
I CONCUR! DO I MATTER?: DEVELOPING A FRAMEWORK FOR DETERMINING THE PRECEDENTIAL INFLUENCE OF CONCURRING OPINIONS*

I. INTRODUCTION

In the 2009 Term, over three-quarters of the opinions published by the Supreme Court of the United States included a concurring opinion written by an individual Justice; an astounding record for the High Court.¹ What makes this high-water mark all the more surprising is that the Justices recognize the importance of issuing unanimous opinions in the name of clarity.² Nonetheless, the Justices continue to issue separate opinions expressing their individual points of view. Some scholars say the practice does nothing but cause confusion.³ Others claim that it legitimizes the individual jurists on the Court.⁴ Regardless, the Justices continue to pen concurring opinions, and everyone continues to read them.

A concurring opinion, or concurrence, is a judicial opinion in which the authoring judge or justice agrees with the lead opinion on certain merits of the case, but writes separately for any number of reasons, which are usually articulated within the concurrence itself.⁵ Maybe the author agrees with the rationale and rule of the lead

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1. Adam Liptak, *The Roberts Court; Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1. Although dropping slightly, in the 2010 Term, more than half of the opinions issued by the Court included at least one concurring opinion by an individual Justice. (This statistic includes in the sum of opinions for the 2010 Term those issued per curiam, but excludes those cases affirmed by an equally divided Court and the single petition of certiorari that was dismissed as being improvidently granted.)

2. See David Von Drehle, *The Incredibly Shrinking Court*, TIME, Oct. 11, 2007 at 40 (noting Chief Justice Roberts's goal to unite the Court for the purpose of establishing clear rules of law); Martha Neil, *Scalia: 'I'm Glad I'm Not Chief Justice'*, ABA JOURNAL (Nov. 19, 2010, 6:18 PM), http://www.abajournal.com/weekly/article/scalia_im_glad_im_not_chief_justice?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email (Scalia speculating he would lose his sense of style and be determined to unite the Court if named Chief Justice).

3. See, e.g., David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183 (2010) (identifying residual confusion where multiple opinions reach similar or slightly different results in interpreting the same issue).

4. See, e.g., Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 194 (1959) (observing Thomas Jefferson's belief that individual opinions assured judicial credibility).

5. See generally PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 10–12 (2010). Justices or the Court's reporter of decisions will often refer to or name a concurrence in accord with

opinion, but believes that a broad application would overstep the rule's bounds.⁶ Perhaps the author agrees with the result of the case, but for different reasoning altogether.⁷ Or maybe the author agrees with the lead opinion entirely, but writes nonetheless to express his enthusiastic joinder.⁸

Despite their prevalence, concurring opinions written by a single appellate-level jurist are not considered binding upon lower courts and have almost no dispositive impact upon the law on which they speak.⁹ Yet, tales of concurring opinions subsequently influencing real law are familiar to even first-year law students.¹⁰ How can we distinguish between those concurrences that may one day become highly influential and those that will be largely forgotten over time? With the increase in political polarization in the United States, the influence of individual opinions by United States Supreme Court Justices could prove substantial for those subscribing to theories of judicial decision makers as strategic actors.¹¹ A particular concurrence, adhering to what a judicial actor views as a personally persuasive legal (or political) argument could provide activist judicial decision makers with an opportunity to alter Supreme Court doctrine at their will. As a result of this risk, a better position is to build some form of predictive framework for concurring opinions—where their precedential influence is based on pragmatic, as opposed to emotional or ideological, concerns.

For instance, in June 2010, a concurrence by Justice Thomas in the landmark Second Amendment case, *McDonald v. City of Chicago*,¹² spurred talk of revolution in

one of the more familiar labels: “concurring in part”, “concurring in the judgment”, “concurring in part, dissenting in part”, etc. But these labels are often misnomers having little to do with the full message contained within the concurring opinion. See *infra* note 113 and accompanying text for discussion on why the particular name given a concurrence by its author is immaterial. Thus, for the purposes of this Comment, where concurrences are discussed in the text or cited in the footnotes, they are referred to as “concurrences” or “concurring opinions” rather than the esoteric name given to the opinion by the authoring Justice.

6. See *infra* Part II.B.3.v for a discussion of limiting concurrences.

7. See *infra* Part II.B.3.vi for a discussion of doctrinal concurrences.

8. See *infra* Part II.B.3.i for a discussion of emphatic concurrences.

9. See *Bronson v. Bd. of Educ. of Cincinnati*, 510 F. Supp. 1251, 1265 (S.D. Ohio 1980) (noting “concurring opinions have no legal effect, and thus, are in no way binding on any court”).

10. This is based on the assumption that most first year law students take Constitutional Law and discuss, as common examples, the impact of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) on presidential powers, or that of Justice Powell's concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.) on affirmative action programs. It is common knowledge that Justice Jackson's concurrence in *Youngstown* established the modern lens through which questions of Executive power are now viewed. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008). Similarly, although a majority of the Court agreed that certain considerations of an applicant's race in college admissions decisions was constitutionally permissible, see *Bakke*, 438 U.S. at 272 (opinion of Powell, J.), the opinion written by Justice Powell announcing the judgment of the Court wherein he expressed his view that “race or ethnic background may be deemed a ‘plus’” in an applicant's file was not joined by any other member of the Court. *Id.* at 265; see also *id.* at 272 (explaining that although Justice Powell announced the judgment of the Court that race *could* be considered in *certain* admissions processes, Justices Brennan, White, Marshall, and Blackmun did not share Justice Powell's reasoning behind that judgment). Even so, the modern Court views Justice Powell's reasoning as the governing rule for affirmative action. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 730, 742, 743, 755 (2007).

11. See *infra* Part II.B.2 for discussion of theories of judicial decision making.

12. 130 S. Ct. 3020 (2010).

the legal academy. Scholars rushed to praise Thomas's revival of a long-dead constitutional provision, even before the case was decided.¹³ But although some scholars argue that Justice Thomas's concurrence *should* be influential, the determination of the concurrence's possible influence on future cases cannot there end. Whether academics—or judges, for that matter—agree with a particular constitutional interpretation is not dispositive to whether a concurrence will have more or less precedential influence on judicial actors deciding future cases.

Realistically, there may not be a sure way to predict whether any one concurrence will end up revolutionizing the law it touches. That being said, analogizing modern concepts of precedent and judicial decision making provides insight into possible factors that may affect the determination of a concurrence's future influence.¹⁴ Because much of American jurisprudence is built on common law traditions, which allot a certain amount of creativity to judicial decision makers,¹⁵ the idea of a concurrence gaining significant influence as a legal precedent is not particularly foreign.¹⁶ It has occurred before and will inevitably occur again. Positive subsequent treatment, persuasiveness of the legal argument, the prominence or belovedness of the authoring jurist, or authorship by the essential swing vote may all influence the precedential strength of a particular concurrence.¹⁷

Although no list could be exhaustive, the issue addressed in this Comment is whether some of the factors determinate in a concurrence gaining precedential influence can be identified, analyzed, and applied to a specific concurrence based on its form and interaction with the lead opinion. Due to the attention Justice Thomas's *McDonald* concurrence attracted in the legal academy, this Comment will focus on determining what, if any, precedential influence that concurrence could have, and the paths the concurrence could take in gaining and exercising that influence. In sum, this Comment argues that due to the persuasiveness of Justice Thomas's argument, the relatively low risk of subsequent reversal any lower federal courts may face in applying that argument to alternate contexts, and Justice Thomas's ever-evolving judicial reputation, it is quite possible that Justice Thomas's *McDonald* concurrence will have a substantive impact on future legal precedents.

This Comment limits its exploration to only the precedential value of concurring opinions written by Supreme Court Justices and how subsequent Supreme Courts and

13. Compare Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 187–93 (2010) (urging revolutionary nature of Justice Thomas's *McDonald* concurrence in regard to Privileges or Immunities Clause), with Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 6 (2010) (same, but before any opinions from *McDonald* were published).

14. See *infra* Part II.B.3 for a discussion on what factors may matter in determining a concurrence's precedential influence.

15. See B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 172–76 (1977) (explaining and providing examples evidencing “judicial creativity”).

16. See *infra* Parts II.B.1 and II.B.2 for discussion on how precedents are generally formed, identified, and applied, and how judicial decision makers choose to adhere to particular precedents.

17. See *infra* Part II.B.3 for a discussion on factors and considerations that may be taken into account in determining possible precedential value of concurrences.

lower federal courts could interpret, use, and apply those opinions. It is well to note, however, that the concepts discussed herein are applicable to opinions by any multi-member, appellate judicial panel. Further, this Comment is by no means an attempt to create a prolific maxim of judicial decision making, or a harangue advocating for a particular judicial philosophy. Humbly, this Comment merely attempts to discern some logic out of a commonly ignored yet enticing phenomenon in American legal discourse.

This Comment first lays out an historical account of concurring opinions, briefly explaining why a particular Justice may choose to draft a concurrence.¹⁸ Often, concurrences begin as persuasive attempts to rally a Justice's colleagues to his viewpoint after conference of a particular case.¹⁹ Part II.A focuses on providing an historical background as to how the modern concurrence has developed and worked itself into Supreme Court jurisprudence. Part II.B then begins by articulating how modern concepts of precedent and judicial decision making support the idea of a concurrence having influence as precedent. Justification for such an occurrence results primarily from the fact that following the reasoning or rule embodied in a concurrence is a legitimate option available to judicial actors, just as the ability to write a concurrence is part of the judicial currency available in influencing future pathways of law.

Having established a foundation on which to stand, Part II.B.3 describes the six different classifications of concurrences articulated by several scholars. In turn, each concurrence type is viewed in light of the aforementioned concepts of precedent and judicial decision making, and several possible factors for determining future precedential influence are discerned for each concurrence type. With that, Part II.C further expounds on the posture, substance, and disposition of Justice Thomas's *McDonald* concurrence and explains why it is an appropriate test case for the analysis suggested in Part II.B.3.

Part III begins by classifying Justice Thomas's *McDonald* concurrence into one of the six concurrence types based on its form and interplay with the lead opinion. The future precedential influence of Justice Thomas's *McDonald* concurrence is then analyzed based on three suggested factors: (1) whether Justice Thomas's argument is compellingly persuasive in nature, (2) whether adherence to Justice Thomas's argument presents a high risk of subsequent reversal to future judicial actors, and (3) whether Justice Thomas's reputation as a jurist adversely or positively affects the persuasiveness of his legal argument. Finally, Part III.B.4 applies the three aforementioned factors to Justice Thomas's *McDonald* concurrence and discusses the potential for its future influence as a legal precedent.

18. See *infra* Part II.A for a discussion on historical and ideological perspectives of concurrences.

19. See CORLEY, *supra* note 5, at 41 (noting that concurrences can begin as bargaining tools during early drafts of Supreme Court opinions); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3-4 (2010) (explaining individual opinions are often written for the purpose of encouraging edits to majority opinions).

II. OVERVIEW: ESTABLISHING A FRAMEWORK FOR THE INFLUENCE OF CONCURRING OPINIONS

A. *Historical and Ideological Perspectives of Concurrences*

Although the Constitution remains silent on the matter, the history of the Supreme Court provides clarity as to how its cases and opinions are reported. The Court's first reported decision followed the English tradition of writing and delivering opinions seriatim.²⁰ Where a court issues an opinion seriatim, each judge or justice writes an individual opinion stating the result they favor in the present dispute and their reasoning in support.²¹ This process provides a glimpse into the individual decision-making processes of each jurist and assures each his own individual credibility.²² But multiple opinions on a single issue present difficulty in determining a sound rule of law, and do little to emphasize the credibility of a strong unified judiciary.²³ To that effect, John Marshall sought to remedy those problems when he was named Chief Justice.²⁴

Marshall is credited with turning the Court away from the practice of seriatim opinions and toward speaking with a unified voice.²⁵ Unanimous opinions from the Court allowed for greater ease in interpreting the particular legal rules established in each case, which helped to establish stronger legal principles.²⁶ This also allowed for the easy completion of two essential duties of the federal judiciary: the duty of the Supreme Court to establish legal rules for lower courts to follow,²⁷ and the duty of lower courts to interpret those legal rules and apply them to subsequent cases as precedents.²⁸

20. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792).

21. *See id.* (demonstrating the results of the seriatim process); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 134–35 (1990) (describing process of issuing seriatim opinions).

22. *See* Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2086 n.14 (1995) (observing that Jefferson thought unanimous opinions encouraged judicial laziness and incompetency); ZoBell, *supra* note 4, at 194 (discussing Thomas Jefferson's defense of the practice of seriatim opinion writing as ensuring judicial credibility).

23. *See* Kirman, *supra* note 22, at 2085–86 (citing “precedential confusion” as a reason for Marshall's crusade for unity).

24. *See* ZoBell, *supra* note 4, at 193–94 (stating that one of Marshall's goals as Chief Justice was to strengthen and unify the Court).

25. *Id.* at 193.

26. Linas E. Ledebur, Comment, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 902 (2009).

27. *See* Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 697 (1990) (asserting that “an essential part of the Court's professional job is to provide useful and useable law to the law's consumers”); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOU. L. REV. 1395, 1396 (2000) (arguing Supreme Court opinions are primarily used to create legal rules); Sonja R. West, *Concurring in Part and Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1955 (2006) (noting the Supreme Court's principal job is to make judgments and issue opinions explaining the judgments).

28. *See* *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (declaring “a precedent of this Court must be followed by the lower federal courts”); *United States v. City of Phila.*, 644 F.2d 187, 192 n.3 (3d Cir. 1980) (stating that inferior courts must obey Supreme Court precedent); Evan H. Caminker, *Why Must Inferior Courts Obey*

Complete unanimity, however, did not appear in every case subsequent to Marshall's appointment. Even in the era of the Marshall Court, Justices were prone to dissent or concur in separate opinions, and individual judicial convictions occasionally outweighed desire for rule absolutism.²⁹ Individualism among the Justices remained relatively rare, however, until the turn of the twentieth century.³⁰

Justice Felix Frankfurter is credited with prompting the modern trend in Supreme Court concurring opinions.³¹ In *Graves v. New York ex rel. O'Keefe*,³² before voicing his concerns with the majority's position, Justice Frankfurter emphasized the importance of individual opinions and specifically advocated for their use.³³ Justice Frankfurter called the publication of individual opinions a "healthy practice," and felt that "the old tradition still has relevance."³⁴ It was this seemingly tenuous ideological aside that scholars cite as spawning a new age in opinion writing on the Supreme Court.³⁵ Since the late 1930s, the appearance of concurrences in the Court's reported decisions has increased dramatically.³⁶ In fact, the modern era of Supreme Court opinion writing, rife with individual opinions, split pluralities, and almost indecipherable holdings, seems to be a step back toward the seriatim opinions of early American history.³⁷ If these individual opinions are to play any role in doctrinal

Superior Court Precedents?, 46 STAN. L. REV. 817, 824 (1994) (discussing lower courts' "duty to obey hierarchical precedent").

29. Kirman, *supra* note 22, at 2087; see ZoBell, *supra* note 4, at 195 (discussing *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 72 (1805) (Johnson, J., concurring), the first recorded individual opinion during the Marshall Court); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 50 (1831) (Thompson, J., dissenting); *Fisher's Lessee v. Cockerell*, 30 U.S. (5 Pet.) 248, 259 (1831) (Baldwin, J., dissenting); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 425 (1830) (Thompson, Johnson, & M'Lean, JJ., dissenting).

30. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 146-52 (1999); Kirman, *supra* note 22, at 2087.

31. See Louis Lusky, *Fragmentation of the Supreme Court: An Inquiry into Causes*, 10 HOFSTRA L. REV. 1137, 1143-45 (1982) (explaining the wide influence of Justice Frankfurter's encouragement to write individually in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487 (1939)).

32. 306 U.S. 466 (1939).

33. *Graves*, 306 U.S. at 487 (Frankfurter, J., concurring).

34. *Id.*

35. As Professor Lusky states:

[Frankfurter] underestimated the eagerness with which his colleagues—and, even more readily, future Justices—would follow his lead. Every one of them had been an outspoken public man until he became a judge, and had accepted the monkish self-restraint of judicial office only under constraint of tradition and peer pressure. Now Frankfurter had announced that the ventilation of individual views . . . far from being blameworthy, was downright praiseworthy. Th[is] novice had lifted the lid of Pandora's box.

Lusky, *supra* note 31, at 1145.

36. Edward McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion Writing in Final Appellate Tribunals*, 31 CAN. B. REV. 595, 613 (1953); see Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 778 (1990) (observing "in the past half century the concurrence has become a frequent appendage of United States Supreme Court opinions").

37. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam opinion followed by individual opinions from each of the nine Justices); Kirman, *supra* note 22, at 2087 (noting that modern opinions share similarities with seriatim opinions). *But see* Liptak, *supra* note 1 (quoting Chief Justice Roberts

discourse, we must understand what their impact may be on a more general and predictable basis.³⁸

Scholars point to two general causes for the prominence of concurring opinion writing on the Supreme Court.³⁹ First, the limits on Supreme Court jurisdiction often present the Justices with controversial issues.⁴⁰ The Judiciary Act of 1925 heavily reformed the jurisdiction of the federal courts in response to a then-overwhelmed docket.⁴¹ In section 237(b), Congress established the now-familiar writ of certiorari.⁴² Since then, the Court reviews and decides only the cases it deems appropriate to hear. As a result, the Court often only grants certiorari to cases dealing with contested constitutional issues or significant political consequences—an environment ripe for controversy and splintered debate.⁴³ Moreover, the decision in *Erie Railroad Co. v. Tompkins*⁴⁴ to eliminate federal general common law forced the Court to transform into a primarily constitutional tribunal.⁴⁵ The current limits upon the Court's jurisdiction therefore impose upon the Justices major questions of constitutional and statutory interpretation, creating a breeding ground for policy and ideological divides.⁴⁶

More individually, a Justice's judicial philosophy, views on policy, or general idiosyncrasies or demeanor may make him more likely to publish a concurring opinion.⁴⁷ For instance, a Justice with a more liberal judicial philosophy may be willing

as hoping the Court has not gotten to the point where opinions "are so abstruse that the educated layperson can't pick them up and read them and understand them").

38. It is well to note that although plenty has been written on the precedential effect plurality and dissenting opinions have in modern Supreme Court jurisprudence, see generally Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593 (1992); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988), both issues are beyond the scope of this Comment.

39. Some scholars would cite here Chief Justice Stone's reputation for inadequate leadership as a distinct factor for division of opinion on the Supreme Court. *E.g.*, McWhinney, *supra* note 36, at 619. Others blame not Chief Justice Stone, but other occurrences, such as the advance of legal realism and liberal legalism onto the Court with the appointment of President Roosevelt's New Deal Justices. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 290–91 (8th ed. 2008).

40. Kirman, *supra* note 22, at 2087.

41. Judiciary Act of 1925, 43 Stat. 936.

42. *Id.* § 237(b).

43. See Ben W. Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents*, 34 A.B.A. J. 677, 679–80 (1948).

44. 304 U.S. 64 (1938).

45. See *Erie*, 304 U.S. at 78–80 (eliminating federal common law and establishing state law as governing in cases not involving questions of federal law).

46. O'BRIEN, *supra* note 39, at 304–05. As the late Chief Justice Rehnquist said:

I think it is by no means irrelevant that the sharp jump in separate concurring and dissenting opinions has accompanied a sharp jump not only in the number and percentage of cases in which a constitutional claim is made, but in the number and percentage of cases in which a constitutional claim is sustained. It may well be that the nature of constitutional adjudication invites, at least, if it does not require, more separate opinions than does adjudication of issues of law in other areas.

William H. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A. J. 361, 363 (1973).

47. See CORLEY, *supra* note 5, at 13–14 (noting that a Justice's policy preferences and relationship with the majority author may influence his decision to write a concurrence, but arguing that ultimately the decision depends on the type of concurrence being written); Kirman, *supra* note 22, at 2087 (explaining that, among

to stray from the established rule of law in an effort to advocate what he feels is the most objectively “correct” constitutional interpretation available.⁴⁸ Further, realist Justices may view the rule of law as a pendulum rather than a collection of fixed black-letter mandates. As such, a realist Justice might construct a concurrence to swing with society’s needs in response to an archaic law rather than adhere to strict concepts of hierarchical precedent.⁴⁹

Such a practice was evidenced in *Maty v. Grasselli Chemical Co.*,⁵⁰ where Justice Black, writing for the Court rather than separately, held that an amendment to a complaint filed subsequent to the running of a New Jersey statute of limitations was still a valid alteration to the plaintiff’s cause of action.⁵¹ Holding that the statute of limitations was not dispositive, Justice Black stated that “[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies” and there should be no “barriers which prevent the achievement of that end.”⁵² In *Maty*, it was clear that Justice Black viewed the established law regarding pleadings to be “at best boundaries within which judges act.”⁵³ This was reflected in Black’s ruling, in which the Court’s outcome seemed to be “the product of a host of internal, attitudinal factors” rather than clear adherence to legal doctrine.⁵⁴ Similar reasoning is available for use by a concurring Justice regarding an endless range of legal subjects. Yet, although

other things, “the new prominence of constitutional issues on the Court’s docket” and individual Justices may be to blame for the rising number of concurrences).

48. Although the argument rests on the assumption that there is an objective, ascertainable meaning to the Constitution, Professor Gary Lawson argues that according to our principles of judicial review from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where two laws conflict, the more superior of those laws will reign supreme. Thus, following the logic of *Marbury* and the supreme nature of the Constitution, “[i]f the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.” Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 27–28 (1994). *Accord* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3063 (2010) (stating “stare decisis is only an ‘adjunct’ of our duty as judges to decide by our best lights what the Constitution means” (emphasis omitted)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring) (judges retain legitimacy by “deciding by [their] best lights whether legislative enactments of the popular branches of Government comport with the Constitution”); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 473–74 (1897) (“Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.”).

49. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40, 48 (1980) (noting where “precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it” (quoting *Francis v. S. Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting))). *See generally* Holmes, *supra* note 48, at 469.

50. 303 U.S. 197 (1938).

51. *Maty*, 303 U.S. at 199.

52. *Id.* at 200.

53. *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1645 (1998) (classifying legal realists as actors who view “legal rules and doctrines [as] at best boundaries within which judges act or, at worst, smoke screens behind which they hide their true motivations”); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 408 (2010) (referencing *Maty* as a realist perspective on pleading law).

54. *See* George, *supra* note 53, at 1645 (explaining the legal realist view of judicial decision making); *Maty*, 303 U.S. at 199–201 (ignoring statute of limitations to allow for plaintiff relief).

sometimes readily apparent (and potentially useful), such realist legal thought has been critiqued as relying on an unascertainable absolute meaning of law⁵⁵ and having the possibility to be influenced by even a jurist's diet.⁵⁶

Although these are all reasonable explanations for why a particular Justice might feel it necessary to write separately, ideological disparities seem to have an insignificant effect on whether judicial decision makers write separate opinions.⁵⁷ One study found that no single or combination of ideological standpoints is determinative as to whether a judicial actor will publish an independent opinion.⁵⁸ In lieu of better explanation, some scholars credit even the increase in the number of judicial clerks on the Supreme Court as having an impact on the prominence of individual opinions.⁵⁹ Thus, rather than attempt to discern why a particular Justice chooses to publish a concurring opinion, the more worthwhile question is exactly what subsequent effects resonate when those Justices do concur.

B. *Identifying the Precedential Influence of Concurring Opinions*

A Justice decides to concur. He must then ask himself: What form shall my concurrence take, and what sort of plan do I have for the future of my concurrence? The Justice has several options regarding how to concur, and each form of concurrence makes a different statement. Also, each form of concurrence, perhaps, has a different jurisprudential consequence.⁶⁰ Arguably, when a Justice on the Supreme Court writes a separate opinion, he attempts to clarify or steer a legal issue on a certain path of his choosing.⁶¹ A Justice must therefore be conscious of the way in which he desires his opinion to be treated in the future,⁶² as a predetermined path of Supreme Court precedent is not always followed as a strict, bright-line rule.⁶³

55. See Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 997 (1987) (arguing the impossibility of ascertaining an objective meaning of the Constitution, for any purpose).

56. See generally Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 97 (David M. O'Brien ed., 3d ed. 2009).

57. O'BRIEN, *supra* note 39, at 299.

58. *Id.*

59. See *id.* at 305 (noting that, when interviewed, Chief Justice Burger admitted he often agreed to publish a concurring opinion written by a zealous clerk rather than risk leaving the clerk heartbroken); Bator, *supra* note 27, at 685–86 (observing “opinions . . . no longer speak with the voice of the Justice, but in the pedantic and pseudo-academic jargon of the law clerk”). But cf. Craig Green, *What Does Richard Posner Know About How Judges Think?*, 98 CALIF. L. REV. 625, 656 (2010) (noting judges might only utilize clerks as resources, which allow them more time to be better judges, academics, parents, spouses, or to get more sleep).

60. See generally CORLEY, *supra* note 5; Ray, *supra* note 36.

61. See Ginsburg, *supra* note 21, at 143–44 (observing “separate opinion[s] may assist the court of next resort by charting alternate grounds of decision”); cf. Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 352–53 (2008) (arguing a Justice can use the “narrowest grounds” doctrine strategically to establish the influence of his concurring opinion).

62. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 79 (1998) (arguing justices “must and do pay some heed to the preferences of others and the actions they expect others to take”).

63. Often, adherence to stare decisis by the Court is dependent on the individual Justice authoring the opinion or the policy implications of the potential ruling, leading to what often seems like ad hoc overruling of

Consequentially, a Justice must be conscious of the different forms of concurrence available to him in his attempt to best clarify the terms on which he joins the lead opinion. Concurring opinions break down into six general classifications, each with a different comment on the lead opinion to which they attach themselves: the “emphatic concurrence,” the “unnecessary concurrence,” the “reluctant concurrence,” the “expansive concurrence,” the “limiting concurrence,” and the “doctrinal concurrence.”⁶⁴ Further, each of these individual options has a jurisprudential impact on the shape of future law, however miniscule.⁶⁵ It is instinctive to claim that when a concurrence attaches itself to a majority opinion, the majority opinion should rule as the case’s precedent.⁶⁶ Although this is generally true, there are exceptions to every rule. Concurring opinions by Supreme Court Justices often substantially influence the law.⁶⁷ Due to the impossibility of the Supreme Court reviewing all lower federal court cases and the Court’s sole reservation to overrule its prior precedents, whether concurring opinions present legitimate precedential options is of tangible importance.⁶⁸

former precedents. *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968))) (two “precedents” overruled within less than twenty years). Some, however, argue that the Court will overrule precedents only under certain requisite circumstances that lead to a determination that a change is necessary. *See* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346–47 (1990) (listing those circumstances as (1) when precedents conflict, (2) where conditions the first decision relied upon change, and (3) where rules the first decision relied upon prove “unworkable,” and citing *Puerto Rico v. Branstad*, 382 U.S. 219 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)), *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) (overruling *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825)), and *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)), respectively, as examples). It is obvious, however, that ideological positions often influence how the Supreme Court Justices treat precedential influences. *Compare* *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677–85 (1992) (Rehnquist, C.J., for majority of White, O’Connor, Scalia, and Thomas, JJ., held a ban on pamphleting and soliciting in New York City’s JFK Airport reasonable due to inconvenience activities placed on transiting passengers, with Souter, Blackmun and Stevens, JJ., dissenting), *with* *Hill v. Colorado*, 530 U.S. 703, 705–07 (2000) (showing a complete flip of Justice participation in majority and dissent where pamphleting and counseling regarding abortions or any other medical treatment were banned within one hundred feet of Colorado medical facilities).

64. CORLEY, *supra* note 5, at 14–19.

65. Ray, *supra* note 36, at 783; *cf.* Kirman, *supra* note 22, at 2110 (arguing only concurrences that agree with the majority’s reasoning have precedential value).

66. Samuel Estreicher & Tristan Pelham-Webb, *The Wisdom of Soft Judicial Power: Mr. Justice Powell, Concurring*, 25 CONST. COMMENT. 229, 231 (2008); *see also* *Bronson v. Bd. of Educ. of Cincinnati*, 510 F. Supp. 1251, 1265 (S.D. Ohio 1980) (noting “concurring opinions have no legal effect, and thus, are in no way binding on any court”).

67. *See, e.g.*, Estreicher & Pelham-Webb, *supra* note 66, at 230–31 (citing Justice Powell’s concurrence in *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring), Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and Justice Frankfurter’s concurrence in *Brown v. Allen*, 344 U.S. 443, 488 (1953) (Frankfurter, J., concurring) as exceptions to the rule favoring majorities).

68. *See* Maltz, *supra* note 27, at 1415–16 (arguing for persuasive influence of Supreme Court concurring opinions); *cf.* Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601, 610 (2012) (recognizing that concurrences “fall comfortably within [the] definition of persuasive precedent”). *Compare* *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (explaining “the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases”), *with* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

Before advancing to a determination of the precedential value of concurring opinions, that potential influence—however strong or weak—must be justified in light of two concepts. The first is a general concept of precedent: Will the doctrines of precedent and stare decisis justify a concurring opinion becoming a precedential influence? And second, even if precedent allows it, does a judicial decision maker have a legitimate choice to allow a concurring opinion to influence him as a precedent? The next two subsections will address these questions in turn.

1. The Influence of Concurring Opinions in Light of Concepts of Precedent

Although much has been written on how concurring opinions affect the lead opinions to which they are attached,⁶⁹ little has been written on the precedential impact of a concurring opinion written by an individual Justice.⁷⁰ To that effect, an exploration into the precedential value of concurring opinions is dependent upon modern views of precedent and continuing discussions of stare decisis.

Precedent, in its literal and practical form, is not merely a judicial creation. As most familiar with basic legal concepts are aware, there are, in fact, different forms of precedent.⁷¹ Legal rules divined by a higher-ranking court may automatically be perceived as mandatory precedents for lower courts.⁷² This primarily results from the judicial system's hierarchical structure—lower court decisions are subject to review of higher courts, whose decisions then bind those lower courts in future cases. Alternatively, precedents can be established over time by consistent positive subsequent treatment, which builds strength for a legal rule.⁷³

Before applying a precedent, however, one must first identify a precedent to apply. Generally, courts identify legal precedents or influences through a variety of factors. One such factor is the similarity of factual circumstances between the present suit and a previous ruling.⁷⁴ Courts apply the “precedent”—that is, the legal reasoning—of the previous ruling to ensure that similarly situated parties receive the same treatment in like cases. For instance, a judge would most likely refrain from applying the rationale of a case involving maritime law as a precedent for a case

854 (1992) (explaining “obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit”).

69. *E.g.*, Berkolow, *supra* note 61.

70. *Cf.* Kirman, *supra* note 22, at 2083–85 (exploring the precedential effects of only two types of concurrences).

71. Generally, “mandatory” precedents are those legal rules expounded by courts that have appellate jurisdiction over the lower courts applying those precedents. “Persuasive” precedents are those legal rules dictated by lower or sister courts with no appellate review of the precedent-applying court. *See* Caminker, *supra* note 28, at 824–25 (distinguishing between the binding nature of hierarchical precedents and the nonbinding nature of coordinate-court precedents).

72. *See id.* at 824 n.28 (citing *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981)) (stating that federal district courts must obey circuit courts of appeals).

73. *See* Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 *LAW & SOC'Y REV.* 325, 331–34 (1987) (observing that positive subsequent treatment of Supreme Court's own precedent increases influence of that precedent).

74. *See* Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 577–78 (1987) (discussing how future precedential effects of current decisions are necessarily dependent on an assumption that similar sets of facts will present themselves, and that those facts will produce similar results).

involving arson.⁷⁵ Further, societal norms or community ideologies may have an effect on how a judge views relevant facts in determining identifiable precedents.⁷⁶

Once a precedent is identified, its application to a present case is generally justified in two ways. First, there are arguments for precedent. Those arguments are readily familiar: where a set of facts was treated a certain way, when those facts once again appear at a future time, because of “historical pedigree,” we should treat those facts the same way once again.⁷⁷ Second, adherence to precedent has been viewed as a “justification.” That is, a judge initially defaults to precedent and then, later, to explain his adherence to a previous mode of decision, he uses precedent to justify his decision for doing so, claiming, “we have always done it that way,” or, “we have never done it any other way.”⁷⁸ Viewing concurring opinions in light of these two concepts, adherence to a concurring opinion (as opposed to the lead opinion that concurrence is attached to) may be viewed only slightly differently: “this *has been* said before” or “this *has been* an idea percolating for many years” in circumstances with relatively similar facts.

Supreme Court concurring opinions thus present an odd medium for legal rules in regard to precedent. They are indeed opinions from the hierarchical pinnacle of our judicial system. But, because of their individual nature, they are typically regarded as merely persuasive, and secondary to a majority consensus.⁷⁹ Yet, although they are not mirror images of majority holdings, they still support holdings christened by a majority or plurality of the Court; and they analyze the same set of facts, even if in an alternate manner.⁸⁰ Thus, outright disavowal of these opinions seems premature without examining how these individual concurrences shape the law. Concurrences written by Supreme Court Justices may provide alternative avenues to majority-legitimized results for subsequent courts addressing similar circumstances.⁸¹

The ability of a concurrence to shape future law is evident in the subsequent treatment of *Regents of the University of California v. Bakke*.⁸² In *Bakke*, the Court split on whether the policy of reserving a certain number of admission slots at the Medical School of the University of California at Davis for specified minority groups violated constitutional concepts of equal protection under the Fourteenth Amendment

75. This is a general conclusion and is always open to contradiction by a wildly rare set of facts. For instance, if someone were to start a fire on a merchant vessel, the accuracy of this statement would be seriously diminished.

76. See Schauer, *supra* note 74, at 578 (stating “rules of relevance” in one era may not be transferable to modern cases, and providing changing views on race relations as a relevant example).

77. *Id.* at 571 (emphasis omitted).

78. *Id.* at 571–72.

79. See *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (explaining “the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases”); *Bronson v. Bd. of Educ. of Cincinnati*, 510 F. Supp. 1251, 1265 (S.D. Ohio 1980) (explaining “concurring opinions have no legal effect, and thus, are in no way binding on any court”).

80. See *infra* Part II.B.3 for a discussion of different types of concurring opinions and their relationships with the majority or plurality opinion to which they attach.

81. See Ray, *supra* note 36, at 800 (observing “the most influential variant of the concurrence is the opinion that advances an alternate theory in support of the Court’s holding”).

82. 438 U.S. 265 (1978).

and the Civil Rights Act of 1964.⁸³ Four Justices⁸⁴ approved the specific program and racial classifications in school admission policies generally because of their attempt to remedy past harms of segregation.⁸⁵ Another four Justices⁸⁶ argued that the program violated Title VI of the Civil Rights Act by exercising racial discrimination in a program that receives federal funds,⁸⁷ ignoring the question of whether race could ever be a factor in a school's admissions policy.⁸⁸

Finding a middle ground, Justice Powell argued that although race was somewhat permissible as a factor in admissions programs,⁸⁹ the specific program at the Medical School was an invalid exercise of that discretion.⁹⁰ In writing separately, Justice Powell held that racial classifications are always subject to strict judicial scrutiny,⁹¹ and determined that schools are only justified when using race as a "plus" factor in making admission determinations that diversify student bodies.⁹² Justice Powell's opinion and reasoning, although written and supported by only one Justice, has been treated as *Bakke's* primary holding by subsequent courts.⁹³ Even the latest case to address the issue of affirmative action in education, *Parents Involved in Community Schools v. Seattle School District No. 1*,⁹⁴ applied Justice Powell's opinion as *Bakke's* dispositive governing authority.⁹⁵

What *Bakke* means for precedent is not so controversial. Precedents, although often viewed as mandatory and steadfast, are often only determined to be precedential after viewing them in light of their subsequent treatment.⁹⁶ This is due to the fact that an opinion today has an infinite amount of "possible subsequent characterizations" tomorrow, and an equal amount of "directions in which it might be extended."⁹⁷ Indeed, when a possible judicial conclusion stands on its own with compelling arguments, "there is no appeal to precedent, even if the same conclusion has been

83. *Bakke*, 438 U.S. at 269–70.

84. Justice Brennan wrote, with whom Justices White, Marshall, and Blackmun joined. *Id.* at 324 (Brennan, J., concurring).

85. *Id.* at 368–69, 379.

86. Justice Stevens wrote, with whom Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined. *Id.* at 408 (Stevens, J., concurring).

87. *Id.* at 421.

88. *Id.* at 409–11.

89. *See id.* at 314 (opinion of Powell, J.).

90. *Id.* at 271–72.

91. *Id.* at 290.

92. *Id.* at 316–18.

93. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 321 (2003) (citing *Grutter v. Bollinger*, 288 F.3d 732, 739 (6th Cir. 2002)) (explaining that the Sixth Circuit found Justice Powell's opinion in *Bakke* binding); *id.* at 323–25 (applying Justice Powell's standard from *Bakke*); *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 248 (6th Cir. 2006); *Doe v. Kamehameha Sch.* 470 F.3d 827, 846 (9th Cir. 2006).

94. 551 U.S. 701 (2007).

95. *Parents Involved*, 551 U.S. at 730, 742, 743, 755.

96. *See Schauer*, *supra* note 74, at 574 (noting "the process of characterizing a decision does not end with its first formulation").

97. *Id.*

reached in the past.”⁹⁸ Thus, subsequent treatment is an undeniably strong factor in determining the validity and vigor of a particular precedent.

Although it is still a rare occurrence, it is not difficult to identify specific concurrences that have gone on to have heavy precedential influence despite their lead opinion counterparts.⁹⁹ These concurrences have gained their precedential influence due to either their positive subsequent treatment or subsequent appeal to the alternate rationales those concurrences forward.¹⁰⁰ Nonetheless, although it is easy to say that concurring opinions could exercise influence on future decisions, what sort of influence those opinions may have is inevitably in the hands of future judicial decision makers.

2. A Right to be Influenced by a Concurring Opinion

Generally, when a judge is asked to rule on an issue previously addressed by an opinion from a superior court, adherence to or departure from precedent can be analyzed based on several models of judicial decision making.¹⁰¹ One finds its basis in legal principles—that is, a consideration of the factors surrounding the opinion, including the holding, the reasoning, and the policy implications.¹⁰² Another is politically based, where a judicial decision maker’s choice is aligned with certain desired political effects.¹⁰³ Alternatively, proponents of the attitudinal model argue that a judicial decision maker will base decisions on individual ideology.¹⁰⁴ In the attitudinal model, judicial decision makers are viewed as “atomistic maximizer[s] of policy preferences.”¹⁰⁵ Although that may be the case, each of these decisions must

98. *Id.* at 576.

99. *See* Estreicher & Pelham-Webb, *supra* note 66, at 231 (observing concurring opinions establishing precedent over majority counterparts is “not a new phenomenon” and referencing *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (Powell, J., concurring) and *Brown v. Allen*, 344 U.S. 443, 488 (1953) (Frankfurter, J., concurring) as examples).

100. *See, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 590–602 (1989) (utilizing Justice O’Connor’s standard for Establishment Clause review from *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (applying Justice Jackson’s standard for analyzing Presidential power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), because it has “in the past [been] found . . . analytically useful”).

101. Johnson, *supra* note 73, at 325. It would be well to note that this discussion of the several models of judicial decision making is merely a summary, and is dealt with at length in other texts. *See generally* EPSTEIN & KNIGHT, *supra* note 62; Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001). For the purposes of this Comment, all that is necessary to understand is that judges may not make decisions in a vacuum, and may often intend specific consequences for their rulings and opinions.

102. Johnson, *supra* note 73, at 326.

103. *Id.* at 330–31.

104. “In other words, ‘Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he [was] extremely liberal.’” EPSTEIN & KNIGHT, *supra* note 62, at xii n.b. (alteration in original) (quoting JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993)).

105. George, *supra* note 53, at 1646.

appeal to the particular judicial decision maker's personal view of his professional duties and, potentially, notions of stare decisis and adherence to legal precedents.¹⁰⁶

One particular model of judicial decision making views jurists as strategic decision makers.¹⁰⁷ This view recognizes judges as "strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act."¹⁰⁸ This relates directly to the aforementioned concepts of precedent and how judicial decision makers decide cases mindful of future precedential consequences.¹⁰⁹ This concept is essential to determining how different forms of concurrences may be viewed as precedential authority by subsequent courts: If a Supreme Court Justice intends his opinion to be influential in a specific way, then what is to stop lower courts from treating it as such?

Finally, a departure from what some judges may determine to be a "valid" precedent is arguably well within a particular judicial actor's discretion in exercising "judicial creativity."¹¹⁰ Indeed, it is out of this discretionary creativity that most of our common law has formed.¹¹¹ Within this general scope of judicial creativity, a jurist may have wide discretion to alter notions of precedents or directions of the law in a variety of ways, including, in certain circumstances, relying on argument pronounced in a concurring opinion.¹¹² This concept of independent judicial discretion is only reinforced when observing the federal judiciary, whose members' lifetime appointment may allot them certain protection in straying from what are perceived to be sound rules of law. In reality, therefore, whether a concurrence has any precedential influence may

106. See Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994) (arguing lower courts are agents of the Supreme Court principal and are bound by its majority decisions). See generally Caminker, *supra* note 28.

107. George, *supra* note 53, at 1655–57.

108. EPSTEIN & KNIGHT, *supra* note 62, at 10; see, e.g., Lawrence v. Texas, 539 U.S. 558, 591–92 (2003) (Scalia, J., dissenting) (critiquing the Court's justification for overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), as inconsistent with the concepts of stare decisis articulated in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and "expos[ing] *Casey's* extraordinary deference to precedent for the result-oriented expedient that it is"). But see Green, *supra* note 59, at 654–55 (pointing out such judicial conspiracy theories lack hard evidence and "skepticism of such insinuations seems apt").

109. See EPSTEIN & KNIGHT, *supra* note 62, at 79 (identifying justices as "'forward-thinking' actors" who make choices with future consequences in mind); cf. Schauer, *supra* note 74, at 579 (identifying that present actors have in mind future consequences of precedents they create).

110. WITKIN, *supra* note 15, at 172.

111. See *Hurtado v. California*, 110 U.S. 516, 530 (1884) (observing "flexibility and capacity for growth and adaptation is the . . . excellence" of American common law); O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881) (arguing law cannot be dealt with under the assumption that "it contain[s] only the axioms and corollaries of a book of mathematics"); Albert A. Ehrenzweig, "False Conflicts" and the "Better Rule": *Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 855 (1967) ("The very growth of common-law rules is based on the judges' choice between competing principles, choices expressed in the process of overruling or distinguishing earlier judicial pronouncements.").

112. See WITKIN, *supra* note 15, at 172–76 (using *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974), to explain concepts of "judicial creativity"); cf. Holmes, *supra* note 48, at 466 ("We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it . . .").

depend primarily on the ways in which future judicial decision makers view and subsequently utilize that concurrence.

3. The Different Forms of Concurrence and Their Possible Precedential Effects

There is not a single form of concurrence, but multiple ways in which a Justice can frame his partial joinder to the majority or plurality coalition. Although there may be confusion regarding what to infer from how an author labels his concurrence (e.g., “concurring in judgment” versus “concurring in part, dissenting in part”), for the purpose of this Comment, what matters is not the name assigned to the opinion, but the way in which the concurrence interacts with the lead opinion.¹¹³ Thus, scholars have recognized six different forms of concurrence: the “emphatic concurrence,” the “unnecessary concurrence,” the “reluctant concurrence,” the “expansive concurrence,” the “limiting concurrence,” and the “doctrinal concurrence.”¹¹⁴ Each form has an identifiable relationship with the lead opinion to which it is attached, and each, when viewed in light of the aforementioned concepts of precedent and judicial decision making, has a possible precedential effect on subsequent cases. In examining each form, the possible factors affecting a concurrence’s precedential influence can be identified.

i. The Emphatic Concurrence

An emphatic concurrence is an individual opinion that “seeks only to emphasize its author’s view of the majority’s position,”¹¹⁵ or to clarify a particular aspect of the lead opinion.¹¹⁶ The emphatic concurrence allows for the concurring justice to “specify the terms of [his] assent or to single out an aspect of the Court’s opinion for elaboration.”¹¹⁷ For example, in *Ashcroft v. American Civil Liberties Union*,¹¹⁸ Justice Kennedy delivered the Court’s opinion, finding that the Child Online Protection Act (COPA)¹¹⁹ violated the First Amendment by restricting the ability of adults to access

113. See West, *supra* note 27, at 1953–54 (identifying misuse of concurrences based on the “title” given by the author, and arguing that labels given by authors matter much less than how the concurrence interacts with lead opinion). See *supra* note 5 for an explanation of how this Comment cites to and refers to concurrences and concurring opinions irrespective of their authors’ labels.

114. See, e.g., CORLEY, *supra* note 5, at 14–19; WITKIN, *supra* note 15, at 217–225; Ray, *supra* note 36, at 784–809. Credit is especially due to Pamela C. Corley, Laura Krugman Ray, and B.E. Witkin for their invaluable research and contribution to the scholarship, including the creation of these six concurrence forms, without which this Comment and its Author would have been lost.

115. Ray, *supra* note 36, at 796.

116. CORLEY, *supra* note 5, at 18.

117. Ray, *supra* note 36, at 800.

118. 542 U.S. 656 (2004).

119. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified in scattered sections of 47 U.S.C.), *invalidated by* ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied* 555 U.S. 1137 (2009). COPA attempted to protect and prevent children from accessing obscene and pornographic material on the Internet by criminalizing the knowing posting of such material for commercial purposes. *Ashcroft*, 542 U.S. at 661.

forms of protected free speech on the Internet.¹²⁰ Justice Stevens, additionally, filed an emphatic concurrence emphasizing “just how restrictive COPA is.”¹²¹

Justice Stevens’s concurrence did nothing to contradict or undermine the majority opinion. It provided only a detailed analysis of Justice Stevens’s belief on why and how COPA repressed the free exercise of speech. His concurrence highlighted his belief that attaching criminal consequences to the vague and subjective area of obscenity law was improper, and further criticized the severity of the criminal consequences contained in COPA.¹²² Additionally, an emphatic concurrence, such as Justice Stevens’s *Ashcroft* concurrence, can function as a “quasi-confessional . . . expression of a justice’s emotional as well as jurisprudential” response to a particular case.¹²³ This is demonstrated by the fact that although Justice Stevens sympathized “[a]s a parent, grandparent, and great-grandparent” with the government’s legitimate interest of protecting children from inappropriate content on the Internet, he justified his decision to concur in the majority opinion by confessing to a “growing sense of unease when [that] interest . . . is invoked as a justification for using criminal regulation of speech as a substitute for . . . adult oversight of children’s viewing habits.”¹²⁴ With his emphatic concurrence, Justice Stevens clarified the terms on which he assented to the majority opinion, while further expounding on what he felt was his judicial duty to the protection of civil rights.

In effect, an emphatic concurrence may be precedentially inconsequential. Merely rewording the general rationale of the lead opinion adds nothing to the discussion of the law and has little value as a legal authority.¹²⁵ That being said, where the emphatic concurrence agrees with the majority’s reasoning and the Justice writing the emphatic concurrence is necessary to provide a majority, the precedential value of that concurrence may be elevated.¹²⁶ Because a majority of the Justices sitting on a particular case is required in order for a legal rule to be treated as precedent,¹²⁷ if the particular Justice writing the emphatic concurrence was necessary for such a majority, a future court might do well to take notice of the particular points the concurring Justice emphasized in his individual opinion.¹²⁸ By catering to those issues, the

120. *Ashcroft*, 542 U.S. at 670. Interestingly, the Court cites language from Justice Thomas’s concurring opinion in *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 830 (2000) (Thomas, J., concurring) as its final rational “oomph.”

121. *Ashcroft*, 542 U.S. at 674 (Stevens, J., concurring).

122. *Id.* at 674–75.

123. Ray, *supra* note 36, at 800.

124. *Ashcroft*, 542 U.S. at 675 (Stevens, J., concurring).

125. Ray, *supra* note 36, at 800.

126. See Kirman, *supra* note 22, 2104–10 (suggesting that when a concurring opinion is both necessary for a numerical majority and compatible with the majority’s reasoning, lower courts “should grant precedential weight to the combination” of opinions).

127. *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (explaining that “the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts”); see G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts*, 11 ADEL. L. REV. 203, 210 (1987) (arguing that in absence of unity, majority consensus strengthens a rule of law).

128. See Kirman, *supra* note 22, at 2097–98 (theorizing that “in obtaining the fifth vote, the Court at times expresses its institutional sanction of the separate opinion’s position—by compromising individual

applying court can assure itself of compliance with the rule of law in that particular case. If the subsequent court is complying with the most passionate Justice on the particular issue, it will most likely appeal to the rest of the majority members as well. This protects the subsequent court against the risk of reversal, a legitimate fear of many jurists.¹²⁹ Although this might not change the future scope of the law, the emphatic concurrence may provide lower courts or future Justices with a different option for valid authority.

ii. The Unnecessary Concurrence

As its name suggests, an unnecessary concurrence is a “concurrence in judgment without opinion.”¹³⁰ An unnecessary concurrence notes that the particular Justice concurs in the decision of the Court, but leaves one to guess as to why he did not simply join in the majority opinion.¹³¹ In essence, it “produces all the evils of a concurring opinion with none of its values,” in that it “casts doubt on the principles declared in the [lead] opinion without indicating why they are wrong or questionable.”¹³²

Moreover, because nothing other than a note on the syllabus appears, one can only speculate a hypothetical reason for the concurrence.¹³³ The Justice could be concurring because he agrees with the lead opinion’s result but not with the authorities it relies on in support; or he agrees with only some of the majority’s principles; or he completely agrees with everything the lead opinion has to say; or, simply, he does not like a particular line of text within the lead opinion.¹³⁴ Regardless, whatever the reason the Justice decides to depart from acquiescing to the lead opinion, this rare¹³⁵ type of concurrence may not warrant an exploration into its precedential value. Where no opinion exists to cite to, the issue of precedential influence is without value.

preferences in order to procure a majority”); *cf.* Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 35 (2009) (noting “minimum winning coalition” and “size of the voting majority” as influencing the authoritativeness of a Supreme Court opinion).

129. *See, e.g.*, Caminker, *supra* note 28, at 827 n.40 (reasoning that judges fear reversal and implicitly attempt to avoid such in light of professional and personal ramifications implicit in reversal).

130. CORLEY, *supra* note 5, at 19.

131. *Id.*; *see, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 (1986) (Blackmun, J., concurring) (concurring in result without opinion); *New York v. Ferber*, 458 U.S. 747, 774 (1982) (Blackmun, J., concurring) (concurring in result without opinion).

132. WITKIN, *supra* note 15, at 223.

133. CORLEY, *supra* note 5, at 19.

134. *Id.*

135. *See id.* at 31, 101–12 (citing *DOJ v. Tax Analysts*, 492 U.S. 136, 155 (1989) (White, J., concurring); *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (Blackmun, J., concurring); *INS v. Pangilinan*, 486 U.S. 875, 887 (1988) (Blackmun, J., concurring); *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (O’Connor, J., concurring); *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (Scalia & O’Connor, JJ., concurring); *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988) (Blackmun, J., concurring); *Comm’r v. Fink*, 483 U.S. 89, 100 (1987) (Blackmun, J., concurring); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (Scalia, J., concurring) as the only examples of unnecessary concurrences for the 1986 to 1989 terms). In reviewing the opinions issued from the 2011 Term, not a single Justice wrote an unnecessary concurrence.

iii. *The Reluctant Concurrence*

In a reluctant concurrence, the concurring Justice joins the majority coalition but writes separately in order to express the fact that he would rather not. The Justice joins the lead opinion, but only because he “feels compelled to, perhaps because of precedent or because of a desire to produce a majority opinion on an important issue.”¹³⁶ The Justices have recognized the importance of unanimity—or at least a perception thereof—where controversial issues producing dramatic social consequences are placed on their docket.¹³⁷ This sort of acquiescence in the name of stare decisis can be seen specifically in *Mathews v. United States*.¹³⁸ In *Mathews*, the majority opinion held that a defendant in a criminal case is always permitted to advance a defense of entrapment, even where that defendant denies committing the crime into which he is alleging he was entrapped.¹³⁹ Justice Brennan, in a short reluctant concurrence, noted that, although he had dissented to the majority’s holding in four previous cases on this matter, he admitted that his differences with the majority opinion were due to his personal views on statutory construction rather than constitutional interpretation.¹⁴⁰ Thus, because the Court had “spoken definitively” on the point of the ruling, Justice Brennan “bow[ed] to stare decisis.”¹⁴¹

Although acquiescence to a majority ruling may create a majority, a reluctant concurrence shares more similarities with a dissent than it does a concurrence.¹⁴² Thus, the precedential value of a reluctant concurrence may be non-existent. If the Justice is merely concurring with the majority opinion for the sake of numbers, the only real legal substance present in the concurrence is a dissidentist attitude and submission to the importance of precedent and stare decisis.¹⁴³ If a reluctant concurrence is viewed as analogous to a dissenting opinion, it may have only a subtle impact on precedent by chipping away at the strength of the lead opinion or presenting an alternate rule of law.¹⁴⁴

136. CORLEY, *supra* note 5, at 17; *see also* John M. Rogers, “I Vote This Way Because I’m Wrong”: *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 463–74 (1991) (opining that marginal adherence to stare decisis and “sacrificing individual consistency” are possible reasons for reluctant concurrences).

137. *See* CORLEY, *supra* note 5, at 17 (noting that concurring Justices may feel compelled to join in the majority’s decision “because of a desire to produce a majority opinion on an important issue”); Ray, *supra* note 36, at 782 (noting that authors of reluctant concurrences “admit[] to being bound by . . . the need to produce a majority opinion on an important issue”). *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

138. 485 U.S. 58 (1988).

139. *Mathews*, 485 U.S. at 62.

140. *Id.* at 66–67 (Brennan, J., concurring).

141. *Id.* at 67 (emphasis omitted).

142. WITKIN, *supra* note 15, at 224.

143. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 354 (1974) (Blackmun, J., concurring) at 223–24 (“I feel that it is of profound importance for the Court to . . . have a clearly defined majority position that eliminates . . . unreteness If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount.”); Ray, *supra* note 36, at 782 n.19 (noting skepticism of “such concurrences since ‘[h]igh courts are constantly seeking to maintain respect for stare decisis by positive declarations that trial judges and intermediate appellate courts must follow controlling authority’” (alteration in original) (quoting WITKIN, *supra* note 16, at 224)).

144. CORLEY, *supra* note 5, at 78; *see also* Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC’Y 78, 78 (1942) (discussing general influence and appeal of dissenting opinions).

Further, if a judicial actor were to rely upon a reluctant concurrence as a precedential influence, other judicial decision makers may question his motive.¹⁴⁵ Although the reluctant concurrence was part of a majority coalition—in that it assented to a particular rule of law or substantive holding—subsequent citation to that reluctant concurrence may be viewed as following the majority holding merely for the purpose of adhering to concepts of hierarchical precedent or stare decisis, much like the original purpose of the author of the reluctant concurrence.¹⁴⁶ Such strategic use of *all* authority available to a judicial actor may advance the point behind the original reluctant concurrence: to uphold stare decisis and hierarchical precedent, essential to the legitimacy of the judicial system, while critiquing the current rule of law.¹⁴⁷ In this respect, the precedential value of a reluctant concurrence could be that it provides jurists with an avenue both to adhere to and critique what is considered to be the more relevant precedent.¹⁴⁸

In sum, a reluctant concurrence may have little present precedential effect. Any separate legal reasoning it supports will be contrary to that contained in the lead opinion.¹⁴⁹ Thus, the rule supported by the majority will likely remain the stronger precedent.¹⁵⁰ That said, the future precedential effect of a reluctant concurrence, like its dissenting doppelganger, may be that it encourages future development of the law.¹⁵¹ In this respect, a judicial decision maker has the option to utilize a reluctant concurrence as a strategic stab at established doctrine.¹⁵²

145. See *supra* notes 101–09 and accompanying text for a discussion on varying choices judicial actors make that raise questions as to the actor’s true motives. This may affect an actor’s own decision to cite to a poorly motivated precedent, for fear of relying upon what may be considered an improper precedential influence. Cf. Caminker, *supra* note 28, at 826 (noting that one reason for adhering to stare decisis is avoiding “chaos” in the judiciary where judicial decision makers act as “autonomous law-declaring actors”).

146. CORLEY, *supra* note 5, at 17; see *Mathews*, 485 U.S. at 67 (Brennan, J., concurring) (“I bow to stare decisis . . .” (emphasis omitted)).

147. Cf. Caminker, *supra* note 28, at 863 (observing that lower courts can attempt to affect reconsideration of precedent by using “critical concurrences,” which follow, but question, superior court rulings); Stone, *supra* note 144, at 78 (noting the reasoning of some majority opinions under Chief Justice Stone were based on the dissenting opinions of prior Courts).

148. For evidence of this type of strategic judicial opinion writing and opinion use, see, for example, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 412 (2002) (Scalia, J., dissenting) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 35–36 (2001) (Scalia, J., concurring)) (Justice Scalia citing prior self-authored opinions to support his continuing argument that the Court should lay down clear rules to avoid litigation).

149. See WITKIN, *supra* note 15, at 224 (noting that reluctant concurrences “weaken[] the authority of the main opinion as a pronouncement of legal doctrine in much the same manner as a dissent”).

150. See *supra* notes 127–28 and accompanying text for a discussion on how rules prescribed and supported by a majority create stronger precedent.

151. See Stone, *supra* note 144, at 78 (stating a dissent’s “real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law”).

152. Cf. *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting) (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring)) (Justice Scalia citing prior self-authored opinions in an effort to forward his view that certain sexually explicit materials are not privy to constitutional protection).

iv. *The Expansive Concurrence*

In an expansive concurrence, a Justice attempts to enlarge the lead opinion's holding or to supplement the substance of the lead opinion.¹⁵³ Although the expansive concurrence, like a reluctant concurrence, is a tool that encourages substantive change in the law—in that it often broadens the application of the lead opinion's reasoning—it does so only collaterally rather than by directly attacking the lead opinion.¹⁵⁴ For example, in *Young v. United States ex rel. Vuitton et Fils*,¹⁵⁵ the majority opinion held that where a district court appoints an attorney to represent a beneficiary, that attorney may not later be appointed as a prosecutor in a contempt hearing for the violation of that order.¹⁵⁶ The majority reasoned that any other holding would present a conflict of interest.¹⁵⁷ Further, the majority opined that an attorney appointed to prosecute a contempt order “should be as disinterested as a public prosecutor who undertakes such a prosecution.”¹⁵⁸ In an expansive concurrence, Justice Blackmun joined the majority's opinion,¹⁵⁹ but stated that he would “go further . . . and hold that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process.”¹⁶⁰

Although expansive concurrences do little other than broaden the legal doctrine contained in the lead opinion, their precedential value may face clear barriers. For instance, in determining the precedential value of Supreme Court plurality opinions, the Court has provided a vague, yet explicit, guideline. In plurality opinions, which often present themselves in the “hard[est]” cases,¹⁶¹ there are always a minimum of three opinions presented in the Court's decision: often two concurrences and one dissent, with an assorted numbers of Justices attaching to the opinion they support.¹⁶² The problem in such a circumstance is that there is no single opinion to which a majority of the Justices attach themselves. Without a majority opinion, there is an inherent difficulty in identifying a legal rule that has binding precedential effect.¹⁶³ Often, the two concurring opinions, while agreeing on the result, will differ substantially in their application or choice of a legal rule.¹⁶⁴

153. CORLEY, *supra* note 5, at 16; Ray, *supra* note 36, at 793.

154. See Ray, *supra* note 36, at 781 (“[T]he expansive concurrence is centrifugal, pulling the holding away from its original context toward other related situations.”); see, e.g., Webster v. Reprod. Health Servs., 492 U.S. 490, 534 (1989) (Scalia, J., concurring) (concurring but arguing that compelling reasons support “go[ing] beyond the most stingy possible holding”).

155. 481 U.S. 787 (1987).

156. *Young*, 481 U.S. at 790.

157. *Id.* at 804–05 n.15.

158. *Id.* at 804.

159. *Id.* at 814 (Blackmun, J., concurring).

160. *Id.* at 814–15.

161. Kimura, *supra* note 38, at 1594 & n.8; see, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion in case adjudicating questions relating to the Court's abortion doctrine).

162. Kimura, *supra* note 38, at 1595.

163. *Id.* at 1594–95; see also Corley, *supra* note 128, at 35 (arguing that rules in plurality opinions are less authoritative than majority or unanimous rulings).

164. For instance, in *Hamdi v. Rumsfeld*,

In light of this confusion, the Supreme Court established the “narrowest grounds” test in *Marks v. United States*.¹⁶⁵ In *Marks*, the Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”¹⁶⁶ Further, the *Marks* doctrine need not apply in the instance that an implicit consensus appears between the concurrences in a plurality decision.¹⁶⁷ That is, where there is “a common thread running through the reasoning of the concurring opinions,” that common thread should be regarded as the holding for precedent’s sake.¹⁶⁸ Thus, when presented with different reasoning for a single result in a plurality of concurring opinions, there are two steps to interpretation: either the least common denominator running throughout the multiple opinions is regarded as precedent, or, where such a denominator is not readily apparent, the opinion which reaches the result on the most narrow grounds shall be regarded as precedent.¹⁶⁹ Although this pronouncement has obvious implications for interpretations of plurality decisions, it also has relevance in determination of the possible precedential effects of expansive concurrences.

In an expansive concurrence, the authoring Justice is purposefully enlarging the residual legal effect of the lead opinion’s rule.¹⁷⁰ In analogizing the strategies for interpreting plurality decisions, both the implicit consensus and the *Marks* doctrine point to reliance on the lead opinion, and not the expansive concurrence, as precedent. The lead opinion will share the legal rule and principles that the expansive concurrence embodies, as well as apply those principles and reasoning more narrowly.¹⁷¹ In this light, it is more than likely that the precedential value of an expansive concurrence will be destroyed by the *Marks* doctrine and a desire to reach a rule on which a majority of Justices agree.¹⁷²

O’Connor, J., announced *the judgment* of the Court and delivered *an opinion*, in which Rehnquist, C.J., and Kennedy and Breyer, JJ., joined. Souter, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which Ginsburg, J., joined. Scalia, J., filed a dissenting opinion, in which Stevens, J., joined. Thomas, J., filed a dissenting opinion.

542 U.S. 507, 508 (2004) (emphasis added) (citations omitted). Thus, for *one* result, *two* opinions were written applying different legal standards.

165. 430 U.S. 188, 193 (1977).

166. *Marks*, 430 U.S. at 193 (internal quotation mark omitted).

167. See generally Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

168. *Id.* at 429.

169. Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 764–65 (1980); Thurmon, *supra* note 167, at 429.

170. CORLEY, *supra* note 5, at 16.

171. See *supra* notes 165–69 and accompanying text for a discussion on how the implicit consensus doctrine and the *Marks* doctrine mandate that conflicting legal rules be interpreted. Here, these models of interpretation can be applied to expansive concurrences and majority opinions analogously due to the similar problem of attempting to rationalize a single precedent out of two competing rationales.

172. See *supra* note 127–29 and accompanying text for clarity on why the number of justices adhering to a particular legal rule is important in interpreting the strength of rules as precedent.

v. *The Limiting Concurrence*

A limiting concurrence is an individual opinion by a concurring Justice that limits or places qualifications or conditions on the lead opinion's holding.¹⁷³ This form of concurrence is used quite frequently to warn of a lead opinion pressing a legal rule's application too far, or to limit the lead opinion solely to the issue before the bar.¹⁷⁴ Such opinions may begin with some familiar variance of "I write separately only to note that today's holding is a narrow one."¹⁷⁵ For instance, in *Gonzales v. Carhart*,¹⁷⁶ a majority of the Court held that the Partial-Birth Abortion Ban Act of 2003 was consistent with its abortion jurisprudence and was a legitimate exercise of congressional Commerce Clause power.¹⁷⁷ Justice Thomas, with whom Justice Scalia joined, wrote a limiting concurrence observing that the legitimacy of the Act under the Commerce Clause was not at issue in the current dispute and need not have been decided.¹⁷⁸ Similarly, in *Metropolitan Life Insurance Co. v. Taylor*,¹⁷⁹ Justice O'Connor, writing for the majority, found that the suit was subject to federal preemption in light of congressional intent suggesting that the case be removable to federal court.¹⁸⁰ Justice Brennan, although concurring in the majority opinion, filed a separate limiting concurrence in which he warned that the majority opinion should not be viewed as "adopting a broad rule that *any* defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction."¹⁸¹

In sum, two familiar purposes of a limiting concurrence are to either limit the scope of the majority holding or point out that the majority has addressed an issue not properly at bar.¹⁸² Because this type of concurrence specifically *limits* the legal rule present in the decision, the jurisprudential value may be assessed similarly to the analysis of plurality opinions and expansive concurrences discussed above.¹⁸³ In light of the implicit consensus analysis and the *Marks* doctrine, a limiting concurrence may actually present a valid and authoritative precedential option. Because of the stringent nature of a limiting concurrence, it will contain the least common substantive denominator of the majority coalition, satisfying the implicit consensus mode of

173. CORLEY, *supra* note 5, at 16.

174. *Id.*; Ray, *supra* note 36, at 784–85; *see also* R. Dean Moorhead, *Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 823 (1952) (noting the value of limiting concurrences).

175. Ray, *supra* note 36, at 784 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987) (Brennan, J., concurring)); *see also* *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (Blackmun, J., concurring) ("I join the Court's opinion and its judgment but upon the understanding that it does not reach the question whether . . . a district court may award fees for an expert witness.").

176. 550 U.S. 124 (2007).

177. *Carhart*, 550 U.S. at 165–68.

178. *Id.* at 169 (Thomas, J., concurring). Interestingly, Justice Thomas's opinion was both limiting, in that it noted that the Commerce Clause issue was not brought before the Court, but also reluctant in that it "reiterate[d his] view that the Court's abortion jurisprudence . . . ha[d] no basis in the Constitution." *Id.*

179. 481 U.S. 58 (1987).

180. *Taylor*, 481 U.S. at 62–63, 66.

181. *Id.* at 67 (Brennan, J., concurring).

182. Ray, *supra* note 36, at 784–85.

183. *See supra* notes 165–72 and accompanying text for a discussion describing and applying models for analyzing plurality opinions analogously to concurring opinions.

interpretation.¹⁸⁴ Further, because a limiting concurrence often attempts to restrict the application of the majority rule to the circumstances before the Court, and advises against general application or a broad-ranging rule, a limiting concurrence will also be regarded as presenting the more narrow line of reasoning subscribed to in the *Marks* doctrine.¹⁸⁵

In fact, the precedential influence of the limiting concurrence is so strong that it has led one group of scholars to use it as an avenue to critique the *Marks* doctrine.¹⁸⁶ By publishing a limiting concurrence, a Justice can “dilute the influence of the plurality and concentrate the focus on his individual opinion.”¹⁸⁷ This may provide Justices with incentive to publish a limiting concurrence in the event of a split decision for solely strategic grounds.¹⁸⁸ The overall influence of this strategic publication increases dramatically where the concurring Justice is holding the vote necessary for a majority.¹⁸⁹ The Justice carrying this swing vote has an astounding ability to influence the law in the event he authors a concurring opinion laying out his limited grounds of assent to the majority coalition.¹⁹⁰ These sorts of opinions have influence as precedent, not only because they adhere to the aforementioned rules regarding analogous plurality interpretation, but also because they allow subsequent judicial actors to cater cases precisely to the legal grounds on which a majority or supermajority of the Supreme Court is prone to agree.¹⁹¹

vi. *The Doctrinal Concurrence*

In a doctrinal concurrence, the authoring Justice agrees with the result or the judgment that the lead opinion reached but rejects the grounds on which the lead opinion came to that decision. The Justice then proffers his own legal theory in support of the result.¹⁹² This is the familiar “right result, wrong reason” concurrence.¹⁹³ For instance, in *Connecticut v. Barrett*,¹⁹⁴ Justice Brennan “concur[ed] in the judgment that

184. See Thurmon, *supra* note 167, at 429 (discussing the role of the “least common denominator” in finding an “implicit consensus” among plurality opinions).

185. *Marks v. United States*, 430 U.S. 188, 193 (1977); see also Kirman, *supra* note 22, at 2095 n.79 (characterizing as a working example of the *Marks* doctrine *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 510 (E.D. Va. 1976), which followed Justice Powell’s concurrence in *Branzburg v. Hayes*, 408 U.S. 665, 709–10 (1972) (Powell, J., concurring), as authority because it was the “minimum common denominator of all the views expressed”).

186. Berkolow, *supra* note 61, at 350–53.

187. *Id.* at 350.

188. *Id.*

189. *Id.* at 351–52.

190. *Id.* at 352–53; see also Kirman, *supra* note 22, at 2097–98 (where a concurring Justice is the fifth vote for a majority, his opinion gains greater influence); Novak, *supra* note 169, at 765 (“[T]he narrowest grounds approach . . . tends to vest disproportionate power in the ‘swing’ Justice . . .”).

191. See Kirman, *supra* note 22, at 2097–100 (where a concurring opinion is necessary to produce a majority and the legal rationale matches that of the majority opinion, it may have precedential authority); cf. Corley, *supra* note 128, at 35 (noting “minimum winning coalition” as influencing the authoritativeness of a Supreme Court opinion).

192. CORLEY, *supra* note 5, at 16; Ray, *supra* note 36, at 800.

193. Ray, *supra* note 36, at 800.

194. 479 U.S. 523 (1987).

the Constitution does not require the suppression of Barrett's statements to the police, but for reasons different from those set forth in the opinion of the Court."¹⁹⁵

Doctrinal concurrences are readily familiar in some of the most controversial areas of law. For example, in *Whitney v. California*,¹⁹⁶ the majority held that a State may restrict the exercise of free speech where such speech "tend[ed] to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."¹⁹⁷ Justice Brandeis, concurring with the judgment of the Court in affirming the petitioner's conviction, wrote separately in an attempt to alter the Court's definition of "clear and present danger."¹⁹⁸ In his definition, Justice Brandeis held that the speech had to do more than tend to incite crime or create danger, and that there must be reasonable ground to believe that the speech will affirmatively cause imminent and serious danger.¹⁹⁹ Justice Brandeis's standard was significantly different than that of the majority in that it moved for more specific requirements before the government could restrict speech.²⁰⁰

A similar occurrence existed in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰¹ where the Court invalidated President Truman's attempt to seize the nation's steel mills to ensure sustained production during the Korean Conflict.²⁰² The majority refused to expand the President's war powers to settling union disputes, reasoning that, even in response to a potential crisis, the President lacked explicit constitutional authority to seize and take control of a national industry.²⁰³ Justice Jackson concurred in the judgment of the Court²⁰⁴ but disagreed with determining the bounds of executive power "based on isolated clauses or even single Articles torn from context."²⁰⁵ What followed was a doctrinal concurrence presenting three distinct levels of presidential power based on the context in which the President acts: (1) a maximum level of power where the President acts with explicit or implied authority from Congress; (2) a "zone of twilight" where the President does an act neither denied to him nor endorsed by Congress; and (3) where the President's acts are "incompatible with the expressed or implied will of Congress."²⁰⁶ Justice Jackson's doctrinal concurrence then invalidated the President's acts in light of those grounds but denounced the majority's contention that executive powers should be limited only to those explicitly enumerated in the Constitution.²⁰⁷

195. *Barrett*, 479 U.S. at 530 (Brennan, J., concurring).

196. 274 U.S. 357 (1927).

197. *Whitney*, 274 U.S. at 371.

198. *Id.* at 374 (Brandeis, J., concurring).

199. *Id.* at 376.

200. Compare *id.* at 371 (majority opinion) (requirement of "tending to"), with *id.* at 376 (Brandeis, J., concurring) (requirement of immanency and reasonable contemplation).

201. 343 U.S. 579 (1952).

202. *Youngstown*, 343 U.S. at 582, 589.

203. *Id.* at 587–88.

204. *Id.* at 634 (Jackson, J., concurring).

205. *Id.* at 635.

206. *Id.* at 635–38.

207. *Id.* at 640.

The precedential value of doctrinal concurrences and their impact on the law has been much debated.²⁰⁸ Nonetheless, concurrences like Justice Brandeis's in *Whitney* and Justice Jackson's in *Youngstown* currently enjoy large amounts of authoritative effect.²⁰⁹ Yet, the subsequent precedential value of doctrinal concurrences would initially seem to be barred by the implicit consensus and the *Marks* doctrines, as well as a desire for legal rules supported by a majority. But the doctrine of stare decisis is not absolute.²¹⁰ A rule of law that is inconsistent with the needs, requirements, and attitudes of current times is of no legitimate use to a court.²¹¹ Thus, the general rule that lower court and later Supreme Court decisions must follow legal rules supported by a majority may not be required in all cases.²¹² In fact, American common law traditions and lifetime appointment by Article III judges reinforce this notion.²¹³ Thus, the persuasive nature of the doctrinal concurrence and its applicability to changing circumstances in the law may be instrumental in its precedential effect. In this light, the precedential value of a doctrinal concurrence may be affected by three key components: (1) the general persuasiveness of the doctrinal concurrence, (2) the potential risks for subsequent reversal, and (3) the reputation of the authoring Justice.

Although a doctrinal concurrence may not prescribe a rule to which a majority of the sitting Justices agree, a concurring opinion written by a Supreme Court Justice may certainly be influential in a general manner. If a lower court or subsequent Supreme Court is searching for a legal authority, and a doctrinal concurrence's argument is compellingly persuasive, commentators have argued "it should be adopted notwithstanding the fact that it does not have the formal status of controlling authority."²¹⁴ Further, doctrinal concurrences may serve as guides to the probable future direction of an area of law.²¹⁵ Thus, a jurist's reliance upon a doctrinal concurrence may serve as preemptive compliance with a future legal doctrine.²¹⁶ This,

208. Compare Ray, *supra* note 36, at 800 (doctrinal concurrences may be most influential type of concurrences), with Kirman, *supra* note 22, at 2104–15 (concurrences that do not meet legal rationale of majority should not have precedential effect).

209. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (adopting Brandeis's standard in *Whitney*); *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action . . .").

210. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (explaining "obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit"; "it is common wisdom that the rule of stare decisis is not an 'inexorable command'" (emphasis omitted)).

211. See James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514, 515 (1943) (stating that "[n]o court can effectively command . . . obedience to a rule of law that departs too far from the norms of the times").

212. See generally Caminker, *supra* note 28.

213. See *supra* Part II.B.1–2 for a discussion on concepts of precedent and judicial decision making that provide a judicial actor with the choice to be persuaded and influenced by a concurring opinion.

214. Maltz, *supra* note 27, at 1415–16; see also Kozinski & Burnham, *supra* note 68, at 610 (observing that concurring opinions "fall comfortably within [the] definition of persuasive precedent")

215. See Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394, 409 (1952) (categorizing minority opinions as "guides" to the likelihood of alternate legal outcomes).

216. See generally John Gruhl, *Anticipatory Compliance with Supreme Court Rulings*, 14 POLITY 294 (1981); John H. Hotz, Note, *Anticipatory Stare Decisis*, 8 U. KAN. L. REV. 165 (1959). But see *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct

however, does not address the problem a judge or justice faces when presented with two alternate paths to a legal result: a lead opinion supported by a majority of the Supreme Court presenting one theory, and a doctrinal concurrence supported by a single Justice presenting another.

Arguably, the only thing preventing lower court judges from abandoning the lead opinion's rationale for that presented in a doctrinal concurrence is the fear of subsequent reversal.²¹⁷ This risk is evermore prevalent where the lead opinion directly distinguishes and attempts to undermine the rationale addressed in the doctrinal concurrence.²¹⁸ That said, there is generally nothing stopping a judicial actor from refusing to follow what is purported to be a Supreme Court precedent "that she considers lawless, [even] aware that her decision will face reversal on appeal but nevertheless [is] committed to exercising her small universe of judicial power in accord with her best legal skills and conscience."²¹⁹ Thus, a doctrinal concurrence may provide a judicial decision maker with a way to adhere to the result prescribed by a Supreme Court decision, but for reasoning he feels is more compatible with his personal judicial philosophy.²²⁰ Thus, by citing the doctrinal concurrence, the citing judge or justice can decide the case in accord with the majority-legitimized rule while avoiding conflict with his personal judicial ethics.²²¹

Further, reputation of the authoring Justice may increase the level of influence one of his doctrinal concurrences receives.²²² One empirical study found that the authorship of a Supreme Court opinion influences its subsequent treatment by federal district courts.²²³ Thus, it may be that Justice Jackson should be trusted on issues involving executive power due to his career in the Executive Department,²²⁴ or Justice Ginsburg trusted on issues of procedure due to her extensive scholarship in the area.²²⁵ Further, opinions regarding administrative law may receive heightened authority when authored

application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

217. See Songer et al., *supra* note 106, at 675 (explaining that appeals court judges attempt to express their own views in a system where the Supreme Court chooses to review decisions based in part on the degree to which those decisions depart from precedent).

218. Examples of these judicial battlegrounds abound. See, e.g., *Giles v. California*, 554 U.S. 353, 369–77 (2008) (belittling dissenters' argument in Justice Scalia's majority opinion); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885–89 (1990) (attacking Justice O'Connor's concurrence in Justice Scalia's majority opinion).

219. Caminker, *supra* note 28, at 818–19.

220. See Ginsburg, *supra* note 21, at 143–44 (noting separate opinions provide legitimate "alternate grounds of decision").

221. Ray, *supra* note 36, at 809.

222. See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 166 (2003) (finding judges are "highly vulnerable to the influence of one another").

223. Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 800 (1979).

224. See generally Victoria A. Graffeo, *Robert H. Jackson: His Years as a Public Servant "Learned in the Law"*, 68 ALB. L. REV. 539 (2005).

225. See David A. Karp, *Why Justice Thomas Should Speak at Oral Argument*, 61 FLA. L. REV. 611, 612 n.7 (2009) (noting Justice Ginsburg taught civil procedure for seventeen years and enjoys speaking on the subject).

by Justice Scalia.²²⁶ In contrast, if a Justice does not have a positive reputation on the Court, lacks a well-recognized area of expertise, or has a reputation not founded in fact,²²⁷ the authority of his doctrinal concurrence may be diminished. Moreover, where a particular Justice presents a well-reasoned, yet unattractive, option to his colleagues, his reputation may not be enough to overcome the hurdle of judicial consequences.²²⁸

In sum, although a doctrinal concurrence may be a useful tool in that it allows a Justice to explore alternative routes to legal results while retaining judicial integrity, its ability to serve as authoritative precedent in subsequent cases is debatable at best. Its precedential value may rest not only on how persuasive the opinion's reasoning is, but also on the risk of reversal in adhering to such reasoning and the reputation of the authoring Justice. In addition, its influential value will be critiqued with respect to the ideals of hierarchical precedent and stare decisis, as well as the responsive and descriptive nature of the law.²²⁹

C. *McDonald v. Chicago: A Test Case Concurrence*

The use of concurring opinions by Supreme Court Justices is not simply a relic of the past. Individual opinion writing on the Court is a continuing practice. Even with Chief Justice Roberts's desire for a return to the unanimity of the Marshall Era,²³⁰ concurring opinions remain prevalent on the Court. In fact, recent terms on the High Court are setting records for the presence of individual opinions.²³¹ During the 2010 Term,²³² Justice Stevens wrote a limiting concurrence in *Bilski v. Kappos*,²³³ arguing

226. See Ray, *supra* note 36, at 788 n.48 (noting administrative law is a specialty of Justice Scalia).

227. Cf. Kenneth L. Port, *Learned Hand's Trademark Jurisprudence: Legal Positivism and the Myth of the Prophet*, 27 PAC. L.J. 221, 232–33 (1996) (arguing that Judge Hand's influence and reputation regarding trademark law were mere myth).

228. In examining the influence of Justices on the Rehnquist Court, one scholar noted that Justice Scalia and Justice Thomas, although often influencing each other, rarely swayed their colleagues to their sometimes-extremist views. This may be in part resulting from the ever-present goal of the judiciary to appear legitimate. See Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L.J. 679, 715 (2007) (explaining "even though Scalia's and Thomas's colleagues may agree with their conservative views, their peers may nevertheless be hesitant to associate themselves with the extremes").

229. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting "obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit"); *Hertz v. Woodman*, 218 U.S. 205, 213–14 (1910) (explaining "the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming authority for the determination of other cases").

230. See Drehle, *supra* note 2, at 40 (noting Chief Justice Roberts's goal to unite the Court).

231. See *supra* note 1 and accompanying text for a discussion of the high number of concurrences appearing in the Court's published opinions in recent Terms.

232. The Court's 2011 Term was still in session at the time this Comment was finalized for publication. Nonetheless, even at that time, the most recent statistics from the Court are revealing. As of June 1, 2012, written opinions had been issued in fifty-seven of the sixty-nine cases granted certiorari for the 2011 Term. Twenty-one of those opinions included at least one concurrence written by an individual Justice. Taking into account the nine per curiam decisions and thirteen unanimous opinions, that number reflects the continuing prevalence of concurring opinion writing on the Court. It is also well to note that these numbers were calculated before some of the 2011 Term's more heavy hitting cases were decided, such as *FCC v. Fox, Inc.*, 10-1293 (argued Jan. 10, 2012) (challenge to FCC's indecency regulation of broadcast television on First Amendment and due process grounds), *Miller v. Alabama* and *Jackson v. Hobbs*, 10-9646, 10-9647 (argued

that the majority interpreted which “processes” are patentable too broadly, and urging that patent law be confined to its “historical and constitutional moorings.”²³⁴ In *Christian Legal Society v. Martinez*,²³⁵ Justice Kennedy’s emphatic concurrence joined the majority in enforcing the “all-comers policy” regarding the law school’s student organizations, and stressed that the school’s policy was essential to the educational experience of students.²³⁶ Additionally, in *Doe v. Reed*,²³⁷ the Court held that disclosure of signatures placed on referendum petitions supporting challenges to particular state laws did not violate the First Amendment.²³⁸ The Court found that the State’s interest in preserving the integrity of the electoral process was greater than any burden on the individual citizen’s right to free speech.²³⁹ Justice Scalia, in an expansive concurrence, would have thrown out a balancing-test approach and argued that the First Amendment provides no “right to anonymity in the performance of an act with governmental effect.”²⁴⁰

All of these concurrences have the potential to impact the future scope of the law they address. If that were not the case, it is doubtful that the Justices would waste their time writing them.²⁴¹ Maybe Justice Stevens’s *Bilski* concurrence, with its more narrow, historical concept of patent definitions, will be influential for future judicial decision makers.²⁴² Maybe Justice Scalia’s expansive concurrence in *Reed* will not, due to its broad-sweeping assertions that conflict with the *Marks* doctrine, the implicit consensus doctrine, and desires for rulings supported by a majority of the Justices.²⁴³ And maybe Justice Kennedy’s passion will provide some guidance as to how he will vote in the future.²⁴⁴

There was one recent concurrence, however, that sparked more than mere speculation. In June 2010, the Court issued its decision in *McDonald v. City of*

together Mar. 20, 2012) (Eight Amendment challenge to sentencing juvenile homicide offenders to life in prison without parole), *Arizona v. United States*, 11-182 (argued Apr. 25, 2012) (Arizona’s challenge to the federal government’s exclusive and plenary power in immigration enforcement), and *Florida v. HHS*, 11-400 (argued Mar. 26–28, 2012) (state and individual plaintiffs’ challenge to the Patient Protection and Affordable Care Act). These cases are sure to spawn multiple opinions.

233. 130 S. Ct. 3218 (2010).

234. *Bilski*, 130 S. Ct. at 3232 (Stevens, J., concurring). Compare *id.* at 3229–31 (majority opinion) (applying precedents to determine possible adequate definitions of patentable processes), with *id.* at 3232 (Stevens, J., concurring) (arguing majority’s exploration into defining patentable processes prone to causing “mischief” and encouraging the Court default to historical and constitutional perspectives).

235. 130 S. Ct. 2971 (2010).

236. *Christian Legal Soc’y*, 130 S. Ct. at 2999–3000 (Kennedy, J., concurring).

237. 130 S. Ct. 2811 (2010).

238. *Reed*, 130 S. Ct. at 2815, 2821.

239. *Id.* at 2819–21.

240. *Id.* at 2832–33 (Scalia, J., concurring).

241. But see Bator, *supra* note 27, at 685–86 (arguing most modern opinions are creations of clerks).

242. See *supra* Part II.B.3.v for a discussion on possible factors determining precedential influence of limiting concurrences.

243. See *supra* Part II.B.3.iv for a discussion on possible factors determining the precedential influence of expansive concurrences.

244. See *supra* Part II.B.3.i for a discussion on possible factors determining the precedential influence of emphatic concurrences.

Chicago,²⁴⁵ the landmark Second Amendment case incorporating the right to bear arms against the States.²⁴⁶ The plurality chose to use the familiar Due Process Clause of the Fourteenth Amendment to incorporate the right to bear arms against the States.²⁴⁷ Justice Thomas wrote separately, however, finding that although the Fourteenth Amendment protected the right, it did so not through “a clause that speaks only to ‘process,’” but through the Privileges or Immunities Clause.²⁴⁸

What is particularly interesting about Justice Thomas’s *McDonald* concurrence is not only his urge to revive what was thought to be a long-dead constitutional provision,²⁴⁹ but that scholars have already hailed his concurrence as a constitutional game changer.²⁵⁰ In order to fully understand the current impact of the *McDonald* decision, one must understand the issue presented to the Court in *McDonald*, how the plurality and other opinions interact with each other, how subsequent courts have interpreted and used the *McDonald* decision, and exactly what scholars are saying about Justice Thomas’s concurrence. From that posture, analysis of what precedential influence Justice Thomas’s *McDonald* concurrence could have for future cases can be addressed.

1. Understanding *McDonald v. City of Chicago*

The question presented in *McDonald v. City of Chicago* was whether the Second Amendment was applicable to the states through the Fourteenth Amendment’s Due Process Clause or its Privileges or Immunities Clause.²⁵¹ The petitioners’ primary argument was that the Court’s ruling in *District of Columbia v. Heller*²⁵² should be expanded to the states and local municipalities through the Fourteenth Amendment.²⁵³ In *Heller*, the Court held Washington, D.C.’s absolute ban on handgun ownership was

245. 130 S. Ct. 3020 (2010).

246. *McDonald*, 130 S. Ct. at 3050.

247. *Id.*

248. *Id.* at 3059 (Thomas, J., concurring).

249. Early interpretation of the Privileges or Immunities Clause led to it being a relatively ineffective provision in protecting individual rights. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (right to keep and bear arms not privilege of United States citizenship and not applicable to states via Privileges or Immunities Clause because existence of right is independent from the Federal Constitution); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) (holding that the Privileges or Immunities Clause applies only to rights owing their existence “to the Federal government, its National character, its Constitution, or its laws”). But see *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999) (using Privileges or Immunities Clause to protect individual citizens’ rights to travel).

250. See, e.g., Gura et al., *supra* note 13, at 189–93 (arguing Justice Thomas has reanimated the Privileges or Immunities Clause); David C. Durst, Comment, *Justice Clarence Thomas’s Interpretation of the Privileges or Immunities Clause: McDonald v. City of Chicago and the Future of the Fourteenth Amendment*, 42 U. ToL. L. REV. 933, 962 (2011) (observing that, although a “difficult road no doubt lies ahead,” Justice Thomas’s *McDonald* concurrence took “the first step” in establishing a substantive doctrine through the Privileges or Immunities Clause); Randy Barnett, *The Supreme Court’s Gun Showdown*, WALL. ST. J., June 29, 2010, at A19 (arguing Justice Thomas’s *McDonald* concurrence has “found” the “lost” Privileges or Immunities Clause and comparing its impact to that of Justice Powell’s opinion in *Bakke*).

251. *McDonald*, 130 S. Ct. at 3028.

252. 554 U.S. 570 (2008).

253. *McDonald*, 130 S. Ct. at 3027.

facially invalid under the Second Amendment,²⁵⁴ declaring that the Second Amendment included a right for individuals to own arms for self-defense in their homes.²⁵⁵ Subsequent to *Heller*, the *McDonald* petitioners brought suit against two municipal laws in the cities of Chicago and Oak Park, Illinois, arguing that the Fourteenth Amendment applied the Second Amendment against the States through either its Due Process Clause or Privileges or Immunities Clause.²⁵⁶ Both the District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals refused to expand the *Heller* holding, and instead applied “defunct” yet directly applicable precedent in declining to apply the Second Amendment to the States.²⁵⁷ Thus, when presenting their argument to the Supreme Court, the petitioners, supported by a litany of academics, focused their argument on the Privileges or Immunities Clause.²⁵⁸

The two primary opinions²⁵⁹ that made up the majority coalition in *McDonald* were Justice Alito’s plurality opinion²⁶⁰ and Justice Thomas’s concurrence.²⁶¹ If there is a holding from *McDonald*, it is that the Fourteenth Amendment incorporates the Second Amendment’s right to bear arms for self-defense against the several States and any city or municipality therein.²⁶² In fact, most of the subsequent cases thus far have

254. *Heller*, 554 U.S. at 635.

255. *Id.*

256. *McDonald*, 130 S. Ct. at 3026–27. The laws challenged were then Chicago, Ill., MUNICIPAL CODE § 8-20-040(a) (2009), and then Oak Park, Ill., MUNICIPAL CODE §§ 27-2-1 (2007), 27-1-1 (2009), both of which banned the possession of handguns by any citizen. *Id.* at 3026.

257. *N.R.A. v. City of Chicago*, 567 F.3d 856, 857–58 (7th Cir. 2009) (applying precedent limiting Fourteenth Amendment Due Process protection in Second Amendment context); *N.R.A. v. Vill. of Oak Park*, 617 F. Supp. 2d 752, 753–54 (N.D. Ill. 2008) (same).

258. See Transcript of Oral Argument at 7:15–22, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (petitioners arguing posture of argument was influenced by lower courts’ refusal to apply Second Amendment rights through substantive due process); Brief for Petitioner, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (fifty-seven pages devoted to argument based on Privileges or Immunities Clause incorporation, only seven for substantive due process); Brief Amicus Curiae of Cato Institute and Pacific Legal Foundation in Support of Petitioners at 3–4, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (arguing *Slaughter-House* should be overruled and Privileges or Immunities Clause restored to “rightful and intended role as guardian of individual rights against state encroachment”); Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners at 11–13, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), (arguing Framers of Fourteenth Amendment knew interchangeable nature of “Privileges or Immunities” included fundamental rights). *Accord* Dale E. Ho, *Dodging a Bullet: McDonald v. City of Chicago and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 383 (2010) (observing that the Court, because of Petitioners’ reliance on Privileges or Immunities Clause, took an “uncommon step” and granted oral argument to N.R.A., which argued “the traditional route of Due Process”).

259. Justice Scalia did write independently in *McDonald*, but “only to respond to some aspects of Justice Stevens’ dissent.” *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring).

260. Chief Justice Roberts, Justice Scalia, and Justice Kennedy made up the Alito plurality. *Id.* at 3026.

261. *Id.* at 3058 (Thomas, J., concurring).

262. This is one of the only issues that gathered a majority of the Justices—that the Fourteenth Amendment forbids the States and the city of Chicago from placing an outright ban on a citizen’s right to own a handgun for self-defense. *Id.* at 3026.

applied *McDonald* in such a general manner.²⁶³ There remains some residual confusion, however, as to exactly which part of the Fourteenth Amendment incorporates that right.²⁶⁴

The petitioners in *McDonald* argued that the right to bear arms was applicable to the States through both the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment.²⁶⁵ The plurality opinion, after reviewing the current breadth of the Privileges or Immunities Clause, saw “no need to reconsider” any of the Clause’s previous interpretations and “decline[d]” to address the Clause’s application to the case.²⁶⁶ Instead, the plurality explored the Second Amendment’s application to the States through the Due Process Clause of the Fourteenth Amendment, reasoning that such questions have “[f]or many decades” been analyzed as such.²⁶⁷ In its analysis, the plurality conceded that “[the Court’s] decision in *Heller* points unmistakably”²⁶⁸ to the conclusion that the right to bear arms is applicable to the States through the Due Process Clause as the right is “deeply rooted in [American] history and tradition”²⁶⁹ and fundamentally “necessary to [the American] system of ordered liberty.”²⁷⁰

The plurality opinion was grounded on the Court’s previous “selective incorporation” jurisprudence. In this approach, the Court incorporates against the States individual federal rights protected by the Bill of Rights one by one through the Fourteenth Amendment’s Due Process Clause.²⁷¹ Although due process proper is traditionally viewed as protection for only those rights essential to prohibit the judicial system from establishing “kangaroo courts,” the Court has used the Clause to incorporate nearly all of the substantive liberties enumerated in the Bill of Rights.²⁷² Although the Clause does seem an odd source on which to base the incorporation doctrine, the Court has justified its use by stating that it protects those rights so

263. *E.g.*, *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800 n.1 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 88 n.3 (3d Cir. 2010); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

264. *See United States v. Seay*, 620 F.3d 919, 924 (8th Cir. 2010) (noting that although the Second Amendment is applicable to States, “the Court was unable to agree on how,” citing Justice Alito’s plurality and Justice Thomas’s concurrence). *But see Am. Fed’n of Labor & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1185 (11th Cir. 2011) (interpreting Second Amendment to have been incorporated through Due Process Clause of Fourteenth Amendment); *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011) (same); *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 WL 3962550, at *5 (S.D.N.Y. Sept. 2, 2011) (same).

265. *McDonald*, 130 S. Ct. at 3028.

266. *Id.* at 3030–31.

267. *Id.*

268. *Id.* at 3036 (citing *District of Columbia v. Heller*, 554 U.S. 570, 598–600 (2008)).

269. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

270. *Id.* at 3042.

271. *See id.* at 3031–36 (describing process of Court’s substantive due process and selective incorporation schemes).

272. *See id.* at 3035 n.13 (explaining that after *McDonald*, the Sixth Amendment’s right to a unanimous jury verdict, the Third Amendment’s protection against quartering soldiers, the Fifth Amendment’s requirement of a grand jury indictment, the Seventh Amendment’s right to a jury trial in all civil cases, and the Eighth Amendment’s protection against excessive fines are the only substantive rights in the Bill of Rights not yet incorporated). For an expansive list of the cases incorporating individual enumerated rights to the states via selective incorporation and substantive due process, see *id.* at 3034 n.12.

fundamental and inherent to our notions of ordered liberty that denying them would equate to denial of the due process of law.²⁷³

Justice Thomas's concurrence, although agreeing with the plurality that "the Fourteenth Amendment makes the right to keep and bear arms . . . fully applicable to the States,"²⁷⁴ could not agree that the right is "enforceable against the States through a clause that speaks only to 'process.'"²⁷⁵ Justice Thomas's believed there was a "more straightforward path" to incorporation of the Second Amendment that was "more faithful to the Fourteenth Amendment's text and history."²⁷⁶ In Justice Thomas's opinion, "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the . . . Privileges or Immunities Clause."²⁷⁷

Justice Thomas distanced himself from, and discredited, the plurality opinion, calling the Court's substantive due process jurisprudence "a legal fiction," and a "particularly dangerous one" at that.²⁷⁸ Justice Thomas acknowledged that there was a "volume of precedents" that rely on substantive due process, and conceded the importance of stare decisis to the legitimacy of the judiciary; but he justified his departure from the due process standard by asserting that

stare decisis is only an "adjunct" of our duty as judges to decide by our best lights what the Constitution means. It is not "an inexorable command." Moreover, as judges, we interpret the Constitution one case or controversy at a time. 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.²⁷⁹

From there, Justice Thomas's launched into a lengthy history of the original intent of the Framers of the Fourteenth Amendment, the common usage and definitions of the phrase "Privileges or Immunities" at the time of the ratification of the Fourteenth

273. *E.g.*, *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (holding that due process encompasses certain enumerated rights); *see also McDonald*, 130 S. Ct. at 3034–36 (describing current standard of substantive due process and selective incorporation). In following the substantive due process argument to its logical conclusion, however, if "due process" efficiently protects and includes as many of the enumerated rights as the Court claims that it does, then why would the Framers have included "due process" as only *one* of the *many* rights present in the Bill of Rights? Under the weight granted to due process in the incorporation context, it is more than apparent that the Framers could have written a Bill of Rights containing only one amendment: the right to due process of law. If the right to due process necessarily includes all of the substantive rights it incorporates, there would have been no need to enumerate any others. Due process would have done the trick. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 10 YALE L.J. 1193, 1225 (1992) (recognizing it "odd to think that the words 'due process' in the Fourteenth Amendment were intended to mean something very different than they did in the Fifth"). This assumption is further supported by reverse incorporation, where the Fifth Amendment's Due Process Clause is read to contain more substantive rights than mere *process*, including the Equal Protection Clause of the Fourteenth Amendment. *See* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 985–89 (2004) (describing *Bolling v. Sharpe*, 347 U.S. 497 (1954), and "reverse incorporation").

274. *McDonald*, 130 S. Ct. at 3058 (Thomas, J., concurring) (internal quotation marks omitted).

275. *Id.* at 3059.

276. *Id.* at 3058–59.

277. *Id.* at 3059.

278. *Id.* at 3062.

279. *Id.* at 3062–63 (citations omitted).

Amendment, and contemporary interpretations of the Fourteenth Amendment directly following its ratification.²⁸⁰ Sticking to his originalist philosophy, Justice Thomas came to the conclusion that, because much of the Fourteenth Amendment's original purpose was to prevent the southern lawmaker's ability to subvert newly freed slaves—in most instances, by disarming them²⁸¹—the inclusion of the Privileges or Immunities Clause in the Fourteenth Amendment was to establish “a minimum baseline of federal rights[,] . . . the constitutional right to keep and bear arms plainly . . . among them.”²⁸²

Justice Thomas's conclusion was based partially on the interchangeable nature of the phrase “privileges or immunities” and the term “rights” at the time of Reconstruction.²⁸³ Thus, it was Justice Thomas's view that the ratification of the Fourteenth Amendment involved a general understanding that the “privileges or immunities” now protected against state infringement included general American “rights” common to citizens of the republic.²⁸⁴ Among those were the enumerated rights in the first eight amendments, and, particularly, the right to keep and bear arms.²⁸⁵

This conclusion, however, calls for a substantive change in the Court's incorporation jurisprudence and the overruling of the *Slaughter-House Cases*.²⁸⁶ In short, the Court had previously gutted the Privileges or Immunities Clause subsequent to the Fourteenth Amendment's ratification in an attempt to limit the Clause's substantive reach.²⁸⁷ In the *Slaughter-House Cases*, the Court used distinctions between state and national citizenship to determine that the clause protected only a handful of rights deriving from the nature of the federal government and could not be assumed to enforce the Bill of Rights against the States.²⁸⁸ Whether the *Slaughter-House Cases*' interpretation of the Privileges or Immunities Clause was correct is immaterial in light of its force as foundational precedent.²⁸⁹ Justice Thomas's concurrence dismisses not only the plurality's reliance on substantive due process, but

280. *Id.* at 3063–83.

281. *Id.* at 3080–83; *see also id.* at 3086–88 (arguing “use of firearms for self-defense was often the only way black citizens could protect themselves” from racist violence and suppression).

282. *Id.* at 3083. *Accord* Petitioners' Brief at 6, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4378912, at *6 (arguing same).

283. *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring).

284. *Id.* at 3069.

285. *Id.* at 3074–75.

286. *Id.* at 3084–86.

287. *See, e.g.*, Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 71, 73 (1989) (observing the *Slaughter-House Cases* “ruthlessly eviscerated” the Privileges or Immunities Clause of “practically all operative meaning”).

288. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74, 79–80 (1872) (describing rights which “owe their existence to the Federal government, its National character, its Constitution, or its laws” as privileges or immunities of federal citizenship, including the right to interact with federal government, demand its care and protection, habeas corpus, all rights of foreign treaties, and free use of federal waterways).

289. *See supra* Part II.B.3.iii for a discussion on how certain members of the Court, regardless of their view of the legitimacy of some form of constitutional interpretation, will adhere to that interpretation in light of stare decisis.

also the authority of the *Slaughter-House Cases*.²⁹⁰ Although this proposed sea change may have fanned the academic fire surrounding the incorporation debate, Justice Thomas's concurrence will not gain precedential influence for simply being penned.

2. Subsequent Cases Applying *McDonald v. City of Chicago*

The majority of subsequent cases have done little to expand any of *McDonald's* opinions beyond their face value. Most courts presented with a Second Amendment issue regard *McDonald* as having incorporated the Second Amendment against the States without mention of the specific constitutional provision.²⁹¹ Some lower courts, however, recognize that the distinction in the *McDonald* opinions stems from different perspectives of constitutional interpretation.²⁹²

Some lower courts have relied exclusively on the plurality's conclusion in *McDonald*, speaking about Second Amendment incorporation from solely a substantive due process standpoint.²⁹³ Alternatively, others have pointed out the wrench that Justice Thomas seems to have thrown into the cogs of selective incorporation.²⁹⁴ This has occurred in only a handful of the reported cases since *McDonald*, however, with the majority merely noting the substantive effect rather than articulating the specific arguments presented in *McDonald*.²⁹⁵

Other than for incorporation purposes, *McDonald* has been used in subsequent cases to repeat the fact that the right to own a gun for self-defense is not without limits. The plurality opinion reiterated *Heller's* declaration that, although laws prohibiting possession of guns inside of citizens' homes are invalid, laws restricting guns in certain sensitive places or restricting ownership from felons or the mentally ill are valid limitations on the right.²⁹⁶ Many subsequent cases interpreting or applying *McDonald* do so in an attempt to decipher a standard of review to apply to firearm regulations.²⁹⁷

290. *McDonald*, 130 S. Ct. at 3061–63, 3084–86 (Thomas, J., concurring).

291. *E.g.*, *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800 n.1 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 88 n.3 (3d Cir. 2010); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

292. *See* *United States v. Seay*, 620 F.3d 919, 924 (8th Cir. 2010) (noting that although the Second Amendment is applicable to States, “the Court was unable to agree on how,” citing Justice Alito's plurality opinion and Justice Thomas's concurrence); *United States v. Huet*, Criminal No. 08-0215, 2010 U.S. Dist. LEXIS 123597, at *24–25 (W.D. Pa. Nov. 22, 2010) (observing a disparity in constitutional standards used by the plurality and Justice Thomas's concurrence).

293. *E.g.*, *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1185 (11th Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011); *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 WL 3962550, at *5 (S.D.N.Y. Sept. 2, 2011).

294. *See, e.g.*, *McKinney v. Jarriel*, No. CV409-091, 2010 U.S. Dist. LEXIS 113916, at *31 (S.D. Ga. Oct. 7, 2010) (using Justice Thomas's concurrence in *McDonald* to support referring to substantive due process as a “somewhat controversial doctrine”).

295. *See supra* note 291 and accompanying text that evidence how most courts simply speak of *McDonald* as having incorporated the Second Amendment, rather than explaining the relevant incorporation theory.

296. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

297. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 89, 90, 96 (3d Cir. 2010) (utilizing *McDonald* and *Heller* to articulate a standard of review for gun regulations).

Even so, at least one court and one ambitious public defender have been using Justice Thomas's *McDonald* concurrence to utilize the Privileges or Immunities Clause. In *Hamilton v. City of Romulus*,²⁹⁸ the Sixth Circuit Court of Appeals cited to Justice Thomas's *McDonald* concurrence in explaining the reach of a federal statute prohibiting government officials from depriving citizens of the privileges or immunities of the Constitution.²⁹⁹ But the appellants did not assert the violation of any substantive right other than their right to association, thereby limiting the court from a more spanning inquiry.³⁰⁰

A more expansive stoking of the Privileges or Immunities Clause is occurring in the Ninth Circuit, where a federal public defender is framing a new argument for how to attack Oregon's "deviant" practice of not requiring a unanimous jury verdict in criminal trials.³⁰¹ According to the argument, along with appealing a non-unanimous jury verdict to the Oregon Court of Appeals, defending counsel should "[f]ile a petition for certiorari to the Supreme Court based on . . . the exceptionally important question of whether the federal Sixth Amendment right to a unanimous jury is fully incorporated into the Fourteenth Amendment's [D]ue [P]rocess [C]lause, *as well as* the Privileges [or] Immunities Clause."³⁰² The rationale is that because the Privileges or Immunities Clause argument "persuaded Justice Thomas" in *McDonald*, it could potentially do so with the other Justices on a Sixth Amendment question.³⁰³ Although creative, utilization of Justice Thomas's concurrence in subsequent cases for more than mere speculation has yet to come to fruition.

3. The Academy's Comments on Justice Thomas's *McDonald* Concurrence

From the moment the decision was published, academics have hailed Justice Thomas as the redeemer of the Privileges or Immunities Clause. Only a day after the decision was reported, Professor Randy Barnett compared Justice Thomas's concurrence to that of Justice Powell's in *Bakke*—arguing that it was only a matter of time before the clause found a rebirth in constitutional adjudication.³⁰⁴ In fact, even the petitioners' mere forwarding of a Privileges or Immunities Clause argument led several scholars to predict revolutionary success.³⁰⁵

In this respect, it is not surprising that other scholars jumped to praise Justice Thomas's *McDonald* concurrence soon after it was published. Shortly after predicting success with the Privileges or Immunities Clause, several Cato scholars³⁰⁶ argued that

298. 409 F. App'x 826 (6th Cir. 2010).

299. *Hamilton*, 409 F. App'x at 834.

300. *Id.*

301. Steve Sady, *McDonald Signals the End of Oregon's Non-Unanimous Jury Rule*, NINTH CIRCUIT BLOG (Jul. 6, 2010, 11:51 AM), http://circuit9.blogspot.com/2010_07_01_archive.html.

302. *Id.* (emphasis added).

303. *Id.* Accord Ho, *supra* note 258, at 391 (evidencing that representatives in Congress during the ratification debates believed that the Privileges or Immunities Clause included rights in the Bill of Rights).

304. Barnett, *supra* note 250.

305. See Blackmun & Shapiro, *supra* note 13, at 6 (arguing *McDonald* as "the perfect case" to overrule the *Slaughter-House Cases* and "rehabilitat[e] the Privileges or Immunities Clause").

306. The Cato Institute is a think tank advocating progressive individual civil rights across the country. For more information, see CATO INSTITUTE, <http://www.cato.org> (last visited May 31, 2012).

the Alito plurality “obfuscated” the Privileges or Immunities Clause, leaving it “beating loudly under the floorboards.”³⁰⁷ Further, they argued that the little attention given to Justice Thomas’s “pivotal concurrence” will allow for it to “reanimat[e]” the Privileges or Immunities Clause covertly, beginning a new discourse on the clause’s meaning.³⁰⁸ Comparing Justice Thomas’s *McDonald* concurrence to that of Justice Jackson’s in *Youngstown* and Justice Powell’s in *Bakke*, these scholars predict Justice Thomas’s concurrence will introduce a “sea change in constitutional law.”³⁰⁹

These views are supported by other scholars, who predict a day where the Court will be forced to reevaluate the *Slaughter-House* decision.³¹⁰ In such cases, the Court could be asked to determine whether the Privileges or Immunities Clause protects certain enumerated rights not yet incorporated through a broad reading of substantive due process.³¹¹ These scholars also argue that Justice Thomas’s concurrence will be best utilized to discuss unenumerated rights contained in the penumbras of the constitutional text, among those certain economic rights perceived necessary to help freed slaves defend their lives and liberty.³¹² Although the concept of economic rights has fallen out of fashion since the demise of the *Lochner* Era,³¹³ the understanding of the Privileges or Immunities Clause at the time of drafting was that it protected all rights common to citizens of the republic, including property and contract rights.³¹⁴

Some scholars, however, point out flaws in such a broad-spanning interpretation of the Privileges or Immunities Clause. For instance, Justice Thomas’s choice to incorporate the Second Amendment through the Privileges or Immunities Clause, rather than the Due Process Clause, restricts the right to bear arms to all “citizens” rather than to all “persons.”³¹⁵ Thus, one scholar has observed that an incorporation theory based on the Privileges or Immunities Clause is much more limited than one

307. Gura et al., *supra* note 13, at 178–82.

308. *Id.* at 187–92, 198.

309. *Id.* at 199–200.

310. See Miller W. Shealy Jr., *The Best of the Supremes: A Review of the U.S. Supreme Court Term, 2009–2010*, 22 S.C. LAW., Nov. 2010, at 24, 24, 26 (opining that the Court will have to reconsider *Slaughter-House* at a future date); *The Supreme Court, 2009 Term: Leading Cases*, 124 HARV. L. REV. 229, 229, 234 (2010) (observing that some cases may require the Court to reconsider Privileges or Immunities Clause); Durst, *supra* note 250, at 962 (predicting that Justice Thomas will get another chance to persuade the Court to see the Privilege or Immunities Clause in a different light).

311. *Leading Cases*, *supra* note 310, at 234.

312. Gura et al., *supra* note 13, at 198; *Leading Cases*, *supra* note 310, at 234–47; see also Durst, *supra* note 250, at 959 (arguing that Justice Thomas’s *McDonald* concurrence left unresolved the issue of whether the scope of the Privileges or Immunities Clause includes unenumerated rights).

313. *Leading Cases*, *supra* note 310, at 236–37.

314. See CONG. GLOBE, 39TH CONG., 1ST SESS. 2538, 2765 (1866) (defining “Privileges or Immunities” as the right to contract, marry, be a juror, judge, hold and dispose property, and “all the rights we have under the laws of the country”).

315. Compare U.S. CONST. amend. XIV, § 1, cl. 2 (states shall not abridge the privileges or immunities of “citizens”), with *id.* cl. 3 (states shall not deprive “persons” of due process of law). See also Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1539–42 (2010) (arguing that Justice Thomas’s concurrence creates a question as to whether Second Amendment rights apply to noncitizens).

based on due process.³¹⁶ If this limitation was not intended, it is puzzling that Justice Thomas would base incorporation on the Privileges or Immunities Clause, as he himself has previously acknowledged the limiting nature of the Privileges or Immunities Clause.³¹⁷

Further, returning to the original interpretation of the Privileges or Immunities Clause may actually pare back the range of rights protected against state infringement. Indeed, even Justice Thomas does not interpret the original understanding of the Clause to include “every public benefit established by positive law.”³¹⁸ In that respect, a rebirth of the Privileges or Immunities Clause may limit already established rights in light of the public’s (rather than the Congress’s) view of the clause and the clouded historical record of its intended breadth.³¹⁹ In any event, however, only time will tell what the clause really means and what Justice Thomas has done to affect that meaning.

Although *McDonald* is a readily apparent, and circumstantially sexy, example of a modern concurrence, the Court issues split opinions regularly and at an ever-increasing rate. Thus, some guidance must be given as to what sort of influence these individual opinions may have on subsequent cases. In attempting to predict what sort of precedential influence Justice Thomas’s *McDonald* concurrence will really have on subsequent cases, the aforementioned concurrence framework and the factors suggested to analyze future precedential influence are helpful in reaching a sound conclusion.

III. DISCUSSION: APPLYING CONCURRENCE FRAMEWORK TO *McDONALD V. CHICAGO*

One cannot ignore the prevalent truth: individual opinion writing—specifically, concurring opinion writing—is one of the many tools used by Justices on the Supreme Court to influence and shape the law. This form of judicial currency is used often, even in a Court desiring unanimity. But what, exactly, is that currency worth? At least on a jurisprudential level, concurring opinions present a unique question as to their actual ability to influence the law. With the High Court perpetually challenged for time and resources, concurring opinions must mean something to the Justices who author them; otherwise, their time might be better spent elsewhere.

Any prediction of the precedential value a single concurrence will have requires more than just a sweeping estimation. As a test case, Justice Thomas’s concurrence in *McDonald* provides a wealth of opportunity to utilize a framework that attempts to predict a concurrence’s future precedential influence. Although some scholars hail Justice Thomas’s concurrence in *McDonald* as the new *Bakke*, it is readily apparent

316. Ho, *supra* note 258, at 402–07; cf. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 308 n.19 (2010) (Thomas, J., concurring) (recognizing that his Second Amendment analysis leads to a question of to whom the right applies, but “express[ing] no view on the difference, if any” because the “case [did] not involve a claim brought by a noncitizen”).

317. See *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (opining that the Privileges or Immunities Clause may be used to “displace, rather than augment” current individual rights instead of becoming a “convenient tool for inventing new rights”); cf. *McDonald*, 130 S. Ct. at 3084 n.20 (2010) (Thomas, J., concurring) (arguing that the Privileges or Immunities Clause could incorporate individual rights contained in the Constitution, but not Bill of Rights provisions that “prevent federal interference in state affairs”).

318. *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

319. Ho, *supra* note 258, at 392.

that such a quick analysis is based, not on a framework of how concurrences influence subsequent judicial decision making, but on the notion that Justice Thomas was “right.”³²⁰ Being “right” does not automatically make one precedential.³²¹ Even Justice Scalia has his doubts about Due Process incorporation, but has succumbed to its historical prestige.³²² Justice Thomas’s concurrence and “*McDonald* as a whole” may “represent[] a crucial first step” to “open[ing] the door to reviving a powerful constitutional provision,”³²³ but merely describing it as such and noting that similar doctrinal shifts have occurred in the past³²⁴ is not dispositive of the matter.

Before any analysis can be made in relation to the concurrence framework discussed above, Justice Thomas’s concurrence must first be classified into one of the six aforementioned concurrence types.³²⁵ Part III.A performs that task, showing that Justice Thomas’s concurrence is a doctrinal concurrence. Once that task is complete, Part III.B determines the relative paths the concurrence could take in gaining precedential influence. Because Justice Thomas’s *McDonald* concurrence is a doctrinal concurrence, its possible precedential influence is dependent on three suggested factors: (1) whether Justice Thomas’s argument to revisit interpretations of the Privileges or Immunities Clause is a compellingly persuasive legal argument, (2) whether adherence to that alternate argument would subject future judicial decision makers to a high risk of subsequent reversal on appeal, and (3) whether Justice Thomas’s reputation as a judicial originalist, or as a legal mind generally, affects the perception of him as a significant authority on the issue of Fourteenth Amendment interpretation.³²⁶ Although these factors are helpful in determining a doctrinal concurrence’s potential value as a precedential influence, it is well to note that these factors are not exhaustive, as it is unrealistic to forward a rigid, prophetic formula.

320. See, e.g., Gura et al., *supra* note 13, at 198 (arguing that “Justice Thomas’s lone concurrence . . . reanimat[ed] the Privileges or Immunities Clause and start[ed] a jurisprudential discourse on that clause’s meaning” with no support but a general interpretation of how Privileges or Immunities Clause should be used to apply federal rights to States); cf. Transcript of Oral Argument at 7:8–13, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Justice Scalia observing that although the Privileges or Immunities Clause is “the darling of the professoriate,” the Court’s jurisprudence does not conform with this academic viewpoint).

321. See *supra* Part II.B.1 for a discussion on the general formation of precedents.

322. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (stating that regardless of Justice Scalia’s “misgivings about Substantive Due Process as an original matter,” even he has “acquiesced” in the due process theory of incorporation).

323. Gura et al., *supra* note 13, at 199.

324. *Id.* at 199–200 (referencing several well-known individual opinions which substantially influenced the law and comparing them to Justice Thomas’s concurrence in *McDonald* without reasoning any substantive relation).

325. See *supra* Part II.B.3 for a discussion on the process of classifying and categorizing different types of concurrences.

326. See *supra* Part II.B.3.vi for a discussion on factors conditioning doctrinal concurrences as possible precedential influences.

A. *Classifying Justice Thomas's Concurrence—An Attempt at a Doctrinal Change*

Justice Thomas's *McDonald* concurrence is a textbook doctrinal concurrence.³²⁷ Much like Justice Brandeis's concurrence in *Whitney*,³²⁸ and Justice Jackson's concurrence in *Youngstown*,³²⁹ Justice Thomas's *McDonald* concurrence forwards an alternate legal theory to support a majority holding: "I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment 'fully applicable to the States.' . . . But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.'"³³⁰ Although the plurality refused to disturb the archaic ruling in *Slaughter-House*, and declined to reexamine the scope of the Privileges or Immunities Clause,³³¹ Justice Thomas advocated the rejection of the *Slaughter-House* decision and a rejuvenation of the Clause's meaning.³³²

The fact that Justice Thomas's *McDonald* concurrence is a doctrinal concurrence is detrimental to its potential influence as a future precedent. The most famous concurrence in Supreme Court history shares its general structure,³³³ but the implicit consensus doctrine, *Marks* doctrine, and general desires for majority rules seem to suggest that *McDonald*'s influence as precedent will be only the best holding one can distill from the case: that the Second Amendment is incorporated, no matter how.³³⁴ In fact, a number of cases ignore Justice Thomas's concurrence completely, strictly interpreting *McDonald* to have incorporated the Second Amendment through the Due Process Clause.³³⁵ Although such evidence may signal the futility of Thomas's concurrence, there have been instances where Justice Thomas's concurrence in *McDonald* has been used to forward alternative legal arguments and critiques of substantive due process.³³⁶ Thus, due treatment of the possible precedential influence of the concurrence is paramount in predicting what exactly Justice Thomas has done.

327. See *supra* Part II.B.3.vi for a discussion on doctrinal concurrences and their attributes.

328. See *supra* notes 196–200 for a discussion and description of Justice Brandeis's concurrence in *Whitney*.

329. See *supra* notes 201–07 for a discussion and description of Justice Jackson's concurrence in *Youngstown*.

330. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058–59 (2010) (Thomas, J., concurring) (citation omitted).

331. *Id.* at 3030–31 (plurality opinion).

332. *Id.* at 3086–88 (Thomas, J., concurring).

333. See *supra* note 209 and accompanying text for a discussion on the subsequent influence of Justice Jackson's concurrence in *Youngstown*. See also Estreicher & Pelham-Webb, *supra* note 66, at 231 (observing that Justice Jackson's concurrence in *Youngstown* has been highly influential).

334. See *supra* notes 208–09 and accompanying and following text for a discussion on the problems of applying aforementioned plurality interpretation theories to doctrinal concurrences. See also *United States v. Seay*, 620 F.3d 919, 924 (8th Cir. 2010) (holding that *McDonald* incorporates Second Amendment through an unclear mechanism).

335. *E.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011); *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 WL 3962550, at *5 (S.D.N.Y. Sept. 2, 2011).

336. See *Seay*, 620 F.3d at 924 (noting that although the Second Amendment is applicable to States, "the Court was unable to agree on how," citing Justice Alito's plurality and Justice Thomas's concurrence); *McKinney v. Jarriel*, No. CV409-091, 2010 U.S. Dist. LEXIS 113916, at *31 (S.D. Ga. Oct. 7, 2010) (referring to substantive due process as a "somewhat controversial doctrine" in reference to Justice Thomas's

B. *What the Future May Hold for Justice Thomas's McDonald Concurrence*

Although some scholars credit Justice Thomas with “reanimating” the Privileges or Immunities Clause,³³⁷ there is no legitimacy to such an observation absent evidence in subsequent jurisprudence. Scholarly support for reviving the Privilege or Immunities Clause existed for sometime prior to the *McDonald* decision.³³⁸ Still, this has not swayed the Court from altering any of the Clause’s precedents originating from the *Slaughter-House Cases*.³³⁹ Thus, in order for Justice Thomas’s concurrence to live up to its reputation, it must gain influence for its structure as a concurring opinion—not as an academic monument.

Due to the substantive and structural form of Justice Thomas’s concurrence—that is, a doctrinal concurrence—the factors that will affect its influence will be whether the argument it presents is compelling enough to be persuasive to subsequent judicial decision makers, whether adherence to that argument by judicial decision makers will subject them to a higher risk of subsequent reversal, and whether the aura surrounding Justice Thomas’s judicial reputation has any positive or negative effects on his notoriety as a learned authority.

1. Is Revival of the Privileges or Immunities Clause a Compelling Legal Argument?

“Virtually no serious modern scholar” thinks that the Court’s narrow interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* and its subsequent application “is a plausible reading of the [Fourteenth] Amendment.”³⁴⁰ This has not stopped the Court, however, from leaving such an interpretation on the books while applying a substantive due process theory of incorporation.³⁴¹ Thus, the obvious academic appeal of the reinterpretation of the incorporation doctrine under the Privilege or Immunities Clause might not hold weight against 140 years of

McDonald concurrence). See also *supra* notes 298–303 and accompanying text for a discussion on the subsequent utilization of Justice Thomas’s *McDonald* concurrence as a persuasive precedential force.

337. Gura et al., *supra* note 13, at 198. See *supra* Part II.C.3 for a discussion of the different views the Academy has on whether and how Justice Thomas’s *McDonald* concurrence will affect the future of the Privilege or Immunities Clause.

338. *E.g.*, Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL’Y 443, 444–45 (1996) (arguing for incorporation through Privileges or Immunities Clause based on plain meaning of the language); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3029–30 (2010) (plurality opinion) (noting that “many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation”); *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) (observing that “[l]egal scholars agree . . . that the Clause does not mean what the Court said it meant in 1873”).

339. *McDonald*, 130 S. Ct. at 3030–31; see also Transcript of Oral Argument at 7:8–13, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Justice Scalia stating that the academic push for Privileges or Immunities Clause reform is “contrary to 140 years of [the Court’s] jurisprudence”).

340. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

341. See, *e.g.*, *McDonald*, 130 S. Ct. at 3030–31 (declining opportunity to reinterpret Privilege or Immunities Clause to prevent states from infringing upon substantive rights); *id.* at 3050 (Scalia, J., concurring) (“acquiesc[ing]” in substantive due process).

precedent.³⁴² In this respect, *McDonald*, in the very least, may evidence that the Supreme Court prefers long-standing precedent over academic proclivities.³⁴³

Curiously, the *McDonald* plurality did not make an effort to discredit Justice Thomas's incorporation argument;³⁴⁴ Justice Alito merely balked on the issue.³⁴⁵ This is particularly odd when comparing other instances of controversial constitutional interpretation, where Justices rabidly discredit each other on a battleground of clashing ideologies.³⁴⁶ Moreover, although such a battlefield existed in *McDonald* between Justices Scalia and Stevens,³⁴⁷ not one Justice attempted to discredit Justice Thomas's breath of life into the Privileges or Immunities Clause, for reasons one can only imagine.³⁴⁸

This might leave the door open for lower courts to determine the future meaning of the Clause on their own, according to the relative persuasiveness lower federal judges assign to Justice Thomas's position.³⁴⁹ For instance, the Court of Appeals for the Eighth Circuit, in *United States v. Seay*,³⁵⁰ recognized that there is still confusion as to which constitutional provision incorporates the Second Amendment against the States—the Fourteenth Amendment's Due Process Clause (as the plurality held) or its Privileges or Immunities Clause (as Justice Thomas held).³⁵¹ A judicial decision maker, thus, relying on his independent view of how to interpret the Fourteenth Amendment and the incorporation doctrine, may choose to cite Justice Thomas's holding over the plurality.³⁵² Although the reasoning is not explicitly supported by a majority of the Justices, Justice Thomas's argument leads to the same bottom-line result as the *McDonald* plurality and may foreshadow the Court's future incorporation

342. See Transcript of Oral Argument at 4:6–10, 7:8–13, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Chief Justice Roberts and Justice Scalia arguing precedential weight of substantive due process).

343. See *McDonald*, 130 S. Ct. at 3030–31 (plurality opinion) (passing on opportunity to reinterpret Privilege or Immunities Clause); *id.* at 3050 (Scalia, J., concurring) (agreeing with the Court's decision but noting "misgivings about Substantive Due Process as an original matter").

344. Gura et al., *supra* note 13, at 199.

345. See *McDonald*, 130 S. Ct. at 3030 (plurality opinion) (seeing "no need to reconsider [Thomas's] interpretation").

346. See *supra* note 218 and accompanying text for a discussion on occurrences of judicial battlegrounds and competing majority and separate opinions.

347. See *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (writing separately only to respond to Justice Stevens's dissent).

348. See *id.* at 3030 (plurality opinion) (explaining "[w]e see no need to reconsider that interpretation"); *id.* at 3050 (Scalia, J., concurring) (explaining "[d]espite my misgivings about Substantive Due Process as an original matter, I have acquiesced" in it because the Court has always used it); *id.* at 3104 (Stevens, J., dissenting) (mentioning Privileges or Immunities Clause only once—in framing petitioners' question); *id.* at 3132 (Breyer, J., dissenting) (stating "the Court today properly declines to revisit our interpretation of the Privileges or Immunities Clause").

349. See *supra* Part II.B.2 for a discussion on how individual philosophies and ideologies affect judicial decision making and the creation of, adherence to, and influence taken from precedents.

350. 620 F.3d 919 (8th Cir. 2010).

351. *Seay*, 620 F.3d at 924.

352. See *supra* Part II.B.2 and accompanying text for a description of how individual judicial decision makers often allow personal judicial philosophies to influence case dispositions.

jurisprudence.³⁵³ Yet, as evidenced by the majority of cases addressing the matter, the debate over which clause incorporated the Second Amendment against the States may be a dead end for advocates of Justice Thomas's position.³⁵⁴

Revival of the Privileges or Immunities Clause, however, is not limited solely to cases dealing with the Second Amendment. The Privileges or Immunities Clause could be used to incorporate remaining enumerated rights or yet-to-be recognized unenumerated rights. If a case is brought before a judicial actor who deems the reinterpretation of the Privileges or Immunities Clause a policy he wishes to forward on a substantive level, or, at the least, a legal argument to which he has an open mind, the existence of Justice Thomas's *McDonald* concurrence provides him with the most legitimate existent authority.³⁵⁵ This traditional form of common law development could allow lower federal courts to examine the whole applicability of the Privileges or Immunities Clause, rather than limiting it to a single issue.³⁵⁶ Certainly, there is plenty of academic discourse waiting to justify such a judicial decision;³⁵⁷ it may only need the requisite first mover.

Additionally, the reinterpretation of the Privileges or Immunities Clause may be well within the "judicial creativity" of lower federal judges, as the question was ignored by the Supreme Court and could warrant experimentation in the federal circuits. Thus, whereas the general persuasiveness of Justice Thomas's argument seems to have been ignored by the Supreme Court, it is possible that his *McDonald* concurrence may provide a legitimate authority for like-minded federal judges to begin to tease out the Privilege or Immunities Clause question, and work it into their future opinions.

353. See *supra* notes 220–21 and accompanying text for a description of how doctrinal concurrences present an alternative legal theory for judicial decisions while supporting majority results.

354. See *supra* Part II.C.2 for evidence that most courts ignore technicalities on how and through what constitutional provision the Second Amendment was incorporated.

355. See EPSTEIN & KNIGHT, *supra* note 62, at 23–25 (arguing the current view is that Justices are not dispositively bound by precedent and are inherently policy makers); cf. *Hamilton v. City of Romulus*, 409 F. App'x 826, 834 (6th Cir. 2010) (using Justice Thomas's concurrence to define the "rights, privileges, or immunities secured by the Constitution" (quoting *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3076 (2010) (Thomas, J., concurring))).

356. See Gura et al., *supra* note 13, at 198–99 (arguing unenumerated rights are the real winners from Justice Thomas's concurrence; and specifying potential economic rights, which include the right to "earn an honest living"); Editorial, *The Court and the Bill of Rights: Ignoring the Reality of Guns*, N.Y. TIMES, June 29, 2010, at A30 (opining that Justice Thomas's interpretation of the Privileges or Immunities Clause opens the door to incorporate more enumerated rights not yet applied through substantive due process). See *supra* notes 298–303 and accompanying text for a discussion of how at least one lower federal court and an ambitious public defender are already using Justice Thomas's *McDonald* concurrence to forward arguments outside of the Second Amendment context.

357. E.g., Amar, *supra* note 338, at 443–45; Amar, *supra* note 340, at 631 n.178; Blackmun & Shapiro, *supra* note 13, at 22–44; Gura et al., *supra* note 13, at 196–200.

2. Would Adherence to Justice Thomas's Concurrence Present a High Risk of Subsequent Reversal?

As has been discussed, often a judicial decision maker's worst fear is that his ruling will be later reversed when reviewed by a higher court.³⁵⁸ Indeed, a rule prescribed to by multiple Supreme Court Justices provides greater insurance against reversal than an individual concurrence.³⁵⁹ Judicial decision makers may therefore view granting precedential influence to Justice Thomas's concurrence as semisuicidal and prefer to grant substantive weight to only the plurality holding.³⁶⁰ But the fact that Justice Thomas's argument was discredited by none of his colleagues leaves one to wonder what the Court would hold if it were forced to rule specifically on the Privileges or Immunities question.³⁶¹ In essence, the risk of reversal of a decision relying on Justice Thomas's concurrence as a substantive authority might depend solely on the subsequent treatment of the concurrence by the various federal circuits.³⁶²

Fear of subsequent reversal and reluctant adherence to questionable precedent is exemplified in the procedural posture of *McDonald*. Even in light of *Heller* establishing the right to bear arms for self-defense as essential to the Second Amendment,³⁶³ the Seventh Circuit specifically refused to incorporate the Second Amendment against the States.³⁶⁴ Instead, the Seventh Circuit relied upon ancient incorporation cases, which held that the Second Amendment was not applicable to the States.³⁶⁵ The Supreme Court later dismissed those cases as not authoritative, noting that none of them analyzed the question of incorporation under substantive due process.³⁶⁶ Although it may have been well within the Seventh Circuit's "judicial creativity" to have viewed *Heller* as noting a substantive turn in the Court's Second Amendment jurisprudence,³⁶⁷ the Seventh Circuit refused to apply alternative principles or speculate as to what *Heller* meant to the then-existing incorporation doctrine.³⁶⁸

358. See *supra* notes 217–18 and accompanying text for a discussion on how the risk of subsequent reversal impacts adherence to a "risky" precedent.

359. See *supra* notes 127–28 and accompanying text for a description of the preference for legal rules supported by multiple Justices.

360. This might be the concern of the subsequent courts applying *McDonald* as if it exclusively resulted in substantive due process incorporation. *E.g.*, *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1185 (11th Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011); *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 WL 3962550 (S.D.N.Y. Sept. 2, 2011).

361. See *supra* notes 347–48 and accompanying text for a discussion of the absence of critique of Justice Thomas's argument in *McDonald*. *But see* Transcript of Oral Argument at 7:8-13, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (evidencing restraint by the Court to reinterpret the Privileges or Immunities Clause).

362. See *supra* notes 73, 96–100 and accompanying text for a description of how positive subsequent treatment of a case by courts can increase its authoritative effect as precedent.

363. See *supra* notes 252–55 and accompanying text for a discussion of *Heller* and its holding.

364. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030 (2010) (plurality opinion).

365. *Id.* (noting Seventh Circuit's reliance on *United States v. Cruikshank*, 92 U.S. 542 (1875), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894)).

366. *Id.* at 3031.

367. See generally Gruhl, *supra* note 216; Hotz, *supra* note 216.

368. *N.R.A. v. City of Chicago*, 567 F.3d 856, 857–58 (7th Cir. 2009).

Instead, the Seventh Circuit held that the confusion as to the Second Amendment's application to the States "does not license the inferior courts to go their own ways."³⁶⁹ Though one scholar argues that inferior federal courts may shirk from Supreme Court precedent when they "sense a shift" in relative doctrine,³⁷⁰ the concept of anticipatory compliance is viewed as "undermin[ing] the uniformity of national law" and as forcing the Court to "grant certiorari before they think the question ripe for decision."³⁷¹ Although a compellingly persuasive alternate rationale such as Justice Thomas's may be justified in the eyes of an individual judicial decision maker, many courts might believe the risk of reversal too high to warrant straying from substantive due process incorporation, even in the event of "defunct" judicial reasoning.³⁷² Moreover, even though Justice Thomas provided the necessary fifth vote to secure the holding of *McDonald*, the conditions of that vote are distinguished from other swing vote Justices that have gone on to receive substantial influence with their individual opinions.³⁷³ In those instances, the swing vote provided a necessary compromising ground between two warring coalitions. Justice Thomas's swing vote does no such thing, other than to support general incorporation of the Second Amendment.

All of this, however, is subject to the unforgettable fact that it is literally impossible for the Supreme Court to review every subsequent decision applying one of its precedents.³⁷⁴ This may allow for Justice Thomas's alternate reasoning to percolate in the lower federal courts before ever obtaining certiorari to the Supreme Court for review. In this light, Justice Thomas's alternative incorporation theory may gain positive subsequent support in the inferior federal courts. This could possibly lead to the theory gaining positive influence on the Supreme Court, similar to the likes of Justice Jackson's framework for analyzing presidential powers in *Youngstown*, Justice Brandeis's definition of "clear and present danger" presented in *Whitney*, and Justice Powell's standard for affirmative action in *Bakke*. This is all speculation, however. And since *McDonald* has only been recently decided, positive subsequent treatment amounting to anything worthwhile may be long off.

3. What Are the Possible Effects of Justice Thomas's Judicial Reputation?

Though certainly not dispositive of the issue, the precedential influence of Justice Thomas's *McDonald* concurrence may be affected by his general reputation as a

369. *Id.*

370. Gruhl, *supra* note 216, at 294–95.

371. *N.R.A.*, 567 F.3d at 858; see *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

372. See, e.g., *N.R.A.*, 567 F.3d at 858 (refusing to stray from "defunct," yet precedential Supreme Court authority).

373. See *supra* notes 127–29, 189–90 and accompanying text for a discussion of the potential for increased precedential influence where a concurring Justice is the swing vote. This influence, however, is primarily important in emphatic concurrences and limiting concurrences, but not doctrinal concurrences.

374. See *Songer et al.*, *supra* note 106, at 675 (observing that most lower court decisions will escape Supreme Court review).

Supreme Court Justice.³⁷⁵ Unfortunately, Justice Thomas was highly criticized during his first few years on the Court.³⁷⁶ Some scholars complain that his published opinions were “shallow and poorly reasoned,” that “he did little work,” and was often a “clone of conservative Justice Antonin Scalia with few ideas of his own.”³⁷⁷ In fact, Justice Thomas has been referred to as “Scalia’s puppet, Scalia’s clone, and even Scalia’s bitch.”³⁷⁸ Moreover, Justice Thomas’s silence during the Court’s oral arguments has drawn criticism that he is lazy and that makes up his mind before hearing alternative argument.³⁷⁹ Indeed, he has been accused of hiring law clerks from only the most elite law schools in order to rely heavily upon their work and publish their draft opinions with few changes.³⁸⁰ Similarly, before his placement on the D.C. Court of Appeals, Justice Thomas was not regarded as especially qualified for the position.³⁸¹ To put it bluntly, much of the criticism regarding Justice Thomas results from the fact that scholars and commentators deem him “a liar and a hypocrite.”³⁸²

Indeed, there is a variance in the way that Justice Thomas has approached even his own Privileges or Immunities Clause jurisprudence. In *Saenz v. Roe*,³⁸³ the Court used the Privileges or Immunities Clause to protect an individual’s right to travel;³⁸⁴ but Justice Thomas dissented, and considered using the clause to “displace, rather than augment” substantive rights.³⁸⁵ Justice Thomas seemingly contradicted himself only a decade later, stating in his *McDonald* concurrence that he would not go so far as to limit the rights protected by the Privileges or Immunities Clause to those enumerated in the Bill of Rights.³⁸⁶ Such a sharp distinction in opinions may lead one to question Justice Thomas’s motives.

That said, criticism of Justice Thomas may be influenced by inappropriate or misguided factors. For instance, although often criticized as a poor Justice at the

375. See *supra* notes 222–28 and accompanying text for a discussion of the influence of a Justice’s reputation on the precedential value of his opinions.

376. See generally SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 25 (1999).

377. *Id.*

378. Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 933 (2005) (footnotes omitted) (internal quotation marks omitted).

379. See Karp, *supra* note 225, at 624–27 (arguing that because Justice Thomas is all but silent at oral argument, yet often argues for expansive alterations and overhauls of constitutional doctrine, he and the Court are undermined as legitimate authorities); Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES, Feb. 13, 2011, at A1 (observing five-year silence of Justice Thomas during oral argument).

380. See JOHN GREENYA, *SILENT JUSTICE: THE CLARENCE THOMAS STORY* 166–67, 237–38 (2001) (arguing Justice Thomas gives clerks “enormous latitude” to write opinions “dismissive of any point of view other than their own”).

381. See *id.* at 153 (explaining ABA qualifications for endorsement of judicial appointments and evidencing that Justice Thomas’s endorsement was on the lower end of the spectrum).

382. GERBER, *supra* note 376, at 34.

383. 526 U.S. 489 (1999).

384. *Saenz*, 526 U.S. at 502–03.

385. *Id.* at 528 (Thomas, J., dissenting).

386. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084 n.20 (2010).

beginning of his tenure, his reputation for adjudication has only increased.³⁸⁷ In fact, Justice Thomas's jurisprudence may be judged harshly by critics due only to the fact that his decisions are often "intrinsically linked to his identity as a Southern black man."³⁸⁸ Further, originalism as a legitimate means of constitutional interpretation has gained favor, perhaps influencing the perception of some of Justice Thomas's more radical positions.³⁸⁹ In fact, after the appointment of Justice Alito and Chief Justice Roberts, the Court has moved significantly more to the right of the political spectrum; and in many cases, where he was once a dissenting voice, Justice Thomas's views are becoming majority doctrine.³⁹⁰

All of this, however, must be viewed alongside the Anita Hill accusations³⁹¹ and the recent revelations of Lillian McEwen.³⁹² Both women accuse Justice Thomas of being an overtly sexual person—Hill accusing him of sexual harassment in the workplace,³⁹³ and McEwen of him being obsessively fond of pornography.³⁹⁴ Such allegations no doubt cloud Justice Thomas's judicial reputation with that of social stigma and immorality.

Whatever conclusions can be deduced from Justice Thomas's reputation, notwithstanding controversy, he is currently a conservative force all his own. He is stringently tied to his originalist ideologies and capable of standing on his own with his

387. See GREENYA, *supra* note 380, at 248–53 (arguing earlier criticism of Justice Thomas has become inapplicable in later years of his service on the Court).

388. Onwuachi-Willig, *supra* note 378, at 938; see also *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) (Justice Thomas's dissent bringing forward personal, racial identity with issues in the case and elaborating upon the significance of a cross burning to a Southern African American); Transcript of Oral Argument at 22–24, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107) (Justice Thomas speaking and bringing a very particular racially influenced viewpoint to oral argument).

389. See Antonin Scalia, *Forward*, 31 HARV. J.L. & PUB. POL'Y 871, 871–72 (2008) (noting rise of originalism on the Court); Jeffrey Rosen, *If Scalia Had His Way*, N.Y. TIMES, Jan. 9, 2011, at WK1 (observing that with the rise of the Tea Party came the strong influence of originalist movement). *But see* Jill Lepore, *The Commandments: The Constitution and its Worshipers*, THE NEW YORKER, Jan. 17, 2011, at 70, 75–76 (exploring hypocrisy, ignorance, and the often contradicting "fad" that is popular originalism); Adam Liptak, *Sidebar, A Taxonomy of Supreme Court Humor*, N.Y. TIMES, Jan. 25, 2011, at A16 (opining that the best joke during the 2010 Term was Justice Alito's clarification that Justice Scalia, in asking whether Framers thought the First Amendment protected violent speech, really wanted to know "what James Madison thought about video games").

390. Jeffrey Toobin, *Annals of Law: Partners*, THE NEW YORKER, Aug. 29, 2011, at 41.

391. See GERBER, *supra* note 376, at 33 (stating Hill accusations surely affect Justice Thomas's judicial reputation).

392. See Ashley Parker, *Ex-Companion Describes 'Real' Thomas*, N.Y. TIMES, Oct. 23, 2010, at A14 (highlighting negative implications on Justice Thomas's personal reputation from Lillian McEwen allegations).

393. See GREENYA, *supra* note 380, at 201 (discussing Hill's accusations that Justice Thomas sexually harassed her during their time together at two government administrative organizations).

394. See Parker, *supra* note 392 (McEwen reporting that pornography was part of Justice Thomas's "personality structure").

fellow Justices.³⁹⁵ Whether he is the academic herald some scholars have made him, however, might be contradictory to past evaluations.³⁹⁶

4. Reaching a Conclusion: Has Justice Thomas Changed Anything?

Obviously, one cannot conclusively speak to the possible future influence of Justice Thomas's *McDonald* concurrence at this time. The opinion is too recent, citations to it are too few, and the possible subsequent characterizations of the opinion are near infinite. Nonetheless, Justice Thomas's opinion is already influencing lower courts asked to define and explore a long-dead constitutional provision.³⁹⁷ Looking to the analysis suggested by this Comment, it is likely that Justice Thomas's opinion could very well have influence upon future precedent. Overruling archaic cases narrowly interpreting the Privileges or Immunities Clause is a familiar legal argument, and it finds support in almost all mediums.³⁹⁸ The only thing preventing this argument from influencing new cases is precedent and precedent alone.³⁹⁹ Thus, it may only take some impassioned judicial first-mover to begin chipping away the precedent restricting the Privileges or Immunities Clause.

Further, the risk of subsequent reversal upon adherence to Justice Thomas's concurrence may not be tantamount to aversion. Although the Seventh Circuit's refusal to reinterpret seemingly dead precedents in light of *Heller* may credit an alternate conclusion, not every case addressing every issue touched by Justice Thomas's argument will appear before the Court. Further, proponents could utilize the Privileges or Immunities Clause to support yet-to-be incorporated provisions of the Bill of Rights or a multitude of unenumerated rights outside the purview of the Second Amendment.⁴⁰⁰ Application of Justice Thomas's argument to such issues would allow for a judicial actor to forward rejuvenation of the Privilege or Immunities Clause while

395. See GERBER, *supra* note 376, at 25 (noting Justice Thomas has become "a right wing intellectual force in his own right").

396. Compare Gura et al., *supra* note 13, at 198–200 (Cato praising Justice Thomas as a savior for "reviving" the correct interpretation of the Privileges or Immunities Clause), and Ashby Jones, *Is His Gun-Control Concurrence Justice Thomas's Finest Hour?*, WALL ST. J. L. BLOG (June 28, 2010, 7:21 PM), <http://blogs.wsj.com/law/2010/06/28/is-his-gun-control-concurrence-justice-thomass-finest-hour> (explaining that "many legal commentators were thrilled by Justice Thomas's concurrence" in *McDonald*), with GREENYA, *supra* note 380, at 154 (Cato sarcastically endorsing Justice Thomas's appointment to the D.C. Circuit Court of Appeals).

397. See *supra* notes 298–303 and accompanying text for evidence of Justice Thomas's concurrence being used to forward alternative legal arguments based on the Privileges or Immunities Clause.

398. See *supra* Part II.C.3 for evidence of academic support of reinterpretation of the Privileges or Immunities Clause. *Accord* Slaughter House Cases, 83 U.S. (16 Wall.) 36, 96–101 (1873) (Field, J., dissenting); *id.* at 114–19 (Bradley, J., dissenting).

399. *Cf.* Transcript of Oral Argument at 4:6–10, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Chief Justice Roberts evidencing concern with overruling 140 years of precedent). *Accord* Trammel v. United States, 445 U.S. 40, 48 (1980) (noting where "precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it" (quoting *Francis v. S. Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting))).

400. See Gura et al., *supra* note 13, at 198–99 (arguing unenumerated rights are the real winners from Justice Thomas's concurrence, and specifically potential economic rights, which include the right to "earn an honest living"). See *supra* notes 301–03 and accompanying text for an example of how the Privileges or Immunities Clause could be used to incorporate rights still missing from substantive due process.

avoiding conflicts with the *McDonald* plurality. Justice Thomas's concurrence could therefore percolate in lower courts for some time, eventually presenting the Court with a more emphatic case for reinterpreting the Privileges or Immunities Clause. As seen in *McDonald*, the Court has not overtly rejected Justice Thomas's argument, but only stayed its hand for a future day. Justice Thomas's concurrence could provide the framework for a Supreme Court holding if the Court is ever presented with a case squarely presenting a question of the Clause's scope.

Finally, although Justice Thomas has been subject to more than enough muckraking, his appeal to interpreting the original intent of the Framers is gaining more and more popular approval as his time on the Court continues.⁴⁰¹ Although there have been serious doubts about his ability to function as an independent Justice, and concerns as to whether he is truly impartial and unbiased,⁴⁰² his form of constitutional interpretation eventually may prove to be highly influential.⁴⁰³ Finally, Justice Thomas's reputation is still a "biograph[y] in progress," with no set guide for what the future of the Court may hold for him.⁴⁰⁴ Although he is often radical in his application of legal doctrine,⁴⁰⁵ history may show his negative reputation as a jurist as more of a moral judgment than a credential determination.

In sum, Justice Thomas's *McDonald* concurrence could very well be used to redefine a long-lost constitutional provision and enforce unenumerated rights.⁴⁰⁶ Although some jurists may use Justice Thomas's concurrence to limit Second Amendment rights to citizens,⁴⁰⁷ or to roll back the legal fiction of substantive due process,⁴⁰⁸ the enforcement of unenumerated rights seems a more realistic path for future Privileges or Immunities Clause jurisprudence. In that respect, Justice Thomas's *McDonald* concurrence may provide valid authority for proponents of that argument. Scholars claim that among these unenumerated rights are economic rights to contract, social rights involving marriage or procreation, rights to own and dispose of property,

401. See *supra* notes 387–90 and accompanying text for a discussion of modern takes on Justice Thomas's judicial reputation.

402. See *supra* notes 376–86 and accompanying text for a discussion on negative attitudes towards Justice Thomas's judicial stature.

403. See *supra* note 389 and accompanying text for a discussion on how originalism has recently gained favor.

404. See Green, *supra* note 59, at 658 (arguing true perceptions of Justices may only come with historical context and benefits of hindsight).

405. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 692–94 (2005) (Thomas, J., concurring) (arguing that the Court should return to the original view of the Establishment Clause and hold it does not apply to States).

406. See Gura et al., *supra* note 13, at 198–99 (arguing unenumerated rights are the real winners from Justice Thomas's concurrence, specifically potential economic rights); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3063–77 (2010) (Thomas, J., concurring) (articulating a spanning inquiry into what the original meaning of the Privileges or Immunities Clause was, and what rights it protects).

407. The protection of due process in the Fourteenth Amendment applies to all persons, whereas the Privileges or Immunities Clause applies to only citizens. U.S. CONST. amend. XIV, § 1; see also Gulasekaram, *supra* note 315, at 1539–42 (arguing Justice Thomas's concurrence presents potential problems for rights of noncitizens).

408. Cf. *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring).

rights to make a living, and numerous other unarticulated rights directly supported by the historically based arguments forwarded by Justice Thomas.⁴⁰⁹

Pervasive lower court treatment and strong substantive changes in one or more federal circuits, therefore, could seriously alter the substantive law addressing the Privileges or Immunities Clause. In fact, the only concerns of the Justices in reviving the Privileges or Immunities Clause seem to be the undefined nature of the precise rights upon which the Clause affects.⁴¹⁰ Positive subsequent treatment of Justice Thomas's concurrence would allow courts to further define exactly what rights are within the purview of the Clause, and alleviate those cursory concerns. In the event that occurs, the Court may be forced to grant certiorari to a case forwarding a direct question as to the interpretation of the Privileges or Immunities Clause.⁴¹¹ In this context, when the Court is presented with no other option and more thoroughly litigated case law, the Justices may very well find Justice Thomas's argument ultimately persuasive. In fact, such brash change in constitutional doctrine is not a rogue occurrence on the Court. Much stranger things have happened.⁴¹² With an infinite amount of possible subsequent characterizations and directions to which the concurrence may be extended, however, the final precedential influence of Justice Thomas's concurrence will have to be observed in hindsight.

IV. CONCLUSION

Although the Supreme Court may seem mercurial at times, the Justices' commitment to stare decisis and precedent is generally intact.⁴¹³ Nevertheless, concurring opinion writing on the Court is increasing at a freight train's pace. Because

409. Gura et al., *supra* note 13, at 198–99.

410. See Transcript of Oral Argument at 5:16–22, 8:3–7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Justice Ginsburg questioning scope of breadth of the Privileges or Immunities Clause); *id.* at 11:14–20 (Justice Stevens inquiring the same).

411. See SUP. CT. R. 10 (emphasizing writs of certiorari are usually granted where United States courts of appeals are conflicted or divided on an issue, or where a United States court of appeal decides federal questions in conflict with previous Supreme Court decisions); EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 250–52 (9th ed. 2007) (observing the Court grants certiorari often in cases where a United States court of appeals decision conflicts with a prior Supreme Court decision, or where a United States court of appeals has taken liberties in applying a Supreme Court opinion as precedent).

412. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–96 (1954) (declaring segregation in public schools unconstitutional and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938) (eliminating tradition of Federal common law and overruling *Swift v. Tyson*, 41 U.S. 1 (1842)); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (evidencing Court's penultimate turn away from principles of economic liberty established in *Lochner v. New York*, 198 U.S. 45 (1905)).

413. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968))) (two precedents overruled within less than twenty years), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (explaining “obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [I]t is common wisdom that the rule of stare decisis is not an ‘inexorable command’” (citations and emphasis omitted)), with *Mathews v. United States*, 485 U.S. 58, 67 (1988) (Brennan, J., concurring) (“I bow to stare decisis.” (emphasis omitted)), and Transcript of Oral Argument at 7:8–13, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (Court cautioning that switching to an incorporation theory based on Privileges or Immunities Clause would be “contrary to 140 years of [the Court's] jurisprudence”).

Supreme Court Justices have the unique and sole responsibility of dictating the final interpretation of the Constitution, it would be pertinent for practitioners and academics to discern the whole of their messages. A Supreme Court Justice is in a position like no other to determine the path on which our nation's laws will be set. Where a single Justice branches out to declare a message on his own, it is imperative that we attempt to determine the full effect of that mighty voice.⁴¹⁴

In that regard, concurrences written by Supreme Court Justices are undoubtedly influential. But the extent of that influence depends on a variety of factors specific to the form and substance that the concurrence takes.⁴¹⁵ These factors can be identified by examining the relationship between the lead opinion and the individualized message the concurrence forwards.⁴¹⁶ Although this Comment focuses on a specific concurrence to exhibit the application of those factors, the schematic proposed by this Comment can apply to any concurrence. Focusing on Justice Thomas's *McDonald* concurrence simply allows for a more specific inquiry and for conclusions to be drawn. And although academics hail Justice Thomas as a champion of privileges and immunities, more is needed to determine exactly what impact the *McDonald* concurrence will have upon the future of the Privileges or Immunities Clause. In applying the aforementioned concurrence framework, and examining the three suggested factors affecting the doctrinal concurrence's precedential influence,⁴¹⁷ a conclusion can be drawn as to what precedential future Justice Thomas's *McDonald* concurrence holds. With positive subsequent treatment, a steady dodge of direct Supreme Court review, and a heightened perception of Justice Thomas as a valid authority on the Court, the *McDonald* concurrence just may live up to its praise.

414. Although certainly not dispositive of whether a concurrence written by a single Justice is properly or significantly influential as an authority upon any legal issue, even recent briefs to the Supreme Court of the United States recognize the opportunity concurring opinions present as authority to forward novel legal arguments. For instance, in arguing that the Supreme Court should overrule its decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the respondent television stations argued that the Court's previous holding that broadcast media has a "uniquely pervasive presence in the lives of all Americans," *id.* at 748, was based on improper conclusions at the time *Pacifica* was decided and, in any event, was simply no longer true. Brief of Respondents Fox Television Stations, Inc. et al. at 16–18, *FCC v. Fox Television Stations, Inc.*, No. 10-1293 (Nov. 3, 2011). For support, the respondents cited two concurring opinions authored by none other than Justice Thomas. *Id.* (citing *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1820–22 (2009) (Thomas, J., concurring)).

415. See *supra* Part II.B.3 for a discussion on varying forms of concurrences and factors affecting their precedential influence.

416. See *supra* Part II.B.3 for a discussion and examples of how classification of concurrences depends on the relationship between the lead opinion and the concurrence.

417. See *supra* Part II.B.3.vi for a discussion on doctrinal concurrences and factors affecting their precedential influence.

