2010

Selected Cases from the United States Supreme Court's 2009-2010 Term

Tim J. Davis
Bryan Cave LLP

Selected Cases from the United States Supreme Court's 2009-2010 Term

Tim J. Davis

The U.S. Supreme Court's 2009–2010 Term ushered in both important federal law clarifications and divisive constitutional pronouncements. The Court performed much work in the realm of civil procedure, doing away with Circuit splits regarding the collateral-order doctrine and diversity jurisdiction, and also explaining what it means to make a mistake for purposes of relation back—decisions sure to affect many a federal practice. The Court also dabbled in employment law under Title VII; decided constitutional challenges to several federal statutes, including an anti-terrorism statute; and attempted to firm up the boundaries that inhere in the constitutional concepts of federalism and separation of powers. But more than any of these other significant rulings, this Term will likely be remembered for two of the Court's decisions that have easily earned "landmark" status: *McDonald v. City of Chicago*,[1] in which the Court held the Second Amendment applicable to the states, and *Citizens United v. Federal Election Commission*,[2] in which the Court held that groups of people organized as a corporation are entitled to the same free-speech rights as individuals. This article attempts to illuminate the rationale and possible implications of these and other notable civil decisions from the Court's 2009–2010 Term.

CIVIL PROCEDURE

In *Mohawk Industries, Inc. v. Carpenter*, the Court put to rest a disagreement among Circuits over whether "disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine."[3] In 2007, Mohawk Industries found itself waging legal battles on two fronts. Norman Carpenter, once a shift supervisor at a Mohawk facility, sued Mohawk on the basis that he was wrongfully terminated. Carpenter claimed it was no coincidence that he was fired after voicing concerns to human resources that Mohawk was employing undocumented immigrants. Although Carpenter had no idea, a whole class of plaintiffs shared Carpenter's concerns, as Mohawk was at that time defending a class-action suit that claimed the company had conspired "to drive down the wages of its legal employees by knowingly hiring undocumented workers."[4] Mohawk higher-ups ordered Carpenter to meet with Mohawk's defense counsel for the class-action suit, where Carpenter was allegedly asked to backtrack on his statements. Carpenter's refusal to comply, he claims, led to his firing under false pretenses.

The class of plaintiffs caught wind of Carpenter's exit and moved for an evidentiary hearing to explore Carpenter's complaint. In response, Mohawk claimed that Carpenter fabricated his story: the meeting with Mohawk's counsel was in fact part of an investigation into Carpenter's having violated company policy by attempting to have Mohawk hire an undocumented worker. Meanwhile, Carpenter's own suit against Mohawk was entering discovery and Carpenter moved to compel Mohawk's production of information regarding both Carpenter's meeting with corporate counsel and Mohawk's termination decision. Mohawk argued that the information was protected by the attorney-client privilege. The district court agreed that the information was privileged, yet granted Carpenter's motion to compel on the theory that Mohawk's discovery responses in the class-action suit waived the attorney-client privilege. The court refused to certify its ruling for interlocutory appeal, but gave Mohawk time to pursue appellate review through mandamus or the collateral-order doctrine. Mohawk did just that, and after finding no success in the Eleventh Circuit, the Supreme Court granted review solely on the question of whether the district court's disclosure was immediately appealable.

Justice Sotomayor, writing for seven other justices, analyzed the issue in traditional fashion by applying the *Cohen* requirements: collateral rulings that do not end the litigation may nevertheless be immediately appealable if (1) they are conclusive, (2) they resolve important questions separate from the merits, and (3) they are effectively unreviewable on appeal from a final judgment. Focusing on the third factor, the Court noted the importance of the attorney-client privilege, but explained that the "crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders."[5] Applying this test, the Court held that the interests served by the attorney-client privilege were adequately protected by appellate courts' ability to remedy the improper disclosure of privileged material by vacating adverse judgments and remanding for a new trial, excluding the protected material the second time around. As the Court explained it, "deferring review until final judgment does not

Footnotes

1. 130 S. Ct. 3020 (2010).
2. 130 S. Ct. 876 (2010).
3. 130 S. Ct. 599, 603 (2009).
4. *Id.*
5. *Id.* at 606.

meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel."[6]

Further, to the extent the privilege guarantees the right not to disclose information at all—as opposed to merely protecting against its use at trial—the Court acknowledged the existence of several litigation tools that help protect this right. A party may seek immediate review through either an interlocutory appeal under 28 U.S.C. § 1292(b) or a petition for a writ of mandamus; or alternatively, parties may defy the district court's disclosure order and appeal any sanctions upon final judgment. Also, the district court may issue protective orders to hedge against the risk that leaked information might damage the disclosing party outside of the courtroom. The fact that "a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are 'only imperfectly reparable' does not justify making all such orders immediately appealable as of right under § 1291."[7]

In what may be the most interesting part of the opinion, the Court once again acknowledged that the rulemaking process is "the preferred means for determining whether and when prejudgment orders should be immediately appealable."[8] In fact, this point motivated Justice Thomas's concurrence, where he expressed his readiness to do away with the *Cohen* analysis altogether, characterizing the Court's opinion as ironic because of its potential to prejudice "the very matters it says would benefit from 'the collective experience of bench and bar' and the 'opportunity for full airing' that rulemaking provides."[9]

In addition to *Mohawk*, the Court tackled another issue that was causing confusion in the Circuits in *Hertz Corp. v. Friend*, refining the test for determining a corporation's "principal place of business" for purposes of federal diversity jurisdiction.[10] In 2007, two California citizens representing a proposed class of California plaintiffs filed suit against Hertz Corporation in California state court, claiming violations of California's wage and hour law. Hertz attempted to remove the case to federal court under diversity jurisdiction. Hertz argued it was diverse from the California plaintiffs because its principal place of business was in New Jersey, where its corporate headquarters is located and where its "'core executive and administrative functions'" are carried out.[11] The district court disagreed with Hertz based on its application of the Ninth Circuit's principal-place-of-business test. The test instructs district courts to first determine "the amount of a corporation's business activity State by State" and then look for one state that has a significantly larger amount.[12] Because the district court found that Hertz's activity in California significantly outweighed its activity elsewhere, the court did not reach the second prong of the Ninth Circuit's test, which locates a corporation's principal place of business where "the majority of its executive and administrative functions are performed."[13] The Ninth Circuit agreed with the district court's analysis and the Supreme Court granted review to resolve the disparate Circuit approaches.

[T]his complexity was likely the result of courts' attempts to uphold the rationale of diversity jurisdiction . . .

In a unanimous decision, the Court began by reviewing how and why the principal-place-of-business test came to be. The Court related how many in Congress had come to doubt whether the state-of-incorporation test for corporate citizenship was serving diversity jurisdiction's policy of "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties."[14] Although simply applied, this test had two undesirable consequences: corporations manipulated federal jurisdiction by incorporating in states where they did hardly any business at all, and the resulting amount of diversity cases caused the federal dockets to swell. Thus, in 1958, Congress modified the diversity-jurisdiction statute so that a corporation would be deemed a citizen "of the State where it has its principal place of business," in addition to the state of its incorporation.[15]

But, as the Court noted, lower courts encountered difficulty in trying to locate a corporation's principal place of business. When a corporation's activities were spread across numerous states, most courts were focusing on "the nerve center"—the place where officers direct, control, and coordinate business activities. Contrastingly, when a corporation's activities were focused in a small number of states, many courts were examining where the actual business activities were taking place. The Court noted the inherent difficulty in applying this latter test: "Perhaps because corporations come in many different forms, involve many different kinds of business activities, and locate offices and plants for different reasons in different ways in different regions, a general 'business activities' approach has proved unusually difficult to apply."[16] This difficulty quickly snowballed into a variety of complex, multifactor tests, prone to inconsistent application. The Court noted that this complexity was likely the result of courts' attempts to uphold the rationale of diversity jurisdiction—to find the State where a corporation is least likely to suffer local prejudice—but ultimately, "that task seems doomed to failure."[17] This is because local prejudice usually turns on factors that are difficult to grasp, like corporate image, history, and advertising, as opposed to the more measurable corporate business activities.

Given this futility in attempting to uphold the rationale of

6. *Id.* at 607.
7. *Id.* at 608 (quoting Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994)).
8. *Id.* at 609 (citing Swint v. Chambers County Comm'n, 514 U.S. 35, 48 (1995)).
9. *Id.* at 610 (Thomas, J., concurring) (quoting the majority opinion at 609).
10. 130 S. Ct. 1181, 1183 (2010).
11. *Id.* at 1186 (quoting Hertz's Petition for Certiorari).
12. *Id.*
13. *Id.* (internal quotations omitted).
14. *Id.* at 1188.
15. *Id.* at 1190.
16. *Id.* at 1191.
17. *Id.* at 1192.

The Court noted, however, that difficult cases will continue to arise given today's Internet-based business world . . .

diversity jurisdiction, the Court chose the path of administrative simplicity, holding that "principal place of business" means "the place where a corporation's officers direct, control, and coordinate the corporation's activities," or, the corporation's "nerve center."[18] The Court noted three considerations in support of its holding: (1) the nerve-center test is consistent with the diversity statute's language, which suggests the principal place of business is a singular place within a state, not a state itself; (2) the nerve-center test conserves both judicial and private resources through administrative simplicity and greater predictability; and (3) the nerve-center test aligns with the statute's legislative history, which suggests Congress intended "principal place of business" to offer a simplistic test for lower courts. The Court noted, however, that difficult cases will continue to arise given today's Internet-based business world, and that the nerve-center test might sometimes produce a result that fails to align with the policy of preventing local prejudice. As a parting shot, the Court attempted to head off a few obvious opportunities for jurisdictional manipulation, advising lower courts and parties that merely designating a principal executive office on a government form or holding an annual executive retreat in a given location will not be sufficient evidence of principal place of business.

In the last notable civil-procedure case, *Krupski v. Costa Crociere S.p.A.*, the Court cast aside the notion that a plaintiff's state of mind or lack of haste in amending pleadings could affect relation back under Federal Rule of Civil Procedure 15.[19] This case began in February 2007, when the plaintiff Wanda Krupski tripped on board a cruise ship, fracturing her femur. Krupski's cruise ticket stated that "Costa Crociere S. p. A., an Italian corporation," was the cruise operator, and required that any lawsuits be filed "within one year after the date of injury."[20] The front of the ticket listed the Florida address of "Costa Cruise Lines," Costa Crociere's sales and marketing agent, and touted Costa Cruise—not Crociere—as a high-quality "cruise company."[21] Krupski's counsel filed suit against Costa Cruise in the Federal District Court for the Southern District of Florida just three weeks before the one-year limitations period expired, alleging that Costa Cruise was the cruise operator. After the limitations period expired, Costa Cruise repeatedly argued that Costa Crociere was the proper defendant. Eventually, in July 2008, the district court allowed Krupski to amend its complaint and add Costa Crociere as a party, while at the same time dismissing Costa Cruise pursuant to the parties' joint stipulation. Costa Crociere responded by moving to dismiss on the ground that Krupski's amendment did not relate back under Rule 15, and thus her claim was untimely under the terms set out in her passenger ticket.

The district court agreed. Although the first two elements of Rule 15 were satisfied—the new claim arose out of the same transaction and Costa Crociere received timely notice such that it was not prejudiced—the court found difficulty in the third element, which requires that the newly named party "knew or should have known that the action would have been brought against it, but for a mistake concerning the property party's identity."[22] According to the district court, Krupski did not make a mistake concerning the identity of the proper party: Rule 15's use of the word "mistake" did not encompass what the court found was Krupski's deliberate decision not to sue Costa Crociere, a party whose identity Krupski was repeatedly made aware of, yet who Krupski decided to add only after much delay. The Eleventh Circuit affirmed the district court's ruling on two grounds. First, because the cruise ticket identified Costa Crociere as the cruise operator, Krupski "either knew or should have known of Costa Crociere's identity as a potential party." Second, because Krupski waited 133 days after filing her initial complaint to seek leave to amend, and then waited another month before actually amending, the district court apparently did not abuse its discretion in "denying" relation back.[23]

All nine Justices disagreed.[24] Tackling the Eleventh Circuit's grounds one at a time, Justice Sotomayor first explained that by "focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point."[25] The Court clarified that whether a *plaintiff* knew or should have known the identity of the proper party at the time of filing the original complaint usually holds no relevance to relation back. Rather, the third element under Rule 15 asks what the *defendant* knew or should have known. The Court stated, however, that the plaintiff's knowledge might still be relevant to the extent it "bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity."[26] But even for the purposes of this narrow inquiry, the Court warned that a plaintiff's mere knowledge of a party's existence does not necessarily equate to the absence of mistake: "A plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have the status of party B."[27] The absence of mistake is instead signified by a deliberate choice to sue a given party, coupled with a full understanding of "the factual and legal differences between the two parties."[28] But again, such deliberate and informed decisions are only relevant insofar as they affect the defendant's state of mind.

18. *Id.*
19. 130 S. Ct. 2485 (2010).
20. *Id.* at 2490 (internal quotations omitted).
21. *Id.*
22. FED. R. CIV. P. 15(c)(1)(C).
23. *Krupski*, 130 S. Ct. at 2492.
24. Justice Scalia concurred in part and concurred in the judgment, as he remained true to his "textualist" method of statutory interpretation, taking issue with the majority's use of Advisory Committee notes to shed light on the meaning of Rule 15. *Id.* at 2498–99 (Scalia, J., concurring).
25. *Id.* at 2493.
26. *Id.* at 2493–94.
27. *Id.* at 2494.
28. *Id.*

Up to this point, the Court's finely drawn line between the knowledge of plaintiffs and prospective defendants remained visible. But the Court's distinction became slightly muddled when it addressed Costa Crociere's argument that an added defendant could "reasonably believe that the plaintiff made no mistake" if a "plaintiff is aware of the existence of two parties and chooses to sue the wrong one."[29] The Court responded that the "reasonableness of the mistake is not itself at issue."[30] But if Rule 15 is only concerned with whether the defendant knew or should have known of the plaintiff's mistake, it would seem the reasonableness of the mistake is relevant—the more unreasonable the mistake, the more deliberate the plaintiff's decision appears, and the less likely that a prospective defendant should have known that such a mistake occurred. Indeed, this logic would be consistent with the Court's later explanation of the policy behind its ruling, "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose."[31] Instead, the Court's statement suggests that, so long as a mistake actually occurred—no matter how unreasonable—the third element of Rule 15 will be satisfied.

This potential glitch in the Court's opinion might be explained in part by the facts of this particular case. The unreasonableness of Krupski's mistake may very well have been outweighed, in the Court's eyes, by the district court's unchallenged finding that Costa Crociere had constructive notice of Krupski's complaint—a complaint which plainly stated Krupski's intent to sue the company that "'owned, operated, managed, supervised and controlled'" the cruise ship.[32] In other words, it might have been so obvious Krupski was trying to sue Costa Crociere that even the most unreasonable actions could not justify the belief that Krupski had not mistakenly sued Costa Cruise.

The Court next turned to the Eleventh Circuit's second reason for holding that relation back was not appropriate: Krupski's lack of diligence in amending her claim. The Court handily did away with this logic, stating that Rule 15(c) does not include diligence as a prerequisite for relation back, and that courts do not have equitable discretion in making the relation-back determination.[33] But once again the Court offered a caveat to its holding, noting that a plaintiff's conduct after initial filing might be relevant insofar as it affects the prospective defendant's belief about whether the plaintiff made a mistake in initially filing suit. In this case, the Court felt that Krupski's 133-day delay in seeking leave to amend was not "sufficient to make reasonable any belief that she had made a deliberate and informed decision not to sue Costa Crociere in the first instance."[34]

DUE PROCESS: SELECTIVE INCORPORATION

Instead, the Court's statement suggests that . . . the third element of Rule 15 will be satisfied.

This Term, the Court issued its inevitable follow up to the two-year old *District of Columbia v. Heller*,[35] where the Court held that the Second Amendment guarantees citizens of the District of Columbia the right to keep handguns in their homes. In the sequel, *McDonald v. City of Chicago*,[36] several residents and activist groups filed suits in federal district court challenging city ordinances that essentially prohibited the possession of handguns in both Chicago and its suburb Oak Park. The cases were consolidated and the district court, although acknowledging *Heller*, held it was bound by prior precedent to conclude that such handgun bans were constitutional. The Seventh Circuit affirmed under a privileges-and-immunities analysis, and so too declined the opportunity to predict whether *Heller* and the Second Amendment would become applicable to the states through selective incorporation. The Supreme Court, of course, did not pass up this opportunity.

Justice Alito, writing for the same five Justices that carried the day in *Heller*,[37] began with a quick dispatching of the Seventh Circuit's analysis: the Fourteenth Amendment's Privileges and Immunities Clause may not impose Second Amendment limits on state governments, but its Due Process Clause may nevertheless achieve the same feat. The Court then reviewed selective incorporation's central tenet, that due process protects those rights "of such a nature that they are included in the conception of due process of law."[38] After devoting much space to the Court's previous, eloquent attempts at expressing the limits of this concept, the Court ultimately concluded that the key inquiry is "whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice."[39] Stated another way, whether it is "deeply rooted in this Nation's history and tradition."[40] Mere inclusion in the Bill of Rights does not alone qualify a right for incorporation through the Due Process Clause.[41] But the Court reemphasized that, if such rights are incorporated, they are "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[42]

Applying this framework to the question before it, the Court ultimately held that the Second Amendment was incorporated into the Fourteenth Amendment's Due Process Clause. In reaching this conclusion, unsurprisingly, the Court engaged in a historical review much like the one it relied on in *Heller*.

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 2497 (quoting Krupski's Petition for Certiorari).
33. *Id.* at 2496.
34. *Id.* at 2497–98.
35. 554 U.S. 570 (2008).
36. 130 S. Ct. 3020 (2010).
37. Chief Justice Roberts and Justices Scalia and Kennedy joined the opinion in full. Justice Thomas joined parts of the opinion, but did not agree with the plurality's analytical framework, as addressed below.
38. *McDonald*, 130 S. Ct. at 3031 (internal quotations omitted).
39. *Id.* at 3034.
40. *Id.* at 3036 (internal quotations omitted).
41. *See id.* at 3035 n.13 (listing the rights not fully incorporated).
42. *Id.* at 3035.

[C]oncern over the right to bear arms was itself an impetus for ratification of the Fourteenth Amendment.

In *Heller*, the Court used history to conclude that individual self-defense is the "central component" of the Second Amendment;[43] here, the Court used history to show why this right of individual self-defense is fundamental. Going as far back as the 17th century, the Court found it notable that the English Bill of Rights recognized a right to keep arms for self-defense, and as early as 1765, Blackstone declared this right to be fundamental. The Court explained how 18th-century American colonists shared this point of view, as evidenced by opposition to the King's attempted disarmament of the colonies. The fundamental nature of this right was also evident in the debates of those who framed the Bill of Rights: Antifederalists feared that the federal government would disarm the people and Federalists claimed that the government's constitutionally limited powers made infringement of this important right impossible. As the Court concluded, "Antifederalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government."[44] The compromise between these two groups resulted in the Second Amendment.

In what is perhaps the most persuasive piece of historical evidence, the Court showed how concern over the right to bear arms was itself an impetus for ratification of the Fourteenth Amendment. Fast-forwarding to the mid-19th century, the Court explained how cooling Antifederalist fears were replaced by an emphasis on the right of self-defense. As the Civil War ended, droves of African-American veterans of the Union Army returned to the South only to be stripped of their firearms—both by force of law and by physical violence. The 39th Congress took note of such injustices and responded with the Freedmen's Bureau bill and the Civil Rights Act of 1866, both of which explicitly recognized the right of all citizens to keep and bear arms, regardless of skin color. These legislative responses, the Court concluded, "demonstrate that the right was still recognized to be fundamental."[45] Ultimately, Congress felt a constitutional amendment was necessary to successfully protect this fundamental right, among others. Thus, the Fourteenth Amendment was passed, which was generally "understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866."[46] As further evidence of this right's fundamental nature, the Court offered several excerpts from congressional debates over the Fourteenth Amendment. The Court also pointed out that, at the time of the Amendment's ratification, 22 of 37 state constitutions had already recognized the right to bear arms.

Lastly, the Court declined the municipalities' invitation to deviate from the selective incorporation analysis it has preferred over the last 50 years. The Court made clear that a right's incorporation does not turn on the ability "to imagine *any* civilized legal system that does not recognize a particular right,"[47] but whether the right is fundamental from an American perspective.

The Court did not make clear, however, the standard of review that should apply to laws that burden the right to bear arms. Nor do the small clues that did make their way into the opinion offer any further enlightenment. At one point, the Court agreed with and quoted from an *amicus* brief filed by 38 states, which noted that state and local "'experimentation with reasonable firearms regulations will continue under the Second Amendment.'"[48] The notion that "reasonable" firearm regulations will be permissible does not necessarily reek of the strict scrutiny that the Court often employs in the realm of fundamental rights. On the other hand, one might not read too much into this quote, as the Court also reaffirmed what it said in *Heller*, that Second Amendment rights should not be determined by "judicial interest balancing."[49]

Given the importance of the issue, it is not surprising that this case produced voluminous concurring and dissenting opinions. Justice Scalia concurred in the Court's result, briefly expressing his usual doubts about the origins of substantive due process, using most of his space to pick at the analytical framework forwarded by Justice Stevens's dissent. Justice Scalia took issue with what he felt was a very subjective approach, which favors a multifactor test over the plurality's historical, tradition-based approach. Justice Scalia summed up his qualm with this approach when he observed that the "ability of omnidirectional guideposts to constrain is inversely proportional to their number . . . even individually, each lodestar or limitation [Justice Stevens] lists either is incapable of restraining judicial whimsy or cannot be squared with the precedents he seeks to preserve."[50] But as Justice Stevens pointed out in his dissent, Justice Scalia's historical, tradition-based approach is also vulnerable to subjectivity. Justice Thomas wrote a concurrence as well, in which he engaged in his own historical account to show why it is the Privileges and Immunities Clause, not the Due Process Clause, which guarantees state citizens the right to bear arms.

Turning next to the dissents, Justice Stevens disagreed with the plurality notion that, if incorporated against the states, constitutional rights reflect identically the scope of federal rights. In other words, he prefers the "two-track" approach. For Justice Stevens, substantive due process, not selective incorporation, presents the proper inquiry in this case—selective incorporation is merely one "subset" of substantive due process.[51] Thus, under his analysis, *Heller*'s interpretation of the Second Amendment has no bearing on the question of whether the Fourteenth Amendment's Due Process Clause guarantees state citizens the right to possess handguns in their homes. As mentioned above, Justice Stevens proposed several

43. *Id.* at 3036.
44. *Id.* at 3037.
45. *Id.* at 3040.
46. *Id.* at 3041.
47. *Id.* at 3044.
48. *Id.* at 3046 (quoting Brief for State of Texas et al. as *Amici Curiae* 23).
49. *Id.* at 3047.
50. *Id.* at 3052 (Scalia, J., concurring).
51. *Id.* at 3093 (Stevens, J., dissenting).

factors that must be examined to answer this question, including "[t]extual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the traditions and conscience of our people."[52] Justice Stevens emphasized, however, that there is no "all-purpose, top-down, totalizing theory of 'liberty.'"[53] In applying this approach, it seems his principal deviation from the plurality lay in the import he took from the plurality's historical evidence: "The many episodes of brutal violence against African-Americans that blight our Nation's history . . . do not suggest that every American must be allowed to own whatever type of firearm he or she desires—just that no group of Americans should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists."[54]

Lastly, Justice Breyer dissented, raising new historical evidence regarding the enactment of the Second Amendment in an attempt to cast doubt on *Heller*. He goes on to offer several reasons why, even taking *Heller* to be correct, incorporation of the Second Amendment is not appropriate. Much like Justice Stevens's approach, Justice Breyer believes that other factors, outside of history, merit consideration for such an important inquiry.

FIRST AMENDMENT: FREEDOM OF SPEECH

Although *McDonald*'s incorporation of the Second Amendment was certainly one of the landmark decisions of this Term, it may still take a backseat to the commotion over *Citizens United v. Federal Election Commission*.[55] In this case, the Court overruled two relatively recent campaign finance First Amendment precedents—*McConnell v. Federal Election Commission* and *Austin v. Michigan Chamber of Commerce*[56]—and set off a wave of criticism among journalists and legal commentators alike.[57]

Citizens United, a nonprofit corporation, brought this case to the Supreme Court after a federal district court ruled that the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited the distribution and advertising of its documentary, *Hillary: The Movie*. The documentary was quite critical of then-Senator and democratic presidential nominee hopeful Hillary Clinton. Citizens United planned to pay a cable company to make the documentary available through video-on-demand in the time period leading up to the 2008 primary elections. According to the district court, this expenditure fell under the BCRA's provision prohibiting corporations from spending general treasury funds on "electioneering communications"—defined as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election."[58] Although Citizens United initially argued that this prohibition was merely unconstitutional as applied to its documentary, the Court felt it was obligated to reconsider *Austin* and *McConnell*. Thus, the Court had to decide whether the holdings of those cases were correct—whether "political speech may be banned based on the speaker's corporate identity."[59]

[T]he First Amendment prevents the Government from silencing . . . speakers . . . because they have taken on the corporate form.

The gist of Justice Kennedy's answer to this question was simple enough: the First Amendment prevents the Government from silencing a group of speakers merely because they have taken on the corporate form. The Court derived this conclusion from two key cases, *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti*.[60] According to the Court, *Buckley* held that limits on individual, independent campaign spending violated the First Amendment; *Bellotti* held that the First Amendment prohibits the Government from imposing speech restrictions based on a speaker's corporate identity. Considering these two holdings together, the Court determined that the BCRA's prohibition on independent corporate expenditures was unconstitutional: if *Buckley* guarantees individuals the constitutional right to make independent expenditures without limit, then *Bellotti* guarantees corporations that same right. But the Court's opinion is more than just reliance on prior precedent; it is clear that the Court viewed this law as repugnant to the First Amendment principles so important to a functioning democracy: "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[61]

Despite this tension with First Amendment principles, the constitutionality of the BCRA's prohibition might have been saved if it were the least restrictive means of achieving a compelling governmental interest. *Austin*, decided after the two aforementioned cases, forwarded such a justification, holding that the Government had a compelling interest in preventing the "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[62] But according to the Court, this anti-distortion rationale was used as a means to avoid the ultimate implications of *Buckley* and *Bellotti*. Thus, the Court overruled *Austin* as an "aberration,"[63] holding that the government has no interest in equalizing the

52. *Id.* at 3096 (internal quotations and footnote omitted).
53. *Id.* at 3100.
54. *Id.* at 3112 (citations omitted).
55. 130 S. Ct. 876 (2010).
56. 540 U.S. 93 (2003); 494 U.S. 652 (1990).
57. *See generally* Floyd Abrams, Citizens United *and Its Critics*, 120 Yale L.J. Online 77 (2010) (describing some of the more harsh instances of criticism).
58. *Citizens United*, 130 S. Ct. at 887.
59. *Id.* at 886.
60. 424 U.S. 1 (1976); 435 U.S. 765 (1978).
61. *Citizens United*, 130 S. Ct. at 907.
62. *Id.* at 903 (citing *Austin*, 494 U.S. at 660).
63. *Id.* at 907.

Justice Stevens disagreed with the very essence of the majority's First Amendment analysis.

political playing field and that it cannot limit political speech based on the amount of a corporation's wealth. The Court further noted that it does not matter that the funds used for corporate speech are accumulated from a public that might dissent from the corporate message, because even individual speakers "use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas."[64]

For the Court, the danger of the opposite conclusion was gravely illuminated by two hypothetical situations. If the anti-distortion rationale were correct, media outlets, which are often organized as corporations, theoretically would not be able to express their political views during the specified election times.[65] Second, although "electioneering communications" does not encompass the print medium under the BCRA, the anti-distortion rationale would theoretically allow the Government to prevent corporations from printing books. Putting these hypothetical concerns aside, the practical reality of this case is that for-profit corporations may now spend unlimited amounts of money to advocate for candidates in the key months leading up to elections. As mentioned above, this pragmatic consequence led to much ire from commentators, and no doubt it motivated Justice Stevens's spirited dissent, joined by three other Justices.

Justice Stevens began by criticizing what he felt was the majority's lack of judicial restraint in looking beyond Citizens United's as-applied challenge to reconsider *Austin* and *McConnell*. For him, the case was more appropriately resolved by holding that the BCRA's statutory prohibition on electioneering communications simply did not encompass *Hillary*. He took further issue with the Court's repeated characterization of the BCRA's limit on electioneering communications as a total "ban," pointing out that members of a corporation are free to create and fund political action committees to continue "speaking" in favor of political candidates as a group. Also, to the extent the majority doubted the ease with which corporations could implement and manage PACs, he noted that the Court's judicial activism left "no record to show how substantial the burden really is, just the majority's own unsupported factfinding."[66]

In addition to questioning the posture on which the case was decided, Justice Stevens disagreed with the very essence of the majority's First Amendment analysis. The majority held that the First Amendment guarantees corporations the same speech rights as individuals, and that the democratic process will benefit from their unfettered voices. Quite oppositely, Justice Stevens argued that the First Amendment allows—and that the principles of democracy require—this distinction between human and corporation:

> In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.[67]

Justice Stevens also expressed serious doubts about the interpretation of precedent the majority used to arrive at its decision. Most significantly, he explained that *Bellotti* did not in fact hold that individuals and corporations must enjoy identical parameters of free speech, especially with regard to independent expenditures. To the contrary, *Bellotti* involved a viewpoint-discriminatory state statute aimed at restricting business-corporation expenditures on a specific tax referendum, which "plainly offended" the First Amendment.[68] Not only that, but Justice Stevens pointed out that *Bellotti* expressly stated that its holding did not apply to the "'context of participation in a political campaign for election to public office.'"[69]

Lastly, Justice Stevens attacked the majority's interpretation and under-appreciation of the compelling governmental interests forwarded by *Austin*. According to him, *Austin*'s holding was not merely based on the interest in preventing some potential distortion among human and corporate speakers. Rather, that holding was justified by the broader concern over the potential corruption of the political process that such large independent expenditures might cause, of which the distortion of individual voters' voices was merely a part. Justices Stevens pointed to the massive legislative record accompanying the BCRA's passage as evidence that these broad concerns have come to fruition, with large corporate expenditures creating the appearance of political tradeoffs. As he put it, "In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials."[70] The majority does not disagree that even the appearance of *quid pro quo* corruption presents a valid justification for the regulation of speech; at this point, the majority simply does not see corporate independent expenditures as creating this appearance.

64. *Id.* at 905.
65. The BCRA section in question, however, did contain an exception for media corporations.
66. *Citizens United*, 130 S. Ct. at 943 (Stevens, J., dissenting).
67. *Id.* at 930.
68. *Id.* at 959 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).
69. *Id.* at 958 (quoting *Bellotti*, 435 U.S. at 788 n.26).
70. *Id.* at 965.

Ultimately, *Citizens United* displayed the stark contrast between the views of the Court's liberal and conservative wings regarding both the political realities created by independent corporate expenditures and the implications of the First Amendment itself. Unlike *Citizens United*, the Court's other First Amendment decisions this Term were not so hotly contested, but are perhaps equally fascinating.

In *United States v. Stevens*, the Court considered the constitutionality of a federal statute that attempted to criminalize "the commercial creation, sale, or possession of certain depictions of animal cruelty."[71] Robert Stevens, indicted for hawking various types of dog-fighting videos, challenged the statute as facially unconstitutional under the First Amendment's guarantee of free speech. More than anything, the Court's response exposed an instance of poor legislative drafting, but it also contained a bit of interesting First Amendment analysis.

Applying the overbreadth doctrine, an eight-Justice majority held that the law was capable of too many unconstitutional applications.[72] The statute defined "depictions of animal cruelty" as "any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" in a manner that is illegal under state or federal law.[73] The words "wounded" and "killed," the Court noted, did not carry any "cruel" qualifier and they do not inherently imply cruelty. Moreover, the statute's requirement that the depicted conduct be illegal under federal or state law did not serve to narrow the statute's focus to depictions of animal cruelty. As the Court pointed out, there are numerous state and federal laws concerning the proper treatment of animals that have no relation to animal cruelty. For instance, there exist countless nuances among the lawful methods of hunting in various states, with some states outlawing hunting altogether. Thus, the statute criminalizes videos or magazines depicting a particular type of hunting—which might be legal in some states—if possessed or sold in a state where such hunting is not legal. Given the enormity of the hunting industry, the Court concluded that the statute's criminal prohibition was so broad as to be unconstitutional.

From a First Amendment standpoint, the Court's overbreadth analysis is interesting in that it allowed the Court to avoid deciding whether a prohibition that strictly applied to depictions of animal cruelty would be constitutional.[74] But despite the avoidance of this important question, the Court did venture to say that animal cruelty would not join the slim ranks of speech categories that receive no protection whatsoever under the First Amendment, such as obscenity or inciting speech.[75] The Court acknowledged, however, that there might be other types of speech not yet recognized by the Court that belong in this group. The Justices did not provide any concrete test for singling out these types of speech, other than pointing out that other categories had been "previously recognized" by the legal community and were "long-established."[76] In any case, animal cruelty does not belong in this group, and therefore any speech restriction based on animal cruelty would be deemed content-based and subject to strict scrutiny. It seems likely, however, that a more narrowly drawn statute might pass strict scrutiny on the compelling governmental interest in reinforcing restrictions on the underlying conduct depicted—*i.e.*, animal cruelty.[77]

[A]n eight-Justice majority held that the law was capable of too many unconstitutional applications.

Also this Term, the Court clarified the distinction between a First Amendment-overbreadth challenge and a Fifth Amendment Due Process-vagueness challenge. In *Holder v. Humanitarian Law Project*, the Court considered a challenge to the federal statute that prohibits individuals or groups from providing "material support" to foreign terrorist organizations.[78] The plaintiffs, various human-rights and nonprofit organizations, requested declaratory relief so that they might go ahead with efforts to support the humanitarian and political arms of two foreign terrorist organizations. The plaintiffs sought to provide legal training—teaching the groups how to use international law and the United Nations to peaceably resolve disputes—and to engage in political advocacy on behalf of these groups.

For their first argument, the plaintiffs contended that the statute's definition of "material support"—including the terms "training," "expert advice or assistance," "service," and "personnel"—was unconstitutionally vague.[79] For example, the plaintiffs argued it was unclear whether the statute prohibited them from providing a course on geography to members of these foreign groups. The problem with the plaintiffs' challenge, the Court explained, was that it relied on hypothetical modes of support to illustrate the statute's grayer areas, while a person of common intelligence would clearly understand that legal training was prohibited under the statute's definitions of "training" and "expert advice or assistance." Thus, even when a statute's prohibition covers speech, and "a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice."[80] The Court explained that such hypothetical sce-

71. 130 S. Ct. 1577, 1582 (2010).
72. Justice Alito dissented, expressing his doubts about whether the Court should apply the overbreadth doctrine without first determining whether the statute was constitutionally applied to Stevens. He also disagreed that the statute was overbroad.
73. *Stevens*, 130 S. Ct. at 1583 n.1 (citing 18 U.S.C. § 48(c)(1)).
74. *See id.* at 1592 ("We therefore need not and do not decide whether a statute limited to . . . depictions of extreme animal cruelty would be constitutional.").
75. For a list of the other types of speech traditionally thought of as unprotected, see *id.* at 1584.
76. *Id.* at 1586.
77. *See id.* at 1592 (acknowledging the Government's argument to this effect, implying that the justification failed in this case due to the extremely broad scope of the statute).
78. 130 S. Ct. 2705 (2010).
79. *Id.* at 2707 (citing 18 U.S.C. § 2339B(a)(1)).
80. *Id.* at 2719.

[T]he Court concluded that "[s]uch support frees up other resources within the organization that may be put to violent ends," . . .

narios were only relevant to a First Amendment-overbreadth argument.

Turning next to the plaintiffs' as-applied First Amendment challenge, the Court first noted that the statute does not prohibit any independent advocacy or expression; rather, it is "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[81] Thus, to the extent the plaintiffs wanted to provide political advocacy that was not coordinated with the foreign terrorist groups, they were free to do so. But the statute did prohibit the plaintiffs from providing material support in the form of speech *to* these groups. In that sense, the statute was content-based and the Government had the burden of showing that it was necessary to achieve a compelling governmental interest.

Neither the parties nor the Court had any doubt that combating terrorism is "an urgent objective of the highest order;"[82] the only question was whether the statute's prohibition on material support—including, as in this case, support for a terrorist organization's legitimate activities—was *necessary* to combat terrorism. Six Justices held that prohibiting even this good-intentioned support was indeed necessary. Deferring to both congressional and executive branch findings, the Court concluded that "[s]uch support frees up other resources within the organization that may be put to violent ends," because foreign terrorist organizations do not maintain legitimate "firewalls" between their "civil, nonviolent activities" and their "violent, terrorist operations."[83] The majority was careful to note, however, that "'authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.'"[84]

In addition to passing judgment on all of these federal statutes, the Court also entertained a pair of First Amendment cases regarding state action. In *John Doe #1 v. Reed*, a group of citizens challenged Washington's Public Records Act (PRA) as an unconstitutional burden on Free Speech.[85] This case began with the Washington government's passage of a controversial bill that provided expanded benefits to registered same-sex domestic partners. The plaintiffs signed a petition to initiate a process where Washington citizens can subject any given state law to referendum approval. After the bill was put to a vote and upheld, various groups that favored the bill sought to obtain a copy of the petition, which was considered a public record and thus available for public inspection and copying under Washington's PRA.

Given that these groups intended to post the petition on a public website in a searchable format, the plaintiff signatories challenged the PRA as unconstitutionally burdening their political expression. Before deciding the issue, the Court noted the unique scope of the question before it, stating that the plaintiffs' claim resembled both an as-applied challenge and a facial challenge:

> The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.[86]

In an interesting juxtaposition to *Citizens United*—where the Court looked beyond the plaintiffs' as-applied challenge and considered the BCRA's facial validity—the Court refused the plaintiffs' request to construe their claim as challenging the validity of Washington's PRA in light of its specific application to them.

The plaintiffs could not satisfy the burden that accompanied this broader "facial" challenge, failing to show that the PRA would be unconstitutional in every application to referendum petitions. The Court acknowledged the political nature of signing a referendum petition, but nevertheless applied an intermediate form of scrutiny given the PRA was merely a disclosure requirement and not a prohibition on political speech. Ultimately, the Court held that the disclosure requirement was substantially related to the important governmental interest of promoting transparency and accountability in the electoral process. This substantial relationship lies in the fact that public disclosure allows the public to supplement the state's own efforts to verify the petition's signatures as legitimate. Further, from a general standpoint, this governmental interest is proportional to the incidental burden on speech that might result from the fear of harassment a public disclosure of an individual's signature could illicit. This was true for the Court given that most bills put to a referendum vote through the petition process do not involve such controversial issues, and thus the usual burdens are not "remotely like the burdens plaintiffs fear in this case."[87] Whether these specific burdens might have constitutional significance is a question the Court left to the district courts—for now.

The second case involving state action was *Christian Legal Society v. Martinez*.[88] In this case, the Christian Legal Society (CLS), a student group at the University of California's Hastings College of the Law, brought a § 1983 action seeking declaratory and injunctive relief from Hastings's "admit all-comers" student-organization policy. Hastings's policy allows

81. *Id.* at 2723.
82. *Id.* at 2724.
83. *Id.* at 2725–26.
84. *Id.* at 2727 (quoting Justice Breyer's dissent at 2743). The dissent's principal disagreement with the majority seems to be whether this nonmonetary, educational-type support really is "fungible," *i.e.*, whether it truly frees up resources for violent terrorism.
85. 130 S. Ct. 2811 (2010).
86. *Id.* at 2817.
87. *Id.* at 2821.
88. 130 S. Ct. 2971 (2010).

registered student organizations to receive certain benefits—including possible financial assistance from the law school and access to school facilities—in exchange for complying with certain policies. The plaintiff student group took issue with Hastings's nondiscrimination policy, which the school interpreted to require all student groups to "allow any student to participate, become a member, or seek leadership positions in the organization," regardless of status or beliefs.[89] CLS interpreted its bylaws to exclude individuals who carry religious convictions that deviate from the group's beliefs and to exclude individuals who engage in "unrepentant homosexual conduct."[90] Given these exclusive bylaws, Hastings denied CLS registered-organization status, but offered it most of the attendant benefits anyway, save for financial support from the school. This denial led CLS to challenge Hastings's policy as an unconstitutional burden on its First Amendment free-speech and expressive-association rights.

Justice Ginsburg, writing for a 5-to-4 majority, explained that CLS's challenge was properly analyzed under the Court's limited-public-forum jurisprudence, and not the more demanding standard that is sometimes used to analyze associational-freedom cases. The Court reasoned that it would be inconsistent to forgo the lesser scrutiny applicable to limited public forums merely because a case involves expressive association as opposed to speech. This is especially true in cases where, as here, expressive association and speech are closely linked, and the challenged rule applies "only indirect pressure" upon groups' membership policies, as opposed to direct compulsion.[91] Thus, given that the limited-public-forum standard controlled, Hastings had the burden of showing that its restriction on access was reasonable given the purpose of the forum, and that it was not discriminating against speech on the basis of viewpoint.

The Court first summarized the various justifications offered by Hastings to support its all-comers policy, finding all of them to be reasonable: to ensure that "leadership, educational, and social opportunities" provided by registered student organizations are available to all students; to allow Hastings to police its nondiscrimination policy without inquiring into student organizations' reasons for restricting membership; to encourage "tolerance, cooperation, and learning among students;" and finally, to advance state-law goals by choosing not to subsidize "conduct of which the people of California disapprove."[92] The Court found the all-comers policy to be all the more reasonable given the substantial alternative channels of communication made available to CLS in spite of their non-registered status, including access to school facilities for meetings and the use of bulletin boards and chalkboards for advertising. These alternative channels of communication, however, cannot save what is otherwise a viewpoint-discriminatory restriction on limited-public-forum access. But the Court had very little trouble in concluding that Hastings's policy was viewpoint neutral: "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[93] Ultimately, given its reasonableness and viewpoint neutrality, the Court held Hastings's all-comers policy did not violate the First Amendment.

[T]he Court had very little trouble in concluding that Hastings's policy was viewpoint neutral . . .

Justice Alito dissented from the Court's opinion and was joined by Chief Justice Roberts and Justices Scalia and Thomas. Though the dissenters did disagree with the majority's dispatching of certain precedents they felt were controlling, their main qualm seemed to lie in the Court's interpretation of the factual record before it. While the majority was content to analyze the constitutionality of the purported all-comers policy, the dissent argued that the record exposed this policy as mere pretext, developed after litigation was initiated. For the dissent, the proper issue was whether Hastings's *written* nondiscrimination policy constituted an impermissible burden on speech or associational expression. If the dissent's interpretation of the facts is correct, its conclusion that Hastings's policy is unconstitutional as viewpoint discriminative is difficult to deny—the written policy prohibited student groups from excluding members on the basis of religion, but not on the basis of other, secular characteristics like political affiliation.[94]

EMPLOYMENT DISCRIMINATION

In addition to grappling with these difficult constitutional questions, the Court resolved a novel issue regarding the timeliness of Title VII employment discrimination suits. Though not as philosophically stimulating as some of the Court's other writings this Term, it seems likely that *Lewis v. City of Chicago* will not go unnoticed in employment law circles.[95] This case dates back to 1995, when the city of Chicago sought to pare down the list of some 26,000 applicants seeking employment with the City's fire department by administering a written examination. The City released the results in January 1996 and announced that applicants who scored an 89 percent or better would be selected at random to move forward in the application process. This random selection process was repeated 11 times over the next six years until all of the top scorers were selected. In March of 1997, an African-American applicant who did not score in the top tier, and thus did not get hired, filed a discrimination charge with the Equal Opportunity Employment Commission (EEOC). The EEOC granted the right to sue, and the man filed a Title VII suit alleging that the City's policy of selecting only from the 89-percent-or-better pool had a disparate impact on African Americans. The district court eventually certified a class of 6,000 plaintiffs consisting

89. *Id.* at 2979 (internal quotations omitted).
90. *Id.* at 2980 (internal quotations omitted).
91. *Id.* at 2986.
92. *Id.* at 2989–90.
93. *Id.* at 2993.
94. The written policy stated that student groups "shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." *Id.* at 2979 (internal quotations omitted).
95. 130 S. Ct. 2191 (2010).

[E]mployees may sue . . . based on recently realized disparate impacts that result from employment policies long ago adopted.

of African Americans who passed the examination but did not score in the City's preferred range.

The City conceded that the 89-percent cutoff had a disparate impact, but it defended on the ground that the only actionable instance of discrimination occurred in January 1996, when it first divided the applicants into different tiers. The City argued, therefore, that even if the March 1997 filing date of the initial plaintiff's EEOC charge applied to the entire class,[96] the plaintiffs' claim was untimely under Title VII, which requires a discrimination charge to be filed with the EEOC within 300 days of accrual.[97] Thus, the issue for the Court was "whether a plaintiff who does not file a timely charge challenging the *adoption* of a practice . . . may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice."[98] The Court easily, and unanimously, held that the plaintiffs had presented a timely claim because, although "the City had adopted the eligibility list . . . earlier . . . it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters."[99]

The practical effect of the Court's holding is that employees may sue under Title VII based on recently realized disparate impacts that result from employment policies long ago adopted. The Court acknowledged the City and its *amici*'s point that this may create notable practical problems in resolving disputes, including evidence-gathering problems. But the Court simply responded that if such consequences were unintended, "it is a problem for Congress, not one that federal courts can fix."[100]

FEDERALISM AND SEPARATION OF POWERS

While the Court was most often demarcating the fine lines that lie between the people and government, this Term also forced the Court to retrace—or redraw, depending on point of view—the line between state and federal power. In *United States v. Comstock*, five incarcerated individuals challenged the constitutionality of a federal statute that allowed the Department of Justice to keep the individuals civilly committed beyond the length of their sentences.[101] The statute allows a district court to order civil commitment of a federal inmate if the Government can prove by clear and convincing evidence that the individual "has engaged in sexually violent activity or child molestation in the past and . . . he suffers from a mental illness that makes him correspondingly dangerous to others."[102] Although the plaintiffs lodged numerous constitutional arguments in the district court, the only issue on review was whether Congress, in creating this civil commitment statute, exceeded its constitutionally enumerated powers. Specifically, the Government petitioned the Court to decide whether Congress's enactment was justified under the Necessary and Proper Clause, which gives Congress the power to make laws that "carry[] into Execution" its other enumerated powers.[103]

Seven members of the Court agreed that the Necessary and Proper Clause justified the statute, though only four joined Justice Breyer's majority opinion.[104] The majority laid out five considerations in support of its holding. First, the Clause grants Congress broad authority to legislate, which in turn suggests a tame standard of review where the Court merely looks "to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."[105] The Court explained that as long as this rational relation exists, Congress, and not the courts, may determine how closely the means will relate to the end. It is this loose means-ends relationship that upholds the existence of the vast majority of federal criminal statutes.

The second and third considerations more or less apply this test. The Court summarized the history of Congress's mental-health-civil-commitment schemes, characterizing the statute at issue as a marginal "addition." In other words, this statute is very similar to statutes that have long been recognized as rationally related to some enumerated power. Next, in perhaps the most provocative of the five considerations, the Court traversed the multi-leg route that connects *this* civil commitment statute to a constitutionally enumerated power: this statute is "reasonably adapted" to further Congress's "power to act as a responsible federal custodian," and this federal custodian power is itself justified because it furthers "federal criminal statutes that legitimately seek to implement constitutionally enumerated authority."[106]

Moving to the fourth consideration, the Court emphasized the statute's deference to the States—the statute requires the Attorney General to inform the State where the federal prisoner is domiciled or was tried of the possibility of civil commitment, and encourage the State to assume custody. Given that the Court long ago rejected a State-sovereignty-based

96. The Court expressed no view on whether this was true, but assumed it was for purposes of analysis. *Id.* at 2197 n.4.
97. 42 U.S.C. § 2000e-5(e)(1).
98. *Lewis*, 130 S. Ct. at 2195 (emphasis added).
99. *Id.* at 2198.
100. *Id.* at 2200.
101. 130 S. Ct. 1949 (2010).
102. *Id.* at 1954 (citing 18 U.S.C. § 4248 and paraphrasing the requirements of § 4247(a)(5)–(6)).
103. U.S. CONST. art. I, § 8, cl. 18. The Court carefully noted that it was expressing no opinion on whether this statute runs afoul of some other constitutional provision; it assumed the statute to be otherwise constitutional for purposes of answering the Necessary and Proper Clause question. *Comstock*, 130 S. Ct. at 1956.
104. Justice Kennedy wrote separately, and briefly, to express some reservations about the Court's remarks regarding State power under the Tenth Amendment. Justice Alito wrote separately because he did not believe the Court's ambiguous five-factor test was necessary to reach its conclusion.
105. *Comstock*, 130 S. Ct. at 1956.
106. *Id.* at 1961.

challenge to a less deferential civil-commitment statute,[107] it concluded there was no federalism problem here. The final consideration driving the Court's conclusion was the narrow scope of the statute—applying only to individuals in federal custody—which cuts against the concern that the Court's holding steps closer to creating some kind of federal police power.

Reading the Court's opinion, this case's impact on federalism may seem tenuous—as the majority showed, the federal statute did not overtly tread on some area of State sovereignty. Motivating the two dissenters, it seems, is the fear that such a broad reading of Congress's power under the Necessary and Proper Clause will nevertheless chip away at the vast remnant of power meant for the States. Justice Thomas, joined by Justice Scalia, first pointed out what he felt was a critical misstep in the Court's analysis: the Court's failure to first make sure that the statute's end was "legitimate," in other words, aimed at furthering an express constitutional power.[108] If the end is illegitimate, the means-end relationship is irrelevant. In this case, Justice Thomas could see no legitimate end, because "it is clear, on the face of the Act and in the Government's arguments urging its constitutionality, that [the statute] is aimed at protecting society from acts of sexual violence, not toward 'carrying into Execution' any enumerated power or powers of the Federal Government."[109] Nor did Justice Thomas agree that the statute's constitutionality could be saved by merely looking to other, valid criminal statutes and concluding that the statute at issue is related to those laws, and thus is related to an enumerated power. This rationale, Justice Thomas wrote, "if followed to its logical extreme, would result in unwarranted expansion of federal power."[110]

Lastly, the Court was also busy in its role as referee between the executive and legislative branches. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, an accounting firm and the nonprofit Free Enterprise Fund asked the Court to declare the Public Company Accounting Oversight Board unconstitutional and to enjoin the Board from exercising its powers.[111] The Board, a private nonprofit corporation created by the Sarbanes-Oxley Act to regulate the accounting industry more closely, features five members who are appointed by the Securities and Exchange Commission. The plaintiffs argued unconstitutionality on the ground that the Board members, as executive officers,[112] were too far insulated from executive review: the Commission may only remove the Board members for cause, and the President in turn may only remove the Commission members for cause, thus diluting the executive's control over the Board members. The question for the Court, then, was whether this double layer of protection was inconsistent with the separation of powers envisioned by the Constitution.

[T]he Court held that the Constitution could not tolerate the "dual for-cause limitations."

In a 5-to-4 decision, the Court held that the Constitution could not tolerate the "dual for-cause limitations."[113] Chief Justice Roberts began by recalling the long-held understanding that because it is the President's constitutional responsibility to ensure the laws are executed, he must have the resultant "'power of removing those for whom he can not continue to be responsible.'"[114] This power is tempered, of course, by Congress's ability to impose for-cause limits on the President's removal power when some level of independence is desirable, *i.e.,* when officers are performing quasi-legislative or quasi-judicial functions. The Court noted that a similar logic has been applied to uphold for-cause limitations on department heads' ability to remove inferior executive officers.

But the Court explained that when both types of limitations come together in one chain of authority, it creates a situation where Board members are not removable except for good cause, and the President has no say 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."[115] This is markedly different from the situation where the Board members are not insulated from the Commission by a for-cause standard, and the "President could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does."[116] Instead, the double for-cause standard "impaired" the President's "ability to execute the laws [] by holding his subordinates accountable for their conduct."[117] For the Court, the necessity of this holding was only heightened by the fear that approving two layers would lead Congress to impose even more layers of protection in the future. Ultimately, the Court merely severed the part of Sarbanes-Oxley that imposed for-cause limits on the Commission's ability to remove Board members, as opposed to dispatching the Board altogether.

The dissent, led by Justice Breyer, felt the Court's opinion was too far removed from the practical realities of executive governance—any for-cause limitation will have a far lesser affect than the slew of political and administrative factors that limit the President's power to "get something done."[118] The dissent also attempted to poke a large hole in the principal logic of the majority's holding: if the President really is prevented from removing the Commissioners but for good cause

107. *See* Greenwood v. United States, 350 U.S. 366 (1956).
108. *Comstock*, 130 S. Ct. at 1971, 1975 (Thomas, J., dissenting).
109. *Id.* at 1974.
110. *Id.* at 1976. Justice Scalia did not join the part of Justice Thomas's opinion that contained this sentence, part III.A.1.b.
111. 130 S. Ct. 3138 (2010).
112. Although Sarbanes-Oxley specifies that Board members are not Government officials for statutory purposes, both parties agreed that, for constitutional purposes, Board members are Government officers who exercise significant authority. *Id.* at 3148.
113. *Id.* at 3152.
114. *Id.* (citing Myers v. United States, 272 U.S. 52 (1926)).
115. *Id.* at 3153.
116. *Id.* at 3154.
117. *Id.*
118. *Id.* at 3170 (Breyer, J., dissenting).

(the first layer of insulation), then, regardless of any second layer, the President will have no power to effect the removal of Board members if the Commission reasonably decides not to do so on its own. In the dissent's words, "the majority's decision to eliminate only *Layer Two* accomplishes virtually nothing."[119] Lastly, the dissent raised serious concerns over whether the Court's opinion might result in the future invalidation of entire administrative agencies given that severability might not always be available as a constitutional cure.

The colossal importance of so many of the Court's decisions this Term is undeniable. The opinions are fascinating in and of themselves, but, like all of the Court's decisions, awaiting the repercussions (good or bad) will be the most interesting part. With decisions touching corporate freedom of speech, the right to possess handguns in the home, terrorism, animal cruelty, and executive power, the coming years should be interesting indeed.

Tim Davis is a commercial litigation associate with the firm of Bryan Cave LLP, where he works in its Kansas City office. Davis received his J.D. in 2010 from the University of Kansas School of Law, where he was editor-in-chief of the Kansas Law Review *and a teaching assistant in the school's legal research and writing program. After graduation, he served as a law clerk to the Hon. Steve Leben of the Kansas Court of Appeals.*

119. *Id.*