The Paradox of *McDonald v. City of Chicago*

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Abstract

On the last day of its 2010 Term, the Supreme Court issued the landmark decision of McDonald v. City of Chicago*, holding that the Second Amendment is incorporated against state and local governments. On its face, the 5–4 decision is simple enough, as a majority of the Court concluded that the 2008 decision in* District of Columbia v. Heller*, which held that the Second Amendment protects an individual's right to own a handgun, applied to state and local governments, such as the city of Chicago, just as it applied to the federal government and its territories, such as the District of Columbia. However, this simple statement of* McDonald*'s holding masks a much more complicated reality—that its outcome, an instance of a rare phenomenon called a "voting paradox," turned not on grand theories of constitutional law, history, or doctrine, but rather on the minutiae of Supreme Court vote counting. In fact, only because the Court reaches a conclusion based on each Justice's vote on the case's outcome, as opposed to voting on the case's individual issues, were the headlines following* McDonald *that gun rights prevailed and gun regulation lost, rather than the other way around.*

This Essay explains why McDonald *is an important example of a voting paradox. The Essay first walks through the opinions in* McDonald *and then places* McDonald *in the context of relevant social choice theory that models voting paradoxes on multimember judicial bodies. Having described how* McDonald *fits into this literature, the remainder of the Essay discusses three significant lessons that come from viewing* McDonald *as a paradox. First,* McDonald *illustrates the importance of the Supreme Court's voting rules, which decide cases based on outcome voting. Second,* McDonald *is a lesson to litigators of the value of including additional arguments. Finally,* McDonald *shows the considerable role of precedent-in-flux in creating voting paradoxes.*

Introduction

On the last day of its 2010 Term, the Supreme Court issued the landmark decision of *McDonald v. City of Chicago*,[1] holding that the Second Amendment is incorporated against state and local govern-

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1 McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

ments.[2] On its face, the 5–4 decision is simple enough: a majority of the Court concluded that the 2008 decision in *District of Columbia v. Heller*,[3] which held that the Second Amendment protects an individual's right to own a handgun, applies to state and local governments, such as the city of Chicago, just as it applies to the federal government and its territories, including the District of Columbia.[4] However, this simple statement of *McDonald*'s holding masks a much more complicated reality—that its outcome, an instance of a rare phenomenon called a "voting paradox," turned not on grand theories of constitutional law, history, or doctrine, but rather on the minutiae of Supreme Court vote counting.

Undoubtedly, much of the commentary following *McDonald* will focus on the larger matters of constitutional law implicated in the case. The debate regarding the right to bear arms in American history will surely persist, in part because the dueling opinions in *McDonald* each espoused distinct readings of history. The opinions also threw fuel onto the fire that is the modern discussion over theories of constitutional interpretation, as the different sides in the case used varying sources and interpretive methodologies to support their reasoning. In particular, the debate between Justices Scalia and Stevens in their separate opinions will provide fodder for those concerned about judicial activism and constitutional adjudication.

On a doctrinal level, the case is the most recent instance of an almost century-and-a-half-old debate about which part, if any, of the Fourteenth Amendment applies the provisions of the Bill of Rights to state and local governments—the Due Process Clause or the Privileges or Immunities Clause. With Justice Thomas basing his separate opinion squarely on the Privileges or Immunities Clause,[5] scholarly attention to that once moribund part of the Constitution will skyrocket.

As much as these important matters certainly played key roles in *McDonald*'s splintered decision, none played as important a role in reaching the case's landmark outcome as the particulars of the Court's voting system. In fact, only because the Court reaches its conclusions based on how each Justice votes on a case's outcome, as opposed to how each Justice votes on a case's individual issues, did the headlines

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2 *Id.* at 3026.

3 District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

4 *McDonald*, 130 S. Ct. at 3026.

5 *See id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

about *McDonald* read that gun rights prevailed and gun regulation lost, rather than the other way around.

This Essay explains why *McDonald* is an important example of a voting paradox. Part I walks through the opinions in *McDonald* and places *McDonald* in the context of relevant social choice theory that models voting paradoxes on multimember judicial bodies. Having described how *McDonald* fits into this literature, Part II discusses three significant lessons to be learned from viewing *McDonald* as a voting paradox. First, *McDonald* illustrates the importance of the Supreme Court's voting rules, which decide cases based on outcome voting. Second, *McDonald* is a lesson to litigators on the value of including additional issues in appellate briefs and arguments. Finally, *McDonald* shows the considerable role that precedent-in-flux plays in creating voting paradoxes.

I. *McDonald* as Voting Paradox

A "voting paradox" occurs when the Court issues a decision with splintered opinions, such as *McDonald*, and the resulting groups of Justices are split such that the outcome of the case is the opposite of the outcome that should arise from the majority's resolution of the controlling issues.[6] This paradox has occurred at least two dozen times throughout the Supreme Court's history[7] and may have been behind the voting alignment in *Bush v. Gore*.[8] Parsing the various opinions in *McDonald* illustrates the voting paradox and shows that this rarity occurred in the landmark decision.

A. The McDonald *Opinions*

The basic question presented to the Court in *McDonald* was whether the Second Amendment right previously recognized by the Court in *Heller* is incorporated against state and local governments.[9] Two years before *McDonald*, the Supreme Court ruled that the Second Amendment protects the right of an individual to own a handgun.[10] That decision was limited, however, because it applied only to

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6 *See* David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. Rev. 183, 188–205 (2010).

7 *See id.* at 219 n.178.

8 Bush v. Gore, 531 U.S. 98 (2000); *see also* Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 Vand. L. Rev. 1849, 1854 (2001) (arguing that the Court's voting alignment in *Bush v. Gore* reflected a desire to avoid a voting paradox in a particularly important case).

9 *McDonald*, 130 S. Ct. at 3025.

10 District of Columbia v. Heller, 128 S. Ct. 2783, 2821–22 (2008).

the District of Columbia.[11] Under longstanding precedent, the guarantees in the Bill of Rights technically apply only to the federal government and its territories.[12] Only through the doctrine of incorporation do rights within the Bill of Rights apply to state and local governments.[13] Before *McDonald*, the Supreme Court had incorporated all but five of the rights included in the Bill of Rights.[14] The Second Amendment remained unincorporated after the Court refused to apply that provision to the states in *Presser v. Illinois*.[15] On the heels of the Court's newly minted Second Amendment jurisprudence, *McDonald* revisited this longstanding precedent.

Although there was only one general issue before the Court—whether to incorporate the Second Amendment—the attorneys for the petitioners presented the Court with two separate arguments to support incorporation. The attorneys argued that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment against the states, the method of incorporation the Court has adopted over the previous century.[16] The attorneys also relied on the Fourteenth Amendment's Privileges or Immunities Clause,[17] a method of incorporation long supported by scholars,[18] but never adopted by the Court. In fact, starting with the *Slaughter-House Cases*,[19] the Court has limited the effect of the Privileges or Immunities Clause such that it means virtually nothing.[20] Along with the Due Process Clause argument, the attorneys launched a full-fledged attack on the Court's line of Privileges or Immunities Clause precedent.[21]

With five separate opinions, the Court's voting alignment resulted in a voting paradox. Justice Alito's opinion, which Chief Justice Roberts and Justices Scalia and Kennedy joined in full, took the Due

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11 *Id.*

12 Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833).

13 *See* Duncan v. Louisiana, 391 U.S. 145, 145–50 (1968).

14 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 545–46 (3d ed. 2009).

15 Presser v. Illinois, 116 U.S. 252 (1886).

16 Brief for Petitioners at 66–72, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

17 *Id.* at 9–65.

18 *See, e.g.*, Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443, 443–45 (1996).

19 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

20 *McDonald*, 130 S. Ct. at 3028, 3029 (describing the *Slaughter-House Cases*' holding as "narrow"). The Court gave some content to the Privileges or Immunities Clause in *Saenz v. Roe*, 526 U.S. 489, 501–04 (1999), but in a different context than incorporation.

21 *See McDonald*, 130 S. Ct. at 3028 ("Petitioners argue . . . that the narrow interpretation of the Privileges or Immunities Clause . . . should now be rejected.").

Process Clause route to incorporation.[22] The opinion looked to "whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice."[23] After reviewing the history of the right to bear arms with a particular focus on the right during Reconstruction, Justice Alito concluded that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[24] Therefore, pursuant to the Court's precedent about incorporation of fundamental rights, the opinion concluded that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[25]

Essential to the creation of the paradox, Justice Alito's opinion also addressed the petitioners' argument that the Privileges or Immunities Clause incorporates the Second Amendment against the states.[26] In a brief section of the opinion, Justice Alito reviewed the precedent holding that the Privileges or Immunities Clause did not incorporate the Bill of Rights.[27] In particular, Justice Alito focused on the *Slaughter-House Cases*, which severely limited the application of the Privileges or Immunities Clause.[28] As noted, the petitioners had called for the Court to overrule *Slaughter-House* and hold that the Privileges or Immunities Clause incorporates the Second Amendment (and other rights), but Justice Alito's opinion refused to go along. The opinion stated that there was "no need to reconsider that interpretation here" and that it would "decline to disturb the *Slaughter-House* holding."[29] Thus, by leaving *Slaughter-House* intact, Justice Alito's opinion rejected the petitioners' argument that relied on the Privileges or Immunities Clause for incorporation.

Justice Thomas's concurrence in the judgment reached the same result as Justice Alito's opinion, but by opposite reasoning.[30] He

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22 *See id.* at 3050 (plurality opinion).

23 *Id.* at 3034 (Alito, J., opinion of the Court). Justice Thomas signed this part of the opinion, but only as a "description of the right" and not as part of his legal reasoning reaching his conclusion. *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

24 *Id.* at 3042 (Alito, J., opinion of the Court).

25 *Id.* at 3050 (plurality opinion).

26 *See id.* at 3028–30 (Alito, J., opinion of the Court); *id.* at 3030–31 (plurality opinion).

27 *Id.* at 3028–30 (Alito, J., opinion of the Court); *id.* at 3030–31 (plurality opinion).

28 *Id.* at 3028–30 (Alito, J., opinion of the Court); *id.* at 3030–31 (plurality opinion).

29 *Id.* at 3030–31 (plurality opinion). Justice Thomas did not sign on to this section of Justice Alito's opinion.

30 Justice Scalia wrote a separate concurring opinion that is irrelevant to the voting paradox analysis, as he joined Justice Alito's opinion in full. *Id.* at 3026 (Alito, J., opinion of the Court); *see also id.* at 3050 (Scalia, J., concurring).

staked out his difference in the very beginning of his opinion by agreeing with the plurality that the right to bear arms recognized in *Heller* is fundamental to American liberty, but refusing to agree with anything more than that "description of the right."[31] Justice Thomas rejected the plurality's Due Process Clause approach because he could not "agree that [the Second Amendment right] is enforceable against the States through a clause that speaks only to 'process.'"[32] Later in the opinion, he reinforced this position by calling the Due Process Clause theory of incorporation a "legal fiction" that he "cannot accept."[33]

Instead, in an attempt to "restor[e] the meaning of the Fourteenth Amendment agreed upon by those who ratified it,"[34] Justice Thomas wrote a lengthy opinion supporting incorporation through the Privileges or Immunities Clause. His historical analysis concluded that "the privileges and immunities of [citizens of the United States] included individual rights enumerated in the Constitution, including the right to keep and bear arms."[35] Justice Thomas decidedly rejected the *Slaughter-House* reading that limited the Privileges or Immunities Clause[36] and reasoned that the precedent applying *Slaughter-House* to the right to bear arms should be overturned.[37]

The dissenting opinions in the case rejected both the Due Process Clause and the Privileges or Immunities Clause claims. Justice Stevens, writing for himself, initially stated that he agreed with the plurality's rejection of the Privileges or Immunities Clause claim.[38] He spent the rest of his opinion arguing that the Due Process Clause does not incorporate the Second Amendment because, "[b]y its terms, the Second Amendment does not apply to the States."[39] Justice Breyer's dissent, joined by Justices Ginsburg and Sotomayor, rejected incorporation through the Fourteenth Amendment as a whole.[40] He wrote that he agreed with the plurality's refusal to reconsider *Slaughter-House* and its treatment of the Privileges or Immunities Clause.[41] However, unlike the rest of Justice Alito's opinion, Justice Breyer re-

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31 *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

32 *Id.*

33 *Id.* at 3062.

34 *Id.*

35 *Id.* at 3068.

36 *Id.* at 3085–86.

37 *Id.* at 3086.

38 *Id.* at 3089 (Stevens, J., dissenting).

39 *Id.* at 3119.

40 *Id.* at 3120 (Breyer, J., dissenting) ("I therefore conclude that the Fourteenth Amendment does not 'incorporate' the Second Amendment's right 'to keep and bear Arms.'").

41 *Id.* at 3132.

futed the notion that the right to bear arms is "fundamental" under Due Process Clause incorporation precedent, concluding that the Court cannot rely on "ambiguous history" to incorporate the right.[42]

Combining all the votes, the separate and overlapping majorities of the Court found, paradoxically, that the Second Amendment is incorporated against state and local governments, but also that neither the Due Process Clause nor the Privileges or Immunities Clause incorporates the right. Five Justices concluded that the Second Amendment applies against the states (Chief Justice Roberts, along with Justices Scalia, Kennedy, and Alito in the plurality, and Justice Thomas in his concurrence in the judgment). A different set of five Justices found that the Second Amendment is not incorporated through the Due Process Clause (Justice Thomas in his concurrence in the judgment, and Justices Stevens, Ginsburg, Breyer, and Sotomayor in the two dissenting opinions). Moreover, yet another group of eight Justices concluded that the Second Amendment is not incorporated through the Privileges or Immunities Clause (Chief Justice Roberts, along with Justices Scalia, Kennedy, and Alito in the plurality, and Justices Stevens, Ginsburg, Breyer, and Sotomayor in the two dissenting opinions).

The voting paradox arises because the combination of finding that the Second Amendment is not incorporated through the Due Process Clause, something a majority of the Court agreed with, and that it is not incorporated through the Privileges or Immunities Clause, something a different majority of the Court agreed with, should lead to the conclusion that the Second Amendment is not incorporated. Through a third majority, however, the Court found that the Second Amendment was indeed incorporated. In chart form,[43] the *McDonald* voting paradox looks like this:

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42 *Id.* at 3136.

43 I take this chart format convention from Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 918 (2006).

Table 1. Voting Pattern in *McDonald v. City of Chicago*

Opinion author (Number of Justices joining opinion)	Does the Due Process Clause incorporate?	Does the Privileges or Immunities Clause incorporate?	Is the Second Amendment incorporated?
Alito (4)	Yes (4)	No (4)	Yes (4)
Thomas (1)	No (1)	Yes (1)	Yes (1)
Stevens (1)	No (1)	No (1)	No (1)
Breyer (3)	No (3)	No (3)	No (3)
Total	**No (5–4)**	**No (8–1)**	**Yes (5–4)**

The bottom row shows the tally for each issue and highlights the paradox. The paradox arises because no individual Justice would vote according to the bottom row, because answering the first two questions "no" (i.e., concluding that the Second Amendment is not incorporated through either the Due Process Clause or the Privileges or Immunities Clause) would lead to answering the third question "no" as well (i.e., concluding that the Second Amendment is not incorporated). However, the Court, as a collective entity, can—and did—answer the first two questions "no" while answering the third, outcome-determinative question "yes."

B. Fitting McDonald *into a Social Choice Model of Voting Paradoxes*

Social choice theory is the study of aggregating individual preferences into group preferences.[44] In the context of courts, social choice scholars study how a multimember court can reach a decision by aggregating the preferences of the individual judges.[45] Some social choice scholars, notably Maxwell Stearns, have placed voting paradoxes in the context of the social choice literature. According to Stearns's analysis, the voting paradox arises when the issues before the Court are multidimensional and the Justices have asymmetrical preferences.[46] *McDonald* illustrates both of these conditions.

The issues in *McDonald* are multidimensional because the preferences of the individual Justices cannot be arranged in a spectrum along which any one Justice prefers the option closer to her own preference to options further away.[47] In contrast, issues are unidimen-

44 *See* AMARTYA SEN, RATIONALITY AND FREEDOM 66 (2002).

45 *See, e.g.*, Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1257–86, 1288–89 (1994).

46 Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 121–24 (1999).

47 *See id.* at 116.

sional when they can be arranged such that a Justice with a preference for an extreme position would prefer the middle position to the opposite extreme.[48]

To illustrate this aspect of *McDonald*, there are four possible positions the Justices could have taken with regard to the two issues in the case:

> (1) incorporated through the Due Process Clause and incorporated through the Privileges or Immunities Clause;
> (2) incorporated through the Due Process Clause but not incorporated through the Privileges or Immunities Clause;
> (3) not incorporated through the Due Process Clause but incorporated through the Privileges or Immunities Clause; or
> (4) not incorporated through the Due Process Clause and not incorporated through the Privileges or Immunities Clause.

No Justice took position (1); Justice Alito's plurality takes position (2); Justice Thomas's individual concurrence in the judgment takes position (3); and the two dissents take position (4). If these preferences were unidimensional, the four positions could be ordered in a way such that a Justice with position (3) would necessarily prefer the position closer to position (3) (hypothetically, if the order above is the order that satisfied this condition, position (2)) to the position further away from position (3) (again, in the hypothetical described, position (1)). Likewise, if the preferences were unidimensional, a Justice with position (4) would prefer hypothetical position (3) before positions (2) or (1).

The positions here, however, are clearly multidimensional, as there is no way to order the positions in this manner. For instance, the Justices in dissent at position (4) are not logically closer to any one position than any other, as a Justice's opinion regarding one issue has no bearing on that Justice's opinion regarding the other issue. As an example, posit that the dissenting Justices reject incorporation because they do not believe the right is fundamental. If, however, they were forced to choose that the right was fundamental, they might believe it is incorporated under both Clauses, if they believe both Clauses function in such a manner that they incorporate fundamental rights; or, they might believe it is incorporated under one but not the other, depending on how they believe the particular Clauses function. The same analysis is true for each of the other positions, as the two issues presented to the Court are distinct from one another.

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[48] *Id.* at 115.

It is because of this multidimensionality that the precedential value of *McDonald* cannot be ascertained by the "narrowest grounds" rule established by *Marks v. United States*.[49] In *Marks*, the Court announced what is now the familiar "narrowest grounds" rule, which it uses to determine the binding holding from a case that has a fragmented majority.[50] In *Marks*, the Court had to interpret a prior case about obscenity that did not have a majority opinion. The Court stated: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."[51]

Using this rule, we can determine the holding of a splintered Court, but only when the splintering is along a unidimensional preference spectrum.[52] For instance, in *Regents of the University of California v. Bakke*,[53] the Court split 4–1–4 on the issue of educational affirmative action under Title VI.[54] Four Justices said that it was impermissible in this manner.[55] Four Justices said that it was permissible in most instances.[56] The one Justice in the middle was Justice Powell, who rejected it in most instances, except for when a school created a plan to further diversity that did not involve quotas.[57] The "narrowest grounds" rule of *Marks* tells us that Justice Powell's opinion is controlling.

The logic behind the *Marks* rule is that the opinion with the "narrowest grounds" is precedential because it is logically entailed by the opinion of enough other Justices to make a majority that agrees on the point. In *Bakke*, Justice Powell's opinion that diversity was a compelling reason for an affirmative action program that did not involve quo-

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49 Marks v. United States, 430 U.S. 188 (1977).

50 *Id.* at 193.

51 *Id.* (internal quotation marks omitted).

52 Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 327–29 (2000).

53 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

54 *See id.* Justice Stevens's opinion for the four Justices who found the program to violate Title VI relied on Title VI alone. *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Powell's individual opinion, as well as Justice Brennan's opinion for the four Justices who broadly approved of affirmative action, relied on both Title VI and the Equal Protection Clause, as both opinions found that Title VI prohibits discrimination to the same extent as the Equal Protection Clause. *Id.* at 287 (Powell, J., judgment of the Court); *id.* at 325–26 (Brennan, J., concurring in the judgment in part and dissenting in part). The summary in the text glosses over this distinction for the sake of demonstration.

55 *Id.* at 418 (Stevens, J., concurring in the judgment in part and dissenting in part).

56 *Id.* at 325 (Brennan, J., concurring in the judgment in part and dissenting in part).

57 *Id.* at 314–15 (Powell, J., judgment of the Court).

tas is logically entailed by the opinion of the four Justices who believed that affirmative action is constitutional in a wide variety of circumstances. Likewise, his position that affirmative action is not permissible in other circumstances is logically entailed by the opinion of the four Justices who believed that affirmative action was prohibited. Thus, his opinion is the *Marks* "narrowest grounds" opinion and is controlling on this point because it is, in essence, supported by a majority of the Court, even if the other Justices did not sign on to his opinion.

Because *McDonald* is a case with multidimensional preferences, however, the *Marks* rule provides no help in determining any precedential position going forward. Since the Justices' preferences are multidimensional, Justice Thomas's opinion is not logically entailed by Justice Alito's opinion. Likewise, Justice Alito's opinion is not logically entailed by Justice Thomas's opinion. After all, they both completely reject each other's rationales, so there is no overlap that would allow the *Marks* "narrowest grounds" rule to operate.[58] What is true about *McDonald* is true in all voting paradox cases because they all involve multidimensionality—the two positions that make up the majority vote on the outcome do not overlap, and one does not logically entail the other. Thus, *Marks* cannot apply to *McDonald* because there is no "narrowest grounds" implicitly agreed upon by the five Justices in the majority.

With respect to the other requirement for a voting paradox, the Justices in *McDonald* have asymmetrical preferences because the opposite positions on the issues taken by the Justices in the majority produce the same result.[59] This part of *McDonald* is more straightforward to explain than its multidimensionality. Sticking to the numbering above, the following two positions take the opposite views on the two issues:

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58 To explain in a slightly different way, there is no way to ascertain which is the "narrowest grounds" opinion—Justice Alito's or Justice Thomas's. Some might argue that Justice Alito's opinion is narrower because Justice Thomas's opinion would rewrite the law of incorporation. Others, however, might argue that Justice Thomas's opinion is narrower because his rewriting of incorporation law might incorporate fewer rights and apply only to "citizens" as opposed to "any person" (because the Privileges or Immunities Clause speaks to "citizens," whereas the Due Process Clause speaks to "any person"). Yet, a proper *Marks* analysis does not leave this question to guesswork. Rather, the answer comes by looking to which rationale is logically entailed by broader reasoning. In *McDonald*, the analysis described in *Marks* is unhelpful because the rationales are multidimensional.

59 Stearns, *supra* note 46, at 122–24.

(2) incorporated through the Due Process Clause but not incorporated through the Privileges or Immunities Clause;
(3) not incorporated through the Due Process Clause but incorporated through the Privileges or Immunities Clause.

Justice Alito's opinion took position (2), and Justice Thomas's opinion took position (3). The two positions reached opposite conclusions on each of the individual issues. However, because both of these positions result in a finding of incorporation, their opposite positions produce the same result—incorporation of the Second Amendment.

With the multidimensional issues in *McDonald* and the Justices' asymmetrical preferences, reasonable assumptions generate an instance of cycling, also known as Condorcet's paradox.[60] If each group of Justices had to rank its positions with respect to the three outcomes reached by the various camps, the following preference-ordering might exist[61]:

- Alito's plurality (for four Justices): (2), (3), (4)
- Thomas's opinion (for one Justice): (3), (4), (2)
- Dissents (combined, for four Justices): (4), (2), (3)

The assumptions under this rank-ordering are not far-fetched. It is plausible to assume that Justice Alito's plurality, which decided that the Due Process Clause alone incorporates the Second Amendment, while saying very little about the Privileges or Immunities Clause other than that it was not going to overturn precedent on the issue, would prefer Justice Thomas's approach to that of the dissenting opinions, which rejects incorporation altogether. Likewise, it is reasonable to assume that Justice Thomas would prefer siding with the dissent, which rejects both theories of incorporation, over agreeing with the plurality's theory, which he believes is just another instance of the "fiction" of substantive due process and is thus closely related to *Roe v. Wade*.[62] Finally, it is also reasonable to assume that the dissenting Justices, who indicate that they take precedent with respect to incorporation seriously, would prefer, if forced to choose one route of incorporation over another, the plurality's Due Process Clause

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60 *See generally* Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 1008–11 (1998).

61 Because Justices write opinions arguing for the outcome they reach and nothing else, they do not explain their secondary or tertiary preferences, so we have no way of knowing their real preferences with respect to the other options.

62 Roe v. Wade, 410 U.S. 113 (1973); *see* McDonald v. City of Chicago, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment) (citing *Roe* as an example of tenuous Due Process Clause precedent).

approach over Justice Thomas's more precedent-changing Privileges or Immunities Clause approach.[63]

Cycling would occur in this situation because, under head-to-head voting, no option prevails. Given a choice between option (2) and option (3), option (2) wins because eight Justices prefer it to option (3). Given a choice between option (2) and option (4), option (4) wins because five Justices prefer it to option (2). Given that (2) defeats (3) and (4) defeats (2), the logical conclusion would appear to be that (4) also defeats (3). However, given a choice between option (3) and option (4), option (3) wins because five Justices prefer it over option (4). This result is an example of cycling, because the head-to-head votes can continue in this manner indefinitely, as no one preference wins over all other preferences. Under these circumstances, the preferences of the Justices in *McDonald* result in an instance of Condorcet's paradox.

Thus, *McDonald* is a classic example of a two-issue voting paradox that fits neatly into the social choice model for such cases.

II. LESSONS FROM *MCDONALD* AS PARADOX

Viewing *McDonald* as a voting paradox leads to three important lessons. None of these lessons is unique to *McDonald* as opposed to most other voting paradox cases, but the high-profile nature of the decision raises the stakes of the voting paradox's implications.

A. Supreme Court Voting Protocol

With the Justices aligned to create a voting paradox, the outcome in *McDonald* was determined not by an agreed-upon theory of constitutional theory, history, or doctrine, but rather by the basics of Supreme Court voting protocol. An essential part of Supreme Court decisionmaking that is often taken for granted is that the Supreme Court reaches resolutions by voting on the outcomes of a case, rather than on individual issues within a case. By way of explanation, the Court, as well as other appellate courts in the United States, decides cases by having the individual Justices vote on the outcome in the case—in most cases, whether to reverse or affirm the judgment of the lower court. The Justices do not hold separate votes on the issues that determine the outcome. Nonetheless, the voting paradox arises because Justices write opinions explaining how they reach their out-

63 These are not necessarily the preferences of the Justices, but the Justices' actual preferences are irrelevant to this analysis. The point of the analysis is to show that the preferences could, under very reasonable assumptions, lead to cycling.

come. In those opinions, the author reasons according to the issues in the case. Thus, even though the vote on the outcome determines the result of the case, the opinions reveal the Justices' preferences with respect to the issues. A voting paradox can arise by analyzing the positions the separate opinions take on each of the issues.

One recurring debate among scholars studying the paradox is whether the paradox justifies a change in voting protocol from outcome-based voting to some form of issue-based voting. Loosely described,[64] under issue-based voting, the Justices would vote on the issues that the case presents, rather than the outcome of the case. The outcome of the case would then flow from the separate majority votes on each issue before the Court. Thus, in an issue-voting world, the Justices in *McDonald* would vote on the two separate issues of whether the Second Amendment is incorporated through the Due Process Clause and whether it is incorporated through the Privileges or Immunities Clause. The Justices would not vote separately on the outcome of the case. Rather, in this issue-based system, the outcome would flow from the separate votes on the issues raised in the case. Taking the positions of the Justices as they are described in the *McDonald* opinions, the outcome would be that the Second Amendment is not incorporated because separate majorities would conclude that neither clause of the Fourteenth Amendment incorporates the right to bear arms against state and local governments.

Supporters of issue-based voting argue that it prevents the problems associated with outcome-based voting. For instance, scholars have supported issue-based voting schemes because they would avoid the seeming irrationality of voting paradoxes, would be fairer to litigants, and would provide better guidance to lower courts, attorneys, and the public trying to understand doctrine that results from splintered opinions.[65] To critics of the current outcome-voting protocol, case results under issue voting would be more rational, just, and usable.

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64 There are different models of issue-based voting, *see, e.g.*, sources cited *infra* note 65, so the description here is just a general description without the nuance that various scholars have attempted to develop.

65 *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 30–33 (1993); Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 146–51 (2003); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1077–84 (1996); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 770–72 (1992).

Critics of a change to issue voting object that voting by issue creates more problems than it solves. To these critics, one of the biggest problems is that issue voting promotes strategic identification of issues. In other words, litigants and attorneys can manipulate what issues the case presents or even split issues into subissues, which can themselves result in voting paradoxes.[66] For instance, almost every individual issue before the Supreme Court can be split into whether the current case is consistent with precedent and whether that precedent should be overruled.[67] Splitting individual issues like this encourages strategic voting, something fundamental rules of fairness in social choice theory prohibit.[68]

The Due Process Clause issue in *McDonald* illustrates this problem. If the Justices operated under an issue-voting protocol, they would have to vote separately on whether the Due Process Clause incorporates the Second Amendment. By the positions as described in the *McDonald* opinions, the result on that vote would be 5–4 against incorporation.[69] The Justices, however, might feel that they should break down this question into separate issues. For instance, two separate issues would be (1) whether the Due Process Clause incorporates substantive rights that are fundamental, and (2) whether the right to bear arms under the Second Amendment is such a fundamental right. Without changing the positions described in the *McDonald* opinions, this breakdown of the one Due Process Clause issue would create another voting paradox.

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66 John M. Rogers, *"Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals*, 49 VAND. L. REV. 997, 1001–06 (1996).

67 *See* Cohen, *supra* note 6, at 205–19, 222–24.

68 MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 89–91 (2000). Strategically determining issues within a case would violate a basic requirement of voting fairness, which is Kenneth Arrow's requirement of independence of irrelevant alternatives. *Id.* Under an issue-voting system, judges could identify issues in a case solely in order to reach other issues or outcomes. Such strategic manipulation of issues violates the principle that judges' preferences on any one option should not be linked to other alternatives. *Id.*

69 The five votes would come from Justice Thomas in his concurrence, along with Justices Stevens, Ginsburg, Breyer, and Sotomayor in the two dissents.

Table 2. Hypothetical Voting Pattern Under Issue Voting in *McDonald v. City of Chicago*

Opinion author (Number of Justices joining opinion)	Does the Due Process Clause incorporate substantive rights that are fundamental?	Is the right to bear arms a fundamental right?	Does the Due Process Clause incorporate the right to bear arms?
Alito (4)	Yes (4)	Yes (4)	Yes (4)
Thomas (1)	No (1)	Yes (1)	No (1)
Stevens (1)	Yes (1)	No (1)	No (1)
Breyer (3)	Yes (3)	No (3)	No (3)
Total	**Yes (8–1)**	**Yes (5–4)**	**No (5–4)**

With this split, under an issue-voting protocol, there would either be another voting paradox (as the last row demonstrates), or there would have to be subissue voting. The former outcome indicates that issue voting does not solve the problem, as issue voting can still lead to voting paradoxes. The latter result shifts issue voting into an almost unstoppable regression, in which each issue can be broken into subissues, which can be broken into sub-subissues, and so forth, with possible paradoxes lurking at every step. Because of these problems with issue voting, many scholars believe that any collective body that attempts to aggregate the preferences of individuals will produce irrational results some of the time, and outcome voting, the current system, is the preferable vote-aggregation system despite the possibility of the voting paradox.[70]

In light of the fact that *McDonald* was one of the most anticipated Supreme Court cases in years, one that expanded a new fundamental constitutional right to every U.S. citizen against every level of government, and one that changed precedent over 130 years old, this debate will surely continue. After all, with an issue-voting protocol, without any change in the Justices' positions on the issues, Chicago would have won and the constitutional doctrine resulting from the case would be that the Second Amendment is applicable only to the federal government and its territories.

B. The Importance of Raising a Second Issue

Appellate litigators should take away an important lesson from *McDonald*: raising a second issue can be the key to winning your case, even if that second issue on its own would not win the case, or, as in

70 *See, e.g.*, Meyerson, *supra* note 43.

McDonald, would not even garner more than a single vote on the Court. After all, without the Privileges or Immunities Clause issue, and presuming the Justices kept their positions the same on the Due Process Clause issue, Chicago would have won. However, with the second issue in the case, the petitioners won instead.

Before *McDonald*, it was basic blackletter constitutional law that the incorporated rights from the Bill of Rights are incorporated through the Due Process Clause.[71] Although some scholars and jurists supported incorporating the Bill of Rights through the Privileges or Immunities Clause, the Supreme Court had squarely rejected that approach and limited that clause to have a very narrow effect.[72] Nonetheless, the lawyers challenging Chicago's handgun ban included the Privileges or Immunities Clause argument in their briefing, making it their primary argument before the Supreme Court.[73] Some questioned the decision,[74] as the lawyers virtually ignored the Due Process Clause argument grounded in existing law and instead focused on an argument that few imagined could attract a majority of the Court.

However, as the voting paradox shows, whether a majority of the Court agreed with the Privileges or Immunities Clause argument proved irrelevant. By raising that argument and getting only Justice Thomas to agree with it, the petitioners' lawyers won even though every other Justice rejected that argument.[75] Without the Privileges or Immunities Clause argument, assuming Justice Thomas would not switch his position on Due Process Clause incorporation just to reach a particular result, only the four Justices in Justice Alito's plurality would have voted in favor of incorporation. However, with Justice Thomas agreeing with that argument (even though he did not agree with the Due Process Clause argument), the petitioners' lawyers had a fifth vote in favor of incorporation and thus won the case.

A counterexample that illustrates the potential importance of raising a second issue is *Gonzales v. Carhart*.[76] In *Carhart*, the Supreme Court revisited legislative prohibitions of "partial birth abor-

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71 *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

72 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

73 Brief for Petitioners at 9–65, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

74 *See, e.g.*, Orin Kerr, *Petitioner's Brief in* McDonald v. City of Chicago *(The Second Amendment Incorporation Case)*, THE VOLOKH CONSPIRACY (Nov. 16, 2009, 10:58 PM), http://volokh.com/2009/11/16/petitioners-brief-in-mcdonald-v-city-of-chicago-the-second-amendment-incorporation-case/.

75 *See supra* Part I.A.

76 Gonzales v. Carhart, 550 U.S. 124 (2007).

tion." In 2000, the Court struck down Nebraska's law, finding that it violated substantive due process guarantees.[77] On the basis of that decision, abortion doctors challenged a 2003 federal law prohibiting essentially the same procedure. In a 5–4 decision, the Court upheld the federal law, finding that it did not facially violate the Due Process Clause.[78] The case presented only one issue—whether the law violated the Due Process Clause—and the Court issued a straightforward, nonparadoxical opinion.

Without changing the Justices' opinions on the Due Process Clause issue, the doctors might have convinced the Court to strike down the federal law by introducing a second argument—that the federal law went beyond Congress's enumerated powers under the Commerce Clause. The Court has struck down only two laws since 1937 for exceeding Congress's powers under the Commerce Clause.[79] Though there is no real argument that the federal abortion law was similar to the two laws in those cases that regulated, according to the Court, noneconomic activity, at least Justice Thomas might have found that the federal law was not within Congress's powers under the Commerce Clause. Justice Thomas has written extensively in his separate opinions about limits on Congress's powers under the Commerce Clause, going so far as to write that "wholly intra state, point-of-sale transactions" are not within Congress's authority[80] and that "health laws of every description" are beyond Congress's authority as well.[81] In the modern era, other Justices have not adopted these positions; Justice Thomas, however, has been clear that he has a much more limited view of Congress's powers under the Commerce Clause than that of the rest of the Court. If he had remained faithful to these previous pronouncements, he would have almost certainly voted to strike down the federal abortion law under the Commerce Clause even though he believed it was constitutional under the Due Process Clause.[82] That he wrote a concurrence in *Carhart* specifically explain-

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77 *See* Stenberg v. Carhart, 530 U.S. 914, 929–30 (2000).

78 *Carhart*, 550 U.S. at 133.

79 United States v. Morrison, 529 U.S. 598, 613 (2000) (striking down portions of a federal statute about violence against women); United States v. Lopez, 514 U.S. 549, 567 (1995) (invalidating a federal law that prohibits the possession of a gun in a school zone).

80 Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring).

81 *Lopez*, 514 U.S. at 594 (Thomas, J., concurring) (internal quotation marks omitted).

82 *See* Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301, 339–40 (2006).

ing that he was not reaching the Commerce Clause issue because it was not raised by the parties drives this point home.[83]

If this second issue had been raised, it could have turned a win for the federal government into a win for the doctors. Such an outcome could have occurred through a voting paradox[84]:

Table 3. Hypothetical Voting Pattern in *Gonzales v. Carhart* with Second Issue Introduced

Opinion author (Number of Justices joining opinion)	Is the federal law unconstitutional under the Due Process Clause?	Is the federal law beyond Congress's Commerce Clause power?	Is the federal law unconstitutional?
Kennedy (3)	No (3)	No (3)	No (3)
Thomas (2)	No (2)	Yes (2)	Yes (2)
Ginsburg (4)	Yes (4)	No (4)	Yes (4)
Total	**No (5–4)**	**No (7–2)**	**Yes (6–3)**

The second column shows the alignment the Court ultimately reached in the case—a 5–4 majority finding the law constitutional. With a second issue presented in the case, however, the outcome could have flipped, even though the second issue would have been rejected by a majority of the Justices, as shown by the third column. Now, with the second issue, the law might have been unconstitutional even though, in the hypothetical, a majority of the Court believes it does not violate the Due Process Clause, and a majority believes it does not go beyond the limits of the Commerce Clause.

Understanding the power of the voting paradox provides lawyers with an additional route to winning a case by prevailing without convincing a majority of Justices of any one of their positions. Including a second issue that could get the assent of just one Justice could be the difference between victory and defeat.

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83 "I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it." *Carhart*, 550 U.S. at 169 (Thomas, J., concurring).

84 The positions in the chart make the reasonable assumptions that only Justice Thomas, and possibly Justice Scalia, would vote to find the federal abortion law beyond the reach of the Commerce Clause. Whether Justice Scalia, who joined Justice Thomas's concurrence, actually would vote as hypothesized is irrelevant, as there would be majorities for the same results without Justice Scalia.

C. *Precedent and Voting Paradoxes*

McDonald's final lesson is that calling precedent into question can have wide-ranging effects without the Court ever overruling that precedent. In other words, advocates, judges, and scholars who chip away at a particular precedent might see dividends long before a majority of Justices agree, if they ever do, that the precedent is no longer good law.

In a previous article about voting paradoxes, I demonstrated the power that precedent-in-flux has by describing and modeling a particular kind of voting paradox—a precedent-based voting paradox.[85] In a precedent-based voting paradox, ostensibly only one issue is presented to the Court; however, because a Justice or group of Justices concurring in the judgment believes the precedent upon which the issue before the Court is based should be overturned, a voting paradox occurs.[86]

The recent decision of *Hein v. Freedom From Religion Foundation, Inc.*[87] illustrates this type of paradox. In *Hein*, only one issue was before the Court: whether the Freedom From Religion Foundation had standing as a taxpayer to challenge the President's Faith-Based and Community Initiatives program as a violation of the Establishment Clause.[88] A majority of the Court believed that the case was identical to *Flast v. Cohen*,[89] a longstanding precedent that allowed such taxpayer standing.[90] A different majority believed that *Flast* was good law.[91] The Court, however, found that there was no standing because two separate groups of Justices formed a majority that voted against standing—three who believed there was no standing because the case could be distinguished from the precedent and two who concluded, even though they believed the case was the same as the precedent, that the precedent no longer constituted good law.[92] Using the chart format for a voting paradox, *Hein* looks as follows:

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85 Cohen, *supra* note 6, at 206–17.

86 *Id.*

87 Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).

88 *Id.* at 592–93.

89 Flast v. Cohen, 392 U.S. 83 (1968).

90 *Id.* at 85–88.

91 *Hein*, 551 U.S. at 615, 643.

92 For a full description of the voting in *Hein*, see Cohen, *supra* note 6, at 206–11.

Table 4. Voting Pattern in *Hein v. Freedom From Religion Foundation*

Opinion author (Number of Justices joining opinion)	Is *Flast* good law?	Is this case the same as *Flast*?	Is there standing?
Alito (3)	Yes (3)	No (3)	No (3)
Scalia (2)	No (2)	Yes (2)	No (2)
Souter (4)	Yes (4)	Yes (4)	Yes (4)
Total	**Yes (7–2)**	**Yes (6–3)**	**No (5–4)**

Although *Hein* did not overrule *Flast*, uncertainty about *Flast*, at least in the eyes of Justices Scalia and Thomas, as well as the advocates who urged its overruling, created the precedent-based voting paradox that ultimately won the case for the government.

Although *McDonald* presents two separate constitutional issues and is therefore not an instance of a precedent-based voting paradox, it shares some of the same qualities with respect to precedent as a precedent-based voting paradox. In both *Hein* and *McDonald*, creating a voting paradox required at least one Justice to believe that a precedent—one that had been criticized by scholars and judges in the past—should be overturned. In *McDonald*, scholars and judges have long criticized the line of cases that virtually nullified the Privileges or Immunities Clause. The brief for the petitioners drew upon that scholarship in its arguments.[93] Although the questioning of this line of precedent did not result in a majority of the Court voting to overturn the precedent, it did result in Justice Thomas casting the decisive vote by disagreeing with the majority on the Due Process Clause but agreeing that the Privileges or Immunities Clause should be revived.

Calling precedent into question increases the likelihood of a voting paradox because it increases the Justices' options for reaching particular conclusions. As I and others have written before, stare decisis is one mechanism the Court uses to decrease the likelihood of cycling and voting paradoxes.[94] Stare decisis generally limits Justices from voting to overrule precedent, which in turn prevents Justices from voting for certain options they might otherwise consider.[95] However, when stare decisis is not followed by all Justices, more options are available to the Justices, thus increasing the possibility of cycling and a

93 Brief for Petitioners at 9–65, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

94 *See, e.g.*, STEARNS, *supra* note 68, at 170–97; Cohen, *supra* note 6, at 217–18.

95 STEARNS, *supra* note 68, at 170–97.

voting paradox. This occurs even though the subset of Justices who believe the precedent should be overruled does not constitute a majority. In *McDonald*, with Justice Thomas basing his concurrence on his belief that *Slaughter-House* should be overruled, a case that no other Justice called into question, he increased the options before the Court and ultimately created a voting paradox.

Thus, *McDonald* demonstrates how precedent plays an important role in creating voting paradoxes. Long before a precedent is actually overturned, if it ever actually is, it can have a very powerful effect on the outcome of major cases.

Conclusion

McDonald is a landmark case that scholars, judges, and lawyers will meticulously dissect for years. Undoubtedly, though, most will focus on the big picture issues of constitutional theory, history, and doctrine. In doing so, they will ignore what really decided this landmark case that created a new federal right for every citizen, thus potentially altering gun policy at every level of American government. The real deciding factor in *McDonald* was the decisionmaking rules of the Court, as the Court reached its conclusion through a voting paradox. Only because the Court uses outcome voting to decide cases was the case resolved in favor of incorporating the right to bear arms against the states.

With *McDonald* as one of the highest-profile voting paradoxes in the history of the Court, the lessons that can be drawn from most voting paradoxes become even starker. Lawyers, judges, and scholars can use *McDonald* to better critically evaluate how the Court operates. They can also use *McDonald* as an example of the importance of strategic decisions, such as raising a second issue more frequently or creating more opportunities to weaken and question precedent. The voting paradox is rare, but as *McDonald* shows, it is immensely powerful.