The Incorporation of the Second Amendment: A Study in Constitutional Dialogue

I. Introduction

District of Columbia v. Heller[1] has been decided, but the debate over the Second Amendment right to bear arms is far from over. In *Heller*, the Court restructured the debate on the Second Amendment by declaring that it was an individual, rather than a collective, right.[2] By doing so, the Court reinvigorated the arguments over the appropriate level of gun control in our country and opened the door to legislative action.

Dialogue, in the way the term will be used within this article, refers to the ongoing political processes by which changes in our laws occur. Courts play an important role in this task by adjudicating claims of rights and challenges to governmental actions.[3] The courts are not, however, the first word on the dialogue. In order for dialogue to occur, the government must first act.[4] There must be an event to discuss. In the confines of *Heller*, the action was a handgun ban. After the governmental action, there must be an individual response.[5] Absent an individual response, the dialogue is unnecessary and will not occur. In *Heller*, the individual response was the filing of suit against the District of Columbia.[6] The next step in the dialogue is the initial case, followed by the appeal(s), and finally, if merited, review by the Supreme Court.[7] The Supreme Court then weighs in on the dialogue by deciding the case, applying precedent, and reviewing the governmental action being attacked.[8] *Heller* has proceeded through these points and will be discussed in detail later.

It is important to realize that the Supreme Court's decision is not the end of the discussion.[9] The decision made by the Court will spark debates, both among private citizens and within legislatures.[10] More lawsuits will be filed to determine the scope of the holding.[11] Laws will be enacted or repelled to comply with the ruling.[12] This is the point *Heller* has reached. The Supreme Court ruled, and the lower courts have been dealing with the guidelines, or lack thereof, laid forth in the decision. *McDonald v. City of Chicago*[13] is one of the cases that resulted from *Heller's* ambiguity. *McDonald* will contribute to the discussion of the Second Amendment right by hopefully answering some of the questions *Heller* did not decide: whether the Second Amendment is incorporated, the appropriate standard of review, and the scope of the Second Amendment right.[14]

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[1] *District of Columbia v. Heller* 128 S. Ct. 2783; 54 U.S. --- (2008)
[2] *Id*. at 2788
[3] Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 654
[4] *Id*. at 655
[5] *Id*.
[6] *Heller* at 2788
[7] Friedman, *Dialogue*, *supra* at 655-56
[8] *Id*. at 657
[9] *Id*. at 656
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *McDonald et al v. City of Chicago* No. 08-4244, 7th Cir. Argued 5/26/2009
[14] Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 Harv. L. Rev. 246, 268-69

Before the *Heller's* dialogue can be discussed further, it is important to determine what *Heller* is doing to the conversation. Supreme Court decisions can generally have one of three effects on an issue. The decisions can be a conversation starter, a conversation moderator, or a conversation terminator. An example of each type is provided here, and each type will be discussed in further next.

When the Supreme Court issues a holding, it can do one of three things. It can either start discussion on a topic, moderate discussion on a topic, or terminate discussion on a topic. Some cases can do all of the above. *Heller* is one of the cases capable of doing all three.

Heller starts the discussion on the issues that its holding left undecided, those being incorporation, standard of review, and scope of the Second Amendment. *Heller* moderates the discussion regarding existing gun legislation. The Court in *Heller* modifies Second Amendment discussion by explicitly stating that they are not calling into question existing gun laws.[15] This illustrates the dialogue between the Court and Congress by showing the discussion between the branches regarding gun control policy. *Heller* terminates the discussion on whether the Second Amendment protects an individual or collective right. The majority states that it is an individual right, and the dissent concedes the same.[16]

Some examples of each of the types in isolation should be helpful to illustrate further what each conversational category is at issue. Conversation starters will be illustrated with *Roe v. Wade*[17] and *Brown v. Board of Education*,[18] followed by conversation moderators with *Tinker v. Des Moines Independent School District*,[19] and concluded by conversation terminators as illustrated by *Lawrence v. Texas*.[20]

Roe v. Wade is a starting point for discussion on the right to abortion.[21] The dialogue in *Roe* started with political activism, which moved into the court system.[22] The Supreme Court ruled on the case, there was backlash, legislative action, and further litigation.[23] *Heller* has followed a similar path to the extent that it has had time to do so. The right to bear arms has been a concern of the National Rifle Association (NRA) for many years. The NRA's political activism combined with a good plaintiff led to a challenge in the court system to the District of Columbia's handgun ban. The case went through the court system and was eventually decided by the Supreme Court, which found the handgun ban unconstitutional. There has not yet been a sufficient passing of time to see if the legislative response will be similar to that in *Roe*, but it is already clear that *Heller* has spawned litigation to determine the scope of the right.

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[15] *Heller*, 128 S. Ct. at 2816-17
[16] *Id*. at 2788, 2822, 2848
[17] *Roe v. Wade*, 410 U.S. 113 (1973)
[18] *Brown v. Bd. of Education*, 347 U.S. 483 (1954)
[19] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)
[20] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[21] Friedman, *Dialogue*, *supra* at, 660
[22] *Id*. at 660-61
[23] *Id*.

Roe and *Heller* are both starting points because they leave a number of things undecided. The issues that a case leaves open are points for further dialogue between the political branches. Those issues are a starting point for the future dialogue, thus the cases that leave those issues open are conversation starters.

Tinker v. Des Moines Independent School District[24] is a conversation moderator because it neither opens new topics for dialogue between the branches nor forecloses future discussion on the topics at issue. *Tinker* moderated the dialogue between school boards, in their quasi-legislative capacity, and the courts to determine when and under what circumstances the student's right to free speech may be abridged. *Tinker* does not start this conversation, nor does it set forth a bright line rule to end the conversation. *Heller* is a conversation moderator in that it leaves a number of legislative gun control restrictions untouched.[25] The Court, by recognizing the validity of the past Congressional action, is neither starting a new conversation about the existing regulations, nor terminating future questioning of the regulations. Cases after *Heller* have continued to uphold these restrictions, showing that the conversation between the courts and legislature is far from over regarding existing gun control laws.[26]

Lawrence v. Texas[27] is a conversation terminator because it forecloses future discussion on disparate treatment of homosexual sexual conduct by declaring such disparate treatment unconstitutional.[28] The Court is very specific when it states that *Bowers* was "wrong when it was decided and is wrong now."[29] The degree of specificity the Court uses to say that the rationale behind *Bowers* is wrong forecloses future argument on the issue. *Heller* terminates discussion on whether the Second Amendment protects an individual or collective right.[30]

Having now discussed each type of conversational category, it seems appropriate to place *Heller* within one category for the purpose of analysis for the remainder of the discussion on *Heller's* silence. *Heller* fits best within the conversation starter category. The number of issues left open for future discussion by the *per curiam* opinion tends to show that *Heller* is meant to start the conversation on these issues.[31] While it is possible to place *Heller* into any of the foregoing conversational categories, the best fit is in the conversation starter category.

How *Heller* being a conversation starter will effect the future of *Heller* will be explored by comparing *Heller* to *Tinker*, *Roe*, *Lawrence*, and additionally with *Brown v. Board of Education*. All of the opinions will be analyzed using Cass Sunstein's judicial

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[24] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)
[25] *District of Columbia v. Heller*, 128 S. Ct. at 2816-17; 54 U.S. --- (2008)
[26] *See People v. Abdullah*, --- N.Y.S. 2d ---, 2008 WL 5448995 (2008)
see also, *People v. Flores*, 169 Cal. App. 4th 568 (2008) (both refusing to use *Heller* to overturn existing gun laws)
[27] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[28] *Id*. at 578
[29] *Id*.
[30] *Heller*, 128 S. Ct. at 2788, 2822, 2848
[31] Those issues are: the incorporation of the second amendment, the scope of the second amendment, and the applicable standard of review. *See,* Sunstein, *Heller as Griswold*, *supra* at 268-69

minimalism framework found in *Leaving Things Undecided*.[32] The framework is helpful in that it allows for an easier method by which to analyze the opinions. After using the framework to discuss *Lawrence*, *Tinker*, *Brown*, and *Roe*, the next important case in the Second Amendment dialogue, *McDonald v. City of Chicago*, will be discussed.

II. Framework

In order to contrast the opinions in *Heller* to *Tinker*,[33] *Brown*,[34] *Roe*,[35] and *Lawrence*[36] with *Heller*, there must exist some sort of analytic framework within which to analyze the cases. For the purposes of this paper, Cass Sunstein's *Leaving Things Undecided* Forward to the Harvard Law Review[37] provides an appropriate framework. In the Forward, Professor Sunstein sets forth a framework that discusses judicial opinions along two continuums.[38] One continuum analyzes shallowness to depth,[39] the other, narrowness and width.[40] These two continuums intersect to provide for four potential categories of cases: narrow and shallow, narrow and deep, wide and shallow, and wide and deep.[41]

It is the existence of these four groups of cases was the impetuous for the use of the four cases cited above to contrast *Heller*. These four cases are used because they fall both within the category of cases required for this analysis (those that either established or defined a right) and within the framework discussed above. Each case also contributes in some way to the constitutional dialogue in its own arena. The placement in the framework is wholly independent from whether a case is a conversation starter, moderator, or terminator.

Having already defined conversation starter, moderator, and terminator, it is necessary to define the terms narrow, shallow, wide, and deep. For the purposes of this paper, "narrow" means having a higher degree of specificity, while "wide" means having a more broadly applicable holding.[42] There is some degree of inherent and inevitable subjectivity, especially in the middle ground, between what one person would call "narrow" and another "wide." This is amplified by the way that any given person frames the rule and/or holding of the case in question.

Depth and shallowness suffer similar constructional defects as narrowness and width. "Shallow" and "deep" refer to the extent to which an opinion is theorized or abstract, with a "shallow" opinion being more factually grounded and a "deep" opinion

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[32] Cass R. Sunstein, *Leaving Things Undecided*, 110 Harv. L. Rev. 4
[33] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)
[34] *Brown v. Bd. of Education*, 347 U.S. 483 (1954)
[35] *Roe v. Wade*, 410 U.S. 113 (1973)
[36] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[37] Sunstein, *Leaving Things Undecided*, *supra*
[38] *Id.* at 15
[39] *Id.* at 20
[40] *Id.* at 15
[41] *Id.* at 23
[42] *Id.* at 15

based less on the specific factual context and more on theoretical principles.[43] Shallowness and depth suffer from the same problems as narrow and wide insofar as there is always some degree of subjectivity in the assessment. The concepts also overlap to some degree, especially when an opinion which speaks of a broad right, such as the right to bear arms in *Heller*, but does so in a fact conscious and fact specific opinion.

Heller has been called a minimalist opinion.[44] In the context of this framework, that would make *Heller* both narrow and shallow.[45] Is *Heller* really a minimalist decision? It certainly shares some aspects of minimalism.[46] The Court only answers the specific question in front of it.[47] The *per curiam* opinion is factually specific and contains detailed historic analysis. The opinion rests on constitutional history rather than on abstract theory.[48] In order to test this theory, this paper will contrast *Heller*, in the "shallow and narrow" quadrant, to *Tinker v. Des Moines Independent School District* (hereafter *Tinker*)[49] in the "deep and wide" quadrant, to *Brown v. Board of Education* (hereafter *Brown*)[50] in the "wide and shallow" quadrant,[51] to *Lawrence v. Texas* (hereafter *Lawrence*)[52] in the "narrow and deep" quadrant, and finally to *Roe v. Wade* (hereafter *Roe*)[53] in the "narrow and shallow" quadrant.[54] Each of these cases will be, in addition to being discussed within the framework, discussed in terms of its affect on the constitutional dialogue within its area. Before moving into a discussion of each of these cases, it is necessary to discuss the *Heller* opinion itself.

III. Analysis of the *District of Columbia v. Heller* Opinion

The factual background of *Heller* shows that the statute at issue made it a crime to carry unregistered handguns, and the registration of handguns was prohibited.[55]

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[43] *Id.* at 20
[44] Sunstein, *Heller as Griswold*, *supra* at 248
[45] Sunstein, *Leaving Things Undecided*, *supra* at15, 20
[46] Sunstein, *Heller as Griswold*, *supra* at 248
[47] Sunstein, *Leaving Things Undecided*, *supra* at 14
[48] Sunstein, *Heller as Griswold*, *supra* at 248-49
[49] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)
[50] *Brown v. Bd. of Education*, 347 U.S. 483 (1954)
[51] I must note that I put *Brown v. Board of Education* in the "wide and shallow" quadrant more because of how Brown was applied than because of any specific language in Brown. Brown could, depending on how the reader wants to define the right, arguably be put into almost any of the categories. Brown could just as easily be viewed as "deep" insofar as it is based on the principle that segregation is evil. For my purposes, Brown was more appropriately placed as "shallow" because of the way the court seemed to craft the ruling around the concept of "separate but equal" being unequal, which, while highly principled, was based on largely factual findings
[52] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[53] *Roe v. Wade*, 410 U.S. 113 (1973)
[54] I suspect there will be much disagreement over my placing Roe in the same quadrant as Heller when Heller is supposedly a minimalist opinion while Roe is far from it. For my purposes, Roe fits under "shallow and narrow" because Roe for purposes here, stands for the "right to choose to terminate pregnancy" rather than the usual "right to privacy." Were I using Roe for the "right to privacy" I would have substituted *Griswold v. Connecticut*, 381 U.S. 479 (1965) and placed it in the "narrow and deep" category.
[55] *See* D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.01(a)(4) (2001), *invalidated by* D.C. v. Heller, 128 S. Ct. 2783 (2008)

Separately from this ban, no person could carry a handgun without a license.[56] The Chief of Police could issue licenses for one-year periods.[57] District of Columbia law also required that any long barreled gun be kept inoperable if kept in the home.[58] Respondent initiated this suit after being denied a permit to carry a weapon outside of his duties as a police officer at the Federal Justice Building.[59]

Scalia wrote the *per curiam* opinion. The opinion has been called the "most explicitly and self-consciously originalist opinion in the history of the Supreme Court."[60] It is not necessarily surprising that the Court would turn to the text of the Constitution to solve a case that had so little precedent.[61] *Heller* was the first case to expressly recognize an individual right to bear arms.[62] It does so by analyzing the text of the Second Amendment in two parts, the prefatory clause and the operative clause.[63] The Court ruled that the former prefatory clause is not meant to limit, but instead to clarify, the operative clause.[64]

Scalia's framing of the Constitutional text splits the Second Amendment to show that "A well regulated Militia, being necessary to the security of a free State,"[65] is the prefatory clause,[66] while the remainder of the Second Amendment, "the right of the people to keep and bear Arms, shall not be infringed"[67] is the operative clause.[68] Scalia is making the point that, because Militia members need guns, and all able-bodied men are subject to militia service, there must be an individual right to bear arms.

The Court may have reached the conclusion in a better way. My first point of contention with the *per curiam* opinion is grammatical. Looking to the placement of the commas in the Second Amendment, the Amendment can be read a number of ways.[69] The full text of the Second Amendment states: "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."[70] The way a sentenced is structured, it should be possible to remove any

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See also, Heller, 128 S. Ct. at 2788
[56] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
[57] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
see also, D.C. Code §§ 22-4504(a), 22-4506, *invalidated by* D.C. v. Heller, 128 S. Ct. 2783 (2008)
[58] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
See also, D.C. Code § 7-2507.02, *invalidated by* D.C. v. Heller, 128 S. Ct. 2783 (2008)
[59] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
[60] Sunstein, *Heller as Griswold*, *supra* at 246
[61] *Id.* at 250
[62] *Id.* at 253
[63] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789; 544 US --- (2008)
[64] *Id.*
[65] U.S. Const. amend. II
[66] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
[67] U.S. Const. amend. II
[68] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788; 544 US --- (2008)
[69] *See* http://www.guncite.com/second_amendment_commas.html
See also, rules governing use of commas for parenthetical elements exemplified here: grammar.ccc.commnet.edu/grammar/commas.htm.
[70] U.S. Const. amend. II

portion between two commas and have the sentence still make sense. This can be done in four ways:

> 1) ". . . being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."
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> 2) "A well regulated Militia . . . the right of the people to keep and bear Arms, shall not be infringed."
>
> 3) "A well regulated Militia, being necessary to the security of a free State . . . shall not be infringed."
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> Scalia's split (4): "… the right of the people to keep and bear Arms, shall not be infringed."

As the sentences above show, there is only one way for the Second Amendment to be split in a grammatically correct way. Basing the conclusion on solely the above language, Scalia split the Amendment into a prefatory and operative clause because it was the only way he could reach his desired result, an individual right to bear arms. The first method of splitting the phrases is close, but forms an incomplete sentence and would contain an extra comma. The second is grammatically incorrect. The third is grammatically correct, but shows intent to leave the militia unregulated, not to leave unregulated possession of guns. The way that Scalia splits the Amendment into a prefatory and operative clause, there is an extra an unnecessary comma in the text. It is not my purpose here to delve into the importance of the placement of that comma; it is only my intent to point out that weakness in the majority argument.

My second point of contention with the *per curiam* opinion is its near complete omission of the Militia Clauses in Article 1 section 8 of the Constitution. Congress's ability to call[71] and to regulate[72] the militia, as granted in Article 1, should not be ignored when discussing the existence of the right to bear arms. In order to grasp the full effect of the Framer's intent, the Amendment should not be viewed in isolation. In viewing the Second Amendment together with the Militia Clauses, a better understanding of the full effect of both may be reached. The *per curiam* opinion's gloss over this point weakens the overall conclusion the textual argument ultimately reaches.

The first militia clause reads: "[Congress shall have the power] to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."[73] The first militia clause can be shown to support an individual right to bear arms because of the non sequitur that would be created if it did not do so. If Congress is capable of calling forth the Militia to suppress insurrections, but only the militiamen have arms, who is it that the Militia is being called to fight? Would it be that the Congress is calling the Militia of one state to suppress that of another? Could it be seriously considered that Congress would, on its own accord, demand that type of conflict between

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[71] U.S. Const. art. 1 § 8 cl. 15
[72] U.S. Const. art. 1 § 8 cl. 16
[73] U.S. Const. art. 1 § 8 cl. 15

states? If it cannot be considered that Congress would so countenance a conflict of its own creation between the states, it must follow that the Militia being called would be suppressing members of its own State. How could an unarmed populous rebel to the point where it becomes necessary to call in the militia? If they are so armed it must be because they are capable of arming themselves. If they are capable of arming themselves to this degree, it must not be unlawful for the people to be armed.

The second militia clause states that:

> "[Congress shall have the power] to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."[74]

One reading of this second militia clause also supports the conclusion that the right to bear arms is individual. Congress's ability to organize the militia shows Congress's ability to control membership in the militia.[75] If only militia members are allowed to bear arms, then Congress could effectively disarm the entire populous by some means of 'organizing' the militia. Given the Framer's distrust of centralized government, leading them to invite the people to deliberate on a new Constitution[76] and the failure of the Articles of Confederation,[77] it is inexplicable to think that they would have given the new central government the power to so easily disarm the people. The right of the people to bear arms was well established in England by the time of the Revolution.[78] The Framers did not want to take this right from the people.[79] Insofar as the Framers would not want the people to be so easily disarmed, the individual right to bear arms may be inferred from the degree to which its absence would make it unconscionably easy for Congress to disarm the populous. Ninth Circuit Judge Gould speaks to this point in his concurring opinion in *Nordyke v. King*.[80]

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[74] U.S. Const. art. 1 § 8 cl. 16
[75] U.S. Const. art. 1 § 8 cl. 16
[76] The Federalist No. 1, at 9 (Alexander Hamilton) (Barnes & Noble Classics ed., 2006) ([Y]ou are invited to deliberate upon a [n]ew Constitution for the United States of America.)
[77] Hamilton, *Federalist Papers No. 1*, *supra* at 9 ([a]fter full experience of the insufficiency of the existing federal government…)
[78] *Heller*, 128 S.Ct. at 2898-99
[79] *Id.* at 2798-2800 (Discussing abuses by the English Crown against the colonists and the history of the repression of the right to bear arms.)
[80] *Nordyke v. King*, 563 F.3d 439, 464 ("The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small craft and then assembling to wreak havoc. That we have a lawfully armed populace adds a measure of security for all of us and makes it less likely that a band of terrorists could make headway in an attack on any community before more professional forces arrived. [Further,] the right to bear arms is a protection against the possibility that even our own government could degenerate into tyranny, and though this may seem unlikely, this possibility should be guarded against with individual

These two clauses, read in conjunction with the Second Amendment, can be used to justify the individual right to bear arms. The second argument, that the Congress's ability to organize the militia could lead to the militia's disarmament, provides a transition into my third point of contention with the *per curiam* opinion in *Heller*.

My third point of contention with the *per curiam* opinion in *Heller* is that it ignores one interpretation of the Framer's intent. The Framers had recently revolted against a strong and tyrannical central government.[81] Their experience with a weak central government had failed.[82] The people were going to be very hesitant to acquiesce to the formation of another strong central government so shortly after revolting against one, even when facing the problems of the government under the Articles of Confederation.[83]

The Framers could have included the Second Amendment as a promise to the people that they will not be disarmed. The Declaration of Independence puts it best when it says: "it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. . . ."[84] If it is the duty of the people to overthrow a tyrannical government, must the people not possess the means by which the government should be overthrown? If democracy alone were sufficient to overthrow the government, would the Second Amendment be necessary at all? Without this individual right to bear arms, if the right were contingent upon militia service, the people would be unable to do as our Declaration once instructed them to do.[85] It is hard to believe that these same men who spoke so forcefully about the power and the duty of the people to overthrow government when necessary would take from the people so quickly any capability of doing so.

The purpose of discussing the opinions flaws is merely to provide for discussion points as this paper progresses. There are portions of the *per curiam* opinion that I take no issue with. Among those sections are Scalia's distinguishing Second Amendment precedent that would seem to negate his position. The opinion is also good in its minimalist aspects, including leaving undecided the standard of review, scope of the right, and the question of incorporation until it becomes necessary and appropriate to decide them.[86] All three of those issues will be discussed in detail in the section on *McDonald v. City of Chicago*.

The dissenting opinions by Justice Stevens and Justice Breyer suffer from different flaws than the *per curiam* opinion, and each will be discussed in turn. Justice

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diligence. Third, while the Second Amendment thus stands as a protection against both external threat and internal tyranny[.]")

[81] *Heller*, 128 S. Ct. at 2798-99
[82] Hamilton, *Federalist Papers No. 1*, *supra* at 9 ([a]fter full experience of the insufficiency of the existing federal government…)
[83] The Federalist No. 85, at 487 (Alexander Hamilton) (Barnes & Noble Classics ed., 2006)(A nation without a government is an awful spectacle.)
[84] The Declaration of Independence para. 2 (U.S. 1776)
[85] The Declaration of Independence para. 2 (U.S. 1776)
[86] Sunstein, *Heller as Griswold*, *supra* at 268-69

Stevens dissents not on the ground that the Second Amendment provides an individual right, a point he concedes, but on the ground that the scope of the right.[87] He errs because the existence of the right, not its scope is at issue in *Heller*

My first point of contention with the dissenting opinion by Justice Stevens is that he places erroneous reliance on the decision in *United States v. Miller*.[88] *Miller* can be, and is easily, distinguished by the *per curiam* opinion using language that Justice Stevens himself cites to. The language in the *Miller* holding stating that "we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*" (emphasis added)[89] directly supports Scalia's attempt to distinguish *Miller* on the grounds that *Miller* ruled on a type of weapon, not on the scope of the Second Amendment.[90]

My second point of contention with the dissent by Justice Stevens is his reliance on the Brief for Professors of Linguistics and English as *Amicus Curiae*.[91] In so relying, Stevens repeatedly claims, but never adequately supports, that the "*unmodified* use of bear arms . . . refers most naturally to a military purpose" (emphasis in original, internal quotations omitted).[92] Justice Stevens fails to provide support for why it should be his interpretation that does not require a modifier, rather than the competing interpretation. In this respect, both opinions are weak. Scalia claims that, absent a modifier, the right to bear arms is individual.[93] Stevens claims that, absent a modifier, the right to bear arms must be for military purposes only.[94] While both Justices make a valiant attempt at the argument, neither does much more than repeat the point and hope that it will be accepted based on how many times it has been repeated.

My third point of contention with Justice Stevens' dissent is in footnote 20, where Stevens asserts that the Congress would not have had the authority to say who will be members of the militia.[95] What exactly is the power to organize a militia, if not the power to control its makeup? What purpose would Congressional ability to discipline the members of the militia serve, if Congress could not punish, or deter, misconduct by threat of removal from service? Stevens' note that there was a perceived gap in Article 1 that would allow for disarmament by failure to arm the militia[96] is also troubling. The gap is not in Article One so much as it is in the logic. If the right to bear arms is limited to militia service, it is not the failure to arm that should be the concern. The concern should be in the power to regulate membership. As already discussed above, Congress could

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[87] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822; 544 US --- (2008)
[88] *U.S. v. Miller*, 307 U.S. 174 (1939)
[89] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2823; 544 US --- (2008)
see also, U.S. v. Miller, 307 U.S. 174, 178 (1939)
[90] *Heller*, 128 S. Ct. at 2813-14
[91] *Id*. at 2828
[92] *Id.*
[93] *Id.* at 2794
[94] *Id*. at 2829
[95] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2832 & n.20; 544 US --- (2008)
[96] *Id*. at 2832-33

disarm the people not by failing to arm them, as is Stevens' concern,[97] but by organizing the militia out of existence.

My fourth and final point of contention with Stevens' dissent is in his reliance on state documents and state constitutions. The states have always been understood to have a separate sphere of sovereignty from the federal government.[98] Stevens' reliance on state laws and enactments, to infer the meaning of a similar federal right, is erroneous. The mere fact that some states included different language in their right to bear arms is inapposite to the meaning of the federal right to bear arms. Where a right is incorporated, the states are only allowed to expand the minimum right granted by the Constitution; they are not allowed to contract it.[99] By relying on language in state enactments that define the right to bear arms as limiting the right to bear arms, Stevens is ignoring this constitutional precept.

Justice Breyer, in his dissenting opinion, discusses two reasons the majority in *Heller* is wrong.[100] His first is based on Justice Stevens' dissent,[101] and for the reasons stated above he is mistaken in his reliance on that dissent. His second reason is that the Second Amendment is not absolute.[102] Justice Breyer's assertion that the Second Amendment is not absolute is, in light of the *per curiam* opinion, both irrelevant and unnecessary. There is no language in the *per curiam* opinion to suggest that the Second Amendment is absolute. In fact, the *per curiam* opinion says exactly the opposite.[103] It seems to be Breyer's point in making the superfluous statement that the Second Amendment is not absolute is to provide a transitory statement for his discussion of rational basis scrutiny and the reasons that the D.C. statutes in question should be upheld insofar as they are rationally related to some governmental goal.[104]

Breyer's discussion of rational basis scrutiny is premised on the government's need to regulate possession of firearms.[105] The government's interest in controlling firearms is well documented and cannot be reasonably contested. However, Breyer's use of rational basis scrutiny, for a challenge to a regulation infringing upon a Constitutional right, is mistaken and specifically disclaimed in footnote 27 of the *per curiam* opinion.[106] Scalia does not contest Breyer's assertion that the D.C. regulations would pass rational basis scrutiny; he contests instead the propriety of using rational basis scrutiny.[107] I will reserve further discussion on this point until later, where the questions the Court left unanswered in *Heller* are discussed. Because the majority of Breyer's dissent has to do

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[97] *Id.*
[98] U.S. Const. amend. X
[99] John G Koeltl, *The Litigation Manuel* at 360 ("[W]hile state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection by enacting the Fourteenth Amendment.")
[100] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2847; 544 US --- (2008)
[101] *Id.*
[102] *Id.* at 2816-17
[103] *Id.*
[104] *Id.* at 2848
[105] *Id.*
[106] *Id.* at 2818
[107] *Id.*

with the applicability and appropriateness of rational basis scrutiny the appropriate time to discuss the dissent more during the analysis of the future of *Heller* after the pending decision in *McDonald v. City of Chicago*. Having now discussed both the framework for my analysis and the opinion in *Heller*, the next topic will be the cases within the framework, and how they relate to any of the conversational categories previously discussed.

IV. *Heller* as a Conversation Terminator: *Heller* resembling *Lawrence v. Texas*

Heller ends the discussion on whether the Second Amendment protects an individual or collective right.[108] The dissent does not contest this conclusion.[109] Similarly, *Lawrence* ends the discussion over whether the disparate treatment of homosexual conduct is constitutional.[110] *Lawrence v. Texas*[111] can be viewed in a number of contexts: as a victory for homosexual rights, as a victory for all people, or as an attack on the sanctity of marriage. Regardless of how it is viewed, it is clear that *Lawrence* terminated the discussion on the constitutionality of treating homosexual sex differently from heterosexual sex.

Lawrence is "deep and narrow" because of the way the opinion of the Court is written. The Court takes great care to discuss the right of people to love whom they choose.[112] The Court phrases the opinion to be applicable to everyone, not just to homosexuals.[113] Giving this "right to love whom you choose" to everyone would tend to indicate that the opinion is going to be both deep and wide. This is not the case because the Court continues from this wide start and proceeds to narrow the opinion by including an in depth discussion on *Bowers v. Hardwick*.[114] *Bowers* upheld the constitutionality of criminal sodomy laws.[115]

This discussion of *Bowers* and all of the reasons for overturning *Bowers* takes what could be a "wide" opinion and turns it into a "narrow" one.[116] That same discussion also makes it clear that the Court is making a decision that is not open to debate. The Court is terminating the discussion on disparate treatment of homosexual conduct. It becomes more clear, as the Court continues its dialogue regarding the reasons for overturning *Bowers*, that the goal of *Lawrence* is not so much to create the right to "love whom you see fit"[117] as it is to overturn *Bowers*.[118] The Court's explicit rejection of *Bowers*, that it was wrong when decided and remained wrong when overturned, ends the

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[108] *Id.* at 2788, 2822, 2848
[109] *Id.* at 2822, 2848
[110] *Lawrence v. Texas*, 539 U.S. at 578 (2003)
[111] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[112] *Id.* at 564
[113] *Id.* at 565
[114] *Bowers v. Hardwick*, 478 U.S. 186 (1986)
[115] *Id.* at 195-96
[116] *Lawrence v. Texas*, 539 U.S. 558, 566-76 (2003) (The lengthy discussion of *Bowers* makes the primary purpose of *Lawrence* appear to be overturning *Bowers.*)
[117] *Id.* at 567
[118] *Id.* at 578

possibility of debate over the constitutionality of disparate treatment of homosexual sexual conduct.

In sum, *Lawrence* becomes a pyrrhic victory for homosexual rights by the Court's eliminating the strength of the "wide" language to all but announce that the decision had only the specific purpose of overturning *Bowers*. After limiting the impact of the "wide" language, the Court leaves an opinion that is highly principled in the language it uses to define the right, but is almost never again going to be applicable to help expand the right. On this basis *Lawrence* is "deep" in its use of language and the theory upon which it was based, but "narrow" in the future inapplicability of the right it purports to create.

If the dialogue following *Heller* looks like that following *Lawrence v. Texas*,[119] we can expect to see very little of *Heller* in the future. *Lawrence* held that a Texas law criminalizing homosexual sodomy, but not heterosexual sodomy, was unconstitutional as a violation of the Equal Protection Clause.[120] *Lawrence*, as discussed previously, used ambitious language to create a right that has been narrowed to the point where its future applicability is all but inexistent. If *Heller's* dialogue is similar, the discussion of the Second Amendment is finished. Three cases are worth mentioning in the wake of *Lawrence*; those are *Standhardt v. County of Maricopa*,[121] *Muth v. Frank*,[122] and *Utah v. Holm*.[123]

In *Standhardt v. County of Maricopa* (hereafter *Standhardt*)[124] rational basis review was used to deny a homosexual couple the right to marry.[125] *Lawrence* is distinguished and severely limited by the Court's characterization of *Lawrence* as a repudiation of *Bowers* and nothing more.[126] By distinguishing *Lawrence* in that way, the Court was refusing to continue the dialogue in the area of homosexual rights. The termination of the dialogue on homosexual rights by the *Lawrence* opinion is likely going to be the reason that *Lawrence* will not be successfully useable to further extend homosexual rights in the future. The ability to so limit the opinion is the fundamental flaw in *Lawrence* opinion. Had the Court spent less time abusing the decision made in *Bowers*,[127] and more time on the substance of *Lawrence*, then the dialogue may not have been so convincingly terminated and *Lawrence* may have been more utilizable to further expand homosexual rights.

Standhardt is further unique in that it appears to suffer from the same fundamental logical flaw that was recognized in *Bowers* by the *Lawrence* opinion: it treats homosexual conduct different from heterosexual conduct simply because it is

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[119] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[120] *Id.* at 585
[121] *Standhardt v. Maricopa County*, 206 Ariz. 276 (App. 2003)
[122] *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005)
[123] *Utah v. Holm*, 137 P.3d 726 (Utah 2006)
[124] *Standhardt v. Maricopa County*, 206 Ariz. 276 (App. 2003)
[125] *Id.* at 280
[126] *Id.* at 281
[127] *Lawrence v. Texas*, 539 U.S. 558, 577-84 (2003) (The Court spends more of the text of the opinion discussing why *Bowers* was wrong rather than why *Lawrence* is right.)

homosexual conduct.[128] The Court recognizes that "marriage is a fundamental right"[129] but then continues to distinguish homosexual marriage from heterosexual marriage.[130] Having determined that marriage is only a fundamental right for heterosexuals, the court applies rational basis review[131] to hold that the state has an interest in refusing homosexuals the right to marry.[132]

Were *Heller* to be limited in the same way, the right to bear arms announced in it would simply be the right to bear arms specifically in your home for the purpose of self-defense only. *Heller* has not yet been so limited, but in the cases following *Heller*, the right has never been expanded beyond the specific scope set in *Heller* itself.[133] Where *Standhart* cut off all future dialogue, cases after *Heller* are tending to show that, while the scope of the discussion is limited, the conversation is ongoing.

In *Muth v. Frank*,[134] the Seventh Circuit denied *habeas* relief to a man convicted of incest. The right in *Lawrence* to not be discriminated against for engaging in homosexual sodomy was held not to extend to protect an incestuous relationship between an older brother married to his younger sister.[135] This is comparable to *Heller*, where the right to bear arms was limited in the opinion itself so that it did not void all of the existing gun legislation. Here, incest was illegal before *Lawrence*,[136] and remained so after. The dialogue regarding sexual freedom was never meant to extend to incest. Comparably, in *Heller*, possession of guns by a felon was illegal before *Heller* and remained illegal after.[137] *Heller's* dialogue has not yet been, and likely will never be, extended to questioning restrictions on weapon ownership by felons or the mentally ill.

In *Utah v. Holm*,[138] a Utah man's conviction for bigamy was affirmed.[139] A challenge based on *Lawrence* fails.[140] The Court finds that the right to marry multiple

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[128] *Standhardt v. Maricopa County*, 206 Ariz. 276, 283
[129] *Id.* at 280 (quoting *Loving v. Virginia*, 388 U.S. 1 (1967))
[130] *Id.* at 281
[131] *Id.* at 286
[132] *Id.*
[133] *See generally, Schubert v. City of Springfield*, 2009 WL 636260, *3+ (D. Mass. Mar 12, 2009) (NO. CIV.A.07-30033MAP); *U.S. v. Miller*, 2009 WL 499111, *1+ (W.D. Tenn. Feb 26, 2009) (NO. 08-CR-10097); *U.S. v. Jackson*, 555 F.3d 635, 636+ (7th Cir.(Ill.) Feb 18, 2009) (NO. 07-3849); *U.S. v. Montgomery*, 555 F.3d 623, 631+ (7th Cir.(Ill.) Feb 13, 2009) (NO. 08-1690); *U.S. v. Anderson*, --- F.3d ----+, 2009 WL 330263, *2+ (5th Cir.(Tex.) Feb 11, 2009) (NO. 08-40160); *U.S. v. Marzzarella*, 595 F. Supp. 2d 596, 597+ (W.D. Pa. Jan 14, 2009) (NO. CRIM 07-24); *People v. Flores*, 86 Cal. Rptr. 3d 804, 806+, 169 Cal. App. 4th 568, 568+, 08 Cal. Daily Op. Serv. 15,407, 15407+, 2008 Daily Journal D.A.R. 18, 615+ (Cal. App. 4 Dist. Dec 19, 2008) (NO. D051215); *U.S. v. Bonner*, 2008 WL 4369316, *2+ (N.D. Cal. Sep 23, 2008) (NO. CR0800389SBA) (All of the preceding cases refused to apply *Heller* in a manner that would have invalidated an existing gun law.)
[134] *Muth v. Frank*, 412 F.2d 808 (7th Cir. 2005)
[135] *Id.* at 818
[136] Wis. Stat §944.06
[137] *Heller*, 128 S. Ct. at 2816-17
[138] *Utah v. Holm*, 137 P.3d 726 (Utah 2006)
[139] *Id.* at 732
[140] *Id.* at 742

people is not a fundamental liberty interest.[141] In the course of the Court's analysis, the limitations of *Lawrence*, in terms of future applicability, are stated when the Court notes that "the holding in *Lawrence* is actually quite narrow."[142] This can be compared to *Heller* because the language in the *Heller* opinion also explicitly limits the scope of the holding.[143] In spite of the explicit limitation in *Heller*, the dialogue has continued as numerous unsuccessful challenges to gun laws have been based on its language. Those challenges will be discussed in more detail later.

V. *Heller* as a Conversation Moderator: *Heller* resembling *Tinker v. Des Moines Independent School District*

In *Tinker*, the Supreme Court struck down a school regulation that prohibited students from wearing black armbands as a silent form of protesting the Vietnam Conflict. The case is a victory for the protection of action as political speech in the context of public schools. *Tinker* was not the first time that action was protected as speech, but in the context of minors in a public school, the case was a victory for the First Amendment. *Tinker* neither began the discussion on students' right to free speech, nor terminated it. *Tinker* helped to moderate the discussion by providing further guidance as to what types of restrictions would be permissible.

Within the context of Sunstein's framework, *Tinker* is "deep" because the Court is based its decision on recognition of the constitutional theory and underlying principle that students do not "forfeit their constitutional rights at the schoolhouse gate"[144] but rather retain the rights subject to some minimally restrictive conditions.[145] The continuation of this dialogue in cases that follow *Tinker* explore the middle ground between these two positions. *Tinker* is a case where the Court bases its ruling on the fundamental right that all people have to free speech. Insofar as the opinion is based on principle, rather than on facts, the case is "deep." That is not to say there was not a factual finding necessary to reach the opinion. There was; it was not, however, dispositive in the way the factual specificity is in other contexts.

Also within that framework, *Tinker* is "wide" in that it does not specifically limit itself to a specific type of speech. The students have a right to express themselves.[146] *Tinker* could have been more narrow had the Court limited the students right to express themselves to political speech, or by defining the first amendment right to not include actions within the realm of protected political speech. The Court chose not to limit the right in that fashion, and absent any narrowing language, the First Amendment protections are wide.

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[141] *Id.*
[142] *Id.*
[143] *Heller*, 128 S. Ct. at 2816-17, 544 U.S. --- (2008)
[144] *Tinker*, 393 U.S. 503, 506 (1969)
[145] *Id.* at 505
[146] *Id.* at 511-12

If the development of the right announced in *Heller*[147] follows the path of the right to action as protected political speech in public schools as announced in *Tinker*,[148] the right to bear arms will be limited to some set of specific circumstances and will be subject to some degree of regulation.[149] The *Heller* decision itself may have already established these special circumstances by providing that the right is protected in the home for self-defense. Language in the recent Ninth Circuit ruling in *Nordyke v. King* supports this conclusion.[150]

In *Tinker v. Des Moines Independent School District*,[151] three students wore black armbands to express their objection to the Vietnam Conflict.[152] All three were suspended and thereafter brought suit under 42 U.S.C. §1983 to obtain injunctive relief to prohibit further punishment for wearing the armbands.[153] The district court upheld the actions of the school, finding the action reasonable and necessary to prevent any disciplinary disturbances.[154] The district court recognized that wearing the armbands was a symbolic act protected by the Free Speech Clause of the First Amendment.[155] An evenly divided Eighth Circuit affirmed without opinion. [156] The Supreme Court reversed,[157] finding that, while student right to free speech is not absolute,[158] the school may not regulate based on some "undifferentiated fear of apprehension of disturbance."[159]

In *Tinker*, the Court refused to allow schools to ban types of speech because there was some chance that there might be a disturbance.[160] This can be contrasted to the right in *Heller* by using the factors to determine whether *Tinker*-style speech will be protected[161] with the prerequisites for Second Amendment protection in *Heller*.[162] Post-*Heller* dialogue could resemble the post-*Tinker* dialogue insofar as the dialogue in both cases attempts to determine the scope of the right at issue in the respective cases. In *Tinker*, the right to action as protected political speech would not be infringed so long as the action does not create a substantial disruption, interfere with education, or interfere with the rights of other students.[163] In *Tinker*, the black armbands caused none of these problems, and thus were held to be exempt from regulation.[164] In *Heller*, the right to bear

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[147] *Heller*, 128 S. Ct. at 2818
[148] *Tinker*, 393 U.S. 503 (1969)
[149] *Id.* at 505 (Discusses the limitations on students' right to wear clothing as political speech)
[150] *Nordyke v. King*, 563 F.3d 439, 460 (2009) (*Nordyke* distinguishes *Heller* as protecting a right to self-defense in the home, and upholds the contested law on the basis that neither the home nor self-defense are implicated in the sale of guns on governmental property)
[151] *Tinker*, 393 U.S. 503 (1969)
[152] *Id.* at 504
[153] *Id.*
[154] *Id.* at 505
[155] *Id.*
[156] *Id.*
[157] *Id.* at 514
[158] *Id.* at 505
[159] *Id.* at 508
[160] *Id.*
[161] *Id.* at 505
[162] *Heller*, 128 S. Ct. at 2816-17, 544 U.S. --- (2008)
[163] *Tinker*, 393 U.S. 503, 508 (1969)
[164] *Id.* at 514

arms is protected if you are not among the classes of people identified in *Heller* as exempted from the protections *Heller* provides.[165] The right at issue in *Heller* is similar to the right in *Tinker*, in that they are both set in factually specific contexts, but it is unlikely that the two will continue along the same path. Dialogue between a school district, in its quasi-legislative capacity, and the courts are inherently different from the dialogue between Congress and the Supreme Court. A brief discussion of a few cases following *Tinker* will be illustrative as to why the right in *Heller* is unlikely to follow the same path as the right in *Tinker*.

The right in *Tinker* was not, and is not, absolute. This became clear within a year and a half of the *Tinker* decision when the Sixth Circuit decided *Guzick v. Drebus*.[166] In *Guzick*, the punishment of a student for wearing a button was upheld[167] because of the likelihood that the button would cause substantial disruption.[168] The school in *Guzick* was recently integrated and there was a history of racial strife among the student body.[169] The prohibition on all buttons was held to be a rational means to help prevent provocation and was upheld on that ground.[170] The Court appears to recognize, drawing from its experience with the school board in *Tinker*, that there is a fundamental difference between the situation in *Tinker*, where there was no substantial disruption, and the situation in *Guzick*, where the substantial disruption was immanent.[171] The Court accordingly provides a different response in *Guzick*.[172]

Heller can be contrasted to *Guzick* because, as cases citing *Heller* have shown (and as *Heller* itself stated), the right to bear arms is not absolute.[173] *Heller* could be following the development of *Tinker* as modified by *Guzick* if a case were to come up in which a mentally ill person were found to be keeping a gun in their home. The fact that the cases occur in the same situations[174] and both deal with the assertion of a constitutional right[175] does not save them form being distinguished. *Guzick* is distinguishable because there would have been a substantial disturbance.[176] The hypothetical case of the mentally ill man with a gun in his home is distinguishable because he falls within the class of people *Heller* excludes from protection.[177]

The right to action as political speech has not been limited to the classroom. In *Texas v. Johnson*,[178] the conviction of a man for burning an American flag was

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[165] *Heller*, 128 S. Ct at 2816-17
[166] *Guzick v. Drebus*, 431 F.2d 594 (1970)
[167] *Id.* at 601
[168] *Id.* at 598
[169] *Id.* at 596
[170] *Id.* at 598-99
[171] *Id.* at 597-98
[172] *Id.* at 601
[173] *Heller*, 128 S. Ct. at 2816-17
[174] Both in schools and homes respectively
[175] The right to action as political speech and right to bear arms respectively
[176] *Guzick*, 431 F.2d at 600 (1970)
[177] *Heller*, 128 S. Ct. at 2816-17
[178] *Texas v. Johnson*, 491 U.S. 397 (1989)

overturned.[179] The flag was burned at the Republican National Convention in Dallas, Texas to protest Reagan's policies.[180] It is with *Johnson* and the other cases that take the right to action as political speech outside of the context of the classroom that make the *Heller* to *Tinker* comparison tenuous. The tenuous comparability of the First and Second Amendments further makes it unlikely that the dialogue following *Heller* will resemble the dialogue that followed *Tinker*. *Heller* is unlikely to be applicable anywhere other than the home[181] because it is near unfathomable that the Supreme Court would announce a rule that people, in their individual capacity, have a right to bear arms in public outside of the existing conceal and carry laws. This shows how the dialogue in the area of existing federal gun control laws is moderated by *Heller* in that the Court and Legislature are in agreement that the existing laws are sufficient and are not invalidated by the *Heller* decision.

United States v. Eichman[182] invalidated Congress's attempt, post-*Johnson*, to make flag burning illegal in spite of the Court's ruling on its constitutionality.[183] In its analysis of the new flag burning statute, the Court is unimpressed by the attempt to circumvent its ruling in *Johnson*.[184] This is a prime example of how dialogue between the judicial and legislative branches occurs after a decision is made. *Eichman* demonstrates that, where the Court is specific in announcing a right, it is willing to engage with the legislative branch to continue to protect the right. *Eichman* is not the first instance of this, nor will it be the last.[185] *Eichman* is included here to show illustrate the interplay between the courts and the legislative branch that occurs during the judicial process.

VI. *Heller* as a Conversation Starter

Conversation starters, as discussed earlier, open dialogue on important issues. Two examples, *Roe v. Wade*, and *Brown v. Board of Education*, help show how dialogue can be opened by judicial decisions. Both cases will be contrasted to *Heller* and within the contrast show how each case starts dialogue in an area.

A. *Heller* Resembling *Roe v. Wade*

Roe v. Wade[186] is arguably one of the most controversial and contested judicial decisions in American jurisprudence. *Roe v. Wade* relied on the "right to privacy" established in *Griswold v. Connecticut*[187] and its progeny to overturn a Texas statute

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[179] *Id*. at 420
[180] *Id*. at 406
[181] *Heller*, 128 S. Ct. at 2816
[182] *United States v. Eichman*, 496 U.S. 310 (1990)
[183] *Id.* at 314
[184] *Id.* at 317
[185] This was seen after *Roe* when states tried to bypass the unpopular ruling of the Court by amending their abortion laws.
[186] *Roe v. Wade*, 410 U.S. 113 (1973)
[187] *Griswold v. Connecticut*, 381 U.S. 479 (1965)

criminalizing abortion on the ground that a woman had the right to choose whether to carry her pregnancy to term or whether to terminate it with the help of a doctor.[188]

Within Sunstein's framework, *Roe* is "narrow" because of the way that it is applied. The right created in *Roe*, as it stood immediately after *Roe*, was the right for a pregnant woman to terminate her pregnancy within the first trimester without interference or regulation by the state.[189] This right applied only to specific people (pregnant women) in a specific time frame (first twelve weeks of pregnancy).[190] Granted, the right to abortion cannot really be extended beyond pregnant women, so the right is to some degree narrow by default, but the further narrowing to first trimester furthers the assertion that the right is narrow.

Roe could be classified as "shallow" or "deep" depending on the context in which you frame the right. For purposes here, it is classified as "shallow" because of the degree of factual specificity in the holdings of the case. If *Roe* were to be "deep" it would have to be founded on a less factually specific formula for the time, means, and measures in which the right to abortion is protected. Had the Court, in deciding *Roe*, simply stopped when it said that a woman had a liberty interest in the right to terminate her pregnancy, *Roe* would be "deep." The Court did not stop there, it continued to place specific factual contexts around the right, thus making the right less about principle and more fact dependent. As the right defined becomes less principled and more fact specific it becomes more shallow.

Roe is ideal to illustrate the dialogic process between the Court and legislative branches. *Roe* is a beginning.[191] The dialogue in *Roe* starts with political activism then proceeds into the court system.[192] After the controversial Supreme Court decision, there is a wave of backlash both in the courts and the legislatures of the states.[193] *Heller* also started with political activism before moving into the court system. Whether *Heller* creates the same backlash will be determined with the passage of time. It appears, for now, that *Heller* will follow a similar path to *Roe*. Whether this will continue is a question that will likely be answered by *McDonald v. City of Chicago*.[194]

If *Heller* is going to continue to resemble *Roe v. Wade*[195] there will be a number of cases arising based on the factual contours of *Heller*, a large number of which will factually distinguish *Heller* in an attempt not to follow it. To some extent this can already be seen.[196] Should *Heller* turn out to resemble *Roe*, we can expect the same

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[188] *Roe v. Wade*, 410 U.S. 113, 153 (1973)
[189] *Id.* at 164
[190] *Id.* at 164-65
[191] Friedman, *Dialogue*, *supra* at 660
[192] *Id.*
[193] *Id*. at 660-61
[194] *McDonald v. City of Chicago*, No. 08-4244 (Depending on the decision regarding the incorporation of the Second Amendment, litigation regarding gun laws could either increase or decrease)
[195] *Roe v. Wade*, 410 U.S. 113 (1973)
[196] *People v. Abdullah*, --- N.Y.S. 2d ---, 2008 WL 5448995 (2008)
see also, *People v. Flores*, 169 Cal. App. 4th 568 (2008) (Both cases note that *Heller* is not incorporated, and would refuse to incorporate *Heller* if the issue came before them.)

conservative – liberal split in each decision on the Second Amendment after *Heller*. We can also expect the right to bear arms to be protected to a varied and fluctuating degree depending on the political ideology of the Court at any given time.

There are a number of ways in which the comparison between *Heller* and *Roe* could be made. Part of the reason *Roe* was, and is, such a highly contested decision is that people viewed *Roe* as having been decided based on a policy judgment of the Supreme Court rather than based on the Constitution.[197] The Court, in *Roe*, decided too much too quickly.[198] *Heller* could be viewed as a similar form of judicial activism, insofar as it overturned the legislative judgment of the District of Columbia's legislature, but the impact of it is lessened by the opinion leaving some areas undecided.[199]

Further, *Roe* invalidated a Texas law criminalizing abortion at any stage of pregnancy except where necessary to save the life of the mother.[200] In doing so, it also decided on the issue of standing,[201] justiciability,[202] and abstention, and also created a trimester framework with various rules for the state to follow.[203] From the opinion, it could be inferred that the only question the Court fails to answer is the "difficult question of when life begins."[204] That is not the case, however, as other issues were left undecided. Those issues are later settled in *Danforth,* discussed later. By creating such a specific framework while using vague language about regulating abortion in ways "rationally related to the mother's health,"[205] the Court set forth a fact specific opinion which would be, and still is, subject to being distinguished on any number of grounds and by any number of interpretations of what is rationally related to the mother's health. Each of the grounds upon which it can be distinguished is a means by which the dialogue on abortion can continue. *Heller* is marginally similar. The Court in *Heller* declared a fact specific right that has been subject to limitation not just by the language in the opinion itself, but by other courts in defining the language used therein. These inherent limitations to the opinion are areas in which the dialogic process has and will continue to function. *Heller* does not decide too much; on the contrary, it may decide too little, thus leaving itself amenable to changes brought about by the dialogic process.

Another similarity is that *Heller* specifically limits its own scope by noting that nothing in it is meant to cast doubt on any long standing prohibitions on gun ownership.[206] *Roe* limits its right with the qualifier that there is not an absolute right to abortion,[207] and by allowing restrictions that are rationally related to the health of the mother.[208] Some of the cases that follow *Roe* may be compared or contrasted with cases

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[197] Friedman, *Dialogue*, *supra* at 659
[198] Sunstein, *Leaving Things Undecided*, *supra* at 20
[199] *Id.* at 19
[200] *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)
[201] *Id.* at 125
[202] *Id.*
[203] *Id.* at 162-65
[204] *Id.* at 159
[205] *Id.* at 164
[206] *Heller*, 128 S. Ct. at 2816-17, 544 U.S. --- (2008)
[207] *Roe v. Wade*, 410 U.S. 113, 153-54 (1973)
[208] *Id.* at 163

that followed *Heller* to illustrate the problems with these kinds of fact specific holdings. For example, neither *Roe* nor *Heller* decriminalized all conduct relating to the right in question. *Connecticut v. Menillo*[209] upheld the constitutionality of a man's conviction for performing an abortion after *Roe* because he was not a licensed doctor.[210] Nothing in *Roe* was meant to decriminalize abortions by non-medical personnel. Similarly, in *United States v. Bonner*,[211] a criminal conviction for possession of body armor was upheld because nothing in *Heller* protected the right of felons to possess body armor.[212] The felon in *Bonner*, and the defendant in *Menillo* are outside of the scope of people protected by *Heller* and *Roe* respectively.

Yet another example of how the cases following *Roe* and *Heller* can be compared is *Planned Parenthood of Central Missouri v. Danforth*,[213] which can be contrasted to the currently pending *McDonald v. City of Chicago*.[214] Both cases resulted from the continuing dialogic process that resulted from the decisions in the cases that preceded them. *Danforth* decided some of the questions which were not presented in *Roe*,[215] including constitutional questions on: the definition of viability, parental consent provisions, spousal consent provisions, the ban on using amniocentesis after the twelfth week of pregnancy, the patient's consent provision, the reporting and record keeping requirement, and the due care provision which subjected doctors to criminal liability. In much the same way, *McDonald* will, upon being decided, hopefully decide some of the issues left unaddressed in *Heller*. What *Danforth* ultimately did was act as an efficient part of the dialogic process by clarifying and further defining the base right given by *Roe*; *McDonald* should do the same for the issues left undecided in *Heller*.

Both *Roe* and *Heller* also protect the right in question by subdividing people into categories depending on traits. The dialogic process has limited the protection in *Roe* to the right to abortion for those who can afford it by refusing to extend Medicaid benefits for either elective[216] or medically necessary abortions.[217] *Heller* provides a similar limitation on the right to bear arms by protecting only what the opinion refers to as law-abiding citizens.[218] The dialogic process currently underway after *Heller* is unlikely to extend the protection in *Heller* beyond what the Court explicitly stated. *Nordyke v. King* exemplifies the unlikeliness of *Heller's* expansion by enlarging the "special places" exception to the Second Amendment from the enumerated list in *Heller* to include almost all governmental property.[219]

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[209] *Connecticut v. Menillo*, 423 U.S. 9 (1975)
[210] *Id.* at 11
[211] *United States v. Bonner*, Slip Copy 2008 WL 4369316 (2008)
[212] *Id.* at *4
[213] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)
[214] *McDonald et al v. City of Chicago* No. 08-4244
[215] *Danforth*, 428 U.S. at 56
[216] *Beal v. Doe*, 432 U.S. 438 (1977)
[217] *Harris v. McRae*, 448 U.S. 297 (1980)
[218] *Heller*, 128 S. Ct. at 2816-17
[219] *Nordyke v. King*, 563 F.3d 439, 459-60 (2009)

While it is too soon for it to have become an issue yet, there is another possible way in which *Heller* could turn out like *Roe*. Upon a change in the makeup of the Court, issues that have been decided could be revisited to change the original ruling. A change in the judicial ideology of the Court will affect the voice with which the Court speaks.[220] If there is a change in the voice in the Court, there must be an accompanying change in the dialogue in which the voice engages in. In *Roe*, this occurred with *Planned Parenthood of Southern Pennsylvania v. Casey*,[221] which revisited a number of the rulings in *Danforth*[222] and re-decided a number of them so as to further limit access to abortion in ways the Court refused to do in *Danforth*. This is yet another example of the voluminous dialogue that followed *Roe* and its progeny and also an example of how a change in the political ideology of the Court will change the voice with which the Court speaks. There is not yet a case that threatens to so limit *Heller*, but, given the similarities between the *Roe* and *Heller* opinions, and the amount of dialogue likely to follow *Heller*, it would not be surprising if, after a change in the ideology of the Court, similar attempts are made to limit *Heller.*

B. *Heller* Resembling *Brown v. Board of Education*

Brown, like *Lawrence*, may be interpreted in any number of ways. *Brown* may be viewed as a principled victory for anti-discrimination, or as a right to an integrated education, or as a determination that separate but equal is never equal.[223] Is the fact that separate but equal is not really equal a factual judgment, or a principled judgment? It may be seen as both. *Brown I*[224] is the factual finding while *Brown II*[225] is more of a principled decision. It is this lack of clarity that lead to the decision to view *Brown*, for the purpose of placement within the framework, as applied rather than as written.

The ability to split *Brown* into four subcategories further magnifies the problem. *Brown* can be subdivided into cases that discuss impermissible remedies to segregation, inadequate but plausible remedies to segregation, valid remedies to segregation, and what, for purposes here, will be called extraterritorial applications.[226] Each of these subdivisions of *Brown* has a set of cases with specific factual and philosophic underpinnings. *Brown* is also unique in that the dialogic process spawned by its holding has continued into the new millennium.[227]

Brown is classified as shallow, rather than deep, because *Brown* was applied to, and conscious of, the factual intricacies of the problems of integration. Had the courts applying *Brown* been able to remove themselves from the factual underpinnings of each

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[220] Friedman, *Dialogue*, *supra* at 665
[221] *Planned Parenthood of Southern Pennsylvania v. Casey*, 431 U.S. 678 (1992)
[222] To see this, compare and contrast the *Danforth* holdings with the *Casey* holdings.
[223] *Brown*, 347 U.S. 483, 495 (1954)
[224] *Brown*, 347 U.S. 483 (*Brown I*) (1954)
[225] *Brown*, 349 U.S. 294 (*Brown II*) (1955)
[226] "Extraterritorial application" is my term, meaning applications of the Brown holding outside the scope of the language of the Brown opinion.
[227] The most recent case bearing directly on *Brown* was *Parents Involved in Community Schools v. Seattle Sch. Dist., No. 1*, 127 S. Ct. 2738 (2007) holding unconstitutional the use of race as a tiebreaking factor for school placement.

case, and focus more on the ideal that separate but equal must cease, then the analysis would be different and the dialogic process afterwards would have been much shorter. This did not occur, and thus *Brown* is, for purposes here, shallow rather than deep.

While *Brown's* placement along the shallow or deep continuum was in many ways problematic, its placement along the narrow or wide continuum is not. *Brown* is wide because of the degree to which the holding in it was extended to and beyond the original scope[228] of the case (what I am calling extraterritorial applicability). Where *Brown* was meant to apply to public school education, it was applied to parks,[229] private schools,[230] and university admissions procedures.[231] While this extension may cause further disagreement with my placement of *Brown* as shallow, the fact specific analysis to follow shows my placement in the narrow category to be correct.

If *Heller* and the dialogic process after it is going to look like *Brown v. Board of Education*,[232] there will be an abundance of litigation in order to determine the scope of the right. This litigation is a natural and necessary part of the dialogic process. *Brown* is unique in that its two decisions announced a rule but gave almost no guidance regarding how the rule was to be applied, thereby almost mandating a continual dialogue to clarify what exactly was being required of the nation's schools. All *Brown* really did was tell the states that segregation in public schools had to end, at some point.[233] *Brown* thus spawned a large amount of litigation to determine what that meant. In that regard, it can be analogized to *Heller*.[234]

Brown's massive amount of litigation can be effectively put into four categories, each of which developed as a result of the continuing dialogic process between various school boards and the courts. First, there were impermissible remedies, those that would never be sufficient to remedy segregation and achieve the goals of *Brown*.[235] Second, there were the inadequate remedies, or those that could work, but needed further refining before they would be valid remedies.[236] Third, and initially most rare, were valid remedies, or remedies the Courts found sufficient to fix the segregation problem.[237] Fourth, and finally, there were extraterritorial remedies. There has not been a sufficient time frame after the decision in *Heller* for the same degree of split among its progeny, but initial indicators show that *Heller* could split into three subcategories in the future:

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[228] *Brown*, 347 U.S. at 494 (The original scope of *Brown* was limited to schools, or arguably education. There was nothing in *Brown* to suggest its potential to desegregate all types of accommodations.)
[229] *Watson v. City of Memphis*, 373 U.S. 526 (1963)
[230] *Runyon v. McCrary*, 427 U.S. 160 (1976)
[231] *Ayers v. Fordice*, 505 U.S. 717 (1992)
[232] *Brown*, 349 U.S. at 300-01 (Discussion process by which desegregation of schools will be effectuated.)
[233] *Id.*
[234] Both cases were litigated to determine the scope of the right.
[235] *Raney v. Bd. of Education for Gould Sch. Dist.*, 391 U.S. 443 (1968) (Freedom of Choice plans inadequate as remedy for past segregation.)
[236] *Monroe v. Bd. of Comm'rs of City of Jackson, Tenn.*, 391 U.S. 450 (1968) (Free transfer plan inadequate to remedy past discrimination.)
[237] *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) (Bussing students to noncontiguous school zones satisfactory as remedy to past segregation. Result not followed as dicta in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 377 F.3d 949 (2007).)

permissible gun regulations, impermissible gun regulations, and regulations on "other arms."[238] Whether this will actually occur will depend on the dialogic process that follows *Heller*.

In order to adequately contrast the subcategories created by *Heller*, it is first necessary to discuss the subcategories created by *Brown*. A discussion of each of the subcategories in *Brown* will precede a discussion of the three potential subcategories in *Heller*, starting with the first subcategory of *Brown*, below.

Brown's first category, impermissible remedies, held that certain state actions to bypass the integration requirement unconstitutional. An example of this is *Griffin v. County School Board of Prince Edward County*.[239] *Griffin* held unconstitutional the County's closing of its public schools to bypass the demand they be integrated.[240] The County was not allowed to force the students to choose between segregated schools or no education.[241] By creating this subcategory, the Court was using the dialogic process between itself and the school board, in its quasi-legislative capacity, to enforce its ruling in *Brown* that segregation must come to an end.[242]

Brown's second subcategory, inadequate remedies, gave some credit to states for taking action, but held that the challenged actions did not go far enough to achieve the stated goal of integrated education. The best examples of these cases are the then-popular "Freedom of Choice Plans."[243] The basic facts of the Freedom of Choice Plan cases are generally these: students living in a School Board designated area for one school are allowed to apply to be transferred, subject to approval, to another school.[244] In *Monroe v. Board of Commissioners of Jackson, Tennessee*[245] this type of plan was held to be insufficient[246] and was subsequently revamped to allow for free transfer so long as there was room in the desired school.[247] The dialogic process is used here by the Court to give credit to the school board for trying to create a remedy, but having that remedy be insufficient. Continued dialogue between the school board and court system eventually made most of these insufficient remedies into workable (third category) plans. The new plan was allegedly applied in a discriminatory manner, allowing for more white children than black children to transfer schools.[248] The Court found that this type of free transfer plan "placed the burden on parents that *Brown II* explicitly placed on the school

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[238] By "other arms" I mean anything other than guns. *See*, *United States v. Bonner*, 2008 WL 4369316 (2008) (refusing to apply *Heller's* right to self defense to a felon in possession of body armor)
[239] *Griffin v. Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964)
[240] *Id.* at 225
[241] *Id.* at 230
[242] *Brown*, 349 U.S. 294, 300 (1955)
[243] *Monroe v. Bd. of Comm'rs of Jackson, Tenn.*, 391 U.S. 450 (1968)
see also, Raney v. Gould Sch. Dist., 391 U.S. 443 (1968) (Both cases discuss the general facts of "free choice plans" usually held insufficient to remedy segregation.)
[244] *Monroe*, 391 U.S. at 453 (1968)
[245] *Monroe v. Bd. of Comm'rs of Jackson, Tenn.*, 391 U.S. 450 (1968)
[246] *Id.* at 453
[247] *Id.* at 454
[248] *Id.*

boards."[249] The same result was reached on a very similar fact pattern in *Raney v. Board of Education of Gould School District*.[250] *Green v. County School Board of New Kent County*[251] also came to the conclusion that the Freedom of Choice plan was inadequate[252] and that the plan must be redesigned.[253]

Swann v. Charlotte-Mecklenburg Board of Education[254] best exemplifies *Brown's* third subcategory, valid remedies. In *Swann*, two different plans, the Board Plan[255] and the Finger Plan[256] were considered to help with integration. In determining which plan was more appropriate, the Court considered a number of factors.[257] The post-*Brown* dialogue here between the school board and court helped to create the valid remedy. The Court found that the Finger Plan, a majority to minority transfer plan, with freely available bussing to the school where the student would transfer in as a minority, was a sufficient remedy and adequately solved the segregation problem.[258]

Brown's fourth subcategory is what makes the upcoming comparison to *Heller* most problematic. *Brown* was not limited in its applicability to only public education. It was extended far more broadly than the language in the original opinion seemed to indicate it would be, including to parks,[259] recreational facilities,[260] private schools,[261] and public universities.[262] While it is not necessary to delve into the facts of each of those cases, it suffices to note that each of those cases takes the rationale of *Brown* and applies *Brown* in an extraterritorial manner. *Heller*, in being so strictly textualist, is much less likely (if even possible) to be applied in such an extra-territorial manner. The Second Amendment right to bear arms is a much more pre-defined area than the Fourteenth Amendment's equal protection and due process rights. The extent to which the Second Amendment is more pre-defined limits the possibility that it will be applied outside the scope of the initially intended application.

Now that the four subcategories of *Brown* have been laid out, it is time to move to the potential subcategories of *Heller*. The first potential subcategory of *Heller*, permissible regulations on the right to bear arms, is best exemplified by the cases following *Heller* that challenged the validity of 18 U.S.C. §922. So far, constitutional challenges against 18 U.S.C. §§ 922(a)(6),[263] 922(g)(1),[264] 922(g)(4),[265] 922(g)(8),[266]

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[249] *Monroe*, 391 U.S. at 458 (1968)
[250] *Raney v. Bd. of Education of Gould Sch. Dist.*, 391 U.S. 443 (1968)
[251] *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968)
[252] *Id.* at 440
[253] *Id.* at 442
[254] *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971)
[255] *Id.* at 8
[256] *Id.* at 9
[257] *Id.* at 22
[258] *Id.* at 28-29
[259] *Watson v. City of Memphis*, 373 U.S. 526 (1963)
[260] *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974)
[261] *Runyon v. McCrary*, 427 U.S. 160 (1976)
[262] *Ayers v. Fordice*, 505 U.S. 717 (1992)
[263] *United State v. Knight*, 574 F. Supp. 2d 224 (D. Me. 2008) (*Heller* did not invalidate penalty for false response to questions on gun purchase application.)

922(g)(9),[267] and also §931[268] have all failed. Some of these failures, such as challenges to the restrictions on felons (see §922(g)(1))[269]and the mentally ill (§922(g)(4))[270]are attributable directly to the language in *Heller* itself. Other failures can be attributed to a hesitance by lower appellate courts to rule on the constitutionality of federal gun legislation. This hesitance is attributable to the conversational moderating done by part of the *Heller* opinion. The dialogue between Congress and the courts has lead the courts to the conclusion that the existing federal gun control laws, specifically §922, are valid restrictions on the Second Amendment right to bear arms. It is also significant and worthy of note that, while the majority of challenges post-*Heller* have been to §922 of the Gun Control Act of 1968, *no case* since *Heller* has found any statute regulating gun possession to be unconstitutional.

Impermissible regulations comprise the second potential subcategory of *Heller* cases. As yet, *Heller* is the only case in this category. The next case likely to fall within this area is *McDonald v. City of Chicago*,[271] currently before the Seventh Circuit. The existence of *McDonald v. City of Chicago* is directly attributable to the dialogic process. If there were no such process, the issue in *McDonald* would have either been decided in *Heller* or would remain undecided. It is the continual dialogue between branches of government and between the people and the courts that require cases such as *McDonald*, which clarify previously unresolved issues, to be decided. *McDonald* should resolve at least one of the questions left unanswered by *Heller*, including the question of incorporation, which the parties have specifically requested the Court address.[272]

Heller has the potential to create a third category, should the Courts applying it so choose. If the Courts decide to treat "arms" as independent categories, meaning to treat guns one way, explosives another, body armor yet a third, then there could form a third category of cases. This is highly unlikely because *Heller* explicitly limits the types of weapons the Second Amendment protects in the *per curiam* opinion.[273] Further limiting the possibility that the Court will proceed to create this category is the decision in *United States v. Bonner*,[274] holding that body armor falls outside the scope of the Second

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[264] *United States v. Robinson*, 2008 WL 2937742 (E.D. Wis. 2008) (*Heller* did not invalidate prohibition on possession of firearms by felons.)
[265] *Heller*, 128 S. Ct at 2817, 544 U.S. --- (2008) (possession by mentally defective person)
[266] *U.S. v. Luedtke*, --- F. Supp. 2d ---, 2008 WL 4951139 (E.D. Wis. 2008) (Upholding law preventing someone under domestic violence restraining order from purchasing gun.)
[267] *U.S. v. White*, Slip Copy 2008 WL 3211298 (S.D. Ala. 2008) (Upholding restriction on gun ownership by person convicted of crime of domestic violence.)
[268] *U.S. v. Bonner*, 2008 WL 4369316 (N.D. Cal 2008) (Upholding restriction on possession of body armor by felon.)
[269] *United States v. Robinson*, 2008 WL 2937742 (E.D. Wis. 2008)
[270] *Heller*, 128 S. Ct at 2817, 544 U.S. --- (2008)
[271] *McDonald v. City of Chicago*, No. 08-4244
[272] Pet'r's Br. 25-9, *McDonald et al v. City of Chicago* No. 08-4244 (7th Cir. filed Jan. 28, 2009; Argued May 26, 2009)
[273] *Heller*, 128 S. Ct at 2817, 544 U.S. --- (2008) (The Second Amendment protects the sort of lawful weapons possessed at home for the purpose of militia duty.)
[274] *U.S. v. Bonner*, 2008 WL 4369316 (N.D. Cal 2008)

Amendment's protection.[275] The statement that body armor falls outside of the scope of the Second Amendment becomes more strange when you look back to the way Scalia defined "arms" in the *per curiam* opinion in *Heller* as including "weapons of offence, or armour of defence."[276] Body armor seems to clearly fall within the latter category. Strange or not, the exclusion of body armor from the definition of arms is purely the result of the dialogic process. The legislature does not want felons to own body armor, so the Court says they cannot, even though the definition of "arms" in the *Heller* opinion suggests that the Second Amendment protects body armor.[277] While the logic is idiosyncratic, the decision in *Bonner* can be clarified and distinguished by the fact that Bonner himself was a felon, and thus outside the scope of those protected by the decision in *Heller* entirely. Even though the body armor issue need not have been addressed, in doing so the court in *Bonner* indicates that the courts are unlikely to split the *Heller* analysis into various parts, and thus *Heller*, at least for now, does not appear to be on a path to follow *Brown's* multi-tier progeny style of decisions.

VII. What Does *Heller* Look Like?

Having analyzed *Heller* both in the context of Sunstein's framework, and in the context of its conversational effect, a determination can be made as to the most probable path that *Heller* and its continuing dialogue will follow. A recap of each of the possibilities combined with the conversational aspects is included below to summarize the main points before the ultimate conclusion is reached.

Heller as a "deep and wide" case would resemble *Tinker*.[278] For *Heller* to be deep and wide, it would have to be applicable on a large scale and would have to be based on principle, rather than fact. *Heller*, for all the things that it is, is not applicable on a large scale. The dialogue following *Heller* tends to establish that *Heller* will be more limited than *Tinker* was. Scalia's opinion explicitly limits the case to a narrow set of circumstances.[279] The Court's leaving undecided questions of the standard of review, scope of the second amendment right, and incorporation also point to the opinion being narrow rather than wide. This creates a need for dialogue greater than what was needed by *Tinker*. By not answering these questions, the Court has given itself room to either expand or contract the right to bear arms in the future. We will see which direction the Court wishes to go in *McDonald*, where the parties have asked for a determination of the incorporation question.[280] Further, the right protected in *Heller* is a specific one,[281] while the right in *Tinker* was the much more ambiguous and less defined student right to action

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[275] *Id.* at *4
[276] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791 (quoting 1773 edition of Samuel Johnson's dictionary)
[277] *Id.*
[278] *Tinker*, 393 U.S. 503 (1969)
[279] *Heller*, 128 S. Ct. at 2817-18 (Stating that: "[U]nder any of the standards of scrutiny that we have applied to constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster" (internal quotations omitted). This means that you can't ban the general populous from having guns in their homes.)
[280] Pet'r's Br. 25-29, *McDonald et al v. City of Chicago* No. 08-4244 (7th Cir. filed Jan. 28, 2009; Argued May 26, 2009)
[281] *Heller*, 128 S. Ct at 2822

as political speech.[282] Because of the differing nature of the right at issue, the nature of the dialogue after the determination of the right will be different.

The question of *Heller's* depth is somewhat more difficult, but continuing the contrast to *Tinker* will help to clarify matters. The case was decided on the principle that the Second Amendment confers an individual right to bear arms.[283] Is the fact that a decision is based on principle enough to make it deep? All Supreme Court cases are, to some degree, based on principle. The Court must have some guidance in making its determinations. When you contrast the principle in *Heller* to the principle in *Tinker*, it becomes more clear that *Heller* is, while based on principle, not the type of case which is sufficiently based on principle to be called deep. The Second Amendment right in *Heller*, as neither deep nor wide, will have very little chance of following the development of the student right to action as political speech in *Tinker*.

Heller as "deep and narrow" would look like *Lawrence*.[284] *Lawrence* was deep because of the broad principle of equality abundant in the language of the *per curiam* opinion.[285] *Lawrence* was also narrow because it was distinguishable to the point where the only thing it accomplished was that it overturned *Bowers*.[286] By demolishing *Bowers* so completely, *Lawrence* terminated the conversation on the issue. *Heller* is marginally comparable in that it terminates the discussion on the nature of the right.[287] *Heller* was not deep because it was not, as "deep" cases are, based primarily on a judgment of principle.

Heller, being narrow but not deep, could follow the same path of the *Lawrence* decision. *Lawrence* was almost immediately limited to its specific facts and all courts hearing challenges based on it have been unreceptive of the claims. It is possible, given the way the cases following *Heller* have gone, that the same fate awaits *Heller*. Should *Heller* follow the path of *Lawrence*, we can expect that the courts will continue to distinguish *Heller*[288] and will continue to find ways to bypass the application of *Heller* where applying *Heller* would invalidate gun laws. Should that occur, the total effect of *Heller* will be to have struck down the D.C. handgun ban and *Heller* will have no further applicability, the same way *Lawrence* has had no applicability except for overturning *Bowers*. Ultimately, whether that occurs will depend on the result of the dialogic process between the legislatures, who pass laws of questionable validity to attempt to bypass unpopular rulings, and the courts.

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[282] *Tinker*, 393 U.S. at 505 (*Tinker*, in my opinion, stands for the proposition that students should be allowed some degree of latitude in expressive clothing, even where that clothing may be offensive to some political viewpoints, so long as it does not disturb the learning environment of the school.)
[283] *Heller*, 128 S. Ct at 2790
[284] *Lawrence v. Texas*, 539 U.S. 558 (2003)
[285] *Id.* at 567
[286] *Bowers v. Hardwick*, 478 U.S. 186 (1986) (The *Bowers* ruling is so utterly eviscerated by the Court in *Lawrence* that the *Lawrence* opinion could be read as doing only that, overruling *Bowers*.)
[287] *Heller*, 128 S. Ct. at 2788, 2822, 2848 (No member of the Court disagrees with the contention that the Second Amendment protects an individual right.)
[288] See footnote 61, *supra*

Heller, as shallow and wide, would look like *Brown*. *Brown* was shallow because the opinion was based on the factual assessment that separate but equal was not equal.[289] This, to be sure, is also a principled decision, but within this framework, the decision in shallow. Had *Brown* been decided on principle alone, it would not have limited the original scope of applicability to public schools,[290] but would have instead decried segregation everywhere. The enormous impact that *Brown* had, due to the post-decision dialogic process, on every aspect of segregation makes it wide, in spite of the actual wording of the opinion. Through the dialogic process, the opinion took on a life of its own and spread beyond the initial scope of the opinion to help eliminate segregation

Heller is shallow. The opinion is based more on facts than on principle. This is made all the more clear by the majority's language in relying so heavily on the text of the Second Amendment. If there were some broader principle at play, they would not resort to something as ambiguous as the language of the Second Amendment. *Heller*, as shallow, but not wide, will probably not follow *Brown's* path, though the dialogic conversation following it may be similar. One would be hard pressed to think of a way to apply *Heller* outside of the confined of the Second Amendment in the same way *Brown* was applied outside the scope of its holding; as such it is unlikely *Heller* will look like *Brown.*

Heller, as narrow and shallow, could look like *Roe*.[291] Contrasting something as minimalist as *Heller*[292] with something as maximalist as *Roe*[293] is inherently problematic, but, given the nature of the dialogic process following the Supreme Court's decisions, it fits. *Roe*, as discussed previously, is narrow and shallow. *Heller*, as discussed so far in this section, is narrow and shallow. The degree of ideological difference between the two decisions is not relevant to the fact that the two could share a common developmental course.[294] *Heller* is analogous to *Roe* in a number of ways, including: the factual specificity of the right created, the likelihood that judicial appointments will affect future related cases, the amount of post-decision litigation spawned, the specific scope of the right announced, and the inapplicability of the right outside the context in which it was announced. Because of all of these similarities, and the degree to which a similar amount of dialogue will be raised subsequent to the case, it can be concluded that *Heller* will most likely resemble *Roe*. This conclusion is further supported by the Ninth Circuit's ruling in *Nordyke v. King*,[295] holding that the Second Amendment is incorporated without defining a standard of review.[296] While *Nordyke* is illustrative of a potential path for the

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[289] *Brown*, 347 U.S. at 495
[290] *Id.* at 494
[291] *Roe v. Wade*, 410 U.S. 113 (1973)
[292] Sunstein, *Heller as Griswold*, *supra* at 248
[293] Sunstein, *Leaving Things Undecided*, *supra* at 48-49
[294] Sunstein prefers to contrast to *Griswold* (381 U.S. 479). I choose to analogize to Roe because of the more limited scope of the abortion right than the expansive scope of the privacy right. Were I to be discussing judicial ideology, *Griswold* would be the more appropriate case, as Sunstein has already done so, I limit my discussion to similarities in applicability and use Roe in its place.
[295] *Nordyke v. King*, 563 F.3d 439 (2009)
[296] *Id*. at 464

incorporation of the Second Amendment, it is not the only path. *McDonald*, for reasons to be discussed, will likely take a different path with a different outcome.

Having determined which path *Heller* is likely to follow, it is time to return to the three concerns with Scalia's *per curiam* opinion discussed earlier in connection with *Heller's* likely path. Those concerns were: the grammatical issues created by the prefatory and operative clause split, the omission of an in depth discussion of the militia clauses, and the omission of discussion about the necessity of the Second Amendment in light of the proposal of a new central government.

If *Heller* follows the path of *Lawrence*, each of these concerns will be moot insofar as the Court will not further alter, or even so much as apply, the right created in *Heller*.[297] If, however, *Heller* follows *Roe*, the first two may be problematic. The third contention with the *per curiam* opinion would have been a persuasive argument for the individual right to bear arms, but its inclusion or omission does not affect the subsequent viability of the decision.

If *Heller* follows the path of *Roe* and is subject to attack based upon the political ideology of the Court,[298] the first contention could be used to weaken *Heller*. In the back and forth that is natural, as a part of the dialogic process, while the Supreme Court grapples with past decisions when making future ones, the Court could, if it so chose, attack the split of the Second Amendment into the prefatory and operative clauses[299] and insist that the more proper split would be one in which there are no grammatical errors.[300] Should the Court choose to adopt a reading of the Second Amendment based on correct grammar and comma placement, the result is likely to be a militia based understanding of the Second Amendment, as shown in my breakdown of the possible breakdowns of the Amendment. This could lead to a limitation, if not flat out reversal, of *Heller*.

Secondly, if *Heller* follows the path of *Roe*, the omission of the militia clauses could be used as an attack on the opinion. The dissent discusses the clauses in a fair amount of detail.[301] The *per curiam* opinion, viewing the Second Amendment in isolation, does not attempt to jointly discuss the two topics. This could be used against the opinion should a desire to alter the outcome arise upon a change in the membership of the Court.

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[297] This point is illustrated by the three cases discusses earlier (*Standhardt v. Maricopa County*, *Utah v. Holm*, and *Muth v. Frank*) following Lawrence which refuse to even consider applying the holding in *Lawrence* outside of the factual context of *Lawrence*.
[298] Sunstein, *Heller as Griswold*, *supra* at 272
[299] *Heller*, 128 S. Ct. at 2789
[300] The prefatory and operative clause split leaves a comma of questionable necessity in the middle of both clauses. The comma between the words Militia and being in the prefatory clause is less questionable than the comma between the words Arms and shall in the operative clause, but both are troublesome. *See* http://www.guncite.com/second_amendment_commas.html
[301] *Heller*, 128 S. Ct. at 2832-33, 2861-62

While it is possible that the development of *Heller* could follow *Roe* or *Lawrence*, it is important to note that *Heller* cannot be understood in such a limited fashion.[302] *Heller* may find its own voice during the period in which its dialogue continues, and in doing so may not follow any of these paths. Just because *Heller* is comparable does not mean it is predictable. There is much more to *Heller* than what is contained within the scope of this paper. That being said, and having now discussed my contentions with the *per curiam* opinion in light of the possible ways the right in *Heller* could develop, it is time to move on to discuss the upcoming case of *McDonald v. City of Chicago* and its potential effects on *Heller*.

VIII. The Dialogic Process as Applicable to the Upcoming Case of *McDonald v. City of Chicago*

The questions of incorporation of the Second Amendment, the standard of review for Second Amendment issues, and the scope of the Second Amendment were all left undecided in *Heller*.[303] As of the drafting of this paper, *McDonald v. City of Chicago*, or the "Chicago Gun Case," is currently before the Seventh Circuit and *Nordyke v. King*[304] was recently decided in the Ninth Circuit.[305] The decisions in *McDonald* and *Nordyke* are a direct result of the dialogic process that resulted from the decision in *Heller*. The parties have explicitly requested a ruling on the incorporation of the Second Amendment to clarify the issue *Heller* left undecided.[306] While *Nordyke* decided the incorporation issue for the Ninth Circuit, it remains to be seen if the Seventh Circuit will do the same.

The standard of review in *Heller* is going to be an interesting issue for the Supreme Court to decide, if it ever chooses to do so. Scalia explicitly disclaims the applicability of rational basis review in footnote 27 of the *per curiam* opinion.[307] It is exceptionally unlikely that the Court would consider using strict scrutiny because of the number of gun laws that would likely be invalidated under that level of scrutiny. Intermediate scrutiny is also problematic insofar as there is no definably suspect class in dealing with a general Second Amendment right. The problem is then clear; there is no readily applicable standard of review. Rational basis doesn't sufficiently protect the right,[308] strict scrutiny provides too much of a right, and there is no basis for using intermediate scrutiny. Where does that leave us? The Court has a few options.

First, the Court could, following the Ninth Circuit's lead in *Nordyke*, refuse to announce a standard of review, thereby bypassing the problem.[309] It could leave the

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[302] Sunstein, *Heller as Griswold*, *supra* at 250-51 (Stating that the abortion cases form an imperfect but highly salient analogy. *Nordyke v. King*, 563 F.3d 439 (2009) directly contrasts the right to bear arms with the abortion right.)
[303] *Id.* at 268-69
[304] *Nordyke v. King*, 563 F.3d 439 (2009)
[305] *Nordyke v. King* was decided April 20, 2009, while this paper was in its preliminary draft
[306] Pet'r's Br. 25-29, *McDonald et al v. City of Chicago* No. 08-4244 (7th Cir. filed Jan. 28, 2009; Argued May 26, 2009)
[307] *Heller*, 128 S. Ct at 2818, n.27; 544 U.S. --- (2008)
[308] *Id.*
[309] *Nordyke v. King*, 563 F.3d 439, 458 (2009) (The only discussion of a standard of review in *Nordyke* is where *Nordyke* mentions that *Heller* left the issue undecided.)

lower courts to determine the appropriate standard and where they apply an erroneous standard, the appellate courts can fix it. This would keep the dialogue between the lower and higher courts open, as the higher courts would have to ensure the lower courts are coming to the appropriate conclusions. This appears to be the approach so far, and the courts generally seem content with the undefined standard(s) currently being used by the lower courts. While the continued dialogue could be beneficial, this approach may or may not be a practical long-term solution because of the potential for circuit splits on the issue, but for now it seems to be the path of choice.

In the alternative, the courts could pick one of the standards and justify its application. If the Supreme Court at some point wishes to back away form the ruling in *Heller*, it could do so by announcing rational basis as the standard of review.[310] The Court could also find some way to create a semi-suspect class of persons (maybe gun-owners?) to justify the use of intermediate scrutiny. The problem of defining this new suspect class and the issues which doing so would raise are outside of the scope of this paper. It suffices to say the necessary complications of doing so would be substantial. The Court could also announce the use of strict scrutiny, but will most likely refuse to because of the number of gun laws doing so would endanger. However, should the Court choose strict scrutiny, it could heighten the dialogue between the branches insofar as the heightened requirement would make it necessary for the legislature to be more precise in the drafting of gun control legislation so that it is narrowly tailored to meet a compelling state interest. This dialogue would be beneficial in that it would eliminate ambiguity in gun control legislation.

It appears that the most plausible actions for the Court to take in the area of a standard of review are to either leave it unannounced, or take the position of Breyer, in his dissenting opinion in *Heller*, that rational basis is the appropriate standard of review.[311] Breyer's position, which was rejected in *Heller*,[312] has been rejected again in the Ninth Circuit in *Nordyke*.[313] Now is the appropriate time to return to Breyer's contention that rational basis scrutiny is appropriate.

Breyer's insistence on the use of rational basis scrutiny to protect an explicit constitutional right is unjustifiable. Rational basis review is premised on the presumptive constitutionality of the questioned law.[314] It is hardly logical to think presumptive constitutionality is the appropriate standard when the law that is being challenged is being challenged on constitutional grounds. It is quite the hurdle to challenge a law as unconstitutional when the law is presumed to be exactly the opposite. Breyer's desire to use rational basis review can be understood in light of his strict view on gun control. The same approach has been taken in the cases following *Lawrence* in which rational basis is applied to the laws challenged under that decision. Because rational basis is used, *Lawrence* is all but limited to its facts. If the Court should desire to limit the applicability

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[310] *Heller*, 128 S. Ct. at 2818 & n.27 (This specifically notes that even the restricted District of Columbia regulation would pass rational basis scrutiny.)
[311] *Id.* at 2851
[312] *Heller*, 128 S. Ct. at 2818 & n.27
[313] *Nordyke v. King*, 563 F.3d 439, 458 & n.19 (2009)
[314] *Heller* at 2818

of *Heller*, or even go so far as overturning it, the easiest approach would be to announce rational basis as the standard of review for Second Amendment cases.

Having taken issue with Breyer's position on rational basis, and having discussed its potential use to eviscerate *Heller*, it is time to move on to the scope of the Second Amendment right. The Court's need to address the scope of the Second Amendment has been, to some degree, handled by the dialogic process between Congress and the Court. *Heller* qualifies the right to bear arms, in terms of the scope of the right, as applicable to "the sorts of weapons that they possessed at home."[315] The *per curiam* opinion further limits the scope of the Second Amendment by discussing the types of people and places *Heller* does not apply to.[316] The people *Heller* does not apply to were determined by the legislature. The Court leaving this untouched is part of the dialogic process in that the Court is recognizing and deferring to the legislative judgment on the issue. While this leaves the scope of who *is* protected by *Heller* in a substantial state of uncertainty, it provides a pretty clear picture of who *isn't* protected. Again, the Court has some options in addressing this issue later.

First, the Court can continue to refuse to judicially define the scope of the Second Amendment. This would allow for the lower courts to make the factual determination of who falls outside of the exceptions the *Heller* opinion explicitly states.[317] This would provide protection for those who are not on the list of people the *Heller per curiam* opinion says are not protected. To clarify, those people would fall outside of *Heller's* exemption from protection; they would be protected.

Second, the Court could try to announce a standard scope of applicability to the Second Amendment. This would be similar to what they have done to date by accepting the legislative standard for the scope of the Second Amendment. Judicially defining the scope of the Second Amendment would possess a similar set of problems to trying to define a new semi-suspect class for the purpose of using intermediate scrutiny. It is doubtful the Court will create such a headache for itself, when doing so is unnecessary where the legislature has created an acceptable standard.

The Court's third option is to limit the scope of the Second Amendment to the facts of *Heller*, basically, limit the Second Amendment protection to the possession of a handgun in the home for the purpose of self defense.[318] Absent announcing a standard of review, limiting the scope of the Second Amendment would probably be the most efficient way of limiting *Heller's* continued viability. This is the path used in the Ninth Circuit in *Nordyke*, where *Heller's* limitation of the right is used as an explicit limitation of the scope of the right.[319]

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[315] *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817; 544 U.S. --- (2008)
[316] *Id.*
[317] *Id.*
[318] *Id.* at 2824
[319] *Nordyke* goes so far as to limit the right to *only* the explicit statement of what is protected by *Heller*, and, in doing so, upholds a ban on gun possession on all governmental property in Alameda County, California.

The incorporation question presented in *McDonald* will result in one of three outcomes. The Second Amendment right protected in *Heller* will either be incorporated, not incorporated, or the Court will refuse to rule on the issue. As the third is the least likely, and would make this section unnecessary, discussion on it is omitted. If the Second Amendment is incorporated, the gun ban in Chicago will most likely be invalidated, and along with it probably a number of similarly functioning bans in cities across the nation.[320] The number of potentially contestable statutes could be a factor for, or possibly against, the incorporation of the Second Amendment. Such a ruling would certainly put the dialogic process into overdrive as legislatures attempt to re-craft the laws such a decision would invalidate.

Heller was the culmination of strategy, timing, and the perfect plaintiff. *McDonald* has a number of the same factors going for it, but *McDonald* also has the added consideration that the ruling there will not be limited to the case at bar in the same way the *Heller* ruling was limited. The ruling in *McDonald*, assuming the Supreme Court hears the case, will apply nationally, to much less perfect plaintiffs in some cases. Factors that lean towards the incorporation of *Heller* through *McDonald* include: the degree to which the national consensus supports an individual right to bear arms, and the similar needs of people in the states[321] to those sought to be protected by *Heller*. Also worthy of note is the *per curiam* opinion's distinguishing of *United States v. Cruikshank*,[322] which limited the Second Amendment to protect against only infringement by Congress and not by the states.[323] Footnote 23, which distinguished *Cruikshank*, is instructive, and will most likely be discusses again in *McDonald*.[324]

There are also a number of factors that weigh in against the incorporation of *Heller*. Included in this are: that the D.C. law was one of the most severely restrictive in the country,[325] the lack of a standard of review for the states to follow,[326] and the undefined scope of the right.[327] Having addressed the problems of a lack of standard of review and undefined scope above, they will not be discussed again. The fact that the D.C. law was so restrictive may or may not have bearing on the overall question of incorporation. If the Second Amendment remains unincorporated, the need for any further dialogue regarding *Heller* will be minimal. The federal gun control laws have all sustained challenges post-*Heller*. If *Heller* remains unincorporated, it will be inapplicable to the state gun control laws. Without any laws to question, the need for further dialogue on the topic would be low.

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[320] It is possible, as *Nordyke* shows, to incorporate the Second Amendment without invalidated the challenged law. That outcome is less likely in *McDonald* because the *McDonald* ban is a full ban similar to the *Heller* restriction, not simply a restriction on sales like the one at issue in *Nordyke*.

[321] The same considerations are protected by Heller, i.e. the right to own a gun, to protect yourself, in your home.

[322] *United States v. Cruikshank*, 92 U.S. 542 (1876)

[323] *Heller*, 128 S. Ct. at 2813; 544 U.S. --- (2008) (quoting *United States v. Cruikshank*, 92 U.S. 542 (1876))

[324] *Heller*, 128 S. Ct. at 2813, n.23; 544 U.S. --- (2008)

[325] Sunstein, *Heller as Griswold*, *supra* at 264-65

[326] *Id.* at 268-69

[327] *Id.*

The Ninth Circuit has weighed in on the issue, ruling in favor of incorporation of the Second Amendment without announcing a standard of review.[328] The Court ruled in favor of incorporation of the Second Amendment after finding that the holding in Heller invalidated existing Circuit precedent, specifically *Hickman v. Block*.[329] *Hickman* would have, prior to *Heller*, precluded the *Nordyke's* Second Amendment claim.[330] The Ninth Circuits' analysis of the incorporation question was based on an analogy to the abortion right.[331] The Court specifically made reference to *Harris v. McRae*, concluding in a very similar manner to the Supreme Court in *McRae*, that even where a right is fundamental, the government need not facilitate in the exercising of the right.[332] In so ruling, the Ninth Circuit has incorporated the Second Amendment while allowing for the government to effectively ban handgun possession on all governmental property, claiming that governmental property is, in its entirety, the exact type of "sensitive place" the *Heller* decision had in mind when it limited the right to bear arms.[333] It is the breadth of that ruling which leads to speculation as to whether, or to what degree, the Seventh Circuit will follow the Ninth's lead.

The Ninth Circuit ruled in favor of incorporation of the Second Amendment because, after *Heller*, it lacked any binding precedent prohibiting it from doing so. That is not true for the Seventh Circuit. *Quilici v. Village of Morton Grove*[334] explicitly states that the "[S]econd [A]mendment does not apply to the states."[335] *Quilici* relies on *Presser v. Illinois*, which ruled that "[t]he Second Amendment declares that it shall not be infringed, but this … means no more than it shall not be infringed by Congress."[336] Because *Heller* distinguished, but refused to overrule *Presser*, *Presser* is still good law. *Quilici* relied on *Presser*, and without *Presser* being overturned, *Quilici*, ruling explicitly against incorporation of the Second Amendment, is still binding. Given that *Quilici* is still binding in ruling against incorporation, it is unlikely that the Seventh Circuit will choose to follow the Ninth Circuit on the incorporation issue.

The most likely course is that the Seventh Circuit will follow *Presser* and *Quilici*, in essence ruling that the Second Amendment is not incorporated and using a rational basis standard of review[337] to uphold the contested gun ban at issue in *McDonald v. City of Chicago*. However, given that the court in *Quilici* relied on *U.S. v. Miller* in determining the scope of the Second Amendment right, it is possible that *Quilici* will be revisited and possibly overruled. All of the cases that could prohibit the Seventh Circuit from following the Ninth can be distinguished. *Presser* and *Cruikshank* are both distinguishable because they refuse to incorporate the Second Amendment by way of the

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[328] *Nordyke v. King*, 563 F.3d 439, 464 (2009)
[329] *Id*. at 444-45
[330] *Id.*
[331] *Id*. at 459
[332] *Id*.
[333] *Id*. at 459-60
[334] *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (1982)
[335] *Id.* at 270
[336] *Presser v. Illinois*, 116 U.S. 252, 265 (1886)
[337] *Quilici*, 695 F.2d at 268

Privileges and Immunities Clause.[338] Incorporation of the Second Amendment in *McDonald* would be through the selective incorporation doctrine tied into the Fourteenth Amendment.[339] *Quilici* can be distinguished or avoided on the basis that the decision relies on *U.S. v. Miller*, which was overruled by *Heller*, to determine the scope of the Second Amendment.[340] The Seventh could refuse to follow it on the basis that its foundation has been eroded and it should no longer be followed.[341]

Ultimately it is the province of the Seventh Circuit to determine the path they will take on the issue of the incorporation of the Second Amendment. While the case law appears to make refusing incorporation the appropriate choice, there is ample room to distinguish the existing case law if they so choose.

IX. Conclusion

Heller maybe compared and contrasted to any number of constitutional doctrines. Based on the analysis previously provided, some predictions may be made. The Seventh Circuit, given the continued validity of *Cruikshank*, will be have to be able to distinguish it to incorporate the Second Amendment. If the Seventh follows, rather than distinguishes, its case law, a split between them and the Ninth Circuit is likely. The resulting Circuit split appears to place *Heller* as a conversation starter, rather than a conversation terminator, in the area of the Second Amendment right to bear arms. A comparison of *Heller* with the cases previously discussed should help illustrate the point.

If *Heller* is to take a similar path to that of *Tinker*, which, given the different scope of the Second Amendment right compared to the First Amendment right, is unlikely, then the Court, in further developing the right to bear arms, will continue to look at the right in the context of the location in which the contested action took place. Where *Tinker* was applicable to student speech in the forum of a public school subject to some restrictions,[342] *Heller* will be applicable to the home and will also be subject to some restrictions.[343] While it is possible that *Heller* could follow this path, it seems unlikely that *Heller* will be so limited because so limiting *Heller* would call into question a number of laws allowing concealed handguns to be carried with the exception of certain sensitive locations as cited illustratively in the *Heller* decision.[344] Due to the societal interest in leaving the majority of gun control laws in place, it is unlikely that the Court, in the future, would follow a path that would lead to the unnecessary invalidation of reasonable gun control laws.

Heller could also follow the development of *Brown*. This is also highly unlikely given the different nature of the rights at play. As evidenced by the broad applicability of

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[338] *Nordyke v. King*, 563 F.3d 439, 448 (2009)
[339] Pet'r's Br. 25-29, *McDonald et al v. City of Chicago*, No. 08-4244 (7th Cir. Filed Jan. 28, 2009; Argued May 26, 2009)
[340] This is exactly what the Ninth Circuit did in *Nordyke* when it distinguished *Hickman*.
[341] *Lawrence v. Texas*, 539 U.S. at 576
[342] *Tinker*, at 505
[343] *Heller*, 128 S. Ct. at 2816-17; 544 U.S. --- (2008)
[344] *Id.*

Brown, the Fourteenth Amendment has a much broader policy base and is much more widely applicable than the Second Amendment. *Brown* was written to be specifically applicable to a single setting, public schools,[345] but was able to be applied in a much more broad scope. The decision in *Heller* is almost certainly not going to be able to be expanded in a similar fashion. There are few, if any, other areas in which the Second Amendment could be extended based on the language in the *Heller* per curiam opinion. The only area where it seems even possible for *Heller* to be extended is in the scope of the right to bear arms. The *Heller* opinion itself can be read to infer that the right does not extend beyond the home.[346] Should *Heller* be read as more expansive than the language initially suggests, the most likely place for an expansion of the right to defend yourself is to extend it beyond the scope of the home.

One of the more likely outcomes for the future of *Heller* is for *Heller* to resemble *Lawrence* in its dialogic path. If *Heller* is to go the path of *Lawrence*, and to be limited to what it specifically decided, there will be certain elements in the *McDonald* opinion, either at the Seventh Circuit, or if the Supreme Court hears it, there, which will show us the limitation. If *Heller* is to be limited the same way *Lawrence* was limited, the right to bear arms will basically be left untouched in the future. *Nordyke's* acceptance of incorporation with its accompanying refusal to overturn the law at issue is a prime example of this. The Court's application of the holding in *Heller* would limit the applicability of the holding. We could observe this as early as the upcoming *McDonald v. City of Chicago* case.

The limitation of *Heller* by *McDonald* could come by refusal to incorporate the right. This would basically ensure that *Cruikshank's* premise that the Second Amendment applies only against the federal Government would still be good law. The Court may choose to limit *Heller* by using *McDonald* to announce a rational basis standard of review. This would leave *Heller* intact, but would make future challenges to gun laws all but impossible to win. That would be similar to what the courts have done in refusing to apply *Lawrence.* By announcing a rational basis standard of review in *Standhart* the court all but refuses to enforce the equal treatment *Lawrence* could have been read to demand. If *McDonald* announces rational basis review for gun laws, it will accomplish nearly the same goal, making constitutional challenges to contested laws nearly impossible to win. It would also be possible for the Court to limit *Heller* by announcing a definite scope of applicability for the Second Amendment. Any one or any combination of these things is possible in *McDonald*.

If *Heller* is to go the path of *Roe*, *McDonald* will rule in favor of incorporation as *Nordyke* did. This will open up a number of challenges to restrictive state gun laws. If *Heller* is to go that route, look for *McDonald* to stay silent on the standard of review, as *Nordyke* did. It could be left to states to determine, subject to Supreme Court approval, what standard each will apply to protecting the right. Another area the Court would likely remain silent on is the scope of the right. If *Heller* is to continue being comparable to *Roe* then the Court will stay silent on questions not before it. This would continue the

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[345] *Brown*, 347 U.S. at 493 (1954)
[346] *Heller*, 128 S. Ct. at 2816-17, 2824

minimalist trend set in the *Heller* opinion[347] and would allow for the Court to continue regulating the Second Amendment right by addressing each issue as it comes up.

Heller can be viewed in one or more of the ways discussed herein, but it is important to realize that *Heller* may also be viewed in many ways not discussed in the scope this article. *Heller* may turn out looking like *Tinker*, *Roe*, *Brown*, or *Lawrence*, or it may look like none of the above. Ultimately, what can be determined is the *Heller* has started a dialogue on the extent of the Second Amendment right. What that dialogue has determined is up for debate, however the most likely outcome is that *Heller's* dialogue will result *Heller* resembling *Roe*, with an unannounced standard of review for Second Amendment cases, the incorporation of the Second Amendment, and the absence of a judicially defined scope to the Second Amendment.

The most likely outcome at this point is that the Second Amendment will be incorporated by *McDonald* and that *McDonald* will continue the trend begun by *Heller* of only deciding the issues in front of it. This will leave the scope and standard of review for another day. I will further predict that it will be the Supreme Court, rather than the Seventh Circuit, who makes that ruling and that the Supreme Court will follow a limited version of the Ninth Circuit's *Nordyke* ruling when they do so.[348] I make this prediction notwithstanding the two cases[349] that explicitly disclaim *Heller's* incorporation.[350] The Second Amendment, if incorporated by *McDonald* (or, if *Nordyke* makes it there first, by *Nordyke*), will still face the same scrutiny in the state courts that it has so far withstood. State courts will not be quick to overturn their legislatures. Deference will be shown to the judgment of those who thought that guns must be regulated, but that deference has limits. Those limits have been, and will continue to be, explored in the dialogue between the courts and the legislatures as Second Amendment case law continues to develop. Ultimately, the dialogue will continue, and the impact of *Heller's* silence will be determined by the conversation it started.

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[347] Sunstein, *Heller as Griswold*, *supra* at 247

[348] Specifically, I do not believe the Supreme Court will take the same expansive view of "sensitive areas" adopted by the Ninth Circuit.

[349] *See People v. Abdullah*, --- N.Y.S. 2d ---, 2008 WL 5448995 (2008)
see also, People v. Flores, 169 Cal. App. 4th 568 (2008)

[350] The charge in *Abdullah* was carrying a firearm. The charge in *Flores* was for a felon in possession of a handgun. Both cases explicitly note *Heller* is not incorporated and therefore not binding on their court. *McDonald* can, and probably will, change this.