Comment on Opinion:

McDonald v. City of Chicago

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On June 28, 2010, the Supreme Court of the United States, in the case of *McDonald v. City of Chicago* (No. 08-1521), issued its opinion. The slip opinion can be found at

(Slip Opinion: http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf)

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Petitioners, in the case of *McDonald v. City of Chicago* presented the following question for consideration:

> "Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses." (Brief for Petitioners, page i)

The Supreme Court stated it in their (slip) opinion on page 5, this way:

> "Petitioners argue that the Chicago and Oak Park laws violate the right to keep and bear arms for two reasons. Petitioners' primary submission is that this right is among the 'privileges or immunities of citizens of the United States' and that the narrow interpretation of the Privileges or Immunities Clause adopted in the *Slaughter-House Cases, supra*, should now be rejected. As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause 'incorporates' the Second Amendment right."

On page 10, the Court responds to Petitioners argument that the right to keep and bear arms is a privilege or immunity of a citizen of the United States, with the answer of no:

> "As previously noted, the Seventh Circuit concluded that *Cruikshank*, *Presser*, and *Miller* doomed petitioners' claims at the Court of Appeals level. Petitioners argue, however, that we should overrule those decisions and hold that the right to keep and bear arms is one of the 'privileges or immunities of citizens of the United States.' In petitioners' view, the Privileges or Immunities Clause protects all of the rights set out in the Bill of Rights, as well as some others, see Brief for Petitioners 10, 14, 15_21, but petitioners are unable to identify the Clause's full scope, Tr. of Oral Arg. 5-6, 8-11. Nor is there any consensus on that question among the scholars who agree that the

> *Slaughter-House Cases*' interpretation is flawed. See *Saenz, supra*, at 522, n. 1 (Thomas J., dissenting).
>
> We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding."

Continuing to the Petitioners' argument that the right to keep and bear arms is incorporated through the Due Process Clause of the Fourteenth Amendment, the Court writes (still on page 10):

> "At the same time, however, this Court's decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding of the States. See *Heller*, 554 U.S., at ____, n. 23 (slip op., at 48, n. 23). None of those cases 'engage[d] in the sort of Fourteenth Amendment inquiry required by our later cases.' *Ibid*. As explained more fully below, *Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of 'selective incorporation' under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.
>
> Indeed, *Cruikshank* has not prevented us from holding that other rights that were at issue in that case are binding on the States through the Due Process Clause. In *Cruikshank*, the Court held that the general 'right of the people peaceably to assemble for lawful purposes,' which is protected by the First Amendment, applied only against the Federal Government and not against the States. See 92 U.S., at 551-552. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a 'fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment.' *De Jonge v. Oregon*, 229 U.S. 353, 364 (1937). We follow the same path here and thus consider whether the right to keep and bear arms applies to the States under the Due Process Clause. . . . .
>
> (page 19)
>
> With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, *Duncan*, 391 U.S., at 149, or as we have said in a related context, whether this right is deeply rooted in this Nation's history and tradition.' *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

(page 31)

> In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."

So Petitioners' claim that the right to keep and bear arms under the Second Amendment was incorporated under the Due Process Clause of the Fourteenth Amendment was recognized by the Supreme Court of the United States.

What Petitioners **may not have realized** is that the Supreme Court did not address their Brief at page 44; where it states:

> "*SlaughterHouse* first observed that while individuals held both federal and state citizenship, the Clause at issue protects only privileges and immunities of national citizenship. SlaughterHouse, 83 U.S. at 74. It then purported to quote Article IV as securing 'the privileges and immunities of ***citizens of the several States***.' Id., at 75.

The Supreme Court did not answered why Justice Miller quoted Article IV, Section 2, Clause 1 of the Constitution of the United States (of America), on page 75 of the *Slaughterhouse Cases,* as "the privileges and immunities of citizens **OF** the several States" rather than "the privileges and immunities of citizens **IN** the several States." What they did do was this:

(slip opinion, page 6)

> "Four years after the adoption of the Fourteenth Amendment, this Court was asked to interpret the Amendment's reference to 'the privileges or immunities of citizens of the United States.' The *Slaughter-House Cases, supra*, involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans. Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.' *Id*., at 79. The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause. *Id.*, at 76.
>
> In drawing a sharp distinction between the rights of federal and state citizenship, the Court relied on two principal arguments. First, the Court emphasized that the Fourteenth Amendment's Privileges or Immunities Clause spoke of 'the privileges or immunities of *citizens of the United States*,' and the Court contrasted this phrasing with the wording in the first sentence of the Fourteenth and in the Privileges and Immunities Clause of Article IV,

both of which refer to *state* citizenship. (5)"

Note 5: The first sentence of the Fourteenth Amendment makes '[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof ... citizens of the United States *and of the State wherein they reside*.' (Emphasis added.) The Privileges and Immunities Clause of Article IV provides that '[t]he Citizens of each State shall be entitled to all Privileges and Immunities of *Citizens in the several States*." (Emphasis added.)

The answer to this question is to be found at page 74 of the *Slaughterhouse Cases*. There you will find the following:

"... Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it ... .

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. ....

Of the ***privileges and immunities of the citizen of the United States***, and of the ***privileges and immunities of the citizen of the State***, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause (first section, second clause) under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the (Fourteenth) amendment. ...." Slaughterhouse Cases: 83 (16 Wall.) 36, at 74 (1873).

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And:

"We think this distinction and its explicit recognition in this [the Fourteenth] Amendment of great weight in this argument, because the next paragraph of this same section (first section, second clause), which is the one mainly relied on by the plaintiffs in error, speaks only of ***privileges and immunities of citizens of the United States***, and does not speak of those (***privileges and immunities) of citizens of the several states***. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed

by the clause are the same. ....

Fortunately we are not without judicial construction of this clause of the Constitution (Article IV, Section 2, Clause 1). The first and leading case of the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.

> 'The inquiry,' he says 'is, what are the privileges and immunities of citizens of the several states? . . .

This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward v. The State of Maryland*." Slaughterhouse Cases: 83 (16 Wall.) 36, at 74, 76 (1873).

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The reason Justice Miller used "the privileges and immunities of citizens OF the several States" is that since the adoption of the Fourteenth Amendment there are now three sets of privileges and immunities in the country of the United States. They are: privileges and immunities of a citizen of the United States, privileges and immunities of a citizen of a State, and privileges and immunities of a citizen of the several States.

Privileges and immunities of a citizen of the United States are located at Section 1, Clause 2 of the Fourteenth Amendment:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Privileges and immunities of a citizen of a State are located in the constitution and laws of an individual State:

> ". . . Whatever may be the scope of section 2 of article IV — and we need not, in this case enter upon a consideration of the general question — the Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another State under its constitution and laws." McKane v. Durston: 153 U.S. 684, at 687 (1894).

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Privileges and immunities of a citizen of the several States are those described in *Corfield v. Coryell* decided by Mr. Justice Washington in the Circuit Court for the

District of Pennsylvania in 1823:

> "In the *Slaughter House Cases*, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 380." Hodges v. United States: 203 U.S. 1, at 15 (1906).

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The location for these privileges and immunities is Article IV, Section 2, Clause 1 of the Constitution:

> "Fortunately we are not without judicial construction of this clause of the Constitution (Article IV, Section 2, Clause 1). The first and leading case of the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.
>
> > 'The inquiry,' he says 'is, what are the privileges and immunities of citizens of the several States? . . .
>
> This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of *Ward v. The State of Maryland*." Slaughterhouse Cases: 83 (16 Wall.) 36, at 75 thru 76 (1873).

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So the Privilege and Immunities Clause of Article IV, since the adoption of the Fourteenth Amendment, has nothing to do with state citizenship. Rather, it has to do with citizenship of the several States, that is, citizenship of all the States, generally.

In addition, the term "citizens of the states" is equivalent to the term "citizens of the several states."

> "Fortunately we are not without judicial construction of this clause of the Constitution (that is, Article IV, Section 2, Clause 1). The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823. 4 Wash C. C. 371.
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> > 'The inquiry,' he says, 'is, what are the privileges and immunities of CITIZENS OF THE SEVERAL STATES? . . .'
>
> This definition of the privileges and immunities of CITIZENS OF THE

STATES is adopted in the main by this court in the recent case of *Ward v. Maryland*. . . .

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so." Slaughterhouse Cases: 83 (16 Wall.) U.S. 36, 75-76, 78-79 (1873).

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Therefore, Article IV, Section 2, Clause 1 of the Constitution of the United States (of America) relates to a citizen of the several States or a citizen of the States:

(*citizens of the several states*)

"In speaking of the meaning of the phrase '**privileges and immunities of CITIZENS OF THE SEVERAL STATES,**' under section second, article fourth, of the Constitution, it was said by the present Chief Justice, in *Cole v. Cunningham,* 133 U.S. 107*,* that the intention was 'to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions.' " Maxwell v. Dow: 176 U.S. 581, at 592 (1900).

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(*citizens of the states*)

"The White Slave Traffic Act of June 25, 1910, c. 395,36 Stat. 825, is a legal exercise of the power of Congress under the commerce clause of the Constitution and does not abridge the **privileges or immunities of CITIZENS OF THE STATES** or interfere with the reserved powers of the States, especially those in regard to regulation of immoralities of persons within their several jurisdictions." *Statement of the Case*, Hoke and Economides v. United States: 227 U.S. 308, at 309 (1913).

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"The grounds of attack upon the constitutionality of the statute are expressed by counsel as follows:

> '1. Because it is contrary to and contravenes Art. IV, §2, of the Constitution of the United States, which reads: "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."
>
> '2. Because it is contrary to and contravenes the following two amendments to the Constitution:
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> "Art. IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> "Art. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."
>
> '3. Because that clause of the Constitution which reserves to Congress the power (Art. I, Sec. 8, Subdiv. 2) 'To regulate Commerce with foreign Nations, and among the several States,' etc., is not broad enough to include the power to regulate prostitution or any other immorality of CITIZENS OF THE SEVERAL STATES as a condition precedent (or subsequent) to their right to travel interstate or to aid or assist another to so travel.' " *Opinion*, Hoke and Economides v. United States: 227 U.S. 308, at 319 (1913).

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