



Virginia Local Government Law

[Second Amendment Applies to States \(and Localities\)](#)

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By: [Andrew McRoberts](#).

U.S. Supreme Court Rules for Incorporation in *McDonald v. City of Chicago*: Litigation Likely

Last year, this blog reported that the U.S. Supreme Court would be ruling on a key Second Amendment case arising in Chicago that may have a bigger impact on state and local governments than the D.C. gun ban case previously decided. The post was entitled, [“U.S. Supreme Court to hear Key Second Amendment Case.”](#)

My post suggested that one of the key issues to be decided was whether the Second Amendment applied to state (and localities) via the Due Process Clause or the Privileges and Immunities Clause.

Today, the case was decided.

Justice Samuel Alito, writing for a four-justice plurality, based the application of the Second Amendment — which on its face only applies to the federal government — to the states by means of the Due Process clause of the Fourteenth Amendment. A fifth justice, Clarence Thomas, appeared to base the incorporation of the Second Amendment upon the Privileges and Immunities Clause, the [SCOTUSblog](#) and the [ABAJournal](#) report. A *Washington Post* article is [here](#).

The fact that only one of the nine justices seemed to apply the Privileges and Immunities Clause seems to doom this argument for now. Instead, the Due Process Clause of the Fourteenth Amendment seems to be the means by which the Second Amendment — like the other amendments — will be applied to the states.

The decision did leave the door open for reasonable state and local regulation of guns as a U.S. Constitutional matter. Outright bans like that in Chicago seem to be in serious question. What lesser level of regulation will be considered reasonable will be determined by future litigation. And lots of it.

In his opinion, Justice Alito issued an assurance that “doomsday” had not come to state and local gun regulation. Likely not. And the result was no great surprise to Supreme Court-watchers. But now the path to

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legally challenge state and local gun regulations is clear, and states and local governments will inevitably see increased litigation as a result.

Douglas Berman, professor of law at Moritz College of Law, said bluntly today on the [SCOTUSblog](#), “Even before having a chance to skim the Supreme Court’s important *McDonald* ruling concerning the application of the Second Amendment to the states, I can already predict one of its likely (and most consequential?) impacts: lots of state court litigation over state criminal laws concerning the possession and use of firearms.”

States (and localities) had better be ready, locked and loaded.

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