ESSAY

SUBSTANTIVE DUE PROCESS AFTER *MCDONALD V. CHICAGO*

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Few were terribly surprised when the Supreme Court announced at the end of June 2010 that the Fourteenth Amendment requires states and municipalities to respect the same individual right to keep and bear arms independent of militia service that the Court had enforced against the federal government two years before in *Heller v. District of Columbia*.[1] The case was nonetheless hotly anticipated, less out of uncertainty over whether one of the *Heller* majority might actually vote against incorporation, but for details of the decision's scope and rationale. Would the Court clarify its *Heller* disclaimer on the scope of constitutional gun rights?[2] Would the Court clarify the relationship between its treatment of liberties in the Bill of

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1 District of Columbia v. Heller, 128 S. Ct. 2783 (2008). On the lack of surprise, see John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2009*, 13 GREEN BAG 2d 31, 34 (2010) ("No one who isn't mystified by instant replay ('He dropped the ball *again!*') could look at the still-extant *Heller* majority and think the outcome here would be any different, and so it was widely expected the Court would hold the right incorporated.").

2 *See Heller*, 128 S. Ct. at 2816-17 ("[T]he 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. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or 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.") (footnote omitted) (citations omitted); *id.* at 2817 ("*Miller* said . . . that the sorts of weapons protected were those 'in common use at the time.' . . . [T]hat limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'") (citation omitted); *id.* at 2817 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").

Rights and those outside of it?[3] Would the Court (or any of its members) repudiate substantive due process incorporation in favor the Privileges or Immunities Clause by overruling the *Slaughterhouse Cases*?[4] Would the Court embrace some form of originalism, as it seemed to in *Heller*?[5] Would Justice Stevens's last day on the Court feature another constitutional-theory fight with Justice Scalia?[6]

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[3] *Compare* Duncan v. Louisiana, 391 U.S. 145 (1968) (standard for incorporation of the Bill of Rights), *with* Washington v. Glucksberg, 521 U.S. 702 (1997) (tradition-based standard for substantive due process outside the Bill of Rights), *and* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (perhaps a different standard for substantive due process outside the Bill of Rights). *See also* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2606 (2010) (plurality opinion of Scalia, J.) (repudiating substantive due process with respect to the same "sort of . . . government conduct" as a right in the Bill of Rights if the Bill of Rights claim itself fails, following cases beginning with Graham v. Connor) (quoting *Graham*, 490 U.S. 386, 395 (1989)).

[4] 83 U.S. (16 Wall.) 36 (1873). The petitioners included a Privileges or Immunities Clause issue in the Question Presented. *See* Petition for a Writ of Certiorari at i, McDonald v. Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 1640363 at *i ("Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses."). The Supreme Court did not rewrite it in granting certiorari. 130 S. Ct. 48 (2009).

[5] The *Heller* majority's analysis was thoroughly focused on what the text of the Second Amendment expressed in its original context, though the Court's only explicit theoretical statement was in distinguishing technical from common meanings:

> "[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." . . . Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Heller, 128 S. Ct. at 2788 (citations omitted). Of course, if meanings known to the *ordinary citizens in* the founding generation are interpretively dispositive, *a fortiori* meanings known *to the founding generation* are as well. The *Heller* dissenters were similarly focused on history, but took the Second Amendment's preambulatory militia purpose to restrict the keep-and-bear-arms provision. *See id*. at 2826 (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage . . . .").

[6] Such fights broke out twice in 2005 in the juvenile-execution and Ten-Commandments-posting cases. *See* Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting); *id*. at 587 (Stevens, J., concurring); McCreary County v. ACLU of Ky., 545 U.S. 844, 896 (2005) (Scalia, J., dissenting); Van Orden v. Perry, 545 U.S. 677, 731 (2005) (Stevens, J., dissenting). For a recapitulation suggesting that both sides share a common mistaken premise that constitutional outcomes can change only if constitutional meaning changes, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 555-58 (2006).

The *McDonald* Court split four-one-four on some issues, five-four on others. Justice Alito, joined in full by Chief Justice Roberts and Justices Scalia and Kennedy, and in part also by Justice Thomas, held that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment *in toto*. Justice Thomas reached the same result by the Privileges or Immunities Clause, joining the Court's recapitulation of its substantive due process and incorporation cases and explanation of why armed self-defense was rooted in the American tradition of civil liberty from Founding to Reconstruction, but not its *Slaughterhouse*-non-overruling portion or two dissent-rebutting sections rejecting the second Justice Harlan's approach to incorporation and relevance for either current consensus or crime-control-related interest balancing. There were two dissents, a solo one by Justice Stevens on his last day on the Court, the other by Justice Breyer joined by Justices Ginsburg and Sotomayor. Justice Stevens also received a special retirement gift: a concurrence from Justice Scalia replying to his dissent.

We can classify the issues addressed (or unaddressed) in *McDonald* into four levels:

• **Level One**: What fundamental rights are protected by the Fourteenth Amendment? Municipalities might want to impose many sorts of restrictions—types of guns, types of gun-owners, places of possession, and restrictions on commerce, for instance—and the constitutionality of these restrictions is important, independent of any larger theoretical concerns.[7]

• **Level Two**: How should interpreters answer Level-One questions? There are five chief possible bases for the fundamentality of a right:

(A) the federal Bill of Rights;[8]

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[7] See *supra* note 2 for language in *Heller* recognizing possible limits on constitutional gun rights in each of these areas.

[8] *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947) (refusing to incorporate against states the comment-on-refusal-to-testify portion of the Fifth Amendment self-incrimination doctrine); Duncan v. Louisiana, 391 U.S. 145 (1968) (incorporating the criminal jury trial right).

(B) the American tradition of civil liberty circa 1868;[9]
(C) the American tradition of civil liberty throughout its history;[10]
(D) the American tradition of civil liberty today;[11] and
(E) moral reality—*i.e.*, whether a right is a genuine natural right, or a right that genuinely promotes good consequences.[12]

• **Level Three**: How should interpreters select among Level-Two considerations? Interpreters have choices both between the Privileges or Immunities Clause and the Due Process Clause and among variants of originalism or common-law constitutionalism; the four main theoretical alternatives are the original textually-expressed meaning, original applications, original purposes, and the history of later interpretations. This produces a menu of eight chief considerations to assess in order to evaluate Level-Two methods:

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[9] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("I would, however, want further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution."); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 78 (1873) ("[S]uch a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.").

[10] *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823) (No. 3,230) ("[T]hose privileges and immunities . . . which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.").

[11] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("Our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause.") (citation omitted); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards"*, 57 UCLA L. REV. 365, 365 (2009) (noting the use of "explicitly majoritarian state nose-counting" in substantive due process, punitive-damages, incorporation, procedural-due-process, Equal Protection, First Amendment, Fourth Amendment, Sixth Amendment, and Eighth Amendment cases).

[12] *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)) (internal quotation marks omitted); Lochner v. New York, 198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

(A) the original textually-expressed meaning of the Due Process Clause;[13]
(B) the original applications of the Due Process Clause;[14]
(C) the original purpose of the Due Process Clause;[15]
(D) the history of subsequent interpretations of the Due Process Clause;[16]
(E) the original textually-expressed meaning of the Privileges or Immunities Clause;[17]

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[13] *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. (forthcoming 2010), *available at* http://ssrn.com/abstract= 1577342; Jason A. Crook, *Exposing the Contradiction: An Originalist's Approach to Understanding Why Substantive Due Process is a Constitutional Misinterpretation*, 10 NEV. L.J. 1 (2009).

[14] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) ("Mr. ROGERS. . . . I only wish to know what you mean by 'due process of law.' Mr. BINGHAM. I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions.").

[15] *See, e.g.*, Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting* Asahi *in the Wake of* Lopez *and* Morrison, 4 NEV. L.J. 141, 144 n.31 (2003) ("[T]he original purpose of the Due Process Clause . . . requir[es] only that states treat all citizens equally . . . .") (citing Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 808 (1981)); United States v. Cruikshank, 25 F. Cas. 707, 710 (D. La. 1874) (No. 14,897) ("[W]hen it is declared that no state shall deprive any person of life, liberty, or property without due process of law, this declaration is . . . a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state . . . .").

[16] *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 125 (1877) ("[D]own to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all."); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) ("The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.") (citing Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring), in turn restating Justice Bradley's views in Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 111-24 (1873) (Bradley, J., dissenting)); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) ("In [certain] situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.") (footnote omitted).

(F) the original applications of the Privileges or Immunities Clause;[18]
(G) the original purpose of the Privileges or Immunities Clause;[19] and
(H) the history of subsequent interpretations of the Privileges or Immunities Clause.[20]

• **Level Four**: How should interpreters select among Level-Three considerations? Here, we ask *why* one might adopt a particular interpretive theory. The main considerations are what interpretive theory would

(A) produce the best consequences;[21]

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[17] *See, e.g.*, Christopher R. Green, *The Original Sense of "Of" in the Privileges or Immunities Clause*, (Sept. 9, 2010), http://ssrn.com/abstract=1658010 [hereinafter, Green, *Of*]; Christopher R. Green, McDonald v. Chicago*, the Meaning-Application Distinction, and 'Of' in the Privileges or Immunities Clause*, 11 ENGAGE, no. 1, 26 (2010).

[18] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Jacob Howard introducing the Fourteenth Amendment to the Senate: "[H]ere is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . ."); CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (John Sherman defending an early draft of the Civil Rights Act of 1875 under the Privileges or Immunities Clause: "What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. The great fountain head, the great reservoir of the rights of an American citizen, is the common law . . . ."); 3 CONG. REC. 1,793 (1875) (George Boutwell defending the Civil Rights Act of 1875) ("[W]hat is the first privilege of citizens of the United States? That they are citizens of the State wherein they reside. And what is the chief right of the citizen of a State? That he is the equal before the law of every other citizen. By the fourteenth amendment the people of the United States, through their constituted authorities, have grasped the question of securing to citizens of the United States their rights as citizens of the several States; and the first right is the right of equality before the law.").

[19] *See, e.g.*, CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869) (Jacob Howard rebutting claim that the Privileges or Immunities Clause secured black voting) ("The immediate object of this was to prohibit for the future all hostile legislation on the part of the recently rebel States in reference to the colored citizens of the United States who had become emancipated, and who finally were declared to be citizens by the civil rights bill passed by Congress."); CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) ("The first section embodies the principles of the civil rights bill . . . .").

[20] *See, e.g.*, Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Saenz v. Roe, 526 U.S. 489 (1999).

[21] *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010).

(B) be most legitimate in allowing the current generation to govern itself;[22]
(C) be most legitimate in allowing current majorities to have their way;[23]
(D) be most legitimate in minimizing judicial discretion,[24]
(E) be most legitimate in preventing opportunities for official self-aggrandizement;[25]
(F) have been adopted by the framers;[26]
(G) fit with contemporary legal culture;[27]
(H) be faithful to the Article VI oath;[28] or
(I) follow from the nature of interpretation.[29]

I will briefly canvass what the *McDonald* opinions had to say about each level of analysis, offering some color commentary along the way.

I. *MCDONALD* AND LEVEL ONE: WHICH GUN RIGHTS ARE FUNDAMENTAL?

Heller tempered its recognition of armed self-defense in federal enclaves with language acknowledging several sorts of

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[22] *See, e.g.*, Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007).

[23] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

[24] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[25] *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

[26] *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

[27] *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[28] *See, e.g.*, Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009).

[29] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); John T. Valauri, *As Time Goes By: Hermeneutics and Originalism*, http://ssrn.com/abstract=1663937 (last updated Aug. 28, 2010); Sean Wilson, *The Fallacy of Originalism: What Philosophy of Language and Law Says About "Original Meanings"*, (May 15, 2009), http://ssrn.com/abstract=1405451.

"presumptively constitutional" regulations.[30] Some observers had hoped that *McDonald* would say more about exactly what sorts of regulations would survive Second Amendment scrutiny. The *McDonald* Court did not say anything specific on this score, but it did reaffirm the *Heller* disclaimer[31] while rejecting the suggestion that states and municipalities were to be afforded any *greater* leeway than the federal government. Contrary to the suggestions of the dissenters, the full Second Amendment is now incorporated, not any "watered-down" version; states and municipalities are now obliged to follow the exact *Heller* standard,[32] rather than some Harlan-style right derived directly from the due process clause[33] or some consensus derived from current state constitutional law.[34] The Court noted that the incorporated Second Amendment "*limits* (but by no means eliminates) [municipalities'] ability to devise solutions to social problems that suit local needs and values," quoting the state amici's assurance that, Second Amendment incorporation notwithstanding, "experimentation with reasonable firearms regulations will continue. . . ."[35]

II. *MCDONALD* AND LEVEL TWO: WHAT IS FUNDAMENTALITY?

A. Background: Duncan*,* Glucksberg*, and* Lawrence

Since the 1960s, the Supreme Court has produced two strands of Fourteenth Amendment precedents. On the one hand, the Court has required states and localities to obey *al-*

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[30] *See supra* note 2.

[31] McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on [certain] longstanding regulatory measures . . . . We repeat those assurances here.").

[32] *Id.* at 3047 (quoting Malloy v. Hogan, 378 U.S. 1, 10-11 (1964)) (internal quotation marks omitted).

[33] *Id.* at 3092-93 (Stevens, J., dissenting) (suggesting that any incorporation occurs, if at all, only in a diluted form).

[34] *Id.* at 3130 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting) (suggesting that any incorporation follow the approach under current state constitutional law rather than *Heller*).

[35] *Id.* at 3046 (majority opinion) (quoting Brief of States of Texas et al. as Amici Curiae in Support of Petitioners at 23, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4378909, at *23).

most all of the Bill of Rights. The Court's latest extensive explanation of its doctrine came in 1968's *Duncan v. Louisiana*,[36] which incorporated Sixth Amendment criminal-jury rights and clarified that "implicit in the concept of ordered liberty," the label attached to incorporated liberties since *Palko v. Connecticut*,[37] the no-double-jeopardy-incorporation case of 1937, did not really mean that such rights were strictly *entailed* by the concept of "ordered liberty" or cognates like "civilization." Taken straightforwardly, the *Palko* standard seems to ask of a particular purportedly-fundamental right whether there is a possible world that (a) has ordered liberty, *i.e.*, is civilized, but (b) lacks the right. In its long footnote fourteen, *Duncan* clarified, however, that this was not the right analysis:

> Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . [R]ecent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.[38]

On the other hand, the Court's non-incorporation substantive due process cases have found constitutional rights to contraception,[39] abortion,[40] private sexual conduct,[41] extended-

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[36] Duncan v. Louisiana, 391 U.S. 145 (1968).

[37] Palko v. Connecticut, 302 U.S. 319 (1937).

[38] *Duncan*, 391 U.S. at 149-51 n.14 (1968) (citation omitted).

[39] Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[40] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[41] Lawrence v. Texas, 539 U.S. 558 (2003).

family living situations,[42] and continued *Lochner*-era precedents on the right to educate one's children[43] and the right against excessive punitive damages,[44] while denying a constitutional right to assisted suicide.[45]

The relationship of the incorporation and non-incorporation components of substantive due process has not been perfectly clear. Only one of these majority non-incorporation substantive due process opinions cites *Duncan*; *Casey* in reaffirming constitutional abortion rights in 1992 cites *Duncan* only for the proposition that "the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States."[46] Justice Powell's plurality opinion in *Moore*, the extended-family-living-together case, does note that *Duncan*'s standard is marked by a "similar restraint" as its own tradition-based approach[47] and notes that *Duncan* "reject[ed] the *Palko* formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition,"[48] but *Duncan* had not, before *McDonald*, had other influence outside the realm of incorporation and the Sixth Amendment.

The most prominent recent attempt to impose some order on non-incorporation substantive due process cases came in 1997 in *Washington v. Glucksberg*, the no-constitutional-right-to-assisted-suicide case.[49] The key was tradition: "Our Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."[50] However, the year after *Glucksberg*, the Court used a "shock the con-

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[42] Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

[43] Troxel v. Granville, 530 U.S. 57 (2000) (following Meyer v. Nebraska, 262 U.S. 390 (1923)).

[44] BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (following St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919)).

[45] Washington v. Glucksberg, 521 U.S. 702 (1997).

[46] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (citing Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968)).

[47] *Moore*, 431 U.S. at 503 n.10 (citing *Duncan*, 391 U.S. at 149-50 n.14) (citation omitted).

[48] *Id.* at 504 n.12 (citing *Duncan*, 391 U.S. at 149-50 n.14).

[49] *Glucksberg*, 521 U.S. 702.

[50] *Id.* at 721 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

science" test in denying a substantive due process excessively-aggressive-police-chase claim in *County of Sacramento v. Lewis*, producing an apoplectic concurrence in the judgment by Justice Scalia.[51] Justice Kennedy replied to Scalia enigmatically:

> [H]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect.[52]

In the *Sacramento* context, this "objective assessment" was part of the rationale for *denying* a constitutional claim. Five years later in *Lawrence v. Texas*, however, Kennedy quoted his "starting point, but not in all cases the ending point" line on behalf of the Court in *upholding* the substantive due process right to private sexual conduct.[53] There was another difference: in the immediate context of the citation to *Sacramento*, the non-tradition-and-history consideration in *Lawrence* concerned, not an "objective assessment" of the reasonableness or justice of homosexual-only sodomy bans, but only the recent history—or rather, the virtually-total non-history—of recent sodomy prosecutions against consenting adults. Tradition and history were not the sole consideration, Kennedy wrote for the Court, because of the "emerging awareness that liberty gives

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[51] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 860-61 (1998) (Scalia, J., joined by Thomas, J., concurring in the judgment) ("Just last Term, in *Washington v. Glucksberg*, the Court specifically rejected the method of substantive due process analysis employed by Justice Souter in his concurrence in that case, which is the very same method employed by Justice Souter in his opinion for the Court today. . . . In fact, if anything, today's opinion is even more of a throw back to highly subjective substantive due process methodologies than the concurrence in *Glucksberg* was. Whereas the latter said merely that substantive due process prevents 'arbitrary impositions' and 'purposeless restraints' (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test.") (citing *Glucksberg*, 521 U.S. at 720-22; COLE PORTER, YOU'RE THE TOP (1934)).

[52] *Id.* at 857-58 (Kennedy, J., joined by O'Connor, J., concurring).

[53] Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting *Lewis*, 523 U.S. at 857).

substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[54]

It is not perfectly clear from *Lawrence* itself whether the "emerging awareness" which Kennedy describes is *itself* the relevant consideration—that is, if contemporary consensus is, by definition, part of what substantive due process protects—or if Kennedy claims for the Court the right to define and protect "liberty" by its own lights, using contemporary consensus as at best a defeasible guide. Is contemporary consensus controlling, or merely one persuasive indication that the Supreme Court may take into account? *Lawrence* quoted language from *Planned Parenthood of Southeastern Pennsylvania v. Casey*—"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[55]—without noting the limiting construction placed on that language in *Glucksberg*, which took that language as a mere description of those traditions that the Court had protected.[56] Indeed, while Justice Scalia's dissent in *Lawrence* relied prominently on *Glucksberg*,[57] the majority did not mention it at all.[58]

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[54] *Id.*

[55] *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[56] Washington v. Glucksberg, 521 U.S. 702, 727 (1997) ("By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.") (footnote omitted).

[57] *Lawrence*, 539 U.S. at 593 (Scalia, J., joined by Rehnquist, C.J., & Thomas, J., dissenting).

[58] *Lawrence*'s similarly-enigmatic conclusion appealed to the rights of "later generations" without making clear whether that means a later-emerging consensus or later individual interpreters of the Fourteenth Amendment:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79 (majority opinion).

Prior to *McDonald*, then, the relationship between *Glucksberg* and *Lawrence* was somewhat muddy. Did *Lawrence* abandon the *Glucksberg* tradition-based standard *sub silentio* in favor of the direct judicial assessment of the reasonableness or justice of state legislation, or did it merely add current consensus—the state of the American tradition of civil liberty *now*—to supplement longstanding traditions? *Glucksberg*'s own reference to "[o]ur Nation's history, legal traditions, *and practices*" could be taken to license recognition of an "emerging consensus," but of course *Lawrence* did not seize on this language itself.

B. McDonald*:* Glucksberg *Restored?*

McDonald emphatically reaffirmed—with Justice Kennedy aboard—*Glucksberg*'s tradition-based methodology as a restatement of *Duncan*. The Court dismissed the dissents' concerns about the dangers of gun rights and devoted no attention to defending gun rights as morally-genuine rights; tradition was the only consideration.

The Court first highlighted the way in which *Duncan* had modified the *Palko* test, relying on the footnote fourteen passage quoted above, but restating *Duncan*'s "Anglo-American regime of ordered liberty" as "*our* scheme of ordered liberty and system of justice,"[59] perhaps because of the recent history of gun control in England. Justice Alito recapitulated the issue in his rebuttal portion (Justice Thomas having left the opinion for this section) as whether a right is "fundamental from an American perspective,"[60] amplifying the point with some backhandedly Europe-friendly language: "If *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world."[61] Europe and England are civilized despite lacking robust gun rights, but precisely because of this

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[59] McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

[60] *Id*. at 3046.

[61] *Id*. at 3044.

sort of discrepancy, Alito rejected "consistency with being civilized" as the measure of fundamentality. After stressing the distinctively American aspects of the incorporation analysis from *Duncan*, the Court presented *Glucksberg* as a restatement of the *Duncan* test, equating the standard derived from *Duncan*—"fundamental to *our* scheme of ordered liberty"—with *Glucksberg*'s "deeply rooted in this Nation's history and tradition."[62]

Below, I discuss the exact temporal shape of Alito's tradition-based analysis—it ends abruptly in 1868—and the relationship of tradition to the Bill of Rights. But the rejection of direct policy analysis or the direct moral evaluation of a right is striking. Alito dismissed quite briefly the sort of consideration Kennedy's not-just-tradition concurrence in *Sacramento* had seen as relevant: an "objective assessment of the necessities of law enforcement."[63] Criminals might take advantage of constitutional gun rights just as they might take advantage of constitutional unreasonable-search rights, but these costs—"disputed public safety implications," Alito called them[64]—were irrelevant to the Court's assessment of fundamentality. The Court's public-policy-free and natural-rights-assessment-free analysis clearly gives the impression that it wants to abandon any role as a committee of philosopher-kings or policymakers-in-chief the Court was accused of assuming in earlier substantive due process cases like *Roe*, *Casey*, and *Lawrence*.

The relevance of Alito's stress on *dispute* over public-safety issues, however, is a bit unclear. In describing gun-control policy issues as "disputed," Alito seemed to refer to the view that gun rights might, after all, be *good* for the safety of those who want to defend themselves by shooting attackers. Such an assessment of policy, Alito suggested, was at least within the realm of reasonable dispute. But what if it were not?[65] It is

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[62] *Id.* at 3036 (citing *Duncan*, 391 U.S. at 149; Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[63] *See supra* note 52 and accompanying text.

[64] *McDonald*, 130 S. Ct. at 3045.

[65] Justice Stevens raises such a hypothetical: "What if the evidence had shown that, whereas at one time firearm possession contributed substantially to personal liberty and safety, nowadays it contributes nothing, or even tends to undermine them? Would

hard to see what would have changed in Alito's argument from tradition. Even if virtually *everyone* seriously analyzing the issue today were to think gun rights were a horrible idea, protecting no genuine right, gun rights would seem still to qualify as fundamental according to the Founding-to-Reconstruction version of the *Glucksberg* standard; the constitutional command seems to amount to "respect rights widely respected in 1868, no matter what." If, on the other hand, the fact that the policy issue is "disputed" today makes a genuine difference in the constitutional analysis, then policy considerations actually *are* a part of fundamentality. The rule would then be "respect traditional rights as long as a reasonable person could think they are a good idea." Protecting 1868-era traditions subject to an all-reasonable-people-*would*-disagree override is not, of course, the only way to combine tradition with contemporary considerations. The Court might instead protect 1868-era traditions subject to a reasonable-people-*could*-disagree override (the sort of standard Justice Breyer seemed to favor), or protect 1868-era traditions subject to a people-today-*tend*-to-disagree override (that is, to adopt a *Corfield*-style throughout-American-history standard).

Justice Stevens's dissent disagreed sharply with a tradition-based approach, seeking to reinvigorate *Palko*'s "implicit in the concept of ordered liberty"[66] as more than just a label. He acknowledged that tradition is relevant and can be persuasive,[67] but judges are ultimately to decide "which rights *really are* vital to ordered liberty."[68] Stevens recapitulated the Court's substantive due process cases in emphatically moral terms: "Government action that shocks the conscience, *pointlessly* infringes settled expectations, trespasses into sensitive private realms or life choices without *adequate justification*, perpetrates gross *injustice*, or simply lacks a rational basis will always be vulner-

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it still have been reasonable to constitutionalize the right?" *Id.* at 3118 (Stevens, J., dissenting).

[66] *Id.* at 3096 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[67] *Id.* at 3099 n.22 ("Justice Scalia and I are on common ground in maintaining that courts should be 'guided by what the American people throughout our history have thought.' Where we part ways is in his view that courts should be guided *only* by historical considerations.").

[68] *Id.* at 3096 (emphasis added).

able to judicial invalidation."[69] Actual reasons were critical for Stevens: "The only way to assess what is essential to fulfilling the Constitution's guarantee of 'liberty,' in the present day, is to provide reasons that apply to the present day."[70]

Stevens attacked the Court's historical focus as itself out of step with the Court's own approach in other cases: "[O]ur substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms."[71] Never? What about *Glucksberg*? Stevens answered in footnote sixteen:

> I acknowledge that some have read the Court's opinion in *Glucksberg* as an attempt to move substantive due process analysis, for all purposes, toward an exclusively historical methodology—and thereby to debilitate the doctrine. If that were ever *Glucksberg*'s aspiration, *Lawrence* plainly renounced it. As between *Glucksberg* and *Lawrence*, I have little doubt which will prove the more enduring precedent.[72]

Of course, *Lawrence* did not "plainly" renounce anything in *Glucksberg*, because the majority opinion does not mention it, and its author, Justice Kennedy, joined the majorities of the Court in both *Glucksberg* and *McDonald*. In the context of Stevens's attack, Kennedy's adherence to the majority in

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[69] *Id*. at 3101 (emphases added). Stevens's application of these criteria is likewise focused on whether gun control is good policy. "[F]irearms . . . can help thugs and insurrectionists murder innocent victims." *Id*. at 3107. "[I]t does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality . . . ." *Id*. at 3109. Justice Breyer's dissent also touches on policy considerations without making quite clear what status they have in making a right fundamental. He notes, "I do not believe history is the only pertinent consideration," *id*. at 3130 (Breyer, J., dissenting), relying on a cocktail of other considerations: "[T]he police power, 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.

[70] *Id*. at 3109 n.36 (Stevens, J., dissenting).

[71] *Id*. at 3097.

[72] *Id*. at 3097 n.16. Stevens later quoted the passage from *Lawrence* quoted *supra* at note 58, calling it "moving[]." *Id*. at 3099 n.21.

McDonald thus gives significant support to a current-consensus reading of *Lawrence*.[73]

Justice Stevens noted Justice Harlan's *Duncan* dissent for the proposition that a tradition-based view of fundamentality is "circular."[74] However, Harlan's dissent plainly advocated a central place for tradition:

> Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words 'liberty' and 'due process of law' and attempt to define them in a way that accords with American traditions and our system of government.[75]

In context, Harlan's claim of circularity is rooted in his disagreement with the *Duncan* Court's view of history itself; the historical considerations in favor of the Sixth Amendment are "true of all"[76] the liberties in the Bill of Rights, leaving no basis for a finding of fundamentality beyond the Court's say-so.

Justice Scalia's concurrence chiefly took aim at Justice Stevens's dissent, defending "the theory of interpretation which underlies the Court's opinion, a theory that makes the traditions of our people paramount."[77] However, Scalia's "theory of interpretation" terminology does not seem quite right; a tradition-based view of *fundamentality under substantive due process* is not quite the same as a theory of *interpretation*—that is, what I call a "Level Three" consideration. A theory of interpretation explains how the Constitution obtains its meaning, but

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[73] Still, *Glucksberg* fans might like to hear this interpretation of *Lawrence* from Justice Kennedy himself, not just implicitly through Justice Alito's failure to be moved by Justice Stevens. Stevens and those like-minded might take the attitude expressed by the Gin Blossoms:

> I don't want to take advice from fools / I'll just figure everything is cool / Until I hear it from you . . . I can't let it get me off / Or break up my train of thought / As far as I know, nothing's wrong / Until I hear it from you.

See GIN BLOSSOMS, *Until I Hear It from You*, *on* CONGRATULATIONS I'M SORRY (A&M 1996).

[74] *McDonald*, 130 S. Ct. at 3098.

[75] Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

[76] *Id.* at 183.

[77] *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

this is a distinct question from what, in fact, fundamentality under the Due Process Clause amounts to. For instance, if the Constitution said plainly, "No State shall infringe natural rights" or "No State shall deprive any person of life, liberty, or property unreasonably," then even an originalist interpreter would be compelled to assess directly the scope of natural rights or the reasonableness of a State's deprivations of life, liberty, or property. Likewise, if the Constitution said plainly, "No State shall abridge the set of privileges generally enjoyed by American citizens at the time of abridgement, but this set may grow or shrink over time," then originalists applying that plain original meaning would be required to update the set of protected privileges by consulting current consensus, rather than freezing that set at the time of enactment. Tradition is not a general method of interpretation, but an assessment of the content of *one particular clause*. Without explaining why the Due Process or Privileges or Immunities Clause could not in fact be tolerably paraphrased in one of these ways, Scalia's argument omits a critical step.

As explained below, Justice Scalia appealed to the minimization of judicial discretion and judicial power relating to basic policy questions, rather than anything specifically related to the history or interpretation of the Due Process Clause, to justify his reading of the Due Process Clause. To the extent that Justice Stevens would agree with the basic metric, Scalia certainly scored some points; after all, as quoted above, Justice Stevens admitted straightforwardly that on his view the Court should decide "which rights *really are* vital to ordered liberty . . . ."[78] However, that very admission suggests that Justice Stevens would simply disagree with Scalia's metric. Justice Stevens has been fine with exercising a degree of policymaking and philosopher-king power these thirty-five years, and his conscience seemed perfectly clear upon his retirement.[79] He thought he

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[78] *Id*. at 3096 (Stevens, J., dissenting) (emphasis added).

[79] For one further indication of Stevens's satisfaction with his career, see http://www.npr.org/templates/story/story.php?storyId=130198344 (during a lengthy and wide-ranging conversation, Stevens said he regrets one vote: "his 1976 vote to uphold the death penalty . . . .") (last visited Oct. 6, 2010).

had exercised such power with proper "humility and caution"[80] and "respect for the democratic process."[81] Justice Scalia disagreed, citing *Casey*,[82] but Justice Scalia's refusal to go any deeper into the justifications for his view of fundamentality limited the audience for his concurrence to those who already disagree with cases like *Casey*.

C. The Fundamentality of the Bill of Rights, and the Fundamentality of Parts of the Bill of Rights

Before turning to temporal aspects of fundamentality—the issue of *when* a right must be rooted in the American tradition of civil liberty—I will touch on the relationship between the two concepts "contained in the Bill of Rights" and "deeply rooted in tradition." The Court recognized in *McDonald* that it has never adopted Justice Black's *Adamson*-dissent everything-in-the-Bill-of-Rights view of fundamentality.[83] However, the Court came very close to adopting Black's view, tempered only by a grand-juries-and-civil-juries stare-decisis disclaimer. In response to arguments stressing the importance of local experimentation, Alito said,

> There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. This argument was made repeatedly and eloquently by Members of this Court who rejected the concept of incorporation and urged retention of the two-track approach to incorporation.

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[80] *McDonald*, 130 S. Ct. at 3101.

[81] *Id.*

[82] *Id.* at 3053 (Scalia, J., concurring) ("'[H]umility and caution' . . . are undeniably admirable. . . [b]ut it makes no difference, for the first case Justice Stevens cites in support, [*Casey*], dispels any illusion that he has a meaningful form of judicial modesty in mind.") (citation omitted).

[83] *Id.* at 3033 (majority opinion) ("[T]he Court never has embraced Justice Black's 'total incorporation' theory."); *see* Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., joined by Douglas, J., dissenting); *id.* at 124 (Murphy, J., joined by Rutledge, J., dissenting) ("I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights.").

> Time and again, however, those pleas failed.[84]

If the "contained in the Bill of Rights" concept does not entail the "deeply rooted in tradition" concept—that is, if there are, or could be, some rights that are both (a) in the Bill of Rights, but (b) not fundamental according to a *Glucksberg* analysis, then the "*fully* binding" language is puzzling. A claim that a right in the Bill of Rights does not meet the *Glucksberg* standard is a claim, of course, that a federal constitutional right should not be fully binding on the States—indeed, it is a claim that a federal constitutional right should not be binding *at all* on the States. Unless Justice Black is right about total incorporation, though, *sometimes* such a claim could win. The Court takes the position, *not* that Justice Black was right, but that there is no partial incorporation of an *individual part of* the federal Bill of Rights. The Bill of Rights thus only partly satisfies the *Glucksberg* standard, but the individual components of the Bill of Rights either satisfy *Glucksberg* completely or not at all. Fundamentality must cut the Bill of Rights at the joints, encompassing either all of an individual right or none of it.

Alito gave little explanation of, or motivation for, this implicit picture of the relationship between the rooted-in-tradition and contained-in-Bill-of-Rights concepts. To the extent that a closer approach to Justice Black's view may be influencing the Court, it is also worth noting that his *Griswold*-dissent nothing-*but*-the-Bill-of-Rights view of fundamentality[85] has been rejected in a long slew of substantive due process cases.[86] If these

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[84] *McDonald*, 130 S. Ct. at 3046. Alito especially cited several separate opinions by the second Justice Harlan.

[85] Griswold v. Connecticut, 381 U.S. 479, 515 (1965) (Black, J., dissenting) (condemning the "natural law due process philosophy" behind *Lochner* and *Griswold*); *cf. Adamson*, 332 U.S. at 80 (Black, J., dissenting) (condemning "the new due process-natural law formula").

[86] However, just as the full-strength-incorporation-if-any-incorporation-at-all idea is a sort of junior-varsity version of Justice Black's full-strength-incorporation-of-the-Bill-of-Rights view, the Court's disavowal of non-Bill-of-Rights substantive due process with respect to the same "sort of . . . government conduct" as a right in the Bill of Rights is a sort of junior-varsity version of Justice Black's nothing-but-incorporation complement. *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2606 (2010) (plurality opinion of Scalia, J.) (following cases beginning with Graham v. Connor, 490 U.S. 386, 395 (1989)). For criticism of *Stop the Beach* on this point, see Green, *Of*, *supra* note 17, at 124-25.

concepts are distinct, and the rooted-in-tradition concept does not completely subsume the contained-in-the-Bill-of-Rights concept, it seems eminently possible that only a portion of an individual right, not all of it, is rooted in tradition in whatever way *Glucksberg* is taken to require. Justice Scalia adds some rhetorical zip to the only-undiluted-incorporation principle in a footnote: "[T]he demise of watered-down incorporation means that we no longer subdivide Bill of Rights guarantees into their theoretical components, only some of which apply to the States. The First Amendment freedom of speech is incorporated—not the freedom to speak on Fridays, or to speak about philosophy."[87] Given doctrine that allows (and requires!) the Court to divide the *Bill of Rights* into its components, however, subdivision of individual rights seems perfectly natural.

The Court may have the opportunity to apply its no-dilution principle again very soon in cases asking the Court to overrule *Apodaca v. Oregon*[88] and *Johnson v. Louisiana*,[89] which allowed state juries but not federal juries to be non-unanimous under the not-quite-fully-incorporated Sixth Amendment. The *McDonald* Court noted that *Apodaca* and *Johnson*—which featured their own four-one-four split with four justices approving non-unanimous federal or state juries, four justices condemning both, and Justice Powell approving state but not federal non-unanimity—were "one exception to this general rule" of non-diluted incorporation, but this exception seems not long for this world.[90]

As Justice Alito noted, the second Justice Harlan repeatedly advocated the sort of dilution of incorporated rights that the Court condemns. Somewhat surprisingly, given Justice Harlan's use of tradition as the central consideration[91] and Justice Stevens's condemnation of a tradition-based approach, Justice Stevens's dissent embraced Harlan's approach to incorporation in *McDonald*, quoting Justice Harlan's *Malloy* dissent—

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[87] *McDonald*, 130 S. Ct. at 3054 n.5 (Scalia, J., concurring) (citation omitted).

[88] 406 U.S. 404 (1972).

[89] 406 U.S. 356 (1972).

[90] *McDonald*, 130 S. Ct. at 3035 n.14 (majority opinion). The Supreme Court turned down a chance to address the issue in Herrera v. Oregon, 79 U.S.L.W. 3141 (2011).

[91] *See supra* note 75 and accompanying text.

"[T]he Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments"[92]—and his *Griswold* concurrence—"While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."[93] Stevens then noted his disagreement with both aspects of Justice Black's views on due process: "Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment. This Court's 'selective incorporation' doctrine is not simply 'related' to substantive due process; it is a subset thereof."[94] Ironically, while this section of Stevens's opinion highlighted effectively the puzzling role of the Bill of Rights in the Court's ultimate conclusion in *McDonald*, it also eloquently justified the Court's merger of the *Duncan* and *Glucksberg* approaches to fundamentality, a merger with which, as noted above, Stevens was quite unhappy.

However intriguing or maddening Stevens's simultaneous embrace of Harlan's approach to incorporation and attack on tradition-based fundamentality might be, he dissented alone and has now retired. For those concerned chiefly with the future of substantive due process, both his attacks on *Glucksberg* and his embrace of Harlan's approach to incorporation are therefore more important for the light they shed on the Court's *rejection* of such views than for any likelihood that such views will soon receive five votes on the Court.

Finally, it is important to note Justice Thomas's views on the relationship of the Fourteenth Amendment to the Bill of Rights. While he joined Justice Alito's chief discussion of fundamentality and use of *Glucksberg*, his discussion of the Privileges or Immunities Clause recapitulated at some length evi-

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[92] *McDonald*, 130 S. Ct. at 3092 (Stevens, J., dissenting) (quoting Malloy v. Hogan, 378 U.S. 1, 24 (1964) (Harlan, J., dissenting)).

[93] *Id.* at 3093 (quoting Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring)); *see also id.* at 3103 ("The question . . . is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom.").

[94] *Id.* at 3093 (citations omitted).

dence from Kurt Lash in support of Justice Black's position that the privileges of citizens of the United States are exclusively defined in the Bill of Rights.[95] In particular, Justice Thomas highlighted Daniel Webster's 1819 argument that the "rights, advantages, and immunities of citizens of the United States"—which Napoleon had been promised in 1803 would be given to the inhabitants of the Louisiana Territory—included only rights in the federal Constitution.[96]

Elsewhere,[97] I criticize the conclusiveness of the Webster evidence, noting that the argument to which it responded was the same argument made by Justice Catron's concurrence in *Dred Scott* in 1857.[98] Justices Curtis and McLean's *Dred Scott* dissents, however, did not rely on Webster's only-rights-in-the-federal-constitution understanding of "rights, advantages, and immunities of citizens of the United States"; they relied instead on the arguments that the 1803 treaty did not bind Congress and only guaranteed rights to people living in New Orleans at the time.[99] Curtis and McLean certainly seemed to assume that the "rights, advantages, and immunities of citizens of the United States" could include rights like the right to own slaves in the territories, and this 1857 evidence is obviously much more probative of the meaning expressed by the text of the Fourteenth Amendment in 1866 than is evidence from 1819.

Justice Thomas did not commit himself to the incorporation-only view, but his use of the Lash evidence certainly suggests that he is inclined in that direction.[100] Future cases should give him ample opportunity to clarify or rethink that position. Given Justice Thomas's repudiation of substantive

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[95] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1256-57 (2010). For Justice Black's position on the Privileges or Immunities Clause, see Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("[T]he words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.").

[96] *McDonald*, 130 S. Ct. at 3068-70 (Thomas, J., concurring).

[97] *See* Green, *Of*, *supra* note 17, at 38-39.

[98] Dred Scott v. Sandford, 60 U.S. 393, 524-26 (1857) (Catron, J., concurring).

[99] *Id*. at 529-633 (Curtis & McLean, JJ., dissenting).

[100] For an argument that the privileges of citizens of the United States go beyond those in the federal Constitution, see Green, *Of*, *supra* note 17, at 122-25.

due process and the possible existence, as in *McDonald*, of a four-four split on fundamental-rights issues, it would be surprising if "or the Privileges or Immunities Clause" bits do not become a regular feature of questions presented in petitions for certiorari.

D. Temporal Considerations: Which Parts of the American Tradition Are Relevant?

Above, I noted three possible temporal variants on a tradition-based inquiry that would focus on (a) the tradition of American civil liberty today, (b) that tradition at the time the Fourteenth Amendment was adopted in 1868, or (c) continuous vitality throughout American history. The Court noted very briefly that self-defense rights have been "recognized by many legal systems from ancient times to the present day,"[101] but made no other mention of the contemporary status of gun rights except in briefly rebutting the dissents' proposals. Largely following the history laid out in *Heller*,[102] the Court began with the English Bill of Rights of 1689[103] and continued the story through Blackstone's commentaries in 1765,[104] the American Revolution,[105] the ratification of the original Constitution,[106] the adoption of the Second Amendment in 1791,[107] pre-1820 state constitutions,[108] early constitutional commentators,[109] the abolitionists,[110] (in extensive detail) Reconstruction,[111] and ended with a quick reference to three Western con-

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[101] *McDonald*, 130 S. Ct. at 3036 (majority opinion). Justice Scalia's *Glucksberg*-defending concurrence also mentions briefly "what the American people *throughout* our history have thought." *Id.* at 3052 (Scalia, J., concurring) (emphasis added).

[102] *Id.* at 3036 (majority opinion) ("Our decision in *Heller* points unmistakably to the answer. . . . *Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 3037.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 3037-38.

[110] *Id.* at 3038.

[111] *Id.* at 3038-42.

stitutions of 1889.[112] The Court stressed Calabresi and Agudo's count that the constitutions of twenty-two of thirty-seven states—fifty-nine percent—protected the right to keep and bear arms in 1868,[113] neglecting the fact that a significantly higher percentage—forty-four of fifty, or eighty-eight percent—do so today.[114]

What are we to make of the Court's selection of evidence? Cases like *Lawrence* make clear that the set of fundamental rights protected under substantive due process can *grow* over time, but *McDonald* suggests that they can never shrink. Fundamental rights therefore seem to be a one-way constitutional ratchet, or at least a set that can never shrink below its 1868 floor—the "Chia-Constitution."[115] They need not be generally recognized today, and therefore, contrary to the tradition-based formulation from *Corfield*, they need not be generally recognized throughout *all* of American history. Rootedness in 1868 is enough.

Justice Alito rebuffed Justice Breyer's suggestion that a current "popular consensus" should be required before deeming a right to be fundamental: "[W]e have never held that a provision of the Bill of Rights applies to the States only if there is a 'popular consensus' that the right is fundamental, and we see no basis for such a rule."[116] However, the Court has certainly expressed the *relevance* of contemporary consensus in many of its incorporation cases. Corinna Lain has noted[117] that many of

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[112] *Id*. at 3042.

[113] *Id*. (citing 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 (2008)).

[114] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 192 (2006).

[115] For an argument that the set of "privileges of citizens of the United States" can both grow and shrink in ways that depart from the American tradition of civil liberty circa 1868, see Green, *Of*, *supra* note 17, at 129-32.

[116] *McDonald*, 130 S. Ct. at 3049.

[117] *See* Lain, *supra* note 11, at 377-80. Lain summarizes, "On each of these occasions, the Court was ostensibly asking whether 'a civilized system could be imagined that would not accord the particular protection.' But in asking that question [from *Palko*], the Justices used little imagination. As elsewhere, they surveyed the states instead." *Id*. at 379-80 (footnote omitted); *see also McDonald*, 130 S. Ct. at 3123 (Breyer, J., dissenting) (right must have "remained fundamental over time") (citing *Duncan* and *Klopfer*).

the selective-incorporation cases of the 1960s—the Fourth Amendment exclusionary rule in *Mapp v. Ohio*,[118] the Sixth Amendment right to appointed counsel in *Gideon v. Wainwright*,[119] the Sixth Amendment confrontation clause in *Pointer v. Texas*,[120] the Fifth Amendment self-incrimination-based no-comment-on-failure-to-testify right in *Griffin v. California*,[121] the Sixth Amendment speedy-trial right in *Klopfer v. North Carolina*,[122] the Sixth Amendment criminal-jury right in *Duncan v. Louisiana*,[123] and the Fifth Amendment double-jeopardy right in *Benton v. Maryland*[124]—were driven by the fact that most states *today* recognize the rights at issue. Given the centrality of *Duncan* to the Court's analysis in *McDonald*, the Court's curt dismissal of a factor *Duncan* itself thought important—moreover, a factor that supports the Court's conclusion more strongly than does the Court's 1868 evidence!—is mysterious.[125]

III. *MCDONALD* AND LEVEL THREE: CONSTITUTIONAL THEORY

A. Justice Alito's Constitutional Theory

Level Three issues pose basic issues of constitutional theory—which clause should be used, and what touchstone (historical purpose, historic textually-expressed meaning, historic applications, or subsequent interpretations) should be used in interpreting it? The key provisions read, of course, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

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118 367 U.S. 643, 651 (1961).
119 372 U.S. 335, 345 (1963).
120 380 U.S. 400, 402 (1965).
121 380 U.S. 609, 611 n.3 (1965).
122 386 U.S. 213, 225-26 (1967).
123 391 U.S. 145, 154 (1968).
124 395 U.S. 784, 795 (1969).
125 The Court does briefly note the number of Congressmen and states to join amicus briefs in favor of McDonald, *see* McDonald v. Chicago, 130 S. Ct. 3020, 3049 (2010), but the Court fails to use the sort of evidence used in the 1960s cases—the number of states currently respecting a right.

any State deprive any person of life, liberty, or property without due process of law . . . ."[126]

Justice Thomas's 1999 dissent in *Saenz v. Roe* (joined by Chief Justice Rehnquist)[127] suggested reviving the Privileges or Immunities Clause from its near-total inactivity since 1873, when the *Slaughterhouse Cases* held that the rights of state and federal citizenship were completely non-overlapping,[128] and 1876, when *United States v. Cruikshank* confirmed that First and Second Amendment rights were not protected against state action by the Clause.[129] In 2000, Thomas had suggested in his *Troxel v. Granville* concurrence that the right to raise one's children might be a privilege of citizens of the United States.[130] In *McDonald*, Thomas would take the plunge in an outcome-determinative way.

First, however, consider Justice Alito's main opinion. Writing for the Court, Justice Alito acknowledged frankly the scholarly consensus that *Slaughterhouse* was wrong. He notes (without evident irony or disagreement) Justice Thomas's 1999 statement that "scholars of the Fourteenth Amendment agree 'that the Clause does not mean what the Court said it meant in 1873,'"[131] further noting that *Cruikshank* had allowed the perpetrators of the "infamous Colfax massacre"—the Easter Day 1873 riots that began the end of Reconstruction in Louisiana—to go free.[132] However, that horrific history did not sway the Court to confess its errors in *Cruikshank* or *Slaughterhouse*.

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126 U.S. CONST. amend. XIV, § 1.

127 526 U.S. 489, 522 (1999) (Thomas, J., joined by Rehnquist, C.J., dissenting).

128 83 U.S. (16 Wall.) 36, 78 (1873) ("[T]he privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government."). One of the few rights of national citizenship acknowledged in *Slaughterhouse* was a right against discrimination based on having traveled to a new state. *See id.* at 80 ("[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State."). *Saenz* interpreted this right to ban welfare-benefits-level discrimination against new residents. *Saenz*, 526 U.S. at 503.

129 92 U.S. 542, 552 (1876).

130 530 U.S. 57, 80 n.* (2000) (Thomas, J., concurring).

131 McDonald v. Chicago, 130 S. Ct. 3020, 3029 (2010) (quoting *Saenz*, 526 U.S. at 522 n.1) (Thomas, J., dissenting).

132 *Id.* at 3030.

Instead, Justice Alito (now writing for only four Justices) noted that the petitioners in *McDonald* were "unable to identify the [revived Privileges or Immunities] Clause's full scope"[133] and that there is no scholarly consensus on what to put in *Slaughterhouse*'s place.[134] The Court thus chose to follow "many decades" of substantive due process cases rather than reviving the Privileges or Immunities Clause.[135]

The Court's two reasons for resisting the Privileges or Immunities Clause—lack of precision as to full scope and lack of scholarly consensus—apply in spades to their substantive due process cases. The Court acknowledged a lack of complete precision in *Glucksberg* itself: "[T]he outlines of the 'liberty' specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[136] As for lack of consensus, the Supreme Court's own five-four disagreements in substantive due process cases such as *Moore v. East Cleveland*,[137] *Bowers v. Hardwick*,[138] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[139] *Stenberg v. Carhart*,[140] *Lawrence v. Texas*,[141] *Gonzales*

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[133] *Id.*

[134] *Id.* (citing *Saenz*, 526 U.S. at 522 n.1) (Thomas, J., dissenting).

[135] *Id.* at 3030-31 ("We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.").

[136] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[137] 431 U.S. 494 (1977) (deciding five-four in favor of constitutional right of grandmother to live with son and two grandsons despite zoning law to the contrary).

[138] 478 U.S. 186 (1986) (deciding five-four against constitutional sexual-conduct rights for gays).

[139] 505 U.S. 833 (1992) (deciding five-four to retain constitutional abortion rights).

[140] 530 U.S. 914 (2000) (deciding five-four in favor of constitutional partial-birth-abortion rights).

[141] 539 U.S. 558 (2003) (deciding five-four in favor of constitutional sexual-conduct rights); *see id.* at 579 (O'Connor, J., concurring in judgment) (voting to reverse on equal-protection grounds, but noting her disagreement with the Court on the substantive due process question).

v. Carhart,[142] and, of course, *McDonald v. Chicago* itself[143] have not induced any misgivings about the doctrine in the Court.

Of the eight Level-Three considerations listed above, then, Justice Alito dismisses all of the historic Privileges or Immunities Clause considerations on the basis of *Slaughterhouse*. He also neglects, however, all three possible forms of originalist analysis of the Due Process Clause in favor of later interpretations. If *Heller* marked the victory of the originalist revolution, Alito's *McDonald* opinion looks on its face like a change-in-personnel-free Thermidor.

This appearance of irrelevance for the original meaning of the constitutional text may, however, be misleading. Just as the 1873 *Slaughterhouse* dissents produced the 1884 *Slaughterhouse II* concurrences that were in turn relied on by the Court in 1897 in *Allgeyer v. Louisiana*,[144] thus influencing *Lochner*[145] and subsequent cases like *Meyer*,[146] originalist Privileges or Immunities Clause evidence still exerted an effect on the Court's interpretation of the Due Process Clause in *McDonald*. In its footnote nine, the Court cites the two strongest pieces of incorporationist evidence—Jacob Howard's 1866 introductory explanation of the Privileges or Immunities Clause to the Senate and John Bingham's 1871 explanation of the Privileges or Immunities Clause during the debates on the Civil Rights Act of 1871—as simply describing the Fourteenth Amendment or Section One as a whole.[147] This evidence serves as the Court's explanation for Justice Black's position on incor-

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[142] 550 U.S. 124 (2007) (deciding five-four against constitutional partial-birth-abortion rights in circumstances narrowly distinguishable from *Stenberg*).

[143] 130 S. Ct. 3020 (2010) (deciding five-four in favor of Second-Amendment incorporation).

[144] *See supra* note 16 (noting that Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), relies on Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring), in turn restating Justice Bradley's views in Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 111-24 (1873) (Bradley, J., dissenting)).

[145] Lochner v. New York, 198 U.S. 45, 53 (1905) (citing *Allgeyer*).

[146] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citing *Allgeyer* and *Butchers' Union*). *Meyer*, of course, has continuing influence on substantive due process cases today.

[147] *McDonald*, 130 S. Ct. at 3033 n.9 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871)).

poration toward which the Court "eventually moved,"[148] and thereby as the Court's chief originalist justification for its no-dilution-of-individual-guarantees view outlined above. As Alan Gura, the lawyer for McDonald who made the Privileges or Immunities Clause his primary argument, put it with his co-authors Ilya Shapiro and Josh Blackman, the fact that the Court felt obliged to fudge this evidence shows that originalist evidence about the Privileges or Immunities Clause is still relevant to how the Due Process Clause will get interpreted. "The *Slaughterhouse* majority might have (temporarily) gotten away with killing the Privileges or Immunities Clause, but Justice Alito's plurality suggests that like Poe's tell-tale heart, the Fourteenth Amendment's central guarantee of liberty is beating loudly under the floorboards."[149]

B. Justice Thomas's Constitutional Theory

There is, of course, additional joy for the originalists in Mudville beyond Justice Alito's use of repackaged Privileges or Immunities Clause evidence to explain substantive due process. Justice Alito's opinion was just a plurality opinion at key points; because the eight Privileges or Immunities Clause-non-revivalists split four-four on the substantive due process issue, Justice Thomas's Privileges or Immunities Clause opinion turned out to be outcome-determinative. Since *Saenz* in 1999, the Roberts-for-Rehnquist switch has reduced the Privileges or Immunities Clause-revivalist camp from two to one. However, the alignment of votes in *McDonald* put Thomas partly in the driver's seat.

Justice Thomas first dismissed substantive due process rather quickly: "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."[150] "[A]ny serious argument over the scope of the Due Process

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[148] *Id*. at 3034.

[149] Alan Gura, Ilya Shapiro, & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 182.

[150] *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring).

Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does."[151] In a bit of an overstatement, Justice Thomas noted regarding the other eight members of the Court, "neither side argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification."[152] As noted below, Justice Stevens briefly defended substantive due process on originalist grounds. However, Justice Thomas had a much bigger fish to fry in the Privileges or Immunities Clause, which has received almost no historical or textual analysis at the Court since 1873.

Unsurprisingly, Thomas seized on the originalist statements from *Heller*[153] and fulfilled his promise in *Saenz* to "look to history to ascertain the original meaning of the [Privileges or Immunities] Clause."[154] His opinion on the original meaning of the Privileges or Immunities Clause is worth extensive analysis, but this essay cannot canvass it in detail. Justice Thomas made four chief points. First, "privileges or immunities" in this context means simply "rights."[155] Second, as noted above, he presented background evidence, especially from Daniel Webster's 1819 argument, suggesting that "privileges or immunities of citizens of the United States" means "privileges in the federal Constitution."[156] Third, he presented incorporationist evidence from Congress in 1866, such as Jacob Howard's introduction to the Senate, and evidence related to later congressional interpretation.[157] Fourth, he explained why the Privileges or Immunities Clause protects certain rights absolutely, not merely against discrimination.[158]

Elsewhere, I explain why I agree with Thomas's first, third and fourth points—that "privileges or immunities" means "rights" (and thus that "of" is the key bit of text), that Second

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151 *Id.*
152 *Id.*
153 *Id.* at 3063 (citing the statement quoted *supra* in note 5).
154 Saenz v. Roe, 526 U.S. 489, 522 (Thomas, J., dissenting).
155 *McDonald*, 130 S. Ct. at 3063-66.
156 *Id.* at 3068-70.
157 *Id.* at 3071-77.
158 *Id.* at 3077-83.

Amendment rights were among the paradigms of privileges of citizens of the United States, and that the Privileges or Immunities Clause protects certain basic rights, in addition to forbidding second-class citizenship.[159] However, I criticize his suggestion that rights stated in the federal Constitution are the limits of the privileges of citizens of the United States.[160] While Justice Thomas is, of course, a firmly committed originalist unlikely to revise his basic approach to interpretation, he will likely have a chance in the future to consider this sort of evidence about how exactly it should be applied.

C. Justice Scalia's Lack of Constitutional Theory

Justice Thomas's frequent partner in crime, Justice Scalia, had very little to say about Justice Thomas's originalist evidence. Relying on his own earlier concurrence, he noted that incorporation under the Due Process Clause is tolerable because it is "long established and narrowly limited."[161] However, as Justice Stevens pointed out, Justice Scalia has expressed hostility even to long-established substantive due process precedents outside the Bill of Rights, like *Meyer*;[162] and as Alan Gura and his co-authors have argued, it is hard to see Justice Scalia approving of *Roe* even if it got to be as old as *Slaughterhouse*.[163] Scalia gives his critics little to work with beyond the "long established and narrowly limited" label.[164]

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[159] *See* Green, *Of*, *supra* note 17, at 5-6 n.7 (agreeing about the "rights" definition and focusing on "of" as a result); *id.* at 115-16 (arguing that there is a basic-rights component protecting rights like those in the Bill of Rights).

[160] *Id.* at 122-28.

[161] *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (citing Albright v. Oliver, 510 U.S. 266, 275 (1994)).

[162] *Id.* at 3118 (Stevens, J., dissenting) ("Justice Scalia's approach . . . would effect a major break from our case law outside of the 'incorporation' area.").

[163] Gura et al., *supra* note 149, at 182-83 ("Imagine a hypothetical Supreme Court in the year 2073, with *Roe v. Wade* on the docket for reconsideration, and Justice Scalia, perhaps by virtue of the recent health care reform law, still advocating originalism from the bench. Would he acquiesce in *Roe* on its 100th birthday—coincidentally the 200th birthday of *Slaughterhouse*—because it would by then be as long established as substantive due process is today?").

[164] As Gura notes, Scalia's failure to discuss originalist evidence in *McDonald* is the sort of failure he has bemoaned elsewhere. *See* Justice Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 871 (2008) (complaining about a time when briefs contain "not a word about what the text was thought to mean when the people adopted it" and

D. Justice Stevens's Constitutional Theory

Like Justice Alito, Justice Stevens spends most of his time considering what Supreme Court precedents say about fundamentality and how to apply it. However, several of his comments actually sound a textualist or originalist note. Like the Court, Stevens rejected the resurrection of the Privileges or Immunities Clause, but he gave a bit more explanation:

> [The petitioner's] briefs marshal an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases*. But the original meaning of the Clause is not as clear as they suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent.[165]

The basic coin of the constitutional realm for Stevens is thus *clarity of original meaning*! If the original meaning had only been clear enough, he would have been willing to overturn *Slaughterhouse*.[166] He also noted several scholars' work defending a substantive view of the Due Process Clause,[167] claiming that "the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase 'due process of law' had acquired substantive content as a term of art within the legal community."[168] Further, Stevens made a brief textualist move in his criticism of *Glucksberg*, saying it is "unfaithful to the expansive principle Americans laid down when

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discuss "only the most recent Supreme Court cases and policy considerations"). For the complaint, see Gura et al., *supra* note 149, at 170.

[165] *McDonald*, 130 S. Ct. at 3089. I owe special thanks to Justice Stevens for citing my own work in his footnote two (hereinafter, the Best Footnote Ever) as support for his "not as clear as they suggest" statement.

[166] For my efforts to help make that meaning sufficiently clear, see my articles cited *supra* in note 17, and also Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 257 n.173 (2009) (Privileges or Immunities Clause has both equal-citizenship and fundamental-rights components).

[167] *McDonald*, 130 S. Ct. at 3090 n.5. Stevens does not, however, engage their critics, such as Harrison, *supra* note 13, or seek to explain exactly what was expressed by the text if the scholars he favors are right.

[168] *Id*. at 3090.

they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language."[169]

As with Stevens's views on fundamentality, his views on the nature of constitutional interpretation are significant less for what now-retired Justice Stevens may say along similar lines in the future, but for what they suggest about the prevailing climate of opinion on such questions. "The way an institution advertises tells you what it thinks its customers demand."[170] Originalism is certainly in the air.

E. Justice Breyer's Constitutional Theory

Justice Breyer's dissent paid little heed to the actual text of the Fourteenth Amendment;[171] he had his sights set much higher. The broad purposes of the *entire Constitution*, rather than its textual components, were his focus:

> I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State. I would include among those factors the nature of the right; any contemporary disagreement about whether the right is fundamental; the extent to which incorporation will further other, perhaps more basic, constitutional aims; and the extent to which incorporation will advance or hinder the Constitution's structural aims, including its division of powers among different governmental institutions (and the people as well). 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 de-

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[169] *Id.* at 3098. Stevens does not further explain the exact nature of this "expansive principle" or how, exactly, it is expressed in the constitutional text.

[170] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971).

[171] The phrase "substantive due process," for instance, occurs twice in the first two paragraphs of Justice Breyer's dissent, but the words "due process" appear nowhere else. *McDonald*, 130 S. Ct. at 3120 (Breyer, J., dissenting). The word "privileges" occurs only once, in his approval of the plurality's dismissal of the Privileges or Immunities Clause. *Id.* at 3132.

> mocratic 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?[172]

Justice Breyer's dissent thus shows—as did his 2005 book Active Liberty[173] and his new book Making Our Democracy Work[174]—that he is still in the business of pitching his explanations of the Constitution at a very high level of generality. Of course, *Palko*'s "implicit in the concept of ordered liberty" shows that such talk from the Supreme Court is not at all new. With Justice Breyer likely to remain on the Court for a while, he will have considerable time to explain exactly what rights, if not those related to guns, are "implicit in the concept of active liberty."

IV. *MCDONALD* AND LEVEL FOUR: CONSTITUTIONAL META-THEORY

Finally, if this constitutional theory seems too down-to-earth, *McDonald* also featured a bit of constitutional *meta*-theory. While Justice Scalia devoted no attention to the original meaning of either the Due Process or Privileges or Immunities Clauses, he rang the same bell he has rung before about how to *choose* a constitutional theory. The minimization of judicial discretion is his key consideration. Justice Stevens notes

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[172] *Id.* at 3123.

[173] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

[174] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW xiii-xiv (2010) ("Throughout, I argue that the Court should interpret written words, whether in the Constitution or a statute, using traditional legal tools, such as text, history, precedent, and, particularly, purposes and related consequences, to help make the law effective. In this way, the Court can help maintain the public's confidence in the legitimacy of its interpretive role."). The plasticity of Justice Breyer's approach was illustrated in his his interviews on the television shows *Good Morning America* and *Larry King Live*, in which Justice Breyer seemed to say that Koran burning might not be constitutionally protected, then seemed to backtrack. *See* Eugene Volokh, *Justice Breyer Clarifies Earlier Remarks, Suggests Koran-Burning is Constitutionally Protected After All, available at* http://volokh.com/2010/09/16/justice-breyer-clarifies-earlier-remarks-suggests-koran-burning-is-constitutionally-protected-after-all/.

that "Justice Scalia's defense of his method . . . holds out objectivity and restraint as its cardinal—and, it seems, only—virtues . . . ."[175] Justice Scalia explained why a tradition-based approach is superior:

> But the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what Justice Stevens proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process.[176]

Scalia did not explain why this is "*the* question to be decided." As noted above, it would certainly be *possible* for a Constitution to include, in language plain enough for an originalist to understand, that "No State shall deprive any person of life, liberty, or property unreasonably." Whether or not this is a tolerable paraphrase of the Due Process Clause (or the Privileges or Immunities Clause) is a historical question; interpreters subject to an Article VI oath to support "this Constitution" cannot simply assume in advance that our actual Constitution is one that does not give undue power to judges.

It is certainly at least *possible* that our actual Constitution might be a relatively fuzzy one; indeed, I have argued, that possibility is realized.[177] If the exact boundary of the basic rights protected by the Fourteenth Amendment is, as *Glucksberg* says, "perhaps not capable of being fully clarified,"[178] then a measure of discretion among those who apply the Constitution is the price of the way our Constitution has been written. Or as Aristotle puts the point,

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[175] *McDonald*, 130 S. Ct. at 3118 (Stevens, J., dissenting).

[176] *Id*. at 3057-58 (Scalia, J., concurring).

[177] *See* Green, *Of*, *supra* note 17, at 24-25 (citing statements from Jacob Howard, George Edmunds, George Boutwell, John Sherman, Reverdy Johnson, and John Pool on the imprecision in the exact boundaries of the Privileges or Immunities Clause).

[178] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

> We must be content, then, in speaking of such subjects and with such premisses to indicate the truth roughly and in outline . . . . [I]t is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits . . . .[179]

If that means that judges have more power than an ideal constitution-designer might like them to have, the remedy is constitutional redesign, not simply reinterpretation of our current Constitution in a way less friendly to judicial power.

CONCLUSION

A lot of things, of course, are going on in *McDonald*, and it is hard to know which of its acorns will become oaks. Justice Kagan's statement in her confirmation hearings, a few days after *McDonald*, that "we are all originalists,"[180] despite the opinion's decidedly non-originalist flavor, suggests at least that the pot of constitutional theory will continue to brew, as do the textualist and originalist moves in Justice Stevens's dissent. Perhaps Justice Kagan or other future justices with closer ties to the legal academy will give more heed to the scholarly anti-*Slaughterhouse* chorus and enable Justice Thomas to regain a second vote, or even a majority, for the invigoration of the Privileges or Immunities Clause. Or perhaps that view will remain a judicial curiosity, a reminder of a path not taken and directly relevant only when the other justices divide evenly, as in *McDonald*. The Court's re-embrace of *Glucksberg* may retain Justice Kennedy's vote in the future, but perhaps repeat performances of Justice Scalia's *Sacramento* concurrence and *Lawrence* dissent lie ahead instead. The 1868 focus of the Court's application of the *Glucksberg* standard may presage a general return to the freezing of constitutional privileges in Re-

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179 *See* ARISTOTLE, NICOMACHEAN ETHICS, *available at* http://classics.mit.edu//Aristotle/nicomachaen.html.

180 *See* David Ingram, *On Day 2, Kagan Tries to Appease Republicans,* NAT'L L.J., (2010), *available at* http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202463159121 ("Sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do. . . . In that way, we are all originalists.").

construction amber, or it may simply offer a way for the Court to avoid discussion of policy questions it sees as close enough for reasonable minds to differ. The Court's emphasis on undiluted incorporation of the individual components of the Bill of Rights, more closely approximating Justice Black's views of the Fourteenth Amendment, may lend support to an attack on non-Bill-of-Rights substantive due process, or it may simply offer a way for the Court to keep its doctrine simpler by adopting a single set of constitutional rules for both the states and federal government, but still allowing that set to expand when Justices feel the relevant urge.