THREE VITAL ISSUES: INCORPORATION OF THE SECOND AMENDMENT, FEDERAL GOVERNMENT POWER, AND SEPARATION OF POWERS—OCTOBER 2009 TERM

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I. *MCDONALD V. CITY OF CHICAGO*: THE BASIS AND SCOPE OF THE INCORPORATION DOCTRINE

PROFESSOR DORF: In *McDonald v. City of Chicago*,[1] the Supreme Court held that the Constitution restricts the ability of state and local governments to ban the possession of handguns.[2] The ruling follows the Court's controversial decision, *District of Columbia v. Heller*,[3] in which the Court held that the Second Amendment "right of the people to keep and bear [a]rms"[4] protects the right to private possession of a handgun for the defense of one's self and one's family in the home.[5] On its face, however, *Heller* only limited the federal government. Three cases from the Nineteenth Century held that the Second Amendment is not applicable to state and local governments.[6] The issue in *McDonald* was whether those cases re-

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[1] 130 S. Ct. 3020 (2010).

[2] *Id.* at 3050.

[3] 554 U.S. 570 (2008).

[4] U.S. CONST. amend. II.

[5] *See Heller*, 554 U.S. at 635.

[6] *See* Miller v. Texas, 153 U.S. 535, 538 (1894) ("[I]t is well settled that the restrictions of [the Second] amendment[] operate only upon the federal power, and have no reference whatever to proceedings in state courts."); Presser v. Illinois, 116 U.S. 252, 265 (1886) (stating that the Second Amendment is one which "has no other effect than to restrict the powers of

mained good law.[7]

Otis McDonald, who lived in a high crime neighborhood in Chicago, claimed that he needed a handgun for home protection because the police failed to adequately perform their duties.[8] In the Supreme Court, his case produced the same five-to-four conservative/liberal ideological split as *Heller* did, except that in *McDonald*, Justice Sonia Sotomayor replaced retired Justice David Souter among the four dissenting Justices.[9] Yet despite the predictable breakdown, *McDonald* involved an interesting doctrinal twist and a surprising potential implication.

McDonald concerned the incorporation doctrine, under which the Court had previously held that the Fourteenth Amendment makes "most of the provisions of the Bill of Rights" applicable against the states.[10] The Justices considered, but ultimately rejected, the possibility of abandoning the Due Process Clause in favor of the Privileges or Immunities Clause as the basis for incorporation.[11] They then hinted at potentially far-reaching implications of such a decision for future cases involving the use of juries in state courts.[12]

To understand *McDonald* and its implications, it is helpful to start at the beginning. The language of two separate provisions of the Bill of Rights—the First Amendment, which specifically refers to "Congress," and the second clause of the Seventh Amendment, which

the national government"); United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .").

[7] *McDonald*, 130 S. Ct. at 3031 (referring to the Court's Nineteenth Century decisions that held that the Second Amendment only applied to the federal government, but indicating that these decisions "do not preclude [the Court] from [re]considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States").

[8] *Id.* at 3026-27.

[9] *Compare id.* at 3088 (Stevens, J., dissenting), and *id.* at 3120 (Breyer, J., dissenting) (joining in Justice Breyer's dissent were Justice Ginsburg and Justice Sotomayor), *with Heller*, 554 U.S. at 636 (Stevens, J., dissenting) (joining in Justice Stevens' dissent were Justice Souter, Justice Ginsburg, and Justice Breyer).

[10] *McDonald*, 130 S. Ct. at 3026, 3034.

[11] *See id.* at 3030 (refusing to reconsider and "hold that the right to keep and bear arms is one of the 'privileges or immunities of citizens of the United States' " (quoting U.S. CONST. amend. XIV, § 1)).

[12] *See id.* at 3046 n.30 (noting that cases holding "that the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement do not apply to the States" were decided prior to the era of the modern incorporation method).

refers to federal courts—clearly implies that these provisions place limitations only on federal action.[13] "The balance of the Bill of Rights, however, sets out rights of the People that, taken at face value, could be said to bar infringements by the states and their sub[]divisions as well as by the federal government."[14]

Yet, this was not how the Bill of Rights was originally understood. In the first Congress, James Madison proposed an amendment that would bar states from violating "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[15] "The proposal was defeated, largely because Madison's fellow representatives saw the Bill of Rights as a check on the federal government alone."[16] The founders thought that "[s]tate constitutions . . . already provided whatever rights were needed against state (and local) violations."[17] In *Barron v. City of Baltimore*,[18] the Supreme Court confirmed that the original Bill of Rights only limited the federal government.[19]

Following *Barron*, the law remained unchanged until 1868, when the Fourteenth Amendment was adopted.[20] It states, in relevant part: "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

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[13] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

[14] Michael C. Dorf, *Does the Second Amendment Bind the States?*, FINDLAW (Oct. 6, 2009), http://writ.news.findlaw.com/dorf/20091007.html.

[15] *Amendment I (Speech and Press): Congress, Amendments to the Constitution*, THE FOUNDERS' CONSTITUTION, http://press-pubs.uchicago.edu/founders/documents/amendI_speechs14.html (last visited Jan. 11, 2011).

[16] Dorf, *supra* note 14.

[17] *Id.*

[18] 32 U.S. 243 (1833).

[19] *See id.* at 250-51. ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government not against those of the local governments. . . . These amendments contain no expression indicating an intention to apply them to the state governments.").

[20] *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, LIBRARY OF CONG., http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html (last visited Jan. 11, 2011).

process of law . . . ."[21]

The Privileges or Immunities Clause of the Fourteenth Amendment appears to be a quite natural way of saying that the Bill of Rights, formerly thought to limit only the federal government, now placed limitations on the states as well. Under such a straightforward interpretation, the "privileges or immunities of citizens of the United States"—that is, the rights set forth in the Bill of Rights—are protected against infringement by each "State."

In fact, there is substantial evidence that the Privileges or Immunities Clause was expected to incorporate the Bill of Rights against the States.[22] Article IV of the original Constitution protects against interstate discrimination with regard to "all Privileges and Immunities of Citizens in the several States."[23] In *Corfield v. Coryell*,[24] Justice Bushrod Washington, a nephew of the first President, famously interpreted the Privileges and Immunities Clause as encompassing those fundamental rights enjoyed by "citizens of all free governments."[25] The framers and ratifiers of the Fourteenth Amendment were well aware of *Corfield*, and by choosing to parallel the Article IV language to the language of the decision, they can be understood to have intended to adopt its approach.

Nonetheless, the Supreme Court rejected this broad interpretation of the Privileges or Immunities Clause shortly after its adoption in the *Slaughter-House Cases*.[26] The Court read the Privileges or Immunities Clause very narrowly.[27] Essentially, the Court interpreted the Clause to recognize only those rights already protected by the language and structure of the pre-Fourteenth Amendment Constitution.[28] Since the Court's decision in the *Slaughter-House Cases*,

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[21] U.S. CONST. amend. XIV, § 1.

[22] *See McDonald*, 130 S. Ct. at 3026, 3046.

[23] U.S. CONST. art. IV, § 2, cl. 1.

[24] 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

[25] *Id.* at 551.

[26] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[27] *See id.* at 36-83; *see also id.* at 129 (Swayne, J., dissenting) ("The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted.").

[28] *Id.* at 75 (majority opinion) (stating that "[t]here can be but little question that the purpose of both these provisions [the Privileges and Immunities Clause in Article IV and the Privileges or Immunities Clause in the Fourteenth Amendment] is the same, and that the privileges and immunities intended are the same in each").

the Privileges or Immunities Clause has been treated as nearly a dead letter.[29]

Yet, as most Americans know, the Bill of Rights does indeed limit the states and their subdivisions. State officials cannot ban political rallies or coerce confessions from criminal suspects without violating the First and Fifth Amendments, respectively.[30] Given *Barron* and the *Slaughter-House Cases*, what makes these and other provisions of the Bill of Rights applicable to the states? The answer is the Due Process Clause of the Fourteenth Amendment.[31]

In a series of Twentieth Century cases, the Court held that most of the provisions of the Bill of Rights do impose limitations on the states, after all.[32] For example, in order to deprive a person of his life, due process requires the State to give him a trial by jury as set forth in the Sixth Amendment.[33] To deprive a person of his freedom from "unreasonable searches and seizures," due process requires that the probable cause and warrant requirements of the Fourth Amendment be honored.[34]

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[29] *See McDonald*, 130 S. Ct. at 3060-61 (Thomas, J., concurring) (noting that the Court has marginalized the Privileges or Immunities Clause and that the "last word" on the clause was in the Nineteenth Century).

[30] *See* U.S. CONST. amend. I (guaranteeing "the right of the people peaceably to assemble"); U.S. CONST. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law").

[31] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (incorporating the First Amendment restrictions upon regulations relating to speech, religion, and association); Malloy v. Hogan, 378 U.S. 1 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.").

[32] *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (listing the various Bill of Rights provisions which have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment); Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104, 122 (1978) (holding that the Takings Clause of the Fifth Amendment "is made applicable to the States through the Fourteenth Amendment."); Pointer v. Texas, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the Fourth Amendment applies to the states in the same manner as it has with respect to the federal government).

[33] *See* U.S. CONST. amend. VI; *see also Duncan*, 391 U.S. at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which . . . would come within the Sixth Amendment's guarantee.").

[34] *See* U.S. CONST. amend. IV; *see also Duncan*, 391 U.S. at 148 (noting that "the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded

The Due Process Clause works well as a basis for incorporation of the procedural rights in the foregoing examples. However, it provides an awkward textual basis for incorporating more substantive rights, such as the First Amendment's protection of speech and the press. Such rights do not merely require the government to provide trials for political dissidents; they forbid prosecution for sedition outright.[35]

Nonetheless, under a doctrine that has come to be known as "substantive due process," the Court held that the Due Process Clause has a substantive component. Under this approach, no amount of fair process suffices to infringe certain fundamental substantive liberties, so that any unwarranted substantive infringement is, ipso facto, a violation of due process. [36]

Academics and Supreme Court Justices alike have long been troubled by the seemingly oxymoronic character of the substantive due process doctrine.[37] The late law professor and dean, John Hart Ely, likened it to "green pastel redness."[38] The late Justice Hugo Black attempted to circumvent substantive due process by arguing that the Fourteenth Amendment, as a whole, including the Privileges or Immunities Clause, accomplishes incorporation.[39] Justice Clarence Thomas, in his dissenting opinion in *Saenz v. Roe*,[40] suggested that the *Slaughter-House Cases* might be overruled and, if that were

from criminal trials any evidence illegally seized" is applicable against the states).

[35] *See* Pennsylvania v. Nelson, 350 U.S. 497, 505-06 (1956).

> [E]nforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Since 1939, in order to avoid a hampering of uniform enforcement of its program by sporadic local prosecutions, the Federal Government has urged local authorities not to intervene in such matters, but to turn over to the federal authorities immediately and unevaluated all information concerning subversive activities.

Id.

[36] *See* County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (discussing the relation between procedural and substantive due process).

[37] *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (Scalia, J., concurring) (alleging substantive due process is an oxymoron rather than a constitutional right); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1938) (contending that substantive due process is a contradiction).

[38] ELY, *supra* note 37, at 18.

[39] *McDonald*, 130 S. Ct. at 3033 ("[Justice Black's] theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights.").

[40] 526 U.S. 489 (1999).

to occur, some of the work now done by the Due Process Clause could be attributed to the Privileges or Immunities Clause.[41]

Similarly, Justice Scalia, the author of the Court's opinion in *Heller*, has been one of the most vocal critics of substantive due process.[42] That doctrine, after all, is the basis for the Court's recognition of unenumerated rights such as those protecting abortion and same-sex sexual conduct.[43] The Constitution does not mention these rights, Scalia says, and therefore the Court has no business recognizing or enforcing them.[44]

Perhaps in a bid to garner the votes of Justices Scalia and Thomas, the lawyers for the petitioners in *McDonald* made a bold gamble: Rather than principally relying on the Due Process Clause as the basis for incorporation of the Bill of Rights against the states, they urged the Court to base its ruling on the Privileges or Immunities Clause.[45]

Only Justice Thomas agreed with the petitioners' suggestion.[46] In his concurring opinion in *McDonald*, Justice Thomas stated that "[t]he notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most

[41] *Id.* at 527-28 (Thomas, J., dissenting) (speculating "that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights" and as such the Court should "consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence").

[42] *See Carlton*, 512 U.S. at 39 (Scalia, J., concurring) (stating that he views substantive due process as an oxymoron rather than a constitutional right).

[43] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) ("The Constitution does not explicitly mention any right of privacy. [However,] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean [a same sex couple's] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[44] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation.").

[45] *McDonald*, 130 S. Ct. at 3028 ("Petitioners' primary submission is that this right is among the 'privileges or immunities of citizens of the United States' . . . . As a secondary argument, petitioners contend that the Fourteenth Amendment's Due Process Clause 'incorporates' the Second Amendment right.").

[46] *Id.* at 3058-59 (Thomas, J., concurring) (indicating that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause").

casual user of words."[47] By contrast, he argued that linguistic gymnastics are not necessary to read the Privileges or Immunities Clause as applying the Bill of Rights to the states.[48]

The balance of the Court decided to stick with the Due Process Clause.[49] Although acknowledging the persistent academic criticism of the *Slaughter-House Cases*, these eight other Justices nonetheless believed that the existing doctrine should be retained as stable and workable.[50] Both the plurality and the dissenting Justices noted that shifting the doctrinal basis for incorporation of the Bill of Rights against the states to the Privileges or Immunities Clause would itself create uncertainties, as scholars disagree over the exact meaning of the Clause.[51]

Although the Court was nearly unanimous in rejecting the proposed shift from the Due Process Clause to the Privileges or Immunities Clause, the Justices were sharply divided about whether the Due Process Clause should be interpreted to incorporate the Second Amendment.[52] The attorneys for the petitioners argued in the alternative for incorporation of the Second Amendment against the states under the Due Process Clause, and the four Justices who accepted that argument concurred with Justice Thomas, thereby providing the

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[47] *Id.* at 3062.

[48] *Id.*

> This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

Id.

[49] *McDonald*, 130 S. Ct. at 3036 (plurality opinion) (clarifying that the Court was considering "whether the Second Amendment right to keep and bear arms [was] incorporated in the concept of due process").

[50] *See id.* at 3029-31 ("[T]his Court's decisions . . . do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States.").

[51] *Id.* at 3030-31 (declining to use the Privileges or Immunities Clause as its doctrinal basis for incorporation); *id.* at 3089 (Stevens, J., dissenting) (agreeing with the plurality that the meaning of the Privileges or Immunities Clause is unclear and should not be used as a basis for incorporation).

[52] *See McDonald*, 130 S. Ct. at 3048-50 (plurality opinion).

petitioners with a victory.[53]

How did the self-styled "textualists" justify their continued reliance on the Due Process Clause as the basis for incorporation? As Justice Scalia explained when elucidating his own reasoning, these Justices were willing to accept substantive due process as a basis for incorporating the Bill of Rights because, when used for this purpose only, the doctrine is " 'long established and narrowly limited.' "[54] Justice Stevens, however, thought that this move—and the parallel one in the majority opinion authored by Justice Alito—was too slick.[55] Justice Stevens was not persuaded.

Why not? Presumably, the Justices who joined Justice Scalia's opinion believed that invoking substantive due process solely for purposes of incorporating the Bill of Rights is a narrowly-limited analytical move, because doing so only permits the Court to recognize rights that are specifically enumerated in the Constitution's text, whereas recognizing a more freestanding kind of substantive due process is a gambit that cannot be cabined: It permits justices, for instance, to decide whether unenumerated rights such as "abortion, assisted suicide, . . . homosexual sodomy," and contraception are protected by the Constitution.[56]

However, Justice Stevens noted that this supposed limitation imposed via incorporation is illusory because the Court has not simply held that all of the rights enumerated in the Bill of Rights apply against the states.[57] Rather, the Court has engaged in "selective incorporation," thereby finding that most, but not all, enumerated rights bind the states.[58] Thus, according to Justice Stevens, the Justices exercised discretion in applying the incorporation doctrine, just as they have exercised discretion in applying substantive due process to rec-

[53] *Id.* at 3036, 3050.

[54] *Id.* at 3050 (Scalia, J., concurring) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994)).

[55] *Id.* at 3120 (Stevens, J., dissenting) (noting that he "would proceed more cautiously" and that the majority's decision disregards the work accomplished thus far to guarantee many of our freedoms).

[56] *Id.* at 3058 (Scalia, J., concurring).

[57] *McDonald*, 130 S. Ct. at 3092 (Stevens, J., dissenting) ("It follows that the term 'incorporation,' like the term 'unenumerated rights,' is something of a misnomer.").

[58] *Id.* at 3094 ("[W]e have never accepted a 'total incorporation' theory of the Fourteenth Amendment, whereby the Amendment is deemed to subsume the provisions of the Bill of Rights en masse.").

ognize unenumerated rights.[59] Incorporation, Stevens argued, is a "misnomer" because selective incorporation is a "subset" of substantive due process.[60]

The majority's response to Justice Stevens was surprising. It does not appear that Justice Alito conceded that incorporation has been selective.[61] Instead, he rather strongly suggested that if faced with the question, the Court might hold that the Due Process Clause incorporates the entire Bill of Rights against the states—without any selection of any particular subset of rights at all.[62] In a footnote, Justice Alito noted that only four other provisions of the Bill of Rights had not, at the time of the decision, been incorporated against the states: the Third Amendment prohibition on peacetime quartering of soldiers; the Excessive Fines Clause of the Eighth Amendment; the grand jury requirement of the Fifth Amendment; and the Seventh Amendment right to a civil jury.[63] Justice Alito explained that the Court never had an opportunity to decide whether the Due Process Clause incorporates the Third Amendment or the Excessive Fines Clause.[64] Moreover, and more startlingly, he observed that the Court's "decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation."[65]

That disclaimer exactly mirrored what the Court said in *Heller* about the Nineteenth Century cases, which rejected the incorporation of the Second Amendment against the states.[66] And just as the language in *Heller* was widely read to presage the incorporation holding in *McDonald*, the language in *McDonald* could also be read to fo-

[59] *Id.* at 3118 ("The judge must exercise judgment, to be sure. When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces.").

[60] *Id.* at 3092-93.

[61] *See id.* at 3050 (plurality opinion).

[62] *McDonald*, 130 S. Ct. at 3034 ("While Justice Black's theory [of total incorporation] was never adopted, the Court eventually moved in that direction by initiating what has been called a process of 'selective incorporation,' *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.").

[63] *Id.* at 3035 n.13.

[64] *Id.*

[65] *Id.*

[66] *See Heller*, 554 U.S. at 626-27.

reshadow future decisions incorporating the civil jury and grand jury requirements. Likewise, language in another footnote in the majority opinion indicates the Court's willingness to overrule its decision in *Apodaca v. Oregon*,[67] which permitted states to convict criminal defendants with a non-unanimous jury.[68]

To be sure, the plurality opinion in *McDonald* does not guarantee that the Court will incorporate the few remaining unincorporated rights against the states.[69] Indeed, the structure of the Court's opinion implies that there is a good chance it may not.[70]

If the majority viewed incorporation as automatic, then most of the *McDonald* opinion would have been unnecessary. Rather than simply stating that the Second Amendment is part of the Bill of Rights and therefore is incorporated against the states, the Court extensively analyzed the historical record in an effort to "decide whether the right to keep and bear arms is fundamental to [the American] scheme of ordered liberty" or, in what the Court took to be an alternative formulation of the same question, "whether the right is 'deeply rooted in this Nation's history and tradition.' "[71] That test leaves open the possibility, at least in principle, that a provision of the Bill of Rights might not be fundamental or deeply rooted, and thus might not be incorporated against the states.

Accordingly, one must be careful not to read too much into Justice Alito's footnotes discussing the as-yet-unincorporated rights. However, one should also not read too little into them. There was no need for the Court to say anything at all about the grand jury and civil

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[67] 406 U.S. 404 (1972).

[68] *See McDonald*, 130 S. Ct. at 3035 n.14 (reasoning that the "ruling [in *Apodaca*] was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation").

[69] *See id.* at 3032-35 (discussing the Court's initiation of selective incorporation, but failure to ever adopt Justice Black's total incorporation theory).

> Only a handful of the Bill of Rights protections remain unincorporated . . . . In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines.

Id. at 3034-35 & n.13.

[70] *See id.* at 3032-33 (plurality opinion).

[71] *Id.* at 3036 (citing *Duncan*, 391 U.S. at 149); *McDonald*, 130 S. Ct. at 3036 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

jury requirements.[72] In going out of its way to say that these rights could be applicable against the states, the Justices in the plurality must have realized that they would be inviting litigation over those questions.

Should such litigation succeed, it would be extraordinarily costly to the states. "The vast majority of civil actions filed in the United States are filed in state courts, and the vast majority of those [filed] are resolved without the use of a jury."[73]

> To read the Seventh and Fourteenth Amendments as requiring juries in a substantial fraction of these cases—as suggested by the *McDonald* footnote—would slow down already overcrowded dockets, leading to long delays, increased costs for litigants, and the inconvenience of more frequent jury duty for all citizens. Likewise, states that do not [require] grand juries to issue indictments would need to upend their criminal justice systems, which would be both disruptive and costly.[74]

Does the Court in *McDonald* really mean to say that it is open to imposing such potentially heavy costs? Perhaps. In response to Chicago's argument that the Second Amendment should not be made applicable to the states because of the threat firearms present to public safety, the Court essentially said, too bad.[75] Noting that other constitutional limits on the criminal justice system also carried costs for public safety, Justice Alito implied that such costs were simply not the Court's concern.[76] If that is the Court's attitude towards costs measured in lives, it is hard to envision the Justices giving a more sympathetic ear to an argument that the incorporation of some right would lead to high costs measured simply in dollars.

In the end, the best hope for avoiding the costly imposition on

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[72] *Id.* at 3035 n.13 (discussing grand jury and civil jury requirements).

[73] Michael C. Dorf, *The Potentially Far-Reaching Implications of the Supreme Court's Ruling that the Second Amendment Binds the States*, FINDLAW (June 29, 2010), http://writ.news.findlaw.com/dorf/20100629.html.

[74] *Id.*

[75] *McDonald*, 130 S. Ct. at 3045 ("Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.").

[76] *Id.*

the states of civil jury and grand jury requirements may rest on cynicism. The Justices in the *McDonald* plurality do not appear to believe that forbidding state and local government handgun bans imposes a cost at all; indeed, the opening pages of the plurality opinion imply that since the enactment of Chicago's handgun ban, "the City's handgun murder rate . . . actually increased."[77] In a quite different type of case—such as one in which a state tort plaintiff seeks a civil jury to adjudicate his state law claim—one or more members of the *McDonald* majority might be more sympathetic to the state's arguments regarding costs. Or, if that rationale would be too obviously result-driven (with costs invoked in one case, but ignored in another), the Justices of the *McDonald* plurality could simply examine the historical evidence and find that the grand jury and civil jury rights are not as "deeply rooted" as the right to keep and bear arms.

Of course, opting to follow such a course would result in a different sort of cost. It would be a tacit admission that Justice Stevens was right in his parting blow: Incorporation, no less than freestanding substantive due process, requires the exercise of value-laden judgment.[78] That would be a fitting, if ironic, retirement gift for Justice Stevens.

DEAN CHEMERINSKY: The practical significance of *McDonald* is that it opens the courthouse doors, federal and state, to challenge all forms of gun laws: criminal laws that have a gun component and civil regulatory statutes. The crucial question will be: What level of scrutiny and what standard of review should be used for this right? The Court, in its opinion, gives almost no guidance. The little guidance the Court provides is the reference, in both the majority and dissent, to the opinion in *Heller*, which stated that the Second Amendment is not absolute.[79] Therefore, this case is really an open invitation to litigation.

The Court appears unwilling to choose a formal level of scrutiny, which may imply that it will use a balancing test in the future. On the one hand, the Court will likely not apply a strict scrutiny test because it recognizes the need for more gun laws. While on the other hand, the Court in a footnote in *Heller* made clear that it is using

[77] *Id.* at 3026 (plurality opinion).
[78] *Id.* at 3119 (Stevens, J., dissenting).
[79] *See id.* at 3047 (majority opinion); *id.* at 3103-04 (Stevens, J., dissenting).

more than rational basis review.[80] The Court will likely look to factors such as the location of the gun (providing more protection for guns in the home than outside the home), the nature of the weapon, and, the justification for the regulation. Until the Supreme Court makes this determination, it is left to the lower courts to struggle and decide which gun laws are constitutional and which are unconstitutional.

II. *UNITED STATES V. COMSTOCK*: THE COURT'S VIEW ON THE POWER OF THE FEDERAL GOVERNMENT

United States v. Comstock[81] involved a provision of the Adam Walsh Child Protection and Safety Act of 2006.[82] The Act provided that a person "in the custody of the [Federal] Bureau of Prisons" can be deemed sexually dangerous and then be subject to continued confinement after he has finished his sentence from the criminal conviction.[83] Specifically, the Act requires that the United States Attorney offer in federal court "clear and convincing evidence" to declare a person sexually dangerous, thereby enabling the Court to confine the person indefinitely.[84] The federal court is then required to conduct a review of its determination every six months.[85]

Comstock involved five defendants who joined together on appeal to the United States Supreme Court.[86] Comstock himself was convicted of violating the Federal Child Pornography Law[87] and was

[80] *See Heller*, 554 U.S. at 629 n.27 ("[T]he same [rational-basis scrutiny] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.").

[81] (*Comstock I*), 130 S. Ct. 1949 (2010).

[82] Adam Walsh Child Protection and Safety Act of 2006, 120 Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 42 U.S.C.A.).

[83] 18 U.S.C.A. § 4248(a) (West 2010).

[84] *Id.* § 4248(a), (d).

[85] *Comstock I*, 130 S. Ct. at 1955 (citing 18 U.S.C.A. § 4247(e)(1)(B), (h) (West 2010)) ("The statute establishes a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals.").

[86] *Id.* at 1955-56.

[87] United States v. Comstock (*Comstock II*), 507 F. Supp. 2d 522, 526 (E.D.N.C. 2007) ("Graydon Comstock pled guilty on 4 October 2000 to one count of 'Receipt [by computer] of materials depicting a minor engaging in sexually explicit conduct' . . . .").

sentenced to thirty-seven months in prison.[88] Just days prior to the completion of his sentence, the United States Attorney made an application in the federal court to declare him as sexually dangerous.[89] The federal court found that the United States Attorney proved by clear and convincing evidence that Comstock was sexually dangerous, and as a result, Comstock has been imprisoned for approximately three years beyond the time of his original thirty-seven month sentence.[90]

The United States Court of Appeals for the Fourth Circuit, in an opinion by Judge Motz, declared the Act unconstitutional because it exceeded the scope of Congress's power.[91] Judge Motz held that Congress did not have the authority to pass this law under the Commerce Clause, or, in the alternative, under the Necessary and Proper Clause.[92] The Supreme Court, however, in a seven-to-two decision, reversed and upheld the constitutionality of the federal law.[93]

In 1997, in *Kansas v. Hendricks*,[94] the Supreme Court held that states are permitted to provide for the indefinite commitment of sexually dangerous individuals even after they finished their sentences.[95] The issue in *Comstock* was not whether the government violates due process or individual liberties when it indefinitely confines sexually dangerous individuals—that issue was already decided in

[88] *Id.* at 526.

[89] *Id.*

[90] *Id.* (noting that his term of imprisonment expired in 2006, yet he is still confined at FCI-Butner).

[91] United States v. Comstock (*Comstock III*), 551 F.3d 274, 276 (4th Cir. 2009) ("The Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law.").

[92] *Id.* at 278-79 (explaining that the Act could only be upheld under the Commerce Clause "if it regulates activities that 'substantially affect' interstate commerce" (citing United States v. Morrison, 529 U.S. 598, 609 (2000))). "[P]recedent . . . compels the conclusion that [the Act] does not constitute a valid exercise by Congress of its Commerce Clause power." *Id.* at 280. The court also indicated that "[t]he Necessary and Proper Clause simply does not—in and of itself—*create* any Congressional power." *Id.*

[93] *Comstock I*, 130 S. Ct. at 1970.

[94] 521 U.S. 346 (1997).

[95] *Compare* Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1 (indicating that "the state [may] confine certain violent sex offenders in mental hospitals after they have served their criminal sentences"), *with Hendricks*, 521 U.S. at 364 (holding that civil confinement of a violent sex offender who served a criminal sentence and who has been deemed to have a "mental abnormality" is constitutional).

Hendricks.[96] *Comstock*, instead, pertained to federal power; specifically, whether Congress had the authority to pass such a law when the Supreme Court previously stated that the individual states could do so.[97] In order to understand the decision, it is necessary to examine the split among the Justices. The only way to understand the decision, and especially the split among the Justices, is in the context outlined above. Justice Breyer wrote the seven-person majority opinion with only Justices Scalia and Thomas dissenting.[98]

Justice Breyer stated that Congress had the authority to pass the law under the Necessary and Proper Clause.[99] He set forth five reasons to demonstrate why the law fell within the scope of the Necessary and Proper Clause, but all five reasons[100] can be reduced to the following: (1) if Congress has the authority to make something a federal crime, then Congress can prescribe the sanctions, including the punishments for the crime; (2) if Congress has the ability to make child pornography a federal crime using the Commerce Clause, then Congress may provide prisons to house those guilty of the crime, establish mental hospitals to commit those guilty of the crime if they are mentally ill, and prescribe what the sanctions will be if found guilty; (3) the sanctions that Congress may prescribe include civil commitment; and (4) civil commitment was previously available at the federal level, and therefore, it was within the purview of the Necessary and Proper Clause.[101]

In writing the opinion, Justice Breyer omits and assumes a key step in the Court's analysis. Most law professors, in constitutional law classes, teach their students that the Necessary and Proper Clause does not, by itself, provide Congress with sufficient authority to act. Instead, it must be used in conjunction with some other federal power.[102] Certainly, Justice Breyer is right in saying that the Ne-

[96] *Hendricks*, 521 U.S. at 357.

[97] *Comstock I*, 130 S. Ct. at 1962-63.

[98] *Id.* at 1953.

[99] *Id.* at 1965.

[100] *Id.* ("[The considerations] include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.").

[101] *See id.* at 1958-63.

[102] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 38 (2005) (Scalia, J., concurring) (claiming that the Necessary and Proper Clause does not permit Congress to regulate intrastate com-

cessary and Proper Clause permits Congress to take any reasonable steps to carry out its powers,[103] but there needs to be a clear explanation as to which underlying federal power the Necessary and Proper Clause is serving. In this case, the Supreme Court does not offer such an explanation, which is troubling because it gives law students the impression—and maybe lower federal court judges as well—that an analysis of whether Congress has power to act rests solely on a reading of the Necessary and Proper Clause without having to focus on any underlying federal powers.

Justices Scalia and Thomas dissented[104] and, at first glance, that might seem unusual. In *Hendricks*, when the Supreme Court determined that states were permitted to pass this law providing for indefinite commitment of sexually dangerous individuals, Justices Scalia and Thomas were part of the majority; Justices Breyer, Ginsburg, and Stevens, who are in the majority in *Comstock*, dissented in *Hendricks*.[105] However, the difference can be explained by the distinct issue in *Hendricks*, which required the Court to consider whether the law violated individual liberty by permitting indefinite commitment.[106]

In *Comstock*, the issue was one of federal power.[107] It has been the case throughout most of American history, and certainly over the last several decades, that conservatives want to narrow the scope of federal power while liberals want to broaden it. The liberal Justices on the Court worry that narrowing the scope of Congress's authority would put federal environmental laws and federal civil rights laws in jeopardy.[108] Thus, in that context, it is not surprising that Justice Breyer wrote for the majority, and Justices Scalia and

merce, but used in conjunction with the Interstate Commerce Clause, Congress may regulate interstate commerce as it deems necessary or appropriate).

[103] *Comstock I*, 130 S. Ct. at 1956 (describing Congress's broad power to enact laws under the Necessary and Proper Clause).

[104] *See id.* at 1970 (Thomas, J., dissenting) (joining in this dissent was Justice Scalia).

[105] *Compare Hendricks*, 521 U.S. at 348 (depicting the split among the Justices with Justices Rehnquist, O'Connor, and Scalia forming the majority), *with Comstock I*, 130 S. Ct. at 1953 (reflecting the seven-to-two split among the Justices in which Justices Breyer, Ginsburg, and Stevens were in the majority).

[106] *Hendricks*, 521 U.S. at 360-61.

[107] *See Comstock I*, 130 S. Ct. at 1954 ("Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government 'of enumerated powers.' ").

[108] *Id.* at 1957.

Thomas dissented.

Many commentators following this case believe that this shows that the Roberts Court will cease to continue the Rehnquist Court's federalism resolution.[109] I believe that constitutional historians will say that the greatest change in constitutional law during the Rehnquist era was in the area of federalism, particularly in limiting the scope of Congress's commerce power, restricting Congress's authority under section five of the Fourteenth Amendment, reviving the Tenth Amendment on the limit of federal power, and expanding the states' sovereign immunity.[110] However, to read this one case as the Roberts Court's repudiation of, or unwillingness to, expand the decision is inaccurate. Almost all of the Rehnquist Court's federalism decisions were five-to-four decisions, wherein Justices Scalia, Kennedy, and Thomas were in the majority.[111] These Justices continue to sit on the Court today, and there is good reason to believe that Justices Roberts and Alito see federalism the same way as Justices Scalia, Kennedy, and Thomas; thus, reading too much into this case is imprudent. Furthermore, the more interesting and high profile issues now being returned to the lower courts for consideration all boil down to federalism issues, as noted in three recent examples.

First, on July 8, 2010, the United States District Court for the District of Massachusetts held the Federal Defense of Marriage Act unconstitutional.[112] Judge Tauro stated that the government had no legitimate interest in keeping gays and lesbians from being able to marry one another and that the denial of federal benefits to same-sex couples violated the Constitution.[113] However, ultimately, the Defense of Marriage Act is an issue of federalism. The question remains whether Congress may declare that a state is not required to recognize a same-sex marriage that occurred in another state.

Second, on July 28, 2010, the United States District Court of

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[109] *See, e.g.*, Ilya Somin, *Bad News for Federalism? Some Preliminary Reflections on* Comstock, THE VOLOKH CONSPIRACY (May 17, 2010, 3:00 PM), http://volokh.com/2010/05/17/bad-news-for-federalism-preliminary-reflections-on-comstock/ (stating the "Supreme Court decision in *United States v. Comstock* is very bad news for constitutional federalism").

[110] *See* Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 777-79 (2008) (discussing the Rehnquist Court's effect on state sovereignty and Congress's commerce power).

[111] *See, e.g.*, *Morrison*, 529 U.S. at 598; United States v. Lopez, 514 U.S. 549, 550 (1995).

[112] *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 386 (D. Mass. 2010).

[113] *Id.* at 396-97.

Arizona enjoined the key provisions of Senate Bill 1070,[114] the Arizona law requiring state and local police to enforce federal immigration law.[115] The central issue of this law concerns the presumptive reach of federal immigration law,[116] which is obviously a question of federalism. In a related issue, the Supreme Court granted review of *Chamber of Commerce of the United States v. Candelaria*.[117] *Candelaria* involves an Arizona law that prohibits businesses in Arizona from employing undocumented immigrants; it provides that violators will lose their business licenses and face other penalties.[118] While similar ordinances and laws in other parts of the country—such as in Hazleton, Pennsylvania—were declared unconstitutional on preemption grounds, the Ninth Circuit upheld the Arizona law.[119] The Supreme Court's decision in this case might be an indication of how it will address Senate Bill 1070 when it reaches the Supreme Court.

The third recent example, a case decided on August 2, 2010, pertains to a federal district court judge in Virginia who denied the government's motion to dismiss a challenge to the federal health care legislation; the challenge was premised on the scope of Congress's commerce-attacking power.[120]

With all of these impending issues regarding federalism, it is premature to assert that *Comstock* will put an end to what the Roberts Court will do, or that *Comstock* represents the fact that the Roberts Court will not necessarily extend what the Rehnquist Court did with

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[114] United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

[115] *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (precluding "law enforcement officials and law enforcement agencies of this state or counties . . . from restricting or limiting the enforcement of the federal immigration laws to less than the full extent permitted by federal law").

[116] *Arizona*, 703 F. Supp. 2d at 991.

[117] 130 S. Ct. 3498 (2010) (granting the writ of certiorari).

[118] *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009).

[119] *Compare* Lozano v. City of Hazleton, 620 F.3d 170, 224 (3d Cir. 2010) (deciding that "the housing provisions of Hazleton's ordinances pre-empted regulations of immigration, and both field and conflict pre-empted by the INA"), *with Napolitano*, 558 F.3d at 867, 869 (upholding the Arizona law while stating "[t]he Act's requirement that employers participate in E-verify . . . does not raise conflict preemption concerns").

[120] *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010) (reducing the complex issue before the court to "the single question of whether or not Congress has the power to regulate—and tax—a citizen's decision not to participate in interstate commerce. . . . [However] [g]iven the presence of some authority arguably supporting the theory underlying each side's position, th[e] [c]ourt" denied the government's motion to dismiss).

regard to federalism.

III. *FREE ENTERPRISE FUND V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD*: THE SEPARATION OF POWERS DOCTRINE

The Sarbanes-Oxley Act created the Public Company Accounting Oversight Board ("PCAOB"), and the Securities and Exchange Commission ("SEC") was given the authority to appoint the PCAOB's members.[121] The SEC also has the authority to remove members, but removal may only be for "good cause."[122] In other words, the President is unable to either appoint or remove members of the board. The issue before the Supreme Court in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[123] was whether this appointment violated the separation of powers doctrine.[124]

Free Enterprise Fund originally had the potential to be more significant than it actually was because for years, conservatives argued that there is a unitary executive, meaning, among other things, that all principal officers and inferior officers of the United States must be removed by the President. In 1988, the Supreme Court in *Morrison v. Olson*[125] upheld the constitutionality of the Federal Independent Law in a seven-to-one ruling.[126] Justice Scalia was the sole dissenter, claiming that the President must be able to remove all principal officers and inferior officers; however, based on the law, the President was unable to remove independent counsel, and therefore,

[121] *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 ("Congress enacted the Sarbanes-Oxley Act of 2002 . . . [which] introduced tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. The Board is composed of five members[] appointed . . . by the Securities and Exchange Commission."); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 750-52.

[122] *See Free Enter. Fund*, 130 S. Ct. at 3148 (stating that "[t]he Commission cannot remove Board members at will, but only 'for good cause shown' "); *see also* Sarbanes-Oxley Act of 2002, 116 Stat. at 752.

[123] 130 S. Ct. 3138 (2010).

[124] *Id.* at 3149 (noting that the petitioners in this case argued "that the Sarbanes-Oxley Act contravened the separation of powers by conferring wide-ranging executive power on Board members without subjecting them to Presidential control").

[125] 487 U.S. 654 (1988).

[126] *Id.* at 658-60. The majority consisted of Justices Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, and O'Connor, Justice Scalia dissented, and Justice Kennedy "took no part in the consideration . . . of the case." *Id.* at 658.

he believed that the law violated the separation of powers.[127] Justices Roberts and Alito endorsed this unitary executive theory in memoranda written by them as young lawyers during the Reagan Administration.[128]

It is conceivable that if five votes on the current Court were in support of the unitary executive theory, and the Court were to adopt and follow it, all of the independent regulatory agencies may be held unconstitutional because they all limit Presidential removal. Whether it is the SEC, the Federal Trade Commission ("FTC"), or the Federal Communications Commission, the President may remove these commissioners only for good cause.[129] However, the Court declined to accept the unitary executive theory and, instead, unanimously upheld the Appointments Provision with regard to the PCAOB.[130] Chief Justice Roberts wrote the opinion for the Court, which did not include any dissents.[131]

Article II of the Constitution provides that Congress may vest the appointment of inferior officers in the President, the department heads, or the lower federal courts.[132] The Court explained that under precedent, the members of the PCAOB are considered inferior officers; they are inferior in terms of their authority in the SEC and the

[127] *Id.* at 715, 723, 726-27 (Scalia, J., dissenting) ("[T]he basic separation-of-powers principles . . . are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers. The same result of unconstitutionality is . . . indicated by our case law in these areas.").

[128] *See* Memorandum from Samuel A. Alito Jr., Deputy Assistant Attorney Gen. to the Litig. Strategy Working Group, U.S. DEP'T OF JUSTICE 2 (Feb. 5, 1986) (on file with the Nat'l Archives), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf; *see also Fact Check: Judge Alito on the Theory of the Unitary Executive*, DEMOCRATS.SENATE.GOV, http://democrats.senate.gov/judiciarycommitteesupremecourt/correcting-12.cfm (last visited Jan. 11, 2011); Robert Parry, *Alito & The Ken Lay Factor*, CONSORTIUM NEWS (Jan. 12, 2006), http://www.consortiumnews.com/2006/011106.html.

[129] *See Free Enter. Fund*, 130 S. Ct 3138; Humphrey's Ex'r v. United States, 295 U.S. 602, 631-32 (1935) (holding that the Federal Trade Commission Act was constitutional and did not interfere with the executive power of the President).

[130] *Free Enter. Fund*, 130 S. Ct. at 3162-63 (holding that "Board members [of the Commission] are inferior officers whose appointment Congress may . . . vest in a 'Hea[d] of Departmen[t]' " and "that the Commission is indeed such a 'Departmen[t]' " and there is "no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs").

[131] *Id.* at 3146 (rejecting, unanimously, the challenge under the Appointments Clause, however, there was a 5-4 majority regarding the dual for-cause mechanism as it pertains to the removal of Oversight Board members).

[132] U.S. CONST. art. II, § 2, cl. 2.

ability of the SEC to remove them.[133] According to Chief Justice Roberts, Congress may vest power of appointment authority of inferior officers to the heads of departments, and, therefore, the SEC is vested with the power of appointment.[134]

In considering the removal provision, there was a five-to-four split among the Justices who were divided along ideological lines.[135] Chief Justice Roberts wrote the opinion for the Court and was joined by Justices Scalia, Kennedy, Thomas, and Alito.[136] Justice Breyer wrote the dissenting opinion and was joined by Justices Stevens, Ginsburg, and Sotomayor.[137] Chief Justice Roberts noted that this provision was different from others the Court previously upheld because in other cases, the President could remove the officer, or the commissioners of, for example, the FTC, for "good cause."[138] Chief Justice Roberts states this is different because the President is permitted to remove the members of the SEC for "good cause," and the SEC is permitted to remove members of the PCAOB for "good cause."[139] Thus, a dual level of insulation exists.[140] This type of insulation rendered the removal provision unconstitutional according to Chief Justice Roberts.[141]

Justice Breyer dissented, urging a more functional approach to the separation of powers doctrine and provided several examples,

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[133] *Free Enter. Fund*, 130 S. Ct. at 3162 (agreeing "that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will").

[134] *Id.* at 3162-63.

[135] *Id.* at 3146 (listing that Chief Justice Roberts wrote the majority opinion which Justices Scalia, Kennedy, Thomas, and Alito joined and Justice Breyer authored the dissenting opinion which Justices Stevens, Ginsburg, and Sotomayor joined).

[136] *Id.*

[137] *Id.*

[138] *Free Enter. Fund*, 130 S. Ct. at 3151-52 (stating " 'one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will' " and "that Congress had [the] power to . . . 'forbid their removal except for cause' " (quoting *Humphrey's Ex'r*, 295 U.S. at 629)).

[139] *Id.* at 3153-54.

[140] *Id.* at 3153.

> The Act . . . does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. . . . The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

Id.

[141] *Id.* at 3151.

detailed in the appendix, noting that this arises all the time.[142] He pointed to the military as one of the many examples and indicated that it is not so innocuous to say that the President's authority of removal is effective with one level of protection, but not with two.[143] However, the Court still held that the insulation of removal of the PCAOB violated the doctrine of separation of powers.[144]

IV. CONCLUSION

The Supreme Court was faced with vital issues last term including incorporation of the Second Amendment, the federal government's power, and separation of powers. However, as a result of its decisions in three particular cases, the Court has left several issues unresolved. These issues include what standard of review will be applied in Second Amendment gun law cases, how the Court's decision in *Comstock* will affect its determination of issues of federalism in the future, and how the Roberts Court will determine separation of powers issues in the future.

First, as a result of the decision in *McDonald*, the Court determined that the Second Amendment is incorporated against the states based on the Due Process Clause. However, the Court left open for another day whether the remaining provisions of the Bill of Rights will be incorporated in the future. By discussing the rights that have not yet been incorporated, the Court has inevitably invited litigation concerning such questions. Additionally, as a result of this decision, the Court has also opened its doors, inviting litigation to challenge all gun laws. The Court in *McDonald*, however, offered little guidance as to what standard of review will be applied in such cases in the future. Until the Supreme Court makes this determination, it is up to the lower courts to interpret the Court's decision in *McDonald* and determine which standard of review should be ap-

[142] *Free Enter. Fund*, 130 S. Ct. at 3164-65, 3184-93 (Breyer, J., dissenting) ("There are [twenty-four] stand-alone federal agencies . . . whose heads are, *by statute*, removable by the President only 'for cause.' Moreover, there are at least [twenty-four] additional offices . . . that are similarly subject, *by statute*, to for-cause removal provisions.").

[143] *Id.* at 3181 (using the military as an example to reject the Court's holding regarding the dual for-cause removal theory by stating "[i]t is difficult to see why the Constitution would provide a President . . . with *less* authority to remove 'inferior' military 'officers' than to remove comparable civil officials").

[144] *See id.* at 3151.

plied.

Second, the Court's decision in *Comstock* leaves open the question as to what stance the Roberts Court will take with regard to federalism. Making a prediction on what the new dynamic of the Court will decide in the future after one case is merely speculative. Since there are many high profile issues regarding federalism currently being decided in the lower courts, it remains premature to determine how the Court will decide such issues of federalism. It will be interesting to see how the Court decides such cases in the future.

Lastly, the Court's decision in *Free Enterprise Fund* leaves open the question on how similar cases will be decided in the future. The decision had the potential of having a more significant implication; if one Justice had changed his or her position and adopted the unitary executive theory, the Court's ruling would have had the effect of declaring all independent regulatory agencies unconstitutional because they limit Presidential removal. Similar issues will continually present themselves to the Court in the future, and it will be interesting to see which Justices will fall on each side in such determinations.