

what the government could not display itself.”¹⁰⁹ The government could, for example, place a Latin cross on the steps of a city hall and then sell the underlying square foot to a private party. The Latin cross would formally lie in private hands, and yet would seem to fall at the center of what the Establishment Clause is designed to protect against. If the Court were to adopt such a test — as *Buono* suggests it might — the Court’s Establishment Clause jurisprudence might countenance a wide swath of traditionally impermissible government activity.

C. Fourteenth Amendment

Incorporation of the Right to Keep and Bear Arms. — It is well accepted today that the Fourteenth Amendment makes a broad array of liberties — including most of those enshrined in the Bill of Rights — judicially enforceable against the states. But the manner by which it does so and the scope of those liberties remain substantially contested. Last Term, in *McDonald v. City of Chicago*,¹ the Supreme Court held that the Second Amendment right to keep and bear arms is fully enforceable against the states by virtue of the Fourteenth Amendment.² This decision reaffirmed the articulation of the right as previously defined in *District of Columbia v. Heller*.³ But this case also presented the broader question of whether the proper basis for applying rights against the states comes from the Fourteenth Amendment’s Due Process Clause or from the Privileges or Immunities Clause.⁴ Although the Court could have relied on the Privileges or Immunities Clause in reaching its decision, the plurality was understandably hesitant to overturn precedent, as the Due Process Clause is the traditional basis for applying rights against the states. Though the result in this case would be effectively the same under either provision, many cases exist today where this distinction *would* be determinative and where the Privileges or Immunities Clause would be necessary to ensure the protection of rights long understood to be part of our legal tradition.

In 1982, Chicago enacted a city ordinance prohibiting possession of handguns by private individuals.⁵ Otis McDonald was one of several Chicago residents who wanted to keep guns in their homes for self-defense.⁶ After the Court decided *Heller*, these residents filed suit in the Northern District of Illinois, seeking a declaration that the Chicago

¹⁰⁹ *Pinette*, 515 U.S. at 792 (Souter, J., concurring in part and concurring in the judgment).

¹ 130 S. Ct. 3020 (2010).

² *See id.* at 3026.

³ 128 S. Ct. 2783, 2821–22 (2008) (holding that a ban on personal possession of handguns in the District of Columbia violated the Second Amendment).

⁴ *See McDonald*, 130 S. Ct. at 3028.

⁵ *Id.* at 3026.

⁶ *Id.* at 3026–27. Chicago had one of the highest murder rates in the country, and McDonald himself had been threatened by drug dealers for his work as a community activist. *Id.*

ordinance violated the Second and Fourteenth Amendments of the Constitution.⁷ The plaintiffs argued both that the right to keep and bear arms is a privilege of American citizenship, and also that the Due Process Clause incorporates the right defined in *Heller* against the states.⁸ The district court rejected these arguments, holding that Seventh Circuit precedent upheld the constitutionality of a ban on handguns.⁹ The court noted that *Heller* expressly declined to address incorporation,¹⁰ and stated that lower courts have a “duty to follow established precedent . . . even though the logic of more recent case law may point in a different direction.”¹¹

The Seventh Circuit affirmed.¹² Like the district court, the Seventh Circuit acknowledged that the reasoning of early Second Amendment cases was “defunct,” as they had been decided well before the Court’s modern incorporation jurisprudence.¹³ But the Seventh Circuit observed that it was bound to follow precedent with direct application and left to the Supreme Court the question of how the Second Amendment should be treated under current doctrine.¹⁴

The Supreme Court reversed. Writing for the Court, Justice Alito¹⁵ held that the Second Amendment was fully applicable against the states. Justice Alito first provided a historical overview of the Court’s incorporation framework. He began by discussing the 1873 *Slaughter-House Cases*,¹⁶ which interpreted the Privileges or Immunities Clause narrowly, holding that it protected only those rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”¹⁷ By contrast, fundamental rights that predated the federal government itself were held not to be protected under the clause.¹⁸ Justice Alito then described the Court’s subsequent decisions

⁷ *Id.* at 3027. McDonald’s action ultimately was grouped with a similar action filed against a handgun ban in Oak Park, a Chicago suburb, and a separate action against the Chicago ordinance brought by the National Rifle Association. *Id.*

⁸ Nat’l Rifle Ass’n v. Vill. of Oak Park, 617 F. Supp. 2d 752, 752 (N.D. Ill. 2008).

⁹ *Id.* at 753 (citing Quilici v. Vill. of Morton Grove, 695 F.2d 261 (7th Cir. 1982)).

¹⁰ *See id.* at 753–54 (citing District of Columbia v. Heller, 128 S. Ct. 2783, 2812–13 (2008)).

¹¹ *Id.* at 753.

¹² Nat’l Rifle Ass’n v. City of Chicago, 567 F.3d 856, 858 (7th Cir. 2009).

¹³ *Id.*

¹⁴ *See id.* at 857–58, 860.

¹⁵ Justice Alito was joined in full by Chief Justice Roberts and Justices Scalia and Kennedy, and in part by Justice Thomas.

¹⁶ 83 U.S. (16 Wall.) 36, 82–83 (1873) (holding that creation of a state-sanctioned monopoly on animal butchering in New Orleans did not violate the Fourteenth Amendment).

¹⁷ *Id.* at 79. As examples of such federal rights, the Court included the right to demand protection of the federal government on the high seas or in foreign jurisdictions, the rights to assemble peaceably and petition for redress of grievances, the privilege of the writ of habeas corpus, and the right to use the navigable waters of the United States. *Id.* at 79–80.

¹⁸ *Id.* at 79.

in *United States v. Cruikshank*,¹⁹ *Presser v. Illinois*,²⁰ and *Miller v. Texas*,²¹ which together held that the Fourteenth Amendment did not protect the right to keep and bear arms.²²

With this background in mind, Justice Alito turned to the petitioners' argument that the Court should overturn the *Slaughter-House* decision and hold that the Privileges or Immunities Clause protects the right to keep and bear arms. Justice Alito seemed concerned that the petitioners could not identify the full scope of the privileges and immunities protected by the clause, particularly with regard to unenumerated rights,²³ and that even if *Slaughter-House* was wrongly decided, there was no consensus on what the clause itself should mean today.²⁴ Because the Court's traditional approach has been to protect rights against state infringement through due process, Justice Alito saw no need to reconsider the *Slaughter-House* decision in this case.²⁵

Justice Alito was willing, however, to reconsider the substantive holdings in *Cruikshank*, *Presser*, and *Miller* in light of the Court's more recent incorporation jurisprudence. He first noted that since the rise of "selective incorporation" in the mid-twentieth century,²⁶ almost all provisions of the Bill of Rights have been incorporated.²⁷ Justice Alito then concluded that the right defined in *Heller* merited incorporation, as it is "deeply rooted in this Nation's history and tradition."²⁸ As evidence of this conclusion, Justice Alito argued that the right to keep and bear arms was recognized by Blackstone, respected by Federalists and Antifederalists alike, and reflected in state constitutions at the time of the Founding and the ratification of the Fourteenth Amendment.²⁹ The self-defense component of the right was seen as particularly important to freed slaves in the post-Civil War era, as it was included in the Freedmen's Bureau Act and the Civil Rights Act of 1866 and discussed in regard to the Fourteenth Amendment itself.³⁰

¹⁹ 92 U.S. 542 (1876).

²⁰ 116 U.S. 252 (1886).

²¹ 153 U.S. 535 (1894).

²² See *McDonald*, 130 S. Ct. at 3030.

²³ The petitioners had argued that the Privileges or Immunities Clause, properly understood, protected all the rights specified in the Constitution itself, along with an array of unenumerated rights. *Id.* This interpretation had been adopted by the dissenters in *Slaughter-House*. See *Slaughter-House*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting) ("The privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner . . .").

²⁴ See *McDonald*, 130 S. Ct. at 3030.

²⁵ See *id.* at 3030–31.

²⁶ See *id.* at 3034.

²⁷ See *id.* at 3034 n.12 (citing cases providing for the incorporation of most enumerated constitutional rights).

²⁸ *Id.* at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

²⁹ *Id.* at 3036–38, 3042.

³⁰ *Id.* at 3040–42.

In Justice Alito's view, the arguments made by Chicago and the dissenting Justices were effectively arguments that the right to keep and bear arms should be treated as a "second-class right."³¹ Chicago presented several arguments counseling against incorporation;³² but for each of these points, Justice Alito provided examples of rights already incorporated that would fail under the suggested standards.³³ In particular, he emphasized that under modern incorporation jurisprudence, the relevant question is not whether *all* civilized societies must protect the right at issue — it is whether the particular right is "fundamental to *our* scheme of ordered liberty and system of justice."³⁴ He also reiterated two central points from *Heller*: the scope of the right is not to be determined according to judicial "interest balancing," but neither should the Court's decision be understood to cast doubt on "longstanding regulatory measures," such as prohibiting guns in schools, government buildings, or other sensitive areas.³⁵

Justice Thomas concurred in part and concurred in the judgment.³⁶ He agreed with the Court that the right to keep and bear arms was fundamental, deeply rooted in American history and tradition, and fully applicable against the states.³⁷ He disagreed, however, that this applicability came from the Due Process Clause, arguing instead that "the right to keep and bear arms is a privilege of American citizenship" protected by the Privileges or Immunities Clause.³⁸ Justice Thomas cited historical sources demonstrating that during Reconstruction, "privileges" and "immunities" were effectively synonymous terms for "rights,"³⁹ and that the Privileges or Immunities Clause was understood to require substantive protection of constitutional rights, not just nondiscrimination among citizens.⁴⁰

In light of his historical conclusions, Justice Thomas argued for reconsideration of the Court's precedent, though he made clear that he was reconsidering precedent *only* for this particular question.⁴¹ That the Privileges or Immunities Clause could potentially be used to en-

³¹ *Id.* at 3044.

³² *Id.* at 3044–48.

³³ *See id.* (arguing, inter alia, that the right to a jury trial, the right against self-incrimination, the right to counsel, the Establishment Clause, and the exclusionary rule would all fail various incorporation tests put forward by Chicago).

³⁴ *Id.* at 3034 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968)).

³⁵ *Id.* at 3047.

³⁶ For ease of explanation, the concurrences and dissents are presented in a slightly different order here than in the decision itself.

³⁷ *McDonald*, 130 S. Ct. at 3058–59 (Thomas, J., concurring in part and concurring in the judgment).

³⁸ *Id.* at 3059.

³⁹ *See id.* at 3063–68.

⁴⁰ *See id.* at 3077–83.

⁴¹ *Id.* at 3084.

force unenumerated rights did not carry any “special hazards,”⁴² both because history could provide guidance in any such case, and because substantive due process itself presents at least as great a risk.⁴³ The Court should therefore have felt comfortable overturning *Slaughter-House* and *Cruikshank* to the extent that they held that the Second Amendment did not apply to the states.⁴⁴

Justice Breyer dissented.⁴⁵ He argued not only that the *Heller* decision itself should be reconsidered,⁴⁶ but also that the right to private self-defense was not sufficiently fundamental to justify incorporation, even accepting *Heller*.⁴⁷ For Justice Breyer, the incorporation question depended not only on history, but also on practical factors, such as the extent to which modern society recognizes a right as fundamental; whether incorporation would further other constitutional aims; and the judiciary’s comparative advantage in resolving a particular question.⁴⁸ On all of these grounds, Justice Breyer found that the evidence weighed against incorporation.⁴⁹ He concluded with his own assessment of history, arguing that the right to bear arms for private self-defense defined in *Heller* (as opposed to the right to keep and bear arms in general) was not as fundamental as the plurality claimed.⁵⁰

Justice Stevens filed a separate dissent. He argued that deciding whether rights apply against states should turn on a direct analysis of the liberty component of the Due Process Clause⁵¹ — a substantive due process question, in his view, of which “incorporation” is only a subset.⁵² The framework identified by Justice Stevens for analyzing substantive due process comes from *Palko v. Connecticut*,⁵³ which asks whether a particular right is “implicit in the concept of ordered liberty.”⁵⁴ History is relevant to this inquiry, but not determinative;⁵⁵ indeed, reliance upon history alone risks disguising subjective judgments as false objectivity.⁵⁶ Justice Stevens ultimately concluded that the pe-

⁴² See *id.* at 3086 (citing *id.* at 3089–90 (Stevens, J., dissenting)).

⁴³ *Id.*

⁴⁴ See *id.* at 3086–88.

⁴⁵ Justice Breyer was joined by Justices Ginsburg and Sotomayor.

⁴⁶ See *McDonald*, 130 S. Ct. at 3120–22 (Breyer, J., dissenting).

⁴⁷ See *id.* at 3123.

⁴⁸ See *id.* at 3123–24.

⁴⁹ See *id.* at 3125–29.

⁵⁰ See *id.* at 3130–36.

⁵¹ See *id.* at 3088–92 (Stevens, J., dissenting).

⁵² *Id.* at 3093.

⁵³ 302 U.S. 319 (1937).

⁵⁴ *Id.* at 325.

⁵⁵ See *McDonald*, 130 S. Ct. at 3098–99 (Stevens, J., dissenting).

⁵⁶ See *id.* at 3117–18.

tioners' interest in keeping handguns in their homes was not "comprised within the term liberty" in the Fourteenth Amendment.⁵⁷

Justice Scalia concurred fully with Justice Alito, but wrote separately to respond to Justice Stevens — in particular, to Justice Stevens's argument that his own approach was "more 'cautiou[s]' and respectful of proper limits on the judicial role."⁵⁸ Justice Scalia's central critique was that the "constraints" identified by Justice Stevens were simply tools that judges could manipulate to achieve any preferred result.⁵⁹ Echoing the reasoning of the plurality, Justice Scalia went through the various reasons given by Justice Stevens for finding the right defined in *Heller* insufficiently fundamental, and argued that many rights supported by Justice Stevens himself would fail under these same standards.⁶⁰ He also argued that while the historical method is far from perfect, it is still the "best means available in an imperfect world."⁶¹

These five opinions traverse tremendous ground, but one unique issue in this case is the Court's treatment of the Privileges or Immunities Clause. As the plurality thought that the Privileges or Immunities Clause was unnecessary to decide this specific case, it may have acted reasonably in not overturning *Slaughter-House*. But even outside the context of the Bill of Rights, there are strong textual and historical arguments that the Privileges or Immunities Clause covers liberties that judges have ignored, even under broader readings of substantive due process. The Court could easily face questions in the future for which reconsideration of *Slaughter-House* is determinative. In such cases, the Court should not hesitate to take seriously the arguments for renewed judicial enforcement of this clause.

At first glance, it may seem naïve to expect the Court to consider privileges or immunities claims in subsequent cases, but *McDonald* actually leaves open this possibility. Although the plurality did not see the Privileges or Immunities Clause as necessary to resolve the case, the result might be different in some future case where the clause *is* necessary. Additionally, careful review of the opinions suggests that the privileges or immunities argument actually received a more favorable hearing than its one vote would suggest. The Justices provided substantial evidence that they at least doubted *Slaughter-House*'s cen-

⁵⁷ *Id.* at 3107 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)). Justice Stevens's arguments for this interpretation focused on the direct risk that firearms posed to the liberty of others, the long history of state regulation and control in this field, and the practical need to let localities address their own particular problems. *See id.* at 3107–16.

⁵⁸ *Id.* at 3050 (Scalia, J., concurring) (quoting *id.* at 3120 (Stevens, J., dissenting)).

⁵⁹ *See id.* at 3051–52.

⁶⁰ *See id.* at 3054–57 (discussing, inter alia, the Establishment Clause, the exclusionary rule, the *Miranda* rule, and the Takings Clause of the Fifth Amendment).

⁶¹ *Id.* at 3058 (emphasis omitted).

tral holding. Justice Alito engaged in careful analysis of the *Slaughter-House* decision itself, which included both the reasoning of the four *Slaughter-House* dissenters and the broad consensus that the case was wrongly decided.⁶² Even Justice Stevens acknowledged that the petitioners “marshal[ed] an impressive amount of historical evidence for their argument that the Court interpreted the Privileges or Immunities Clause too narrowly in the *Slaughter-House Cases*.”⁶³ It also may be relevant that neither Justice Scalia nor Justice Kennedy wrote separately to respond to Justice Thomas, despite potential reasons to do so.⁶⁴ Obviously these arguments hardly prove that the Court would be amenable to future Privileges or Immunities Clause arguments, but the question is at least left open.

Of course, it is often accepted today that the Due Process Clause has assumed much of what the Privileges or Immunities Clause was designed to accomplish.⁶⁵ Indeed, *McDonald* itself is arguably further evidence that distinguishing between these clauses is only academic. Thus, even assuming some chance of the Privileges or Immunities Clause’s being taken seriously going forward, why is it a doctrine worth insisting on?

While there is a wide array of reasons to consider reinvigorating the Privileges or Immunities Clause, the most direct and practical argument is that there are many rights decidedly *not* given meaningful protection under substantive due process that have a strong textual and historical grounding in privileges and immunities. The most obvious candidates are the remaining provisions of the Bill of Rights not fully incorporated against the states.⁶⁶ If the Court decides these pro-

⁶² See *id.* at 3028–30 (majority opinion). Justice Alito went so far as to include Justice Thomas himself as part of this consensus, citing his opinion in *Saenz v. Roe*, 526 U.S. 489, 522 n.1, 527 (1999) (Thomas, J., dissenting). See *McDonald*, 130 S. Ct. at 3029.

⁶³ *McDonald*, 130 S. Ct. at 3089 (Stevens, J., dissenting) (citation omitted).

⁶⁴ Justice Scalia’s opinion focused almost entirely on the risk of excessive judicial discretion, yet made no mention of the potential for the Privileges or Immunities Clause to protect unenumerated rights, and Justice Kennedy declined to write separately to distance himself from any extreme revisionism by Justice Thomas. Cf. *United States v. Lopez*, 514 U.S. 549, 568, 574 (1995) (Kennedy, J., concurring) (writing separately to make clear that he would not go nearly as far as Justice Thomas in reinstating limits on the Commerce Clause).

⁶⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 759 n.6 (1997) (Souter, J., concurring in the judgment) (acknowledging that, “[t]o a degree,” the *Slaughter-House* “decision may have led the Court to look to the Due Process Clause as a source of substantive rights”).

⁶⁶ These include the Third Amendment, the Fifth Amendment’s grand jury indictment requirement, the Sixth Amendment’s unanimous jury requirement, the Seventh Amendment right to a jury in civil cases, and the Eighth Amendment’s prohibition of excessive fines. See *McDonald*, 130 S. Ct. at 3035 n.13. An Oregon public defender is already seeking to challenge the non-unanimous jury rule in the wake of *McDonald*, relying on both the Due Process Clause and the Privileges or Immunities Clause. See Steve Sady, *McDonald Signals the End of Oregon’s Non-Unanimous Jury Rule*, NINTH CIRCUIT BLOG (July 6, 2010, 11:51 AM), <http://circuit9.blogspot.com/2010/07/mcdonald-signals-end-of-oregons-non.html>.

visions do not meet the due process threshold,⁶⁷ the Privileges or Immunities Clause presents a potentially necessary alternative.⁶⁸

But the real reason the Privileges or Immunities Clause creates such a stir, among both its advocates and its opponents, is its potential to protect unenumerated rights — in particular, certain economic rights that, as a class, have largely gone unprotected since the 1930s. To define with precision the full scope of privileges or immunities is obviously a monumental task,⁶⁹ but by any interpretive standard, it is clear that the term was understood to protect at least part of what we would now call “economic liberty.”⁷⁰ Indeed, along with the right to keep and bear arms, rights of property and contract were among the rights distinctly denied to freedmen,⁷¹ and thus distinctly wanting for judicial protection during the framing of the Fourteenth Amendment.

Of course, any discussion of economic liberty raises the specter of the *Lochner* era and the corresponding fear that broad swaths of progressive legislation, like minimum wage laws, could be put in jeopardy.⁷² This concern, however, indulges in unhelpful generalities, assuming that there is a binary choice between judicial hostility to all

⁶⁷ The Court’s opinion suggests some deference to precedent declining to incorporate the grand jury and civil jury requirements. See *McDonald*, 130 S. Ct. at 3046 & n.30.

⁶⁸ There is strong historical support for the argument that the Privileges or Immunities Clause was understood to apply the individual rights in the first eight amendments against the states. See David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1868*, 30 WHITTIER L. REV. 695 (2009); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

⁶⁹ One resolution of the ubiquitous “which rights?” question is, essentially, “all rights” — that is, all liberty merits meaningful protection, and when states infringe upon liberty, they bear the burden of justifying this infringement. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). Such a view, however, is more a construction of the Fourteenth Amendment than an interpretation, *id.* at 4, and its acceptance is unnecessary to recognize that the Privileges or Immunities Clause has some enforceable meaning.

⁷⁰ See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (listing “enjoyment of life and liberty, with the right to acquire and possess property of every kind,” *id.* at 551, among the general privileges and immunities of citizenship); CONG. GLOBE, 42D CONG., 1ST SESS. APP. 86 (1871) (statement of John Bingham) (identifying privileges or immunities as including “the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil”). Even Professor Jack Balkin concedes that the original understanding of privileges or immunities included the “basic rights to make contracts and own property.” Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 331–32 (2007).

⁷¹ See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION*, 1863–1877, at 200–04 (1988).

⁷² An alternative, more progressive understanding of the Privileges or Immunities Clause is that it might itself *compel* minimum wage laws, or certain welfare benefits. Such an argument, however, is unlikely to prevail under a view of the Fourteenth Amendment guided by text, history, and constitutional structure. See 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, 84–86 (2010).

economic regulation and complete judicial abdication of the field. Whatever the merits of the Court's due process jurisprudence from 1908 to 1937, there is little doubt today that economic legislation passed to protect public health and safety or to ensure genuinely consensual contracts would withstand even substantially heightened judicial scrutiny. But there are many economic fields where greater judicial investigation is both appropriate and necessary.

The best place to start might be the right at issue in *Slaughter-House* itself: the right to pursue a lawful occupation.⁷³ Occupational licensing receives scant attention in mainstream constitutional circles, but not for lack of practical relevance. States today strictly regulate legal access to professions as innocuous as interior design,⁷⁴ floristry,⁷⁵ and African hair braiding,⁷⁶ just to name a few.⁷⁷ The simplest explanation for the proliferation of such licensing regimes comes from elementary public choice theory — existing members of a profession have a strong interest in using political channels to limit potential competition, but the general public lacks a commensurate interest in anti-protectionism because of the relatively small impact of any one regulation.⁷⁸

Of course, nothing in logic or law suggests the impropriety of all regulations touching on employment any more than the right to keep and bear arms suggests the impropriety of all regulations concerning firearms. The question is whether the legislation amounts to what Justice Bushrod Washington referred to as “such restraints as the government may justly prescribe for the general good of the whole.”⁷⁹ While this language appears highly nebulous on its own, one articulation of the appropriate judicial standard would be to ask whether the state can establish (not merely assert) any purpose aside from interest group protectionism. Such a standard would surely present some gen-

⁷³ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 97 (1872) (Field, J., dissenting) (arguing that privileges or immunities included “the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons”).

⁷⁴ See David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers*, INST. FOR JUSTICE (Feb. 2009), http://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.

⁷⁵ See Dick M. Carpenter II, *Blooming Nonsense: Experiment Reveals Louisiana's Florist Licensing Scheme as Pointless and Anti-Competitive*, INST. FOR JUSTICE (Mar. 2010), http://www.ij.org/images/pdf_folder/other_pubs/laflowerreportfinalsm.pdf.

⁷⁶ See Valerie Bayham, *A Dream Deferred: Legal Barriers to African Hairbraiding Nationwide*, INST. FOR JUSTICE (Dec. 2005), http://www.ij.org/index.php?option=com_content&task=view&id=1534&Itemid=194.

⁷⁷ For information on numerous other occupational licensing regimes, see *Economic Liberty*, INST. FOR JUSTICE, <http://www.ij.org/economicliberty?task=view> (last visited Oct. 2, 2010).

⁷⁸ See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

⁷⁹ *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).

uinely difficult cases and would necessitate carefully elaborated doctrine. Indeed, it would require judges to consider competing arguments regarding the purpose, context, and effect of state regulations. The same is true, however, for a host of other constitutional provisions that judges take for granted.⁸⁰ The burden at least should fall on those who argue that this one area of constitutional law presents unique interpretive challenges.

Protection of the right in *Slaughter-House* would also require reversing over a century of precedent. Yet traditional arguments for the value of constitutional precedent have less weight in this context than in many others. For example, precedent may be entitled to greater deference when it represents practical doctrine designed to secure complex constitutional rights,⁸¹ or even when sufficiently robust liberty interests have arisen in reliance on prior doctrine.⁸² But neither situation exists here.⁸³ The truth is that in the wake of *Slaughter-House*, there is really no such thing as privileges or immunities doctrine — there is only precedent holding that, in effect, no such doctrine exists. The dissenters in *Slaughter-House* proved tragically prescient in their statement that the Court had reduced the Privileges or Immunities Clause to “a vain and idle enactment, which accomplished nothing.”⁸⁴

The question then is not whether to abolish some elaborate set of constitutional doctrines. The question is whether an enumerated provision of the Constitution, of significant import by even the most cursory textual or historical analysis, is to have any meaning. Interpretation of the Privileges or Immunities Clause may present difficult questions, but they are questions the Constitution asks the Court to answer.⁸⁵ Nothing in *McDonald* prevents the Court from at least considering the most basic and historically grounded claims under the Privileges or Immunities Clause. If the Justices wish to avoid such re-

⁸⁰ See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (examining local context to determine the Establishment Clause implications of a religious monument). Indeed, the entire structure of “tiers of scrutiny” seems to rest on the assumption that courts can perform this function adequately.

⁸¹ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000) (declining to overturn the prophylactic constitutional doctrine articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

⁸² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992) (declining to overturn the right defined in *Roe v. Wade*, 410 U.S. 113 (1973)).

⁸³ Renewed enforcement of the Privileges or Immunities Clause admittedly raises the complicated question of how to handle substantive due process rights that might fail a privileges or immunities inquiry. It will suffice here to say that substantive due process can be defended as its own doctrine, that the rights in question will have value as precedent on which liberty interests rely, and that the more controversial substantive due process rights will likely be subject to ongoing critical debate, whether the Privileges or Immunities Clause is enforced or not.

⁸⁴ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting). The right to travel between the states appears to be the only real vestige of the Privileges or Immunities Clause to have survived *Slaughter-House*. See *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999).

⁸⁵ See *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in part and concurring in the judgment).

consideration, they may find a way to do so, but it will not be the law that compels this result. Before assuming office, judges take an oath to uphold the Constitution — it will be a sad day for liberty and law if we can no longer take seriously any judge who means it.

D. Freedom of Speech and Expression

1. *Categorical Exclusions.* — In the wake of World War I, one author argued that the First Amendment’s boundary line “can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing . . . of two very important social interests, in public safety and in the search for truth.”¹ The backdrop has shifted from wartime propaganda, but the question of what constitutes protected speech is still alive today. Last Term, in *United States v. Stevens*,² the Supreme Court invalidated a statute criminalizing depictions of extreme animal cruelty, finding that the speech was protected by the First Amendment and the law was substantially overbroad. By rejecting the government’s proposed balancing test as “startling and dangerous,”³ *Stevens* redefined how courts delineate categories of unprotected speech, making it harder to account for both social harms and First Amendment values in changing contemporary contexts.

Stevens invalidated 18 U.S.C. § 48,⁴ which was enacted in 1999 in an effort to stifle the interstate market in crush videos.⁵ Crush videos appeal to a distinct sexual fetish by depicting women, usually in stiletto heels, slowly crushing to death small animals such as cats, mice, or monkeys.⁶ Animal cruelty is illegal in all fifty states and the District of Columbia;⁷ § 48 criminalized the sale and possession of depictions of animal cruelty, not the underlying acts themselves.⁸ Congress found that a statute targeting sale and possession was necessary because it is often impossible to prosecute production of such images,⁹ and there is evidence that § 48 successfully weakened the market in crush videos.¹⁰

¹ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 959–60 (1919).

² 130 S. Ct. 1577 (2010).

³ *Id.* at 1585.

⁴ 18 U.S.C. § 48 (2006).

⁵ See H.R. REP. NO. 106-397, at 2 (1999).

⁶ *Id.* at 2–3.

⁷ See *Stevens*, 130 S. Ct. at 1583 (citing Brief for the United States at 25 n.7, *Stevens*, 130 S. Ct. 1577 (No. 08-769), 2009 WL 1615365, at *25 n.7).

⁸ See *id.* at 1582.

⁹ See H.R. REP. NO. 106-397, at 3 (noting that laws targeting production are often ineffective because crush videos do not reveal the producers’ or participants’ identities).

¹⁰ See *Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting) (“[B]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48. Now, after the Third Circuit’s decision [facially invalidating the statute], crush videos are already back