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CATEGORICALISM AND BALANCING IN FIRST AND SECOND AMENDMENT ANALYSIS

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The least discussed element of District of Columbia v. Heller *might ultimately be the most important: the battle between the majority and dissent over the use of categoricalism and balancing in the construction of constitutional doctrine. In* Heller*, Justice Scalia's categoricalism essentially prevailed over Justice Breyer's balancing approach. But as the opinion itself demonstrates, Second Amendment categoricalism raises extremely difficult and still-unanswered questions about how to draw and justify the lines between protected and unprotected "Arms," people, and arms-bearing purposes. At least until balancing tests appear in Second Amendment doctrine—as they almost inevitably will—the future of the Amendment will depend almost entirely on the placement and clarity of these categories. And unless the Court better identifies the core values of the Second Amendment, it will be difficult to give the categories any principled justification.*

Heller *is not the first time the Court has debated the merits of categorization and balancing, nor are Justices Scalia and Breyer the tests' most famous champions. Decades ago, Justices Black and Frankfurter waged a similar battle in the First Amendment context, and the echoes of their struggle continue to reverberate in free speech doctrine. But whereas the categorical view triumphed in* Heller*, Justice Frankfurter and the First Amendment balancers won most of their battles. As a*

 As an associate at O'Melveny & Myers LLP, I assisted the drafting of the District of Columbia's merits briefs in *District of Columbia v. Heller*. The opinions expressed here are solely my own and do not represent those of the District or of any other party to the case. I owe enormous debts of gratitude to Jack Balkin, Rachel S. Bloomekatz, Josh Chafetz, Walter Dellinger, Brannon Denning, Brianne Gorod, Adam Jed, Marin Levy, Daniel Markovits, Robert Post, Natalie Ram, Judith Resnik, Reva Siegel, and Matt Shors, as well as to workshop participants at Yale Law School, the University of North Carolina School of Law, and Duke University School of Law.

result, modern First Amendment doctrine is a patchwork of categorical and balancing tests, with a tendency toward the latter. The First and Second Amendments are often presumed to be close cousins, and courts, litigants, and scholars will almost certainly continue to turn to the First Amendment for guidance in developing a Second Amendment standard of review. But while free speech doctrine may be instructive, it also tells a cautionary tale: Above all, it suggests that unless the Court better identifies the core values of the Second Amendment, the Second Amendment's future will be even murkier than the First Amendment's past.

This Article draws the Amendments together, using the development of categoricalism and balancing tests in First Amendment doctrine to describe and predict what Heller*'s categoricalism means for the present and future of Second Amendment doctrine. It argues that the Court's categorical line drawing in* Heller *creates intractable difficulties for Second Amendment doctrine and theory and that the majority's categoricalism neither reflects nor enables a clear view of the Amendment's core values, whatever they may be.*

INTRODUCTION

In the wake of *District of Columbia v. Heller*,[1] courts and scholars are faced with the task of operationalizing a new constitutional right. Litigants already are preparing for the next set of legal battles, which ultimately will prove even more critical to the scope of gun rights than *Heller*'s holding that the Second Amendment protects an "individual" right to bear arms disconnected from any militia service.[2] These conflicts—whose initial skirmishes have already begun—will eventually determine the standard of review applicable to Second Amendment claims and thus shape both the scope of the right and the government's power to burden it. In attempting to construct this new constitutional doctrine, foes and supporters of gun control have increasingly returned to arguments developed in past constitutional struggles, especially those involving the First Amendment. The familiarity of that constitutional terrain, and *Heller*'s endorsement of a "categorical" rather than "balancing" approach to Second Amendment protection, indicate that the fight over gun control after *Heller* is likely to involve maneuvers perfected decades ago during the battle over categorical and balancing approaches to free speech doctrine. This Article argues that *Heller*'s categoricalism neither reflects nor enables a clear view of the Second Amendment's core values—whatever they may

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[1] 128 S. Ct. 2783 (2008).

[2] This issue, which dominates the pre-*Heller* literature, has frequently been mislabeled as a debate between "individual" and "collective" viewpoints. *See, e.g.*, Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 140 (2007) ("[T]he bulk of this scholarly literature can be subsumed within the collective rights and individual rights frameworks."). The District of Columbia argued, and the dissenting Justices recognized:

> The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Heller, 128 S. Ct. at 2822 (Stevens, J., dissenting); *see also* Saul Cornell, *The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292, 307 (2008) ("For much of the twentieth century, the debate over the Second Amendment was framed in simple dichotomous terms: collective right v. individual right. Scholarship on this topic no longer fits such a simplistic model.").

In any event, this Article, like Justice Breyer's dissent in *Heller*, 128 S. Ct. at 2848, takes the "individual" right as a given and instead focuses on how that right may be constitutionally regulated.

be—and that *Heller* therefore fails to justify the constitutional categories it creates. The future of the Second Amendment thus may be even murkier than the past of the First.

The general consensus is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control.[3] Indeed, the two dissenting opinions criticized the majority as leaving "for future cases the formidable task of defining the scope of permissible regulations"[4] and "leav[ing] the Nation without clear standards for resolving those challenges."[5] It is undoubtedly true that the majority did not embrace the "traditionally expressed levels"[6] of review such as strict scrutiny, intermediate scrutiny, or rational basis review—the familiar "tiers of scrutiny" that are closely associated with the Warren Court and have long served as the building blocks of constitutional doctrine.

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[3] *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161, 163 (D. Me. 2008) (concluding that Supreme Court "consciously left the appropriate level of scrutiny for another day"); United States v. White, No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala., Aug. 6, 2008) (noting lack of "any guidance concerning the proper legal standards to apply to any scrutiny of [the ban on possession of firearms by those convicted of domestic violence] under the Second Amendment"). Others have stated:

> [Because] the *Heller* majority declined to give a detailed accounting of the proper standard of review to be used in subsequent Second Amendment cases, litigants have a rare opportunity to write on a *tabula* much more *rasa* than is ordinarily the case in constitutional litigation, while making use of recent scholarship on the crafting of constitutional decision rules that implement constitutional provisions.

Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 Nw. U. L. REV. 2035, 2035 (2008); *see also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009) (manuscript at 30), *available at* http://ssrn.com/abstract=1265118 ("[T]he actual holding of the opinion does not provide much guidance for future cases. The Court did not even provide a standard of review."); Richard Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32, 34 ("All that is clear is that an absolute ban on possessing a pistol is unconstitutional. The other restrictions that a government might want to impose are up for grabs."); Linda Singer, *Court Misfired on Safety Case for Guns*, LEGAL TIMES, June 30, 2008, at 53 ("The Court failed to give guidance to the lawmakers who must evaluate current statutes and try to abide by its ruling . . . ."); Heller*'s Fallout: The Court's Decision Raises More Legal Questions Than It Answers*, NAT'L J. ONLINE, July 17, 2008, http://www.nationaljournal.com/njonline/ii_20080715_4338.php (describing lack of guidance for future as "one of the great failings of the *Heller* decision"); Posting of Doug Kmiec to Convictions, http://www.slate.com/blogs/blogs/convictions/archive/2008/07/08/what-the-heller-is-only-the-supreme-court-s-liberty-enhanced.aspx (July 8, 2008, 06:00 EST) (noting *Heller*'s failure to establish whether scope of "individually enforceable right" required a "militia-nexus"); Robert A. Levy, District of Columbia v. Heller*: What's Next?*, CATO UNBOUND, July 14, 2008, http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next/ (noting that *Heller* did not resolve standard of review despite considerable attention to issue in various amicus briefs).

[4] *Heller*, 128 S. Ct. at 2846 (Stevens, J., dissenting).

[5] *Id.* at 2868 (Breyer, J., dissenting).

[6] *Id.* at 2821 (majority opinion).

But the search for the familiar may be leading courts and commentators astray: The central disagreement in *Heller* was a debate not about strict scrutiny and rational basis review but rather about categoricalism and balancing. Fifty years ago, that same debate was at the center of a doctrine-defining struggle over free speech, with Justices Black and Frankfurter, respectively, advocating categorical absolutism and interest-balancing approaches.[7] Their debate still reverberates in the First Amendment's mix of balancing and categorical tests, and, at least until *Heller*, free speech was the area of law with which the conceptual distinction between categoricalism and balancing was most closely associated, both in doctrine and in scholarship.[8] Moreover, rightly or wrongly, the First and Second Amendments have often been considered close cousins. As a result, courts, litigants, and scholars will almost certainly continue to turn to First Amendment doctrine for guidance in developing Second Amendment standards of review, as Justices Scalia and Breyer effectively did in *Heller* by reprising the roles of Justices Black and Frankfurter. That reliance will be especially pronounced in light of the near absence of relevant Second Amendment precedent.

In *Heller* itself, the Court rejected Justice Frankfurter's balancing approach and embraced a Justice Black–style categoricalism. Foreshadowing at oral argument this preference for absolutism, Chief Justice Roberts noted that "none of [the levels of scrutiny] appear[s] in the Constitution" and that they instead "just kind of developed over the years as sort of baggage that the First Amendment picked up."[9] This dim assessment of First Amendment doctrine proved pro-

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[7] *See infra* Part I.B (describing both debate between Justices Black and Frankfurter and continuing relevance of categoricalism despite triumph of balancing approach).

[8] *See* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1429 (1962) [hereinafter Frantz, *The First Amendment in the Balance*] (asserting that balancing has "come to the fore largely in a single type of case: that in which a compelled disclosure of membership or other association may have a deterrent effect on the exercise of first amendment freedoms"); Laurent B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 729–38, 750–53 (1963) [hereinafter Frantz, *Is the First Amendment Law?*] (discussing balancing and absolutism in free speech context); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 821 (1962) (same); *see also* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 672 (1983) (discussing "continuing controversy over whether first amendment adjudication should be grounded on a categorical (and possibly absolute) theory or whether a balancing of competing interests is more appropriate"); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996) (evaluating balancing test that takes into account, not "whether the means are narrowly drawn to accomplish the interest, [but] whether the means are nonetheless impermissible" but preferring "an approach that operates through categorical rules").

[9] Transcript of Oral Argument at 44, *Heller*, 128 S. Ct. 2738 (No. 07-290).

phetic: Rather than adopting one of the First Amendment's many Frankfurter-inspired balancing approaches, the majority endorsed a categorical test under which some types of "Arms" and arms-usage are protected absolutely from bans and some types of "Arms" and people are excluded entirely from constitutional coverage.[10]

Justice Breyer's dissent, by contrast, picked up the banner of balancing and argued for an approach that would ask whether the burdens imposed by a particular gun control restriction are disproportionate in light of the government's legitimate interests in regulation.[11] The result was a remarkable colloquy between the majority and dissent on the virtues and vices of categorical and balancing tests in constitutional doctrine. Moreover, because *Heller* was the Roberts Court's first (and perhaps last) opportunity to paint constitutional doctrine on a nearly blank canvas, the debate—and the Court's ultimate selection of a categorical palette—is notable for what it says, not just about the Amendment, but about constitutional doctrine and the Court itself.

Building on an analysis of free speech doctrine and its evolution, this Article argues that because *Heller*'s categoricalism is not based on any possible core Second Amendment value, it threatens to stunt the growth of coherent Second Amendment doctrine and theory. Part I briefly describes the differences and relationship between the categorical and balancing approaches and illustrates how they manifest themselves in First Amendment doctrine. Part II charts the development of categorical and balancing tests in Second Amendment analysis, first detailing the presumed connection between the First and Second Amendments and then explaining how *Heller* transformed Justice Black's First Amendment categoricalism into a Second Amendment framework. Part II also argues that the *Heller* majority's categorical approach is likely to evolve—as First Amendment doctrine has—into a patchwork of categorical and balancing tests, but that doing so in a principled and coherent manner will require courts to identify more clearly the core, guiding values of the Second Amendment. Finally, Part III addresses the future of Second Amendment categoricalism and its relationship to common law adjudication. This Part explains how categories evolve and predicts how they might do so in the context of the Second Amendment. The discussion concludes by describing what *Heller*'s endorsement of categoricalism might suggest

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[10] *See infra* Part II.B.1 (discussing *Heller* majority's approach).

[11] *See Heller*, 128 S. Ct. at 2847–48, 2854 (Breyer, J., dissenting) (discussing whether government regulation is "unreasonable or inappropriate in Second Amendment terms"); *see also infra* Part II.B.2 (discussing Justice Breyer's balancing approach).

about the Roberts Court's approach to the development of constitutional doctrine and the role of the courts more generally.

I
CATEGORICALISM AND BALANCING IN FIRST AMENDMENT DOCTRINE

This Part briefly describes the theoretical and practical differences between categorical and balancing approaches to constitutional doctrine and then shows how they operate in practice. Because this distinction has received its most thorough treatment in the context of the First Amendment's Free Speech Clause, which in turn has been frequently linked to the Second Amendment, the analysis focuses on free speech doctrine.

A. The Difference Between Categoricalism and Balancing

Judges and scholars often have intuited, and occasionally tried to describe, the difference between categorical and balancing approaches. As always, the distinction is clearer in the telling than in the doing.

Generally, balancing approaches set the individual's interest in asserting a right against the government's interest in regulating it, attach whatever weights are appropriate for the context, and determine which is weightier. In contrast, categoricalism prohibits this kind of weighing of interests in the individual case and asks only whether the case falls inside certain predetermined, outcome-determinative lines. Balancing therefore "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation," whereas categorization "binds a decisionmaker to respond in a determinative way to the presence of delimited triggering facts."[12] The difference between categorization and balancing thus roughly tracks the familiar division between rules and standards:[13]

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[12] Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 58 (1992) (citations omitted).

[13] Sullivan described the debate thusly:

> The Justices of rules are skeptical about reasoned elaboration and suspect that standards will enable the Court to translate raw subjective value preferences into law. The Justices of standards are skeptical about the capacity of rules to constrain value choice and believe that custom and shared understandings can adequately constrain judicial deliberation in a regime of standards.

Id. at 27 (citations omitted); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that adopting clear rules constrains judges from acting on their political preferences in future cases based on "balancing"); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) (contrasting rules- and content-based approaches to decisionmaking); Pierre Schlag, *Rules and Stan-*

"Categorization corresponds to rules, balancing to standards."[14] In Kathleen Sullivan's description:

> When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement. [When balancing predominates,] the judge's job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.[15]

Categoricalism allows a judge to transform some background value into a rule that will govern all subsequent cases inside the category without any further reference to the background principle or value.[16] The creation of the category cuts off future adjudicators from the underlying value and prohibits the reweighing of interests.[17]

The distinction between categoricalism and balancing is easier to describe than to maintain, and the relationship between the two is complicated, as the discussion throughout this Article demonstrates. In order to begin that analysis, however, it suffices to posit that both the categorical and balancing approaches rely—albeit in different ways—on some conception of underlying constitutional values. Interests cannot be balanced without some common metric. Categories can, at least arguably,[18] be applied in individual cases without refer-

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dards, 33 UCLA L. REV. 379, 398 (1985) ("The dialectic here [of rules v. standards] traces the so-called balancing v. absolutism debate.").

[14] Sullivan, *supra* note 12, at 59; *see also* Frederick Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENT. 69, 75 (1989) ("[A] rule necessarily applies its normative pressure to a *category*, a category that is the instantiation of some deeper justification."). *But see* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1495 n.15 (2006) ("A 'balancing' approach shares similarities with, but is not identical to, judging by 'standards.'").

[15] Kathleen M. Sullivan, *Post-liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992).

[16] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (categorically excluding obscenity from First Amendment protection). Kermit Roosevelt states:

> In a striking number of cases the Court has forgotten the reasons behind the particular rules and has come to treat them as nothing more than statements of constitutional requirements. This mistaken equation of judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values; it also distorts the relationship the Court has to other governmental actors and to the American people.

Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652 (2005).

[17] Sullivan, *supra* note 12, at 57–58 ("Rules, once formulated, afford decisionmakers less discretion than do standards.").

[18] I hold aside for the moment this question—made most famous by the "no vehicles in the park" debate about whether the purpose behind a rule always informs the rule's appli-

ence to underlying values. But the *creation* and justification of constitutional categories—the problem the Court faced in *Heller*—is critically dependent on constitutional values. When a category does not align with underlying values, absurdities such as significant over- or underinclusion can undermine the category's legitimacy and stability. The Court's failure to clearly identify any such values in *Heller*, or to clarify the conflicts between them, makes its use of categoricalism particularly problematic.

B. Echoes of the Debate in Free Speech Doctrine

Although the distinction between categoricalism and balancing appears throughout constitutional law,[19] it is associated most closely with—and, at least until *Heller*, had the most direct effect on—the First Amendment.[20] Indeed, modern First Amendment doctrine

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cation. *See generally* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (arguing that purpose informs rule); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (arguing that rules have their own meaning, separate from any background purposes). For a description of the Fuller-Hart debate, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1110–11 (2008).

[19] *Compare* Morrison v. Olson, 487 U.S. 654, 689–93 (1988) (finding that separation of powers challenges cannot be answered by reference to "rigid categories" and that Court instead must employ more flexible standards), *with id.* at 733 (Scalia, J., dissenting) ("Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law."). This debate has also taken place in the contentious realm of detainment of U.S. citizens in the "war on terror." *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion). There the plurality cited the *Mathews* test for procedural due process:

> *Mathews* dictates that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of the risk of an erroneous deprivation of the private interest if the processes were reduced and the probable value, if any, of additional or substitute safeguards.

Id. at 529. Justice Scalia strenuously objected to this use of balancing:

> [The majority] claims authority to engage in this sort of "judicious balancing" from *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Id. at 575–76 (Scalia, J., dissenting).

[20] *See* Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 757 (1963) ("[I]t is particularly in respect of claims involving constitutional protections of freedom of speech, press, association, and religion that the controversy about the appropriateness of proceeding by a 'balancing of the interests' has been most heated and most in need of analysis."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*,

essentially tracks the battle lines between the categorical and balancing approaches. This Section therefore begins by describing the views of free speech's leading categorizer and of its most committed balancer and then identifies the echoes of their voices in the various tests that constitute modern First Amendment doctrine.

The dominance of the categorization-balancing debate in First Amendment law is due in large part to the eloquence and dedication of its leading foils, Justices Black and Frankfurter,[21] whose performances essentially went unmatched until Justices Scalia and Breyer revived them in *Heller*. In Justice Black's famously absolutist view:

> To apply the Court's balancing test . . . is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling those freedoms is greater than the interest of the people in having them exercised." . . . [U]nless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great Charter of liberty will be more honored in the breach than in the observance.[22]

Justice Black's approach was categorical: If an act of speech fell within the scope of speech protected by the First Amendment, it was protected from abridgement by the government. But Justice Black's preference for categoricalism did not mean that he woud give *all* speech-like acts complete immunity from regulation. Justice Black trimmed the most problematic results of his absolutist test by finding categorical exceptions to the categorical rule. Indeed, he was quicker than many balancing-inclined Justices to find that certain speech acts fell completely outside the bounds of the First Amendment.[23]

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117 HARV. L. REV. 1765, 1765 (2004) ("The history of the First Amendment is the history of its boundaries.").

[21] *See generally* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF DECISIONMAKING (1984) (comparing Black's desire to confine judicial judgment with Frankfurter's efforts to sanctify it); Fisher, *supra* note 14, at 1526 ("Many scholars have likened the Court's debates between absolutism and balancing to those a half-century ago between Justices Black and Frankfurter.").

[22] Barenblatt v. United States, 360 U.S. 109, 143–44 (1958) (Black, J., dissenting); *see also* Konigsberg v. State Bar, 366 U.S. 36, 61–65 (1961) (Black, J., dissenting) ("[T]he very object of adopting [the Bill of Rights] was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence.").

[23] *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 522, 526 (1969) (Black, J., dissenting) ("It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite."); Brown v. Louisiana, 383 U.S. 131, 151–52 (1966) (Black, J., dissenting) ("I do not

Justice Frankfurter referred to the absolute approach as "a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict."[24] In *Dennis v. United States*,[25] which has been called the "arch-example" of free speech balancing,[26] Justice Frankfurter's concurring opinion suggested that balancing was not simply the best way but the *only* way to evaluate First Amendment claims: "Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. . . . If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds."[27] Frankfurter recognized that categories quickly erode and surmised that balancing tests better reflected the complexities of free speech doctrine:

> Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial pro-

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believe that any provision of the United States Constitution forbids any one of the 50 States of the Union, including Louisiana, to make it unlawful to stage 'sit-ins' or 'stand-up' in their public libraries for the purpose of advertising objections to the State's public policies."); *see also* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 114 n.15 (1982) (collecting cases where Justice Black "sustain[ed] many laws believed to be unconstitutional . . . even by more conservative colleagues not sharing his 'absolute' commitment to the first amendment"). The use of categorical exclusions to a categorical rule is not limited to the First Amendment, though. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court created a categorical rule that compensation is required under the Takings Clause only where *all* economically beneficial use of land has been denied. *Id.* at 1019. In dissent, Justice Stevens—himself an advocate of balancing—wrote that "[l]ike many bright-line rules, the categorical rule established in this case is only 'categorical' for a page or two in the U.S. Reports" before admitting of an exception. *Id.* at 1067.

[24] Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring); *see also* Frantz, *The First Amendment in the Balance*, *supra* note 8, at 1424 (identifying Frankfurter as "chief spokesman" of balancing approach).

[25] 341 U.S. 494.

[26] Sullivan, *supra* note 15, at 294 n.3. Laurent Frantz traces the lineage of the balancing cases to *Schneider v. New Jersey*, 308 U.S. 147 (1939), a case involving restrictions on handbills, in which the Court held that "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights," *id.* at 161. Frantz, *The First Amendment in the Balance*, *supra* note 8, at 1425.

[27] *Dennis*, 341 U.S. at 519 (Frankfurter, J., concurring). The plurality opinion in which Frankfurter was concurring seemed to adopt the balancing approach espoused by Chief Judge Learned Hand in the court of appeals opinion below: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (plurality opinion) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)); *see* Van Alstyne, *supra* note 23, at 124 (providing graphic representation of this test).

> cess, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[28]

Frankfurter, in other words, preferred to consider competing interests in the context of each individual case.

The echoes of this debate can still be heard throughout First Amendment law. Justice Frankfurter's voice generally drowns out Justice Black's, as balancing has largely displaced categorization as the preferred mode of First Amendment protection.[29] But the fact that balancing tests generally prevail in First Amendment analysis does not mean that Justice Black fought entirely in vain. Indeed, various forms of categoricalism—if not the kind of categorical absolutism that Justice Black advocated—apply throughout First Amendment doctrine, often in tandem with balancing. Such is the case with the commercial speech test described in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[30] which prescribes balancing by permitting restrictions that directly further a substantial government objective and reach no further than necessary to accomplish that objective[31] but also categorically denies coverage to commercial speech that is false or misleading.[32]

In order to shed light on the complicated relationship between categoricalism and balancing, the following Subsections consider the use of categorical analysis at three different levels[33] of First

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[28] *Dennis*, 341 U.S. at 524–25 (Frankfurter, J., concurring).

[29] *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 779 (2001) ("Contemporary First Amendment opinions . . . are loaded with the rhetoric of balancing . . . ."). *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 785, 825 (arguing that intermediate scrutiny has effectively become "some sort of default standard" in Supreme Court such that "[b]alancing . . . may be inevitable" in First Amendment jurisprudence).

[30] 447 U.S. 557 (1980).

[31] *Id.* at 564; *see also* Metromedia v. City of San Diego, 453 U.S. 490, 507 (1981) (applying *Central Hudson*).

[32] *See Central Hudson*, 447 U.S. at 563–66 (holding that because First Amendment protected commercial speech for its informational value, misleading commercial messages are not protected).

[33] Pierre Schlag's slightly different approach to rules and standards essentially eliminates the second level, which I call classification:

> [T]here are two sets of oppositions that constitute the rules v. standards dichotomy: The trigger can be either empirical or evaluative, and the response can be either determined or guided. The paradigm example of a rule has a hard empirical trigger and a hard determinate response. . . . A standard, by contrast, has a soft evaluative trigger and a soft modulated response.

Schlag, *supra* note 13, at 382–83. I part ways with this approach for a few reasons, not least of which is the prevalence of hard triggers that result in soft modulated responses and soft triggers that lead to hard modulated responses. For example, the Eighth Amendment categorically forbids (hard response) the imposition of "cruel and unusual" punishments (soft

Amendment analysis: First, in determining *coverage*—whether a speech act implicates the First Amendment at all; second, in determining *classification*—whether the act falls into a subcategory like commercial speech or expressive conduct that may be entitled to intermediate protection (usually through balancing); and, finally, in defining *protection*—whether and for what purpose the government may ban or burden the covered act.[34]

1. Categorization as Coverage

The first stage at which categoricalism operates in free speech cases is in the initial determination of whether a speech act is covered at all by the First Amendment. If an act is not covered, it by definition lacks constitutional protection. Thus, as Frederick Schauer notes, "questions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies."[35]

Total categorical coverage may be particularly unattractive to those who are committed to total categorical *protection* because the combination of categorical coverage and protection would lead to equal and absolute protection for all speech acts, including libel,[36] obscenity,[37] child pornography,[38] and the like. The Justices often tinker with coverage as a means of zoning out such unsavory results.[39]

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trigger), and the Fifth Amendment requires "just compensation" (soft response) for any taking (hard trigger).

[34] This three-part structure is adapted from Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). As is always the case with adaptations, it preserves the structure of the original and reflects the director's gratitude to its author, while attempting to offer a new interpretive gloss.

[35] Schauer, *supra* note 20, at 1767.

[36] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged . . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (footnotes omitted)); *see also* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding that protection of "liberty" under Fourteenth Amendment did not prevent state from punishing criminal libel).

[37] *See* Miller v. California, 413 U.S. 15, 23 (1973) (finding that obscene material is not protected speech under First Amendment).

[38] *See* New York v. Ferber, 458 U.S. 747, 765 (1982) (finding that child pornography is not protected speech and upholding statute prohibiting persons from distributing material depicting sexual performance by child under age of sixteen). *But see* Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002) (declining to extend categorical exclusion of child pornography to cover virtual child pornography).

[39] *See* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 78–79 ("A favorite judicial technique [of absolutists] has been to define one's absolute so that its protective scope does not cover the interests before the Court.").

Even Justice Black, the devoted absolutist, was relatively flexible about the ways in which he drew the borders around "speech,"[40] and the Court has generally followed his lead. Fraud and crime-facilitating speech, for example, are thought to be entirely outside the bounds of the Amendment, and no balancing is required to suppress them in a given case.[41]

But importantly, the boundaries of these categorical exclusions may be a result of balancing.[42] Indeed, even scholars and judges who avowedly oppose balancing as a mode of protection seem sanguine about using it to define (and limit) coverage.[43] Obscenity, for example, has been "[t]he most notorious of the First Amendment's visibly contested boundary disputes."[44] And in *Miller v. California*,[45] the Court clearly stated that obscenity falls outside the First Amendment's protection: "This much has been *categorically* settled by the Court, that obscene material is unprotected by the First Amendment."[46] But the scope of this exclusion is itself defined through a kind of balancing test that relies on a conception of the First Amendment's central values: Speech is obscene under *Miller* if it appeals to the "prurient interest," is patently offensive, and has no

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[40] *See supra* note 23 (noting cases describing Justice Black's categorical approach).

[41] *See, e.g.*, Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud."); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); Frohwerk v. United States, 249 U.S. 204, 206 (1919) (affirming conspiracy conviction and noting that First Amendment, "while prohibiting legislation against free speech as such[,] cannot have been, and obviously was not, intended to give immunity for every possible use of language" (citing Robertson v. Baldwin, 165 U.S. 275, 281 (1897))); *see also* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103 (2005) ("Surprisingly, the Supreme Court has never squarely confronted this issue [of when crime-facilitating speech should be constitutionally unprotected], and lower courts and commentators have only recently begun to seriously face it." (footnotes omitted)).

[42] *See* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 959–60 (1919) ("The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing . . . of two very important social interests, in public safety and in the search for truth."). *See generally* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192–93 (1970) (describing "definitional balancing" approach).

[43] *See* Frantz, *Is the First Amendment Law?*, *supra* note 8, at 731–32 ("Nor am I discussing whether the judge should examine the pros and cons before defining the *scope* of a constitutional guarantee.").

[44] Schauer, *supra* note 20, at 1774.

[45] 413 U.S. 15 (1973).

[46] *Id.* at 23 (emphasis added); *see also* Roth v. United States, 354 U.S. 476, 483, 485 (1957) (holding that, despite "unconditional phrasing of the First Amendment," "obscenity is not within the area of constitutionally protected speech or press").

serious literary, artistic, political, or scientific value.[47] Similarly, in *Brandenburg v. Ohio*[48] the Court apparently engaged in some kind of interest-weighing when it concluded that the First Amendment allows the government to proscribe advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[49] And in *Ashcroft v. Free Speech Coalition*,[50] the Court invoked balancing to justify its *refusal* to extend the categorical exclusion of child pornography to cover virtual child pornography: "Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[51]

As the Third Circuit recently recognized in declining to identify depictions of animal cruelty as a "new category of speech that is unprotected by the First Amendment,"[52] the "common theme" among these categories of excluded speech "is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest."[53] In other words, the First Amendment's categorical coverage rules were derived not directly from the text of the First Amendment, nor necessarily by tracing the lineal descendants of some "original" categories, but by weighing contemporary interests in light of the Amendment's core values.

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[47] *Miller*, 413 U.S. at 24; *see also Roth*, 354 U.S. at 487 (defining "obscene material" as "material which deals with sex in a manner appealing to prurient interest").

[48] 395 U.S. 444 (1969) (per curiam).

[49] *Id.* at 447. Whether *Brandenburg* is a true balancing test is a somewhat tricky question. As John Hart Ely notes, "[t]here is in *Brandenburg* no talk of balancing." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1491 (1975). And yet *Brandenburg* has often been characterized as a kind of weighted balancing test. *See, e.g.*, Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 913 (2005) (arguing that "*Brandenburg* stakes out the strong version of" a "multipart balancing" involving "an assessment of the harm, the likelihood of the harm, and the intent of the speaker"). Perhaps the best explanation is that "[t]he *Brandenburg* decision effectively overruled the balancing approaches utilized in *Schenck* and *Dennis*. However, the *Brandenburg* standard was itself derived using a balancing approach that highly values political speech, and even in its application it requires a calculated judgment to determine the immediacy, likelihood, and seriousness of the harm." Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 856 (2004); *see also* Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 760 n.141 (2003) ("*Brandenburg* might be viewed as the outcome of a balancing analysis.").

[50] 535 U.S. 234 (2002).

[51] *Id*. at 253–54.

[52] United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008).

[53] *Id.* at 224.

2. Categorization as Classification (Subcategorization)

Even if a particular speech act is covered by the First Amendment, it may be classified into one of the many *subcategories* of free speech,[54] each of which receives a different level of protection. Many of these levels of protection are akin to balancing,[55] and thus it is at this stage that categorization and balancing most commonly interact: The division between types of speech is categorical, but the levels of protection are often variants of balancing.

A robust system of classification typically develops only over time, as courts come to recognize classes of cases—such as expressive conduct, commercial speech, or certain speech fora—that are similar enough to be grouped together. Drawing these lines is rarely an easy task. It is not always clear, for example, whether a public forum is "limited."[56] The boundaries of commercial speech, too, are incredibly ill defined.[57] And because classification employs different tests and contemplates a multiplicity of subcategories (rather than the simple, binary, in-or-out results of the coverage inquiry), it almost inevitably yields overlapping and nonexclusive subcategories. For example, government speech is defined largely by speaker identity (government or not), commercial speech is defined not by speaker identity but by content, and forum analysis begins by asking where (either physically or

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[54] Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1256 (2005) ("Subdivision is part and parcel of any body of law, and wisely creating the subdivisions is as central to First Amendment doctrine as it is to torts, contracts, agency, antitrust, securities regulation, and of course much, much else.").

[55] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995) (noting that courts have not been able to develop uniform and cohesive framework for First Amendment analyses, as there are numerous social contexts that tests must address); *see also* Frantz, *Is the First Amendment Law?*, *supra* note 8, at 731 ("Suggestions that *ad hoc* balancing is appropriate only for a particular class of cases appear in the opinions.").

[56] Justice Souter, similarly to Justice Kennedy, has argued that "[p]ublic forum analysis is stultified . . . by treating its archetypes as closed categories." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 710 (1992) (Souter, J., dissenting); *accord id.* at 693–94 (Kennedy, J., concurring) ("Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.").

[57] For Frederick Schauer, "[c]ommercial speech is also a category relatively easy both to identify and to describe," Schauer, *supra* note 34, at 291, but I confess great personal confusion on the matter. *See* Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 32–33 (2007) (noting Supreme Court's recitation of various descriptions and indicia of commercial speech but lack of precise and comprehensive definition). My confusion seems to be widely shared. *See generally, e.g.*, Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999) (acknowledging and defending imprecise definition of commercial speech in Supreme Court jurisprudence).

metaphorically[58]) a particular speech act is made.[59] "Quite obviously, . . . a particular speech act may in fact cut across these artificial lines, readily embarrassing an attempt to say which kind of speech it was."[60]

Just as the subcategories blend into one another, so too do the various tests that apply within them. Instead of the rigid two-tier approach that is associated most closely with the Warren Court[61] and around which free speech doctrine has long been "almost obsessively organized,"[62] the Court has applied "intermediate scrutiny" to a growing list of these First Amendment subcategories.[63] Indeed, various forms of intermediate scrutiny—dubbed the "Test That Ate Everything" by one First Amendment scholar[64]—apply to nearly all of

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58 *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 830 (1995) ("The [student activities fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

59 Blocher, *supra* note 57, at 50–51 (describing problem of overlapping and conflicting subcategories).

60 Van Alstyne, *supra* note 23, at 141. For my own "embarrassing . . . attempt," see Blocher, *supra* note 57. *See also* Schauer, *supra* note 34, at 307 ("The risk of misapplication of numerous subcategories leads us to eschew subcategories within the first amendment, avoiding them even when a distinction seems justifiable.").

61 *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that "[t]he Warren Court embraced a rigid two-tier attitude" in equal protection cases). The disintegration of the tiers of scrutiny is not limited to First Amendment cases, but extensive discussion of the broader trend is beyond the scope of this Article. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 968 (1987) (noting, more than twenty years ago, that "[t]he two-tiered approach . . . is cracking, and a sliding-scale balancing approach may be slowly emerging"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1336 (2007) ("With the ghost of *Lochner* no longer quite so frightening, the Court now eschews the relatively rigid discipline of a two-tiered scheme of strict scrutiny and minimal rational basis review that it once found attractive."); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 77 (1996) (arguing that "[t]he hard edges" of tiered review have "softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests"); *see also* Bhagwat, *supra* note 29, at 787 ("The final step in the codification of tiered review in free speech cases was the adoption of the formal standards of review developed in the equal protection arena—that is, rational basis review and strict scrutiny—into the edifice of First Amendment law.").

62 Rubenfeld, *supra* note 29, at 785.

63 Intermediate scrutiny appears to have arisen in equal protection cases involving gender distinctions. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand Fourteenth Amendment challenge). However it has since migrated to many other areas of constitutional law. *See* Bhagwat, *supra* note 29, at 784 (describing growth of intermediate scrutiny in First Amendment as paralleling Fourteenth Amendment sex discrimination doctrine).

64 *See* Bhagwat, *supra* note 29, at 783 (dubbing intermediate scrutiny as such in title of article).

the First Amendment's major subcategories,[65] from commercial speech[66] to expressive conduct[67] to time, place, and manner restrictions.[68] Although the precise contours of intermediate scrutiny theoretically vary among subcategories, they have in some cases collapsed on top of one another.[69] In any event, intermediate scrutiny in all of its forms represents "an overtly balancing mode"[70]—perhaps "the only genuine balancing mode that we have."[71]

3. Categorization as Protection

Finally, categorization and balancing differ in the *protection* they extend to speech acts. Under a balancing approach, a speech act may be banned when the government's interests (however weighted) outweigh those of the speaker (again, however weighted).[72] If a speech act is entitled to categorical protection, however, the government may not ban—and may not even be able to burden—it.

Because Justice Black essentially lost his battle for First Amendment categoricalism, very few speech acts—even covered ones—enjoy absolute categorical protection. As Schauer says, "It is at this stage that we can no longer escape facing up to the recurrent

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[65] *See id.* at 810–16 (discussing, inter alia, regulations of mass media, speech of government employees, regulation of sexually oriented businesses, and charitable solicitation); *see also* Rubenfeld, *supra* note 29, at 779 ("Contemporary First Amendment opinions, especially in their development of strict scrutiny and other, intermediate levels of review, are loaded with the rhetoric of balancing.").

[66] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (applying modified form of intermediate scrutiny to restrictions on commercial speech).

[67] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that government regulation of expressive conduct is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than [necessary]").

[68] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 803 (1989) (allowing content-neutral regulations on speech so long as they serve important government objective, are narrowly tailored, and preserve ample alternative means of communication).

[69] *See* Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989) (noting that commercial speech test and time, place, and manner test are "substantially similar"); Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995) (describing tests as "essentially identical").

[70] Sullivan, *supra* note 15, at 297.

[71] Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 606 (1992).

[72] *See* Fried, *supra* note 20, at 763 (noting that balancing can be short-circuited where Court "cast[s] the controversy in a form which conceals the conflict to be resolved, as it does whenever it inflates one part of the balance while leaving the other highly particular" (citing, inter alia, Barenblatt v. United States, 360 U.S. 109, 134 (1954))); *see also* Frantz, *The First Amendment in the Balance*, *supra* note 8, at 1440 ("[I]t is conceivable that a court might apply the balancing test [in First Amendment cases], yet attach so high a value to freedom of speech that the balance would nearly always be struck in its favor.").

question of ad hoc balancing."[73] But "while the government may regulate some aspects of private speech (such as its time, place, and manner), the inviolable rule of the First Amendment is that viewpoint discrimination is prohibited."[74] This is true, at least doctrinally, no matter how important the interests asserted by the government. As Justice Kennedy has noted, "raw censorship based on content" is "forbidden by the text of the First Amendment,"[75] leaving no room for justification. This categorical ban on viewpoint discrimination can be restated as a categorical rule protecting viewpoints. As discussed in more detail in the following Subsection, the Court's categorical rule against viewpoint discrimination suggests that viewpoints are themselves central to core First Amendment values.

4. The Role of Values in Determining First Amendment Categories

As even this brief description indicates, First Amendment doctrine is a complicated and occasionally illegible map of sometimes-overlapping categories, which are joined and in many areas simply painted over by balancing approaches. But at all three levels of analysis described above, First Amendment categoricalism tracks—albeit imperfectly—deeply embedded free speech values.

At the first two levels (coverage and subcategorization), the Court often has denied coverage to certain categories of "speech" or given varying levels of protection to certain speech subcategories depending on their proximity to the apparent core values of the First Amendment,[76] such as the protection of political viewpoints and the promotion of democracy.[77] In *Chaplinsky v. New Hampshire*,[78] for

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[73] Schauer, *supra* note 34, at 296; *see also* Sullivan, *supra* note 15, at 296 n.9 ("Intermediate scrutiny . . . is a balancing mode, whether adopted officially, or de facto." (citing United States v. O'Brien, 391 U.S. 367 (1968) (officially); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (de facto))).

[74] Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 613–14 (2008); *see also id.* at 614 n.33 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972))).

[75] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 128 (1991) (Kennedy, J., concurring).

[76] For purposes of this discussion, I hold aside the possibility that the core value of the First Amendment is some speaker-focused value like the protection of autonomy or self-actualization. Viewing the First Amendment through one of these lenses would undoubtedly change the resulting categorical analysis.

[77] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'. . . ."); *see also* Harry Kalven Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT.

example, the Court noted that categories of unprotected speech such as obscenity and fighting words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[79] This is a balancing method ("outweighed") but a categorical result (exclusion from coverage), and it is informed by First Amendment values (the value of the "exposition of ideas" and the "social value as a step to truth"). Conversely, and invoking the same First Amendment values, the Court has found that commercial speech is covered by the Amendment because it is *not* so far removed "from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection."[80] Because commercial speech is not immediately proximate to these core values, it receives *less* protection than political speech and other subcategories closer to the core.[81]

With regard to coverage, the Court's treatment of "incidental burdens" on fundamental rights confirms the central importance of constitutional values in categorical analysis.[82] Under a balancing approach, incidental burdens are treated the same as any other burden but are constitutional almost by definition, since an "incidental" burden is likely to be outweighed by even a moderate governmental interest. Under a categorical approach to protection, however, incidental burdens are as impermissible as any other burden and cannot be balanced away. This can lead to absurd results, such as the

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REV. 191, 204–10 (suggesting *Sullivan* represented return to focus on rejection of seditious libel and of government's ability to censor critical speech).

78 315 U.S. 568 (1942).

79 *Id.* at 572.

80 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (citations and internal quotation marks omitted) (quoting Roth v. United States, 354 U.S. 476, 484 (1957); *Chaplinsky*, 315 U.S. at 572).

81 *See* Rubenfeld, *supra* note 29, at 801 (doubting proposition, but noting that "[a] lot of scholarly and judicial language suggests that 'political speech' is the true core of the First Amendment and that words moving away from this core are entitled to proportionately less constitutional protection").

82 Here I mean burdens that are "incidental" to the *right* in the sense that they are peripheral and do not burden the core of the right, rather than burdens that are incidental in the sense that they are unintended side effects of a regulation. For an illuminating discussion of whether incidental burdens should be analyzed in the same way as any other burden, see Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179, 1181 (1996), arguing that even "incidental burdens [should] be treated as real infringements of rights" and that a "substantiality threshold ought to apply to incidental and facilitative direct burdens, but not to purposeful ones." *See also* Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 837 (1991) ("[R]ules both work better in trivial cases and last longer in trivial domains.").

invalidation of popularly enacted laws that present a minor and unintended obstacle to the exercise of a categorically protected right.[83] The Court, of course, may attempt to avoid such results by treating incidental or other infringements as categorical exceptions, as it has with the exclusionary rule.[84] But in order to determine whether burdens are only "incidental" to the core of the right, the Court must first identify that core.

Thus the identification of core values enables courts to accord lessened protection to covered subcategories that are not proximate to those values (a question of subcategorization) and to transform incidental burdens into categorical exclusions (an issue of coverage). At the other end of the spectrum, this approach also allows courts to create areas of absolute categorical protection. Viewpoints, for example, are categorically protected[85] in keeping with the general presumption that a central purpose of the First Amendment—perhaps *the* central purpose—is to prevent the government from discriminating against them.[86]

One way to build such categorical protections on a foundation of constitutional principle is by identifying the government's purpose in burdening a right. Where that purpose runs counter to the purpose of the right, the burden is flatly unconstitutional, no matter how the balance would otherwise be struck.[87] Jed Rubenfeld has argued for an increased focus on such "purposivism" in First Amendment cases,[88] and others have suggested that it already underlies much modern free

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[83] *Cf.* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581 (1983) (striking down facially discriminatory "special tax that applies only to certain publications protected by the First Amendment" but noting that "[i]t is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems").

[84] *See infra* notes 292–97 and accompanying text (discussing creation of categorical exceptions in exclusionary rule doctrine).

[85] Corbin, *supra* note 74, at 613, 614 & n.33.

[86] *Id.*; *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (arguing that compelled speech "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

[87] *See generally* Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401 (1995) (arguing that Court's incidental speech restriction cases reflect its effort to identify improper governmental motive).

[88] *See generally* Rubenfeld, *supra* note 29 (contending that purposivist interpretation of First Amendment will eliminate balancing test currently in doctrine and shift focus from actor's purpose in breaking law to state's purpose in enacting law).

speech doctrine.[89] Rubenfeld further connects purposivism to categoricalism, arguing that "[t]he purpose of purposivism is to reclaim an old idea: that there are certain First Amendment absolutes, which stand up regardless of any balancing of interests."[90]

But one cannot reclaim the idea of First Amendment absolutism without first discovering another idea: what *value* the First Amendment protects.[91] In *R.A.V. v. City of St. Paul*,[92] for example, Justice Scalia wrote for the Court that just because a city may ban obscenity does not mean that it may ban "only those legally obscene works that contain criticism of the city government."[93] This would reflect an impermissible government purpose: the suppression of political dissent. But the rule in *R.A.V.* in effect gives protection to a category of speech—obscene works—that is otherwise *not* covered by the First Amendment. Regardless of whether this rule is correct, it is only justifiable if explained by reference to background First Amendment values—the purpose not just of the challenged government regulation but of the First Amendment itself, which, as described by the *R.A.V.* Court, is the protection of political dissent. Interestingly, once impermissible government purposes have been identified by reference to constitutional values, the creation of constitutional categories can be justified not only through purposivist categoricalism but through balancing. That is, if illegitimate government purposes are simply given no weight on the scale, then in any balancing evaluation the scale will tip in favor of the individual every time, no matter how slight her interest. The result is a categorical protection.[94]

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[89] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("[N]otwithstanding the Court's protestations in *O'Brien*, . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."); Post, *supra* note 55, at 1256 ("[A] close analysis of these cases indicates that they almost invariably turn on judicial scrutiny of the purposes served by the regulation at issue.").

[90] Rubenfeld, *supra* note 29, at 770; *see also id.* at 779 ("A purposivist view of the First Amendment does not involve *balancing*. It is absolute. It does not purport to determine if the constitutional 'costs' in a given case are 'outweighed' or 'justified' by the governmental 'benefits.'").

[91] *See id.* at 787 (disclaiming attempt "to answer the 'big why'").

[92] 505 U.S. 377 (1992).

[93] *Id*. at 384; *see also id.* ("Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well."); Texas v. Johnson, 491 U.S. 397 (1989) (holding that speech act of flag burning, which expresses criticism of government, is protected by First Amendment and cannot be criminalized).

[94] This assumes, of course, that the individual has a legitimate interest to assert. If one believes—as this zero-weight balancing explanation would suggest—that obscenity is cate-

This blending of categorical and balancing approaches is representative of First Amendment doctrine more generally. Rather than fully embracing categorization or balancing at all levels of analysis, First Amendment doctrine generally combines the two, for example by using balancing or other standard-like tests to establish the borders of constitutional coverage and then applying categorical rules to speech in certain subcategories. Obscenity is perhaps the most notable example of a category whose blurry borders[95] seem to be drawn using balancing[96] but whose level of protection (none) is more clear.[97] Conversely, other areas of the First Amendment are surrounded by easily defined boundaries but are governed by blurry balancing standards. The time, place, and manner test, for example, applies to a broad and relatively well-defined area of speech restrictions but utilizes a balancing-style approach.[98]

Thus, even within the confines of the First Amendment, the relationship between categorization and balancing is extraordinarily complex, and one is often used to moderate the other. This may be due in part to the fact that neither courts nor scholars have identified a single, overriding core First Amendment value.[99] Indeed, it seems

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gorically excluded from First Amendment coverage because individuals have no legitimate interest in it, then the *R.A.V.* situation would involve weighing nothing against nothing. The result of this weighing would probably favor the speaker: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2669 (2007).

[95] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to define in detail obscenity and stating: "[P]erhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[96] *See* Roth v. United States, 354 U.S. 476, 487 (1957) (defining "obscene material" as "material which deals with sex in a manner appealing to prurient interest"); *see also* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U. L. REV. 641, 677–78 (1994) ("The quintessential instance of definitional balancing in the First Amendment involves state regulation of obscene materials. . . . [I]t is the government interests themselves that led the Court to define speech so as to not encompass obscenity.").

[97] Miller v. California, 413 U.S. 15, 23 (1973) (defining obscenity as outside boundaries of First Amendment). Cases in which the government restricts speech in its capacity as a "manager"—for example in content-neutral regulation of a limited public forum—receive similar treatment, ROBERT C. POST, CONSTITUTIONAL DOMAINS 234–40 (1995), as do cases in which the government itself is speaking. *See* Garcetti v. Ceballos, 547 U.S. 410, 421–23 (2006) (denying First Amendment protection to statements made by public employee pursuant to his official duties); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) (exempting government speech from First Amendment scrutiny). Presumably a similar rule allowing regulation will arise in Second Amendment cases where government employees assert the right to bear arms in connection with their jobs.

[98] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 803 (1989) (allowing content-neutral regulations on speech so long as they serve important objective, are narrowly tailored, and preserve ample alternative means of communication).

[99] *Compare* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 70–75 (1965) (arguing that central purpose of free speech is to

that the messiest and most incoherent areas of doctrine—obscenity and commercial speech among them—are those in which the underlying values are the most contested.[100] The point here is only that the Court's use of categoricalism in First Amendment doctrine correlates, at least roughly, with the core values of the Amendment upon which the Justices have from time to time agreed. Where those embedded core values are implicated, as in the context of viewpoint discrimination or political speech,[101] categoricalism provides relatively clear, certain, and justifiable rules. Where they are not, or are unclear, balancing tests provide adjudicators with more flexibility.

In sum, First Amendment doctrine employs a categorical approach frequently at the level of coverage, occasionally at the level of subcategorization, and rarely—and usually only by reference to the core values of the Amendment—at the level of protection. At every level, however, categoricalism relies on some conception of the First Amendment's core values. Those values may be contested, and the lines between categories correspondingly uncertain, but the doctrine itself seems roughly dependent on underlying principles.

In *Heller*, the Court had an opportunity to revisit all three levels of categorical analysis and to identify the core principles of the Second Amendment. It also had an opportunity, in doing so, to draw on the lessons—both good and bad—of the First Amendment by creating categories based on embedded constitutional values. The following Part describes the Court's failure to do so.

II
HELLER'S CATEGORICALISM AND THE GHOST OF JUSTICE BLACK

The first Section of this Part describes the close-but-troubled relationship between the First and Second Amendments and explains how old battles over First Amendment protection reverberate in current

promote democracy), *with* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (arguing that one central purpose of free speech is self-realization).

[100] *See, e.g.*, Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 345 (2008) ("The difficulty with a national standard is that a national community of values regarding obscenity scarcely exists.").

[101] *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose."); Boos v. Barry, 485 U.S. 312, 318 (1988) (noting that regulation "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech"); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

discussions of the Second. The second Section explores the debate between Justices Scalia and Breyer in *Heller*, which echoes the terms, theories, and significance of the debate between Justices Black and Frankfurter over the meaning of the First Amendment. The third Section then describes the triumph of the categorical approach in *Heller*, what it ultimately may mean for Second Amendment doctrine, and what—if anything—it indicates about the core values of the Second Amendment.

A. The Relationship Between the First and Second Amendments

Until *Heller*, the Second Amendment debate focused almost exclusively on whether the Amendment protects an "individual" right to gun ownership unconnected to any actual or potential militia service. To call the literature on this issue voluminous would be a gross understatement,[102] and it is far beyond the scope of this Article to assess it. For present purposes, the relevant point is simply that scholars, litigants, and courts often have presumed that the First and Second Amendments are closely and meaningfully related.[103] Even as the constitutional and popular debates shift from the "individual" nature of the Second Amendment right to the more meaningful discussion of the *scope* of that right, First Amendment doctrine and scholarship probably will continue to be a standard reference point for courts struggling to craft constitutional rules governing the right created in *Heller*.[104] Indeed, arguments from the individual rights debate

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[102] The reader doubtless expects to see here a lengthy "*See, e.g.*" footnote demonstrating, by its length, the size of the literature. I have omitted such a footnote for fear that—unless it were allowed to crowd out the rest of the Article—it would understate the amount of ink that has been spilled on the topic. Instead, I refer interested readers to an online bibliography cataloguing much of the literature, David B. Kopel, Comprehensive Bibliography of the Second Amendment in Law Reviews (Nov. 26, 2002), http://www.saf.org/AllLawReviews.html.

[103] *See, e.g.*, Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007) ("But just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, . . . the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."); David G. Browne, *Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply Its First Amendment Expertise to the Great Second Amendment Debate*, 44 WM. & MARY L. REV. 2287, 2289 (2003) (arguing that Second Amendment is naturally compared to First); George A. Mocsary, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2171 (2008) (same); Randy E. Barnett, *Was the Right To Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 271 (2004) (book review) (same).

[104] Whether this connection is justifiable is a more complicated question. I do not mean to endorse it as a normative matter, only to recognize it as a descriptive, and therefore doctrinally relevant, one.

already have begun to be transposed into the question of the applicable standard of review.[105]

The comparison is doubtless attractive for supporters of broad gun rights because of the vaunted place that the First Amendment holds in constitutional law and popular discourse. As Schauer notes, the "First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines."[106] Thus:

> [L]awyers representing clients with claims and causes not necessarily lying within the First Amendment's traditional concerns have reason to add First Amendment arguments to their core claims, or to modify their core claims to connect them with First Amendment arguments, in the hope that doing so will increase the probability of success.[107]

In linking the First and Second Amendments, scholars have also connected the dissent-promoting values of each, suggesting that they—apparently more than other amendments—are focused on empowering individuals to resist government oppression.[108] For example, it has been argued that, because the Second Amendment—like the First—is designed to protect dissent, gun-registration requirements and the assault-weapons ban are unconstitutional.[109] This dissent-focused, functionalist account is distinguishable from the leading alternative explanations: self-defense for the Second Amendment, self-actualization for the First.[110]

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[105] *See, e.g.*, Gary E. Barnett, *The Reasonable Regulation of the Right To Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL'Y (forthcoming 2008), *available at* http://ssrn.com/abstract=1152102 (reviewing *Heller* and applying First Amendment time, place, and manner doctrine to Second Amendment).

[106] Schauer, *supra* note 20, at 1790. This may be due in large part to the fact that the First Amendment protects freedoms that are especially near and dear to scholars, lawyers, and judges, who traffic in speech. *Id.* at 1793; *see also* R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 4 (1977) (arguing that academics overvalue free speech and undervalue free markets).

[107] Schauer, *supra* note 20, at 1795.

[108] *See* David B. Kopel, *Trust the People: The Case Against Gun Control*, 109 POL'Y ANALYSIS 1, 25 (1988) ("The Supreme Court has ruled that the First Amendment prohibits the government from registering purchasers of newspapers and magazines, even of foreign Communist propaganda. The same principle should apply to the Second Amendment: the tools of political dissent should be privately owned and unregistered."); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 71 (1996) ("This does not imply, however, that courts should uphold the [assault-weapons ban]. As the Supreme Court has recognized in the analogous area of the First Amendment, leaving legislatures free to engage in whimsical infringements on fundamental rights prepares the way for more serious assaults on individual liberty.").

[109] *See supra* note 108.

[110] As to the latter, gun advocates might also argue that gun ownership has some kind of expressive value and is therefore no different from flag burning (or waving). But here,

Gun-rights supporters also can point to the apparent textual similarities between the two Amendments, particularly their unqualified admonitions that the rights they protect "shall not" be infringed or abridged. In this respect, the First Amendment "is exceptionally crisp and unambiguous."[111] Not every amendment has language lending itself to such rule-like application, and the text of some amendments all but demands balancing.[112] The Fourth Amendment's prohibition on "unreasonable" searches and seizures is a prime example of text that calls for balancing, as Justice Scalia has recognized,[113] as is the prohibition on "excessive" bails and fines.[114] The Second Amendment, however, at least arguably has language that is as precise and absolutist as the First.[115]

Of course, "[d]espite the simplicity and logical force of a literal interpretation of the first amendment, it has never commanded a majority of the Supreme Court."[116] As the Court noted in declaring obscenity to be "outside the protection intended for speech and

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rather than using one amendment to cast light on the other, this essentially would invoke—simultaneously—Second Amendment and expressive conduct claims.

111 Van Alstyne, *supra* note 23, at 110.

112 Schlag, *supra* note 13, at 391 n.27 ("The textualist position with regard to interpretation is not without irony: [M]uch of the text of the Constitution reads (literally) like standards."). However, in his famous exchange with Laurent Frantz, Wallace Mendelson argued that the "highly ambiguous" language of the First Amendment supported the Court's use of balancing in free speech cases. Mendelson, *supra* note 8, at 821.

113 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (Scalia, J.) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"); *see also* Hudson v. Palmer, 468 U.S. 517, 527 (1984) ("Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests.").

114 U.S. CONST. amend. VIII. Other examples include the Sixth Amendment's guarantee of a "speedy" trial, and the Fifth Amendment's requirement of "just" compensation for a taking. *See* Van Alstyne, *supra* note 23, at 110 (noting that Fourth, Fifth, and Eighth Amendments are ambiguous and equivocal, containing "adjectives that are not self-defining" whose "necessary referents . . . lie outside the words of the Constitution").

115 Because the Supreme Court so clearly rejected it, I do not address here the argument that the first half of the Second Amendment—unlike the language of the First—identifies the purpose of the right the Amendment protects. William Van Alstyne argues:

> [T]he first amendment differs from the second amendment in this respect. The first amendment does not link the protection it provides with any particular objective and may, accordingly, be deemed to operate without regard to anyone's view of how well the speech it protects may or may not serve such an objective. The second amendment expressly links the protection it provides with a stated objective ("A well regulated Militia, being necessary to the security of a free state") and might, therefore, be deemed to operate only insofar as the right it protects ("the right of the people to keep and bear arms") can be shown to be connected with that objective.

Van Alstyne, *supra* note 23, at 112 n.13.

116 *Id.* at 113.

press,"[117] "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[118] As described in Part I, free speech doctrine has been pockmarked with categorical exclusions and stretched and trimmed with balancing tests, and so the textual similarities between the First and Second Amendments are not enough to show that gun ownership should receive the kind of absolute protection that some gun-rights advocates may favor. Nevertheless, First Amendment doctrine is comfortingly familiar, and courts almost certainly will continue to rely on it—probably explicitly so—as they attempt to address the seemingly parallel problems arising under the Second Amendment. For example, forum analysis may prove just as relevant for the Second Amendment as it has for the First. Indeed, both before and after *Heller*, gun owners have asserted a broad constitutional right to gun possession in the kinds of public and semipublic[119] places that led to seminal cases in First Amendment law, such as malls,[120] airports,[121] post offices,[122] and schools.[123]

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117 Roth v. United States, 354 U.S. 476, 483 (1957).

118 *Id*. at 482–83.

119 *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946) (discussing speech in company-owned town and stating that "[t]he more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it").

120 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76–77 (1980) (considering right of private shopping mall to exclude speakers); Doug Patton, *Mall Signs Might as Well Read 'Please Shoot Me*,' HUM. EVENTS, Dec. 11, 2007, http://www.humanevents.com/article.php?id=23900 (criticizing designation of schools, shopping malls, and U.S. post offices as "gun-free" zones because it may lead to increased violence by designating them as soft targets).

121 *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (determining that airports are nonpublic fora for First Amendment purposes); John Sullivan, *Airport's Ban on Guns Is Disputed in Atlanta*, N.Y. TIMES, July 2, 2008, at A12 (discussing post-*Heller* challenge by GeorgiaCarry.org to Atlanta airport's ban on guns).

122 *See* United States v. Dorosan, No. 08-042, 2008 WL 2622996, at *6 (E.D. La. June 30, 2008) (rejecting Second Amendment claim arising from possession at post office, as "Congress has the authority to regulate safety of the post office and its property, notwithstanding the individual right to bear arms in the home, where the need for defense of self, family and property is most acute" (internal quotation marks omitted)). *See generally* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671 (2007) (discussing relationship between post office and First Amendment).

123 *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513–14 (1969) (holding that teachers and students may exercise First Amendment rights within schools as long as conduct does not create substantial disruption and does not impinge on rights of others); Students for Concealed Carry on Campus, http://concealedcampus.org (last visited July 11, 2008) (arguing for expanded gun rights at schools). In addition to addressing these doctrinal problems, scholars may find fertile ground for more theoretical comparison between the Amendments. To take just one obvious example, the debate over the "individual" or "collective" nature of the Second Amendment, *see supra* note 2 and sources cited, may

Categoricalism and First Amendment doctrine were therefore central to *Heller* long before it reached the Supreme Court. Indeed, the use of categorization in the court of appeals' decision[124] is what drew the United States into the case as an amicus opposing that decision, notwithstanding the Bush Administration's support for the court's almost-unprecedented[125] determination that the Second Amendment protects an individual right to gun ownership unconnected to any actual or potential militia service. In addition to recognizing an "individual" right, the court of appeals created a categorical rule to govern it: "Once it is determined—as we have done—that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them."[126] The Solicitor General agreed with the court of appeals that "the Second Amendment protects an individual right to possess firearms unrelated to militia operations"[127] but nonetheless argued that laws burdening the right should be subject to a form of "heightened scrutiny"[128] instead of the court of appeals' "more categorical approach."[129] The Solicitor General's pro-

already have a rough analogue in First Amendment theory. *See, e.g.*, Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115–23 (1993) (advancing autonomy-based account of First Amendment and criticizing "collectivist" theories that focus on specific goals of public discourse). With regard to such theories, my inclination toward an institutional view of the First Amendment compels me to note also the pathbreaking work of Frederick Schauer (and the lesser contributions of others). *See* Schauer, *supra* note 54 (arguing for First Amendment jurisprudence that takes institutional contexts into account); *see also* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 828 (2008) (arguing that "Institutional First Amendment" approach should also take into account economic understandings of marketplace of ideas).

124 Parker v. District of Columbia, 478 F.3d 370, 394–401 (D.C. Cir. 2007).

125 The only federal court to reach a similar conclusion was the Fifth Circuit, in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). The Fifth Circuit found that "the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by *Miller*, regardless of whether the particular individual is then actually a member of a militia." *Id.* at 264 (referencing United States v. Miller, 307 U.S. 174, (1939)). Nonetheless, the court held that "the predicate order in question here is sufficient, albeit likely minimally so, to support the deprivation, while it remains in effect, of the defendant's Second Amendment rights." *Id.* at 265.

126 *Parker*, 478 F.3d at 400. Perhaps foreshadowing what is to come, elsewhere the majority apparently countenanced the possibility of First Amendment time, place, and manner restrictions. *Id.* at 399 ("The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment." (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

127 Brief for the United States as Amicus Curiae at 7, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 157201.

128 *Id.* at 8.

129 *Id.* at 9.

posed two-tiered standard of review—cribbed from voting rights cases like *Burdick v. Takushi*[130]—was unmistakably a balancing test.[131]

Weaving together these threads of categoricalism and First Amendment analysis at oral argument, Chief Justice Roberts previewed the Court's eventual approach:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case?[132]

By creating a new individual Second Amendment right disconnected from any military service, the Court was in some sense "starting afresh." It was not without guidance, however, in creating a framework of review to govern the new right. Every state court to consider the question had settled on a standard of "reasonableness,"[133] and scholars had endorsed similar levels of scrutiny.[134] But as Chief Justice Roberts's question suggested, the Court's decision in *Heller* turned not on levels of scrutiny but on the difference between categoricalism and balancing.

B. Categoricalism and Balancing in Heller

Justice Scalia's majority opinion in *Heller* is, in essence, what Justice Black might have written if *Heller* had been a First Amendment case. It is beyond the scope of this Article to evaluate in any depth the historical and textual analysis underlying the majority's

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130 504 U.S. 428, 434 (1992) (describing "flexible" approach that would "weigh the character and magnitude of the asserted injury to the rights protected by the [First Amendment] against the precise interests put forward by the State as justifications for the burden . . . taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights" (internal quotation marks omitted)).

131 Brief for the United States as Amicus Curiae, *supra* note 127, at 9.

132 Transcript of Oral Argument, *supra* note 9, at 44.

133 *See* Brief for Petitioners at 40–59, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 102223 (arguing that District's gun control laws are "reasonable" regulations and noting state courts that have upheld "reasonable" regulations over state constitutional challenges); *see also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007) (noting that state courts apply reasonableness standard rather than strict scrutiny review).

134 *See, e.g.*, Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133 (2000) (arguing for "semi-strict" scrutiny); Winkler, *supra* note 133, at 686 ("[T]he Second Amendment[ ] . . . is appropriately governed by a deferential, reasonableness review . . . .").

conclusion that the Second Amendment protects an "individual" right to bear arms for "confrontation."[135] The goal of the present analysis instead is to evaluate the soundness of the majority's categorical approach and to identify some of the difficult questions it leaves unanswered.

1. The Majority's Categorical Approach

From its central holding, which extends broad protection to the "individual" right to bear arms unconnected from militia service, to its flat exclusions of felons, the mentally ill, and certain "Arms" from constitutional coverage, the majority opinion in *Heller* was categorical in its approach. And in keeping with its originalist tone, the majority justified its categories as being compelled by the text and original understanding of the Second Amendment. This kind of originalist categoricalism—which the majority compares (wrongly, it would seem[136]) to First Amendment categoricalism—neither requires nor permits any balancing beyond that accomplished by the Framers themselves:

> The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.[137]

The majority emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[138] Somewhat ironically, however, this approach to constitutional coverage cannot even explain the First Amendment examples the majority itself invoked. For while it is true that some First Amendment exceptions have been justified in originalist terms,[139] many (if not most) of its categorical exceptions—

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[135] *Heller*, 128 S. Ct. at 2797.

[136] *See supra* Part I (describing predominance of balancing in First Amendment doctrine).

[137] *See Heller*, 128 S. Ct. at 2821.

[138] *Id.*

[139] *See, e.g.*, Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder . . . would be an unconstitutional interference with free speech."); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have *never* been thought to raise any constitutional problem." (emphasis added)).

including obscenity—are either created or defined by judicial balancing.[140] More fundamentally, as explained above in Section I.B, First Amendment doctrine for the most part has *rejected* categoricalism in favor of balancing tests and intermediate scrutiny.

Although the majority did not countenance balancing, it did hint at the possibility of constitutional gun control regulations. Again, the analysis built on First Amendment categoricalism:

> Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.[141]

This passage is notable both for what it says and what it does not. It does *not* allow for "reasonable regulation" of gun ownership—the weighted balancing test adopted by all the state courts that have addressed the question under their parallel constitutional provisions.[142] Rather, the majority's reference to the First Amendment suggests an effort to temper the scope of a categorical test by creating categorical exceptions—just as Justice Black did.

Of all the First Amendment cases the majority could have cited for the basic proposition that the right to free speech is not unlimited, the fact that it turned to *United States v. Williams*[143] may be particu-

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[140] *See supra* notes 42–53, 76–87 and accompanying text (discussing examples of categorical exclusions created by balancing in First Amendment doctrine).

[141] *Heller*, 128 S. Ct. at 2799 (citing United States v. Williams, 128 S. Ct. 1830 (2008)). The majority's comparison of "*any sort* of confrontation" to "speak[ing] for *any purpose*" is interesting. It would seem that most First Amendment categorical exclusions are based not on the "purpose" of a speech act but on its "sort" or manner. This is reflected in the requirement that time, place, and manner restrictions be content neutral. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998) (holding that government may impose time, place, and manner regulations "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view" (alteration in original) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985))).

[142] Winkler, *supra* note 133, at 687, 716–18; *see also Heller*, 128 S. Ct. at 2853 (Breyer, J., dissenting) (citing Winkler for proposition that state "[c]ourts that do have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference"). *But see* Wilkinson, *supra* note 3, at 47 ("*Heller* (like *Roe*) has given birth to a balancing test that will force courts into the conscious weighing of competing factors as they decide which state interests are sufficiently strong and which regulations unduly burden the new right." (internal quotation marks omitted) (referencing Roe v. Wade, 410 U.S. 113 (1973))). I disagree with Judge Wilkinson on this point not because I think Second Amendment doctrine will eschew balancing—I think that such balancing is inevitable as courts grapple with the scope of the right, *see infra* Part III.A—but because I think that *Heller* itself forbids it.

[143] 128 S. Ct. 1830 (2008).

larly telling. In *Williams*—also authored by Justice Scalia—the Court rejected a First Amendment challenge to a statute criminalizing pandering in child pornography. Because it was rendered just a month before *Heller*, *Williams* may have been a particularly handy reference point. But it was also a *categorical* decision, based on the fact that child pornography is a "category of proscribable speech."[144] By endorsing the *Williams* approach, the majority signaled its preference for a categorical approach to both Amendments.

As if confirming its allegiance to categoricalism, the majority in *Heller* disclaimed any Second Amendment version of the First Amendment's time, place, and manner test: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."[145] Justice Breyer's dissent, in contrast, would have imported some of the "ample alternatives" inquiry that often has been used to justify speech regulations:[146] "In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions?"[147] Justice Breyer concluded, "Here I see none."[148]

In a short passage near the end of its opinion, the majority also suggested the possibility of constitutional gun control but again avoided endorsing a balancing approach. Post-*Heller* cases have relied on this passage in rejecting Second Amendment challenges

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144 *Id.* at 1836.

145 *Heller*, 128 S. Ct. at 2818. The court of appeals made a nearly identical ruling:

> The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted.

Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007). The First Amendment's time, place, and manner test usually turns on the availability of other channels of communication. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 803 (1989) (permitting content-neutral regulations on speech so long as they serve important government objective, are narrowly tailored, and preserve ample alternative means of communication); *see also* Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 294 (1984) (upholding prohibition on camping in park as permissible time, place, and manner restriction). *But see* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53–54 (1986) (upholding zoning ordinance against adult theaters even though few, if any, reasonable alternative sites were available).

146 *See supra* note 145 (explaining how ample alternative means of communication is factor in permitting content-neutral regulations on speech in First Amendment context).

147 *Heller*, 128 S. Ct. at 2864 (Breyer, J., dissenting).

148 *Id.*

from felons and others,[149] and indeed it seems to be the closest the majority came to a roadmap for constitutional gun regulation:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[150]

The Court further clarified: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[151]

But acknowledging that the right is "not unlimited" did not commit the majority to a balancing approach any more so than Justice Black's recognition that the First Amendment had a limited "scope" prevented him from supporting absolute protection for whatever fell within that scope.[152] Instead, the majority followed Justice Black's lead by preserving a categorical rule while carving out categorical exceptions. The justifications, if any,[153] for these categorical exclusions are discussed in more detail in Subsection II.C.1.

The majority also attempted—as Heller had[154]—to carve out a categorical exception for safe storage laws: "Nor, correspondingly,

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149 *See, e.g.*, United States v. Gilbert, 286 F. App'x 383, 386 (9th Cir. 2008) ("Under *Heller*, individuals still do not have the right to possess machineguns or short-barreled rifles, as Gilbert did, and convicted felons, such as Gilbert, do not have the right to possess any firearms."); United States v. Harden, No. 06-79-KI, 2008 U.S. Dist. LEXIS 54717, at *2 (D. Or. July 16, 2008) (finding that challenge to felon-in-possession statute "goes well beyond the holding in *Heller*" and "declin[ing] to extend the case to that extent"); Johnson v. United States, No. 1:07CV155 HEA, 2008 U.S. Dist. LEXIS 51148, at *14 (E.D. Mo. July 2, 2008) (citing same passage and finding that *Heller* "completely foreclosed" Johnson's challenge to felon-in-possession law).

150 *Heller*, 128 S. Ct. at 2816–17 (citations omitted).

151 *Id.* at 2817 n.26.

152 *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–75 (1960) ("[O]ne of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas—*whatever the scope of those areas may be*." (emphasis added)).

153 *See* Wilkinson, *supra* note 3, at 23 ("The *Heller* majority seems to want to have its cake and eat it too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right.").

154 Transcript of Oral Argument, *supra* note 9, at 72 ("Whatever standard of [re]view we may wish to apply, I think, would encompass a safe storage provision."); Respondent's

does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents."[155] The Court's efforts to create this exception, however, demonstrated the weakness and instability of the categoricalism it employed—a categoricalism purportedly based directly on original understanding. After disclaiming any intent to suggest the invalidity of safe storage requirements, the majority proceeded to do exactly that, holding unconstitutional the District's trigger lock law, which required guns to be kept "unloaded and dissembled or bound by a trigger lock or similar device."[156] The Court struck down the law on the basis that it contained no explicit conception for self-defense. The District—joined by the Solicitor General on this point[157]—argued that the Court should not create a potential constitutional infirmity by reading the law to prohibit self-defense but instead simply should acknowledge the same kind of common law self-defense exception that applies to other criminal prohibitions, such as assault and murder, which also lack explicit self-defense exceptions.[158]

The Court declined to do so, finding that the language of the statute required guns to be locked even in emergency situations. This "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense and [was] hence unconstitutional."[159] In support of this conclusion, though, the majority's originalist categoricalism took an odd turn, because there were undoubtedly Founding-era restrictions that would have prevented, in effect, the use of weapons in self-defense and that, like the District's regulation, contained no explicit self-defense exception. While it would not recognize a self-defense exception to the District's law, the majority was able to find

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Brief at 54, *Heller*, 128 S. Ct. 2783 (No. 07-290), 2008 WL 336304 ("Respondent would not quarrel with a true 'safe storage' law, properly crafted to address Petitioners' stated concerns.").

155 *Heller*, 128 S. Ct. at 2820.

156 D.C. CODE ANN. § 7-2507.02 (LexisNexis 2001), *invalidated by* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

157 Brief for the United States as Amicus Curiae, *supra* note 127, at 31.

158 *See, e.g.*, Hernandez v. United States, 853 A.2d 202, 205–07 (D.C. 2004) (reversing conviction for aggravated assault where trial court failed to instruct jury on right of self-defense); MODEL PENAL CODE § 3.04 (1962) (discussing, as defense to criminal liability, justifiable use of force in self-protection); *see also* United States v. Panter, 688 F.2d 268, 272 (5th Cir. 1982) ("We hold today that where a convicted felon, reacting out of a reasonable fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself, he is not guilty of violating [law prohibiting possession of firearms by convicted felons].").

159 *Heller*, 128 S. Ct. at 2818.

categorical self-defense exceptions to these Founding-era restrictions.[160]

The majority then suggested that it was the amount of prescribed punishment that distinguished the District's law from its historical predecessors:

> [Said predecessors were] akin to modern penalties for minor public-safety infractions like speeding or jaywalking. . . . [W]e do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in

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[160] Thus a Massachusetts law that "forbade the residents of Boston to 'take into' or 'receive into' 'any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building' loaded firearms, and permitted the seizure of any loaded firearms that 'shall be found' there," did not actually bar the use of weapons in self-defense, because there is "reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case)." *Id.* at 2819 (citing Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218); *see also id.* at 2820 (citing Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208) (claiming that it is "implausible" that another of Boston's laws "would have been enforced against a citizen acting in self-defense"). Although Pennsylvania had a law restricting the firing of guns at certain times and places, "it is unlikely that this law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense" because, according to the majority, Justice Wilson, an authority on Pennsylvania, recognized that "the right to self-defense with arms was protected by the Pennsylvania Constitution." *Id.* at 2820 (citing Act of Aug. 26, 1721, ch. 245, § 4, 3 Pa. Stat. at Large 253–54). By contrast, the District of Columbia's recognition of the right to self-defense, the lack of evidence that the District had ever prosecuted anyone for unlocking a weapon to use in self-defense, and the District's representations that it had no intent to pursue such prosecutions in the future did not give the majority "reason to doubt" that the District would do so anyway. Brief for Petitioners, *supra* note 133, at 56. Justice Breyer noted in dissent, "I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses to accept the District's concession that this law has one." *Heller*, 128 S. Ct. at 2853–54 (Breyer, J., dissenting).

The fact that *Heller* was a facial challenge should have made the lack of evidence on this point particularly notable. To prevail on such a challenge, "[t]he challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987) (upholding constitutionality of Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50 (Supp. III 1982), against claims that portions of Act allowing pretrial detention of dangerous suspects violated substantive due process). Where burdens are speculative—as they arguably were in *Heller*—such attacks generally fail. *See id.* ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully . . . ."); *cf.* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615, 1621–24 (2008) (finding insufficient evidence of burden to support facial attack on Indiana voter identification requirement since, "seeking relief that petitioners have advanced a broad attack on the constitutionality of the [state statute, plaintiff] bear[s] a heavy burden of persuasion"). The District currently is considering legislation that would explicitly allow guns to be kept in their homes, loaded and unlocked, for "immediate self-defense." Nikita Stewart, *Gun Bill Provides for Self-Defense*, WASH. POST, July 1, 2008, at B1.

> prison (five years for a second violation) for even obtaining a gun in the first place.[161]

But the Court's analysis on this point was fundamentally flawed: It compared Founding-era penalties for violating safe-storage laws to contemporary penalties for unlawful *possession* rather than for violations of the trigger-lock requirement (a modern safe-storage requirement). And even assuming that the Court's comparison is legitimate, it seems unlikely that the remote prospect of punishment, even a prison term, would deter a modern homeowner from unlocking his gun "to protect himself or his family from violence"[162] any more than it would deter a homeowner in the eighteenth century.

More importantly, as discussed in more detail in Section II.C, the majority's analysis demonstrated the limits of its own originalist-categoricalist approach. Without identifying some constitutional value, that approach cannot reasonably—or at least did not in *Heller*—justify the creation of modern constitutional categories simply by labeling them the descendants of Framing-era forebears.[163]

2. Justice Breyer's Balancing Alternative

Justice Breyer began his dissent with the straightforward, Frankfurter-like assessment that the majority's categorical approach was "wrong" because "the protection the Amendment provides is not absolute."[164] Even assuming that the majority was correct that the

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[161] *Heller*, 128 S. Ct. at 2820–21 (citing D.C. CODE ANN. § 7-2507.06 (LexisNexis 2001)).

[162] *Id.* It would be possible, of course, to argue that trigger locks are impermissible because, as a practical matter, they make it impossible to defend one's self against an intruder. *See* Parker v. District of Columbia, No. 04-7041, 2007 U.S. App. LEXIS 22872, at *5 (D.C. Cir. Sept. 25, 2007) (per curiam) (noting that if Supreme Court took certiorari, it "would necessarily be obliged to consider the impact of Section 7-2507.02 [on the constitutionality of the Act as a whole], since a disassembly or trigger lock requirement might render a shotgun or rifle virtually useless to face an unexpected threat"). But this is emphatically not the basis for the result in *Heller*. Aside from a short discussion at oral argument, Transcript of Oral Argument, *supra* note 9, at 82–84, neither party made mention of the practical difficulties occasioned by trigger locks. I will not discuss them at length here. For more on trigger locks generally, including a description of federal, state, and local laws on locking devices, see LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA 223–30 (2008), http://www.lcav.org/library/reports_analyses/regulating_guns.asp. *See generally* Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47 (1999) (discussing efficacy of Child Access Prevention laws, of which trigger locks are often important element).

[163] *See infra* notes 192–94 and accompanying text.

[164] *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting); *see also id.* at 2848 ("I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority . . . does not, because it cannot, convincingly show that the Second Amendment seeks to maintain [such a right] in pristine, unregulated form."); *id.* at 2870 ("In my view, there simply is no untouchable constitutional right guar-

Second Amendment right is not militia related but rather protects a right to bear arms for "confrontation," self-defense, or something else entirely,[165] Justice Breyer argued that the proper way to evaluate burdens on that right would be to balance the government's interests against the interests of an individual in exercising the right. "The ultimate question" under his approach would be "whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."[166] In identifying the purpose of the regulation and acknowledging its historical forebears, Justice Breyer determined that "a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime."[167] Justice Breyer's inquiry included elements of purposivism, historical analysis, reasonableness, and deference to legislative judgment. But its discussion of goals, burdens, and tailoring was unmistakably the language of balancing.

Having described his balancing test, Justice Breyer—citing "First Amendment cases applying intermediate scrutiny"[168]—proceeded to canvass the "empirically based arguments" presented by Heller and his amici.[169] Justice Breyer noted that "the question here is whether [those arguments] are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them."[170] He observed that urban areas "have different experiences with gun-related death, injury, and crime, than do less densely populated rural areas"[171] and that "the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas."[172] He recognized—indeed, emphasized—that the special dangers of urban gun violence were not on the minds of the Framers when they drafted the Second Amendment.[173] But rather than focusing on the content of Founding-era regulations, as the majority purported to do, Justice Breyer asked

anteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas.").

165 *Id.* at 2793 (majority opinion); *see also id.* at 2796 (arguing that "bear arms" means "simply the carrying of arms").

166 *Id.* at 2854 (Breyer, J., dissenting).

167 *Id.* at 2847; *see also id.* at 2847–48 (describing law at issue in *Heller* as being tailored to unique needs of urban areas and as imposing burden upon gun owners "that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted").

168 *Id.* at 2860 (borrowing test of "substantial evidence" of reasonable inferences drawn by legislature).

169 *Id.* at 2859.

170 *Id.*

171 *Id.* at 2857.

172 *Id.*

173 *Id.* at 2866 ("[A]ny self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers.").

whether, in light of the deference to which it was entitled,[174] the District's legislature had struck a reasonable balance. He concluded it had.[175]

C. Categoricalism and Second Amendment Values

Justice Breyer framed his dissent with what he called a "process-based" question, which actually involves the substance of the Second Amendment right: "How is a court to determine whether a particular firearm regulation . . . is consistent with the Second Amendment?"[176] Justice Breyer concluded that "[b]ecause [the majority's decision] says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges."[177] In an effort to describe some of these future challenges and identify the Second Amendment values relevant to their resolution, this Section returns to the three types of categorization employed in First Amendment doctrine—coverage, classification, and protection—and analyzes their use in *Heller*. It argues that the majority's attempt to create categories neither reflects nor enables a coherent account of the Second Amendment's core values, whatever they may be. It also argues that, although *Heller* clearly endorsed categoricalism, Second Amendment doctrine will eventually become, like First Amendment doctrine, a patchwork of balancing and categorical tests.

1. Second Amendment Coverage (Exclusions in Search of a Justification)

Heller categorically excludes certain types of "people" and "Arms" from Second Amendment coverage, denying them any constitutional protection whatsoever. In this respect, its use of categorical exclusions to trim the results of its categorical rule is reminiscent of the speech exceptions endorsed by First Amendment categoricalists like Justice Black.[178] And just as those free speech exceptions have been criticized as unprincipled (albeit expedient),[179] it is difficult to discern the principles or values behind *Heller*'s carve-outs.

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174 *See id.* at 2860 ("[L]egislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.").

175 *Id.*

176 *Id.* at 2850–51.

177 *Id.* at 2868.

178 *See supra* notes 36–41 and accompanying text (discussing Justice Black's willingness to categorically exclude certain types of speech from First Amendment protection).

179 As William Van Alstyne has pointed out with regard to the First Amendment, it is "verbal subterfuge" to say that "appropriately tailored" speech regulation does not

The majority opinion specifically approved—for unstated reasons[180]—the categorical exclusion of at least two groups of "the people" from Second Amendment coverage: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[181] The Court's approval of "prohibitions," rather than regulations, confirms that felons and the mentally ill, however defined, are excluded entirely from Second Amendment coverage. What is less clear, under the majority's reading of the Amendment, is why they should be. The exclusion of felons and the mentally ill seems contrary to the majority's all-inclusive reading of "the people," which was the heart of its textual interpretation of the Second Amendment's "individual" right. Indeed, establishing that "the people" meant everyone was the first step in the majority's analysis of the Amendment's "operative" clause: "[I]n all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."[182] In other words, by analyzing the lack of categorical exceptions in other constitutional provisions that refer to "the people," the majority concluded that the Second Amendment, too, must extend to all citizens as "individuals." But as Justice Stevens pointed out in dissent, even felons and the mentally ill are people with rights under the other amendments the majority identified, including the First.[183] Perhaps Founding-era gun laws prevented felons and the mentally ill from owning guns, and the majority's categorical exclusions are simply the modern analogues of these (unidentified and perhaps nonexistent) historical exceptions.[184] But because the values behind the categorical exclusion of felons in *Heller* are opaque, and because the United States has a long history of stringent gun control (particularly, it should be noted, against socially

infringe or abridge a constitutional right. Van Alstyne, *supra* note 23, at 114; *see also* Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 242 (1978) (lamenting "durability of the Orwellian ploy of reading obscenity out of the sphere of protected expression by simply 'defining' it as form of nonspeech").

180 *See* Wilkinson, *supra* note 3, at 22–23 ("[T]he Court does not explain why these restrictions are embedded in the Second Amendment.").

181 *Heller*, 128 S. Ct. at 2816–17; *see also id.* at 2819 ("Before this Court petitioners have stated that 'if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified,' by which they apparently mean if he is not a felon and is not insane.").

182 *Id.* at 2790–91.

183 *Id.* at 2827 (Stevens, J., dissenting).

184 Such a tradition-based analysis seems to apply in the First Amendment's definition of "public" forum. *See* Hague v. Comm. Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

disfavored groups like African Americans[185]), it is unclear what other categories of "the people" will find themselves outside the bounds of the Second Amendment under this approach. Equal protection doctrine might prevent some pernicious omissions, but the indeterminacies of equal protection law make this anything but clear. Post-*Heller* cases have already extended the list to include illegal aliens[186] and persons convicted of misdemeanor crimes of domestic violence.[187]

The majority encountered, but did not acknowledge, similar difficulties when attempting to define the category of "Arms" covered by the Second Amendment. The court of appeals had classified "Arms" by tracing the "lineal descendant[s] of . . . founding-era weapon[s]" that are "in 'common use' today."[188] The *Heller* majority defined the category slightly differently, holding that "the Second Amendment

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185 *See, e.g.*, STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866–76 (1998) (contrasting intent of Fourteenth Amendment's framers that Second Amendment be incorporated against states to preserve freedmen's right to bear arms with race-based attempts by Southern states to limit black gun ownership in Reconstruction era through "black codes" and with reluctance of judiciary to incorporate); Robert J. Cottrol & Raymond T. Diamond, *"Never Intended To Be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995) (examining relationship between race and gun ownership right in United States); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 342–58 (1991) (discussing both importance of gun ownership to African Americans in Reconstruction Era and in 1960s and attempts by white Southerners to limit gun ownership through state law).

186 United States v. Boffil-Rivera, No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633, at *21–22 (S.D. Fla. Aug. 12, 2008) (order denying motion to dismiss) ("Clearly, under any historical interpretation of the enactment of the Second Amendment or the interpretation of any similar right under the Constitution, the individual right to bear arms defined by *Heller* does not apply to an illegal and unlawful alien." (italics omitted)); *cf.* Dearth v. Mukasey, 516 F.3d 413, 414 (8th Cir. 2008) (considering challenge to enforcement of provisions of 18 U.S.C. § 922 that prohibit non-residents of United States from receiving or selling firearms for nonsporting purposes). *See generally* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) (examining role of equal-protection and federal-power principles in judicial analysis of alien gun laws).

187 One district court reasoned:

> Based on the absence of a meaningful distinction between felons and persons convicted of crimes of domestic violence as predictors of firearm violence, the critical nature of the governmental interest, and the definitional tailoring of the statute, the Court concludes that persons who have been convicted of a misdemeanor crime of domestic violence must be added to the list of "felons and the mentally ill" against whom the "longstanding prohibitions on the possession of firearms" survive Second Amendment scrutiny.

United States v. Booker, 570 F. Supp. 2d 161, 164–65 (D. Me. 2008); *see also* United States v. White, No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008) (upholding, in wake of *Heller*, defendant's conviction for possession of gun following conviction for misdemeanor crime of domestic violence).

188 Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007).

extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[189] But the "bearability" test carries (so to speak) its own complications. For one thing, the extension of protection to all "bearable" arms seems to conflict with Justice Scalia's famous argument that, in identifying the appropriate "level of generality" at which to evaluate historical tradition, the Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[190] In evaluating the District's handgun ban, the "most specific level" of "historical tradition" could not possibly have been "bearable" arms—the statute explicitly allowed "bearable" weapons like shotguns and rifles. The framework for analysis instead should have been something along the lines of handguns or pistols, rather than all bearable arms. And if all "bearable" weapons are categorically protected, then small machine guns, grenades, detonators, and other handheld weapons should also be prima facie immune from bans, as they too may be carried and therefore "borne."[191]

But having selected bearability as the relevant concept connecting modern weapons to their historical ancestors, the majority was free to modify the court of appeals' "lineal descendant" test and to reject as "bordering on the frivolous" the suggestion (advanced by no one) that "only those arms in existence in the eighteenth century are protected by the Second Amendment."[192] In the majority's words, "We do not interpret constitutional rights that way," as evidenced by the fact that "the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search."[193] This is true, of course, but it is not the end of the inquiry. Explaining why the First Amendment protects modern forms of communication requires the identification of some value that connects those forms to their ancestors. It is impossible, for example, to explain why the First Amendment covers an eighteenth-century political pamphlet and a twenty-first-century political blog but not an obscene twenty-first-century *non*political pamphlet, without connecting those real-world categories to some constitutional value. That is, the preceding examples could be explained by the fact that the first

189 District of Columbia v. Heller, 128 S. Ct. 2783, 2791–92 (2008).

190 Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., for the Court, joined by Rehnquist, C.J.).

191 *See Heller*, 128 S. Ct. at 2793 ("At the time of the founding, as now, to 'bear' meant to 'carry.'").

192 *Id.* at 2791.

193 *Id.* (citations omitted).

two are means of communicating political ideas, a kind of expression that is at the core of the First Amendment.[194] Identifying that value makes it clear that it is the political-ness that matters, not the pamphlet-ness. The question in *Heller*, then, was not whether modern handguns are connected to Founding-era weapons by some technological link but rather whether they are connected by some meaningful constitutional principle. In other words, to what constitutional value are Founding-era pistols and modern handguns both related?

In 1939, the Court employed just such a value-based approach in attempting to define the category of constitutionally protected "Arms" in *United States v. Miller*.[195] In *Miller*, the Court rejected a Second Amendment challenge brought by two men who had been convicted of transporting an unregistered short-barreled shotgun in interstate commerce. The Court held:

> In the absence of any evidence tending to show that possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.[196]

The Court continued: "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[197] Thus it appears that the Court defined the category of protected "Arms" by reference to the *militia-related purpose* of the Second Amendment.[198]

The *Heller* majority, however, emphatically rejected the reading that the Second Amendment only protected military use of arms: "*Miller* did not hold that and cannot possibly be read to have held that."[199] Instead, the majority found that "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons"[200]—namely, "arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[201] The majority and dissents therefore

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194 *See* Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); *see also supra* Part I.B.4 (discussing how free speech values determine which speech is at core of First Amendment protection).

195 307 U.S. 174 (1939).

196 *Id.* at 178.

197 *Id.*

198 *See id.* ("With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made.").

199 District of Columbia v. Heller, 128 S. Ct. 2783, 2814 (2008).

200 *Id.*

201 *Id.* (quoting United States v. Miller, 307 U.S. 174, 178 (1939)).

essentially agreed that the Amendment allowed restrictions based at least on the type of weapons. But, the majority continued, it "would be a startling reading" of *Miller* to conclude that it protected military equipment and nothing else.[202] The majority instead seized on another sentence later in *Miller*—"[o]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time"[203]—and concluded that the Second Amendment covers Arms that are both "ordinary military equipment" and "in common use."[204]

This is an interesting move for many reasons. For one thing, it suggests that the categorical exclusion of certain "Arms" from Second Amendment coverage is justified by a different constitutional value than the exclusion of certain "people." Weapons lose constitutional coverage if they have no military use, but people are excluded according to some completely different principle, or else felons would have Second Amendment rights—they serve not just in the militias (at least in the National Guard, perhaps the militias' most direct descendant) but in other armed forces as well.[205] Additionally, the majority suggested that the central question in determining whether a firearm receives Second Amendment coverage is whether it is in "common use." Indeed, it determined that handguns could not be banned because they are "the most popular weapon chosen by Americans for self-defense in the home."[206] Tying this popular preference back to the *Miller* test, the majority concluded quite simply that the people's preferences—as evidenced by private gun ownership, not by the actions of their popularly elected representatives[207]—are better indicators of constitutional meaning than the lone precedent of *Miller*:

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202 *Id.* at 2815.

203 *Id.* (quoting *Miller*, 307 U.S. at 179).

204 *Id.* at 2815–16. Presumably neither *Miller* nor *Heller* meant for the phrase "at the time" to limit the class of covered weapons to those in use "at the time" of the drafting of the Second Amendment; rather, they meant it to denote *any* time when a person was called for militia service.

205 *See* Michael Boucai, *"Balancing Your Strengths Against Your Felonies": Considerations for Military Recruitment of Ex-offenders*, 61 U. MIAMI L. REV. 997, 1000–01 (2007) (noting "military's use of moral waivers to knowingly recruit thousands of persons with criminal backgrounds each year"); Russell Carollo, *Troubled Pasts Linked to Some Troops' Crimes*, NEWS & OBSERVER (Raleigh, NC), July 13, 2008, at A9 (noting existence of National Guard felony waiver policy, which was suspended in December 2007 as result of better recruiting).

206 *Heller*, 128 S. Ct. at 2818; *see also id.* ("It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.").

207 Writing for the Court in *Crawford v. Washington*, 541 U.S. 36 (2004), Justice Scalia stated that "the Framers had an eye toward politically charged cases like Raleigh's—great

> As for the "hundreds of judges" who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.[208]

Even if this statement were accurate—which is doubtful[209]—what relevance it should have in the majority's originalist categorical framework is entirely unclear. Basing categories on popular understanding is living constitutionalism, plain and simple.[210]

As it had with the category of "people," the majority simply shaved off the disfavored results of categorical protection for firearms by creating "another important limitation on the right to keep and carry arms": "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"[211] Although this limitation, too, is probably in line with contemporary popular understanding of the Second Amendment, it is difficult to justify based on a categorical reading of the Amendment's text or original understanding. The majority's carve-out of "dangerous and unusual weapons" effectively creates a rule that the government may not ban arms that it has not

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state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear." *Id.* at 68.

[208] *Heller*, 128 S. Ct. at 2815 n.24 (citation omitted).

[209] Justice Stevens objected strongly and persuasively to the notion that Americans have relied on the majority's understanding of the Amendment:

> [I]t is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures. Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the Second Amendment did not reach possession of firearms for purely private activities, "millions of Americans," have relied on the power of government to protect their safety and well-being, and that of their families.

Id. at 2844 n.38 (Stevens, J., dissenting).

[210] *See* Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2008/07/is-heller-original-meaning-decision.html (July 2, 2008, 09:31 EST) ("Justice Scalia is well known to despise the idea of living constitutionalism. But what he has given us in *Heller* is actually a living constitutionalist argument disguised as law office history."); *cf.* Posner, *supra* note 3, at 32, 33 ("[T]he *Heller* decision is exposed as an example of loose construction—despite the Court's pretense of engaging in originalist interpretation . . . .").

[211] *Heller*, 128 S. Ct. at 2817. Post-*Heller* cases have construed this passage as creating a categorical rule. In *Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, for example, a district court rejected the plaintiff's arguments that regulation of machine guns should be "limited to reasonable time, place, and manner restrictions" and that "he may accordingly own almost any type of weapon he chooses . . . so long as he complies with reasonable time, place, and manner restrictions." No. 5:07-CV-154-D, 2008 U.S. Dist. LEXIS 51059 at *6–7 (E.D.N.C. July 2, 2008).

already banned, and as the dissent pointed out, "[t]here is no basis for believing that the Framers intended such circular reasoning."[212] The more likely explanation, it seems, is that Justice Scalia—the self-described "faint-hearted originalist"[213]—is also a faint-hearted categoricalist. This may be fine, or even desirable. However, the carving out of apparently absurd results not only raises questions about the feasibility of categoricalism but also suggests the likelihood and cost of line-drawing errors—after all, a category can be wrong without quite being absurd. The majority's struggle to define coherent categories of "Arms" in *Heller* demonstrates the risk of error in creating categories "out of whole cloth"[214] without the benefit of prior weighing—or even identification—of substantive constitutional values, particularly in areas where federal judges are not experts.[215]

If *Heller*'s categoricalism is taken seriously, many of the most important gun control battles will be fought not over the effectiveness of gun control but over whether particular classes of "Arms" or "people" are covered by the Second Amendment. Of course, courts may well employ balancing as a means of establishing these categories—finding, for example, that machine guns or felons are categorically excluded from Second Amendment coverage because the balance almost always will tip in favor of the government's attempts to regulate them. As noted above, even Justice Black and other avowed opponents of balancing as a mode of protection have been comfortable with the use of balancing to define coverage.[216] The majority's acknowledgement of the possible exclusion of "dangerous and unusual weapons"[217] seems to provide just such an opportunity.

Naturally, however, Second Amendment categoricalism will run into difficulties, just as categoricalism has in First Amendment doctrine, where the lines between covered and uncovered speech often blur or cross. Submachine guns, for example, are arguably both "pistols" (at least as defined in the District of Columbia's stricken regulations), in that they are "originally designed to be fired by use of a

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212 *See Heller*, 128 S. Ct. at 2869 (Breyer, J., dissenting) (criticizing majority for determining which weapons are permissible based on what existing regulations permit).

213 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("Having made that endorsement, I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

214 *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting).

215 United States v. Rybar, 103 F.3d 273, 294 n.6 (3d Cir. 1996) (Alito, J., dissenting) ("[A]ppellate judges . . . are not experts on firearms [or] machine guns . . . .").

216 *See supra* notes 22–23, 39–43 and accompanying text (contrasting Justice Black's absolute categoricalism with his flexibility in defining coverage boundaries of free speech doctrine).

217 *Heller*, 128 S. Ct. at 2817.

single hand,"[218] *and* machine guns, defined by federal statute as "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger."[219] Dick Heller himself already has filed a lawsuit arguing that the District's new statute, which defines semiautomatic pistols as machine guns, "is contrary to the ordinary usage of those terms in the English language and in the laws of the United States."[220] Perhaps these "mixed" guns will get the kind of intermediate protection under the Second Amendment that "mixed" speech currently receives under the First.[221] But as John Hart Ely pointed out in the mixed speech context, "burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression."[222] So, too, can a machine pistol be considered both 100% a self-defense weapon—and therefore entitled to complete Second Amendment protection[223]—and 100% a "dangerous and unusual" weapon—thus subject to categorical exclusion.[224] Even drawing clear lines does not always lead to clear answers.[225]

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[218] D.C. CODE § 7-2501.01(12) (2008), *invalidated by* Heller v. District of Columbia, 128 S. Ct. 2783 (2008).

[219] 26 U.S.C. § 5845(b) (2006) (defining "machinegun").

[220] Del Quentin Wilber & Paul Duggan, *D.C. Is Sued Again over Handgun Rules*, WASH. POST, July 29, 2008, at B1 (quotation marks omitted).

[221] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (calling *O'Brien* test "intermediate standard of review"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 579 (1991) (Scalia, J., concurring in the judgment) (characterizing plurality's test based on *O'Brien* as "intermediate level of First Amendment scrutiny").

[222] Ely, *supra* note 49, at 1495.

[223] The *Heller* majority suggested that the self-defense utility of a gun entitles it to full categorical protection, basing its decision on the preferability of handguns for self-defense, *Heller*, 128 S. Ct. at 2818, without also considering that the same qualities make handguns the weapons of choice for criminals. *See id.* at 2856 (Breyer, J., dissenting) (describing significant use of handguns in violent crime).

[224] United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008), *cert. denied*, 2009 WL 425146 (Feb. 23, 2009) ("[U]nder *Heller*, . . . [m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.").

[225] In practice, a categoricalist faced with this problem is likely to narrow the categories, for example by extending Second Amendment protection to commonly used handguns that are not dangerous or unusual. (A balancer would almost certainly reach the same result, albeit by a different path.) But deciding which category—self-defense or dangerousness—must yield is not a problem that *Heller*'s originalist categoricalism is well equipped to answer.

2. *The Lack of Classification or Subcategorization (Protection in Search of Tailoring)*

Although *Heller* relied heavily on categoricalism at the levels of coverage and protection, it essentially avoided—perhaps in part because it had little cause to consider—categorization at the level of classification: that is, the creation of subcategories that may warrant only intermediate protection.

The only subcategory the majority seemed to recognize was "the commercial sale of arms," which may be subject to "conditions and qualifications"[226]—apparently a kind of intermediate scrutiny. This is a particularly interesting subcategory, since it has a First Amendment analogue in the subcategory of commercial speech. And just as commercial speech receives lessened protection on account of its distance from the core values of the First Amendment,[227] *Heller* might signal that commercial arms sales are sufficiently removed from the Second Amendment's core value (be it self-defense or the prevention of tyranny) as to receive lower protection.[228]

But other than the possible example of commercial arms sales, *Heller* avoided suggesting that subcategories of covered "Arms," "people," or arms-bearing uses could be covered by the Amendment and yet subject to less-than-absolute protection. Of course, because *Heller* was the first meaningful Second Amendment case the Court had heard in seventy years, the opportunities for subcategorization were limited. As courts in future cases tailor Second Amendment doctrine to fit the wide variety of guns, gun owners, and gun uses, subcategorization is likely to become an increasingly rich area of analysis. Are all handguns to be treated the same, or does a Colt Buntline revolver (the gun Dick Heller sought to possess) get more Second Amendment protection than an Uzi? Do security guards or antigovernment militias have heightened Second Amendment protection, given their role in effectuating the Amendment's underlying self-defense or antityranny values? Do people living in dangerous neighborhoods have "stronger" Second Amendment rights because of the heightened need for self-defense? As Judge J. Harvie Wilkinson notes, the "array of issues [raised by *Heller*] rivals and may exceed the

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[226] *Heller*, 128 S. Ct. at 2817; *see supra* text accompanying note 150 (quoting relevant passage from *Heller*, 128 S. Ct. at 2816–17).

[227] *See supra* note 81 and accompanying text.

[228] A separate "commercial" problem might arise if corporations—which have First Amendment rights—were to assert something akin to Second Amendment rights, for example by arguing for a self-defense right that extends to armed security guards.

number and complexity of subsidiary issues that were eventually decided by courts in the aftermath of *Roe*."[229]

If First Amendment doctrine is any guide, courts are likely to apply (consciously or not) balancing analysis to these various subcategories in an attempt to craft constitutional tests that best reflect underlying constitutional values. And perhaps, as in First Amendment doctrine,[230] these various balancing approaches will eventually blend into one another. If so, it seems likely that reasonableness review—the form of scrutiny universally applied by state courts considering their own state constitutions' gun provisions[231]—will become the Second Amendment equivalent of First Amendment intermediate scrutiny, the "Test That Ate Everything" in free speech doctrine.[232] In any event, *Heller*'s strict categoricalism will make this a difficult task. Classification implicitly requires the establishment of a metric by which to sort different categories and accord them different levels of protection.[233] But in *Heller*, the Court failed to clearly identify a coherent core value of the Second Amendment and thus made such analysis difficult.

3. Categorical Protections (A Right in Search of a Value)

As described in Part I, the Court, in interpreting the First Amendment, essentially eschews categorical protection in the form of absolute immunity from regulation, except when it comes to certain speech restrictions—such as viewpoint discrimination—that are thought to impinge upon, or even run counter to, the central values of the Amendment.[234] In *Heller*, however, the majority did not clearly indicate the core Second Amendment value or values upon which the handgun ban impinged. Its failure to do so makes it especially diffi-

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229 Wilkinson, *supra* note 3, at 37 (referencing Roe v. Wade, 410 U.S. 113 (1973)); *see also id.* at 33 ("Can a non-violent felon be prohibited from owning firearms? What procedures must be followed before someone is constitutionally classified as 'mentally ill' and thereby stripped of his Second Amendment rights? Would a park qualify as a 'sensitive place' where guns could be banned in order to protect children?").

230 *See supra* Part I.B.4 (describing overlapping balancing approaches in First Amendment jurisprudence).

231 *See* Winkler, *supra* note 133, at 686–87 (describing application by state courts of "deferential 'reasonable regulation' standard in arms rights cases").

232 *See generally* Bhagwat, *supra* note 29 (discussing intermediate scrutiny in First Amendment context).

233 *See supra* notes 82–87 and accompanying text (discussing determination of "core" of constitutional right and how courts protect rights incidental to that core).

234 *See supra* Part I.B.4; *see also* Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); Corbin, *supra* note 74, at 613, 614 & n.33 (explaining that "inviolable rule of the First Amendment" is that viewpoint discrimination is prohibited, although "this rule is frequently broken").

cult to justify, in the context of the Second Amendment, the kinds of value-based categorical protections that apply in certain areas of First Amendment doctrine.

This is not to say that the majority entirely failed to consider the values behind the Second Amendment. The parties and amici suggested three leading candidates: to protect the state militias from federal interference,[235] to check federal tyranny through a populace of armed individuals,[236] and to enable private self-defense against criminals and the like.[237] But instead of selecting one of these values, the Court created—"out of whole cloth"[238]—a new category of use: "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of *confrontation*."[239] Of all the dogs in the kennel, this was the one most likely to chase its own tail. Since "confrontation" is nearly the only use for weapons, it provides hardly any guidance at all. It is like saying that the First Amendment guarantees an individual right to speak and act in case of communication, which it does not.[240]

The majority most likely intended to constitutionalize a "right of personal self-defense"[241]—presumably a right to defend oneself with guns—and indeed the opinion refers to the "core lawful purpose of self-defense."[242] If armed self-defense is the core value of the Second Amendment, then, following the First Amendment model, it could be said that the Second Amendment categorically prohibits laws that ban the use of arms for personal self-defense (presuming, of course, that one is not mentally ill, a felon, or using a "dangerous and unusual" weapon). Under this reading, the use of "Arms" to "confront" threats to personal safety is akin to the expression of a political viewpoint under the First Amendment: The government cannot present evi-

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235 Brief for Petitioners, *supra* note 133, at 21–22, 26.

236 Respondent's Brief, *supra* note 154, at 30–32.

237 Brief Amicus Curiae of the Heartland Institute in Support of Respondent at 3–8, 11, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 405555.

238 *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting) ("No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth.").

239 *Id.* at 2797 (majority opinion) (emphasis added).

240 The majority's definition might exclude gun collecting and target shooting from Second Amendment coverage, but little else. It might also exclude hunting, unless one can be said to "confront" a deer. *See* Garry Wills, *To Keep and Bear Arms*, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62, 64 ("One does not bear arms against a rabbit.").

241 *Heller*, 128 S. Ct. at 2847 (Breyer, J., dissenting).

242 *Id.* at 2818 (majority opinion); *see also id.* at 2821 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 235–38 (2008) (arguing that *Heller* constitutionalized right of self-defense).

dence to "balance" against that particular use. This may have been what the majority meant when it criticized Justice Breyer's proposal by saying, "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[243] Of course, as described throughout this Article, *many* enumerated constitutional rights—including the right to free speech—are subject to balancing.[244] But more fundamentally, it is unclear whether the majority truly treated self-defense as the "core protection" of the Second Amendment.

Despite the majority's acknowledgement of the value of self-defense, it elsewhere seemed to adopt the antityranny value urged by Heller[245] and supported by many scholars who favor broad gun rights.[246] Under this reading of the Second Amendment, the majority noted, "the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence."[247] The majority based this conclusion on its historical analysis, which it said "showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[248] Following this line of reasoning, the majority suggested that self-defense in fact had little to do with the "codification" of the right to bear arms:

> [T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do

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243 *Heller*, 128 S. Ct. at 2821.

244 *See, e.g.*, *supra* note 113–114 and accompanying text.

245 Brief for Petitioners, *supra* note 133, at 21–22, 26.

246 *See, e.g.*, Joshua Horwitz & Casey Anderson, *Taking Gun Rights Seriously: The Insurrectionist Idea and Its Consequences*, 1 ALB. GOV'T L. REV. 496, 497 (2008) ("Insurrectionist ideology holds that government, even in its most democratically accountable forms, is inevitably the enemy of freedom, and condemns any and all gun regulation as a government plot to monitor gun ownership (presumably to lay the groundwork for confiscation in the event of a political crisis)."); Kopel, *supra* note 108, at 25 ("The same principle should apply to the Second Amendment [as applies to the First]: the tools of political dissent should be privately owned and unregistered."); Lund, *supra* note 108, at 31 ("An armed populace—even if it could not serve to deter tyranny as effectively as a legal prohibition against federal standing armies—would still constitute a highly significant obstacle to the most serious kinds of governmental oppression.").

247 *Heller*, 128 S. Ct. at 2798–99.

248 *Id.* at 2801.

> with the right's *codification*; it was the *central component* of the right itself.[249]

But by divorcing the "central component" of the Second Amendment from the reason for the Amendment's inclusion in the Constitution, the majority made it all but impossible to identify a "fixed star" to guide Second Amendment analysis.[250]

The majority's failure to identify a core purpose of the Second Amendment makes it very difficult to create principled limitations on the right it protects. This is why the majority's attempt to carve out an exclusion for "sensitive places such as schools and government buildings"[251] is unsatisfying. "Sensitive" to what? Is all government property "sensitive"? If a purpose of the Second Amendment is to allow individuals to arm themselves against government tyranny—as Heller argued and the majority seemed to accept—then it makes little sense to prevent the bearing of arms in government buildings, which is where they arguably would be most needed to prevent government tyranny. Similarly, the exclusion of "dangerous and unusual weapons"[252] is completely inconsistent with (and indeed runs counter to) an antityranny reading of the Second Amendment, since bombs, rocket launchers, and other dangerous weapons are precisely the kinds of weapons one would need to repel (or even deter) an oppressive federal government.

If, on the other hand, the core value of the Second Amendment is self-defense, it seems odd that felons and the mentally ill should be prohibited categorically from invoking it. Felons, in particular, are likely to move in circles where self-defense is an imperative.[253] One might argue, of course, that the dangers of allowing felons to own guns outweigh their constitutional right to armed self-defense. But this is precisely the kind of position that is unavailable to originalist categoricalists. And even then, the rule would be overbroad since there is little reason to think that nonviolent felons pose any special risk of gun violence. Nor, on the self-defense reading of the Second Amendment, would it make sense to categorically exclude "Arms"

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249 *Id.* (citation omitted).

250 *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

251 *Heller*, 128 S. Ct. at 2816–17.

252 *Id.* at 2817.

253 *See, e.g.*, United States v. Gomez, 92 F.3d 770, 778 (9th Cir. 1996) (holding that district court erred by prohibiting admission of justification defense in felon-in-possession case where defendant obtained prohibited gun to defend himself from extraordinary threats from criminal associates).

that lack a military purpose, as the majority does. Such military relatedness (or lack thereof) should be entirely irrelevant to an Amendment whose core value is self-defense. And if self-defense is truly categorically protected, it is difficult to see how any criminal law can survive after *Heller* without an explicit self-defense exception, since all such laws presumably could burden the exercise of self-defense rights (with or without guns) in certain circumstances. The alternative implication would be that citizens have a constitutional right to self-defense by "Arms" but not by other means, such as their bare hands. This would certainly be a "startling"[254] reading of the Constitution.

Such over- and underbreadth is part and parcel of any categorical approach. As Schauer notes, "[r]ules get interesting . . . when some member of the category is within the category as stated but not within the background justification."[255] And, as noted in Part I, such results may be excluded categorically so long as the government's purpose in passing a law is not contrary to the purpose of the Amendment itself. Thus, for example, the Supreme Court upholds incidental burdens on speech so long as they do not facially target core First Amendment values like the protection of unpopular viewpoints or political dissent.[256]

But the lack of an identifiable core Second Amendment value makes the purposivist approach all but impossible to apply to gun control laws. If the Amendment's aim is to protect a right to self-defense, then laws whose purpose—not incidental impact, but *purpose*—is the prevention of self-defense would be unconstitutional, just like laws whose purpose is to burden free expression.[257] This inquiry, of course, would be useless in practice since it is all but impossible to imagine any legislature passing a law whose purpose is the prevention of self-defense. In other words, Second Amendment purposivism nearly always would come up empty if the purpose of the Amendment were to protect self-defense.

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[254] *Cf. Heller*, 128 S. Ct. at 2815 (noting that Second Amendment could be read to protect only weapons useful in warfare but that this result would be "startling").

[255] Schauer, *supra* note 14, at 75; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976) ("The use of rules, as opposed to standards, to deter immoral or antisocial conduct means that sometimes perfectly innocent behavior will be punished, and that sometimes plainly guilty behavior will escape sanction.").

[256] *See supra* notes 82–83 and accompanying text (discussing how Court treats incidental burdens on speech).

[257] *See, e.g.*, Rubenfeld, *supra* note 29, at 768 ("[A] person who breaks a law not directed at speech can claim no constitutional immunity just because he was acting for expressive reasons. There is no First Amendment 'pass' from a law whose purpose is not to punish speech.").

Similarly, if the underlying purpose of the Second Amendment is to protect individuals' right to arm themselves against federal tyranny, then any effort by the government to disarm people for the purpose of oppressing them would be flatly impermissible, even if the people being disarmed were felons or the guns being carried were "dangerous and unusual." Holding aside the probability that, regardless of any Second Amendment implications, a court would strike down any law whose stated purpose is oppression, such disarmament-for-oppression laws are far removed from modern debates over gun control, and it is difficult to imagine any individual actually raising or prevailing on such a claim. Many people question the wisdom of gun control, and some argue that it has the effect of burdening armed insurrection, but few argue that gun control measures are intended to oppress. Again, purposivism would be of little use in advancing the constitutional debate over the modern meaning of the Second Amendment, at least under the majority's implied reading of Second Amendment purposes as self-defense and defense against tyranny.

Lest this discussion of Second Amendment categoricalism draw an unfair comparison, it should be noted again that neither First Amendment doctrine nor balancing analysis more generally has achieved satisfying coherence, largely due to their own failures to identify core values. After all, balancing also requires the establishment of a metric: "Nothing can be balanced against anything else without a common unit of measure. What is the unit of measure when First Amendment rights are 'weighed' against governmental interests? No court has ever said."[258] But Second Amendment doctrine should not be commended for achieving, in a single decision, the kind of incoherence that it took the First Amendment nearly a century to cultivate. Nor does *Heller*'s defensibility as an act of living constitutionalism make it any more satisfying as a purported exercise in originalist categoricalism. With a better-defined central value and a better-explained framework of review, the Second Amendment's future could, at the very least, be less murky than the First Amendment's past.

As Part III suggests, balancing approaches may be better equipped to deal with a pluralism of values and with areas where underlying values are disputed. Many interests can be added to the scale without destroying it. And in the context of disputed values, categories are likely to be particularly unstable and unwieldy. The problems of under- and overbreadth that inevitably accompany categorical or rule-based approaches may lead to situations in which one

[258] *Id.* at 788.

acknowledged value (such as prevention of tyranny) would clearly extend constitutional protection to a particular category (such as weapons with military utility), while another acknowledged value (such as self-defense) would just as clearly exclude the same category. In such a situation, it may be difficult or even impossible to create categories by reference to first principles. Balancing approaches, on the other hand, give courts the opportunity to weigh competing values in a series of cases, and if one value consistently outweighs the other, a categorical rule may develop.

III
CATEGORICALISM, INTERPRETATION, AND THE ROLE OF THE COURTS

Because *Heller* essentially gave the Court a rare blank canvas on which to paint constitutional doctrine, the majority's selection of a categorical palette is especially significant. Indeed, the Court's endorsement of categoricalism in *Heller* may signal the majority's view of the proper role of categoricalism, the common law, and the role of courts more generally.[259]

A. Categoricalism, the Common Law, and "Narrow" Decisionmaking

Chief Justice Roberts, it is said, "tries to define the principle in question as narrowly as possible."[260] In his own words, "In most cases, I think the narrower the better, because people will be less concerned about it."[261] This view of the judicial role essentially embraces the common law ideal of incremental development of legal principles through narrow, case-by-case decisionmaking.[262]

But there is nothing necessarily "narrow" about categoricalism. In fact, in the early free speech cases, balancing was considered to be the narrower approach: "Balancing suggested a particularistic, case-by-case, common law approach that accommodated gradual change

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[259] *See* Sullivan, *supra* note 12, at 112–22 (describing how "[d]ifferent conceptions of judicial role emerge from the Justices' two different patterns of choices among constitutional rules and standards").

[260] Jeffrey Rosen, *Roberts's Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 110, *available at* http://www.theatlantic.com/doc/print/200701/john-roberts.

[261] *Id.*

[262] Scalia, *supra* note 13, at 1177 ("[N]ot relying upon overarching generalizations, and thereby leaving considerable room for future judges[,] is thought to be the genius of the common-law system."); *see also* Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (describing courts' lawmaking power as "genius of the common law system that we inherited from our English forbears").

and rejected absolutes."[263] Justice O'Connor, herself no absolutist, described this as "the sounder approach . . . more consistent with our role as judges to decide each case on its individual merits."[264]

Categoricalism can be narrow, of course, but only if the categories themselves are. One way to create narrow categories is to adopt (as First Amendment doctrine often has) only those categories that have been refined through repeated balancing—a kind of "common law categoricalism." As explained above, and as the Court itself has noted, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction."[265] That is, if balancing favors the government in ninety-nine out of one hundred obscenity cases (or maybe even in nine out of ten), courts may see no need to balance again in the hundred and first (or eleventh) case and can safely presume that the government will prevail once again. The Court's "experience" with such repeated balancings may, as Sullivan notes, eventually lead it to establish "categories [that] may be rationalized as merely the precipitate of earlier balancing that always happens to come out the same way."[266] Thus in *Heller*, Justice Breyer strongly advocated a balancing approach to Second Amendment analysis[267] but nonetheless noted (with a nod to Justice Holmes[268]) that "[e]xperience as much as logic has led the Court to decide that in one area of constitutional law or another the interests are likely to prove stronger on one side of a typical constitutional case than on the other."[269] So long as there are enough cases to sufficiently tailor the

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263 Aleinikoff, *supra* note 61, at 961.

264 Employment Div. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring) (analyzing Free Exercise Clause).

265 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989), *quoted in* Scalia, *supra* note 13, at 1183.

266 Sullivan, *supra* note 15, at 295 n.6; *see id.* at 300 (describing eventual adoption of categorical rule in free exercise exemption cases); *id.* at 311 ("Each of these distinctions (public forum/nonpublic forum, public speech/private speech, extracurricular/curricular, and penalty/non-subsidy) has been precipitated into a rule from an implicit prior weighing of substantive values."); *see also* Schlag, *supra* note 13, at 425 (noting that "[c]ertainly . . . examples of this transubstantiation of standards into rules" exist but also noting counterexamples).

267 *See supra* Part II.B.2.

268 *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Transaction Publishers 2005) (1881) ("The life of the law has not been logic: [I]t has been experience.").

269 District of Columbia v. Heller, 128 S. Ct. 2783, 2852–53 (2008) (Breyer, J., dissenting); *see also id.* at 2853 ("Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference."); Winkler, *supra* note 133, at 686 ("Forty-two states have constitutional provisions guaranteeing an individual right to bear arms and, tellingly, the courts of every state to consider the question apply a deferential 'reasonable regulation' standard in arms rights cases.").

doctrine, this kind of common law categoricalism should be able to avoid many of the problems of over- and underinclusion.

Categories developed through common law categoricalism "promote economies for the judicial decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts."[270] These balancing-based categories, like all other categories, essentially preclude the exercise of judicial discretion[271]—"once the categories are established, further ad hoc balancing is cut off"[272]—but they are nonetheless a product of it. Unlike categories created out of whole cloth in the first instance, they represent the considered judgment of courts over the course of many cases: the "genius of the common law."[273]

But not all categorical tests are honed and shaped through a history of repeated balancing. Some categorical tests, such as *Heller*'s, burst fully armored from the Justices' foreheads.[274] Such categories are usually justified on originalist or textualist grounds. Justice Black, for example, defended his First Amendment absolutism by saying, "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"[275] Justice Scalia embraces a similar view: "Just as that manner of ['plain meaning'] textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction."[276] Applying such an approach in *Crawford v. Washington*[277]—a case that, like *Heller*, involved a right to "confron-

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270 Sullivan, *supra* note 12, at 63.

271 *See infra* Part III.B (describing how categorical approach in *Heller* reduced discretion of lower courts deciding individual cases and increased power of Supreme Court establishing categories).

272 Sullivan, *supra* note 15, at 295 n.6.

273 *See* sources cited *supra* note 262 (describing "genius of the common law").

274 *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting) (describing majority's holding as creating definitions "out of whole cloth"). Kathleen Sullivan notes:

> One camp, epitomized by Justice Scalia, favors a flexible approach to precedent but favors rules at the interpretive and operative levels. The other camp, epitomized by the *Casey* joint opinion authors—Justices O'Connor, Kennedy and Souter—favors a rule of adherence to precedent but favors standards at the levels of interpreting precedents and constitutional text and fashioning operative doctrines.

Sullivan, *supra* note 12, at 112–13 (referencing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

275 Black, *supra* note 152, at 867.

276 Scalia, *supra* note 13, at 1184; *see also id.* ("[E]ven if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures.").

277 541 U.S. 36 (2004).

tation," albeit in a different context (that of the Sixth Amendment's Confrontation Clause)—the Court adopted a categorical rule barring the use at trial of statements made to police by an unavailable witness.[278] The Court found an originalist basis for this sharply defined rule, writing that the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people. . . . By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[279] Notably, Justice Scalia authored the majority opinions in both *Crawford* and *Giles v. California*,[280] another Sixth Amendment case, in which he wrote that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values."[281]

The basis for this approach seems to be a presumption that the Court can identify "original" categories and then trace their modern descendants. As Chief Justice Roberts said at oral argument in *Heller*, discussing the constitutionality of reasonable limitations on gun ownership: "[Y]ou would define 'reasonable' in light of the restrictions that existed at the time the amendment was adopted. . . . [W]e are talking about lineal descendents of the arms but presumably there are lineal descendents of the restrictions as well."[282] But, like the court of appeals below,[283] the majority in *Heller* failed to establish any meaningful relationship between modern categories and their historical ancestors. Nowhere was this more evident than in the Court's treatment of the District's safe-storage law[284]—the very subject of Chief Justice Roberts's comment—which had clear historical ancestors that the majority failed to distinguish on any principled basis. And, as

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278 *Id.* at 68–69.

279 *Id.* at 67–68.

280 128 S. Ct. 2678 (2008).

281 *Id.* at 2692. Indeed, the Court seems to have embraced categoricalism in a few notable recent criminal procedure cases. *See generally* Fisher, *supra* note 14, at 1506–10 (describing *Crawford* and *Blakely v. Washington*, 542 U.S. 296 (2004), which was also authored by Justice Scalia). The Court's decision in *Kennedy v. Louisiana*, rendered the day before *Heller*, created a categorical constitutional prohibition on the use of capital punishment for crimes that do not result in death. 128 S. Ct. 2641, 2665 (2008).

282 Transcript of Oral Argument, *supra* note 9, at 77; *see also id.* at 44 ("Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time . . . and determine . . . how this restriction and the scope of this right looks in relation to those?").

283 *See* Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007) (concluding that pistol, rifle, and long-barreled shotgun are logical descendants of Founding-era weapons).

284 *See supra* notes 154–62 and accompanying text (discussing safe storage law).

explained above,[285] it is simply impossible to trace the "descendants" of the original categories without knowing something about the principles behind them. Modern blogs are descendants of political pamphlets not because the Internet is a descendant of the printing press, a concept which is irrelevant to the First Amendment, but because both blogs and pamphlets are—or can be—methods of expressing viewpoints, a concept which is central to the First Amendment.

But *Heller* failed to identify its underlying values, making it difficult for future courts to recognize any lineal descendants of the original categories ascertained by the Court in *Heller*. Already, lower courts have begun to fill in the blanks in the majority's analysis, using the same kind of judicial discretion the majority seemed to abhor. In *United States v. Booker*, for instance, the district court found no "meaningful distinction between felons and persons convicted of crimes of domestic violence as predictors of firearm violence"[286] and therefore added "persons who have been convicted of a misdemeanor crime of domestic violence" to the list of people who are categorically excluded from Second Amendment coverage.[287] If the *Booker* court is right, and the likelihood of firearm violence is the guiding principle behind the categories, then perhaps future courts will carve out nonviolent felons from the ambit of the felon exception. This might be defensible, or even desirable, but it is in no way compelled by the *Heller* majority's valueless approach.[288]

The Court's awkward treatment of "original" categories reflects a deeply conflicted view of common law adjudication. On the one hand, the majority did not trust judges to balance the newly created "individual" Second Amendment right, nor even to continue applying the well-established common law self-defense exception. On the other hand, the majority implicitly *adopted* prior common law balancing by finding that the Second Amendment protects a right to use arms for traditionally "lawful" purposes like the common law right to self-defense[289]—a category of uses entirely defined by past laws and opinions, many of which would have been unconstitutional had they been evaluated under the majority's approach. In a similarly conflicted passage about the prefatory clause and the effectiveness of a modern militia, the majority acknowledged that "it may be true that no

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285 *See supra* notes 192–94 and accompanying text.

286 570 F. Supp. 2d 161, 164 (D. Me. 2008).

287 *Id.*

288 Despite the apparently clear lines it draws, the majority's approach does little to encourage national uniformity because it leaves to future courts the task of fleshing out its sparse framework.

289 *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2815–16 (2008).

amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right."[290] However, it is not "modern developments" that have "limited the degree of fit" or made it difficult for the people to arm themselves effectively against the federal government. Rather, it is a history of regulation, approved both explicitly and implicitly by courts, denying "the people" the ability to purchase rocket launchers, tanks, and missiles.

This demonstrates another potentially important difference between starting from categoricalism and starting from balancing: While balancing may eventually evolve into categoricalism through the usual mechanisms of common law, the reverse is not equally true. Where categoricalism has led to seemingly unacceptable results, the Court has instead attempted to cure the defects with more categoricalism—for example, by using categorical exclusions to carve out the disfavored results of categorical protection.[291] Thus balancing may eventually calcify into a category, but categories tend to beget more categories, either in the form of categorical exclusions or in the form of subcategories.

The evolution of the exclusionary rule is representative. In a series of cases culminating in *Mapp v. Ohio*,[292] the Court created a categorical rule that unconstitutionally seized evidence must be suppressed at trial.[293] But, over time, the Justices decided that this rule was too costly—an evaluation, of course, that is only intelligible in the context of some background constitutional value, such as the fair and practical administration of justice—and began to carve out categorical exceptions. Holding true to this categorical approach, the Court has since held that the exclusionary rule categorically does not apply where an officer has relied in good faith on a faulty warrant,[294] where a warrant was faulty because of a court clerk's error,[295] or where the evidence was seized as the result of a knock-and-announce viola-

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290 *Id.* at 2817.

291 As Schauer notes, such "rule-revision by judges might be a necessary pressure-release valve from rules the under- or over-inclusion of which would otherwise produce results of such unjustness or silliness as to exceed the capacity of a society to tolerate them." Schauer, *supra* note 13, at 687; *see also infra* notes 292–96 and accompanying text (discussing creation of exceptions to exclusionary rule).

292 367 U.S. 643 (1961).

293 *Id.* at 646–55; *see also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) (applying exclusionary rule).

294 United States v. Leon, 468 U.S. 897, 913 (1984).

295 Arizona v. Evans, 514 U.S. 1, 16 (1995).

tion.[296] Critically, however, there is some room for balancing in the *construction* of these categories: Evidence will not be excluded where the social cost of suppression outweighs the deterrence value of exclusion.[297] Though a product of balancing, the exclusionary rule is not a balancing test—a defendant may not argue that in his particular case, despite the usual rules, deterrence would be effective enough to justify the cost. And just as important for the present discussion, the categorical lines—as in First Amendment doctrine—are moored to background constitutional values: deterring police misconduct while minimizing the social cost of excluding probative evidence.[298]

All this is to say that where constitutional doctrine ends up may well depend on where it starts. The Second Amendment, like the First, might end up as a patchwork of categorical and balancing tests. But in order to get there in any kind of principled fashion, courts will need to better identify the values of the Second Amendment. By failing to do so, and by evincing an apparent distrust of the common law, *Heller* has made this a difficult task.

B. Increasing Judicial Power, Limiting Judicial Discretion

Categoricalism is above all a means of allocating decisionmaking power,[299] and *Heller*'s categoricalism is no exception. But although categorization may at first appear—and has often been justified—as a limitation on judicial power, *Heller* demonstrates that it is more properly described as a limitation on judicial *discretion* that increases the power of the category creator (here, the Supreme Court) and limits the power of the lower courts in individual cases.

One matter on which the Justices in *Heller* all seemed to agree was that judges should not actively be involved in decisions regarding gun control. Justice Stevens bemoaned the fact that the majority opinion "will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned

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296 Hudson v. Michigan, 547 U.S. 586, 599 (2006).

297 *See, e.g.*, *Leon*, 468 U.S. at 906–07 (weighing deterrent benefits against costs of exclusion).

298 *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) ("[W]e have held [the exclusionary rule] to be applicable only where its deterrence [of police misconduct] outweigh[s] its 'substantial social costs.'").

299 *See* Schauer, *supra* note 13, at 647 (discounting "frequently overstated arguments for certainty and predictability, and instead concentrat[ing] largely on rules as devices for the allocation of power"); *see also* Schauer, *supra* note 14, at 83 ("[W]e must understand the ways in which rules operate as instruments for the allocation of power."); *id.* at 84 ("I do want to suggest . . . that evaluating the appeal of ruleness cannot take place without confronting the question of *who* is making the constitutional decision.").

at any time in the 18th, 19th, or 20th centuries."[300] Justice Breyer agreed, saying that he could "find no sound legal basis for launching the courts on so formidable and potentially dangerous a mission."[301] And for Justice Scalia, the promotion of judicial restraint has always been one of the cardinal virtues of the rule-like categorical approach the majority applied. In his account, the standard-like balancing approach both demands too much of judges and gives them too much in return: "Only by announcing rules do we hedge ourselves in"; balancing, by contrast, permits judges to be guided by their "political or policy preferences"[302] in a particular case. Unsurprisingly, then, his opinion for the *Heller* majority characterized Justice Breyer's balancing approach as "judge-empowering" and said that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[303] Justice Breyer took "this criticism seriously," but did "not think it accurate."[304] He acknowledged that his own approach, "of course, requires judgment, but the very nature of the approach . . . limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize."[305] He finished: "The majority's methodology is, in my view, substantially less transparent than mine."[306]

The majority's characterization of balancing tests as not only opaque but "judge-empowering"—a charge that also has been made by Justice Black, among others[307]—was not necessarily accurate. To

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300 District of Columbia v. Heller, 128 S. Ct. 2783, 2847 (2008) (Stevens, J., dissenting). Justice Stevens continued:

> The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy.

Id.; *see also* Posner, *supra* note 3, at 33 ("The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding.").

301 *Heller*, 128 S. Ct. at 2870 (Breyer, J., dissenting); *see also id.* at 2860 (arguing for judicial deference to policy judgment of local legislature).

302 Scalia, *supra* note 13, at 1179–80 (arguing that rules-based approach precludes indulgence in these preferences).

303 *Heller*, 128 S. Ct. at 2821.

304 *Id*. at 2868 (Breyer, J., dissenting).

305 *Id.*

306 *Id.*

307 *See* Black, *supra* note 152, at 878 ("[A] balancing approach to basic individual liberties assumes to legislators and judges more power than either the Framers or I myself believe should be entrusted, without limitation, to any man or any group of men.");

the contrary, balancing often goes hand in hand with deference to the legislature. In free speech doctrine, "[a]d hoc balancing gained its dismal first amendment reputation in large part because its chief proponent, Justice Frankfurter, held as well a theory of great deference to legislative determinations."[308] Justice Breyer seems to have inherited Frankfurter's preferences both for balancing and for deferring to the legislature.[309]

Far from limiting judicial power, categorical opinions like *Heller* tend to increase it by giving judges the extraordinary responsibility of striking down popularly enacted legislation. While limiting judicial discretion is the very purpose of categoricalism,[310] it inevitably increases the power of those who establish the categories in the first place. And since it is usually higher courts—particularly the Supreme Court—that create categorical rules, categoricalism does not reduce the power wielded by the judiciary as a whole but simply takes it away from trial judges weighing interests in individual cases and gives it to appellate judges.

CONCLUSION

Categoricalism does not absolve judges of the difficult task of identifying constitutional values, and *Heller*'s purportedly originalist categoricalism risks incoherence by creating legal categories that are not grounded in any such values. The Court has confronted this problem before. Indeed, it has struggled for decades to draw coherent categorical lines in First Amendment doctrine. Although balancing tests generally prevail, categories and subcategories persist, sometimes as a result of repeated balancing. The resulting patchwork of categor-

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Sullivan, *supra* note 12, at 118 ("The vaguer and more unpredictable [a standard's] extension to the next situation with slightly different facts, the more it transfers power from the political branches to the courts.").

308 Schauer, *supra* note 34, at 303 (citing Dennis v. United States, 341 U.S. 494, 524–25, 542 (1951) (Frankfurter, J., concurring); WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 119–20 (1961)).

309 *See* Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 266 n.390 (2002) (noting "Justice Breyer's tendency to defer to Congress as a co-equal branch of government and his deference to government more generally"); *see also* United States v. Lopez, 514 U.S. 549, 617–29 (1995) (Breyer, J., dissenting) (arguing for deference to legislature with regard to Gun Free School Zones Act).

310 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) ("[C]ourts . . . should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense.").

ical and balancing tests is tied by a very fine thread to the presumed core values of the First Amendment, such as protecting political speech and preventing viewpoint discrimination. The next few decades are likely to see a similar struggle over categoricalism and balancing in the Second Amendment and perhaps a better explanation of that Amendment's core values.

It has been said that "the choice between [categorization and balancing] cannot successfully be explained by general constitutional theory,"[311] and it also may be true that the choice is at some level a "misleading oversimplification."[312] But it is an oversimplification that nevertheless demands attention[313] because it has consequences for the characterization and shape of constitutional law. In addition to determining doctrinal rules, the Court's selection of a categorical or balancing approach may reveal—or construct—constitutional values. At the very least, "categorization and balancing are practically if not logically distinct. Rhetorically they call forth very different efforts. And such differences give shifts between the modes their dynamic power—that's why the Court treats them as worth fighting over."[314] The fight rarely produces clear winners, and the resulting map of categorical and balancing tests generally reflects an uneasy doctrinal détente. But the possibility that the Second Amendment may eventually achieve this détente does not mean that it already has.

Near the end of the majority opinion in *Heller*, Justice Scalia suggests that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before [the Court]."[315] Indeed, there will be time yet for a hundred decisions (and for a hundred scholarly visions and revisions[316]) about the constitutional right that *Heller* created. But by

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311 Sullivan, *supra* note 15, at 317.

312 Schauer, *supra* note 13, at 653 n.11.

313 *See* Rubenfeld, *supra* note 29, at 788 ("The debate over balancing in free speech jurisprudence and elsewhere in constitutional law is an old story. But it is worth the attention it gets.").

314 Sullivan, *supra* note 15, at 309; *see also* Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319, 319 (1992) ("I agree that it can make some difference whether judges employ balancing tests instead of categorical tests."); Sullivan, *supra* note 12, at 59 ("When categorical formulas operate, the key move in litigation is to characterize the facts to fit them into the preferred category." (internal citation omitted)).

315 District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).

316 As T.S. Eliot wrote:

> There will be time, there will be time
> . . . .
> There will be time to murder and create,
> . . . .
> And time yet for a hundred indecisions,
> And for a hundred visions and revisions . . . .

casting the Second Amendment framework as categorical—subject to "exceptions" rather than "regulation"—the majority has set the Second Amendment on the First Amendment's road not taken. Whether that road leads gun-related rights to a similar destination as free speech remains to be seen.

T.S. ELIOT, *The Love Song of J. Alfred Prufrock*, *in* PRUFROCK AND OTHER OBSERVATIONS (1917), *reprinted in* T.S. ELIOT, COLLECTED POEMS: 1909–1962, at 3, 4 (Harcourt, Brace & World 1963).