

# *Fordham Urban Law Journal*

---

*Volume 39, Number 5*

2012

*Article 5*

SYMPOSIUM - GUN CONTROL AND THE SECOND AMENDMENT:  
DEVELOPMENT AND CONTROVERSIES IN THE WAKE OF  
DISTRICT OF COLUMBIA V. HELLER AND MCDONALD V.  
CHICAGO

---

## Gun Control and the Second Amendment: Developments and Controversies in the Wake of District of Columbia v. Heller and McDonald v. Chicago

Harris Fischman\*

\*United States Attorney's Office for the Southern District of New York

Copyright ©2012 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

**INTRODUCTORY REMARKS TO THE  
*FORDHAM URBAN LAW JOURNAL'S*  
VOLUME XXXIX SYMPOSIUM:**

**GUN CONTROL AND THE SECOND  
AMENDMENT: DEVELOPMENTS AND  
CONTROVERSIES IN THE WAKE OF  
*DISTRICT OF COLUMBIA V. HELLER* AND  
*MCDONALD V. CHICAGO***

FORDHAM LAW SCHOOL – MARCH 9, 2012

*Harris Fischman\**

Introduction .....	1340
I. The Text of the Second Amendment .....	1340
II. Supreme Court Decisions Analyzing the Second Amendment .....	1341
III. The Supreme Court's Decision in <i>District of Columbia v.</i> <i>Heller</i> .....	1342
IV. The Supreme Court's Decision in <i>McDonald v. City of</i> <i>Chicago</i> .....	1347
V. Issues Being Litigated Post- <i>Heller</i> and Post- <i>McDonald</i> .....	1350
Conclusion.....	1352

---

\*Harris Fischman is an Assistant United States Attorney assigned to the Criminal Division of the United States Attorney's Office for the Southern District of New York. A 2005 *cum laude* graduate of Northwestern University School of Law, Mr. Fischman worked as a litigation associate at the law firm of Cravath, Swaine & Moore LLP prior to joining the United States Attorney's Office. Before that, Mr. Fischman served as a law clerk in the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia where he was a member of the team prosecuting the former president of Yugoslavia, Slobodan Milosevic.

### INTRODUCTION

Thank you, Dean Martin, and thank you to the members of the *Fordham Urban Law Journal* for putting together this event and giving me the opportunity to speak to you all today.

What I would like to do in the time I have is to try and provide a bit of background for some of the debate on the Second Amendment that you will hear later today. To that end, I am going to try to summarize how the Supreme Court has interpreted the Second Amendment, most importantly focusing on the 2008 and 2010 decisions in *District of Columbia v. Heller*<sup>1</sup> and *McDonald v. City of Chicago*.<sup>2</sup> Please know that I speak today not on behalf of the Department of Justice or the United States Attorney's Office, and any opinions or beliefs that I express are my own and not necessarily those of the Department.

### I. THE TEXT OF THE SECOND AMENDMENT

A natural place to start is with the text of the amendment itself. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>3</sup> The amendment contains two parts: the prefatory language, "A well regulated Militia, being necessary to the security of a free State," and the operative part, "the right of the people to keep and bear Arms, shall not be infringed." How to interpret the relationship between the prefatory language and the operative language is the cornerstone of the debate in the Supreme Court's 2008 decision in *District of Columbia v. Heller*.<sup>4</sup> Does the operative language, "the right of the people to keep and bear arms, shall not be infringed," only apply when arms are kept or carried in connection with a military purpose? Or does the prefatory language concerning the necessity of a militia merely provide the backdrop against which the Founders felt it necessary to codify an individual right of "the people" to keep and bear arms—whether or not the use of arms is related to military use?

The Supreme Court did not address this issue of linguistics and the Founders' intent until the *Heller* decision in 2008. Commentators on both sides of this issue have argued that the Court's silence on this

---

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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

3. U.S. CONST. amend. II.

4. See *Heller*, 554 U.S. at 577–78, 598–600; *id.* at 643–44 (Stevens, J., dissenting).

2012]

*INTRODUCTORY REMARKS*

1341

topic suggests that one way or the other, before *Heller* there really was no serious debate about the meaning of the Second Amendment. Depending on your viewpoint, the Court in *Heller*, in finding that the Second Amendment protects an individual's right to bear arms in non-military conduct, either affirmed a well-accepted principle or, on the other hand, expanded the scope of the right under the Second Amendment, despite the plain language concerning the militia, to create a constitutionally protected individual right to bear arms when such a constitutional right had never existed before nor was intended to exist by the Founders.

## II. SUPREME COURT DECISIONS ANALYZING THE SECOND AMENDMENT

Interestingly, before *Heller* and *McDonald*, the Second Amendment rarely was a source of much interest for the Supreme Court. Indeed, prior to the 2008 *Heller* decision, the meaning and scope of the Second Amendment seems only to have been the focus of three Supreme Court decisions.<sup>5</sup> I will discuss each of those briefly.

First, in 1876, the Supreme Court in *United States v. Cruikshank*,<sup>6</sup> a few years after passage of the Fourteenth Amendment, addressed whether the Second Amendment applies by its own force to anyone other than the Federal Government.<sup>7</sup> The Court concluded that the Second Amendment means no more than that the right to keep and bear arms shall not be infringed by Congress, and that states were free to protect or restrict that right under their police powers.<sup>8</sup>

In 1886, the Supreme Court in *Presser v. Illinois* upheld a state law that forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law.<sup>9</sup> The Court upheld the law and affirmed its holding in *Cruikshank* that the Second Amendment is only a limitation upon the power of Congress and the national government, and not upon that of the states.<sup>10</sup> The Court also found that the state

---

5. *See generally* Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

6. 92 U.S. 542.

7. *See id.* at 550–51.

8. *See id.* at 553.

9. *Presser*, 116 U.S. at 253.

10. *See id.* at 264–65.

law did not violate a citizen's rights under the Fourteenth Amendment.<sup>11</sup>

In 1927 and 1934, Congress passed what Justice Stevens's dissenting opinion in *Heller* characterized as the first federal laws directly restricting civilian use of firearms.<sup>12</sup> The 1927 Act prohibited mail delivery of firearms capable of being concealed on one's person.<sup>13</sup> The 1934 Act prohibited the possession of sawed off shotguns and machine guns.<sup>14</sup>

The 1934 Act came under review in the 1939 Supreme Court decision *United States v. Miller*,<sup>15</sup> the third and final Second Amendment Supreme Court decision preceding *Heller* and *McDonald*. In *Miller*, the Supreme Court upheld the 1934 Act outlawing possession of, among other things, a short barrel shotgun.<sup>16</sup> The Supreme Court reasoned that since there was no evidence that a short barrel shotgun has "some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."<sup>17</sup> As I will discuss in a moment, how to interpret the holding in *Miller* is one of the central disagreements between the majority and dissent in *Heller*.

### III. THE SUPREME COURT'S DECISION IN *DISTRICT OF COLUMBIA V. HELLER*

So let's discuss *Heller*. In the pivotal 5-4 decision, the Supreme Court reviewed District of Columbia ordinances that generally prohibited the possession of handguns.<sup>18</sup> Specifically, it was a crime in Washington D.C. "to carry an unregistered firearm, and the registration of handguns [was] prohibited."<sup>19</sup> "District of Columbia law also require[d] residents to keep their lawfully owned firearms,

---

11. *See id.* at 266.

12. *See* District of Columbia v. Heller, 554 U.S. 570, 675 (2008) (Stevens, J., dissenting).

13. *See id.* (citing Act of Feb. 8, 1927, ch. 75, 44 Stat. 1059).

14. *See id.* (citing National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. 5801-5849 (2006))).

15. 307 U.S. 174 (1939).

16. *See id.* at 178.

17. *Id.*

18. *See Heller*, 554 U.S. at 574.

19. *Id.* at 574-75.

2012]

*INTRODUCTORY REMARKS*

1343

such as registered long guns, ‘unloaded and disassembled or bound by a trigger lock or similar device’ . . . .”<sup>20</sup>

The majority opinion, written by Justice Scalia, held that the Second Amendment protects an individual’s right to possess a firearm unconnected with service in militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.<sup>21</sup> Scalia reasoned that the Second Amendment’s prefatory clause—“A well regulated Militia, being necessary to the security of a free State”—did not limit or expand the operative clause of the amendment—“the right of the people to keep and bear Arms shall not be infringed.”<sup>22</sup> Scalia wrote that the operative clause’s text and history—including its legislative history, post-ratification commentary, and the limited jurisprudence analyzing the Second Amendment that I just very briefly discussed—all support a reading that the Second Amendment protects an individual’s right to keep and bear arms.<sup>23</sup> Scalia reasoned that the prefatory language announced the purpose for which the right to bear arms was codified, but did not contain all components of the right.<sup>24</sup> Scalia wrote, “[T]he threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.”<sup>25</sup> Scalia noted, however, that “[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”<sup>26</sup>

The majority found that the handgun ban amounted to a prohibition on an entire class of firearms that Americans choose for the lawful purpose of self-defense.<sup>27</sup> The majority opinion noted that the complete prohibition of handguns would fail either intermediate or strict scrutiny but, interestingly, declined to adopt a specific standard of review.<sup>28</sup> Scalia wrote, “[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one

---

20. *Id.* at 575 (quoting D.C. CODE § 7-2507.02 (2009), *amended by* 56 D.C. Reg. 1365 (2009)).

21. *See id.* at 635.

22. *Id.* at 577.

23. *See id.* at 579-620.

24. *See id.* at 599.

25. *Id.*

26. *Id.*

27. *See id.* at 628.

28. *See id.* at 634-35.

should not expect it to clarify the entire field.”<sup>29</sup> The Court also found that the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense, and is therefore unconstitutional.<sup>30</sup>

The majority was careful to note that, like most rights, the right secured by the Second Amendment is not unlimited.<sup>31</sup> Not purporting to have made an exhaustive list, the Court mentioned some of the permissible restrictions on possession of firearms, namely prohibitions on the possession of firearms by convicted felons and the mentally ill; laws forbidding the carrying of firearms in sensitive places such as schools; laws imposing conditions and qualifications on the commercial sale of firearms; and, in keeping with the majority’s reading of *Miller*, prohibitions on firearms that are not in common use at the time.<sup>32</sup>

Returning to *Miller* for a moment, the 1939 case held that Congress may prohibit or restrict possession of guns that have no reasonable relationship to the preservation or efficiency of a well regulated militia.<sup>33</sup> The majority in *Heller* interpreted *Miller* to mean that certain types of weapons are not protected under the Second Amendment—not that a weapon must be used in connection with military activity to be protected—but rather that *Miller* asks whether the gun at issue is of a type that is related to the preservation or efficiency of the military.<sup>34</sup> The majority went on to say that arms that have some relationship to the preservation or efficiency of a well regulated militia are not necessarily those weapons that are most commonly used by the military but rather those that are in common usage at the time.<sup>35</sup> So put another way, the majority in *Heller* interpreted *Miller* to hold that the Second Amendment protects an individual’s right to bear arms that are commonly used at that time.

Justice Stevens, dissenting in *Heller*, interpreted *Miller* to mean that the Second Amendment only protects the right to bear arms insofar as it is connected with military usage.<sup>36</sup> Stevens wrote:

---

29. *Id.* at 635.

30. *See id.* at 630.

31. *See id.* at 595.

32. *See id.* at 626-27.

33. *United States v. Miller*, 307 U.S. 174, 178 (1939).

34. *See Heller*, 554 U.S. at 622-25.

35. *See id.* at 624-25.

36. *See id.* at 637-38 (Stevens, J., dissenting).

2012]

## INTRODUCTORY REMARKS

1345

[I]f the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?<sup>37</sup>

The dissent's disagreement over the majority's interpretation of *Miller* spills into the heart of the dispute in *Heller*. As Justice Stevens wrote in dissent:

The view of the amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.<sup>38</sup>

Justice Stevens also took issue with Justice Scalia's mode of statutory construction, which in the eyes of the dissent relegated the prefatory language concerning the militia to merely contextual information.<sup>39</sup> Quoting *Marbury v. Madison*, Stevens wrote that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”<sup>40</sup>

The dissent, like the majority opinion, looked at the legislative and post-ratification history of the amendment but came to a far different conclusion.<sup>41</sup> In particular, Justice Stevens focused on James Madison's consideration and rejection of potential formulations of the amendment that would have, in the words of Justice Stevens, “unambiguously protected civilian use of firearms.”<sup>42</sup> Specifically, the dissent focused on proposed language from New Hampshire that stated, “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion,”<sup>43</sup> and proposals considered in other states, including Madison's native Virginia, that defined the right to bear arms in more clearly personal terms.<sup>44</sup>

---

37. *Id.* at 677.

38. *Id.* at 637-38.

39. *See id.* at 643-44.

40. *Id.* at 643 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)) (internal quotation marks omitted).

41. *See id.* at 641-62.

42. *Id.* at 660.

43. *Id.* at 657.

44. *Id.* at 659-60.



Justice Breyer joined in Justice Stevens' dissent and also dissented on the ground that even if the Second Amendment could be construed to protect a civilian's non-military bearing of arms, the Washington D.C. regulation, in the words of Justice Breyer, "which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem."<sup>45</sup> Justice Breyer criticized the majority for not setting forth a standard of review and noted that if, for instance, "rational basis" review were the proper standard, the legislation would undoubtedly pass that test.<sup>46</sup> Justice Breyer went on to write that adoption of a strict scrutiny standard of review—under which a gun law would be reviewed to determine whether it is narrowly tailored to achieve a compelling governmental interest—would be impossible.<sup>47</sup> Reasoning that since almost every gun control law will seek to advance a primary concern of the government (the safety of its citizens)—and such an interest has been determined in other cases to be compelling—any attempt to apply strict scrutiny would in practice turn into an interest balancing inquiry "with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter."<sup>48</sup> Justice Breyer therefore recommended simply adopting an interest-balancing inquiry explicitly as the appropriate standard of review.<sup>49</sup>

Justice Breyer concluded that in light of the compelling government interest in the safety of its citizens, and since self-defense is not the primary interest advanced by the Second Amendment—rather, the preservation of the militia is—the Washington D.C. laws did not disproportionately burden Amendment-protected interests. Therefore, in his eyes, even assuming that the Second Amendment protects the right to self-defense, the Washington D.C. regulations pass constitutional muster.<sup>50</sup>

After the majority holding in *Heller*, it is now clear that the Second Amendment protects an individual's right to bear arms in the home for the lawful purpose of self-defense. As I noted, the decision did

---

45. *Id.* at 681-82 (Breyer, J., dissenting).

46. *See id.* at 687-88.

47. *See id.* at 689.

48. *Id.*

49. *See id.*

50. *See id.* at 720-23.

2012]

*INTRODUCTORY REMARKS*

1347

leave certain areas, such as standard of review, open for debate. The *Heller* decision also was silent on whether the Fourteenth Amendment incorporated the Second Amendment right to keep and bear arms for the purpose of self-defense.<sup>51</sup>

#### IV. THE SUPREME COURT'S DECISION IN *MCDONALD V. CITY OF CHICAGO*

In 2010, the Supreme Court in *McDonald* addressed whether, in the wake of *Heller*, the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.<sup>52</sup>

Under review in *McDonald* were Chicago laws that prohibited handgun possession similar to the DC regulations at issue in *Heller*.<sup>53</sup> The municipalities of Chicago and Oak Park argued that their laws were constitutional because the Second Amendment has no application to the States.<sup>54</sup>

However, Justice Alito, writing a plurality opinion for the Court, held that the Second Amendment right was applicable to the States under the Due Process Clause of the Fourteenth Amendment,<sup>55</sup> which provides that no State may deprive any person of life, liberty or property, without due process of the law.<sup>56</sup> Justice Alito recognized that earlier Second Amendment opinions of the Supreme Court in *Cruikshank*, *Presser*, and *Miller* held that the Second Amendment applies only to the Federal Government and not to the states.<sup>57</sup> However, Justice Alito found that those decisions “preceded the era in which the Court began the process of ‘selective incorporation’ under the Due Process Clause, and [that the Supreme Court had] never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.”<sup>58</sup>

Applying the test set forth in the Supreme Court's decision in *Duncan v. Louisiana*, the Court analyzed whether the right protected by the Second Amendment is fundamental to the nation's scheme of

---

51. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3027 (2010) (citing *NRA, Inc. v. Vill. of Oak Park*, 617 F. Supp. 2d 752, 754 (N.D. Ill. 2008)).

52. *See id.* at 3026.

53. *See id.*

54. *See id.*

55. *See id.*

56. U.S. CONST. amend. XIV, § 1.

57. *See McDonald*, 130 S. Ct. at 3030.

58. *Id.* at 3031.

ordered liberty;<sup>59</sup> or applying the test from *Washington v. Gluckberg*, whether it is “deeply rooted in this Nation’s history and tradition” and, therefore, incorporated from the Bill of Rights into the Fourteenth Amendment and applied to the States.<sup>60</sup> Justice Alito remarked, “Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the *central component*’ of the Second Amendment right.”<sup>61</sup> Justice Alito rejected the municipal respondents’ argument that the central component of the right was as a means of preserving the militia, and not self-defense.<sup>62</sup> The plurality opinion then went on to recount the legislative history of the amendment and the post-ratification history of the amendment that demonstrated 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.<sup>63</sup>

Justice Alito also reaffirmed, as provided in *Heller*, that the right to keep and bear arms is not limitless and incorporation of the Second Amendment right through the due process clause of the Fourteenth Amendment to make that right applicable to the states did not disturb certain longstanding regulatory measures such as prohibitions on the possession of firearms by felons and forbidding the carrying of firearms in sensitive areas such as schools.<sup>64</sup>

Justice Thomas concurred in part with the plurality opinion and concurred in the judgment.<sup>65</sup> He agreed that the Fourteenth Amendment makes the right to keep and bear arms, as set forth in the Second Amendment, fully applicable to the States but wrote separately because he believed that the right is incorporated, not through the Due Process Clause of the Fourteenth Amendment, but rather through the Fourteenth Amendment’s Privileges and Immunities Clause.<sup>66</sup> The Privileges and Immunities Clause of Fourteenth Amendment provides that a State may not “abridge the

---

59. *See* 391 U.S. 145, 149 (1968).

60. *McDonald*, 130 S. Ct. at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

61. *Id.* (footnote omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

62. *See id.* at 3048.

63. *See id.* at 3037-42.

64. *See id.* at 3047.

65. *See id.* at 3058 (Thomas, J., concurring).

66. *See id.* at 3059.

2012]

## INTRODUCTORY REMARKS

1349

privileges or immunities of citizens of the United States.”<sup>67</sup> The scope of rights protected under the Privileges and Immunities Clause, as many of you well know, has been construed rather narrowly since the landmark *Slaughter-House Cases*<sup>68</sup> of the nineteenth century and the proper interpretation of that clause is an issue that has been the source of much scholarly debate. Justice Thomas argued, among other things, that the Privileges and Immunities Clause protects constitutionally protected rights, including the right to keep and bear arms.<sup>69</sup>

There were two dissenting opinions in *McDonald*, again penned by Justice Stevens and Justice Breyer. Much of Justice Stevens’ dissent, like Justices Scalia and Thomas’ concurring opinions, is spent analyzing the proper interpretation of the Fourteenth Amendment.<sup>70</sup> Justice Stevens argued that the Supreme Court had already decided in *Cruikshank*, *Presser*, and *Miller* that the Second Amendment right had not been incorporated into the Fourteenth Amendment.<sup>71</sup> Thus, Justice Stevens framed the question as whether the particular right asserted by petitioners—to bear arms in the home for the purpose of self-defense—applies to the States “because of the Fourteenth Amendment itself, standing on its own bottom.”<sup>72</sup> Justice Stevens then undertook to analyze whether the right to bear arms in the home constitutes a “liberty” interest within the meaning of the substantive due process clause of the Fourteenth Amendment.<sup>73</sup> He ultimately concluded that on the facts before the Court in this case,

[h]aving failed to show why their asserted interest is intrinsic to the concept of ordered liberty or vulnerable to maltreatment in the political arena, [petitioners] have failed to show why “the word liberty in the Fourteenth Amendment” should be “held to prevent the natural outcome of a dominant opinion” about how to deal with the problem of handgun violence in the city of Chicago.<sup>74</sup>

Justice Breyer focused his dissenting opinion on whether the right to bear arms in the home for self-defense was “sufficiently ‘fundamental’” to warrant incorporation and “remove it from the

---

67. U.S. CONST. amend. XIV, § 1.

68. 83 U.S. 36 (1872).

69. See *McDonald*, 130 S. Ct. at 3068 (Thomas, J., concurring).

70. See *McDonald*, 130 S. Ct. at 3090-3103 (Stevens, J., dissenting).

71. See *id.* at 3088 & n.1.

72. *Id.* at 3103.

73. See *id.* at 3103-07.

74. *Id.* at 3116 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

political process in every state.”<sup>75</sup> He was critical of Justice Alito’s opinion for relying just on the historical status of the right in determining whether it was fundamental to the American scheme of justice.<sup>76</sup> Breyer wrote that other considerations should bear on the calculus, such as: “the nature of the right; any contemporary disagreement about whether the right is fundamental; [and] the extent to which incorporation [would] further other . . . constitutional aims.”<sup>77</sup> He concluded that incorporation was not appropriate because, among other things, “[i]n sum, the police power, the superiority of legislative decisionmaking, the need for local decisionmaking, the comparative desirability of democratic decisionmaking, the lack of a manageable judicial standard, and the life-threatening harm that may flow from striking down regulations all argue against incorporation.”<sup>78</sup> Justice Breyer went on to write that “the important factors that favor incorporation in other instances—*e.g.*, the protection of broader constitutional objectives—are not present here.”<sup>79</sup>

#### V. ISSUES BEING LITIGATED POST-*HELLER* AND POST-*MCDONALD*

So, as we just discussed, *Heller* establishes that the Second Amendment protects the right to bear arms in the home for the lawful purpose of self-defense,<sup>80</sup> and *McDonald* incorporates that right through the Due Process Clause of the Fourteenth Amendment so that it is applicable to the states.<sup>81</sup>

In the wake of *Heller* and *McDonald*, several issues are being litigated across the country. I would like to close my remarks today by highlighting a few of those, and I’m sure your panelists will raise others throughout the day.

One issue being litigated is whether the holding in *Heller* protects gun possession outside of the home. As Justice Alito in *McDonald* described the central holding in *Heller*: “the Second Amendment protects a personal right to keep and bear arms for lawful purposes,

---

75. *Id.* at 3123 (Breyer, J., dissenting).

76. *See id.* at 3122.

77. *Id.* at 3123.

78. *Id.* at 3129.

79. *Id.*

80. *See* District of Columbia v. Heller, 554 U.S. 570, 573-626 (2008); *supra* Part III.

81. *See McDonald*, 130 S. Ct. at 3028-30, 3031-44; *supra* Part IV.

most notably for self-defense within the home.”<sup>82</sup> The question has arisen in several litigations of what, if any, Second Amendment protections are available outside of the home.<sup>83</sup> As noted in some of those cases, there is language in *Heller* that suggests that the right also applies to keeping and bearing arms in public. For example, the Court in *Heller* more generally referred to an individual’s right “to possess and carry weapons in case of confrontation.”<sup>84</sup> Litigants all over the country are arguing both sides—on the one hand that the right only attaches to firearms in the home and on the other hand that the right extends outside of the home—and I imagine panelists today will argue both sides of that issue.

A second issue that has arisen at the trial court level is what other categories of prohibitions or restrictions on gun possession qualify as public safety exceptions. As we discussed, the Supreme Court recognized certain public safety exceptions to the reach of the protection afforded under the Second Amendment (such as forbidding guns in school and prohibiting convicted felons from possessing guns), but conceded that list was not necessarily exhaustive.<sup>85</sup> Whether other categories of gun prohibitions or restrictions, if any, fall into the public safety exception is another issue that is being litigated in several courts.<sup>86</sup>

Finally, parties are litigating over the correct standard of scrutiny to apply in analyzing a regulation that prohibits or restricts gun possession.<sup>87</sup> As I mentioned earlier, the Court in *Heller* declined to set forth a standard of review for gun control laws.<sup>88</sup> *McDonald* also did not establish a standard of review.<sup>89</sup> Many scholars, and certainly

---

82. *Id.* at 3044.

83. *See, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011) (reserving the question of whether the Second Amendment right to bear arms extends outside the home); *People v. Aguilar*, 944 N.E.2d 816, 827 (Ill. App. Ct. 2011), *leave for appeal granted*, 949 N.E.2d 1099 (Ill. 2011); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011), *cert. denied*, 132 S. Ct. 93 (2011).

84. *Heller*, 554 U.S. at 592.

85. *See id.* at 626-27.

86. *See, e.g.*, *United States v. Young*, 58 F. App’x 980 (4th Cir. 2003) (applying public safety exception where officers ask a handcuffed defendant if there is a gun in the home); *United States v. Reynolds*, 334 F. Supp. 2d 909 (W.D. Va. 2004) (considering whether public safety exception applies when officers are voluntarily given a gun by defendant and ask if defendant has any other weapons in the house).

87. *See, e.g.*, *Nordyke v. King*, 681 F.3d 1041, 1045–46 (9th Cir. 2012) (en banc) (O’Scannlain, J., concurring); *Osterweil v. Bartlett*, 819 F. Supp. 2d 72, 84 (N.D.N.Y. 2011).

88. *See generally Heller*, 554 U.S. 570.

89. *See generally McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

litigants and courts across the country, have pored over those decisions, particularly *Heller*, to argue which standard of scrutiny is suggested by the Court's opinions. Some argue that the holding in *Heller* suggests that strict scrutiny applies since it terms the right to possess arms in the home for self-defense as a "fundamental right."<sup>90</sup> On the other hand, some have argued that intermediate scrutiny seems to apply because it termed the public safety exceptions to the Second Amendment as "presumptively constitutional" whereas under strict scrutiny they would presumptively be unconstitutional.<sup>91</sup> Some have argued for the interest balancing approach that Justice Breyer advocated in his dissent in *Heller* and others have attempted hybrid approaches.<sup>92</sup>

### CONCLUSION

These are only some of the issues that are being litigated in courthouses all over our country post-*Heller* and *McDonald*, and I am sure the panelists will debate these and other issues throughout the day.

I would again like to thank Fordham Law and the *Fordham Urban Law Journal* for the opportunity to speak with you this morning. I hope you all enjoy the symposium. Thank you very much.

---

90. See Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011).

91. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 460 (4th Cir. 2011); *United States v. Miller*, 604 F. Supp. 2d 1162, 1170-71 (W.D. Tenn. 2009) (collecting cases).

92. See *State v. Brown*, 815 N.W.2d 407 (Wis. 2012) (reasonableness test); *People v. Williams*, 962 N.E.2d 1148, 1153-54 (Ill. App. Ct. 2011) (rational basis test).