# CAC Supreme Court Preview:

## Three Big Cases, One Monumental Test for the Roberts Court

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## Introduction

*Citizens United v. FEC* -- heard by the Supreme Court in a rare September sitting -- has already been flagged as a huge test for Chief Justice John Roberts, particularly in terms of Roberts' willingness to overturn prior rulings by the Court. But *Citizens United* is only one of several big tests looming on the docket for Roberts and the five-Justice conservative majority he helps lead. Two other cases could end up being just as important when all is said and done:

- In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a cast of conservative all-stars -- including Ken Starr, Viet Dinh and Michael Carvin for the petitioners, and former Attorneys General Robert Barr and Edwin Meese as *Amici* -- is asking the Supreme Court to hold unconstitutional the Public Company Accounting Oversight Board (known colloquially as "peek-a-boo") established in the aftermath of the Enron scandal, because Congress sought to insulate the Board from presidential control. The case provides Chief Justice Roberts and Justice Samuel Alito with their first opportunity as Justices to weigh in on the "unitary executive" theory they helped develop during their work as young lawyers for the Reagan Administration.

- In *McDonald v. City of Chicago*, and its companion case, *NRA v. City of Chicago*, pending now on *certiorari* review, the Court is being asked to back away from century-old rulings holding that the Second Amendment does not apply against the states. If the Court decides to review one of these cases, it will have to decide not just whether, but how, the Fourteenth Amendment applies or "incorporates" the Second Amendment against the states, a matter that raises profoundly important questions about the Constitution and presents a dilemma for professed originalists like Justice Antonin Scalia.

Each of these cases involves a central objective of the conservative legal movement: equalization of corporate and individual speech in *Citizens United*, expansion of executive powers in *Free Enterprise Fund*, and stronger Second Amendment rights in *McDonald*. In all three cases, litigants

are pushing the Court to make significant changes to existing case law based on arguments about constitutional first principles, though, as we explain below, these arguments vary considerably in force. Collectively, these cases will help answer important questions about the Roberts Court: Will the Court be minimalist, resolving these big cases with narrow opinions focused on the nuances of the facts at bar? Will the Court instead boldly follow constitutional first principles, even if, as is the case in *McDonald*, these principles push in a direction conservatives like Justice Scalia will surely find uncomfortable? Or will the Court's conservative majority instead follow a results-oriented path, ignoring compelling arguments about constitutional text and history when they are inconvenient, overturning precedents when there are five votes, and moving consistently in only one direction: politically to the right?

## ***Citizens United v. FEC*: A Clean Test that Will Set the Stage**

*Citizens United* will almost certainly be the first case the Court decides this fall (it is technically still a case from the Court's October 2008 term), and the Court's decision will set the tone for the cases that follow. Three aspects of the case seem particularly important to watch:

A Spotlight on the Chief Justice. *Citizens United* focuses a spotlight on Chief Justice Roberts, both because the issue of adherence to precedent is so squarely presented -- the Court itself ordered briefing on whether it should overturn two prior rulings that upheld regulation of corporate independent spending in candidate elections -- and because three of Roberts' conservative colleagues, including, most importantly, Justice Kennedy, have already expressed a willingness to overrule these cases. If the Court steps back from the cliff and declines to overturn those cases -- *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC* -- the credit (or blame, depending on your perspective) will be squarely placed at Roberts' feet. By the same token, a ruling overturning these important precedents and unleashing unlimited corporate spending on elections -- a huge "jolt" to our legal system by anyone's measure -- would also be his responsibility.

Can Justice Stevens Do it Again? Justice John Paul Stevens plays a unique role on the Roberts Court. A Republican appointee with 35-years on the Court, a "greatest generation" statesman who served as a code breaker in World War II, and a first-rate intellect with deft political skills to match, Stevens can speak powerfully as the Court's institutional voice. At oral argument in *Citizens United,* Stevens seemed to be having a conversation directly with Chief Justice Roberts, reminding Roberts that his predecessor and former boss, Chief Justice Rehnquist, was in the majority in *Austin* and had powerfully articulated the basis in our Constitution's text and history for treating corporations differently than individuals. Roberts was ready for this, quickly chiming in that Rehnquist had changed his mind in dissent in *McConnell.* But no one on the Court or at the podium seemed to anticipate Stevens' focus on a position advanced by conservative stalwart Charles Cooper on behalf of the National Rifle Association, which Stevens advocated as a way the Court could rule for Citizens United and allow non-profit corporations to engage in electoral communications without overruling *Austin* and unleashing corporate and union election spending.

Justice Stevens' push towards a narrower resolution in *Citizens United* brought to mind last spring's blockbuster case that fizzled, *NAMUDNO v. Holder.* In *NAMUDNO,* after an oral argument at which the Court's conservative majority seemed eager to strike down a central component of the Voting Rights Act, the Court ruled narrowly in an opinion by Chief Justice Roberts that conspicuously relied on a theretofore obscure 1980 concurring opinion by Justice Stevens. Whether it is possible for Stevens to help engineer a similar feat in *Citizens United* remains to be seen, but one thing is certain: Stevens is irreplaceable and, if he does retire at the end of this term, as is being speculated, the Court will change rather dramatically regardless of who replaces him.

Ruling Broadly and Facing the Music. The label "politically deft" also applies in spades to Chief Justice Roberts, who despite his conservative views and the purported "liberal media bias," has received overwhelmingly favorable press coverage since his nomination to the Court four years ago. That could change in a hurry if Roberts writes or joins a sweeping ruling overturning a century of campaign finance laws in this country. Public and media attention to *Citizens United* has grown steadily since oral argument as the high stakes in the case have become apparent, and a broad ruling could trigger a fury of condemnation from the President, Congress, columnists and editorial boards that far exceeds what we've seen in response to any previous ruling of the Roberts Court. If this happens, it will be interesting to see whether Roberts responds to such an outcry either with: (1) the cheerful defiance that has been Justice Scalia's trademark in responding to unfavorable media; or (2) the caution for protecting the Court's institutional interests that has been Roberts' preferred course to date. This could have a big impact on how the Court's later rulings in big cases such as *Free Enterprise Fund* and *McDonald* (assuming the Court hears it) play out.

## ***Free Enterprise Fund v. PCAOB*: A Narrow Ruling or a Challenge to the "Headless Fourth Branch"?**

*Free Enterprise Fund v. Public Company Accounting Oversight Board* is a separation-of-powers and Appointments Clause challenge to the Public Company Accounting Oversight Board ("the Board" or "the PCAOB"). Created in 2002 as part of the Sarbanes-Oxley Act in the wake of the Enron financial auditing scandal, the Board ensures oversight of audits of public companies that are subject to federal securities laws.

Right now, *Free Enterprise Fund* looks a great deal like *Citizens United* looked this spring before oral argument -- a case involving a convoluted area of the law that should be decided narrowly based upon an application of prior case law to the facts of the case. Congress made the PCAOB a sub-unit within the SEC, and gave the SEC commissioners, not the President, the authority to remove Board members for cause. Since its 1935 ruling in *Humphrey's Executor v. United States,* the Court has upheld "for cause" restrictions on the President's ability to remove executive branch officials working for independent government agencies. Critics of the set-up of the PCAOB call it "Humphrey's Executor Squared," and argue that Congress has

unconstitutionally limited the President's power to control officials within the executive branch.

But lurking underneath the surface of *Free Enterprise Fund* is the boiling conservative opposition to *Humphrey's Executor* and the Court's ruling in *Morrison v. Olson* that extended *Humphrey's* to uphold the Independent Counsel Act. In its broadest formulations, the "unitary executive" theory -- a darling of the conservative legal movement positing that all executive authority must reside in the hands of the President -- would render unconstitutional many of the independent administrative agencies -- including the FCC, FEC, NRLB and the Federal Reserve -- that have been a fixture of this country's government since the New Deal. The "unitary executive" theory was pushed by those working in the Reagan Administration and Meese Justice Department, including John Roberts and Samuel Alito, then cutting their teeth as conservative lawyers. As then-Associate White House Counsel Roberts wrote to White House Counsel Fred Fielding in 1983*, "*the time is ripe to reconsider the Constitutional anomaly of independent agencies…" (Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007), pp 256-57.)

In 1987, Samuel Alito, then President Reagan's Deputy Assistant Attorney General for the Office of Legal Counsel, authored a brief for the Justice Department arguing that the Independent Counsel Act was unconstitutional because independent counsels were not removable at will by the president or the attorney general. Alito's brief asserted that "subordinate executive offices created by statute possess no constitutional power independent of the President. Any executive power authorized by such offices is the President's power and therefore must be exercised in accordance with his direction." While recognizing that the Supreme Court had, for more than a century, permitted Congress to limit the President's ability to fire an "inferior" federal officer except for misconduct or other "cause," Alito opined that these precedents could be construed as permitting removal whenever "the president believed the inferior officer not to be executing the laws faithfully." The Supreme Court ultimately rejected this argument in *Morrison v. Olson* and upheld the constitutionality of the independent counsel statute by a vote of 7-1, over what Justice Alito has called Justice Scalia's "brilliant, but lonely" dissenting opinion. (Citations and additional information about Alito's record on issues of executive power, along with a refutation of many of the central tenets of Scalia's and Alito's views on executive power, are available at www.communityrights.org/alitoreport.pdf.)

Scalia might not be so lonely anymore. Indeed, it seems safe to conclude that going into *Free Enterprise Fund*, there will be four members of the Supreme Court who favor a broad ruling limiting Congress' ability to insulate entities such as the PCAOB from presidential control. In April, Chief Justice Roberts and Justices Alito and Thomas signed on to a portion of Justice Scalia's opinion in *FCC v. Fox Television Stations, Inc.,* 129 S.Ct. 1800 (2009), that bemoans "the separation-of-powers dilemma posed by the Headless Fourth Branch [*i.e*.. independent agencies]" and accuses Justice Stevens and his liberal colleagues on the Court of wanting to let "Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." *Id.* at 1817. Justice Stevens pointedly responded that the FCC rulemaking process "may offend Justice Scalia's theory of the 'unitary

Executive,' but it does not offend the Constitution." *Id.* at 1826, n. 2 (Stevens, J. dissenting).

Passions are plainly high on this topic, particularly on the conservative side, and it seems likely that *Free Enterprise Fund* will split the Court along ideological lines. It is telling in this regard that Justice Kennedy, who joined most of the rest of Justice Scalia's *FCC* opinion, refused to join the passages quoted above. Justice Kennedy has also sided with the Court's liberals in a number of recent executive power/"war on terror" cases, suggesting that *Free Enterprise Fund* will likely end up as a spirited contest for Justice Kennedy's vote. That contest, in turn, may depend on whether the other conservatives are willing to accept an opinion distinguishing *Humphrey's Executor* and *Morrison* and leaving these earlier rulings in place, or instead whether they push for a broader opinion calling these earlier rulings into question. Like *Citizens United*, the outcome here will tell us a great deal about how aggressive the Court will be under Chief Justice Roberts' leadership in terms of jettisoning precedents that stand in the way of conservative results.

## *McDonald v. City of Chicago*: A Blockbuster in Waiting and a Dilemma for Justice Scalia

*Citizens United* and *Free Enterprise Fund* both seek far-reaching change in the name of constitutional first principles, but it's far from clear that the Court's conservatives have constitutional text and history on their side. *Citizens United* asks the Court to vindicate the constitutional rights of corporations, yet the Constitution was written to protect living persons -- the "We the People" named in the Constitution's first words. Throughout our Constitution's history, corporations have been seen as artificial entities exercising special privileges from the state, and as such subject to broad governmental regulation. (For more discussion, see the *amicus* **brief** filed by the League of Women Voters and Constitutional Accountability Center in *Citizens United*). *Free Enterprise Fund* faces similar obstacles. Conservatives highlight the argument that Article II vests all executive power in the President, yet ignore the wealth of powers the Constitution gives to Congress, including the power to "make all Laws necessary and proper" for executing all "Powers vested in the Constitution in the Government of the United States, or in any Department or Officer thereof." Roberts and his colleagues will have to find an answer to these powerful arguments if they plan to remake constitutional law in these areas.

For these reasons, *McDonald* may make the strongest case for far-reaching constitutional change. If, as is widely expected, the Court decides (perhaps as early as next week) to add *McDonald v. Chicago* (and its companion case, *National Rifle Association v. Chicago)* to its docket for the upcoming term, the Court will have to decide whether and how the Second Amendment's right to bear arms is incorporated against the states. The Court's 2008 ruling in *Heller v. District of Columbia* struck down on Second Amendment grounds a District of Columbia ban on handguns. Because Congress controls the District's laws, the Second Amendment applied by its own force. Most observers believe the Court will take *McDonald*

and decide that the individual, Second Amendment right recognized in *Heller* applies also as a limit on state and local laws. Justice Scalia powerfully points in this direction in a footnote in *Heller* that flags this issue and undercuts the three 19th century precedents holding that the Second Amendment does not apply to state and local laws.

But if the fact of application of the Second Amendment against state action through incorporation into the 14th Amendment is a given (and it probably is), the *method* of incorporation is not, and that's where things get really interesting. Indeed, the "how" question with respect to Second Amendment incorporation could be one of the most profoundly important questions of constitutional law decided in decades. In past cases, the Court has turned to the 14th Amendment's Due Process Clause to incorporate virtually all the rights in the Bill of Rights, but that approach does not sit well with the Constitution's text and history, especially for substantive rights like those protected by the Second Amendment. Nor should the Due Process incorporation approach sit well with the current conservative Justices. Incorporation in those cases relies on the Court's doctrine of "substantive due process," which conservatives, including Justice Scalia, love to hate.

McDonald's lawyer, Alan Gura, who successfully argued *Heller*, has offered the Justices an alternative: incorporation via the 14th Amendment's Privileges or Immunities Clause. Gura is backed in this argument by an *amicus* brief filed by Constitutional Accountability Center on behalf of a diverse collection of preeminent constitutional scholars, including Jack Balkin and Randy Barnett. CAC's brief explains to the Court that there is now a remarkable scholarly consensus about the fact that the Privileges or Immunities Clause is the text in the Constitution designed to protect substantive fundamental rights -- including the right to bear arms -- from hostile state legislation. (For further explanation, see CAC's 2008 report, ***The Gem of the Constitution*.)**

The Court botched this up in an 1873 ruling in *The Slaughterhouse Cases,* in which the Court drew an implausible distinction between rights of state and national citizenship, and concluded that virtually all constitutional and common law rights were state rights, and that only rights connected to the workings of the federal government or the Union were rights of federal citizenship. In a trio of cases -- *United States v. Cruikshank* in 1875, *Presser v. Illinois* in 1886, and *Miller v. Texas* in 1894 -- the Court seized on this dichotomy to conclude that the Second Amendment does not apply to the States. As the Court wrote in *Cruikshank*: "The second amendment declares that [the right to bear arms] shall not be infringed; but this . . . 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 federal government . . . ."

In *Heller*, Justice Scalia recognized these Second Amendment rulings as dubious precedents that gave no real consideration to the question of 14th Amendment incorporation, setting the stage for overruling or distinguishing them at a later date. But there is no reason to simply stop at these three Second Amendment rulings, which build off *Slaughterhouse's* rotten foundation.

As Yale's Akhil Amar has stated: "Virtually no serious modern scholar -- left, right, and center -- thinks that Slaughterhouse is a plausible reading of the Fourteenth Amendment."

But this creates a predicament for Justice Scalia, unquestionably the leader of the Court's conservative bloc when it comes to gun rights. The right answer to the incorporation question for a committed originalist is incorporation of the Second Amendment through the Privileges or Immunities Clause. Indeed, Justice Thomas, who Justice Scalia frequently cites as the Court's only other originalist, has already indicated a willingness to reconsider *Slaughterhouse* and the appropriate meaning of the Privileges or Immunities Clause.

The problem for Scalia is that a ruling that overrules *Slaughterhouse* and restores the Privileges or Immunities Clause to its intended constitutional role will simultaneously build a stronger textual foundation for the Court's existing fundamental rights jurisprudence, starting with the Court's 1923 ruling in *Meyer v. Nebraska* and running through such rulings as *Roe v. Wade* and *Lawrence v. Texas.* While conservatives would certainly continue to attack these rulings as illegitimate even if the Privileges or Immunities Clause were revived, it's far easier to say that the entire enterprise of protecting substantive fundamental rights is out of bounds (as conservatives have said for years about substantive due process) rather than to directly question whether the rights recognized in cases like *Roe* and *Lawrence* are part of the "privileges or immunities of citizens of the United States." And while Justice Scalia has declared himself to be a "faint-hearted originalist" -- meaning he's sometimes willing to follow established, non-originalist precedent -- that provides no cover on the question of how to incorporate the Second Amendment, because the Court will have to overrule or substantially depart from portions of *Cruikshank* as well as two other very old cases to find incorporation at all.

So will Justice Scalia follow his method to a result that makes him uncomfortable, or will he follow a more politically expedient choice? Will Justice Thomas stick to his guns when faced with what is plainly an "appropriate case" to reconsider the Privileges or Immunities Clause? Will Justice Stevens and his liberal colleagues press their advantage by pushing for incorporation through the Privileges or Immunities Clause? Will this be the case where Chief Justice Roberts (conveniently) rediscovers the virtues of "minimalism?"

All these questions and more loom if the Court takes *McDonald*, which may result in a push within the Court to either deny review or strike the Privileges or Immunities question from *McDonald*'s questions presented.

## Conclusion

In *Citizens United*, *Free Enterprise Fund* and *McDonald*, parties (or their *amici* in *Free Enterprise Fund*) are urging the Court to make profound changes in constitutional law: (1) overturning a century of campaign finance laws in *Citizens United*, (2) invalidating a slew of independent federal agencies in *Free Enterprise Fund*, and (3) revisiting a 135-year old opinion interring the Privileges or Immunities Clause. The bar for making such changes has to be very high.

That bar is met in *McDonald* both because the constitutional text and history supporting reexamination of the Privileges or Immunities Clause are exceptionally strong and because the erasure of the Privileges or Immunities Clause from the 14th Amendment has fundamentally distorted the conversation about the Constitution in this country. On the other hand, as CAC has argued in its *Citizens United* brief, the Constitution's text and history favor retaining the Court's ruling in *Austin*, and, as Chief Justice Rehnquist explained in his *Morrison* opinion, there is a powerful case in text and history for the functional approach to separation of powers taken by the Court in *Humphrey's Executor.*

The big question this term is how the Court's conservatives navigate these far-reaching arguments in these three significant cases. They could be minimalists and refuse each of the opportunities to make bold constitutional changes. They could get it right, and move boldly in *McDonald* and rule narrowly in *Citizens United* and *Free Enterprise Fund.* But if they move boldly in *Citizens United*, support profound changes in *Free Enterprise Fund,* and discover minimalism in *McDonald,* they will be following a result-oriented path of least resistance.