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WHAT *MCDONALD* MEANS FOR UNENUMERATED RIGHTS

A. Christopher Bryant*

ABSTRACT

In June a splintered Supreme Court held in McDonald v. City of Chicago that the Second Amendment applied to state and local governments. But the case was about much more than handguns. It presented the Court with an unprecedented opportunity to correct its own erroneous precedent and revive the Fourteenth Amendment's Privileges or Immunities Clause. The plurality declined the offer not, as Justice Alito's opinion suggested, out of a profound respect for stare decisis, but rather because at least four Justices like the consequences of that ancient error, especially insofar as unenumerated rights are concerned. This observation in turn raises questions about interpretative method and the Court's fidelity to the written Constitution.

INTRODUCTION

Justice Scalia is fond of saying that he is an originalist, not "a nut."¹ If so, the Court's June decision in *McDonald v. City of*

* Professor, University of Cincinnati College of Law. For their many helpful comments on prior drafts, I thank Lou Bilonis, Emily Houh, Tom McAfee, Darrell Miller, and Verna Williams. Thanks also to Greg Horn for excellent research assistance, and the University of Cincinnati College of Law and the Harold C. Schott Foundation for financial support. Of course remaining errors are mine alone.

¹ See, e.g., All Things Considered: Scalia Vigorously Defends a 'Dead' Constitution (National Public Radio broadcast Apr. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90011526>.

*Chicago*² makes the case for a more robust insanity. *McDonald* gave the Court a singular opportunity to rectify a century-old jurisprudential perversion, the profound consequences of which continue to shape our constitutional culture. Justice Scalia (and the plurality of Justices he joined) declined that opportunity, not because, as they protested, modesty forbade it. They did so because they rather like the consequences of that perversion.

In support of that confrontational claim, this essay briefly reviews the Court's *McDonald* decision, underscoring the fork in the road it presented. Part II then explains why Justice Scalia and his colleagues in the plurality were anything but disinterested in this far-more-than-academic choice. Specifically, although the election among paths is of little or no consequence for gun rights, the immediate issue before the Court, it is of enormous importance for the full range of issues addressed by the Court's modern unenumerated rights jurisprudence, which governs everything from parental rights and academic freedom to reproductive rights and sexual autonomy. In Part III, this essay explores the likely significance of this recent chicanery for future unenumerated rights decisions and for the integrity of the Court's interpretative enterprise.

I. A CASE (NOT REALLY) ABOUT GUNS

On its face, *McDonald* was a case about handguns, specifically Chicago's regulation effectively banning them.³ Two years ago in *District of Columbia v. Heller*⁴ the Court had invalidated D.C.'s similar law, and the issue before the Court in *McDonald* was whether that rule of decision extended beyond the federal enclave to circumscribe the powers of state and local governments throughout the nation. Taking *Heller* as a given, the question might have been non-controversial. The reasoning of the

² 130 S. Ct. 3020 (2010).

³ *Id.* at 3025. See also Chicago, Ill., Municipal Code § 8-20-040(a) (2009).

⁴ 128 S. Ct. 2783 (2008).

Court's modern case law finding specific Bill of Rights provisions to be incorporated into the Fourteenth Amendment fairly clearly extended to the kind of individual right *Heller* had recognized.⁵ Yet the Court split five to four on the issue, with the five Justices in the *Heller* majority voting to extend it over the opposition of three of the *Heller* dissenters, joined by their newest colleague, Justice Sotomayor.⁶

None of this surprised anyone, the only suspense *McDonald* generated concerning *which* part of the Fourteenth Amendment would be found to encompass the substance of the Second. In an opinion for four Justices, Justice Alito decided the case on the basis of the Fourteenth Amendment's prohibition on state deprivations of a person's life, liberty, or property without

⁵ See *McDonald*, 130 S.Ct. at 3036-42. To be sure, the lower federal courts found themselves on the horns of a dilemma. On the one hand, the rationale of *Heller* pointed towards application of the Second Amendment to the states. On the other hand, however, the Supreme Court has commanded that when one of its rulings "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Discerning when an ancient precedent has "direct application" to a current case is more of an art than a science. Compare *National Rifle Ass'n of America, Inc. v. Chicago*, 567 F.3d 856, 858 (2009) (incorporation question controlled by Reconstruction-Era cases), with *Nordyke v. King*, 563 F.3d 439, 448-49 (2009) (Reconstruction-Era cases did not foreclose consideration of the selective incorporation issue).

⁶ The dissents might best be understood as reflecting their authors' continuing non-acquiescence in *Heller* itself, see *e.g.*, *McDonald*, 130 S. Ct. at 3122 (Breyer, J., dissenting) (chastising the Court for declining to reconsider *Heller* in light of intervening scholarly criticism), despite the dissenters' occasional protestations that they took "*Heller* as a given." *Id.* For a counting of the individual Justices' votes that produces a surprising result, see David S. Cohen, *The Paradox of McDonald v. City of Chicago*, __ Geo. Wash. L. Rev. __ (forthcoming 2010), available at <http://www.ssrn.com/link/Drexel-U-LEG.html> (concluding that "separate and overlapping majorities of the Court found, paradoxically, that the Second Amendment was incorporated against state and local governments but also that neither the Due Process Clause nor the Privileges or Immunities Clause incorporated the right").

“due process of law.”⁷ As Justice Thomas observed in his separate opinion concurring in the result, this provision might have seemed an unpromising one, given that it apparently spoke in terms of minimal procedures rather than substantive rights of any sort.⁸ But as Justice Alito had painstakingly explained, for more than a century the Court had persisted in just such an apparent misreading of the Fourteenth Amendment’s text.⁹ For him and his colleagues in the plurality, the instant case provided no occasion for correction of that error, if error there was.¹⁰

Were nothing more at stake, it might be hard to argue with such a Burkean prudence.¹¹ But for the reasons developed below in Part II, that ancient error (and error there most certainly had been) had long distorted discussion about the Constitution’s protection of individual rights. Before the Fourteenth Amendment’s guarantee of due process, section 1 forbade states from making or enforcing “any law abridging the privileges or immunities of citizens of the United States.”¹² No other clause of the Constitution apparently promised so much only to be authoritatively construed to mean so little.¹³ In *The Slaughter-House Cases*,¹⁴ decided a mere five years after the Fourteenth Amendment was ratified, a bare majority of the Justices badly butchered the Privileges or Immunities Clause, reducing it to an absurdly narrow and historically irrelevant compass. Legal academics dispute nearly everything, yet there is virtual unanimity that the Court misconstrued the Privileges or Immunities Clause in *The Slaughter-House Cases*¹⁵ (though, of course, there is nothing

⁷ U.S. Const. am. 14, § 1; see *McDonald*, 130 S. Ct. at 3030 (plurality opinion).

⁸ *Id.* at 3059 (Thomas, J., concurring in the judgment).

⁹ *Id.* at 3030-31 (plurality opinion).

¹⁰ *Id.*

¹¹ See generally Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) (describing tension between a Burkean deference to tradition and an originalist approach to constitutional interpretation).

¹² U.S. Const. am. 14, § 1.

¹³ See generally 130 S. Ct. at 3060-3061.

¹⁴ 83 U.S. 36 (1873).

¹⁵ 130 S. Ct. 3030.

approaching consensus as to what the correct construction of that clause might be).¹⁶

As Justice Scalia observed in his opinion for the Court in *Heller*, the Second Amendment is something of a final frontier for constitutional interpretation. More than two centuries old, the Second Amendment was there treated rather like a blank slate, free from any distorting judicial gloss accumulated in the intervening centuries.¹⁷ Applying *a priori* principles to decode the constitutional text, *Heller* held that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.”¹⁸ Hence, McDonald’s challenge, filed in the immediate wake of *Heller*,¹⁹ to Chicago’s handgun ordinance for the first time squarely brought to the Court the one-hundred-forty-year-old question: did the Fourteenth Amendment make the Second Amendment a limit on the states as well as the federal government? If ever there would be occasion for the contemporary Court to correct its *Slaughter-House* slip, *McDonald* seemed to provide it.

Justice Alito, at this point writing for five Justices, came close to conceding as much. He engaged in an unusually extensive discussion of the manner in which petitioners’ had presented their alternative legal arguments against the Chicago ordinance, describing their claim that the right to keep and bear arms was among the “privileges or immunities of U.S. citizens” as their “primary submission.”²⁰ Their contention that the right ought to be incorporated into the Due Process Clause of the Fourteenth Amendment and thereby made applicable to state and local governments was “a secondary argument.”²¹ He then launched

¹⁶ *Id.*

¹⁷ *Heller*, 128 S. Ct. at 2815-2816; *but see id.* at 2822-23 (Stevens, J., dissenting) (insisting that precedent foreclosed the majority’s interpretation of the Second Amendment).

¹⁸ *McDonald*, 130 S. Ct. at 3026 (plurality opinion).

¹⁹ *Id.* at 3027.

²⁰ *Id.* at 3028-3031.

²¹ *Id.* at 3028.

into a five-page discussion on the sad history of U.S. citizens' privileges and immunities, acknowledging that legal scholars have been uncharacteristically in accord in their condemnation of "the narrow *Slaughter-House* interpretation" of that clause of the Fourteenth Amendment.²² He even added that the Court's 1876 *Cruikshank* decision holding that the right to keep and bear arms was not a privilege or immunity within the meaning of that provision was itself the product of the Court's ignominious abandonment of Reconstruction, arising as it did in the context of the Court's award of amnesty to perpetrators of the "infamous Colfax Massacre in Louisiana on Easter Sunday 1873."²³ Had Justice Alito set out to lay the foundation for overruling *Cruikshank* and embarking on the privileges or immunities path, it is difficult to imagine what more he might have done.

But it was all wind up and no pitch. For on the following page, now writing for a plurality of four Justices, Alito tersely dismissed the argument with the imperious declaration that "[w]e see no need to reconsider [the *Slaughter-House Cases*'] interpretation here."²⁴ There was, he found, no impediment to a due process decision. The *Cruikshank* Court had not expressly addressed a due process claim, no doubt because the litigants had not surprisingly failed to anticipate that the Court would read the clause of the Fourteenth Amendment apparently protecting rights to be a nullity and then go on to read a clause evidently about procedures to be a font for substantive rights.²⁵ Having turned a

²² *Id.* at 3029.

²³ *Id.* at 3030; *see also id.* (noting that "[d]ozens of blacks, many unarmed, were slaughtered by a rival band of armed white men" and that the lead defendant in the case had "himself marched unarmed African-American prisoners through the streets and then had them summarily executed"), *citing* C. LANE, *THE DAY FREEDOM DIED* 265-66 (2008).

²⁴ *McDonald*, 130 S. Ct. at 3030. *See generally* Nelson Lund, Two Faces of Judicial Restraint (or are There More?) in *McDonald v. City of Chicago* 11, http://www.ssrn.com/abstract_id=1658198 (last visited Aug. 22, 2010) (concluding that Alito's opinion reflected "a very strong, if implicit, position that judicial restraint consists primarily in fidelity to precedent").

²⁵ *Id.* at 3031.

blind eye to the kind of intellectual jujitsu inherent in this history, Justice Alito proceeded to first describe²⁶ and then apply the standard for “selective incorporation” as it ultimately emerged in the Court’s 1968 ruling in *Duncan v. Louisiana*.²⁷ The only surprising aspect of this analysis was that it was not unanimous among the eight Justices who found it to be more or less the proper inquiry. But these eight were unanimous as to one, critical decision -- to leave the Privileges or Immunities Clause in the same moribund condition in which they found it.

Justice Scalia devoted two sentences of his fifteen-page concurring opinion to explaining why he joined Justice Alito’s analysis despite his “misgivings about Substantive Due Process as an original matter.”²⁸ Citing his own opinion in *Albright v. Oliver*,²⁹ where he had first formally “acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights,” he reiterated that he did so because the practice was “both long established and narrowly limited.”³⁰ As such his assent to incorporation was more a pragmatic than a principled one, the concession of a moderate statesman submitting to the errors of his predecessors. In short, the kind of temperate compromise expected of anyone “not a nut.”

Scalia had in effect broadcast this position when, at oral argument, he derisively dismissed the petitioners’ Privileges or Immunities Clause argument as “that darling of the professoriate.”³¹ In so exempting a cornerstone of modern constitutional jurisprudence from the dictates of his oft professed dedication to originalism, however, he disregarded his own trenchant observation that the “notion that the absence of a

²⁶ *Id.* at 3034.

²⁷ 391 U.S. 145 (1968).

²⁸ 130 S. Ct. at 3050 (Scalia, J., concurring).

²⁹ 510 U.S. 266 (1994).

³⁰ 130 S. Ct. at 3050 (Scalia, J., concurring) (quoting *Albright*, 510 U.S. at 275 (Scalia, J., concurring)).

³¹ *McDonald v. City of Chicago*, Transcript no. 08-1521, pg. 7, line 9 (argued March 2, 2010).

coherent theory [of constitutional interpretation] will somehow curtail judicial caprice is at war with reason.”³² Even if the instant case did not “require [him] to reconsider [the] view” he had expressed in *Albright*,³³ it certainly permitted and invited him to do so, as the example of Justice Thomas illustrates.³⁴ After all, Justice Scalia has made it clear that he does not “believe in rigid adherence to *stare decisis* in constitutional cases.”³⁵ So why did he meekly refrain from going where his originalist method would have taken him? Why the sudden modesty?

II. WHAT A DIFFERENCE A CLAUSE CAN MAKE

The Court’s most controversial decisions have, almost without exception, concerned claims of unenumerated rights. This should come as no surprise. As Justice White noted, the “Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”³⁶ That the case in which he made this observation has itself been overruled only underscores the vitality and intensity of that debate. In the early twentieth century, the great constitutional clashes centered around the rise and fall of liberty of contract, a notion the Court, for a time, found implicit in the Due Process Clause.³⁷ In the latter half of the century and into this one, the most volatile of

³² 130 S. Ct. at 3052 (Scalia, J., concurring) (emphasis in original).

³³ *Id.* at 3050 (Scalia, J., concurring).

³⁴ *Id.* at 3058-3059 (Thomas, J., concurring in the judgment) (analyzing the case under the Privileges or Immunities Clause).

³⁵ *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting). Nor is Justice Scalia alone in his *stare-decisis* agnosticism. See generally Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1537 (2008) (asserting that in the 2006 Term, “[i]n case after case, Roberts and Alito abandoned the principle of *stare decisis*.”).

³⁶ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by Lawrence*, 539 U.S. 558.

³⁷ See *Lochner v. New York*, 198 U.S. 45, 53 (1905); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

constitutional questions have concerned reproductive freedom³⁸ and sexual autonomy.³⁹ After an initial hesitancy⁴⁰ and experimentation with alternative avenues,⁴¹ the modern Court, like its *Lochner* Era predecessors, rooted these rights in the due process clauses of the Fifth and Fourteenth Amendments.⁴² The concept if not all of its manifestations at some point apparently entered the constitutional canon. Judge Bork doomed his 1987 nomination to the Supreme Court when he proclaimed that he could find no right to privacy in the Constitution.⁴³

Nonetheless, Justice Scalia has ordered his constitutional jurisprudence in opposition to the Court's modern unenumerated-rights rulings. If a Justice can ever claim a mandate, he could fairly claim this to be his. He was nominated to serve on the Court by a President twice elected on a platform that renounced *Roe v.*

³⁸ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

³⁹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁴⁰ See generally *Griswold*, 381 U.S. 479. See also Erwin Chemerinsky, *Substantive Due Process*, 17 *TOURO L. REV.* 1501, 1506 (1999) ("The best illustration of the avoidance of substantive due process is Justice Douglas's majority opinion in *Griswold v. Connecticut*.").

⁴¹ See generally *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁴² See Chemerinsky, *supra* note 40, at 1507 (*Roe* "was unquestionably a substantive due process case.").

⁴³ See Thomas B. McAfee, *The Role of Legal Scholars in Confirmation Hearings for Supreme Court Nominees -- Some Reflections*, 7 *ST. JOHN'S J. LEGAL COMMENT.* 211, 214 (1991) ("According to his scholarly and senatorial opponents, Judge Bork's steadfast opposition to the legitimacy of judicial elaboration of unenumerated constitutional rights was a sufficient ground to reject his nomination. This single issue became the linchpin in the argument that he was a constitutional extremist."). See also Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *CHI. KENT L. REV.* 131, 135 (1988) ("Judge Bork was deprived of a seat on the Supreme Court largely because of his refusal to acknowledge the 'unenumerated' right to privacy as being part of the set of constitutional rights legitimately enjoyed by Americans.").

Wade as an illegitimate judicial usurpation⁴⁴ and was confirmed the year before the Bork nomination became a senatorial referendum on originalism, after which the three Justices nominated by a Republican have had to pretend indecision as to the constitutional status of abortion.⁴⁵

In any event, Scalia has faithfully pursued his anti-unenumerated-rights agenda. In the almost twenty-five years he has been a Justice, the Court has considered or reconsidered claims that the Constitution implicitly protected an individual right to refuse life-sustaining medical treatment,⁴⁶ have access to one's biological children,⁴⁷ deny others access to one's children,⁴⁸ engage in adult, consensual homosexual sex,⁴⁹ as well as terminate a pregnancy⁵⁰ including via a specifically banned procedure.⁵¹ Petitions for *certiorari* have during this same period begged in vain for the Court to decide whether the Constitution implicitly guaranteed a right to be free of blatantly protectionist economic regulation,⁵² to access potentially life-sustaining pharmaceuticals pending FDA approval,⁵³ and to distribute both sexual stimulation devices⁵⁴ and hard-core pornography.⁵⁵ Justice Scalia's

⁴⁴ See H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 672 (2004).

⁴⁵ See Robert J. Pushaw, *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 588 (2008).

⁴⁶ See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

⁴⁷ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁴⁸ See *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000).

⁴⁹ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁰ See *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

⁵¹ See *Stenberg v. Carhart*, 530 U.S. 914, 929 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁵² Compare *Craigsmiles v. Giles*, 312 F.3d 220, 229 (2002) (invalidating funeral director's licensing requirement as a "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers"), with *Brown v. Hovatter*, 561 F.3d 357, 369 (4th Cir. 2009) (upholding a similar licensing requirement).

⁵³ See *Abigail Alliance v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2008) (en banc).

⁵⁴ See *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001).

unwavering response to such claims when they have reached the Court has been to reject them, often in dissent from his colleagues' contrary views.⁵⁶

Moreover, Justice Scalia has consistently sought to recast the discussion so as to sharply circumscribe the Court's capacity to enlarge the list of "fundamental rights" meriting meaningful substantive protection under the Due Process Clause. In his plurality opinion in *Michael H. v. Gerald D.*, Scalia declared that

[i]n an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest *traditionally protected* by our society.⁵⁷

Nor did he stop there. In a portion of his opinion in which only the Chief Justice joined, Scalia added that, when searching for evidence of our traditions, the Court "refer[s] to the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁵⁸ Whatever the merits of this methodology,⁵⁹ it is apparent that

⁵⁵ See *United States v. Extreme Associates, Inc.*, 552 F.Supp.2d 578 (W.D. Pa. 2005) (dismissing prosecution brought under federal obscenity statutes as contravening individuals' substantive due process rights to possess and view obscene material in the home), *rev'd*, 431 F.3d 150 (3d. Cir. 2005).

⁵⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting); *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting); cf. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring).

⁵⁷ 491 U.S. 110, 122 (1989) (plurality opinion) (emphasis added).

⁵⁸ *Id.* at 127 n.6.

⁵⁹ Compare Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090 (1990) (criticizing Scalia's proposed methodology), with Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991) (defending same).

Scalia asserted (and repeatedly reasserted) it as a tool to cabin judicial identification of unenumerated rights out of a hostility to them.

The analytical linchpin of Justice Scalia's assault on the modern unenumerated rights cases is that the very term "substantive due process" is itself an oxymoron.⁶⁰ Indeed, the due process clauses of the Fifth and Fourteenth Amendments promise *process* before life, liberty, or property can be taken away. So long as procedural requisites are satisfied, it would seem that the state can, insofar as due process is concerned, deprive the individual of her liberty, her property, and even her life. *A fortiori*, so the argument goes, with sufficient procedures (such as those necessary to enact a statute) the state can take an individual's "right" to refuse life-sustaining medical treatment⁶¹ or terminate a pregnancy⁶² or do any of the other things the Court's substantive due process cases have deemed sacrosanct. In so arguing, Scalia follows the example, and draws upon the prestige and authority, of a politically diverse array of distinguished jurists⁶³ and

⁶⁰ See, e.g., *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation."). See also *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) ("there is no right to 'liberty' under the Due Process Clause The Fourteenth Amendment expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided.") (emphasis in original); *Albright*, 510 U.S. at 275 (Scalia, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-471 (1993) (Scalia, J., concurring) (same).

⁶¹ See *Cruzan*, 497 U.S. 261.

⁶² See *Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113. On this view, the Due Process Clause would entitle someone prosecuted under the Texas abortion statute, for example, to a trial before conviction and punishment, but does not confer immunity from prosecution altogether, as did the Court's decision in *Roe*.

⁶³ See, e.g. *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (Hughes, C.J.) ("[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The

commentators.⁶⁴ Moreover, this argument's emphasis on the *text* of the Due Process Clause (in contradistinction to, for example, inquiry into the intent of its drafters⁶⁵ or such historical antecedents of the clause as the Magna Carta⁶⁶) accords with Scalia's

Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”); Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (Posner, J.) (discussing “the ubiquitous oxymoron ‘substantive due process’”); United States v. Fitzgerald, 724 F.2d 633, 639 (8th Cir. 1983) (en banc) (Arnold, J., concurring) (noting substantive due process is “an oxymoron if ever there was one”). *See also* Gosnell v. City of Troy, 59 F.3d 654, 657 (7th Cir. 1995) (asserting that substantive due process is an oxymoron and procedural due process is a redundancy); Newell v. Brown, 981 F.2d 880, 885 (6th Cir. 1992) (noting substantive due process is a “durable oxymoron”). *See generally* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 894 n.195 (2000) (citing cases).

⁶⁴ *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 3 (1997); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (labeling substantive due process a “momentous sham”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (describing substantive due process as “a contradiction in terms-- sort of like ‘green pastel redness’”); Akhil Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 122-23 (2000).

⁶⁵ *See, e.g.*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009) (arguing that at the time the Fifth Amendment was adopted one widely shared interpretation of the Due Process Clause was that it protected unenumerated substantive rights).

⁶⁶ *Id.* These inquiries are not necessarily inconsistent with a textualist approach to constitutional interpretation. *See id.* at 588-89 (distinguishing between “original-meaning originalism,” which focuses on how the constitutional *text* would have been understood by the relevant community at the time of its adoption, and “intentional meaning originalism,” which focuses on the intent of a provision’s drafters). But to conform to textualism interpretations drawn from inquiries into original meaning must confront and surmount the fact that “[b]y their terms, the Due Process Clauses of the Fifth and Fourteenth Amendments appear to protect only rights to legal process.” *Id.* at 589.

“textualist” methodology for both statutory and constitutional interpretation.⁶⁷

Of course the paradox of looking to an apparently procedural guarantee for the protection of substantive rights vanishes once one shifts the focus from the Due Process to the Privileges or Immunities Clause. The language of that clause is perfectly consistent with, indeed arguably invites, a reading that accords it substantive significance. To be sure, a great deal of work remains to be done to get from even *that* text to the Court’s unenumerated rights rulings, either historical⁶⁸ or contemporary,⁶⁹ and it is far from clear how such inquiries either would or ought to be resolved. But at least such efforts would be directed to the right part of the Constitution, and the debate would be freed from the sophistries occluding understanding that have long been prevalent in the substantive due process conversation – including the incorporation debate.

In addition to the claim that the very concept of substantive due process is oxymoronic, the location of substantive rights in the Due Process Clause presents other serious interpretative anomalies. For example, the assertion that such Bill of Rights protections as the prohibitions on double jeopardy and compulsory self-incrimination are made applicable to the states via the Due Process Clause of the Fourteenth Amendment encounters the difficulty that the Fifth Amendment distinctly enumerates all three rights guarantees. As Justice Frankfurter observed in his opposition to Justice Black’s “total incorporation” theory, “[i]t ought not to

⁶⁷ See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9-20 (Amy Guttman, ed., 1997). See also *Heller*, 128 S. Ct. at 2788 (“In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. 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.”) (internal quotation marks and citation omitted).

⁶⁸ See *supra* note 37.

⁶⁹ See *supra* notes 38 - 51 and accompanying text.

require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth.”⁷⁰ But that interpretative anomaly would be inescapable, absent attribution of an astounding redundancy to the draftsmanship of James Madison, an equally grave hermeneutical sin.⁷¹ As with the “oxymoron” label, this Hobson’s choice is avoided if the Fourteenth Amendment’s Privileges or Immunities Clause replaces the Due Process Clause as the font of incorporation.⁷² This shift would dispense with any need to read due process to mean different things when found in different parts of the Constitution. In short, the Due Process Clause is an exceedingly awkward textual basis for the protection of both enumerated and unenumerated substantive rights.⁷³

⁷⁰ *Adamson v. California*, 332 U.S. 46, 66 (Frankfurter, J., concurring).

⁷¹ *Id.* Frankfurter also dismissed as self-evidently erroneous “a construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights.” *Id.* at 67. He observed that “[t]he short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains ‘nor shall any State deprive any person of life, liberty, or property, without due process of law,’ was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of 12 in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds \$20, is that it is a strange way of saying it.” *Id.* at 63. Identification of at least some of these rights as the privileges or immunities of U.S. citizens is, however, far less jarring.

⁷² On the significance of the parallel between the “privileges and immunities” clause of Article IV, section 2, and the “privileges or immunities” clause of the Fourteenth Amendment, see *infra* notes 75 - 77 and accompanying text.

⁷³ Justice Black tacitly acknowledged as much when, in his *Adamson* dissent, he referred repeatedly to “section 1” of the Fourteenth Amendment, leaving it somewhat ambiguous as to *which* part of that section he was invoking. See, e.g., *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting) (asserting that “one of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states”); see also *id.* at 124 (Murphy, 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.”).

In addition to avoiding the wrong questions, a focus on the Privileges or Immunities Clause would permit sustained judicial consideration of the right ones.⁷⁴ The scope of the Fourteenth Amendment's protection would be reconnected to the parallel provision in Article IV, section 2,⁷⁵ and to Justice Washington's celebrated antebellum disquisition on the same,⁷⁶ which was forefront in the minds of many of the Amendment's framers.⁷⁷ A great deal of scholarly ink has already been, and continues to be, spilt on these matters,⁷⁸ but a judicial resurrection of the Privileges or Immunities Clause would provide an avenue for reception of these debates into the U.S. reports. Wherever these conversations might ultimately lead, one can imagine why Justice Scalia would prefer they never occur. They could only complicate and weaken his case against the modern case law he so detests.

⁷⁴ See Christopher R. Green, The Original Sense of "Of" in the Privileges or Immunities Clause 7 (Aug. 12, 2010), <http://www.ssrn.com/abstract=1658010> (observing that "refocusing the textual inquiry on the Privileges or Immunities Clause would allow proper framing of the historical questions related to the Fourteenth Amendment").

⁷⁵ U.S. Const., art. IV, § 2.

⁷⁶ *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

⁷⁷ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard); see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1416-20 (1992) (discussing possible influence of *Corfield* on the Fourteenth Amendment's framers).

⁷⁸ See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 57-69 (2d ed. 1997); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 7-8 (1998); Philip A. Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. ____ (forthcoming 2011), available at <http://ssrn.com/abstract=1557870>; Harrison, *supra* note 77, at 1416-20; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham's Epiphany*, ____ GEO. L.J. ____ (forthcoming 2011), available at <http://ssrn.com/abstract=1561183>; Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 771-92 (2001); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIB. 115 (2010).

More important even than the effect on the unenumerated rights debate would be the significance of a Privileges or Immunities Clause ruling for the conversation about interpretative method. Finally that discussion would be freed from so much of the baggage that Bork brought to it, with his talk of constitutional inkblots and his recalcitrant opposition to even the possibility of a reservoir of rights beyond the first eight amendments.⁷⁹ And the application of those amendments to state and local governments, which after all is where modern constitutional law works its greatest practical significance, might be compelled by an originalist methodology, rather than as the *McDonald* suggests, a grudging concession of originalist principles for the sake of stability. Far from undermining the application of (most of) the Bill of Rights to the states, a privileges or immunities ruling in *McDonald* may have placed the practice on a firmer foundation, while as the same time making less radical the consequences of adopting the interpretative method Scalia professes to embrace.⁸⁰

To be sure, were the Privileges or Immunities deemed an equality provision, as some have forcefully argued,⁸¹ then the Court's protection of substantive rights -- whether enumerated in the Bill of Rights or found nowhere in the Constitution -- from state intrusion would be set on a collision course with originalism.⁸² Accordingly, one possible consequence of a privileges-or-immunities-based jurisprudence would be that originalist Justices would have to choose between substantive and equality interpretations of that provision -- between, on the one hand, a jurisprudence including both incorporation and unenumerated rights or, on the other hand, a modern case law

⁷⁹ See *supra* note 43.

⁸⁰ Because the Fourteenth Amendment protects the privileges and immunities of U.S. "citizens" and extends due process to all "persons," an issue, well beyond the scope of this essay, would then arise under the Amendment as to which federal rights ought not to belong to non-citizens. U.S. Const. am. 14, § 1.

⁸¹ See, e.g., Harrison, *supra* note 77, at 1422; Hamburger, *supra* note 78.

⁸² Cf. Lawrence Rosenthal, The New Originalism and Incorporation, <http://www.ssrn.com/abstract=1358473> (last visited Aug. 22, 2010) (arguing that the "original public meaning" case for incorporation is problematic).

having neither. A desire to avoid such a stark choice would give Justice Scalia yet another reason, more pragmatic than principled, to prefer a muddled due-process compromise to the privileges or immunities inquiry originalism would seem to require. But he avoids this inquiry only at the cost of “dilut[ing] originalism and mak[ing] it a nakedly discretionary practice.”⁸³

III. WHAT DIFFERENCE WILL *MCDONALD* MAKE?

Since *McDonald* was really about the Court’s unenumerated rights rulings, the decision invites speculation about what effect it will likely have on them, both in the near and more distant future.

In the short run, *McDonald* signals a return to the *Washington v. Glucksberg*⁸⁴ settlement, according to which the Rehnquist Court purportedly committed itself to applying a grudging and restrictive methodology for identifying new unenumerated fundamental rights. Scalia’s atypical silence in *Glucksberg* represented his declaration of victory in his long struggle to halt the advance of substantive due process; there was no need for him to write separately (and abundant reason not to do so) when the Chief Justice’s opinion for the Court pledged it to an approach to discovering new unenumerated in terms close to those Scalia himself had used (albeit never for majority of the Justices).⁸⁵ The practical consequence of this settlement is that the Court will honor its precedents and protect the unenumerated rights it has previously found to be entitled to some form of enhanced judicial scrutiny, but that it will almost invariably decline invitations to name new rights, even when presented with claims highly

⁸³ Reva B. Siegel, *Heller and Originalism’s Dead Hand: In Theory and Practice*, 56 UCLA L. REV. 1399, 1409 (2009).

⁸⁴ 521 U.S. 707 (1997).

⁸⁵ For a discussion of Justice Scalia’s proposed substantive due process methodology, see *supra* notes 57 - 59 and accompanying text.

analogous to those it had in the past embraced.⁸⁶ To choose but one example, *McDonald* makes it less likely that the Court will recognize a right to potentially lethal palliative care, even though five Justices arguably held open that possibility⁸⁷ in *Glucksberg* itself.⁸⁸

In the longer term, however, it is far from clear that even the rights the Court has previously recognized will continue to enjoy the Court's solicitude. It is no secret that not only our constitutional but indeed our political culture has for more than three decades labored under the weight of a deep and passionate divide on the issue of abortion. When then-nominee John Roberts came before the Senate Judiciary Committee, the candidate and his inquisitors spoke of this matter in code, substituting for *Roe* the

⁸⁶ See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 568 (2002) (asserting that *Glucksberg* was notable "not only because the Court unanimously declined to announce a constitutional right to assisted suicide, but because the majority opinion offered an analysis of fundamental rights that suggested that there would be few such announcements in the future").

⁸⁷ See *Glucksberg*, 521 U.S. at 736-37 (O'Connor, J., concurring) (stressing that "[t]he parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death"). Justices Ginsburg and Breyer joined Justice O'Connor's opinion. *Id.* at 736. See also *id.* at 750 (Stevens, J., concurring in the judgment) (declining to "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge"); *id.* at 780 (Souter, J., concurring in the judgment) (emphasizing that "[t]he State . . . generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding"). See also David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L.Q. 947, 951-54 (1997) (discussing O'Connor and Breyer opinions' treatment of palliative care issues).

⁸⁸ Additional examples are supplied by the numerous contentious claims considered in the lower federal courts and assiduously avoided by the Supreme Court. See *supra* notes 52-55, and accompanying text.

concept of the “superprecedent.”⁸⁹ The idea was that some rulings, no matter how wrong, might become so embedded into our fundamental law, most obviously by the Court’s repeated reaffirmation of their substance, that any further reconsideration would be ill advised, even reckless.⁹⁰ Roberts dutifully promised that he believed in such precedents and pledged to honor them were he confirmed.⁹¹ When Roberts joined the Court as its sixteenth Chief Justice, five other members were on record in support of *Roe*’s “fundamental holding,” and nothing in the meantime affords any reason to suspect that this has changed. But it might. The three out of those five Justices who remain on the Court are now in their seventies,⁹² and one has struggled against cancer.⁹³ Should any one of those Justices’ seats become vacant during a Republican administration, the Chief Justice might be tested as to whether *Roe* (as modified in *Casey*) really deserved super-precedential status.⁹⁴ And of course whither *Roe* other unenumerated rights precedents⁹⁵ might follow. To be sure, *McDonald* in no way commits the Roberts Court to pursuit of such an unenumerated rights rollback, but it assiduously avoided adding an obstacle to that path.

Finally, *McDonald* makes it significantly less likely that the Justices will, anytime within a judicial life now in being, make substantial progress towards putting their interpretative house in

⁸⁹ Jeffrey Rosen, *So, Do You Believe in “Superprecedent”?* N.Y. TIMES, Oct. 30, 2005, at 41.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Biographies of Current Justices of the Supreme Court, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Aug. 9, 2010).

⁹³ See *Ailing Justice Returns to Court*, N.Y. TIMES, Sept. 26, 2009, at A13.

⁹⁴ There is perhaps less reason to wonder where Justice Alito stands on the matter. Shortly after the announcement of his nomination, his mother said of her son, a Catholic, “of course he [was] against abortion.” *Court’s New Order: Bush Picks Samuel Alito for Supreme Court Spot*, CHI. TRIB., November 1, 2005, at 3.

⁹⁵ See *supra* notes 38 - 51 and accompanying text.

order. Much of the Court's modern case law concerning individual rights, including both those enumerated in the Bill of Rights and those lacking such a textual hook, at least appears to be willful invention from an originalist perspective.⁹⁶ As noted above, the precedents' claim that substantial portions of the First, Fourth, Fifth, Sixth, and Eighth Amendments are implicit in the Fourteenth Amendment's Due Process Clause confronts unanswerable textual objections.⁹⁷ Of course, even more fundamentally the existence of a written Constitution arguably undercuts the case for an unwritten one.⁹⁸ This rupture between the jurisprudence and the Constitution's text emits its own penumbras and emanations, which eventually lead to the startling, but descriptively compelling, claim that the Constitution's text has become irrelevant to the project of modern constitutional law.⁹⁹

Such a verdict should be more than a little troubling, given that the justification for judicial review is that treating a *written* constitution as fundamental law requires no less.¹⁰⁰ Had the Court taken the occasion of *McDonald* to shift the focus from the Due Process to the Privileges or Immunities Clause of the Fourteenth Amendment, the effort to square the U.S. reports with the words if not also the history of the Constitution would have been made that much easier. The Court's failure to do so supplies dispiriting evidence that such matters as intellectual consistency and coherence count for little in the minds of most sitting Justices.

⁹⁶ See, e.g., BERGER, *supra* note 78, at 413; see also *supra* note 64.

⁹⁷ See *supra* notes 70 - 71 and accompanying text.

⁹⁸ See generally THOMAS B. MCAFFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* 173 (2000) ("A rights foundationalist theory of the Constitution . . . carries the potential to privilege judicial views of natural law or political morality over the views of the people who are the source of judicial office.").

⁹⁹ See Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

¹⁰⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See generally MCAFFEE, *supra* note 98, at 172.

CONCLUSION

To the casual observer, the mainstream media, pundits, most monitoring lawyers, and even the dissenting Justices, *McDonald* was a gun-rights case. But *Heller* had so foreshadowed the ultimate verdict on the Second Amendment's application to the states as to all but foreclose credible contrary argument. The real significance of the decision lies in what it says about the Fourteenth Amendment's protection of the privileges or immunities of citizens, whether and if so to what extent that clause accords protection to individual rights, including rights not enumerated in the Bill of Rights, and the rigor with which a majority of the Justices are willing to treat the text of the Constitution. Sadly, *McDonald* teaches that citizens' privileges and immunities, whatever they may be, will linger in obscurity and forecasts that future debate about such issues as parental rights and reproductive freedom will be conducted on the basis of false premises and with arguments designed more to obfuscate than to enlighten. What all this in turn means for the present state of judicial fidelity to the Constitution is no cause for celebration.