<sup>155</sup> adopted the second Justice John Marshall Harlan’s view that “the Court’s usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.”<sup>156</sup> Relying on Justice Harlan’s dissent in *Duncan*, Stevens argued it was “circular” to incorporate only rights “deeply rooted in our history” because “state actors have already been according the most extensive protection” to those same rights.<sup>157</sup>

Justice Stevens also remarked that *Glucksberg* “promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently ‘rooted’” in our history and traditions.<sup>158</sup> Stevens thus equates

<sup>154</sup> *Id.* at 3086.

<sup>155</sup> Compare *id.* at 3092 (Stevens, J., dissenting) (“It follows that the term ‘incorporation,’ like the term ‘unenumerated rights,’ is something of a misnomer. Whether an asserted substantive due process interest is explicitly named in one of the first eight Amendments to the Constitution or is not mentioned, the underlying inquiry is the same: We must ask whether the interest is ‘comprised within the term liberty.’”) (internal citations omitted) with Blackman & Shapiro, *Pandora’s Box*, *supra* note 19, at 8 (“Indeed, ‘incorporation’ is a misnomer, a constitutional malapropism. The concept of ‘incorporation’ was anachronistically inserted into our constitutional jurisprudence decades after the ratification of the Fourteenth Amendment. Historical accounts of the ratification debates reveal that the Privileges or Immunities Clause was meant to protect both more and less than the Bill of Rights—but in any event not the eight particular amendments as such.”).

<sup>156</sup> McDonald, 130 S. Ct. at 3092 (Stevens, J., dissenting) (citing *Malloy v. Hogan*, 378 U. S. 1, 24 (1964) (Harlan, J., dissenting)).

<sup>157</sup> *Id.* at 3098 (citing *Duncan v. Louisiana*, 391 U.S. 145, 183 (1968) (Harlan, J., dissenting) (critiquing “circular[ity]” of historicized test for incorporation)).

<sup>158</sup> *Id.* at 3098–99.

the *Glucksberg* inquiry as “countenanc[ing] the most revolting past injustices in the name of continuity,” such as “slavery” and the “subjugation of women and other rank forms of discrimination.”<sup>159</sup>

In a somewhat confusing closing, Justice Stevens noted that the *Glucksberg* test is “judicial abdication in the guise of judicial modesty.”<sup>160</sup> But it would seem that the justices abdicating their judicial role are those willing to delegate the interpretation of the Constitution to the City of Chicago and eschew federal judicial enforcement of the right to bear arms. The faux judicial modesty belongs to Stevens, and not the Court.

#### *E. Justice Breyer’s Multi-Factor Balancing Dissent*

Justice Breyer’s dissenting opinion makes several points: First, like Stevens, Breyer briefly reopened the *Heller* debate by outlining his contrary version of the text and history of the right to keep and bear arms. Unlike Stevens’s competing originalism, however, Breyer prefers his own (ahistorical) theory of “active liberty” to interpret the Constitution. Second, again somewhat like Stevens, Breyer would hold that the Second Amendment right to “private self defense” is not “fundamental” and should not be incorporated. That is, even “taking *Heller* as a given”—something none of the dissenters apparently do, even though Justice Sotomayor accepted during her confirmation hearing just last year that *Heller* was “settled law”<sup>161</sup>—Justice Breyer contended that the majority “fails” to show that the right to keep and bear arms is “fundamental to the American scheme of justice.”<sup>162</sup> Third, Breyer seeks to distinguish the right to keep and bear arms from “other forms of substantive liberty” because the Second Amendment “often puts others’ lives at risk,” and “does

<sup>159</sup> *Id.* at 3099. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992) (plurality opinion) (“Liberty finds no refuge in a jurisprudence of doubt.”).

<sup>160</sup> McDonald, 130 S. Ct. at 3099 (Stevens, J., dissecting).

<sup>161</sup> David B. Kopel, *Sotomayor Targets Guns Now: Justice’s Dissent Contradicts Confirmation Testimony*, Wash. Times, June 29, 2010, at B1. Elena Kagan also commented that *Heller* was “settled law” during her confirmation hearing. See Elena Kagan, *Confirmation Hearing Day 2 (June 29, 2010)*, available at <http://www.c-spanvideo.org/program/294264-2>; David Ingram, *On Day 2, Kagan Tries to Appease Republicans*, Nat’l. L. J., June 30, 2010, available at <http://www.law.com/jsp/article.jsp?id=1202463143586>. Only time will tell whether she follows Justice Sotomayor’s change of heart.

<sup>162</sup> McDonald, 130 S. Ct. at 3123 (Breyer, J., dissenting) (citing *Duncan*, 391 U.S. at 149).



not warrant federal constitutional regulation.”<sup>163</sup> Finally, in an uncharacteristic paean to judicial minimalism, Breyer faults the majority for “transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts or from the States to the Federal Government.”<sup>164</sup>

Continuing his disapproval of originalism, Justice Breyer remarked that “in the incorporation context, as elsewhere, history often is unclear about the answers”—even though Justice Stevens’s *Heller* dissent relies almost exclusively on history—and “the historical status of a right is [not] the only relevant consideration.”<sup>165</sup> Yet Breyer’s preferred approach for determining whether a right is “fundamental” meanders even from established incorporation jurisprudence. Breyer seeks to consider a laundry list of factors, including “the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution’s structural aims, including its division of powers among different governmental institutions (and the people as well).”<sup>166</sup> Questions of whether incorporation “further[s] the Constitution’s effort to ensure that the government treats each individual with equal respect” and is consistent “with the Constitution’s efforts to create governmental institutions well suited to the carrying out of its constitutional promises” are at the core of Breyer’s approach to incorporation, one that seems inspired by “redemptive constitutionalism” that now constitutes the leading edge of progressive legal thought.<sup>167</sup>

In any event, Justice Breyer’s critique of originalism makes two crucial errors: First, like Justice Stevens in *Heller*, Breyer conflates “original intent originalism”—which looks to constitutional framers’ intent and “motivations”—with “original public meaning originalism”—the so-called New Originalism, which seeks to understand

<sup>163</sup> *Id.* at 3120.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 3123.

<sup>166</sup> *Id.* These aims largely mirror the considerations discussed in Jack Balkin & Reva Siegel, *The Constitution in 2020* (2009), to discern when a right should be protected. See Blackman & Shapiro, *Pandora’s Box*, *supra* note 19, at 31–41 (discussing and criticizing this view).

<sup>167</sup> See generally Balkin & Siegel, *The Constitution in 2020*, *supra* note 166; Stephen J. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005).

the semantic context of terms and how they were understood by the public at the time of ratification.<sup>168</sup> While the former has been seriously discredited, largely by scholars on the left, the latter has gained general acceptance. Second, Breyer considers originalism at the wrong time.<sup>169</sup> While it was appropriate in *Heller* to consider the meaning of the right to keep and bear arms at the time of the Second Amendment's ratification, the correct timeframe for analyzing the Fourteenth Amendment's substantive protections is the Reconstruction era. Breyer mistakenly grounds his analysis in 1791 rather than 1868—when the self-defense interest was perhaps the strongest it has been in American history—concluding that “the Framers did not write the Second Amendment in order to protect a private right of armed self-defense.”<sup>170</sup>

### III. *McDonald's* Aftermath: Opening the Door to Liberty

The most common question about the state of the legal world after *McDonald*—no doubt what some readers of this article are looking for—relates to the future of “gun rights.” That is, what does this “application of the Second Amendment to the states” mean in practice and what kinds of lawsuits will be successful? Each of us, for example, is regularly asked by friends, colleagues, and public interlocutors to explain the scope of this individual right to keep and bear arms.<sup>171</sup> One of us (Gura) is counsel in various lawsuits challenging “may issue” gun-carry permit systems (which require individuals to justify their need or show “good cause” to exercise

<sup>168</sup> See generally Antonin Scalia, *A Matter of Interpretation*, 16–18, 29–30, 37–41, 133–36, 140–42, 145–48 (1997); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2005).

<sup>169</sup> See Blackman & Shapiro, *Pandora's Box*, *supra* note 19, at 51 (“Originalism demands that the interpreter select the proper temporal location in which to seek the text’s original public meaning.”).

<sup>170</sup> *McDonald*, 130 S. Ct. at 3136 (Breyer, J., dissenting).

<sup>171</sup> See, e.g., Ilya Shapiro, Guest Appearance on The Colbert Report, July 8, 2010 (replying “no personal rocket launchers” when asked by the host to name one acceptable firearm regulation), available at <http://www.colbertnation.com/the-colbert-report-videos/340923/july-08-2010/automatics-for-the-people-ilya-shapiro-jackie-hilly>.

their Second Amendment right),<sup>172</sup> a gun-range ban,<sup>173</sup> handgun-rostering schemes that turn legislators into gun designers,<sup>174</sup> and laws restricting access to arms during times of emergency.<sup>175</sup> Opinions citing *McDonald* in cases involving various municipal restrictions are already emerging from the lower courts<sup>176</sup> and the Ninth Circuit has specifically requested *McDonald*-related supplemental briefing in the continuing *Nordyke* saga.<sup>177</sup>

But all this Second Amendment litigation is almost beside *McDonald*'s point. Yes, the right at issue here—the one triggering, as it were, the fascinating seminar on incorporation doctrine—was one involving guns. But nowhere in *McDonald* will you find a discussion of the constitutionality of licensing or registration requirements, concealed-carry regimes, firearm- or ammunition-purchasing limits, automatic-rifle or “assault-weapon” prohibitions, or any of the myriad other issues at the heart of the legal and political battles over the future of gun regulations. Much like *Heller*—which decided “only” that the Second Amendment protected an individual right not connected to militia service—*McDonald* “merely” said that this right, whatever its scope, offered protection against all levels of government, not just the federal. In neither case did the Court even attempt to sketch the line between constitutional and unconstitutional gun laws. And that demurral is neither surprising nor disappointing; the Court simply didn't have to reach those issues to evaluate the claims made in the respective lawsuits.

<sup>172</sup> *Kachalsky v. Cacase*, No. 10-CV-5413 (S.D.N.Y. filed July 15, 2010); *Woollard v. Sheridan*, No. 10-CV-2068 (D. Md. filed July 28, 2010); *Sykes v. McGinness*, No. 09-1235 (E.D. Cal. filed May 7, 2009).

<sup>173</sup> *Ezell v. City of Chicago*, No. 10-CV-5135 (N.D. Ill. filed Aug. 16, 2010).

<sup>174</sup> *Pena v. Cid*, No. 09-CV-1185 (E.D. Cal. filed Apr. 30, 2009).

<sup>175</sup> *Bateman v. Perdue*, No. 10-CV-265 (E.D.N.C. filed July 6, 2010).

<sup>176</sup> See, e.g., *United States v. Marzzarella*, No. 09-3185, 2010 U.S. App. LEXIS 15655 (3d Cir. July 29, 2010), available at <http://www.ca3.uscourts.gov/opinarch/093185p.pdf> (using intermediate scrutiny to uphold prohibition on serial-number removal as an incidental burden on Second Amendment rights); *United States v. Skoien*, No. 08-3770, 2010 U.S. App. LEXIS 14262 (7th Cir. July 13, 2010) (en banc), available at <http://www.ca7.uscourts.gov/tmp/0H0079JV.pdf> (upholding a prohibition on gun possession by those previously convicted of a domestic violence misdemeanor).

<sup>177</sup> *Nordyke v. King*, 07-15763 (9th Cir. July 19, 2010) (order for parties to file supplemental briefs in light of *McDonald*).

What makes *McDonald* interesting and significant, therefore, is not what it said about the right to keep and bear arms or the “incorporation” of that right against the states, but what it said about rights generally. What rights do we have and how did we come to have them? Which constitutional provisions protect these rights? If we accept that the Constitution protects rights that are not explicitly enumerated therein—as we must if we are to give effect to the Ninth Amendment<sup>178</sup>—then what is the scope of these unenumerated rights? Most immediately, which state laws are now in jeopardy for violating the Fourteenth Amendment’s substantive protections? These are the questions that are *McDonald*’s progeny.

Most of these questions were provoked not by the plurality opinion, however, or even by the debate between the plurality and the dissents. And they do not flow from the simple fact that the Court incorporated the Second Amendment. Instead, it was Justice Thomas’s lone concurrence that, by reanimating the Privileges or Immunities Clause and starting a jurisprudential discourse on that clause’s meaning, resurrected the old idea that we possess certain “unalienable rights.” In stirring passages detailing the state oppressions rampant before and after the Civil War, Thomas showed the reasons for, first, the Civil Rights Act of 1866 and, soon after, the Fourteenth Amendment. Freed slaves needed guns to defend themselves against pervasive threats to life and liberty, to be sure—which is partly why extending the right to keep and bear arms is vitally important—but they also needed the freedom to secure employment in a variety of professions, to keep the fruits of their labors, to engage in economic transactions, and a host of other rights that in the parlance of the day were called privileges or immunities. These sorts of rights do not appear explicitly in the text of the Fourteenth Amendment, but in reviewing explanatory documents like the speeches of the amendment’s framers and ratifiers, and sources such as *Corfield v. Coryell*, one finds that those unenumerated rights were very much understood to be constitutionally protected.

It is thus that Justice Thomas’s forceful and scholarly opinion will influence litigation that has nothing to do with guns or the Second

<sup>178</sup> See, elsewhere in this volume, Michael W. McConnell, The Ninth Amendment in Light of Text and History, 2009–2010 *Cato Sup. Ct. Rev.* 13 (2010).

Amendment but with unenumerated rights—and especially the economic liberties that *Slaughterhouse* disparaged and that were subverted by the infamous *Carolene Products* footnote four.<sup>179</sup> Every complaint challenging the host of capricious laws impeding the fundamental right to earn an honest living—such as arbitrary licensing restrictions (typically sought by the very industry the law is supposed to be regulating) and other irrational barriers to entry—will now cite Thomas’s *McDonald* concurrence. His opinion will also strengthen future challenges to the pervasive regulatory state that has exploded in recent years. When you think about it—and quite apart from the over-arching question of where the government gets the expansive power it asserts—legislation such as TARP and ObamaCare offends a host of unenumerated rights as well.

Significantly, even though Justice Alito did not adopt Justice Thomas’s approach, he took great pains in his plurality opinion not to reject or criticize it (as did, for that matter, Justices Stevens and Breyer in their dissents). *McDonald* as a whole thus represents a crucial first step down the path to constitutional liberty and opens the door to reviving a powerful constitutional provision. Thomas’s clarion call for a liberty-focused originalism provides a foundation on which to build.

In the annals of Supreme Court history, solo or minority opinions that introduce novel ideas often start a trickle of discussions. These arguments swirl and strengthen, and over time flow into a sea change in constitutional law. Look no further than the first Justice John Marshall Harlan’s opinion in *Plessy v. Ferguson*, which argued that separate is not equal. Harlan’s lone dissent culminated in *Brown v. Board of Education*. Or consider Justice Owen Roberts’s opinion for

<sup>179</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (subjecting to higher scrutiny legislative actions relating to “specific prohibitions of the Constitution, such as those of the first ten amendments,” as well as those affecting “discrete and insular minorities”). Ironically, Chicago’s handgun ban implicated just such a specific constitutional prohibition—the Second Amendment. Both dissenting opinions somehow missed this in arguing that gun-control regulations do not demand of judges a searching inquiry. See, e.g., *McDonald*, 130 S. Ct. at 3116 (Stevens, J., dissenting) (“[T]his is not a case, then, that involves a ‘special condition’ that ‘may call for a correspondingly more searching judicial inquiry.’”) (citing *Carolene Products*, 304 U.S. at 153, n.4.); *id.* at 3125 (Breyer, J., dissenting) (“We are aware of no argument that gun-control regulations target or are passed with the purpose of targeting ‘discrete and insular minorities.’”) (citing *Carolene Products*, 304 U.S. at 153, n.4).

himself and Justice Hugo Black in *Hague v. CIO*, which has become canonical within First Amendment law for its bold declaration of freedom in the public square.<sup>180</sup> Or the landmark case of *Griswold v. Connecticut*, in which only Justice Byron White squarely held that a state ban on the sale of contraceptives deprived married couples of substantive liberty under the Fourteenth Amendment's Due Process Clause.<sup>181</sup> Or to Justice Robert Jackson's concurrence in the *Steel Seizure Case* that now provides the framework by which the president's foreign policy powers are measured.<sup>182</sup> Indeed, law students in 25 or 50 years might look back at Justice Thomas's role in *McDonald* as most akin to that which Justice Lewis Powell played in *Regents of the University of California v. Bakke*, the unfortunate case allowing race to play a factor in university admissions.<sup>183</sup> There was no majority in *Bakke*, either, but Justice Powell's solo concurrence has come to be known as the controlling law of that case—think what you will of its (decidedly non-originalist) reasoning—and was essentially adopted by the Supreme Court a quarter-century later.<sup>184</sup>

In one respect, Thomas's position in *McDonald* is even more noteworthy than Harlan's was in *Plessy*, because Thomas represented the decisive fifth vote for a majority judgment rather than a dissent (or a superfluous concurring vote that might be disregarded as an outlier). In one opinion Justice Thomas has shown the way for the Privileges or Immunities Clause—long-hidden under the constitutional floorboards—to protect our most basic freedoms.

<sup>180</sup> *Hague v. Comm. for Industrial Org.*, 309 U.S. 496, 515–16 (1939) (Roberts, J.).

<sup>181</sup> 381 U.S. 479, 502–07 (1964) (White, J., concurring).

<sup>182</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1953) (Jackson, J., concurring)).

<sup>183</sup> 438 U.S. 265, 317–19 (1978) (Powell, J., concurring) (arguing that a policy that focused on diversity and only considered race a “plus,” rather than a quota, could withstand strict scrutiny).

<sup>184</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[T]oday we endorse Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).