



Written by [Alex Newman](#) on March 5, 2010

Partial Gun Rights Victory Could Have Other Implications

Analysts are predicting at least a partial victory for gun rights after the Supreme Court heard oral arguments Tuesday in *McDonald v. Chicago*, a case about the city's draconian hand-gun ban that could have major implications for state and local firearm regulations across the nation. But even some supporters of the right to keep and bear arms have been critical of the strategy pursued.



Attorney Alan Gura, who argued against the ban on behalf of Otis McDonald and others, told the Supreme Court that it should strike down the unconstitutional hand-gun restrictions. He said the Court should force state and municipal governments to respect Second Amendment protections by "incorporating" the right to keep and bear arms using the "privileges or immunities" clause of the 14th Amendment. But this strategy differs from past arguments for incorporating the Bill of Rights against the states in an important way.

Using just the due process clause of the 14th Amendment would be enough to overturn Chicago's anti-gun ordinances, argued Gura. But there are other reasons for it as well, he told the justices.

"In 1868, our nation made a promise to the McDonald family that they and their descendants would henceforth be American citizens, and with American citizenship came the guarantee enshrined in our Constitution that no State could make or enforce any law which shall abridge the privileges or immunities of American citizenship," Gura explained during his opening argument.

In the past, the Supreme Court has usually relied on the "due process" clause of the 14th Amendment to force states to recognize various rights. But for the Court to go along with Gura's "privileges and immunities" argument, it could have to overturn the landmark "[Slaughterhouse-Case](#)" rulings that protected a butchering monopoly created by the state of Louisiana and held that the "privileges or immunities" clause affected only rights pertaining to U.S. citizenship.

"The Privileges or Immunities Clause could be used as a source for judicial activism unlike anything America has ever seen," warned the conservative American Civil Rights Union on its [website](#). The non-profit organization, which filed a brief in support of McDonald, argued that while the Court should incorporate the Second Amendment against the states using the privileges and immunities clause, it should not overturn the Slaughter-Case decisions as proposed by Gura.

But while some conservatives oppose the idea of reversing that historic decision, an informative *Washington Times* article about the debate entitled "[Gun rights lawyer gives hope to liberal causes](#)"



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noted that some “progressive” groups are joining with Gura in calling for the court to strike down the Slaughter-House ruling.

“[Progressives] cannot afford to absent themselves simply because the first beneficiary of the demise of Slaughterhouse may be a conservative cause, Second Amendment rights,” explained a report from the [Constitutional Accountability Center](#), a liberal organization which filed a brief in support of Gura’s argument. Critics argue that such a reversal could pave the way for the Court to extend all sorts of “rights” including abortion, healthcare, and gay marriage, and that it would disrupt the proper federal-state relationship.

Other analysts are crying foul on the move to strike down Chicago’s hand-gun ban for different reasons. “The Bill of Rights was never intended to be a list of individual rights, but a list of things the federal government could not do to the states,” explained Jack Hunter in an article entitled “[Gunning Down the Constitution](#)” for *The American Conservative*. “The 2nd amendment does not apply to the Chicago gun ban because the federal government is not involved — nor should it be.” So while the ban may be “ridiculous,” Hunter claims people should oppose the Court striking it down “because this decision would trample the most important right of all — that of the states to limit the power of the federal government.”

But not so, according to constitutional attorney Edwin Vieira, Jr., who has prevailed in three cases before the U.S. Supreme Court.

“Both the original Constitution and the Second Amendment made abundantly clear that ‘the right of the people to keep and bear Arms’ applies to every level of government, without exception, throughout the United States,” he wrote in an analysis of the case for *The New American* entitled “[The Second Amendment, The States, and the People](#)”: “Indeed, the original Constitution actually required both the General Government and the States, not just to protect, but also affirmatively to promote, that exercise. This is because the original Constitution incorporated within its federal structure ‘the Militia of the several States.’”

Vieira argues that the even though a legislative solution would be preferable, “even under the Supreme Court’s misconceptions about the 14th Amendment, ‘the right of the people to keep and bear Arms’ should be held applicable to the States.”

During the hearing, a majority of Justices seemed like they were at least partially swayed by Gura’s arguments. Justice John Paul Stevens, however, was concerned that applying the Second Amendment in full against the states could end up giving people “the right to parade around the streets with guns.” Justice Stephen Breyer thought the true issue boiled down to guns versus life. “Here, every case will be on one side guns, on the other side human life,” he said.

But regardless of what the public thinks, the Court is widely expected to incorporate the Second Amendment against the states while allowing “reasonable” restrictions to remain intact. What the definition of “reasonable” might be is still not known.

There is good news related to gun rights, too, however. While Chicago continues to defend its infringement upon the unalienable rights of its residents, states across the Union are defying federal government regulations by passing state laws nullifying some of those restrictions. [Montana](#), Utah, and Tennessee have all passed versions of the “[firearms freedom act](#)” into law, voiding most federal rules against guns manufactured and kept in their respective states. Many other states are working on it as well. And [public opinion](#) is solidly in favor of less gun control, not more.



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So while the anticipated Supreme Court decision may represent a partial victory to some, and an unconstitutional infringement on the powers of state governments to others, the future of gun rights in America generally looks brighter than it did just a few years ago. After all, more and more Americans are beginning to appreciate that the right to keep and bear arms is an unalienable gift from their Creator which “shall not be infringed” by government. And that is encouraging news.



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