

McDonald v. City of Chicago: Did Justice Thomas Resurrect the Privileges or Immunities Clause from the Dead? (And Did Justice Scalia Kill It Again?)*

I. INTRODUCTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹

The Supreme Court recently held in a 5–4 decision that the Second Amendment right to keep and bear arms is “fully applicable to the States”² through the Fourteenth Amendment.³ A plurality of the Court agreed that the Due Process Clause of the Fourteenth Amendment is the constitutional vehicle that incorporates the right.⁴ One Justice, however, broke with 137 years of precedent to find “a more straightforward path” to the same conclusion.⁵ Justice Thomas relied on the Privileges or Immunities Clause of the Fourteenth Amendment to enforce the Second Amendment against the States.⁶ This reasoning, though cited as the petitioners’ primary argument,⁷ was not given serious consideration by any other opinion in the case. Possibly the most noteworthy aspect of the

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1. U.S. CONST. amend. XIV, § 1 (emphasis added).
2. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (plurality opinion).
3. *Id.* at 3050.
4. *Id.*
5. *Id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).
6. *Id.* at 3059.
7. *Id.* at 3028 (plurality opinion).

decision is that Justice Scalia, a self-proclaimed textualist, originalist,⁸ and fierce critic of substantive due process,⁹ acquiesced to using the much-ridiculed doctrine¹⁰ of substantive due process to apply the Second Amendment to the States.¹¹

The Privileges or Immunities Clause presents a unique and important question in constitutional law. Its exact meaning, role, and relevancy are without consensus today. Originalists generally agree that the framers intended to incorporate at least some of the protections guaranteed by the Bill of Rights.¹² Some originalists would like to see the Privileges or Immunities Clause revived and used to limit the creation of unenumerated rights—others still may believe in premise, but decline to advocate such a radical change in constitutional jurisprudence.¹³

Operating from an originalist perspective of constitutional interpretation—which assumes that the Clause should be interpreted according to what it meant to the public when it was adopted in 1868¹⁴—this Note practically evaluates the future prospects of the Privileges or Immunities Clause in light of the *McDonald v. City of Chicago* plurality opinion and the concurrence of Justice Thomas. In an originalist's perfect world, the Supreme Court would wipe clean its constitutional slate and use the Privileges or Immunities Clause of the Fourteenth Amendment to enforce the Bill of Rights against the States rather than the Due Process Clause. Fourteenth Amendment jurisprudence as it stands now, however, may permanently preclude incorporation via the Privileges or Immunities Clause.

8. Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, in CATO INSTITUTE, CATO SUPREME COURT REVIEW: 2009–2010, at 163, 183 (2010) (citing Hon. Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Address to the Federalist Society National Lawyers Convention (Nov. 22, 2008)).

9. See KEVIN A. RING, SCALIA DISSENTS 304 (2004).

10. That is much ridiculed by originalists. See, e.g., Gura, Shapiro & Blackman, *supra* note 8, at 170 (“[T]here was no evidence—none—that the ratifiers of the Fourteenth Amendment understood the Due Process Clause to transmit substantive rights . . .”). “Justice Scalia famously derided substantive due process as an ‘atrocious’ and an act of ‘judicial usurpation.’” *Id.* (quoting *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting)).

11. *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

12. Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1309 & n.71 (2009) (citing RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 292 (2008)).

13. Such pragmatism is seen in Justice Scalia's approach in *McDonald*. See discussion *infra* Part IV.B.

14. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE, at vii (2011).

In reality, there are three obstacles that stand in the way. The first is *stare decisis*—redefining federal privileges or immunities would likely require overturning 138 years of precedent going back to the *Slaughter-House Cases*.¹⁵ Second, even Justice Scalia has submitted to the fact that substantive due process now enforces individual rights against the States, therefore making it extremely impractical to switch doctrines of incorporation.¹⁶ Finally, even if the Court considered abandoning substantive due process, it is extremely wary of doing so without a clear consensus on the full scope and meaning of federal privileges or immunities.¹⁷

II. HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE

A. *The Fourteenth Amendment*

Before the ratification of the Fourteenth Amendment, the Bill of Rights applied only to the Federal Government and not to the States.¹⁸ In the 1833 case of *Barron ex rel. Tiernan v. Mayor of Baltimore*, “the [Supreme] Court, in an opinion by Chief Justice Marshall, . . . firmly rejected the proposition that the first eight Amendments operate as limitations on the States, holding that they apply only to the Federal Government.”¹⁹

But, after the Civil War, the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments “fundamentally altered our country’s federal system.”²⁰ In the immediate aftermath of the Civil War, southern states enacted “black codes” designed “to force blacks into a state of subservience and subjugation.”²¹ The laws restricted the civil rights and liberties of former slaves.²² In response, Congress enacted “the first

15. See 83 U.S. (16 Wall.) 36 (1873); discussion *infra* Part II.C.

16. See *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

17. See *id.* at 3030–31 (plurality opinion); *id.* at 3089 (Stevens, J., dissenting). At oral argument, petitioners’ counsel answered a line of questioning regarding the privileges and immunities to be incorporated by the Fourteenth Amendment and admitted that he could not “give a full description of all unenumerated rights that are going to be protected.” Transcript of Oral Argument at 61–64, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

18. *McDonald*, 130 S. Ct. at 3028 (plurality opinion) (citing *Barron ex rel. Tiernan v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243 (1833)).

19. *Id.*

20. *Id.*

21. KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 262 (3d ed. 2005).

22. *Id.*

congressional protection of individual liberty in American history”²³; the Civil Rights Act of 1866.²⁴ Because “[s]ome members of Congress doubted the constitutionality of the 1866 Civil Rights Act,” Congress passed the Fourteenth Amendment.²⁵

However, “[d]ebate still rages over the purpose or ‘intent’ of these amendments.”²⁶ “But, at a minimum, the framers of the [Thirteenth and Fourteenth A]mendments believed they were expanding the Bill of Rights to the states and giving Congress broad plenary power to protect both civil rights and civil liberties”²⁷

B. Interpretations of the Privileges or Immunities Clause

There has been much debate in recent decades over the meaning of “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”²⁸ There are disagreements at virtually every step of the analysis, even among those who consider themselves originalists.²⁹ First, there is disagreement about “whether the clause was intended simply to require the states to make their laws apply *equally* to all their citizens or to mandate a certain *substantive content* to state law.”³⁰ The former interpretation focuses on equality and reads the Clause as a nondiscrimination provision similar to the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which prevents States from treating visitors differently than residents.³¹ The latter, substantive interpretation reads the Clause as a mandate for a “substantive package of entitlements” to be guaranteed under state law.³²

23. *Id.* at 265.

24. *Id.* at 262.

25. *Id.* at 266. “In 1870, Congress ‘reenacted’ the 1866 act, on the assumption that the . . . Fourteenth . . . Amendment[] gave additional constitutional authority to the law.” *Id.* Congress went on to pass the Civil Rights Act of 1875, however, after the rights of blacks began to deteriorate in 1873 as Democrats began to regain control of the southern states. *Id.* at 267. In 1883, the Supreme Court found the Civil Rights Act of 1875 unconstitutional. *Id.*

26. *Id.* at 259.

27. *Id.*

28. U.S. CONST. amend. XIV, § 1.

29. See Calvin Massey, *Privileges or Immunities*, in THE HERITAGE GUIDE TO THE CONSTITUTION 390, 390 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005).

30. *Id.*

31. *Id.*

32. *Id.*

The substantive view itself has two competing interpretations as to the meaning of the privileges or immunities of federal citizenship.³³ The first interpretation applies the Bill of Rights and every other constitutional guarantee to the States.³⁴ The second interpretation views the Clause as applying *only* the Bill of Rights to the States and nothing more.³⁵ This interpretation takes a Lockean view of privileges or immunities by defining them broadly as natural rights given to all people that cannot be taken away by government.³⁶ Advocates of these views are generally referred to as “incorporationists” in the context of the interpretation of the Privileges or Immunities Clause.³⁷

In addition to various disagreements about the meaning of the clause, there is even disagreement about whether it has any meaning at all.³⁸ Judge Bork, an originalist icon, famously described it as nothing more than an “ink blot.”³⁹ Of course, Judge Bork’s interpretation is directly at odds with Chief Justice Marshall’s statement in *Marbury v. Madison* that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”⁴⁰ Chief Justice Marshall’s pronouncement notwithstanding, thanks to an infamous 1873 decision by the Supreme Court in the *Slaughter-House Cases*, the Privileges or Immunities Clause was virtually dead for over a century until 1999 when the Court invoked it in *Saenz v. Roe*.⁴¹

C. *The Slaughter-House Cases*

Slaughter-House is an important part of the debate over the meaning of the Privileges or Immunities Clause. The general consensus is that Justice Miller’s majority opinion “rejected any significant role for the Privileges or Immunities Clause in the protection of individual rights generally, and in the incorporation of Bill of Rights freedoms more

33. *See id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 647–49 (2000).

38. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990), *quoted in* Aynes, *supra* note 12, at 1300.

39. *Id.*

40. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

41. Massey, *supra* note 29, at 393.

specifically.”⁴² It has also been maligned as “one of the most outrageous actions of [the] Supreme Court.”⁴³ Right or wrong, *Slaughter-House* has been controlling precedent on the Privileges or Immunities Clause for 138 years.⁴⁴

During Reconstruction, the State of Louisiana created the Crescent City Live-Stock Landing and Slaughter-House Company in New Orleans.⁴⁵ The Louisiana Legislature, concerned with sanitary conditions in the community, confined slaughtering to the area owned by Crescent City, effectively creating a monopoly because it forced individual butchers to rent space from the government-owned entity.⁴⁶ A group of local butchers challenged the Louisiana law as unconstitutional because it “denied them their right to work and consequently violated . . . the Privileges or Immunities Clause.”⁴⁷ Louisiana claimed the monopoly was a legitimate regulation under its state police power.⁴⁸

Justice Miller, writing for a 5–4 majority, rejected the butchers’ claims by finding that the Privileges or Immunities Clause only protected rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”⁴⁹ Justice Miller began his opinion by examining the Fourteenth Amendment as a whole, explaining how the drafters designed the Citizenship Clause of Section 1 to overrule *Dred Scott v. Sandford*⁵⁰ “by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States.”⁵¹ Justice Miller quickly turned his attention to Section 2, where the controversy began.

42. Newsom, *supra* note 37, at 650–51.

43. MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 58 (1999) (quoting CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 89 (1997)).

44. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3089 (2010) (Stevens, J., dissenting) (noting that, as of 2010, the *Slaughter-House* precedent had stood for 137 years); see also *Saenz v. Roe*, 526 U.S. 489, 503 (1999) (relying on *Slaughter-House* in interpreting the Fourteenth Amendment’s Privileges or Immunities Clause).

45. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 38 (1873).

46. *Id.* at 38–43, 57, 62–63, 87.

47. Newsom, *supra* note 37, at 651 (citing *The Slaughter-House Cases*, 21 L. Ed. 395, 396–99 (1873)).

48. *Slaughter-House*, 83 U.S. (16 Wall.) at 87.

49. *Id.* at 79, quoted in *McDonald*, 130 S. Ct. at 3022 (plurality opinion).

50. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

51. *Slaughter-House*, 83 U.S. (16 Wall.) at 73.

First, Justice Miller pointed out the sharp distinction between citizenship of the United States and citizenship of the states as “clearly recognized and established.”⁵² Justice Miller then declared that the Constitution only protects the privileges or immunities of federal citizenship and that any rights left to be protected by the States were out of reach of the Fourteenth Amendment.⁵³ Before defining federal privileges or immunities, however, Justice Miller—using Justice Washington’s list from *Corfield v. Coryell*⁵⁴—first defined the state privileges or immunities guaranteed by Article IV, Section 2:

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.⁵⁵

Under this interpretation, Article IV, Section 2 was essentially a nondiscrimination clause that prevented a State from treating visitors differently under the law than it did its own citizens.

So, then, what exactly are *federal* privileges and immunities? Justice Miller declined to explicitly rule on this question, and the Court “excused [itself] from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.”⁵⁶ Justice Miller did, however, give an idea of what rights might constitute privileges or immunities.⁵⁷ First, he cited the “very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts.”⁵⁸ Second, seemingly anticipating the argument that his list of federal privileges and immunities was too narrow, Justice Miller listed several other rights, such as the rights

to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to

52. *Id.*

53. *Id.* at 74.

54. *Id.* at 75–76 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230)).

55. *Id.* at 77.

56. *Id.* at 78–79.

57. *Id.* at 77.

58. *Id.*

seek its protection, to share its offices, to engage in administering its functions. [A citizen] has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.⁵⁹

He also mentioned the right “to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government,” “the privilege of the writ of *habeas corpus*,” the “right to use the navigable waters of the United States,” and “all rights secured to our citizens by treaties with foreign nations.”⁶⁰

Most notably, Justice Miller mentioned the “right to peaceably assemble and petition for redress of grievances,”⁶¹ a line which parallels some First Amendment protections.⁶² This is significant because it arguably left the door open to interpreting *Slaughter-House* as incorporating at least *some* of the Bill of Rights against the States⁶³ because the plaintiffs did not actually bring any claims under the Bill of Rights,⁶⁴ and the Court did not explicitly deny incorporation.⁶⁵ Justice Miller did inquire, however, whether the Privileges or Immunities Clause “transfer[red] the security and protection of all the [aforementioned] civil rights . . . from the States to the Federal government.”⁶⁶ To this question, he replied that “no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.”⁶⁷

Regardless of Justice Miller’s intent, subsequent Supreme Court cases closed any opening left by him in *Slaughter-House*.⁶⁸ As this Note will discuss later, Justice Miller’s inclusion of some First Amendment rights in his list is an important point to consider as incorporationists

59. *Id.* at 79 (alteration in original) (quoting *Crandell v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868)) (internal quotation marks omitted).

60. *Id.*

61. *Id.* at 79.

62. See U.S. CONST. amend. I.

63. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3060 (2010) (Thomas, J., concurring in part and concurring in the judgment).

64. See Newsom, *supra* note 37, at 658.

65. See *id.* at 666.

66. *Slaughter-House*, 83 U.S. (16 Wall.) at 77.

67. *Id.* at 78.

68. See *McDonald*, 130 S. Ct. at 3060 (Thomas, J., concurring in part and concurring in the judgment) (noting the more narrow interpretation of the Privileges or Immunities Clause in the aftermath of *Slaughter-House*).

grapple with the necessity of overruling *Slaughter-House*. In the last decade, scholars have revisited Justice Miller's opinion and concluded that it is friendlier to incorporation than once thought—arguing that it simply fell victim to a series of bad Supreme Court decisions after it was decided.⁶⁹ Justice Thomas recognized this in *McDonald*.⁷⁰

There are a variety of theories on the method to Justice Miller's reasoning. The conventional wisdom has been that he restricted the Privileges or Immunities Clause because the only alternative was to open a Pandora's Box of new legal rights.⁷¹ Others argue that Justice Miller was primarily worried about a major shift in the balance between state and federal rights based on his concern that the Supreme Court would effectively become the “perpetual censor” of the state legislatures.⁷² Originalists point out the irony of such concern, given that the method ultimately chosen to enforce the Bill of Rights against the States—substantive due process and its kaleidoscope of rights—is subject to exactly that criticism.

D. Saenz v. Roe

The next time the Court seriously dealt with the Privileges or Immunities Clause came in the 1999 case of *Saenz v. Roe*.⁷³ California passed a law limiting welfare benefits for new residents of the state.⁷⁴ In order to prevent people from moving to California for larger welfare checks, the statute limited new residents to receiving the same amount of

69. E.g., Newsom, *supra* note 37, at 649 (stating that “[n]ot once in [*Slaughter-House*] did the Court seriously suggest . . . that the Privileges or Immunities Clause did not incorporate Bill of Rights freedoms” and that “it suggests that core Bill of Rights freedoms are among the ‘privileges [and] immunities of citizens of the United States’ protected by the Fourteenth Amendment.” (third alteration in original) (quoting U.S. CONST. amend. XIV, § 1)).

70. 130 S. Ct. at 3060 (Thomas, J., concurring in part and concurring in the judgment); *see infra* text accompanying notes 141–43.

71. Newsom, *supra* note 37, at 666 (citing LOUIS LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 199 (1975)).

72. William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 177 (2002) (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 78); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 337 (2005) (same).

73. 526 U.S. 489, 511 (1999) (Rehnquist, C.J., dissenting) (“The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision . . .”).

74. *Id.* at 492 (majority opinion).

welfare benefits they would have received in their previous state of residence for a period of one year.⁷⁵

Finding an unenumerated right to travel in the Constitution,⁷⁶ Justice Stevens, writing for the majority, struck down the statute as a violation of the Privileges or Immunities Clause of the Fourteenth Amendment because it infringed on citizens' "right to choose to be citizens 'of the State wherein they reside.'"⁷⁷ This right to travel had three components: the right to enter one state and leave another; "the right to be treated as a welcome visitor rather than an unfriendly alien"; and, for those who want to be permanent residents, the right to be treated equally to native-born citizens.⁷⁸ The last right was the principal right violated by the State of California.⁷⁹ Supporting this proposition, Justice Stevens cited the only real existing precedent on the Privileges or Immunities Clause—*Slaughter-House*.⁸⁰ While acknowledging the controversial nature of *Slaughter-House*, he asserted that "it has always been common ground that this Clause protects the third component of the right to travel."⁸¹ He looked to both Justice Miller's statement in *Slaughter-House* that any federal citizen can "'become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State'"⁸² and Justice Bradley's dissent that "used even stronger language to make the same point."⁸³ For Justice Stevens, the Privileges or Immunities Clause was essentially a nondiscrimination provision protecting the right to migrate and the right to travel.⁸⁴ Justice Thomas and Chief Justice Rehnquist both wrote dissenting opinions.⁸⁵

Although obviously not shy about invoking the Privileges or Immunities Clause, given *McDonald*, Justice Thomas did not see *Saenz* as the proper case for its resurrection.⁸⁶ Since the case only involved

75. *Id.*

76. *Id.* at 498 ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))).

77. *See id.* at 510–11 (quoting U.S. CONST. amend. XIV, § 1).

78. *Id.* at 500.

79. *Id.* at 502.

80. *Id.* at 503.

81. *Id.*

82. *Id.* (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873)).

83. *Id.* (citing *Slaughter-House*, 83 U.S. (16 Wall.) at 112–13 (Bradley, J., dissenting)).

84. Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities": Saenz v. Roe*, 119 *S. Ct. 1518* (1999), 23 *HARV. J.L. & PUB. POL'Y* 295, 304 (2000).

85. *See Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting); *id.* at 521 (Thomas, J., dissenting).

86. *See id.* at 527–28 (Thomas, J., dissenting) ("I would be open to reevaluating [the Privileges

benefits established by positive law, and not fundamental rights, only the Equal Protection Clause could possibly be relevant.⁸⁷ To Justice Thomas, the *Saenz* majority “attribute[d] a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.”⁸⁸ Because the *Saenz* majority failed to ascertain the original meaning of the Privileges or Immunities Clause, the *Slaughter-House* opinions and the majority’s consensus on the right to travel were irrelevant to an analysis under the Privileges or Immunities Clause.⁸⁹

Justice Thomas chastised Justice Stevens’s invocation of the Privileges or Immunities Clause as “yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’”⁹⁰ Justice Thomas believed that Justice Washington’s 1825 opinion in *Corfield v. Coryell* defined “privileges” and “immunities” according to their historical understanding—only those “*fundamental* rights that belong to all citizens of the United States.”⁹¹ The majority’s use of *Slaughter-House* “fail[ed] to address its historical underpinnings or its place in . . . constitutional jurisprudence.”⁹² Justice Scalia, along with Justices Kennedy and O’Connor, silently joined the majority in a 7–2 decision.⁹³ Over a decade later, Justice Thomas found a more proper opportunity to invoke the Privileges or Immunities Clause—and he seized it.⁹⁴

III. MCDONALD V. CITY OF CHICAGO

In the 2010 case of *McDonald v. City of Chicago*, a group of petitioners used the Privileges or Immunities Clause of the Fourteenth Amendment to argue that the rights guaranteed under the Second Amendment should apply to the States.⁹⁵ Despite ruling for the

or Immunities Clause’s] meaning in an appropriate case.”).

87. *See id.* at 526–28; *see also* Lemper, *supra* note 84, at 308.

88. *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting).

89. *See id.* at 522, 527 (noting the majority’s failure to examine the Clause’s original meaning and that *Slaughter-House* had “sapped the Clause of any meaning”).

90. *Id.* at 528 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

91. *Id.* at 525–26 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3,230)).

92. *Id.* at 527.

93. *Id.* at 491 (majority opinion).

94. *See infra* Part III.B.

95. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010) (plurality opinion).

petitioners, the Court chose not to use the Privileges or Immunities Clause—opting instead for the more conventional route through substantive due process.⁹⁶ Justice Thomas’s powerful concurring opinion, however, embraced the petitioners’ argument and supported the enforcement of the Second Amendment against the States via the Privileges or Immunities Clause.⁹⁷

The petitioner-plaintiffs in *McDonald* challenged gun-control laws in Chicago and Oak Park, Illinois that banned handgun possession by private citizens.⁹⁸ They claimed that these restrictions violated their Second Amendment right to keep and bear arms as extended in the Court’s 2008 decision in *District of Columbia v. Heller*.⁹⁹ They argued that the Fourteenth Amendment should enforce the Second Amendment against the States—primarily under the Privileges or Immunities Clause and secondarily under the Due Process Clause.¹⁰⁰ The petitioners asserted that the Court should reject the *Slaughter-House* interpretation of the Privileges or Immunities Clause as overly narrow.¹⁰¹ The respondents, in addition to arguing that the right to keep and bear arms was not fundamental enough to be incorporated via the Due Process Clause,¹⁰² argued that Section 1 of the Fourteenth Amendment was also merely a nondiscrimination rule, designed to protect the rights of former slaves after the Civil War.¹⁰³

A. Justice Alito’s Plurality Opinion

1. Applying via the Privileges or Immunities Clause

While the Court did not explicitly reject the argument based on the Privileges or Immunities Clause, it found no reason to revisit *Slaughter-House* and decided to adhere to decades of precedent by applying the Due Process Clause to Fourteenth Amendment claims of State infringement.¹⁰⁴ Justice Alito opened the plurality opinion by addressing

96. *Id.* at 3030–31.

97. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

98. *Id.* at 3027 (plurality opinion).

99. *Id.*

100. *Id.* at 3028.

101. Petitioners’ Brief at 42–65, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

102. Brief for Respondents City of Chicago and Village of Oak Park at 7, 64, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

103. *Id.* at 42–81.

104. *McDonald*, 130 S. Ct. at 3030–31 (plurality opinion).

the issue as the petitioners hoped he would, by discussing the *Barron* aftermath and the need for some vehicle to incorporate the Bill of Rights against the States—the Privileges or Immunities Clause.¹⁰⁵ Naturally, his analysis started with the Fourteenth Amendment and, of course, *Slaughter-House*.¹⁰⁶ He discussed *Slaughter-House*'s majority opinion as well as the dissents of Justices Field, Swayne, and Bradley.¹⁰⁷ He then aptly stated that “[t]oday, many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation,” but gave no further discussion of the case.¹⁰⁸ He then mentioned three nineteenth century cases—*United States v. Cruikshank*,¹⁰⁹ *Presser v. Illinois*,¹¹⁰ and *Miller v. Texas*,¹¹¹ which held that the Second Amendment applied only to the Federal Government—and the petitioners’ argument for overturning those cases and *Slaughter-House*.¹¹² Justice Alito did not discuss these cases as they related to privileges or immunities.¹¹³

Justice Alito declined to overturn *Slaughter-House* and noted that the petitioners could not identify the full scope of the Privileges or Immunities Clause nor was there consensus on the issue among the scholars who believe *Slaughter-House* was incorrectly decided.¹¹⁴ There was no real need to reconsider the interpretation of the Privileges or Immunities Clause in this case because “[f]or many decades, the question of the rights 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.”¹¹⁵

In his dissent, Justice Stevens agreed with the plurality’s refusal to overturn *Slaughter-House* and its decision to adjudicate the case under the Due Process Clause.¹¹⁶ Like Justice Alito, he was hesitant to overturn 137 years of precedent.¹¹⁷ Justice Stevens noted that “[t]he

105. *Id.* at 3028.

106. *Id.*

107. *Id.* at 3029.

108. *See id.* (citing *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999)).

109. 92 U.S. 542 (1876).

110. 116 U.S. 252 (1886).

111. 153 U.S. 535 (1894).

112. *See McDonald*, 130 S. Ct. at 3027–31 (plurality opinion).

113. *Id.*

114. *Id.* at 3030–31.

115. *Id.*

116. *Id.* at 3089–90 (Stevens, J., dissenting).

117. *Id.* at 3089; *see id.* at 3028–36 (plurality opinion) (discussing the long history of incorporation under the Due Process Clause of the Fourteenth Amendment).

burden is severe for those who seek radical change in such an established body of constitutional doctrine.”¹¹⁸ Though he admitted that the petitioners amassed “impressive” evidence supporting their interpretation of the Privileges or Immunities Clause, he argued that “the original meaning of the Clause is not as clear as they suggest.”¹¹⁹

2. Incorporation via the Due Process Clause

Justice Alito instead used the existing precedent under the Due Process Clause of the Fourteenth Amendment to incorporate the Second Amendment against the States.¹²⁰ First, he rejected the late-nineteenth century precedent of *Cruikshank*, *Presser*, and *Miller* as inapplicable because they preceded the modern jurisprudence on the issue.¹²¹ They were irrelevant because they did not “engage[] in the sort of Fourteenth Amendment inquiry required by . . . later cases.”¹²²

Under the Due Process Clause, the Court has incorporated most of the protections of the first eight amendments against the States, but not all.¹²³ To determine whether a particular protection in the Bill of Rights applies to the States, Justice Alito saw *Duncan v. Louisiana*¹²⁴ and *Washington v. Glucksberg*¹²⁵ as the controlling precedent.¹²⁶ The *Duncan* test asked “whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice.”¹²⁷ The more recent *Glucksberg* test asked, in a similar context, whether the right is “deeply rooted in this Nation’s history and tradition.”¹²⁸ For Justice Alito and the plurality, the Second Amendment right of individual self-defense satisfied those tests.¹²⁹

The 2008 *District of Columbia v. Heller* decision made this an easy determination for Justice Alito.¹³⁰ The *Heller* decision, written by Justice

118. *Id.* at 3089 (Stevens, J., dissenting).

119. *Id.* at 3089 & n.2 (gathering sources that illustrate the division on this topic).

120. *Id.* at 3050 (plurality opinion).

121. *Id.* at 3031.

122. *Id.* at 3031 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008)).

123. *Id.* at 3034–35. This is commonly referred to as “selective incorporation.” *Id.* at 3034.

124. 391 U.S. 145 (1968).

125. 521 U.S. 702 (1997).

126. *McDonald*, 130 S. Ct. at 3034, 3036 (plurality opinion).

127. *Id.* at 3034 (citing *Duncan*, 391 U.S. at 149).

128. *Glucksberg*, 521 U.S. at 721, quoted in *McDonald*, 130 S. Ct. at 3036 (plurality opinion).

129. *McDonald*, 130 S. Ct. at 3036–38 (plurality opinion).

130. *Id.* at 3036.

Scalia, struck down a District of Columbia law banning handgun possession in the home.¹³¹ The Court held that the D.C. law infringed upon a Second Amendment right to individual self-defense, which was “a basic right, recognized by many legal systems from ancient times to the present day.”¹³² Specifically, the Court noted that “individual self-defense is ‘the *central component*’ of the Second Amendment right.”¹³³ Thus, under *Heller*, the Second Amendment requires that “citizens must be permitted ‘to use [handguns] for the core lawful purpose of self-defense’” in federal enclaves such as Washington, D.C.¹³⁴

In deciding whether this federal right should apply to the States, Justice Alito noted how *Heller* traced the origin of the Second Amendment back to the 1689 English Bill of Rights.¹³⁵ American colonists enjoyed the right to keep and bear arms, and the Framers of the Constitution during the 1788 ratification debates considered it a fundamental right.¹³⁶ Applying the *Heller* decision to the *Glucksberg* test, Justice Alito wrote, “*Heller* makes it clear that this right is ‘deeply rooted in this Nation’s history and tradition.’”¹³⁷

Finally, Justice Alito argued in *McDonald* that it was the express intent of the Framers of the Fourteenth Amendment to protect Second Amendment rights against State infringement.¹³⁸ He pointed to the debates of the thirty-ninth Congress in which sponsors of the Fourteenth Amendment mentioned the right to bear arms as being protected by it.¹³⁹ Justice Alito also pointed out that in the years after the passage of the Fourteenth Amendment, members of Congress acknowledged the Fourteenth Amendment’s role in applying Second Amendment protection to the states.¹⁴⁰

131. *Id.* at 3026 (citing *District of Columbia v. Heller*, 554 U.S. 570, 576, 636 (2008)).

132. *Id.* at 3036.

133. *Id.* (quoting *Heller*, 554 U.S. at 599).

134. *Id.* (alteration in original) (quoting *Heller*, 554 U.S. at 630).

135. *Id.* (citing *Heller*, 554 U.S. at 592–95).

136. *See id.* at 3037 (citing *Heller*, 554 U.S. at 598–603).

137. *Id.* at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

138. *See id.* at 3040–41.

139. *Id.* at 3041 (“Senator Samuel Pomeroy described three ‘indispensable’ ‘safeguards of liberty under our form of Government.’” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866))).

140. *Id.* at 3041–42.

B. *Justice Thomas's Concurrence*

Justice Thomas's concurrence in *McDonald* laid out the framework for abdicating the doctrine of substantive due process in favor of the Privileges or Immunities Clause of the Fourteenth Amendment. Before ascertaining the original meaning of the Privileges or Immunities Clause, Justice Thomas dealt with *Slaughter-House* and its progeny. He first cited *Slaughter-House's* distinction between state and federal citizenship¹⁴¹ and noted Justice Miller's possible lifeboat for incorporation by his mention of the right to assemble and the privilege of the writ of habeas corpus.¹⁴² Justice Thomas then explained that any notion of incorporation in *Slaughter-House* disappeared three years later in *Cruikshank* when the Court held that the First and Second Amendments were natural rights predating the Constitution and, therefore, not privileges of United States citizenship.¹⁴³ After dismissing the Court's decision in *Saenz v. Roe*, he began his assault on the true villain of this story—substantive due process.¹⁴⁴

Justice Thomas argued that with the Privileges or Immunities Clause marginalized under *Slaughter-House* and *Cruikshank*, those seeking federal protection of fundamental rights had to go elsewhere in the Constitution and found the Due Process Clause of the Fourteenth Amendment.¹⁴⁵ At first, the provision only incorporated against the States those rights that were “sufficiently ‘fundamental’” and “essential to the scheme of ordered liberty,” but eventually the Court also enforced unenumerated rights against the States via the Due Process Clause.¹⁴⁶ As examples, he cited three of the most infamous cases involving substantive due process—*Lochner v. New York*,¹⁴⁷ *Roe v. Wade*,¹⁴⁸ and

141. See *id.* at 3060 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas pointed out that the *Slaughter-House* Court held that the Privileges or Immunities Clause only protects federal citizenship and not state citizenship. *Id.* (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873)).

142. *Id.* at 3061; see *supra* text accompanying notes 61–70.

143. *McDonald*, 130 S. Ct. at 3060 (Thomas, J., concurring in part and concurring in the judgment) (citing *United States v. Cruikshank*, 92 U.S. 542, 551, 553 (1876)).

144. See *id.* at 3061–63. “The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.” *Id.* at 3062.

145. *Id.* at 3061.

146. *Id.* at 3061–62 (quoting *id.* at 3046 (plurality opinion)).

147. 198 U.S. 45, 53, 64–65 (1905) (finding that a New York labor law infringed upon the freedom of contract as a “liberty of the individual protected by the [Fourteenth] Amendment”).

148. 410 U.S. 113, 166–67 (1973) (finding that a Texas law prohibiting abortion violated the

Lawrence v. Texas.¹⁴⁹ Despite his agreement with the plurality that the Second Amendment protects a fundamental right, he lumped the plurality opinion in with *Lochner*, *Roe*, and *Lawrence* to demonstrate the folly of using that method of incorporation, which he considers a “legal fiction” that lacks a guiding principle.¹⁵⁰

Justice Thomas finally had an opportunity to ascertain “the meaning of the Fourteenth Amendment agreed upon by those who ratified it.”¹⁵¹ Reasoning that the authors of the Fourteenth Amendment would have written it to be understood by the voters, Justice Thomas explained that his real task was finding what “ordinary citizens” would have understood the Privileges or Immunities Clause to mean at the time of ratification.¹⁵² First, he pointed out the terms “privileges” and “immunities” had a long tradition, going back centuries in England, as being synonymous with “rights.”¹⁵³ He pointed out that the public’s previous understanding of their privileges and immunities as citizens of the several states provided under Article IV, Section 2 of the Constitution to further his case—privileges and immunities are only those rights “which are, in their nature, *fundamental*.”¹⁵⁴ Article IV, Section 2 therefore kept States from denying traveling citizens the fundamental rights they guaranteed to their own citizens.¹⁵⁵

But Justice Thomas still faced two huge questions of constitutional interpretation. First, he asked, “[a]re the privileges or immunities of ‘citizens of the United States’ recognized by § 1 the same as the privileges and immunities of ‘citizens in the Several States’ to which Article IV, § 2 refers?”¹⁵⁶ Justice Thomas answered that the evidence “overwhelmingly demonstrates” that the privileges and immunities protected by Section 1 included individual enumerated constitutional rights, such as the right to bear arms.¹⁵⁷

Fourteenth Amendment’s Due Process Clause).

149. 539 U.S. 558, 578–79 (2003) (finding that a Texas law prohibiting certain sexual conduct between individuals of the same sex violated the Fourteenth Amendment’s Due Process Clause).

150. *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring in part and concurring in the judgment).

151. *Id.* at 3063.

152. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008)).

153. *Id.*

154. *Id.* at 3067 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230)).

155. *Id.* at 3068.

156. *Id.*

157. *Id.*

Drawing on a variety of sources, Justice Thomas focused primarily on the context in which the thirty-ninth Congress enacted the Fourteenth Amendment because it “illuminates what the public understood the words chosen by the draftsmen to mean.”¹⁵⁸ He pointed to a speech by the main author of the Fourteenth Amendment, Representative John Bingham, that expressly advocated that Section 1 of the Fourteenth Amendment enforced the Bill of Rights against the States.¹⁵⁹ Representative Bingham’s speech was published as a pamphlet and distributed across the country.¹⁶⁰ The sponsor of the Amendment in the Senate, Senator Jacob Howard, made a similar argument on the Senate Floor.¹⁶¹ Senator Howard’s speech was published and discussed in newspapers across the country.¹⁶² Justice Thomas concluded that these statements, among others, “point unambiguously toward the conclusion that the Privileges or Immunities Clause enforces at least those fundamental rights enumerated in the Constitution against the States.”¹⁶³

Second, Justice Thomas asked, “[d]oes § 1, like Article IV, § 2, prohibit only discrimination with respect to certain rights *if* the State chooses to recognize them, or does it require States to recognize those rights?”¹⁶⁴ Justice Thomas rejected the interpretation that Section 1 is merely a nondiscrimination clause, stating:

Section 1 guaranteed the rights of citizenship in the United States and in the several States without regard to race. But it was understood that liberty would be assured little protection if § 1 left each State to decide which privileges or immunities of United States citizenship it would protect.¹⁶⁵

The drafters, therefore, intended the Clause to establish a “minimum baseline of federal rights” for all Americans.¹⁶⁶

Finally, Justice Thomas dealt with the fact that his analysis would effectively overturn more than a century of Supreme Court precedent

158. *Id.* at 3072.

159. *Id.* (citing CONG. GLOBE, 39th Cong. 1st Sess. 1089–90 (1866)).

160. *Id.* at 3073.

161. *Id.* at 3073–74 (citing CONG. GLOBE, 39th Cong. 1st Sess. 2765–66).

162. *Id.* at 3074.

163. *Id.* at 3075.

164. *Id.* at 3068.

165. *Id.* at 3083.

166. *Id.*

beginning with *Slaughter-House* and *Cruikshank*.¹⁶⁷ Though Justice Thomas is certainly not the Court's most faithful guardian of *stare decisis*, he acknowledged its importance and longevity and recognized that his reasoning broke new ground in modern jurisprudence.¹⁶⁸ He did not hesitate, however, to reject both the *Slaughter-House* definition of privileges or immunities of federal citizenship and the application of *Slaughter-House* in *Cruikshank*.¹⁶⁹ In his view, given the historical evidence, privileges or immunities of federal and state citizenship should overlap; therefore, *Slaughter-House* was incorrect in that regard.¹⁷⁰ Despite the precedent of *Slaughter-House* and *Cruikshank*—which he dismissed—Justice Thomas saw the historical evidence in favor of incorporating the Second Amendment against the States as too strong to ignore.¹⁷¹

IV. DISCUSSION

A. *The Plurality's Unsatisfying Discussion of Privileges or Immunities*

Justice Alito's plurality opinion was extremely disappointing for originalists who hoped to fully revive the Privileges or Immunities Clause, especially given the manner in which the Court did it—devoting only 172 words to the topic.¹⁷² Alan Gura, counsel for petitioners in *McDonald*, and Ilya Shapiro, Editor-in-Chief of the Cato Institute's *Supreme Court Review*, described the plurality's opinion as “uncharacteristically curt” and “odd” given the importance of the issue.¹⁷³

Although the plurality mentioned the *Slaughter-House* dissents of Justices Bradley, Field, and Swayne and admitted that “many legal scholars” dispute the *Slaughter-House* interpretation,¹⁷⁴ they failed to

167. *Id.* at 3084.

168. *See id.* at 3062–63. “I further acknowledge the importance of *stare decisis* to the stability of our Nation's legal system. But *stare decisis* is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means. It is not ‘an inexorable command.’” *Id.* (citations omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

169. *See id.* at 3086–88.

170. *Id.* at 3087.

171. *Id.* at 3088.

172. Gura, Shapiro & Blackman, *supra* note 8, at 178.

173. *Id.* at 177–78.

174. *McDonald*, 130 S. Ct. at 3029–30 (plurality opinion) (gathering sources that illustrate the

give any meaningful consideration to overturning *Slaughter-House*. Noting petitioners' inability to identify the full scope of the Privileges or Immunities Clause and lack of consensus among *Slaughter-House* critics on the issue, the plurality "decline[d] to disturb the *Slaughter-House* holding"¹⁷⁵ without so much as a paragraph of inquiry as to the original meaning of the Privileges or Immunities Clause itself.¹⁷⁶

Despite acknowledging that the right to bear arms is "deeply rooted in this Nation's history and tradition"¹⁷⁷ and citing many of the same sources as Justice Thomas about the understanding of Section 1 of the Fourteenth Amendment at the time it was adopted,¹⁷⁸ the plurality refused to discuss or investigate which clause in Section 1 was intended by the authors to be used to apply the Bill of Rights to the States.¹⁷⁹ Gura and Shapiro point out that Justice Alito cited a statement by Senator Howard that expressly stated that the Fourteenth Amendment protected the rights guaranteed by the first eight amendments¹⁸⁰ but failed to recognize that the topic of Senator Howard's speech was not the Fourteenth Amendment in general or even Section 1—it was specifically the Privileges or Immunities Clause.¹⁸¹ They further point out that Justice Alito made the same mistake again when referring to a similar statement by Representative Bingham¹⁸²—pointing out that Representative Bingham specifically said, "[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."¹⁸³

disparate viewpoints).

175. *Id.* at 3030–31.

176. *See id.* at 3028–31 (discussing early Fourteenth Amendment cases but offering no explanation of the Clause's original meaning).

177. *Id.* at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

178. *See id.* at 3033 n.9 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Senator Jacob Howard)).

179. *See id.* at 3033 (noting simply that the Court has since embraced a selective-incorporation approach via the Due Process Clause).

180. Gura, Shapiro & Blackman, *supra* note 8, at 180.

181. *Id.* ("As shown in the fuller quote of the same speech . . . the subject of Howard's speech was the *Privileges or Immunities Clause*.").

182. *Id.* at 180–81.

183. *Id.* at 181 (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 84 (1871)).

B. *Why Scalia? Why?*

Perhaps most disheartening for proponents of the Privileges or Immunities Clause, though not necessarily surprising given his joining of the majority in *Saenz v. Roe*, was Justice Scalia's refusal to sign on to Justice Thomas's concurrence, or at least make his own case in his concurrence for why he would not use the Clause. The esteemed Justice, who has been described as "the Court's premier [judicial] conservative, intellectual gladiator, and chief wordsmith,"¹⁸⁴ passed on a golden opportunity to go to bat for originalism¹⁸⁵ and help turn the tide against his arch enemy—substantive due process.¹⁸⁶ Instead, Justice Scalia embraced his nemesis, choosing *stare decisis* and expediency over originalism.¹⁸⁷

Shockingly, Justice Scalia only devoted fifty-five words in his concurrence to the Privileges or Immunities Clause.¹⁸⁸ He merely wrote:

I join the Court's opinion. 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." This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.¹⁸⁹

Justice Scalia wrote his separate concurring opinion only to "respond to some aspects of Justice Stevens' dissent."¹⁹⁰ The rest of the opinion disputes Justice Stevens's claim that the living constitution method of incorporation is "more 'cautiou[s]' and respectful of proper limits on the judicial role."¹⁹¹

184. RING, *supra* note 9, at ix.

185. See Gura, Shapiro & Blackman, *supra* note 8, at 187 ("Justice Scalia could have demonstrated fidelity to the judicial method he would use to attack Justice Stevens by joining Justice Thomas's concurrence.").

186. See *id.* at 182 (stating that Justice Scalia has described substantive due process as "babble," a "usurpation," and an "atrocious").

187. See *id.* at 184.

188. *Id.* at 182.

189. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (Scalia, J., concurring) (citation omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)). *But see* Gura, Shapiro & Blackman, *supra* note 8, at 182 (describing Justice Scalia's concurring opinion as "quixotic").

190. *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

191. *Id.* at 3050 (alteration in original) (citing *id.* at 3119–20 (Stevens, J., dissenting)).

While Justice Scalia's opinion itself does not give much insight into his thought process on the issue, his exchanges during the *McDonald* oral argument are somewhat telling of his reasoning. In this case, he was unusually concerned with *stare decisis*¹⁹² and the practicality of using substantive due process instead of overturning a century of precedent. Though he joined Justice Alito's plurality opinion, he did not, however, seem worried about petitioners' failure to define the scope of the Privileges or Immunities Clause.

In oral arguments, Justice Scalia asked lead counsel for the petitioners, "do you think [it is] at all easier to bring the Second Amendment under the Privileges [or] Immunities Clause than it is to bring it under our established law of substantive due [process]?"¹⁹³ Justice Scalia continued, "[a]nd if the answer is no, why are you asking us to overrule . . . 140 years of prior law . . . when you can reach your result under substantive due [process]?"¹⁹⁴ He then referred to the petitioners' argument as "the darling of the professoriate"¹⁹⁵ and inquired why the petitioners would take on the heavy burden of incorporating via the Privileges or Immunities Clause and overturning *Slaughter-House* instead of simply using substantive due process.¹⁹⁶ But, he did not ask any questions concerning the creation or limitation of unenumerated rights.¹⁹⁷

Recall that Justice Scalia silently voted with the majority in *Saenz*, where the Court protected an *unenumerated* right to travel using the Privileges or Immunities Clause.¹⁹⁸ Therefore, Justice Scalia agreed with Justice Stevens's statement that the right to travel is "firmly embedded in our jurisprudence,"¹⁹⁹ "so important that it is 'assertable against private interference as well as governmental action, . . . [and] a virtually unconditional personal right, guaranteed by the Constitution.'"²⁰⁰ The *Saenz* majority believed the right to travel "has always been common

192. See RING, *supra* note 9, at 15 (stating that "some critics assert that while Scalia decries judicial activism, he is an activist himself because he often votes to strike down laws and overturn Court precedents," however, "when he has ignored the doctrine of *stare decisis*[,] . . . he has done so because the Court's previous holding had no foundation in constitutional text").

193. Transcript of Oral Argument, *supra* note 17, at 6.

194. *Id.* at 6-7.

195. *Id.* at 7.

196. See *id.*

197. See *id.* at 6-17.

198. *Saenz v. Roe*, 526 U.S. 489, 491 (1999).

199. *Id.* at 498 (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)).

200. *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)).

ground,”²⁰¹ and it relied on both Justice Miller’s majority opinion and Justice Bradley’s dissent in *Slaughter-House* as evidence.²⁰²

Justice Stevens acknowledged that he agreed with the *McDonald* plurality that the Privileges or Immunities Clause does not apply because “the original meaning of the Clause is not as clear as [the petitioners] suggest . . . and not nearly as clear as it would need to be to dislodge 137 years of precedent.”²⁰³ But Justice Stevens did not hesitate to invoke the Privileges or Immunities Clause in *Saenz*.²⁰⁴ It seems Justice Stevens found three major differences between *Saenz* and *McDonald*. First, *Saenz* did not require overturning *Slaughter-House*.²⁰⁵ Second, the scope of the right was limited and clearer in *Saenz* than it was in *McDonald*. Third, *McDonald* involved the Second Amendment, which is already covered under substantive due process.

C. The Future

1. Reviving the Privileges or Immunities Clause Without Overturning *Slaughter-House*

Overturning *Slaughter-House* is not necessarily a prerequisite to reviving the Privileges or Immunities Clause. *Slaughter-House* did not involve any claims under the first eight amendments, and Justice Miller’s opinion did not explicitly deny incorporation of the Bill of Rights.²⁰⁶ The right to travel at issue in *Saenz* was not at issue in *Slaughter-House* and was only mentioned in dicta by the Court.²⁰⁷ While *Slaughter-House* is a huge hurdle, it should not necessarily preclude a continued discussion of the meaning of the Privileges or Immunities Clause. In fact, there is a strong case for reinterpreting *Slaughter-House* to include Bill of Rights protections.²⁰⁸ The current Court could do this by

201. *Id.* at 503.

202. *Id.* (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873); *id.* at 112–13 (Bradley, J., dissenting)).

203. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3089 (2010) (Stevens, J., dissenting) (footnote omitted).

204. *See Saenz*, 526 U.S. at 503.

205. *See id.* (noting the acknowledgment of the right to travel in *Slaughter-House*).

206. *See supra* notes 61–70 and accompanying text.

207. *See Slaughter-House*, 83 U.S. (16 Wall.) at 77.

208. *See Newsom, supra* note 37, at 666 (“There is nothing in Miller’s opinion . . . that forecloses the decidedly nontrivial notion that the Clause incorporated Bill of Rights freedoms. In fact, there is an eminently reasonable reading . . . that suggests quite the opposite.”).

distinguishing between the common law economic rights that were at issue in *Slaughter-House* and “core Bill of Rights freedoms”²⁰⁹ such as the Second Amendment protections at issue in *McDonald*.

2. Defining the Scope of Federal Privileges or Immunities

The *McDonald* plurality and Justice Stevens correctly note that the full scope of the Privileges or Immunities Clause is unclear, especially when it comes to unenumerated rights. This is a major question in constitutional law that should draw continued discussion. Even Justice Thomas admits that “[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.”²¹⁰ In *Saenz*, however, Justices Scalia and Stevens used the Clause to invoke an unenumerated right, yet expressed no reservations about not fully defining the scope of federal privileges or immunities.²¹¹ In contrast, the *McDonald* petitioners did not ask for total incorporation of the Bill of Rights, nor did they ask for an unenumerated right—they merely asked the Court to enforce one right against the states, which was the individual right to keep and bear arms for self defense in the home under the Second Amendment.²¹² So, why then would Justices Scalia and Stevens, who disagreed over the *McDonald* outcome and the nature of the Second Amendment, be content using the Privileges or Immunities Clause in *Saenz*, but not in *McDonald*? The answer is, of course, substantive due process.

3. Privileges or Immunities Dies Again?

Justice Scalia’s questions during oral argument,²¹³ his concurrence,²¹⁴ and the plurality opinion²¹⁵ all show that he based his acquiescence to substantive due process on a pragmatic and realistic evaluation of the state of modern constitutional jurisprudence. After

209. *Id.* at 667.

210. *Saenz*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (gathering sources that illustrate the wide-ranging views).

211. *See id.* at 498–511 (majority opinion).

212. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010) (plurality opinion).

213. *See* Transcript of Oral Argument, *supra* note 17, at 6–11.

214. *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

215. *See id.* at 3036–44 (plurality opinion) (discussing incorporation through the Due Process Clause).

years of dissenting valiantly while the Court recognized more and more unenumerated rights, Justice Scalia has shifted his focus. Instead of expressing his “misgivings” about substantive due process and fighting the good fight, perhaps he is now using the twilight of his remarkable career on the bench to help shape the future of substantive due process jurisprudence on the Roberts Court, instead of tearing it down.

While the plurality opinion may be considered incorrect by true originalists, it is indeed a practical course of action. In the end, the Second Amendment was still enforced against the States. Justice Scalia even got the petitioners’ counsel in *McDonald* to admit during oral argument that the tests for whether a right is fundamental under substantive due process and the Privileges or Immunities Clause are nearly identical.²¹⁶ Sure, Justice Scalia may have doomed the rebirth of the Privileges or Immunities Clause before it ever occurred, but even if he had not acquiesced, it is very unlikely that the “misgivings” he has about substantive due process would have been rectified by reviving the Privileges or Immunities Clause.

V. CONCLUSION

Justice Thomas’s concurrence, while lone and underappreciated by the other eight members of the Court, could serve as the foundation for a future Supreme Court to reconsider the meaning of the Privileges or Immunities Clause. The “privileges” and “immunities” of federal citizenship, regardless of their scope, have a long history in this country. They were certainly important enough that the authors of the Fourteenth Amendment decided to include them in Section 1—directly *before* the Due Process Clause.²¹⁷

Even if the Privileges or Immunities Clause is forever doomed to remain “the darling of the professoriate,”²¹⁸ the prerogative of defining constitutional rights, privileges, and immunities is still left to the Supreme Court under the Due Process Clause. Because the tests for determining the applicability of rights against the States under the Privileges or Immunities and Due Process Clauses are nearly identical, it is likely that originalist members of the Court will still have the framework available to limit the creation of unenumerated rights. Using

216. Transcript of Oral Argument, *supra* note 17, at 11.

217. See U.S. CONST. amend. XIV, § 1.

218. Transcript of Oral Argument, *supra* note 17, at 7.

the Due Process Clause is much less controversial and allows the Court to make incremental progress without drawing the controversy of overturning *Slaughter-House* and 138 years of precedent. Even if the Privileges or Immunities Clause remains dead, however, the Court, as well as the professoriate, should at the very least consider its original meaning and use it as a guidepost when determining what rights are fundamental under substantive due process. This may be the practical solution to remaining faithful to both stare decisis and the authors of the Fourteenth Amendment.