

# PRUDENTIALISM IN MCDONALD V. CITY OF CHICAGO

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Justice Stevens'[s] final reason for rejecting incorporation of the Second Amendment reveals, more clearly than any of the others, the game that is afoot. Assuming that there is a "plausible constitutional basis" for holding that the right to keep and bear arms is incorporated, he asserts that we ought not to do so *for prudential reasons*.<sup>1</sup>

Prudential considerations have long been understood to influence Supreme Court decisionmaking. At least two kinds of prudential arguments have been identified in the literature on constitutional interpretation. The first, broader form of prudentialism inquires into the overall consequences for the constitutional system, whether good or bad, of deciding a constitutional question in a particular way.<sup>2</sup> One might call this variant *system-centered prudentialism*. The second, narrower type inquires into the consequences of having the federal courts, as opposed to some other institution, decide the issue in a particular way.<sup>3</sup> One might call this category *court-centered prudentialism*.

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1. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3056 (2010) (Scalia, J., concurring).

2. *See, e.g.*, PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 55 (5th ed. 2006); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 61 (1982) ("Prudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision.").

3. *See, e.g.*, BREST ET AL., *supra* note 2, at 55.

System-centered prudentialism endeavors to register an all-things-considered judgment about the relative costs and benefits of alternative resolutions of a constitutional question. Court-centered prudentialism focuses more specifically on the way in which the federal judiciary responds to a controversy. For example, court-centered prudentialism may inform whether the Justices decide a case or decline to decide, whether they decide the merits or decide on procedural grounds, or whether they decide the merits relatively broadly or narrowly.

Commentators often characterize court-centered prudentialism as motivated by anxiety over the Supreme Court's preservation of its own public legitimacy, which can be undermined when the Justices decide divisive issues in ways that cause backlash.<sup>4</sup> In my own work, for example, I have stressed the importance of the virtue of judicial statesmanship. Judicial statesmanship, among other things, counsels the Justices to perceive and vindicate the preconditions of the public legitimation of the constitutional law that they craft.<sup>5</sup> By contrast, system-centered prudentialism asks not only what judicial response is best for the Court's present and future effectiveness, but also what resolution is best for the constitutional system as a whole when the Court's own legitimacy is not threatened.<sup>6</sup>

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4. See, e.g., *id.* (“[Judges] may be concerned that taking up a controversial question, or offering a broad or ambitious reading of the Constitution, even if correct, will provoke a backlash from the other branches of government or from the public generally.”). For a classic display of court-centered prudentialism, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

5. See generally Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

6. Court-centered prudentialism is a subset of system-centered prudentialism because judgments about what is best for the Court properly inform judgments about what is best for the constitutional system as a whole. This may be why scholars do not always distinguish the two forms of prudentialism. See, e.g., Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401 (2005) (“[T]he rules of avoidance, putatively about judicial restraint and deference to political institutions, allowed the Court to play a game of high-stakes politics, to correct individual injustice in some circumstances, and to protect its independence and future autonomy.”); BREST ET AL., *supra* note 2, at 55 (noting the possibility of prudential objections to judicial decisions that “in the long run will have worse consequences for the constitutional system than if courts had avoided taking up the issue directly for the moment, deferred to the political branches, or offered a narrow or limited ruling”). I offer the distinction between court-centered and system-centered prudentialism because I want to explore situations in which Justices reason prudentially but are unconcerned about the Court's institutional position.

The Court's recent decision in *McDonald v. City of Chicago*<sup>7</sup> illustrates the practice of system-centered prudentialism. Judging from the concerns raised by several Justices at oral argument, especially Justice Scalia, members of the *McDonald* plurality appeared to reason prudentially in deciding to use Section 1 of the Fourteenth Amendment's Due Process Clause—and not its Privileges or Immunities Clause—to apply the Second Amendment to state and local governments.<sup>8</sup> The Court reasoned prudentially in substantial part because it was troubled about the consequences for the American constitutional system of opening up a Pandora's Box of new assertions of unenumerated rights, not because its own legitimacy was in any way at stake.

Part I describes relevant portions of the oral argument and opinions in *McDonald*. Part II identifies system-centered prudentialism in *McDonald*, contrasting the several prudential concerns laid bare at oral argument with the absence of a key prudential consideration in Justice Alito's plurality opinion and Justice Scalia's concurrence. Part III suggests that *McDonald* illustrates both the importance of understanding why judges may decline to acknowledge their own practice of prudentialism, and the need for constitutional theory to accommodate prudential argument.

## I. THE ARGUMENT AND DECISION IN *MCDONALD*

In *McDonald*, litigants on the same side of the case confronted the Court with alternative routes to the conclusion that the Second Amendment, as interpreted by the Court in *District of Columbia v. Heller*,<sup>9</sup> regulates state and local governments. Alan Gura, counsel for the petitioners in both *McDonald* and *Heller*, enthusiastically invited the Court to overrule the *Slaughter-House Cases*<sup>10</sup> and bring back to life the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment.<sup>11</sup> In stark contrast, former Solicitor General Paul Clement, representing the National Rifle Association in support of the petitioners, urged the Court to rely on the Due Process Clause of

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7. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

8. Transcript of Oral Argument at 6–7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter “Tr.”].

9. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

10. *Slaughter-House Cases*, 83 U.S. 36 (1872).

11. See Brief for Petitioners at 42, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

the Fourteenth Amendment.<sup>12</sup> This has been the orthodox path traveled by the Court when holding that particular provisions of the Bill of Rights bind the states.<sup>13</sup>

At oral argument, it immediately became evident that the Court was unenthusiastic about bringing the Privileges or Immunities Clause back to life.<sup>14</sup> Indeed, the Court was as enthusiastic about that project as Gene Wilder was interested in bringing the dead back to life at the beginning of the movie *Young Frankenstein*.<sup>15</sup> Chief Justice Roberts advised Gura that he had to carry “a heavy burden” in order to persuade the Court to overrule a decision that has been the law for 140 years.<sup>16</sup> Justice Sotomayor wanted to know “[w]hat injustice has been caused by [*Slaughter-House*] that we have to remedy?”<sup>17</sup> Justice Ginsburg skeptically inquired, “[w]hat unenumerated rights would we be declaring privileges and immunities under your conception of it?”<sup>18</sup>

Most illuminating were Justice Scalia’s questions and comments from the bench. “I’m not talking about whether . . . the Slaughter-

12. See Brief for Respondents the National Rifle Ass’n of Am., Inc., et al. in Support of Petitioners at 22, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521); Reply Brief for Respondents the National Rifle Ass’n of Am., Inc., et al. in Support of Petitioners at 9, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521). Paul Clement’s name appears only on the NRA’s reply brief, but he argued the case in the Supreme Court on behalf of the organization.

13. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968) (summarizing the provisions of the Bill of Rights that the Court has held are incorporated into the Due Process Clause of the Fourteenth Amendment).

14. It might be objected that the Privileges or Immunities Clause lives in light of *Saenz v. Roe*, 526 U.S. 489 (1999). The *Saenz* Court held that one facet of the fundamental right to travel is the right of new residents of a state to be treated the same as longer term residents, and that this facet of the right is protected by the Privileges or Immunities Clause. *Id.* at 502–03. So far, however, *Saenz* has not had generative force beyond the context of the right to travel, which the Court has long deemed protected apart from the Privileges or Immunities Clause. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

15. See Gene Wilder, *Young Frankenstein* (1974), screenplay at <http://www.horrorlair.com/scripts/young.txt>. In his role as Dr. Frankenstein, Wilder exhausted (and wounded) himself trying to disabuse a young medical student who persisted in inquiring about the re-animation of dead tissue:

[O]nce the human organism has ceased to function, nature has deemed that creature to be dead. . . . You have more chance of re-animating this knife than you have of mending a broken nervous system . . . . My grandfather’s work was Doo-Doo! Dead is Dead! There’s only one thing I am interested in . . . and that is the preservation of LIFE!

As it turned out, Dr. Frankenstein protested too much. Time will tell whether the same can be said of the *McDonald* Court’s relationship to the Privileges or Immunities Clause.

16. Tr., *supra* note 8, at 4.

17. *Id.*

18. *Id.* at 5.

House Cases were right or wrong,”<sup>19</sup> he insisted. Rather, if using the Privileges or Immunities Clause does not “make it any easier to get the Second Amendment adopted with respect to the States,” why, Scalia asked with exasperation, did Gura want the Court “to overrule . . . 140 years of prior law—when you can reach your result under substantive due [process]— . . . unless you’re bucking for . . . a place on some law school faculty.”<sup>20</sup> Not content with one slap at the legal academy(!), Scalia added that “what you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it’s wrong . . . —even I have acquiesced in it.”<sup>21</sup>

During Gura’s rebuttal, Justice Kennedy asked him to identify “what privileges and immunities are now being denied citizens of the . . . the United States.”<sup>22</sup> When Gura responded that he “can’t give a full description of all unenumerated rights that are going to be protected,”<sup>23</sup> Justice Scalia revealingly wanted to know why his inability to provide such an account “doesn’t trouble you.”<sup>24</sup> By stark contrast, Paul Clement’s characteristically masterful argument gave most of the Justices in the *Heller* majority just what they seemed to want: a full-throated defense of using the Due Process Clause as the vehicle to incorporate the Second Amendment.<sup>25</sup>

Like the statements from the bench during oral argument, Justice Alito’s plurality opinion and Justice Scalia’s concurrence snuffed out the privileges or immunities argument with dispatch. Unlike oral argument, however, their explanations were less robust. In an opinion joined by Chief Justice Roberts and Justices Scalia and Kennedy, Justice Alito initially observed that “petitioners are unable to identify the Clause’s full scope, . . . [n]or is there any consensus on that question among the scholars who agree that the *Slaughter-House Cases*’ interpretation is flawed.”<sup>26</sup> As for the reason why the plurality was rejecting the privileges or immunities argument, however, he

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19. *Id.* at 6.

20. *Id.* at 6–7.

21. *Id.* at 7.

22. *Id.* at 62.

23. *Id.* at 63–64.

24. *Id.* at 64.

25. *See id.* at 18 (“Under this [C]ourt’s existing jurisprudence, the case for incorporating the Second Amendment through the Due Process Clause is remarkably straightforward.”).

26. *McDonald*, 130 S. Ct. at 3030.

stated only that the Court need not reconsider *Slaughter-House* because “[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.”<sup>27</sup>

In his concurrence, Justice Scalia echoed his assertion at oral argument that *McDonald* did not require him to reconsider his acquiescence in substantive due process, despite his serious misgivings about it as an original matter. Reconsideration was unnecessary, according to Justice Scalia, “because [substantive due process] is both long established and narrowly limited,”<sup>28</sup> and because “straightforward application of settled doctrine suffices to decide” the case.<sup>29</sup> Unlike his statement at oral argument, Justice Scalia did not mention being “trouble[d]”<sup>30</sup> by counsel’s inability to identify all of the unenumerated rights that a rehabilitated Privileges or Immunities Clause would protect.

Only Justice Thomas accepted the privileges or immunities argument.<sup>31</sup> He thoughtfully disputed Justice Stevens’s suggestion that a revitalized Privileges or Immunities Clause would increase judicial discretion relative to the doctrinal status quo.<sup>32</sup>

## II. SYSTEM-CENTERED PRUDENTIALISM IN *MCDONALD*

As noted above, the plurality opinion offered a cursory explanation of why it was relying on the Due Process Clause instead of the Privileges or Immunities Clause.<sup>33</sup> After referencing in passing the uncertain scope of the Privileges or Immunities Clause, Justice

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27. *Id.* at 3030–31.

28. *Id.* at 3050 (Scalia, J., concurring) (internal quotation marks omitted).

29. *Id.*

30. Tr., *supra* note 8, at 64.

31. *McDonald*, 130 S. Ct. at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

32. *Id.* at 3086. Notably, Justice Thomas’s opinion is suffused with prudentialist reassurances that his preferred resolution of the case would not destabilize the legal system. *See id.* at 3063 (“The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here.”); *id.* at 3084 (“I do not endeavor to decide in this case whether, or to what extent, the Privileges or Immunities Clause applies any other rights enumerated in the Constitution against the States . . . I consider *stare decisis* only as it applies to the question presented here.”); *id.* at 3086 (“Because this case does not involve an unenumerated right, it is not necessary to resolve the question whether the Clause protects such rights, or whether the Court’s judgment in *Slaughter-House* was correct.”).

33. *See supra* note 27 and accompanying text (quoting Justice Alito).

Alito invoked *stare decisis* as the reason for using the Due Process Clause.<sup>34</sup> But viewing *McDonald* as a case involving just a straightforward application of precedent risks overlooking the “prudential and pragmatic considerations” that infuse the Court’s determination of whether to abide by precedent.<sup>35</sup> For example, the *Heller* Court did away with a militia-based reading of the Second Amendment that had been on the books longer than the Court’s incorporation doctrine, and the Court overrules precedent, whether implicitly or explicitly, with some regularity in constitutional cases.<sup>36</sup> A prudential, discretionary judgment must explain why the *McDonald* plurality respected precedent in *McDonald* but not in *Heller*. The fact that the Court’s own practice of *stare decisis* is a form of prudentialism should give pause to those who, like Justice Scalia in the quotation that opens this essay, use the term “prudential” to identify constitutional decisions that are based on non-constitutional and illegitimate concerns.<sup>37</sup>

Moreover, Justice Scalia’s full explanation at oral argument for sticking with the Due Process Clause suggests the presence of prudential reasoning that is distinguishable from the prudential considerations that are conventionally understood in terms of *stare decisis*. He was in essence suggesting this: because the end result in *McDonald* would be the same, the Court should continue to enforce

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34. *McDonald*, 130 S. Ct. at 3030–31.

35. “[W]hen this Court reexamines a prior holding,” the *Casey* Court wrote, “its judgment is customarily informed by a series of prudential and pragmatic considerations . . . .” *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (citations omitted). Specifically:

[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

*Id.* at 854–55 (citations omitted).

36. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda V. Arizona)*, -- GEO. L.J. (forthcoming 2010), available at SSRN: <http://ssrn.com/abstract=1647745>.

37. In contrast to Justice Scalia’s usage, the Court’s “prudential” standing doctrine is explicitly based on non-constitutional but legitimate concerns. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“[T]he question of standing . . . involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”) (citation omitted).

the deeply incorrect understanding of one clause of the Constitution (due process), rather than enforce the correct understanding of another clause of the Constitution (privileges or immunities). It seemed of little consequence that the latter clause had effectively been excised from the Constitution by a judicial decision that almost no one today of any ideological or methodological persuasion is prepared to defend as even arguably correct.<sup>38</sup> Textualist and originalist arguments, no matter how strong, do not appear to meet the “burden” of overcoming Justice Scalia’s “acquiesce[nce]” in substantive due process so long as “straightforward application of settled doctrine” gets the Court where he believes it should go.<sup>39</sup>

Significantly, Justice Scalia did not suggest that the Court should take this path because he is committed to a strong form of stare decisis in constitutional cases; like the rest of the *McDonald* plurality and *Heller* majority, he is not strongly committed to stare decisis in constitutional adjudication.<sup>40</sup> Rather, he seemed to be standing on the shoulders of some distinguished jurists before him, including Judge Wilkinson, who have warily regarded the Privileges or Immunities Clause as “something like a dormant volcano.”<sup>41</sup> That is, Justice Scalia

38. See, e.g., Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) (noting that “[t]he *Slaughter-House Cases* . . . on the most straightforward and conventional reading[,] virtually read the [Privileges or Immunities Clause]—the central clause of Section 1!—out of the Amendment[.]” and that “[v]irtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment”); Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 3, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521):

Reviving the Privileges or Immunities Clause and limiting *Slaughter-House* and its progeny would bring this Court’s jurisprudence in line with constitutional text and a near-unanimous scholarly consensus on the history and meaning of the Clause. *Slaughter-House* read the Privileges or Immunities Clause so narrowly as to essentially read it out of the Amendment . . . .

39. See *supra* notes 21, 29 and accompanying text (quoting Justice Scalia). Given his belief that the Court’s substantive due process jurisprudence is indefensible as an original matter, it is not clear why Justice Scalia believes as an original matter that the Constitution requires incorporation of the Second Amendment.

40. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586–87 (2003) (Scalia, J., dissenting) (“I do not myself believe in rigid adherence to *stare decisis* in constitutional cases . . .”).

41. J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL’Y 43, 51 (1989). Judge Wilkinson vividly voiced prudential concerns about using the Privileges or Immunities Clause:

The danger in this expansive interpretation . . . is the often-made observation that the Privileges or Immunities Clause may be something like a dormant volcano. For well over a hundred years the clause has remained in the background of the constitutional

seemed moved by concern for the proper functioning of the constitutional system. Reading between the lines of his utterance near the end of oral argument, he appeared “trouble[d]”<sup>42</sup> by the legal uncertainty, incentives for new assertions of unenumerated rights, and opportunities for judicial creativity that overruling *Slaughter-House* would likely usher into existence.<sup>43</sup> Justice Scalia presumably had in mind the liberals and conservatives (whether law professors, political activists, or federal judges) who disagree about much but who agree that the Privileges or Immunities Clause should be put back to work. For example, an impressive and ideologically diverse group of legal academics argued in an amicus brief that “the textually and historically accurate way to determine if the states must respect an individual right to keep and bear arms is to examine the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.”<sup>44</sup>

I rely on Justice Scalia’s statements from the bench because he is not one to play devil’s advocate or to keep his concerns to himself when he cares deeply about an issue. He seemed to be endorsing the City of Chicago’s argument in its merits brief that “[o]verruling *Slaughter-House* and its progeny would create a chaotic situation in

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landscape. A dormant volcano may not be very exciting, but once it erupts the excitement may prove a bit much. Its course of eruption would be both difficult to predict and to contain. Neither the language of the clause nor any judicial interpretations provide useful guidance in determining what rights would be fundamental. The clause would become a font for new federal common law. This was Justice Frankfurter’s concern when he warned against the “mischievous uses to which that clause would lend itself” if it escaped the bounds set by the *Slaughter-House* majority.

*Id.* (quoting *Adamson v. California*, 332 U.S. 46, 61–62 (1947) (Frankfurter, J., concurring)); *see id.* at 52 (“For the very reason that it has so long remained a clean slate, a revitalized Privileges or Immunities Clause holds special hazards for judges who are mindful that their proper task is not to write their personal views of appropriate public policy into the Constitution.”); *id.* (“[T]here is much to be said for continuing the present predictability of ‘privileges or immunities’ jurisprudence, and not engaging in a disruptive roll of the dice.”).

42. Tr., *supra* note 8, at 64.

43. I surmise that Justice Scalia was concerned about new assertions of unenumerated rights in particular, and not just about legal uncertainty in general, in light of the uncertainty caused by *McDonald* and *District of Columbia v. Heller*. *See, e.g., McDonald*, 130 S. Ct. at 3115 (Stevens, J., dissenting) (“[T]oday’s decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established.”).

44. Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 2–3, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521). The academics who signed this brief were Richard Aynes, Jack Balkin, Randy Barnett, Steven Calabresi, Michael Kent Curtis, Michael Lawrence, William Van Alstyne, and Adam Winkler.

constitutional law . . . . [P]etitioners' argument would require this Court to sort out which unenumerated and previously unrecognized rights are protected by the Privileges or Immunities Clause."<sup>45</sup> Justice Scalia, as well as the rest of the plurality, also may have been concerned about future pressure to incorporate enumerated rights; the Court has long held that the Fifth Amendment's Grand Jury Clause and the Seventh Amendment's civil jury requirement do not apply to the States via the Due Process Clause. Justice Alito thus wrote that "[u]nder our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, *unless stare decisis counsels otherwise*, that guarantee is fully binding on the States."<sup>46</sup>

In *Heller*, Justice Scalia declared that "it is not the role of this Court to pronounce the Second Amendment extinct"<sup>47</sup> despite more than a century of precedent to the contrary. In *McDonald*, by contrast, he appeared to believe that it is the role of the Court not to disturb the near extinction of the Privileges or Immunities Clause when applying the best textualist and originalist reading of the Clause holds the potential for mischief. Prudentialism seems present even in the reasoning of a jurist who self-identifies as an originalist, who insists that "the soul of the law . . . is logic and reason,"<sup>48</sup> and who, in the very case *sub judice*, denounced Justice Stevens's own practice of prudentialism as "incapable of restraining judicial whimsy."<sup>49</sup>

### III. REALISM ABOUT PRUDENTIALISM

For those who assert a sharp distinction between constitutional law and constitutional politics, court-centered prudentialism may be easier to justify, or at least to excuse, than the system-centered prudentialism on display in *McDonald*. After all, even if one believes that constitutional decisions characteristically should be entirely

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45. Brief for Respondents City of Chicago and Village of Oak Park at 47, 50, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 5190478.

46. *McDonald*, 130 S. Ct. at 3046 (plurality opinion) (emphasis added) (footnote omitted) (citing *Hurtado v. California*, 110 U.S. 516 (1884) (indictment); *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916) (civil jury)).

47. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008).

48. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 633 (2007) (Scalia, J., concurring in the judgment); *see also id.* at 618 ("If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides.").

49. *McDonald*, 130 S. Ct. at 3052 (Scalia, J., concurring). *See also supra* note 1 and accompanying text (quoting Justice Scalia's criticism of Justice Stevens's prudentialism).

“principled,”<sup>50</sup> one might not be enthusiastic about a Court that walks itself off a cliff—as it came close to accomplishing in 1937,<sup>51</sup> and as Justice Scalia himself wisely took pains to avoid having the Court do in *Heller*.<sup>52</sup> At least one should not be enthusiastic about a Court that always follows principles out to their logical conclusions if one values the institution of judicial review.<sup>53</sup>

System-centered prudentialism, by contrast, is no mere pragmatic exception to principle that is justifiable or excusable on grounds of institutional survival. Such prudentialism can be defended only with a persuasive account of why it is part of the judicial role to exercise discretion in ways that promote the stability and health of the American constitutional order.<sup>54</sup> From a system-centered prudential perspective, the Court is, in part, the head of a branch of government, and an important part of what branches of government do is govern. From this vantage point, there is much to admire in the *McDonald*

50. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”).

51. See, e.g., BICKEL, *supra* note 4, at 45 (“Serving this value [of *laissez faire*] in the most uncompromising fashion, at a time when it was well past its heyday, five Justices, in a series of spectacular cases in the 1920s and 1930s, went to unprecedented lengths to thwart the majority will. The consequence was very nearly the end of the story.”).

52. *Heller*, 128 S. Ct. at 2816–17:

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.

The *McDonald* plurality repeated this list of “don’t worries.” See *McDonald*, 130 S. Ct. at 3047. In this and in other ways, Justice Scalia is more of a prudentialist than he typically presents himself to be, whether in *McDonald* or elsewhere. See, e.g., *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 920 (2004) (memorandum of Scalia, J.) (“To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.”).

53. See Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 602 (1963) (“Standards or principles have a certain ‘damn the torpedoes’ quality. . . . Standing on principle, in international, barroom, or legislative-judicial relations is likely to lead to a fight.”).

54. For preliminary attempts at such an account, see generally Robert Post, *Theorizing Disagreement: Re-conceiving the Relationship Between Law and Politics*, 98 CAL. L. REV. (forthcoming 2010); Siegel, *supra* note 5; Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007).

plurality's willingness to consider the possible consequences of clause shifting in incorporating the Second Amendment, even if reasonable minds can differ about the wisdom of the prudential judgment that the plurality ultimately made. The key normative question is whether and when such a governance function for the Court is compatible with its legal obligation to uphold the rule of law.

This question may be related to another one that *McDonald* illustrates well: why do judges who practice prudentialism often decline to acknowledge that they are doing so, or affirmatively deny that they are doing so, or criticize others for doing so?<sup>55</sup> The issue warrants careful exploration, as there are several possible explanations besides the obvious candidates of self-delusion and willful blindness.<sup>56</sup> Such judges may recognize the importance of prudentialism but may be unable to defend it as a proper consideration because they do not perceive a way to reconcile it with their responsibility to sustain rule-of-law values.<sup>57</sup> In a given case, it may turn out that there are in fact ways to reconcile the pursuit of consequentialist objectives with fidelity to professional legal reason.<sup>58</sup> Or the case may be one in which the pursuit of instrumental goals affirmatively contradicts the dictates of professional reason.<sup>59</sup>

Alternatively, perhaps judges who deny their own practice of prudentialism regard such prudentialism—and the discretion it entails—as a proper but unspeakable consideration. They may regard it as unspeakable for at least two reasons: one predominantly system-centered and the other primarily court-centered. First, they may fear that the very articulation of consequentialist reasoning may reduce the likelihood that the reasoning will prove sound. Second, they may fear that the truth of law's own application conflicts at times with the preconditions of its public legitimation.

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55. *Cf. McDonald*, 130 S. Ct. at 3058 (Scalia, J., concurring) (“In a vibrant democracy, usurpation should have to be accomplished in the dark.”).

56. *Cf., e.g., BICKEL*, *supra* note 4, at 74 (“Judges and lawyers recurrently come to feel that they find law rather than make it. Many otherwise painful problems seem to solve themselves with ease when this feeling envelops people.”).

57. For a discussion of rule-of-law values, *see, e.g.,* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015–16 (2005).

58. For a discussion, *see* Post & Siegel, *supra* note 54, at 1497–1503 (examining “weak” dilemmas).

59. For a discussion, *see id.* at 1503–11 (examining “strong” dilemmas).

Regarding the first possibility, an example may be the Court's unspoken "antibalkanization" rationale in the area of affirmative action in higher education, which constitutionally favors those admissions programs that mask their use of racial criteria. According to the antibalkanization rationale, programs with essentially the same net operative results may differentially affect preexisting beliefs about racial issues because they differ in the explicitness of their use of race.<sup>60</sup> So, for example, a program that uses race as a "plus" factor is deemed less suspect by the Court than a set-aside program or a program that awards a set number of points based on race.<sup>61</sup> Justices Powell and O'Connor may have concluded that articulating the antibalkanization rationale—and thereby declaring publicly that the net operative results of these programs are largely the same—would have undermined the objective of the rationale, which is to reduce social tension over affirmative action.<sup>62</sup>

Regarding the second possibility, judges who practice prudentialism may feel the need to make a virtue of opacity when they perceive an antinomy between the actual sources of the law they are fashioning and the conditions of its legitimacy in the eyes of the public. Martin Shapiro gave powerful voice to this perspective when he wrote years ago that "[t]he distinction between what the Court says to the public about what it is doing and what scholars say to one another about what it is doing must be held firmly in mind."<sup>63</sup> According to Shapiro, "[i]t would be fantastic indeed if the Supreme Court in the name of sound scholarship were to publicly disavow the myth upon which its power rests."<sup>64</sup> The concern here is that the legitimacy of the legal system depends substantially (or, in some versions of the argument, exclusively) on the popular belief that judges decide cases impartially based upon preexisting law that is fully autonomous of politics. As Robert Post has observed, "viewing law as completely divorced from politics . . . is deeply ingrained and pervasively regarded as a necessary foundation for the maintenance

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60. See generally Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, Individualized Consideration*, 56 DUKE L.J. 781, 790–793 (2006).

61. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

62. For a discussion, see Post & Siegel, *supra* note 54, at 1488–97, 1503–06.

63. Shapiro, *supra* note 53, at 601.

64. *Id.*; see also *id.* at 603 ("If the Court is to be successful as a political actor, it must have the authority and public acceptance which the principled, reasoned opinion brings.").

of judicial independence.”<sup>65</sup> This popular belief explains the political success of Chief Justice Roberts’s assertion that “[j]udges are like umpires” during his Supreme Court confirmation hearing,<sup>66</sup> notwithstanding the intellectual vulnerabilities of analogizing a Supreme Court Justice to a baseball umpire.<sup>67</sup>

It follows from this account of legal legitimacy that prudential reasoning, which is prospective in outlook and requires the exercise of discretion and judgment, over time will disillusion members of the public, who will construe such reasoning as evidencing the assertion of merely political power.<sup>68</sup> The fear that the public perception of prudentialism will tend to undermine legal legitimacy may help to explain why dissenters seem more comfortable voicing prudential concerns than Justices in the majority, particularly when the Court is invalidating democratic action. The contrast between the approaches of Justice Scalia and Justice Stevens in *McDonald* comes to mind.<sup>69</sup> Justice Scalia devoted his opinion to criticizing Justice Stevens’s approach to substantive due process for licensing judicial discretion.<sup>70</sup> Justice Stevens, however, did not fully deny the charge. The Stevens

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65. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110 (2003); see e.g., *id.* (“It is no accident that the Court characteristically appeals to this image of the law-politics distinction whenever it feels called upon explicitly to defend its legal authority.”); Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965) (footnotes omitted) (“Despite (and perhaps also because of) its shortcomings as a description of reality, the ‘declaratory theory’ [associated with Blackstone] expresses a symbolic concept of the judicial process on which much of courts’ prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance.”).

66. *Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States, Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (testimony of Judge John G. Roberts, Jr.) (“Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”). During her Supreme Court confirmation hearing, Justice Sotomayor made a similar statement. See *Sotomayor Pledges “Fidelity to the Law,” CNNPOLITICS.COM*, <http://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html?iref=hpmostpop> (last updated July 13, 2009) (“In the past month, many senators have asked me about my judicial philosophy . . . . It is simple: fidelity to the law. The task of a judge is not to make law, it is to apply the law.”).

67. For a critique, see generally Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007).

68. For a discussion of this view of legal legitimacy, see Post & Siegel, *supra* note 54, at 1506–1508.

69. So does the contrast between the majority and dissenting opinions in *United States v. Lopez*, 514 U.S. 549 (1995). See, e.g., *id.* at 608 (Souter, J., dissenting) (“[T]here is no reason to hope that the Court’s qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began.”).

70. *Supra* notes 1, 4949, and accompanying text.

opinion constitutes a rare attempt by a judge, writing in his official capacity, to come to terms with the fact of judicial discretion from the internal perspective of the faithful practitioner of the law. “[T]o acknowledge that the task of construing the liberty clause requires judgment is not to say that it is a license for unbridled judicial lawmaking,” he wrote. “To the contrary, only an honest reckoning with our discretion allows for honest argumentation and meaningful accountability.”<sup>71</sup>

Under either account of unspeakability sketched above, the very jurists who exercise discretion—who employ the distinctly human faculty of judgment—may conclude that the constitutional system in which they operate, or the courts on which they sit, are best served if they deny this fact. Regardless of whether such concerns about the consequences of judicial candor are well founded,<sup>72</sup> they should not be confused with the truth of the matter. I suspect, although I cannot demonstrate here, that the kind of prudentialism on display in *McDonald* is common. For example, system-centered prudentialism almost certainly will influence the Court’s future determination of the level of scrutiny that judges will apply in Second Amendment cases. The stakes are too high, and the Justices are too sensible, for it to be otherwise. If I am right, there may be a lesson here. The lesson may be that we still require “[t]heory that can face fact,” as Llewellyn bluntly put the point in 1934.<sup>73</sup> “We must,” Cardozo instructed in 1921, “seek a conception of law which realism can accept as true.”<sup>74</sup> A realistic appreciation of the presence of prudentialism in judicial practice does not itself qualify as a persuasive conception of law. But neither can realism accept as true a conception of law that always equates such prudentialism with lawlessness.

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71. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3103 (2010) (Stevens, J., dissenting).

72. For an argument that these concerns are real but often overstated, see generally Post & Siegel, *supra* note 54.

73. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 40 (1934).

74. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 127 (1921).