

THE POTENTIALLY EXPANSIVE REACH OF  
*McDONALD V. CHICAGO*: ENABLING THE  
PRIVILEGES OR IMMUNITIES CLAUSE

*Michael Anthony Lawrence\**

I AM PLEASED TO JOIN THIS DISCUSSION ORGANIZED BY THE *Cardozo Law Review de-novo* online journal as we await oral arguments in the Supreme Court of the United States in *McDonald v. City of Chicago*. I am guided by the instructions from the editors: “to discuss the importance of *McDonald*, with regard to the Second Amendment, its contours in light of the *District of Columbia v. Heller* decision, and the question of its incorporation through the Fourteenth Amendment.”

First, the basics: *McDonald v. City of Chicago* follows naturally from the Court’s 2008 *D.C. v. Heller* decision, which held that the Second Amendment protects an individual right that Congress may not abridge—but which expressly did not address the question of whether the Second Amendment is incorporated through the Fourteenth Amendment to apply to the States. Because the challenged gun-control law in *McDonald* is a Chicago city ordinance, the first question the Court must answer, therefore, is whether the Second Amendment can even be claimed as protection by petitioner Otis McDonald—i.e., whether the Second Amendment is incorporated to apply to the States. Then, if the answer is affirmative, the Court must decide whether the particular ordinance runs afoul of the Second Amendment.

---

\* Professor & Associate Dean for Graduate, International & Interdisciplinary Programs, Michigan State University College of Law; author of *RADICALS IN THEIR OWN TIMES: FOUR HUNDRED YEARS OF STRUGGLE FOR LIBERTY AND EQUAL JUSTICE IN AMERICA*, (forthcoming 2010, Cambridge University Press); <http://progressiveliberty.blogspot.com>. Portions of this piece were first published in Michael Lawrence, *Rescuing the Privileges or Immunities Clause: How “Attrition of Parliamentary Processes” Begat Accidental Ambiguity; How Accidental Ambiguity Begat Slaughter-House*, 18 WM. & MARY BILL RTS. J. 445 (2010).

I will focus entirely on the first question—the issue of incorporation. One reason this case is so interesting is that since the United States Supreme Court began its modern practice of selectively incorporating individual Bill of Rights provisions through the Fourteenth Amendment Due Process clause in 1925, it has never addressed the question of whether the Second Amendment applies to the States. So this question alone—whether the amendment is incorporated through the Due Process clause—is of great practical importance.

But there is much more, in the fact that the Court has *never* given another relevant provision of the Fourteenth Amendment—the Privileges or Immunities clause, which was expressly intended by its framers to incorporate the *entire* Bill of Rights (including the Ninth Amendment, protecting unenumerated rights)—its proper reading; and this case offers the Court a golden opportunity to finally correct its past mistakes. This is precisely the point I made in an article published a couple years ago in the *Missouri Law Review* entitled *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*<sup>1</sup>—and it is precisely the point petitioners Otis McDonald et al. are making in *McDonald v. City of Chicago* (spending fully sixty-five of seventy-three pages of their argument on the privileges or immunities argument; and the remaining eight on the traditional Due Process argument).<sup>2</sup>

In Section I of this short essay, I will briefly review the sad history of how the Court buried the Privileges or Immunities clause in 1873 just five years after its birth; then in Section II, I will offer a possible doctrinal approach were the Court to move forward in (finally) giving proper effect to the Privileges or Immunities clause.<sup>3</sup>

---

<sup>1</sup> 72 MO. L. REV. 1 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=723501](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=723501).

<sup>2</sup> Petitioners' Brief, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 16, 2009), 2009 WL 4378912, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1521\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1521_Petitioner.pdf). It is also precisely the point that a remarkable cross-section of amici curiae make in support of petitioners' arguments—including a brief by the Constitutional Accountability Center I joined together with law professors Richard L. Aynes (Akron), Jack Balkin (Yale), Randy Barnett (Georgetown), Steven Calabresi (Northwestern), Michael Curtis (Wake Forest), Richard Van Alstyne (William & Mary), and Adam Winkler (UCLA). Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 23, 2009), 2009 WL 4099504, available at <http://www.chicagocase.com/wp-content/uploads/2009/11/08-1521-tsac-constitutional-accountability-center.pdf>.

<sup>3</sup> This approach was first offered in a 2007 article I wrote for the *Louisiana Law Review* entitled, *Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1 (2007) [hereinafter

## I. THE FOURTEENTH AMENDMENT PRIVILEGES OR IMMUNITIES CLAUSE

### A

The enactment and ratification of the Privileges or Immunities clause, together with the rest of the Fourteenth Amendment,<sup>4</sup> was a landmark achievement in American history. With this act, Americans moved to counteract the nation's time-proven discriminatory *modus operandi* by strictly prohibiting any exercise of governmental power that would "abridge the privileges or immunities" (meant to be broadly read as "individual natural rights") including the Bill of Rights and other enumerated and unenumerated rights of all American citizens.<sup>5</sup> In returning to the Enlightenment-inspired Revolutionary ideals expressed in the Declaration of Independence, Constitution, and Bill of Rights, Section One was designed to reinstate, to borrow Professor Randy Barnett's imagery, an American "sea of individual liberty" interrupted only occasionally by discrete "islands of government power."<sup>6</sup>

---

Lawrence, *The "Reasonable Time, Place and Manner" Standard*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985915). Portions of the rest of the paper are derived from my *Missouri Law Review* article noted above and a third, more recent essay in the *William & Mary Bill of Rights Journal* entitled, *Rescuing the Privileges or Immunities Clause: How "Attrition of Parliamentary Processes" Begat Accidental Ambiguity; How Ambiguity Begat Slaughter-House*, 18 WM. & MARY BILL RTS. J. 445 [hereinafter Lawrence, *Rescuing the Privileges and Immunities Clause*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462184](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462184).

<sup>4</sup> The Fourteenth Amendment states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

.....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV (emphasis added).

<sup>5</sup> The Fourteenth Amendment framers' desire for *freedom and independence* was also at the core of the Constitution's founders' desire to abolish the culture of pervasive dependence that existed from the earliest colonial days up until the Revolution. *See generally* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

<sup>6</sup> *See, e.g.*, WOOD, *supra* note 5, at 189–91 ("For the revolutionary generation, America became the Enlightenment fulfilled . . . 'the opening of a grand scene and design in Providence for the illumination of the ignorant, and the emancipation of the slavish part of mankind all over the earth.'" (quoting John Adams, *Dissertation on the Feudal and Canon Law*, in GORDON S. WOOD, *THE RISING GLORY OF AMERICA, 1760-1820*, at 29 (1971))). Bernard Bailyn stated,

No less a figure than Voltaire stated [in 1734] that America was the refinement of all

Following the Civil War, with half a million dead and a shattered nation, the Thirty-Ninth Congress recognized that the original promise of liberty and equal justice in American had fallen grievously short. So Congress decided to make it explicitly clear that henceforth there were some things that oppressive state majorities could no longer do. The rest of the members of Congress in 1866 understood perfectly well that Section One of the Fourteenth Amendment was intended to apply the Bill of Rights, and more, to the States. “Over and over [John Bingham] described the privileges-or-immunities clause as encompassing ‘the bill of rights’—as phrase he used more than a dozen times in a key speech on February 28.”<sup>7</sup> In short, regarding the effect of the privileges or immunities clause on the States, there was no question—and in response to Bingham’s strong statements in the House, nobody spoke up to disagree with him.<sup>8</sup>

Similarly in the Senate, Senator Jacob Howard, speaking on behalf of the Joint Committee on Reconstruction, commented on May 23, 1866:

[Section One is intended to impose a] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. . . . It is not, perhaps, very easy to define with accuracy what is meant by the expression, “citizen of the United States” . . . . To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal right guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and . . . the right to keep and to bear arms . . . . [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them. . . . [Presently,] they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not

---

that was good in England, writing in his *Lettres philosophiques* that Penn and the Quakers had actually brought into existence “that golden age of which men talk so much and which probably has never existed anywhere except in Pennsylvania.”

BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 84 (1967); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 1 (2004).

<sup>7</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS* 182 (1998).

<sup>8</sup> *Id.* at 187 (stating “[s]urely, if the words of section [one] meant something different, this was the time to stand up and say so”).

restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. *The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. . . . I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.*<sup>9</sup>

To repeat, the framers were determined (in light of the Court's *Barron v. City of Baltimore*<sup>10</sup> decision holding that the Bill of Rights applies not to states but only to Congress) to amend the Constitution to make clear that the Bill of Rights and protections of other basic rights *do* apply to the States. Both houses of Congress were well aware of the intended scope of the privileges or immunities clause—and the amendment's opponents (primarily Democrats) did not like it. They claimed, for example, that the amendment was “a dangerous infringement upon the rights and independence of the States,” and would provide power “substantially to annihilate the state judiciary.”<sup>11</sup> Discussions in the Senate were brief, dealing mostly with the recently-added citizenship clause—as for the privileges or immunities, due process and equal protection provisions, Senator John Henderson said, they “merely secure the rights that attach to citizenship in all free Governments.”<sup>12</sup> Everybody in Congress—supporters and opponents alike—had known for months that the proposed privileges or immunities clause, together with the rest of Section One and Section Five, would substantially lessen States' ultimate authority over their citizens. That's why the opponents brayed so loudly: they knew that states would no longer be able to deny citizens (indeed, all manner of citizens, as specified in the newly-added first sentence) the individual liberty and equal justice the people had claimed in the Declaration of

---

<sup>9</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (emphasis added). Senator Howard's comments were widely reported in the local and national press. His comment that “to these [privileges and immunities] should be *added* the personal rights guaranteed and secured by the first eight amendments” would explain why the Fourteenth Amendment's proponents did not simply say: No State shall make or enforce any law which shall abridge the Bill of Rights protections of citizens of the United States. *Id.* at 2765 (emphasis added).

<sup>10</sup> 32 U.S. 243 (1833).

<sup>11</sup> MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 151–52 (1986).

<sup>12</sup> *Id.* at 89.

Independence, but had been denied for four score and ten years since. All of this the opponents understood, so they objected—and they lost.

## B

Despite the facts above regarding this duly-debated, proposed and ratified amendment to the Constitution, just five years later, in 1873, the United States Supreme Court held 5-4 in *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Livestock Landing & Slaughter-House Co. (Slaughter-House Cases)*<sup>13</sup> that the privileges or immunities clause applied only to the few privileges or immunities associated with national citizenship, thereby leaving the states free to continue regulating (or, more likely, not regulating) those many residual privileges and immunities said to be associated with state citizenship. Then, in *United States v. Cruikshank*,<sup>14</sup> the Court held that the Bill of Rights, including the Second Amendment right to keep and bear arms, does not apply to the States. The damage done by the Supreme Court to this expressed ideal in two cases less than a decade after ratification of the Fourteenth Amendment—which had, after all, been designed and ratified with the purpose of restoring the primacy of “the private interest of every individual” over an out-of-control (in this case, State) government—cannot be overstated. With this holding, released of the privileges or immunities clause’s constraints, states were free, for example, to perpetuate unjust discriminatory Jim Crow laws for another 90 years;<sup>15</sup> and to infringe, to this day, upon the individual right to bear arms and other enumerated and unenumerated privileges and immunities.

As might be expected, since the *Slaughter-House* decision was directly contrary to what Section One’s framers in Congress intended for the clause, reaction at the time was withering. The four dissenting justices were unsparing in their criticism. “No searching analysis is necessary to eliminate [the privileges or immunities clause’s] meaning,” Justice Swayne explained. Further,

[i]ts language is intelligible and direct. Nothing can be more

---

<sup>13</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>14</sup> 92 U.S. 542, 552 (1876).

<sup>15</sup> The Court held in 1954 that “separate but equal” laws violate the fourteenth amendment equal protection clause, thus reversing its infamous 1896 *Plessy v. Ferguson* decision. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out. . . . A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. . . . The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language ‘citizens of the United States’ was meant *all* such citizens; and by ‘any person’ was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color. . . . [The majority] defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted.<sup>16</sup>

Regarding the justices’ responsibility in interpreting the Constitution, Swayne continued, “[t]his court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it.” Finally, to those objecting to a broad reading of Section One, Swayne answered that the restrictions imposed upon States are indeed “novel and large [but] the novelty was known and the measure deliberately adopted.”<sup>17</sup>

Justices Bradley, Field and Chase also dissented. “[C]itizenship is not an empty name, but . . . has connected with it certain incidental rights, privileges, and immunities of the greatest importance,” Justice Joseph Bradley argued. He further noted that while

formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens, that cannot be said now . . . [I]t was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen.<sup>18</sup>

Elaborating upon the point that fundamental rights were found in Magna Charta, Blackstone’s *Commentaries*, and Justice Washington’s enumeration in *Corfield v. Coryell*,<sup>19</sup> Bradley explained: “But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It

---

<sup>16</sup> *Slaughter-House Cases*, 83 U.S. at 126–29 (Swayne, J., dissenting).

<sup>17</sup> *Id.* at 129.

<sup>18</sup> *Id.* at 116; 121–22 (Bradley, J., dissenting).

<sup>19</sup> *Id.* at 115–17.

is in the Constitution itself.”<sup>20</sup>

Justice Stephen Field agreed, lamenting that if the majority’s assertion that most rights remained under State control was indeed accurate, then the Fourteenth Amendment “was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.”<sup>21</sup>

The *Slaughter-House* dissenters’ strong comments highlight that the bare 5-4<sup>22</sup> majority’s approach was not, contrary to long-held revisionist wisdom,<sup>23</sup> a foregone conclusion in 1873. Indeed, if anything, the foregone conclusion at the time was that the Fourteenth Amendment applied *all* rights, privileges, liberties, and immunities—those enumerated within the Bill of Rights and elsewhere, as well as those unenumerated—to the States.

The few scholars who continue to support the *Slaughter-House/Cruikshank* interpretation point to the relative paucity of contemporaneous newspaper accounts during the state ratification debates from 1866-1868 as evidence for their position. “If the amendment was truly intended to apply the Bill of Rights to the States,” they might say, “we would see evidence of that interpretation in the news of the day.”<sup>24</sup>

This argument is fallacious. The fact that available news accounts fail to explain that the amendment would apply the Bill of Rights to the states does not mean that the public failed to understand this intent, just as the absence of a smoking gun in a criminal case does not mean a shot was not taken. Yet juries draw conclusions based on strong circumstantial evidence all the time. In the absence of the gun, we look to other evidence—and here we find it, in the congressional debates and elsewhere.

---

<sup>20</sup> *Id.* at 118.

<sup>21</sup> *Id.* at 96 (Field, J., dissenting).

<sup>22</sup> For discussion of the dynamics of this 5-4 split, see Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 686-87 (1994).

<sup>23</sup> The perpetuation of the myth of *Slaughter-House*’s inevitability throughout much of the Twentieth Century can be traced to a few influential works. See generally RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

<sup>24</sup> See, for example, Brief of Constitutional Law Professors as *Amici Curiae* in Support of Reversal at 6-7, *Nat’l Rifle Ass’n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009) (Nos. 08-4241, 08-4243, 08-4244), 2009 WL 908685, for further discussion.

Even assuming the absence of contemporaneous news stories,<sup>25</sup> who really knows what this might mean? Maybe, after the horrific bloodshed of the recent war, the public was so fed up that it quietly and resolutely went along with the idea that states would henceforth be bound by the Bill of Rights—in other words, because it was so obvious to the people that states would no longer have discretion to abridge individual rights and liberties (i.e., “privileges and immunities”), there was simply no need to discuss the matter. This interpretation is at least as plausible as saying, as opponents do, that the public expressly believed the amendment would not apply the Bill of Rights to the states. In short, in the final analysis, absent a strong body of contemporaneous statements favoring either alternative, the default conclusion must favor the understanding as expressed by the amendment’s framers and contemporaneous commentators.

One Senator involved in the framing of the amendment, Senator George Franklin Edmunds, said that the *Slaughter-House* opinion “radically differed” from what the framers had intended for Section One.<sup>26</sup> Political scientist John W. Burgess reflected in 1890 that *Slaughter-House* eviscerated “the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned.”<sup>27</sup>

Summing up, as explained by Professor Michael Curtis for amici curiae in the 2009 Ninth Circuit case, *Nordyke v. King*:

The *Slaughter-House* majority provided a radically incomplete historical background for the Fourteenth Amendment. It ignored Southern state suppression of civil liberty—including speech, press, assembly, arms, and free exercise of religion—in the interest of protecting slavery. It ignored the denial of these basic liberties including the right to bear arms that characterized the quasi-slavery of the Black Codes. *Slaughter-House* did discuss the Black Codes,

---

<sup>25</sup> Two recent works persuasively dispute this assumption, arguing instead that that media accounts did in fact place the public on notice. See, e.g., Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1590 (2007) (explaining, “the newspaper coverage of the Bingham and Howard speeches [during the debates in Congress] provides substantial evidence that the national body politic, during 1866–68, was placed on fair notice about the incorporationist design of the Amendment”); David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695 (2009).

<sup>26</sup> CURTIS, *supra* note 11, at 177.

<sup>27</sup> 1 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 228 (Boston, Ginn & Co. 1890).

but failed to mention how they limited the rights of blacks to free speech, assembly, exercise of religion, and the right to bear arms. It totally ignored statements of leading supporters of the Amendment. It failed to note that the words “privileges” and “immunities” had a long history as description of liberties such as those in the Bill of Rights. The Court suggested, incorrectly, that the Fourteenth Amendment was motivated simply by the need to protect blacks.<sup>28</sup>

### C

Ever since *Slaughter-House*, the Privileges or Immunities Clause has been a virtual nullity, offering virtually zero protection to individuals of the several states. That the narrow *Slaughter-House* interpretation still controls after these many years, however, begs the question: *Why* has it survived? The most obvious answer—one that generations of beginning law students have been taught—is that Justice Samuel Miller’s opinion makes sense in strictly textual terms. Specifically, while Section One’s first sentence provides that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are *citizens of the United States and of the State* in which they reside”; its second sentence provides, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*.”<sup>29</sup> Seizing upon this language, Justice Miller wrote for the 5-4 *Slaughter-House* majority:

It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.<sup>30</sup>

In strictly textual terms, this is a plausible interpretation. But then, in strictly textual terms an interpretation under Article II, Section 1, Clause 5 (“No person except a natural born Citizen . . . shall be eligible to the Office of President”) that no person born by Caesarian-section delivery is eligible to be President is also plausible. We understand the ludicrousness of such an interpretation, though, relative to the

---

<sup>28</sup> Amicus Curiae Brief of Professors of Law in Support of the Appellants and in Support of Reversal at 26–27, *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) (No. 07-15763).

<sup>29</sup> U.S. CONST. amend. XIV, § 1.

<sup>30</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873).

surrounding *context*. Likewise, once we move beyond Section One's bare text to the context of the post-Civil War years of 1866-1868, we understand that *Slaughter-House's* strictly textual interpretation is also nonsense. According to the absurdity doctrine, textual readings leading to absurd results should not control.<sup>31</sup>

The *Slaughter-House* majority's ultimately dispositive strict textual reasoning leaves us with an important lingering question: *Why* did the Fourteenth Amendment's framers mention "United States" and "State" citizenship in Section One's first sentence, but only "United States" citizenship in the second?

I address this question in the essay in the current issue of *The William & Mary Bill of Rights Journal*, referenced earlier.<sup>32</sup> The essay suggests there is a convincing case to be made that the disparity in language between the first and second sentences was simply inadvertent—the result of what may be termed the "attrition of parliamentary processes." It further explains that this is not a new argument to the Supreme Court; and that, indeed, the argument appears to have played a key role in influencing the Court to depart from its earlier narrow reading of Section One of the Fourteenth Amendment in *Slaughter-House*; in favor of a broader reading to include not only freedmen but also white people and artificial persons, including corporations, under the due process clause's definition of "person." The essay concludes that like the Due Process Clause initially, arguably the Privileges or Immunities Clause was also a victim of the "attrition of parliamentary processes" that occurred during the Fourteenth Amendment's creation. Just as the intended and understood broad meaning of "personhood" was not initially recognized in *Slaughter-House*, neither was the intended and understood broad meaning of "privileges or immunities" recognized. And just as the Court restored the Due Process Clause in the late nineteenth century, it should now do the same for the Privileges or Immunities Clause.

While nothing can remedy the many decades of liberty already lost due to the Supreme Court's mistaken reading of Section One in *Slaughter-House* and *Cruikshank*,<sup>33</sup> the 2009-2010 Roberts Court in *McDonald v. City of Chicago* can forever distinguish itself as the group of

---

<sup>31</sup> See, e.g., Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006).

<sup>32</sup> See *supra* note 3.

<sup>33</sup> See, e.g., CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 55 (1997) (commenting, *Slaughter-House* "is probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court").

justices that finally gave effect to the People's will as expressed in the Fourteenth Amendment's Privileges or Immunities Clause.

## II. THE "REASONABLE TIME, PLACE OR MANNER" TEST FOR ALL LIBERTY INTERESTS

### A

It will require a radical re-directing of the U.S. Supreme Court's constitutional jurisprudence to realize the full and proper intended promise of the Privileges or Immunities Clause—a task, frankly, for which most members of the Roberts Court, with their cramped views of liberty and equal justice, are probably not well-suited. In another generation or two, however, perhaps the Court will have evolved to the point where its members are better able to look beyond their own narrow ideological predispositions to be able to recognize the superior status of individual rights and equal justice vis-à-vis government power. In addition to giving effect to the Privileges or Immunities Clause, this will require the Court to read the Ninth Amendment for what it is—a remarkably powerful sweeping provision—and give full recognition and respect to a full range of pre-existing *unenumerated* rights. The full range of these privileges, immunities, rights and liberties—available equally to all (“equal justice”)—we may simply name collectively, “liberty interests.”<sup>34</sup>

All of this is not to lay the blame for the failed promise of American freedom solely at the feet of the Supreme Court. It is not the Court, after all, that makes and executes the laws that abridge individual liberties: it is the popularly-elected legislature and executive. It is because too many representatives fail to understand that the very core essence of the Nation as reflected in its founding documents is its civil libertarian character, that the Court is called into service in the first place.

And the Court's proper role in this scheme is to act merely as a guardian of the Constitution. As Chief Justice John Roberts put it in his September 14, 2005 Senate confirmation hearings in response to a

---

<sup>34</sup> “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

query of whether he viewed the Court as Congress's taskmaster, "I don't think the Court should be the task master of Congress. I think the Constitution is the Court's task master, and it's Congress's task master as well."<sup>35</sup>

Chief Justice Roberts' comment nicely captures the essence of the political theory underlying this Nation's system of government: It is the *Constitution*—not Congress, not the Executive, not even the Judiciary—that establishes the baseline conduct to which government must faithfully adhere. It is the *Constitution* that is sovereign; and nothing any official in any branch of government tries to say can change the underlying axiomatic proposition that government, in the conduct of its official duties, simply may not ignore basic constitutional guarantees of individual liberty.<sup>36</sup>

With the Supreme Court's proper role of protecting liberty and equal justice from oppressive majorities in mind, how can the Court in practical terms proceed in order to honor these principles? One thing is certain: the Court's current "presumption-of-constitutionality" standard of review must change, as it gives entirely too much deference to government. (Under this standard of review the great majority of government actions are heavily presumed as valid and are almost always upheld, subject only to a challenger's showing the action is unreasonable and/or arbitrary; and only in the exceptional case—where the government action affects a previously Court-identified liberty interest or suspect classification—will the presumption be reversed to impose the initial burden on the government to justify its action.)<sup>37</sup>

---

<sup>35</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 299 (2005). As James Madison argued (as urged by his friend Thomas Jefferson) on June 8, 1789, asking the First Congress to adopt the Bill of Rights, "one [needs] to controul the majority from those acts to which they might be otherwise inclined." 12 THE PAPERS OF JAMES MADISON 196, 205 (Charles F. Hobson et al. eds., 1979). Madison further argued that "independent tribunals of justice will consider themselves in a peculiar manner . . . [to] be an impenetrable [barrier] against every assumption of power in the legislative or executive [branch]; they will be naturally led to resist every encroachment upon rights." *Id.* at 207.

<sup>36</sup> The Court may, and does, fail in its elucidation of constitutional *law* from time to time, but the Constitution itself, as reflected in its text and original meaning, as amended, never fails.

<sup>37</sup> As explained in my *Louisiana Law Review* article, the reason for the Court's move toward an overly-deferential presumption-of-constitutionality standard of judicial review traces back to *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny. See Lawrence, *The "Reasonable Time, Place and Manner" Standard*, *supra* note 3, at 11–36. Despite its singular position as a constitutional outcast, in fact *Lochner* at a rudimentary level provides a more properly-balanced approach to reconciling government power and individual liberty than does the current standard of review. The *Lochner* doctrine, as *applied* by the Court, was sometimes seriously flawed (especially when reviewing Acts of Congress during the New Deal era), but its underlying premise was sound.

The problem with this highly deferential standard is rooted in the nature of government itself. America's founders and framers were themselves deeply aware that the natural tendency of government is "threatening, pushing and grasping; . . . too often in the end . . . destroy[ing] its benign—necessarily benign—victim."<sup>38</sup> Alexis de Tocqueville presciently recognized this threat in America as early as 1835, commenting: "The [democratic] sovereign . . . spreads a fine mesh of uniform, minute, and complex rules, through which not even the most original minds and most vigorous souls can poke their heads above the crowd. . . . Rather than tyrannize," this subtle government power-grab "inhibits, represses, saps, stifles, and stultifies, and in the end [it] reduces each nation to nothing but a flock of timid and industrious animals, with the government as its shepherd."<sup>39</sup> And the fact is: the flock rarely acts against the shepherd's subtle abridgments, as the Declaration of Independence expressly recognizes. "All experience hath shown," the Declaration observes, "that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

What the Court should impose instead is a new "presumption-of-liberty" standard of review, which would do a much better job of embracing the robust conception of liberty and equal justice under which the nation was founded and then reconstructed after the Civil War. One mechanism the Court could employ to implement this new standard (as proposed in my 2007 *Louisiana Law Review* article) is its own familiar First Amendment "reasonable time, place and manner" doctrine, expanded to apply to all government actions potentially affecting liberty interests.

Under this doctrine, the government restriction is presumed invalid, but may be upheld if the government meets a burden of demonstrating the particular action is a "reasonable time, place and manner restriction." As the Court states in *Clark v. Community for Creative Non-Violence*,<sup>40</sup> for example, "[w]e have often noted that [time, place and manner] restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental

---

<sup>38</sup> BAILYN, *supra* note 6, at 56–58.

<sup>39</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 819 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

<sup>40</sup> 468 U.S. 288 (1984) (upholding, as a reasonable time, place and manner restriction, Park Service's denial of a permit for protesters to sleep overnight in symbolic tent city).

interest, and that they leave open ample alternative channels for communication of the information.”<sup>41</sup> This last point is crucial: outright prohibitions on the speech liberty interest are *never* “reasonable”—the restriction must leave open alternative times or places for its exercise.<sup>42</sup>

It is conceptually possible to extend the reasonable time, place, and manner analysis to other liberty interests beyond the First Amendment, whereby the *Clark* statement would be amended to now read: “. . . Time, place and manner restrictions . . . are valid provided that they are . . . narrowly tailored to serve a significant government interest, and that they leave open alternative [times or places for its exercise.]” In fact one federal court, the Federal Court of Appeals for the Third Circuit, has already done so. In *Lutz v. City of York*, the Third Circuit found a constitutional right of intrastate travel in the Fourteenth Amendment substantive due process doctrine, and then applied a time, place, and manner analysis to determine whether a local ban on “cruising” violated that liberty interest.<sup>43</sup> In applying the well-recognized and well-accepted time, place and manner doctrine for the first time to liberty interests beyond the First Amendment, *Lutz* provides an excellent practical framework for extending a heightened scrutiny standard of review to governmental restrictions on *all* asserted liberty and equal justice interests.<sup>44</sup> This would be an extremely positive development, as the time, place and manner standard more accurately reflects the Constitution’s core Liberty-First ideals, while also recognizing the proper constitutional governmental role in maintaining “law and order.”<sup>45</sup>

---

<sup>41</sup> *Id.* at 293.

<sup>42</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1090–92 (2d ed. 2002).

<sup>43</sup> 899 F.2d 255.

<sup>44</sup> The approach does not supersede all prior substantive due process jurisprudence. The current “fundamental rights” designation, for example, should be retained for those liberty interests (previously and as yet) recognized as deserving of the highest degree of protection from government interference (strict scrutiny). Absent retention of the existing fundamental rights regime in some form, the new “reasonable time, place and manner” approach (essentially a form of intermediate scrutiny) would have the undesired effect of actually *lessening* the degree of protection for the liberty interests currently designated as “fundamental rights,” which currently receive strict scrutiny protection.

<sup>45</sup> See also BARNETT, *supra* note 6, at 325 (“Like the modern doctrine that views content-neutral ‘time, place, and manner’ regulations of speech to be consistent with the First Amendment, the police power permits the states the authority ‘to make extensive and varied regulations as to the time, place, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming into conflict with any of those constitutional principles which are established for the protection of private rights or private property.’” (quoting THOMAS

How would the new “reasonable time, place, and manner” standard work in practice? Whenever a plaintiff asserts that government is restricting a liberty interest,<sup>46</sup> the burden shifts automatically to the government to prove any one of the following: (1) the asserted interest is not a liberty interest (broadly-defined);<sup>47</sup> (2) the restriction is not a *substantial* burdening of the liberty interest;<sup>48</sup> or (3) the government action is a reasonable time, place and manner restriction of the liberty interest.<sup>49</sup> If the government fails to prove at least one of these items, the restriction is struck down.<sup>50</sup>

In applying stage one of the test, “liberty interests” is expansively defined. Justice Brandeis enunciated Liberty’s proper scope in *Olmstead v. United States*: “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>51</sup> John Stuart Mill’s “harm principle” captures the essence of Liberty as protected under the new standard:

[T]he only purpose for which [government] power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . The only part of the conduct of any

---

M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 597 (Boston, Little, Brown & Co., 3d ed. 1874)).

<sup>46</sup> It is important to note that in cases not involving an asserted liberty interest, nothing would change—the presumption-of-constitutionality standard would still apply. See, e.g., BARNETT, *supra* note 6, at 265 (stating that “the many laws that regulate the internal operation of government agencies or the dispensation of government funds, for example, would be unaffected by a Presumption of Liberty”).

<sup>47</sup> See *infra* notes 51–54 and accompanying text for discussion of the harm-principle in defining liberty. In meeting this stage one of the test, the government should be held to some kind of “proximate cause” standard, familiar from tort law. It is not simply enough for the government to assert some sort of broad, generalized harm. Specific harm to another must be shown.

<sup>48</sup> This second element resembles the similar inquiry under the Court’s current substantive due process approach, where “[t]he Supreme Court has said that in evaluating whether there is a violation of a [fundamental] right it considers ‘[t]he directness and substantiality of the interference.’” ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 796 (3d ed. 2006).

<sup>49</sup> Strict scrutiny—not the time, place and manner test—would apply if the restriction either: (1) involves a previously-recognized (or as yet recognized) “fundamental right,” see *supra* note 44, or (2) distinguishes among different individuals’ exercise of the liberty interest (thus directly denying “equal justice”).

<sup>50</sup> If the restriction consists of legislation, it can be struck down either as-applied or on its face. See, e.g., Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

<sup>51</sup> 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); see also CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 68–69 (2007) (“Imagine that each of us moves through life surrounded by a bubble [(what we might call moral or liberty space), and] no one [including government] may trespass upon it without doing me wrong.”).

one, for which he is amenable to [government<sup>52</sup>], is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>53</sup>

In short, as Brandeis and Mill suggest, government simply has no business intruding into an individual's liberty interest.<sup>54</sup>

Assuming we have both a liberty interest and a direct and substantial restriction, thus satisfying stages one and two, we then look to stage three and, assuming the restriction neither involves a previously-recognized fundamental right nor distinguishes among persons seeking to exercise the liberty interest (in which case strict scrutiny would apply), we inquire whether the government's limiting action is a reasonable time, place or manner restriction. Under this inquiry, as the Court has often noted in the analogous First Amendment context, the restriction will be upheld only if "they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for [exercise of the liberty interest]."<sup>55</sup>

The impact of the new standard of review would be most dramatically felt in the many cases involving genuine (though currently-unrecognized) liberty interests where the government restriction is currently presumed constitutional and upheld so long as it is rationally related to a legitimate purpose.<sup>56</sup> For example, mere "conduct" that is presently excluded from protection under the Court's current First Amendment doctrine *would* now be entitled to protection so long as it constitutes a liberty interest as defined above; whereas, before, only conduct that is sufficiently communicative would be entitled to protection.<sup>57</sup> And, as we shall see, by requiring heightened scrutiny for restrictions on *all* asserted liberty interests, we remove a degree of discretion from the judiciary, thus lessening concerns regarding the

---

<sup>52</sup> "Government" is substituted here for Mill's "society."

<sup>53</sup> JOHN STUART MILL, ON LIBERTY 22 (London, John W. Parker & Son, 2d ed. 1859).

<sup>54</sup> See also, Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123 (2006). Really, if we stop and think about it, why should any person be allowed to impose his or her morality on others? For that matter, why do they want to? Anyone who wishes to impose his or her morality on others arguably is presumptively unfit to serve. As the old saying goes, the only people whom we should really want to have the job of governing are those who do not truly want the job.

<sup>55</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>56</sup> Under the current presumption-of-constitutionality standard the challenger has the heavy burden of showing the government action is arbitrary or unreasonable. This burden would disappear under the new approach.

<sup>57</sup> See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

countermajoritarian difficulty.

A fair application of the new standard would accordingly invalidate many current laws across the board—including, for example, many involving sex and drugs. We see, in applying the new test, that the government’s criminalization of such matters of personal choice as engaging in prostitution and using marijuana, for example, violates individual liberty. The government is unable to meet its burden of showing any of the three criteria for either of these activities. First, deciding what to do with and put into one’s own body is a liberty interest<sup>58</sup>—neither prostituting oneself nor using marijuana directly harms any other person.<sup>59</sup> Second, the government’s criminalization of the activities of prostitution and marijuana use certainly impose *substantial* burdens on these liberty interests. Third, outright *prohibitions* on prostitution and marijuana use are not “reasonable time, place, and manner restrictions,” for they do not allow *any* exercise of the right. Accordingly, since the government is unable to meet its burden by demonstrating any one of the three criteria, the criminalization of prostitution and marijuana use are unconstitutional. Of course there may well be *non-coercive* societal or moral pressures against certain activities, such as prostitution—just as there were in the days before prostitution was criminalized. For our purposes, however, the important point is that the *coercive* power of government is not imposed.

Regarding stage three of the new test, it is worth repeating that government may *regulate* prostitution and marijuana use, much like it regulates other professions like medicine and drugs like alcohol and cigarettes. The new proposed standard still gives adequate deference to the state to regulate for the health, safety, and welfare of the people under its police power. If the exercise of the asserted liberty interest truly directly harms another or others, it is not a protectable “liberty interest” under item one of the test because it violates the harm principle, and it may therefore be proscribed. Under item three, moreover, the government may exercise its police power by imposing reasonable time, place and manner regulations (but *not* prohibitions) on the liberty interests, even as newly broadly-defined.<sup>60</sup>

---

<sup>58</sup> The Court already recognizes elements of this liberty interest in its current substantive due process approach.

<sup>59</sup> Arguments that prostitution and marijuana use “harm society” are unavailing as failing to meet the proximate cause requirement. Any harm caused to others by the individual action is simply too remote.

<sup>60</sup> See, e.g., BARNETT, *supra* note 6, at 262 (“[W]hen[, for example,] the rightful exercise of

Unquestionably, government would be forced to fundamentally change its way of doing business under this proposal. As American law and culture is built upon the edifice of decades of legislative supremacy met with the people's mostly silent and passive acquiescence, this upheaval would no doubt encounter resistance from many quarters.<sup>61</sup> To the extent the new Liberty-First standard of review eliminates laws substantially burdening individual liberty interests and forces government to think more critically about the effects of its laws, serious progress will have been made in protecting liberty and equal justice.

## B

The advantages of adopting the reasonable time, place and manner standard of review for *all* restrictions on asserted liberty interests are significant. Most obviously, it re-establishes the proper elevated posture of individual liberty interests (broadly-defined) vis-à-vis government power, whereby government must explain to the individual when it restricts the person's liberty, rather than requiring the person to approach the government hat-in-hand to redeem the liberty that is rightly hers in the first place. While the new standard would be much more protective of liberty interests, it bears repeating that many restrictions regulating liberty interests will be upheld as reasonable time, place, and manner *regulations*.<sup>62</sup> As with the Court's First Amendment doctrine, outright *prohibitions* of the liberty interest will *never* be acceptable, however.

Moreover, from a jurisprudential standpoint, applying the reasonable time, place, and manner approach for all asserted liberty interests addresses the counter-majoritarian difficulty posed when unelected judges strike down some, but not other, acts of the

---

freedom involves more than one person, it can be 'regulated' or made regular to facilitate its exercise and, if necessary, to protect the rights of others. A regulation of liberty is not an improper infringement of liberty if a legal system merely says that, to obtain its protection, contracts or other transactions must take a certain form (if such regulation is also found to be necessary.").

<sup>61</sup> It goes without saying that the upheaval itself should be no reason to avoid the change. If a particular government practice unconstitutionally deprives a person of liberty, mere inconvenience or expense in abating the practice is an unacceptable excuse for failing to force the change.

<sup>62</sup> See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 14 (2006) (stating, in a related context, "[t]his [individual natural rights] model [of the Ninth Amendment] does not exclude the *regulation* of natural rights, any more than an individual natural rights model of the First Amendment excludes all time, place or manner regulations of speech, press, or assembly" (emphasis added)).

democratically-elected branches of government. To illustrate, consider first Robert Bork's discussion of the proper exercise of judicial review:

[T]he Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle.

....

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. . . . [Our Constitution] has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

. . . Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.<sup>63</sup>

By removing the Court's discretion under its current substantive due process doctrine to handpick which liberty interests are sufficiently "fundamental" to trigger heightened scrutiny,<sup>64</sup> this essay's proposal to

---

<sup>63</sup> Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3 (1971); see also Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1273 (1997) (The "more modest view of constitutional judicial review is that the constitution is not designed to produce the one 'best answer' to all questions, but to establish a framework for representative government . . . . The job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent.").

<sup>64</sup> Robert Bork is arguably correct in describing the Court's current substantive due as technically unprincipled. Bork, *supra* note 63. The Court's substantive due process jurisprudence, where the Court is forced to pick and choose from among particular "rights" according to its own value system (whether based on the Justices' own individual understandings of "original intent," "tradition," "neutrality," personal predilections, or other criteria), lacks adequate moorings. To some, liberty may be the freedom to make end-of-life decisions free of

subject restrictions on *all* liberty interests to heightened time, place and manner scrutiny<sup>65</sup> offers a principled approach of judicial restraint, though of a different sort than that championed by Holmes, Frankfurter, Hand et al., who elevate majoritarian democracy above Liberty itself; or of Robert Bork himself, Antonin Scalia and others with excessively cramped views of Liberty. The proposed approach is, rather, more in keeping with the principles of Paine, Hamilton, Madison, Jefferson, Lincoln and others with expansive views of Liberty, who understand the perils of leaving the People's liberties to the whims of elected majorities.

Using the time, place and manner approach, no longer may the Court be accused of acting as a "superlegislature"; rather, the new approach enforces constitutional liberty interests in a more even-handed, almost ministerial sense. The Constitution itself makes those value choices for the Court, and *requires* it to nullify those legislative and executive acts that excessively restrict the core constitutional value of individual Liberty (encompassing, as it always does, Equal Justice). Again, as Chief Justice Roberts said it in his confirmation hearings, "The Constitution is the Court's task master, and it's Congress's task master as well."

Once we accept the proposition that the genuine Constitution was premised upon an expansive view of liberty and equal justice vis-à-vis government power, we see how the notion of "special" protections falls away. The fact that the Constitution does not name a right is simply irrelevant: *all* liberty interests—enumerated and unenumerated—are protected.<sup>66</sup>

---

government interference, or to have sex with whomever they choose on whatever terms they may arrange (economic or otherwise), or to smoke marijuana free of threat of imprisonment by the government; to others liberty may be the freedom to engage in certain economic transactions or to pursue a livelihood of one's choosing—and never the twain shall they meet. This approach is rightly criticized. Liberty should not be left to a regime that awards special protection to those who are able to shout the loudest or to spend enough money to elect their candidates or place their judges in positions of prominence. It is important to note, though, that economic liberty interests, while protected to a degree under the new approach, are less protected than other individual liberty interests. See, e.g., FRIED, *supra* note 51, at 154 (stating, as an example, that "unlike liberty of the mind and sex, property is not a natural right").

<sup>65</sup> See *supra* note 44 (stating that existing (and future) fundamental rights still receive strict scrutiny review).

<sup>66</sup> Then, if the results are unacceptable—if, for example, the Court consistently strikes down governmental actions that the people popularly support—the people have recourse in Article V to amend the Constitution to curtail the constitutional protections of Liberty. It would seem highly unlikely they would do so, however, since every amendment ever ratified (save one, the Eighteenth Amendment, which was undone by the Twenty-First Amendment a mere 14 years later) has acted to *broaden* liberty—further proof that the core value for which the people believe

## III. CONCLUSION

*McDonald v. City of Chicago* will offer the Supreme Court its best opportunity in many decades to right the wrong that was done to Americans' birthright to liberty and equal justice by the 1873 *Slaughter-House* decision. If the Roberts Court were to restore the promise engendered by the Fourteenth Amendment Privileges or Immunities clause, it would potentially open an entirely new era for American Freedom. One way the Roberts Court (or, more likely, a future Supreme Court) could begin to realize this promise is by embracing a more liberty-friendly standard of review concerning government actions that affect liberty interests. This essay has reviewed one such approach—the “reasonable time, place and manner” standard for all government restrictions burdening liberty interests.

This may seem like a radical approach—and it probably *is* radical, when viewed in the context of current judicial practice. No doubt such a change would create an uproar among lawyers, academics, legislators, lobbyists, administrators, jurists, and others vested in the *status quo*. But that would be a good thing. Quixotic? Maybe. But then again, maybe not. As discussed, the suggestion does have the practical advantage of being “doable” within the Court’s current analytical imagination. In any event, every movement starts with conversation,<sup>67</sup> and with every new exchange reminding us of our Liberty-based birthright, we make positive progress in our “own search for greater freedom.”<sup>68</sup>

---

the Constitution stands is Liberty.

<sup>67</sup> For example, in 2005, Professor Jack M. Balkin wrote:

Legal culture has an important place for . . . “off-the-wall” arguments. They are a form of prophecy. They dare others to think differently about settled questions in a constitutional regime. They try to unsettle what seems fixed and certain. Even if today a particular position seems extreme, the position asserts that it is the true meaning of the Constitution that will come to be recognized in time. . . . Members of social movements with “off-the-wall” arguments have an effect . . . They make claims about the Constitution and start a conversation. Only the future knows whether the unconventional position, or parts of it, will become accepted. Much turns on whether social movements and political parties get behind a particular interpretation of the Constitution and use their power to push it into public acceptance.

Jack M. Balkin, *Wrong the Day It Was Decided: Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 720–21 (2005).

<sup>68</sup> *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).