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TWO FACES OF JUDICIAL RESTRAINT (OR ARE THERE MORE?) IN *McDONALD V. CHICAGO*

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**George Mason University Law and Economics
Research Paper Series**

10-39

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**Two Faces of Judicial Restraint (Or Are There More?) in
*McDonald v. Chicago***

Nelson Lund[□]

“Judicial restraint,” and its counterpart “judicial activism,” are widely regarded as meaningless terms, useful primarily as rhetorical weapons with which to praise or condemn judicial decisions about which the speaker has strong feelings. The terms certainly are frequently used in that manner, but there may also be analytically distinct forms of judicial restraint to which different judges adhere. Academic commentators have articulated and defended various theories of judicial restraint, but my purpose here is to examine the debate “at work,” so to speak, in an actual case.

*The Court’s recent Second Amendment incorporation decision, *McDonald v. Chicago*, is an especially interesting example because strikingly different models of judicial restraint are adopted by subsets of the more conservative wing of the Court, and subtly different models are adopted by subsets of the more liberal wing. A close look at the*

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opinions in the case suggests that each model has different strengths and weaknesses, but also that they are by no means created equal. Surprisingly, perhaps, the most radical sounding opinion in the case may on balance be the most restrained.

I. Introduction

Since the days of the Warren Court, conservatives have been attacking “judicial activism.”¹ Beginning with the Robert Bork hearings, and lately with increasing frequency, liberals have sought to turn the tables.² Conservative judges are now charged with activism, especially when they undermine liberal precedents or strike down liberal legislation.³ Defenders of judicial activism have all but disappeared.⁴

One sign of this apparent consensus is that all Supreme Court nominees now promise to be paragons of judicial restraint. Any of the following statements, for example, could easily have been uttered by any of the four most recent nominees.

¹ E.g., Mark Levin, *Men in Black: How the Supreme Court Is Destroying America* (2005).

² See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 Harv. L. Rev. 2387, 2387 (2006) (book review) (“The odd thing is that — unlike any earlier time in American history — both sides of the political spectrum proclaim themselves unhappy with the courts. Charges of judicial ‘activism,’ once a staple of conservative critiques of the courts, now are heard as often from liberals and progressives.”).

³ E.g., Cass Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005).

⁴ See, e.g., Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. Colo. L. Rev. 1401, 1401 (2002) (“Everyone scorns judicial ‘activism,’ that notoriously slippery term.”).

- I'm not quite sure how I would characterize my politics. But one thing I do know is that my politics would be, must be, have to be completely separate from my judging. And I — I agree with you to the extent that you're saying, look, judging is about considering a case that comes before you, the parties that comes before you, listening to the arguments they make, reading the briefs they file, and then considering how the law applies to their case — how the law applies to their case — not how your own personal views, not how your own political views might suggest, you know, anything about the case, but what the law says, whether it's the Constitution or whether it's a statute. Now, sometimes that's a hard question, what the law says, and sometimes judges can disagree about that question. But the question is always what the law says.
- Sometimes it's hard to give meaning to a constitutional term in a particular case. But you don't look to your own values and beliefs. You look outside yourself to other sources. This is the basis for, you know, that judges wear black robes, because it doesn't matter who they are as individuals. That's not going to shape their decision. It's their understanding of the law that will shape their decision.
- Judges have to be careful not to inject their own views into the interpretation of the Constitution, and for that matter, into the interpretation of statutes. That is not the job that we are given. That is not authority that we are given. Congress has the law-making authority. You have the authority to make the policy decisions and it's the job of the judiciary to carry out the policy decisions that are made by Congress when it's enacting statutes.
- [T]he role of judges is to interpret both the Constitution and

law. Their role is to do both in accordance with their terms. And so that is the function of a judge. Clearly, a judge looks at the terms and tries to, if it's not — if it's the Constitution, what are the principles that underlie that provision of the Constitution and it's informed by precedent. If it's a statute, you use principles of statutory construction, starting always with the words, and you give effect to Congress's intent. That's the role of a judge. . . . I do not believe that judges should use their personal feelings, beliefs or value systems or make their — to influence their outcomes.⁵

Some politicians and commentators have suggested that nominees are dissembling when they make such statements, and some of the sitting Justices have been accused of repudiating positions they took when seeking Senate confirmation.⁶ Usually, these charges

⁵ The four statements were made at their confirmation hearings by Elena Kagan, John Roberts, Samuel Alito, and Sonia Sotomayor, respectively.

⁶ *E.g.*, Kagan Hearing, Statement of Sen. Specter:

What, if anything, can be done about nominees who drastically abandon positions taken at the confirmation hearings? . . . I would like to put into the record the questioning that I made of Chief Justice Roberts which took 28 of my 30 minutes, and his concurring opinion in *Citizens United* which is an apology, a really repudiation of everything he testified to, just diametrically opposed. That concurring opinion goes into great detail as to why stare decisis ought not to be followed.

Kagan Hearing, Statement of Sen. Cornyn:

[I]t is disconcerting, to say the least, where what appears to me, and in fairness, does appear to be a direct contradiction of what Judge Sotomayor said in her confirmation hearings [about the Second Amendment], with what she has decided on the first opportunity to decide a case on that same subject.

are made by conservatives against liberals, and by liberals against conservatives.⁷ Disinterested observers are likely to recognize that such generalized professions of modesty and restraint are carefully designed to say next to nothing of any substance. At most, nominees now seem to promise that they will exhibit a certain *style* in their future work.

And that promise they generally do keep. The current members of the Supreme Court pretty consistently present their own positions as manifestations of judicial restraint, and frequently accuse their colleagues of violating this cardinal judicial virtue.⁸

⁷ Not always, though. Louis Michael Seidman, a strong proponent of progressive judicial activism, denounced Sonia Sotomayor's testimony at her confirmation hearing. The Federalist Society Online Debate Series, July 19, 2009, <http://www.fed-soc.org/debates/dbtid.30/default.asp> (" I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified."). See also Richard A. Posner, *How Judges Think* 81 (2008):

The tension between what [John Roberts] said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts's reputation for candor and a further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.

⁸ E.g., *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) ("[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*." (citation omitted); *id.* at 918 (Roberts, C.J., concurring) ("The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us."); *id.* at 979 (Stevens, J., concurring in part and dissenting in part) ("Our colleagues have arrived at the conclusion that

Perhaps “judicial activism” just describes any decision with which the speaker very strongly disagrees.⁹

Before accepting this conclusion, perhaps we should consider the possibility that there are analytically distinguishable forms of judicial restraint to which different Justices adhere. Academic commentators have articulated and defended various theories of judicial restraint,¹⁰ but my purpose here is to examine the debate “at work,” so to speak, in an actual case.

The Court’s recent decision in *McDonald v. Chicago*¹¹ is an especially interesting example because strikingly different models of judicial restraint are adopted by subsets of the more conservative wing of the Court, and subtly different models are adopted by subsets of the more liberal wing. A close look at the opinions in the case suggests that each model has different strengths and weaknesses, but also that they are by no means created equal.

Austin must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court’s lawmaking power.”).

⁹ See, e.g., Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 Tex. L. Rev. 1057, 1077 (2002) (“Very little attention has been paid to the meaning of the term activism. The term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging.”).

¹⁰ A useful introduction to several contending positions can be found in *Symposium, Can Originalism Be Reconciled With Precedent?*, 22 Const. Comm. 257 (2005) (articles by Randy Barnett, Thomas W. Merrill, Michael Stokes Paulsen, David A. Strauss, and Steven G. Calabresi).

¹¹ 130 S. Ct. 3020.

McDonald is a sequel to *Heller v. District of Columbia*,¹² decided two terms earlier. In *Heller*, the Court undertook its first thorough consideration of the Second Amendment, and resolved (at least as a matter of law) a longstanding academic debate about the nature of this constitutional provision. Writing for five members of the Court, Justice Scalia concluded (1) that individuals have a constitutionally protected individual right to keep and bear arms for self defense, not just a right to serve in militias organized by state governments, and (2) that D.C.'s handgun ban violated the Second Amendment.

Justices Stevens and Breyer wrote dissenting opinions, both of which were joined by all four dissenters. The Stevens opinion disputed Scalia's textual and historical analysis of the original meaning of the Amendment, arguing that it was meant to protect only militia-related interests, not an interest in individual self-defense. Breyer contended that even if one accepted the majority's mistaken understanding of the original meaning, the Second Amendment should be interpreted to permit the D.C. handgun ban.

Immediately after the *Heller* decision was announced, separate sets of plaintiffs filed suits challenging similar handgun bans in Chicago and several of that city's suburbs. Because *Heller's* holding applies directly only to federal laws like the one in D.C., the plaintiffs invoked the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment. The district court and the Seventh Circuit rejected all these claims on the ground that they were foreclosed by precedent.¹³

¹² 128 S. Ct. 2783 (2008).

¹³ With respect to the claims under due process, the Seventh Circuit was quite wrong. See Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse L. Rev. 185 (2008). This issue is

The Supreme Court granted certiorari in one of the Chicago cases, and concluded that the Constitution's protection of the right to arms applies to state and local laws in the same way that it applies to federal laws. Justice Alito's plurality opinion for four Justices relied on the Fourteenth Amendment's Due Process Clause. Justice Thomas rejected this approach, but reached the same substantive conclusion under the Privileges or Immunities Clause. Justice Stevens wrote a dissenting opinion for himself alone, and Justice Breyer wrote a dissenting opinion that was joined by Justices Ginsberg and Sotomayor.

II. Precedent plus Originalism: Justice Alito's Plurality Opinion

A. Precedent

Alito's plurality opinion treats fidelity to precedent as the centerpiece of judicial restraint. He presents a thorough survey of the Court's evolving approaches to the application of the Bill of Rights to the states. He then argues, and concludes, that the governing precedents require that the Second Amendment right be protected against state action under the Due Process Clause, in the same manner that it is protected against federal action by the Second Amendment itself.

The Bill of Rights originally applied only to the federal government.¹⁴ Shortly after the Fourteenth Amendment was adopted in 1868, the *Slaughter-House Cases* interpreted the Privileges or Immunities Clause very narrowly, holding that it

obviously now moot.

¹⁴ Barron v. Mayor of Baltimore, 32 U.S. 243 (1833).

protects only those rights that “owe their existence to the Federal government, its National character, its Constitution, or its laws.”¹⁵ In *United States v. Cruikshank*,¹⁶ the Court found that the right to keep and bear arms (and other rights protected by the Bill of Rights as well) pre-existed the federal Constitution. Accordingly, the rights were not protected under the *Slaughter-House* reading of the Privileges or Immunities Clause.¹⁷

Beginning at the end of the nineteenth century, and continuing somewhat fitfully thereafter, the Court took a new approach. Rather than revisit its precedents, however, it started making some provisions of the Bill of Rights (but not others) applicable to the states under a more general doctrine that has come to be known as substantive due process. This doctrine gives certain “fundamental rights” substantive protection, and the process of “selective incorporation” applied this doctrine to the provisions of the Bill of Rights.¹⁸

¹⁵ 83 U.S. 36, 79 (1873).

¹⁶ 92 U.S. 542 (1876).

¹⁷ This conclusion was reaffirmed in *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894).

¹⁸ The origin of this doctrine in federal law was *Dred Scott*'s conclusory holding that the Fifth Amendment's Due Process Clause protected the right of slave owners to take their peculiar form of property into the federal territories. *Scott v. Sandford*, 60 U.S. 393, 450 (1857). In the nineteenth and early twentieth centuries, the doctrine was used to protect a variety of rights (some of which are listed in the Bill of Rights and some of which are not) against federal and state interference. In 1938, the Court repudiated a number of prior decisions, substituting a virtually conclusive presumption of constitutionality under due process for “regulatory legislation affecting ordinary commercial transactions,” while endorsing substantive due process constraints in at least three somewhat overlapping categories: 1) laws that on their face fall within a specific constitutional prohibition (including some provisions of the Bill of Rights); 2) laws that distort the proper functioning of the political process; and

During the first half of the twentieth century, a number of rights were brought under the umbrella of substantive due process, but the Court also decided that several Bill of Rights provisions were not sufficiently fundamental to justify incorporation. Important decisions involving both enumerated and unenumerated rights were later overruled. Most of the individual rights listed in the Bill of Rights were eventually incorporated, but *McDonald* was the first case in which the Court agreed to decide how the selective incorporation doctrine applies to the Second Amendment.

The importance of precedent in Alito's analysis is highlighted by his refusal even to consider the arguments for protecting the right to arms under the Privileges or Immunities Clause. These arguments had been pressed very strenuously by the lawyer for the *McDonald* petitioners and by a large and diverse collection of *amici*. Alito acknowledged that *Slaughter-House* had been subjected to serious and widespread criticism, beginning with the four dissenters in *Slaughter-House* itself, and continuing with a wide range of modern scholars.¹⁹ Moreover, Alito's own survey of the Court's substantive due process jurisprudence hardly depicts a well-reasoned or coherent body of case law. This line of cases includes numerous decisions overruling prior cases, as Alito's opinion acknowledges, and none of the Court's opinions attempts to reconcile the doctrine with the text of the Due Process Clause. Why not rethink the matter now?

Alito's answer to this question is brief and revealing. He notes that the petitioners' lawyer was unable at oral argument to

3) laws that disadvantage "discrete and insular minorities." *United States v. Carolene Products*, 304 U.S. 144, 152, 153 n.4 (1938). Alito's opinion largely ignores the strand of doctrine dealing with unenumerated rights, which is described in more detail in Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555, 1558-68 (2004).

¹⁹ 130 S. Ct. at 3029-30.

identify the “full scope” of the Privileges or Immunities Clause, and he observes that the scholars who criticize the *Slaughter-House* interpretation of the Clause have not been able to agree among themselves about the correct interpretation.²⁰ Nowhere in the opinion does Alito make any effort to defend *Slaughter-House* or its progeny, and he makes no effort to show that the modern doctrine of substantive due process has any basis in the Constitution.

The implication seems to be that if there are doubts about the original meaning of a constitutional provision, it is better to accept whatever precedents happen to exist, even if that requires deciding a case under a line of case law that is itself chock full of uncertainties. This suggests a very strong, if implicit, position that judicial restraint consists primarily in fidelity to precedent.

Given this strong presumption that the original meaning of a constitutional provision is irrelevant once the Court has spent “many decades” deciding cases without making any inquiries about the original meaning,²¹ one would expect Alito to analyze the Second Amendment in much the same way that the Court has previously treated other substantive due process and selective incorporation cases.

²⁰ *Id.* at 3030. One might wonder why disagreements among scholars should prevent the Justices from doing their own research and reaching their own conclusions about the meaning of a constitutional provision. With their shrunken docket, large staffs, and long summer vacations, it’s hard to believe that they’re really too busy. One might also wonder why an advocate’s inability to identify the “full scope” of a constitutional provision should induce a court to disregard that part of the Constitution. Perhaps we should count ourselves lucky that the Court did not impose such demands on the advocates in *Strauder v. West Virginia*, 100 U.S. 303 (1879), or in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²¹ 130 S. Ct. at 3030-31.

At one level, Alito does exactly that. The legal test on which he relies is drawn from two cases, *Duncan v. Louisiana*²² and *Washington v. Glucksberg*.²³ *Duncan* was the most recent case incorporating a provision of the Bill of Rights, and *Glucksberg* was a recent substantive due process case involving an unenumerated right. Alito points to similar formulations in both cases, and concludes that the established test under substantive due process is whether a right is “fundamental to *our* scheme of ordered liberty” or in other words whether the right is “deeply rooted in this Nation’s history and tradition.”²⁴ One might quibble over whether these formulations adequately encapsulate the existing due process jurisprudence,²⁵ but it would not be easy to find a better statement of the approach that has emerged in the case law.²⁶

²² 391 U.S. 145, 149 (1968).

²³ 521 U.S. 702, 721 (1997).

²⁴ 130 S. Ct. at 3036 (paraphrasing *Duncan* and quoting *Glucksberg*, respectively).

²⁵ For a discussion of Stevens’ proposed alternative, see *infra*.

²⁶ *Duncan* was a criminal procedure case, and it might be read as confined to that context. The language that Alito cites (and revealingly does not quote) specifically deals with the issue of a fair trial. Alito is right, however, that *Duncan*’s approach is broadly consistent with the decisions in the selective incorporation cases that are still good law, both in the criminal procedure context and in other areas such as free speech.

The invocation of *Glucksberg* raises a different question. The approach taken in that case, which rejected a claim that the right to assisted suicide is protected by due process, is completely inconsistent with a subsequent decision, *Lawrence v. Texas*, 539 U.S. 558 (2003), which recognized a substantive due process right to engage in sodomy. *Lawrence* made no effort to reconcile its holding with the *Glucksberg* test, and indeed did not even mention *Glucksberg*. But neither did *Lawrence* propose any alternative general test of fundamentality under substantive due process. *Lawrence* is probably best seen as the latest in a

Applying this test to the Second Amendment is quite straightforward. As Alito notes, *Heller* had already collected a mass of historical evidence showing that the right to arms, like the right to self defense that it serves, is very deeply rooted in America's history and tradition. But then Alito goes on to suggest that the Fourteenth Amendment was specifically designed to incorporate the Second Amendment. Taking this step is somewhat odd, both because it is not required by the *Duncan/Glucksberg* test, and because the Court has rarely if ever treated evidence of the original intent of the Fourteenth Amendment as a significant factor in substantive due process or selective incorporation cases.

Alito must have taken this novel and unnecessary step in order to suggest that fidelity to precedent leads in this case to the same result as originalism.²⁷ He is certainly right that a decision consistent both with precedent and with originalism rests on a stronger foundation than a decision that must reject one or the other. Alito's opinion thus suggests that *McDonald* required the Court to make no hard choices or to exercise any kind of discretion that might constitute judicial activism.

line of *sui generis* sexual freedom cases — a line that includes *Griswold v. Connecticut*, 381 U.S. 479 (1963) and *Roe v. Wade*, 410 U.S. 113 (1973) — and Alito's decision to rely on *Glucksberg* is therefore quite reasonable. For further discussion of the relation between *Glucksberg* and *Lawrence*, see Lund & McGinnis, *supra* note 18, at 1607-11.

²⁷ Alito never quite says that the Fourteenth Amendment was specifically designed to incorporate the Second Amendment, or that his arguments about the intent of the 39th Congress provide an adequate and independent ground for the Court's incorporation holding. But the arguments he presents can hardly have any other purpose than to create that impression.

B. Originalism

Unfortunately, Alito's effort to marry respect for precedent with an originalist inquiry leads him into some difficulties. Perhaps most obviously, he cites no evidence about the original meaning of the Due Process Clause. And for good reason. If an originalist case can be made for incorporation, it has to be based on the Privileges or Immunities Clause, which he has already refused to consider.

Taken by itself, this may not be particularly troubling. Alito seems implicitly to argue that even if the Court picked the wrong clause to justify its doctrine of selective incorporation, the fact remains that the Fourteenth Amendment was meant to protect the Second Amendment right against state action. Or, to put it another way, even if the Court's approach has been questionable as a formal matter, the outcome is substantively correct under originalism, and that agreement is what is most important. Why engage in a disruptive spring cleaning of a century's worth of case law, only to reach the same result under a different clause of the same constitutional provision?²⁸

What *is* troubling is that the evidence Alito presents actually points *away from* incorporation. He relies primarily on two related statutes, the Freedmen's Bureau Act and the Civil Rights Act, both enacted in 1866.²⁹ These are excellent sources of evidence because there is no doubt that a leading purpose of the Fourteenth Amendment was to put the Civil Rights Act beyond constitutional challenge.³⁰ These statutes, moreover, are more

²⁸ Cf. Lund & McGinnis, *supra* note 18, at 1609 (making the same point).

²⁹ 14 Stat. 176; 14 Stat. 27.

³⁰ Both statutes had been enacted over the veto of President Johnson, who did not believe that they were within congressional authority under the Thirteenth Amendment. At the very least, Johnson's position was sufficiently plausible that

reliable evidence of congressional intent (and arguably of the public's understanding as well) than statements by individual legislators.³¹ Here we have specific and precise language that was agreed to by overwhelming majorities in the 39th Congress.

The difficulty arises from the fact that the relevant provisions of both statutes were antidiscrimination provisions, *not* generalized substantive protections of any federal rights.

Section 14 of the Freedmen's Bureau Act, for example, applied only in those parts of the defeated Confederacy where "the ordinary course of judicial proceedings" were not yet operating or where "constitutional relations to the [federal] government" had not yet been restored. Consistent with this geographic limitation, the statute provides for military enforcement of certain basic civil rights:

the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens [of the limited geographic areas where the statute applies] *without respect to race or color, or previous*

supporters of the statutes could reasonably have feared that the courts might agree with him.

³¹ Alito also quotes a variety of individual legislators, but none of the quotations articulates the incorporation thesis.

*condition of slavery.*³²

It is true, as Alito stresses, that this provision assumes the existence of “the constitutional right to bear arms.” But the statute also assumes the existence of several other “laws and proceedings,” without implying that any of them is derived from or defined by federal law or the federal Constitution. Rather, the right to bear arms is given as an example of a larger set of matters that were at that time almost exclusively determined by state law, and it requires only that all citizens be given the “full and equal benefit of all [such] laws and proceedings . . . *without respect to race or color, or previous condition of slavery.*”

Read as a whole,³³ section 14 is clearly aimed at ensuring that black citizens get treated the same as whites with respect to a wide array of widely accepted rights, and it is easy to understand why Congress would have been especially concerned to prevent the selective disarmament of freedmen in the Southern states where this statute was operative. But the content and contours of those rights, including that of the constitutional right to bear arms, were at that time determined by state law.³⁴ Section 14 does not

³² 14 Stat. 173, 176-77 (1866) (emphasis added).

³³ Alito quotes only part of this provision.

³⁴ In 1868, 60% of American states (and 73% of Southern states) had state constitutional provisions expressly protecting the right to keep and bear arms, and several of the remaining states had provisions expressly protecting the right to defend life, liberty, and property, which may have entailed the right to arms. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 50-52 (2008). In states that lacked such provisions, courts might have held that a constitutional right to arms was implied in other provisions or by principles of general constitutional law, if a legislature had ever taken the unprecedented step of banning the private possession or use of firearms.

purport to specify or alter the effects of those determinations (other than by forbidding racial discrimination). Nor does section 14 imply that Congress believed it was enforcing the Second Amendment against the states, or was requiring the states to conform their laws with the Second Amendment.

Section 14 is a perfectly good piece of evidence to support Alito's argument that the right to arms meets the *Duncan/Glucksberg* test under substantive due process, but it does not suggest that the 39th Congress meant to make the Second Amendment applicable throughout the nation, either through the Freedmen's Bureau Act itself or through the Fourteenth Amendment.

The same problem afflicts Alito's interpretation of the broader and more famous Civil Rights Act of 1866, which was adopted a few months before the Freedmen's Bureau Act. Section 1 of the Civil Rights Act, like section 14 of the Freedmen's Bureau statute, was an antidiscrimination statute that required states to protect a wide range of state law rights without engaging in racial discrimination.³⁵ Alito is probably right that this would have been

³⁵ Section 1 of the statute provided that:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance,

understood to include the right to arms — which many states had expressly protected in their own constitutions and which no state to my knowledge had ever claimed was unprotected as a matter of state constitutional law.³⁶ Once again, this offers support for the proposition that the right is deeply rooted in our nation’s history and traditions. But Alito is quite mistaken when he asserts that “[t]he *unavoidable* conclusion is that the Civil Rights Act, like the Freedmen’s Bureau Act, aimed to protect ‘the constitutional right to bear arms’ and not simply to prohibit discrimination.”³⁷

The unavoidable conclusion is precisely the opposite. The language of the statute guarantees to all citizens the “full and equal benefit of laws and proceedings for the security of person and property, *as is enjoyed by white citizens.*” Nothing in section 1 of the Civil Rights Act purports to specify what legal benefits are or must be enjoyed by white citizens, or even suggests that its aim is anything more than “simply to prohibit discrimination.”

As Jack Balkin has pointed out, section 1 of the Civil Rights Act of 1866 is still in effect today.³⁸ If it is “unavoidably” interpreted to give general substantive protection to “the

regulation, or custom, to the contrary notwithstanding.

14 Stat. 27, 27 (emphasis added), codified as amended at 42 U.S.C. § 1981.

³⁶ The fact that the constitutional right to arms was not mentioned in this statute, but was specifically listed a few months later in the Freedmen’s Bureau Act, presumably reflects the fact that the selective disarmament of blacks was regarded as a pressing problem in the jurisdictions covered by the latter statute.

³⁷ 130 S. Ct. at 3040-41 (emphasis added).

³⁸ Jack Balkin, *Supreme Court Holds That Congress Has Incorporated Entire Bill of Rights*, Balkinization, July 2, 2010, <http://balkin.blogspot.com/2010/07/supreme-court-holds-that-congress-has.html>

constitutional right to bear arms,” which is not mentioned in that statute, it is pretty hard to see how one could avoid interpreting it to do the same for other constitutional rights, including at a minimum the other rights listed in the Bill of Rights.³⁹ Given the undisputed (and I think indisputable) fact that the Fourteenth Amendment was meant primarily to put this statute on an unquestionable constitutional foundation, section 1 of the Civil Rights Act (as re-adopted and amended after the Fourteenth Amendment was enacted) is a valid exercise of congressional authority under section 5 of the Fourteenth Amendment. As that statutory provision is interpreted by Alito, it seems to follow almost inexorably that Congress has protected all of the individual rights in the Bill of Rights against state action, including those that have not been incorporated under substantive due process.

Balkin sketches several arguments that might be used to wriggle out of this conclusion, and rightly suggests that they are unconvincing. For my purposes here, the most serious problem with Alito’s argument is that his interpretation of section 1 of the Civil Rights Act (apart from its inherent textual implausibility) is inconsistent with *the Court’s* longstanding interpretation of the statute.⁴⁰ In his effort to marry respect for the Court’s substantive

³⁹ Alito apparently thinks his conclusion is unavoidable because the right to bear arms was specifically mentioned in section 14 of the Freedmen’s Bureau Act, though not in the Civil Rights Act itself. But nothing in the language or structure of section 14 so much as suggests that the constitutional right to bear arms is the *only* constitutional right protected by that statute. Suppose, for example, that a state had passed a statute forbidding blacks to worship God or express political opinions. No one would think that this would have been permitted by section 14.

⁴⁰ The Court has issued decisions on whether particular forms of discrimination are racial discrimination within the meaning of the statute, without ever suggesting that § 1981 protects against anything other than racial discrimination. *See, e.g.,* McDonald v. Santa Fe Trans. Co., 427 U.S. 273 (1976); St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987). The notion that the statute “incorporates” provisions of the Bill of Rights would be particularly

due process precedents with the original meaning of the Fourteenth Amendment, Alito got so carried away that he disregarded the Court's *statutory* precedents.

The Court frequently says that *stare decisis* has even stronger force in statutory cases than in constitutional cases.⁴¹ Alito's novel misinterpretation of the 1866 statute was almost certainly inadvertent, and the chances that the Court will adopt it in a statutory construction case are nil. But Alito's misstep is a tribute to the deep appeal of originalism. In an opinion that consciously stresses the virtue of fidelity to precedent, the gravitational force of originalism seems to have dragged the author unwittingly into committing an aggravated form of the very kind of adventurism he was trying to avoid.

As the preceding discussion may suggest, it is possible to argue that the Privileges or Immunities Clause itself — like section 14 of the Freedmen's Bureau Act and section 1 of the Civil Rights Act — is an antidiscrimination provision rather than a general guarantee of federally defined substantive rights. Justice Field suggested this interpretation in his dissenting opinion in *Slaughter-House*,⁴² and a number of distinguished scholars have shown that the Clause can reasonably be read as a guarantee of equality.⁴³ Not surprisingly, the *McDonald* respondents sought to

strange in light of the fact that the Court has interpreted § 1981 to apply to private discrimination. *See, e.g.,* Runyon v. McCrary, 470 U.S. 160 (1976).

⁴¹ *E.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done”).

⁴² 83 U.S. at 95-101.

⁴³ *E.g.,* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill*

enlist this interpretation in defense of their handgun bans.

Alito could simply have dismissed this argument on the same rationale that he used to dismiss the petitioner's interpretation of the Privileges or Immunities Clause. Both positions are inconsistent with well-settled precedent. Instead, Alito's opinion rejects the antidiscrimination argument as implausible on five other grounds, all of which are themselves implausible as a matter of original meaning.

First, he points out that this interpretation would mean either (1) that the Fourteenth Amendment permits the states to engage in non-discriminatory abridgements of various other rights in the Bill of Rights, or (2) that the Second Amendment should be singled out for anomalously unfavorable treatment. That is certainly a powerful argument in terms of fidelity to precedent, and quite consistent with the opinion's earlier insistence that the right to arms meets the *Duncan/Glucksberg* test for incorporation. But it is no refutation of the antidiscrimination interpretation of the original meaning of the Fourteenth Amendment.⁴⁴

of Rights?, 2 Stan. L. Rev. 5 (1949); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 20-51, 134-56 (1977) David P. Currie, *The Constitution in the Supreme Court: 1789-1888* 347-50 (1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). There are disagreements among these commentators about the exact scope and effect of the Privileges or Immunities Clause, and they do not all purport to reach firm conclusions.

⁴⁴ The Equal Protection Clause is obviously an antidiscrimination provision, and the Due Process Clause can also be understood in large part as a safeguard against certain kinds of discrimination, such as arbitrary actions by the executive and legislation that lacks the generality implied by the term "law." For a discussion of the difficulties entailed in the notion that the Due Process Clause was originally meant to effectuate incorporation, see the discussion of Stevens' opinion *infra*.

- Second, Alito points again to section 14 of the Freedmen’s Bureau Act, and concludes that “[i]t would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist.”⁴⁵ For the reasons set out above, this refutation of the respondents’ argument is based on the fallacious assumption that the constitutional right referred to in the statute must have been a *federal* constitutional right.
- Third, Alito notes that a mere rule of nondiscrimination would have been less effective in protecting freedmen during Reconstruction because it would have permitted Southern governments to disarm the general population, while allowing state militias and state peace officers to oppress black citizens. Leaving aside the fanciful supposition that Reconstruction-era Southern whites might have voted to surrender their own right to the private possession and use of guns, Congress enacted numerous statutes that sought to curtail the oppression of blacks by state governments. None of those statutes did everything that could possibly be done to accomplish that goal, and the truly implausible interpretation of the Fourteenth Amendment is that it invalidated *ex proprio vigore* any and all laws that might have left Reconstruction-era freedmen with less than perfect protection against white oppression.
- Fourth, Alito notes that laws forbidding racial discrimination in connection with bearing arms would not have prevented Southern governments from disarming white supporters of black rights. That is a good reason for suspecting that Congress should have gone beyond banning racial discrimination, but it does not show that Congress or

⁴⁵ 130 S. Ct. at 3043.

the Fourteenth Amendment did so.

Fifth, and this is the most shocking argument of them all, Alito points out that the 39th Congress balked at a proposal to disarm the white militiamen who were abusing and oppressing the newly freed slaves, deciding instead simply to disband the militias without disarming their members. This is a justly famous example of the understanding in Congress that the Second Amendment protects an individual right to keep and bear arms from infringement by the *federal* government. But it is utterly irrelevant to the issue Alito is addressing, which is whether the 39th Congress meant to impose the Second Amendment on the *states*.

Once again, Alito's effort to marshal originalist evidence to reinforce his *Duncan/Glucksberg* analysis falls woefully short, and even leads him to make untenable arguments. This is regrettable because the evidence supporting his substantive due process analysis is overwhelmingly powerful. The evidence had already been adequately presented in *Heller*, and adequately summarized earlier in Alito's *McDonald* opinion. He might have left it at that, but instead chose to gild the lily with fallacious arguments about the intent of the 39th Congress.⁴⁶

C. Activist Dicta

Alito's effort to introduce an element of originalism into his analysis will probably be of little interest except to a few academics. Far more important as a practical matter is his

⁴⁶ None of this is meant to imply that the Fourteenth Amendment in general, or the Privileges or Immunities Clause in particular, must be only an antidiscrimination provision. For a serious originalist argument in favor of Second Amendment incorporation, however, we will have turn to Justice Thomas' concurrence.

opinion's unrestrained deference to a series of dicta in the Court's *Heller* opinion:

We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” We repeat those assurances here.⁴⁷

This repetition of *Heller*'s “assurances” is unnecessary and irresponsible. These three dicta, which will probably be treated by most lower courts as though they are the law, were tossed off by the *Heller* Court without a basis in prior Supreme Court case law and without regard to the original meaning of the Second Amendment.⁴⁸ Their reappearance in Alito's *McDonald* opinion is the single largest obstacle to regarding that opinion as a sound model of judicial restraint.

Heller correctly characterized the right to keep and bear arms as one that pre-existed the Second Amendment. More dubiously, the Court suggested that the scope and nature of the right can be discovered through an historical inquiry. Although *Heller* did not purport to provide an “exhaustive historical analysis,”⁴⁹ the opinion pretty clearly implied that the three

⁴⁷ 130 S. Ct. at 3047 (citation omitted).

⁴⁸ The following discussion is drawn in part from Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1356-62 (2009).

⁴⁹ 128 S. Ct. at 2816.

limitations reaffirmed by Alito have a solid historical grounding. This tantalizing originalist garb resembles the emperor's new clothes in Hans Christian Andersen's story.

Consider the first dictum: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill”⁵⁰ This sounds intuitively obvious, at least at first. But how “longstanding” are these prohibitions? Scalia either did not know, or decided not to tell us. Apparently, however, the first general ban on the possession of firearms by felons was enacted in 1968.⁵¹ This was 177 years after the adoption of the Second Amendment, and less

⁵⁰ *Heller*, 128 S. Ct. at 2816-17. In a footnote to the sentence containing this dictum and the dicta about sensitive places and commercial sales discussed below, *Heller* says, “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 2817 n.26. The Court does not say how strong the presumption is, but the opinion later refers to these restrictions as “regulations of the right that we describe as permissible,” and calls them “the exceptions we have mentioned.” *Id.* at 2821. And, at the very end of the opinion, the Court flatly declares: “The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence], including some measures regulating handguns” *Id.* at 2822 (citing the page on which the Court had earlier endorsed the three Second Amendment exceptions). All of this suggests that the presumption is very strong indeed, if it can be overcome at all.

⁵¹ See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698-99 (2009). Even limited bans on the possession of concealable weapons by violent felons were apparently not adopted until well into the twentieth century. See *id.* at 707-08.

It might be possible to interpret the sentence from *Heller* quoted in the text to refer only to those felon-in-possession laws that are in fact “longstanding,” and perhaps a court determined to read the dictum narrowly might adopt such an interpretation. That is, however, a highly unnatural reading of the sentence, and such a court would still be left to wonder how long a particular felon-in-possession law has to have been in existence to be “longstanding.”

than a decade before the D.C. handgun ban was enacted.⁵²

Aside from the absence of historical support for the claim that such prohibitions are consistent with the preexisting right to arms, they are inconsistent with what *Heller* itself calls its “core,” namely self defense.⁵³ *Heller*’s dictum allows legislatures to leave American citizens defenseless in their own homes for the rest of their lives on the basis of nothing more than a nonviolent felony like tax evasion or insider trading. It would make more sense to say that the government may *silence* these felons for the rest of their lives — regulatory crimes, after all, usually involve an abuse of speech, such as making false statements or negotiating contracts that the government forbids. Such regulatory crimes have nothing at all to do with violence or the use of firearms.⁵⁴

Heller next endorses prohibitions on “the carrying of firearms in sensitive places such as schools and government buildings.”⁵⁵ Scalia provides no evidence that this limitation was part of the pre-existing right that he believes was codified in the Second Amendment in 1791. Nor does he explain what makes these particular places “sensitive,” or how courts are supposed to go about determining the scope of this newly announced exception to the right to arms.

Is a university campus more “sensitive” than a shopping

⁵² Alito actually broadens *Heller*’s dictum by omitting the qualifying term “longstanding.”

⁵³ *Heller*, 128 S. Ct. at 2818.

⁵⁴ This point is so completely obvious and so plainly significant that some lower courts may be unwilling to treat this dictum from *Heller* as though it is the law. *See, e.g.*, *United States v. Williams*, No. 09-3174 (7th Cir. August 5, 2010).

⁵⁵ *Heller*, 128 S. Ct. at 2816-17.

mall across the street? Is a government-owned cabin in a national forest more “sensitive” than a privately owned hotel on a public road? Did the whole city of New Orleans become a “sensitive” place after Hurricane Katrina, thus justifying the government in forcibly disarming law-abiding citizens whom the government was unable to protect from roving bands of criminals?⁵⁶

Maybe this dictum about sensitive places simply means that judges will decide whether the costs of allowing citizens to take their guns to certain places exceed the benefits. If so, it is not easy to see the difference between this approach and the Breyer cost/benefit analysis that Scalia ridicules with the following observation: “The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”⁵⁷

The *Heller* majority next endorses “laws imposing conditions and qualifications on the commercial sale of arms.”⁵⁸ Once again, Scalia presents no historical evidence about the nature or even existence of pre-1791 commercial regulations. Nor does he suggest any limit on the government’s power to impose “conditions and qualifications” on these commercial transactions. For all we are told here, Congress could place a prohibitively high

⁵⁶ See generally Stephen P. Halbrook, “Only Law Enforcement Will Be Allowed to Have Guns”: Hurricane Katrina and the New Orleans Firearm Confiscations, 18 Geo. Mason U. Civ. Rts. L.J. 339 (2008).

⁵⁷ *Heller*, 128 S. Ct. at 2821. There is one difference between Scalia’s approach and Breyer’s: Breyer goes to the trouble of actually conducting an analysis.

⁵⁸ *Heller*, 128 S. Ct. at 2817.

tax on the sale of firearms, or create burdensome regulatory obstacles that would make it impractical for a commercial market to exist. If the Court means that it would approve only reasonable conditions and qualifications, it failed to say so, and it suggested no criteria by which reasonable restrictions could be distinguished from unreasonable restrictions.

The Court introduces the three Second Amendment exceptions just discussed with the unimpeachable observation that the right protected by the Second Amendment is not unlimited, and with the historical claim that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”⁵⁹ This appears to be an endorsement of yet another exception to the constitutional right (though it is not one that Alito’s *McDonald* opinion expressly reaffirms).

Scalia provides no evidence of any such prohibitions prior to 1791, and the nineteenth-century cases do not provide direct evidence of the scope of the pre-existing right. Nor does Scalia explain why or to what extent judicial decisions under state analogues of the Second Amendment would be relevant to the original meaning of the Second Amendment. Nor does he provide arguments to support his apparent assumption that the state cases he alludes to were correctly decided.

Perhaps the “exhaustive historical analysis” alluded to by Justice Scalia will someday provide good answers to some of these questions.⁶⁰ Alito’s opinion in *McDonald*, however, simply reaffirms the dicta without any analysis at all. What’s more, the early leading cases, as well as the two state cases Scalia cites,

⁵⁹ *Id.* at 2816 (citations omitted).

⁶⁰ *Id.*

affirmatively *undermine* Scalia’s claim.⁶¹

In some American jurisdictions today, openly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against “terrifying the good people of the land” by going about with dangerous and unusual weapons.⁶² If courts were to conclude that open carry violates this common law prohibition (and thus is not within the pre-existing right protected by the Second Amendment), after *Heller* has effectively decreed that bans on concealed carry are *per se* valid, the constitutional right to bear arms would effectively cease to exist.

We do not yet know how the courts will rule on laws that forbid both open and concealed carry of firearms. Nor do we know what the term “sensitive places” will turn out to mean, or what kinds of commercial regulations will be upheld. A myriad of other future regulations will also be tested in the courts, including new regulations aimed at frustrating the exercise even of the narrow right to keep a handgun in the home for self defense.⁶³ What we do know is that *Heller* and *McDonald* noisily provided “assurances” about the legality of a broad range of limits on the right to arms, without performing a genuinely legal analysis of the legal issues.⁶⁴

⁶¹ For a detailed analysis of this issue, see Lund, *Originalist Jurisprudence*, *supra* note 48, at 1359-62.

⁶² William Blackstone, 4 *Commentaries* *148.

⁶³ Litigation has already been filed in response to regulations adopted by Chicago and the District of Columbia in response to *McDonald and Heller*.

⁶⁴ *Heller* also articulated a “common use” test under which many weapons will be treated as *per se* outside the scope of the Second Amendment. This test was presented as one with a basis both in originalism and in Supreme Court precedent. Both claims are false. See Lund, *Originalist Jurisprudence*, *supra* note 48, at 1362-67; Nelson Lund, *Heller and Second Amendment Precedent*, 13 *Lewis & Clark L. Rev.* 335 (2009).

This, too, is a kind of judicial restraint. It might be called the restraint of the political operator.⁶⁵ It is no secret that gun control has been a very contentious political issue for many decades now, with emotions running high on both sides of the policy debate. *Heller* and *McDonald* gave victories to one side of that debate. What could be more politic than to reassure those on the other side that they too can expect some victories, and perhaps even hope that the right to keep a handgun in the home will turn out to be the *only* right that is protected? Whatever may be the merit of this kind of politically soothing commentary, it contradicts what is perhaps the Supreme Court's most frequently articulated principle of judicial restraint, namely that constitutional questions should not be decided except when actually presented in a case.⁶⁶

III. Restrained Originalism: Justice Thomas' Concurrence

The Thomas concurrence offers a sharp contrast with Alito's plurality opinion, and it will no doubt strike many observers as an outburst of judicial activism. Thomas dismisses a gigantic body of substantive due process case law, which he calls a "legal fiction" that does not even have a guiding principle to distinguish between rights it protects and those that it does not protect.⁶⁷ He then undertakes his own extended inquiry into the

⁶⁵ In some cases, statements that are technically dicta might be justified by the Court's obligation to provide clear guidance to the inferior courts. *Heller*'s dicta, however, are unexplained and in some cases make the Court's opinion internally inconsistent. These dicta raise many more questions than they answer.

⁶⁶ Among countless examples, see *Boumediene v. Bush*, 128 S. Ct. 2229, 2281-82 (2008) (Roberts, C.J., dissenting, joined by Scalia, Thomas, and Alito, J.J.) ("Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. This is a fundamental rule of judicial restraint.") (citations and internal quotation marks omitted).

⁶⁷ 130 S. Ct. at 3062.

original meaning of the Privileges or Immunities Clause, concluding that the evidence “overwhelmingly demonstrates that the privileges and immunities of [United States] citizens included individual rights enumerated in the Constitution, including the right to keep and bear arms.”⁶⁸

Much of the evidence that Thomas presents also supports the plurality’s conclusion that the right to arms meets the *Duncan/Glucksberg* test of “fundamental” rights, and he joins the part of Alito’s opinion that summarizes that evidence.⁶⁹ Thomas, however, goes into much more detail about the legislative history of the Fourteenth Amendment. The reason for this more extended historical exegesis is that his inquiry is focused on determining what ordinary citizens at the time of ratification (not just the members of the 39th Congress) would have understood the Privileges or Immunities Clause to mean.⁷⁰ *Heller* had purported to engage in the same kind of inquiry with respect to the Second Amendment itself, but that was a case in which there were virtually no relevant precedents.⁷¹ Public meaning originalism is a perfectly respectable interpretive approach in cases of first impression like *Heller*,⁷² but it is also one that the Supreme Court

⁶⁸ *Id.* at 3068.

⁶⁹ That part of Alito’s opinion includes the discussions of the Freedmen’s Bureau Act and the Civil Rights Act of 1866 criticized *supra*.

⁷⁰ 130 S. Ct. at 3072.

⁷¹ Thomas quotes *Heller*’s remark that constitutional provisions “are written to be understood by the voters.” 130 U.S. at 3025 (quoting *Heller*, 128 S. Ct. at 2783). The quotation is accurate. Whether *Heller* was a successful exercise in public meaning originalism is a separate matter. See Lund, *Originalist Jurisprudence*, *supra* note 48.

⁷² The *Heller* dissenters agreed that the case should be decided on the basis of the “the text of the Amendment [and] the arguments advanced by its

has repeatedly rejected in its selective incorporation decisions.⁷³

Thomas candidly acknowledges that the record of the congressional debates is “less than crystal clear.”⁷⁴ Several Members made statements consistent with the view that the Privileges or Immunities Clause is an antidiscrimination provision that was meant to operate by analogy with the similarly worded Privileges and Immunities Clause of Article IV. For that reason, Thomas attributes special significance to evidence that the most widely publicized statements by congressional proponents of the Fourteenth Amendment “point unambiguously” to the conclusion that the Privileges or Immunities Clause substantively enforces at least the fundamental rights enumerated in the Constitution, including the right protected by the Second Amendment.

Some of the historical evidence about the publicity given to these statements has only recently become widely known. It may be too soon to say whether dispassionate students of the entire historical record will necessarily agree with Thomas’ conclusions.⁷⁵ On its face and taken as a whole, however, his very

proponents.” 128 S. Ct. at 2822 (Stevens, J., dissenting).

⁷³ Indeed, one might say that the Court has *always* rejected this approach in its incorporation cases, at least implicitly. But it has also rejected the approach more openly, most notably in its refusal to consider the historical argument presented in Justice Black’s dissent in *Adamson v. California*, 332 U.S. 46 (1947).

⁷⁴ 130 S. Ct. at 3075.

⁷⁵ Anyone who assumes that Thomas’ evidence about the original public meaning of the Privileges or Immunities Clause clearly confirms the incorporation thesis should take a careful look at Philip Hamburger, *Privileges or Immunities*, 105 *Northwestern U.L. Rev.* (forthcoming) (providing detailed evidence that the Clause was an attempt to resolve a longstanding national dispute about the rights of free blacks under the Privileges and Immunities Clause of Article IV), draft posted at

detailed exposition is at least plausible, and none of the other opinions in *McDonald* makes the slightest effort to refute his findings.

That said, there are some obvious weak links even on the face of Thomas' analysis. For example:

- Like the plurality, Thomas seeks to enlist the Freedmen's Bureau and Civil Rights Acts of 1866 in support of Second Amendment incorporation. This is a mistake, for the reasons set out above.
- Some of the quotations that Thomas uses in support of the incorporation thesis are equally compatible with the nondiscrimination thesis.

For example, he offers the following quotation from the Senate Report of the Joint Committee on Reconstruction: "[A]dequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic."⁷⁶ This does not imply that the law must "determine" these rights by making them substantively uniform throughout the nation.

Thomas quotes one participant in a floor debate in Congress a few years after the Fourteenth Amendment was adopted, who said that the country "gave the most grand of all these rights, privileges, and immunities [listed in the Bill of Rights], by one single amendment to the

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557870.

⁷⁶ 130 S. Ct. at 3071 (quoting Senate Report of the Joint Committee on Reconstruction).

Constitution, to four millions of American citizens' who formerly were slaves."⁷⁷ Since virtually all the rights listed in the Bill of Rights were already protected by state law throughout the nation, this specific reference to the freedmen is more compatible with the nondiscrimination interpretation of the Privileges or Immunities Clause than with the incorporation thesis (especially when one takes account of the imprecision typical of political speeches).

Similarly, another participant in the same debate said that the Bill of Rights "and some provisions of the Constitution of like import embrace the 'privileges and immunities' of citizenship as set forth in article 4, section 2 of the Constitution *and in the fourteenth amendment.*"⁷⁸ The speaker's pairing of Article IV's Privileges and Immunities Clause with the Fourteenth Amendment points more strongly toward the antidiscrimination thesis than toward the incorporation thesis.

Thomas notes that the Civil Rights Act of 1871 "prohibits state officials from depriving citizens of 'any rights, privileges, or immunities *secured by the Constitution.*'"⁷⁹ This statutory provision is not inconsistent with the proposition that the Privileges or Immunities Clause simply secures the right to equal treatment, by analogy with Article IV's requirement that the "[C]itizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States."

⁷⁷ *Id.* at 3075 (quoting from 1871 floor debate in the House of Representatives).

⁷⁸ *Id.* at 3076 (emphasis added by Thomas).

⁷⁹ *Id.* (quoting the statute) (emphasis added by Thomas).

- Thomas notes that President Johnson and several Southern governors proposed to replace section 1 of the proposed Fourteenth Amendment with a version more closely modeled on the Privileges and Immunities Clause of Article IV.⁸⁰ This could mean that they believed that the text actually adopted prohibited more than discrimination, but it could also mean that they simply regarded that language as too easily subject to misinterpretation.
- Thomas points out that many people believed that section 1 of the Fourteenth Amendment was superfluous because the Thirteenth Amendment and/or the Civil Rights Act of 1866 had already accomplished its goal. That fact affirmatively supports the nondiscrimination interpretation of section 1, and undermines the incorporation thesis.

Perhaps the Fourteenth Amendment's vague language and variegated legislative history will never yield up a fully satisfying or conclusive answer to the question of its original meaning. Even so, as a foundation for incorporation, Thomas' position is manifestly far superior to the unexplained (and apparently unexplainable) notion that the Court's selective incorporation doctrine can be derived from the original meaning of the Due Process Clause. But that leaves open the question whether Thomas' foray into originalism, even assuming that it is the best reading of text and history, should be characterized as judicial activism.

Thomas himself anticipates this question, and answers it by presenting a model of judicial restraint that is quite different from the model implicitly relied on in Alito's plurality opinion.

⁸⁰ *Id.* at 3078.

Stare decisis, as Thomas rightly points out, has never been considered an “inexorable command.”⁸¹ The Court frequently finds that it should overrule or disregard a prior decision or line of decisions. The Court’s most recent effort to articulate a coherent explanation of its approach to *stare decisis* came in a list of factors set out in the *Casey* abortion opinion,⁸² but Thomas only quotes a dictum from Chief Justice Rehnquist’s partial *dissent* in that case.⁸³ Nor does Thomas does try to justify his approach in *McDonald* under the *Casey* factors. This is no accident. None of those factors would justify overruling the large and well-settled body of selective incorporation precedent.

- That body of case law has certainly not “come to be seen so clearly as error that its enforcement [is] for that very reason doomed.”⁸⁴
- Nor have these precedents “proven to be intolerable simply in defying practical workability.”⁸⁵
- The rules adopted in these cases are at least arguably “subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add

⁸¹ *Id.* at 3063 (quoting *Lawrence v. Texas*).

⁸² *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). Whether the Court successfully articulated a coherent doctrine is open to serious question. See Michael S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165 (2008).

⁸³ 130 S. Ct. at 3063.

⁸⁴ 505 U.S. at 854.

⁸⁵ *Id.* (citation omitted).

inequity to the cost of repudiation.”⁸⁶

- Nor have “related principles of law [] so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”⁸⁷
- Finally, it is not the case that “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”⁸⁸

Rather than follow the *Casey* scheme, Thomas repairs to a much older understanding of judicial restraint. Perhaps the deepest enduring feature of our common law tradition is that every court is obliged to apply the law correctly *to the particular case it is deciding*. That one simple rule — reflected in our practice of identifying decisions by the names of the parties to the case — is related to many oft-repeated principles associated with the ideal of judicial restraint. These include the case or controversy requirement of Article III and the related proscription against advisory opinions, as well as the distinction between binding holdings and obiter dicta. And that rule is an important part of what allowed Alexander Hamilton to assure our young nation that the judiciary would necessarily be “the least dangerous to the political rights of the Constitution.”⁸⁹ Whatever the accuracy of that prediction, it rested on an ancient and vital understanding of the common law,⁹⁰ one that modern courts have seldom dared to

⁸⁶ *Id.* (citation omitted).

⁸⁷ *Id.* at 855 (citation omitted).

⁸⁸ *Id.* (citation omitted).

⁸⁹ *The Federalist No. 78*.

⁹⁰ For a detailed study of the roots of judicial review in the common law, see Philip Hamburger, *Law and Judicial Duty* (2008), briefly reviewed in Nelson

openly repudiate.

Of course, the venerable obligation of courts to decide every case correctly according to the law does not provide any information about what law applies in any particular case. More specifically, it does not tell courts what they should do in case of a conflict between the correct interpretation of a written law and the interpretation adopted in that court's precedents.⁹¹ Thomas agrees with the plurality that a large volume of precedents rest on the substantive due process framework, and that *stare decisis* is important to the stability of our legal system.⁹² In his view, however, the crucial fact is that there are *no* substantive due process precedents applicable to the specific Second Amendment incorporation question presented by the *McDonald* case itself. For that reason, Thomas maintains that this large body of precedent is no obstacle to resolving *this* case on other grounds, at least so long as the result is the same as it would be under substantive due process. Doing so would create no direct conflict with any substantive due process precedents, all of which would remain untouched.⁹³

Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 Const. Comment. 169 (2009).

⁹¹ For historical evidence that Article III implies that courts owe prior judicial decisions some measure of deference (though perhaps not nearly so much as they customarily receive today), see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Northwestern U. L. Rev. 803 (2009); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001).

⁹² 130 S. Ct. at 3062.

⁹³ As far as I know, this approach to Second Amendment incorporation was first suggested in Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N. Mex. L. Rev. 195, 260 (2009). Klukowski filed a brief in the *McDonald* case making the same point. Brief for American Civil Rights Union et al. as Amici Curiae, at 34-35.

On this point, Thomas is indubitably correct. He also recognizes, of course, that taking his approach in this case could raise questions in future cases that would not be raised under the plurality's approach.⁹⁴ His straightforward response — which offers a striking contrast with the plurality's legally gratuitous reaffirmation of *Heller*'s legally gratuitous dicta — is a refusal to consider hypothetical cases that are not before the Court. This is the essence of the model of judicial restraint adopted by Thomas in his concurrence.

So much for substantive due process. With respect to the Privileges or Immunities Clause, Thomas does have some difficult precedents to deal with. At oral argument in *McDonald*, the first comment came from the Chief Justice, who said that petitioners' "argument is contrary to the Slaughter-House Cases, which have been the law for 140 years. It might be simpler, but it's a big — it's a heavy burden for you to carry to suggest that we ought to overrule that decision." Scalia soon followed up by mocking the lawyer for pressing an argument that is "the darling of the professoriate, for sure" when the lawyer should have been content to argue substantive due process, "[w]hich, as much as I think it's wrong, I have — even I have acquiesced in it."⁹⁵

⁹⁴ Perhaps the most obvious question is what gun rights non-citizens would have. Whereas the Due Process Clause protects all "persons," the text of the Privileges or Immunities restricts its coverage to "citizens." See 130 S. Ct. at 3083 n.19. Cf. Klukowski, *supra* note 93 at 236-39; Brief for American Civil Rights Union, *supra* note 93, at 32-34.

⁹⁵ Scalia was certainly right to suggest that petitioners' effort to persuade the Court to overrule *Slaughter-House* was a quixotic undertaking. Ridiculing the lawyer for making an original-meaning argument that was far from frivolous, however, was not a display of anything that could be called judicial restraint. Especially coming from a Justice who has spent much of his career promoting the very interpretative approach on which the lawyer was relying. Apparently, the mere fact that "even I have acquiesced in" a doctrine that "I think [is] wrong" should be good enough for everyone else.

Like the petitioners' lawyer and nearly all academic commentators, Thomas indicates that he is unpersuaded by the *Slaughter-House* majority opinion. Consistent with his model of judicial restraint, however, he notes that the opinion can be read to leave unresolved the question whether the Privileges or Immunities Clause incorporates the individual rights enumerated in the Bill of Rights.⁹⁶ Accordingly, he declines to consider whether that Clause protects any unenumerated rights and he declines to consider whether the judgment in *Slaughter-House* was correct.⁹⁷

Thomas nonetheless firmly rejects the central analytic point in the *Slaughter-House* opinion, namely that the rights of federal citizenship and of state citizenship are mutually exclusive categories. This point led the Court to rule, in *United States v. Cruikshank*,⁹⁸ that the right to keep and bear arms is not protected

Thomas, who rarely speaks at oral argument, has offered the following comment about the behavior of some of his colleagues: "So why do you beat up on people [i.e. advocates at oral argument] if you already know [what you think the answer is]? I don't know, because I don't beat up on 'em. I refuse to participate. I don't like it, so I don't do it." Quoted from Associated Press story on <http://justicethomas.blogspot.com/>, Oct. 23, 2009.

⁹⁶ Arguments supporting this conclusion have been set out in Earl M. Maltz, *The Concept of Incorporation*, 33 U. Rich. L. Rev. 525, 525-31 (1999); Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L.J. 643, 658-87 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 739 (1984); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J. 1051, 1063-66 (2000); Klukowski, *supra* note 93.

⁹⁷ 130 S. Ct. at 3085-86.

⁹⁸ 92 U.S. 542 (1876). The holding was reaffirmed in *Presser v. Illinois*, 116 U.

by the Privileges or Immunities Clause because it is a right of state citizenship that pre-existed the federal Constitution. Notwithstanding this square holding, Thomas concludes that *Cruikshank*'s interpretation of the Constitution is so inconsistent with the plain evidence of the original meaning of the Privileges or Immunities Clause that the case is not entitled to any respect as precedent.⁹⁹

This willingness to assign a higher authority to the Constitution than to *Cruikshank* points to the fundamental difference between Thomas' approach and that of the plurality. His claim that he is indeed respecting "the importance of *stare decisis* to the stability of our Nation's legal system,"¹⁰⁰ rests partly on his certainty that *Cruikshank* misinterpreted the Constitution (a proposition that no other Justice attempted to refute).¹⁰¹ But it is also supported by his refusal to opine on any issues other than the one before the Court in *McDonald* itself.

Thomas is well aware that his approach to this case, had the Court adopted it, could have significant effects in future cases. He says, for example, that "this case presents an opportunity to

S. 252 (1886), and *Miller v. Texas*, 153 U. S. 535 (1894).

⁹⁹ 130 S. Ct. at 3086. Thomas also adds some confirmatory illustrations of the ways in which *Cruikshank*'s holding served to undermine the central goal of the 39th Congress, namely to protect freedmen and their descendants from white oppression.

¹⁰⁰ *Id.* at 3062. Thomas devotes an entire section of his opinion to the issue of *stare decisis*, giving it far more serious attention than Alito gives to the issue of the Constitution's original meaning.

¹⁰¹ In *Adamson v. California*, 332 U.S. 46, 51-53 (1947), the Court similarly refused even to address Justice Black's elaborate historical argument in favor of incorporation through the Privileges or Immunities Clause. For that Court, as for this one, a citation to *Slaughter-House* and its progeny was sufficient.

reexamine, *and begin the process of restoring*, the meaning of the Fourteenth Amendment agreed upon by those who ratified it.”¹⁰² It is not hard to imagine that this process might eventually lead the Court to incorporate some provisions of the Bill of Rights that have so far been treated as insufficiently “fundamental.”¹⁰³ And it is easy to imagine that some decisions recognizing unenumerated rights might one day be overruled.¹⁰⁴

But this is just speculation. In this case, which is the only case on which Thomas would have the Court rule, his understanding of the Privileges or Immunities Clause leads to exactly the same result as the plurality’s substantive due process analysis. We do not know how Thomas would rule in a case where those approaches would lead to different results. Suppose, for example, that Thomas’ inquiry into the original meaning of the Privileges or Immunities Clause had led him to conclude that *Slaughter-House* and *Cruikshank* were correctly decided. Would he then have thought that the Court should refuse to apply the *Duncan/Glucksberg* test, and rule in favor of Chicago? We don’t know. Nor do we know how he would rule in a right to arms case involving a non-citizen, or how he would rule in an incorporation case involving the Third Amendment or the Excessive Fines

¹⁰² 130 S. Ct. at 3063 (emphasis added).

¹⁰³ Even Alito seems to suggest that these precedents may be vulnerable. *See id.* at 3035 n.13 (plurality opinion) (“Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement long predate the era of selective incorporation.”).

¹⁰⁴ *See, e.g., id.* at 3062 (Thomas, J. concurring in part and concurring in the judgment) (noting that *Roe v. Wade* and *Lawrence v. Texas* (as well as *Lochner*) protected unenumerated rights “without seriously arguing that the [Due Process] Clause was originally understood to protect such rights”); *id.* at 3084 n.20 (noting that the Establishment Clause “does not purport to protect individual rights”) (citation omitted).

Clause of the Eighth Amendment.¹⁰⁵ Nor, given the emphasis he places on the word “process” in the Due Process Clause, is it clear what his position would be on the incorporation of various procedural protections in the Bill of Rights through that Clause.¹⁰⁶

Thomas’ approach in *McDonald* can be described as restrained originalism. Inherent in our legal system is an enduring tension between the written Constitution’s claim to be the “supreme Law of the Land” and Article III’s grant of “the judicial Power of the United States” to the federal courts. The original meaning of Article III entailed an understanding of judicial power that included a deep common law tradition of *stare decisis* that is in sharp tension with the proposition that precedents must always be ignored when they conflict with the authoritative text of the Constitution.¹⁰⁷ The model of judicial restraint adopted in Thomas’ *McDonald* opinion resolves the tension in this case by respecting another element of the tradition on which Article III rests: the practice of deciding one case at a time and avoiding decisions in hypothetical disputes.

That model is not the kind of grand theory so beloved by

¹⁰⁵ Some years ago, Thomas joined a dissenting opinion that appeared to assume that the Excessive Fines Clause applies to the states. *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 803 (1994) (Scalia, J., dissenting). If that dissent made that assumption, Thomas would presumably not consider himself bound by it in a case actually presenting the issue of Excessive Fines Clause incorporation.

¹⁰⁶ 130 U.S. at 3062 (“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 3061 (referring to the “procedural protections listed in the first eight Amendments”).

¹⁰⁷ That tradition, of course, never made an absolute rule of *stare decisis*, and neither has the Court.

academics, and it will not point out a clear path in every case where the Court finds a conflict between the Constitution's original meaning and its own prior decisions. But it has the great merit of avoiding the plurality opinion's amalgam of perfectly respectable adherence to precedent with much more dubious intimations of originalism and politically convenient dicta.

IV. Judicial Restraint as Common Lawyering: Justice Stevens' Dissent

Thomas restrains his core commitment to originalism by recurring to the ancient common law principle that courts decide only the case before them. Stevens puts that restraining principle at the very center of his approach in *McDonald*, and proposes that the case be decided on the narrowest possible grounds.

As Stevens sees it, the only question presented in this case is whether the Fourteenth Amendment gives individuals the right to possess a *handgun* in the home for self protection. He emphasizes that the challenged law allowed residents to keep loaded rifles and shotguns in their homes for self defense, and concludes that the facial challenge in this case should fail.¹⁰⁸ He acknowledges that there is "real force" to the petitioners' claim, primarily because of the importance of their interest in defending "life, liberty, and property" and because of the special role that the home has been given in the Court's Fourteenth Amendment cases.¹⁰⁹ After a lengthy discussion of competing considerations,

¹⁰⁸ Unlike the other members of the Court, Stevens insists on the importance of the fact that only Chicago's law was actually at issue. In the courts below, the challenge to this law had been consolidated with another case that also challenged a somewhat more restrictive law in Oak Park, Illinois. The Court, however, had granted certiorari only in the Chicago case.

¹⁰⁹ 130 S. Ct. at 3104. He also suggests that an appropriately limited decision in petitioners' favor would also help to moderate the legal uncertainty created by *Heller*'s refusal to specify the contours of the newly recognized right to keep

Stevens finally concludes that even this limited recognition of the right to arms would be imprudent. Strikingly, however, he expressly leaves open the possibility that some as-applied challenges to the law might succeed, such as one brought by an elderly widow who lacks the physical strength to operate a rifle or shotgun and lives in a dangerous neighborhood.¹¹⁰

Taken as an exercise in common law adjudication on an issue of first impression, Stevens' detailed and carefully reasoned analysis is at least perfectly respectable. He acknowledges that this is a difficult case, canvasses competing arguments, and concludes that judicial restraint counsels against intruding on the police power of the states by imposing a single, nationwide rule that courts are ill-equipped to fashion.

As Stevens recognizes, however, this is not sufficient to justify his conclusion. The common law tradition also requires him to show that his approach is consistent with the Court's large mass of Fourteenth Amendment precedents, and here he walks on ground that is much more uncertain.

Stevens' quickly dismisses "Second Amendment incorporation" on the ground that *Cruikshank* had already rejected it. He then argues that the right to a handgun in the home must derive, if at all, from the Fourteenth Amendment's Due Process Clause "standing on its own bottom."¹¹¹ Notably, this formulation is not drawn from an opinion of the Court.¹¹² Nonetheless, Stevens

and bear arms. *Id.* at 3105. This point is in some tension with Stevens' insistence that he would decide only the narrow question presented in the case.

¹¹⁰ *Id.* at 3107.

¹¹¹ *Id.* at 3103.

¹¹² *See id.* at 3093 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 500 (Harlan, J. concurring in the judgment)).

argues at some length that Alito’s invocation of the *Duncan/Glucksberg* test mischaracterizes the Court’s substantive due process case law. Rather, he argues, the underlying test that dominates those cases is whether “the allegedly unlawful practice violates values ‘implicit in the concept of ordered liberty.’”¹¹³

In light of the shifting nature of the Court’s approach to substantive due process over the last century, which Alito chronicles, it would be hard to say that Stevens’ contention is indefensible. Indeed, if there were one single formulation that explained every decision, it would almost have to be something as vague and devoid of guidance as the one that Stevens chooses. As a response to Alito’s position, however, his argument has some obvious problems.

First, the language he quotes is from a case that was later overruled;¹¹⁴ if both cases were applying the same test, it can hardly be much of a test. Second, an important element of Stevens’ argument — that some protections enumerated in the Bill of Rights apply in a narrower or less protective form when applied to the states under due process — relies principally on *dissenting* opinions by the second Justice Harlan.¹¹⁵ Third, Stevens’ accurate statement that *Glucksberg* is inconsistent with the Court’s

¹¹³ *Id.* at 3096 (quoting *Palko v. Connecticut*, 302 U. S. 319, 325 (1937)). *Palko* actually referred to “immunities” (not “values”) that are implicit in the concept of ordered liberty.

¹¹⁴ *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) (overruling *Palko*).

¹¹⁵ The only actual precedent of the Court on which Stevens can rely involves the Sixth Amendment right to a unanimous jury verdict, which has been applied to the federal government but not to the states. As the plurality opinion points out, that conclusion became a holding despite the fact that eight Justices agreed that the Sixth Amendment applies identically to both the federal and state governments. *See* 130 S. Ct. at 3035 n.14.

subsequent decision in *Lawrence v. Texas* loses a lot of its force in this context when one considers that *Lawrence* did not even mention *Glucksberg*. Doesn't Stevens' understanding of the substantive due process case law turn almost every case into a case of first impression, to be decided under a legal test that can produce any result that a majority of the Court thinks is good for the nation?

Stevens denies this, insisting instead that the law provides adequate guideposts, which allow conscientious judges to avoid the temptation to engage in free-wheeling policy analysis. One may doubt that this is so, but one might also wonder how much better the *Duncan/Glucksberg* test is.¹¹⁶ At least in this case, moreover, Stevens' approach exhibits more deference to democratically elected legislatures than Alito's approach, and can be said in that respect to show greater judicial restraint.

This last point, however, is significant only if Stevens can show that such deference is consistent with the Constitution. Even granting that Article III contemplates a role for *stare decisis* in constitutional adjudication, Article VI unambiguously makes the Constitution itself the supreme law of the land and nowhere suggests that judicial opinions have a higher status (or any status

¹¹⁶ In *McDonald*, Scalia's concurring opinion offers a characteristically caustic rebuttal of Stevens' position, arguing that the *Glucksberg* "history and tradition" test constrains judicial discretion far more than Stevens' interpretation of *Palko*'s reference to "values 'implicit in the concept of ordered liberty.'" Stevens responds by arguing at some length that the two tests are equally malleable, and that his own approach has the virtue of transparency.

It seems undeniable that either approach permits what both Justices agree is forbidden, namely the imposition of judges' personal notions of sound policy in the guise of the law. I am inclined to think that the *Glucksberg* approach would be considerably more constraining, at least as used in *Glucksberg* itself, if the Court were to become committed to it. But *Lawrence* suggests that this is likely to remain an untested hypothesis.

as law at all).¹¹⁷ Stevens does not claim that the decision in this case was determined by the Court's precedents,¹¹⁸ and he recognizes that he has an obligation to defend his conclusions with an argument about the meaning of the Constitution itself.

His argument has two main elements. First, he maintains that Thomas' interpretation of the Privileges or Immunities Clause is not clearly correct as a matter of original meaning, and is therefore not an adequate basis on which to overrule *Cruikshank*. On this point, it seems to me, reasonable minds might differ, and Stevens is not clearly wrong. But Stevens agrees that the Due Process Clause does protect a large number of substantive rights, and his second (and crucial) argument is that the decisions recognizing this protection are justified by the *original meaning* of that Clause. Consistent with his claim that the relevant legislative history of the Fourteenth Amendment is hopelessly indeterminate, Stevens rests his argument on the text of the Constitution.

The text of the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Stevens reads this to mean that courts are obliged by the text to give substantive content to the word "liberty" by protecting those rights that are implicit in this term.

Whatever the word "liberty" may mean, however, the text expressly *permits* the states to deprive people of liberty so long as they are given "due process of law." Stevens, however, contends

¹¹⁷ For a detailed elaboration of this point, see John Harrison, *Judicial Finality and the Constitutional Text*, 23 Const. Comm. 33 (2006).

¹¹⁸ See, e.g., 130 S. Ct. at 3107 ("While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago.").

that the text forbids the states to deprive people of some kinds of liberty *even when due process of law has been given*. This conclusion is demanded, according to Stevens,

lest superficially fair procedures be permitted to “destroy the enjoyment” of life, liberty, and property, *Poe v. Ullman*, 367 U. S. 497, 541 (1961) (Harlan, J., dissenting), and the Clause’s prepositional modifier be permitted to swallow its primary command. Procedural guarantees are hollow unless linked to substantive interests; and no amount of process can legitimize some deprivations.¹¹⁹

Pause for a moment over this remarkable claim. For fear that due process of law would not do enough to protect liberty, Stevens effectively deletes that part of the Clause from the Constitution, at least for cases in which he thinks due process is not a sufficient constraint on the government.

Alternatively, Stevens contends that “the historical evidence *suggests* that . . . the phrase ‘due process of law’ had acquired substantive content as a term of art within the legal community.”¹²⁰ In support of this suggestion, he cites snippets from four academic commentators.¹²¹ The evidence provided by

¹¹⁹ *Id.* at 3090.

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.* at 3090 n.5 (citing and quoting James W. Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *Const. Commentary* 315, 326–327 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 *Emory L. J.* 585, 594 (2009); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 *Am. J. Legal Hist.* 305, 317–318 (1988); Lawrence H. Tribe, *Taking Text and*

these commentators does not even begin to establish that “due process of law” was generally understood as an invitation for judges to figure out which rights are implicit in the term “liberty.”

- No doubt some judges had invoked due process as an unexplained all-purpose catchphrase to condemn legislation that they considered unjust, as Chief Justice Taney did in *Dred Scott*.¹²² The pointed rebuke in Justice Curtis’ dissent should be enough to establish that the phrase had not become a term of art meaning “unjust laws are unconstitutional.”¹²³
- It is also true that some state courts had plausibly interpreted “law of the land” and “due process of law”¹²⁴

Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1297, n. 247(1995)).

¹²² Taney’s entire analysis is contained in the following expostulation:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

60 U.S. at 450.

¹²³ *Id.* at 624-26 (Curtis, J., dissenting). Responding to a claim that the federal government violated the Fifth Amendment’s Due Process Clause when it changed the legal tender laws, the Court later said, “Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.” *Knox v. Lee*, 79 U.S. 457, 552 (1871).

¹²⁴ These were generally regarded as synonymous terms. Some constitutions use one phrase, and some the other.

clauses to require legislatures to act through statutes that were sufficiently general to be called laws (in contradistinction to decrees).¹²⁵ But that is completely irrelevant to Stevens' claim that the Constitution forbids laws that are insufficiently respectful of "liberty."

And it is true that some judges took these provisions to constitutionalize the settled principles of what one called "the ancient common law of the land."¹²⁶ But that is pretty much the opposite of Stevens' understanding of an evolving judicial search for "values implicit in the concept of ordered liberty."

One of the commentators on which Stevens purports to rely, Professor James Ely, concludes his survey by saying that antebellum courts "were *increasingly* seeing due process as a substantive protection for vested property rights and as a guarantee against class legislation."¹²⁷ Ely makes no claim that a consensus existed even as to these very limited points in what he calls "the evolving due process jurisprudence" of the time.¹²⁸ And Ely certainly does not even suggest that the phrase had become anything like a term of art.

¹²⁵ See generally John V. Orth, *Due Process of Law: A Brief History* (2003).

¹²⁶ The phrase is from Judge Waties' dissenting opinion in *Lindsay v. Commissioners*, 2 Bay (S.C. 1796) 38, 59, discussed in Ely, *supra* note 121, at 332-33.

¹²⁷ Ely, *supra* note 121, at 345 (emphasis added). Maltz and Gedicks make similarly limited claims, based largely on the same evidence deduced by Ely. Tribe's seemingly more expansive claim ("substantive requirements of rationality, non-oppressiveness, and evenhandedness") is supported only by citations to two cases. One of them does not support the general proposition and the other is Chief Justice Taney's notorious and unreasoned pronouncement in *Dred Scott*.

¹²⁸ Ely, *supra* note 121, at 343.

But let us assume that some such limited “substantive” restrictions on legislative discretion had frequently been inferred from the terms “law of the land” or “law.” Was such an interpretation of the term “due process of law” generally accepted in the 39th Congress (some of whose members were famously unfamiliar even with *Barron v. Baltimore*¹²⁹), let alone by the ratifiers of the Fourteenth Amendment?¹³⁰ Stevens cannot make any such claim.

In any event, Stevens is hardly in a position to rest his claim about the meaning of the Fourteenth Amendment on what he says the historical record only “suggests.” Not after dismissing as inconclusive the detailed historical evidence presented by Thomas about the original meaning of the Privileges or Immunities Clause.¹³¹ Accordingly, Stevens’ interpretation of the meaning of the text must actually rest on the proposition that the “prepositional modifier” in the Due Process Clause modifies nothing, and may as well not be in the text.

Consistent with this rewriting of the Constitution’s text, Stevens renames the Due Process Clause, which now becomes “the liberty clause.” He insists that the Constitution has imposed on the courts a duty to work out the meaning of the liberty protected by that clause through a process of common law adjudication. In his view, as we have seen, the result has been a search for “values implicit in the concept of ordered liberty,” or more specifically:

¹²⁹ See, e.g., 130 S. Ct. at 3073 (Thomas, J., concurring in part and concurring in the judgment).

¹³⁰ See, e.g., *id.* at 3078-80 (Thomas, J., concurring in part and concurring in the judgment).

¹³¹ 130 U.S. at 3088-89.

the ability independently to define one's identity, the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny, and the right to be respected as a human being. Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect — these are the central values we have found implicit in the concept of ordered liberty.¹³²

Whether or not this is an accurate summary of the relevant case law, it is hard to deny that the application of these “central values” to specific cases cannot be guided by anything that is actually in the Constitution. I do not understand Stevens to disagree.¹³³ Thus, with the Constitution rendered irrelevant, judicial restraint becomes indistinguishable from the proper conduct of pure common law adjudication. Because no legislature has the power to correct constitutional decisions that reflect a willful exercise of the judicial power, Stevens' version of judicial restraint presupposes that the discipline of common law reasoning is an adequate substitute for the written law.

¹³² *Id.* at 3101 (citations and internal quotation marks omitted).

¹³³ *See, e.g., id.* at 3101-02 (citations and internal quotation marks omitted):

[S]ensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion.

This sensitivity is an aspect of a deeper principle: the need to approach our work with humility and caution. Because the relevant constitutional language is so spacious, I have emphasized that the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

V. Presumptions of Judicial Inaction: Justice Breyer's Dissent

No other member of the Court joined the Stevens opinion. Writing for the other three dissenters, Breyer endorsed Stevens' general substantive due process analysis, but was unwilling to jettison the settled selective incorporation jurisprudence on which the plurality had relied.¹³⁴ In applying that body of case law, Breyer invokes two main principles of judicial restraint: a presumption against extending the reach of highly questionable precedents and a presumption against judicial abridgements of the police power of the states.

To justify reliance on the first presumption, Breyer renews and supplements the attack on *Heller* that had informed the dissenting opinions in that case. He focuses his critique (1) on the *Heller* majority's admission that the Second Amendment was adopted for the purpose of protecting the militia, and (2) on shortcomings that he sees in *Heller*'s historical claim that the Second Amendment codified a pre-existing private right to have arms for personal self defense. While only suggesting that *Heller* should be reconsidered, Breyer contends that where a decision rests entirely on historical foundations that are highly uncertain, its applicability should at least not be extended.¹³⁵

Turning to selective incorporation itself, Breyer asks whether "the right in question has remained fundamental over time."¹³⁶ Breyer is reluctant to rely heavily on history, where he

¹³⁴ *Id.* at 3120. Breyer mistakenly attributes this approach to "the Court," *id.*, overlooking the fact that Thomas rejected the applicability of that body of case law.

¹³⁵ *Id.* at 3122.

¹³⁶ *Id.* at 3123 (string cite omitted).

thinks it is often impossible to get useful or reliable answers. Instead, he lists several other factors:

[T]he 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). Is incorporation needed, for example, to further the Constitution's effort to ensure that the government treats each individual with equal respect? Will it help maintain the democratic form of government that the Constitution foresees? In a word, will incorporation prove consistent, or inconsistent, with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises?¹³⁷

It is a little difficult to see how this could provide more certainty or predictability than the historical inquiry pursued, in different ways, in the Alito and Thomas opinions. Breyer's is a "spirit of the Constitution" approach, untethered to the specific provisions of the document and easily capable of justifying virtually any result in virtually any case.

Consider just one example. Breyer belittles the importance of the views of the enacting generation because he thinks a right should not be incorporated unless it "has remained fundamental over time."¹³⁸ He then argues that there is no contemporary

¹³⁷ *Id.*

¹³⁸ *Id.*

consensus that the right to arms is fundamental, relying largely on his contention that “every state regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation.”¹³⁹

At the time they were incorporated, however, one could have said the same thing about many other rights that are now protected against state action. Speech, for example, has always been extensively regulated, and there have always been disagreements about how it should be regulated. Would anyone infer from those facts that there has never been a consensus that the right of free speech is fundamental? It simply does not follow that disagreements about the appropriate way to regulate a right imply disagreements about whether the right is fundamental.

As Alito points out, moreover, the Court *did* have evidence of a contemporary consensus on the question at issue in this case.¹⁴⁰ An *amicus* brief filed by 58 Senators and 251 Members of the House of Representatives, and another brief filed by 38 state governments, urged the Court to incorporate the Second Amendment right. Breyer responds that other *amici* took a different position. If such large supermajorities of the people’s elected representatives do not show the existence of a consensus, simply because other *amici* took an opposing position, consensus must mean “virtual unanimity.”

Notwithstanding the potpourri of factors that Breyer draws from his vision of the spirit of the Constitution, his driving principle in this case appears to be a conviction that incorporation of the Second Amendment right will require judges to engage in

¹³⁹ *Id.* at 3124.

¹⁴⁰ Alito, however, did not agree that incorporation doctrine contains a “popular consensus today” requirement.

essentially legislative activities. Just as he believes the *Heller* court was incompetent to resolve disputes among professional historians about the meaning of the Second Amendment, so incorporation of the right will “require finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make.”¹⁴¹

Breyer is certainly correct that adjudication of cases in this area will necessarily require courts to balance the government’s interest in public safety against the individual’s interest in self protection. And he acknowledges that a similar kind of balancing between public and private interests is required in the enforcement of other individual rights.¹⁴² *Heller*, and Alito’s plurality opinion in this case as well, had insisted that the challenge is no greater here than elsewhere, a claim that Breyer dismisses as “mere assertion.”¹⁴³ But Breyer’s dismissal also seems to be mere assertion, and it is hard to foresee a developed body of Second Amendment case law that will turn out to involve more difficult and fine-grained judgments than the existing jurisprudence of free speech, cruel and unusual punishment, or unreasonable searches and seizures.

Whatever the accuracy of Breyer’s predictions about the future, what is the source of his extremely strong presumption

¹⁴¹ 130 S. Ct. at 3126. This appears to be the unifying principle in the list of factors that Breyer thinks argue against incorporation: “the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation.” *Id.* at 3129.

¹⁴² *Id.* at 3126 (citing examples of cases arising under the First, Fourth, Fifth, and Eighth Amendments).

¹⁴³ *Id.* at 3127.

against recognizing this particular right? “[T]he important factors that favor incorporation in other instances — *e.g.*, the protection of broader constitutional objectives — are not present here.”¹⁴⁴ Implicit in this judgment is a view of “constitutional objectives” that essentially makes the Constitution itself irrelevant, at least to the extent that Breyer does not feel obliged to make reasoned arguments from the Constitution when deciding that some rights (whether enumerated in the text or not) deserve judicial protection while others do not.

Because he does not engage in the kind of detailed common law reasoning that we find in Stevens’ opinion, Breyer may be said to go even further in the direction that Stevens marked out. If Stevens exemplifies the restraint of a common law judge, Breyer’s restraint resembles that of an eighteenth century common law jury. Those juries, of course, delivered only judgments, not opinions. This form of restraint is not one that Breyer would impose on himself or the Court.

Conclusion

If all of these four opinions exemplify judicial restraint, then the term is every bit as meaningless as its opposite, judicial activism, is often said to be. In my view, the Stevens and Breyer versions depart from the proper judicial role because both of them effectively replace the rule of the Constitution with the rule of judges. The restraint displayed in their opinions is therefore not judicial restraint. I recognize, however, that those who prefer the rule of judges (or the rule of judges like Stevens and Breyer) are unlikely to be dissuaded from that view by anything I could say.

The dispute between Alito and Thomas appears to me far more interesting and difficult. Even acknowledging that any

¹⁴⁴ *Id.* at 3129.

interpretive method can be manipulated, and admitting that all judges will sometimes have difficulty in overcoming the human tendency to find the answer that appeals to their policy preferences, the Thomas and Alito approaches are at least more likely than the other two to approximate the rule of law.

As the discussion above may suggest, I find myself inclined toward Thomas' position, notwithstanding my doubts about the validity of the historical analysis on which his conclusions largely rest. Whether his answer is right or not, he asked the questions posed by this particular case and by the Constitution. A form of judicial restraint that refuses to subordinate those questions to other considerations may appear idiosyncratic in today's dominant legal culture. That does not make it wrong.