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## Does Justice Scalia Think the Second Amendment Applies Only to the Federal Government?

Damon W. Root | February 19, 2010

*The Wall Street Journal* Law Blog has an interesting, if somewhat imprecise post devoted to whether or not Justice Antonin Scalia will “flip flop” on the Second Amendment when the Supreme Court hears the gun rights case *McDonald v. Chicago* next month. The controversy centers on an article by Jess Bravin, the *Journal's* Supreme Court correspondent, that features the following paragraphs:

In a 1997 book, "A Matter of Interpretation," Justice Scalia wrote that he viewed "the Second Amendment as a guarantee that the federal government would not interfere with the right of the people to keep and bear arms."

Yet, this next passage gives court watchers some pause. "Of course," Justice Scalia continued, "properly understood, it is no limitation upon arms control by the states."



The issue facing the Court in the Chicago gun case, however, is not simply what the Second Amendment means, but “Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.” So what actually matters is Scalia’s view of incorporation under the 14th Amendment. That’s where things get interesting. As the legal scholars Ilya Shapiro and Josh Blackman note in their superb article “Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States,” Scalia has yet to vote in favor of incorporating a right against the states via the 14th Amendment’s Due Process Clause. In fact, he’s been a sharp and persistent critic of the Court’s incorporation jurisprudence (so have many other conservative legal theorists and activists).

But does that mean Scalia will have to “flip-flop” in order to apply the Second Amendment to the states? Not if he follows the text and history of the Privileges or Immunities Clause. Although it was notoriously gutted by the Court in the 1873 *Slaughterhouse Cases*, the Privileges or Immunities Clause was specifically designed to protect individual rights from abusive state and local governments—including the right of armed self-defense.