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Heller's Problematic Second Amendment Categoricalism

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Until very recently, Second Amendment scholarship has focused almost exclusively on the question of whether the amendment protects an "individual" right to bear arms unrelated to any militia service. In *District of Columbia v. Heller*,¹ the Supreme Court answered this question in the affirmative for the first time. But *operationalizing* that right—creating constitutional doctrine to govern when, where, and how the government can regulate "Arms"—is an entirely different issue. And although it has largely been overlooked, *Heller's* "categorical," rather than "balancing," approach to this second question is no less important for the future of the Second Amendment than *Heller's* endorsement of an "individual" right. *Heller* owes much to the decades-old debate over categoricalism and balancing in First Amendment doctrine. And yet *Heller's* own categoricalism is deeply problematic, largely because the Court failed to identify the core value or animating purpose of the Second Amendment.

I. Categoricalism and Balancing

The two major modes of constitutional construction at work in the majority and dissenting opinions in *Heller* can be fairly described as categoricalism (embraced by Justice Scalia's majority opinion)² and balancing (endorsed in Justice Breyer's dissent).³ The difference between these two modes, which largely tracks the distinction between "rules" and "standards," has long been of interest to constitutional scholars. Balancing approaches, like standards, require a judge to weigh the interests of a rights-holder against the interests of a would-be regulator, attach appropriate weights based on the context (such as deference to the legislature or a fear of chilling speech), and determine which side is heavier. Categoricalism, on the other hand, is rule-like. It prohibits judges from engaging in this kind of interest-weighing. Instead, categoricalism asks only whether the case falls inside or outside of certain preexisting, outcome-determinative categories.

Although this difference may appear stark, the relationship between categoricalism and balancing is complicated and subtle. Some categories are simply "outcome-determinative" balancing tests where the weights on one side are so heavy that the balance always tips in their direction. Other "calcified" categories are the *results* of prior balancing tests. For example, if a court has determined in ninety-nine consecutive cases that the government's interest in banning a particular activity outweighs an individual's interest in engaging in that activity, then in the hundredth case, the court may simply decide that the activity is categorically unprotected and that no further balancing is needed. Finally, there is a kind of "whole cloth" categoricalism—often based on a textualist or originalist interpretivism—under which a court simply creates a new category without any prior balancing in individual cases. *Heller* employed this "whole cloth" categoricalism.

II. The Relevance of First Amendment Categoricalism

Although *Heller* would eventually throw the distinction between categoricalism and balancing into particularly sharp relief, the tension between them is nothing new. Fifty years ago, Justice Frankfurter, a great proponent of balancing, and Justice Black, who was famously absolutist, waged a pitched battle over whether categories or balancing would form the basis of free speech doctrine. By and large, Frankfurter prevailed. But First Amendment doctrine does contain some elements of categoricalism: categorical exclusions, such as obscenity and libel; subcategories, such as expressive conduct and commercial speech; and a few absolute rules, such as the flat ban on viewpoint discrimination. Significantly, the placement, protection, and contours of these categories seem to be justified by their proximity to core First Amendment values such as the protection of political viewpoints. Thus, obscenity and fighting words are too far removed from that core value to be protected by it; commercial speech is not too far to be protected but is not entitled to the same insulation as political speech; and political viewpoints are given absolute protection because they are at the very core of the Amendment's purpose. The principled categoricalism of First Amendment doctrine thus appears to track—at least roughly—the same core values that inform the Amendment's balancing tests.

The connection between categoricalism and constitutional values in the context of free speech has special relevance for the Second Amendment because, rightly or (often) wrongly, the First and Second Amendments have often been considered close cousins. This presumed relationship has proven especially attractive for those who support broad "individual" Second Amendment rights, as opposed to "collective" (that is, militia-related) rights. Now that *Heller* has given a clear victory to the "individual" rights view, some argue that Second Amendment rights should be protected by the same kind of strict scrutiny that applies in some areas of the First and Fourteenth Amendments.⁴ Thus, free speech doctrine, including its mix of balancing and categorical approaches, will almost certainly play an important role (justifiably or not) in the evolution of Second Amendment doctrine.

III. Categoricalism and Balancing in *Heller*

Given this background, it is unsurprising that the *Heller* litigation drew heavily on First Amendment doctrine, including its mix of categories and balancing. The D.C. Circuit opinion striking down the District of Columbia's gun regulations embraced the "individual" right interpretation of the Second Amendment and created a categorical approach to govern that right.⁵ Although this categorical approach went mostly unnoticed in the *Heller* commentary—which focused almost exclusively on the individual rights issue—it was deeply significant for the future of the Amendment. Indeed, the appellate court's apparent categoricalism led the U.S. Solicitor General to file an amicus brief opposing the Circuit Court's decision, while supporting the Court's conclusion that the Second Amendment protects an individual right disconnected from militia or military service.⁶

Tracking this division, the Justices disagreed sharply about both the "individual" nature of the Second Amendment right and the standard of review (or lack thereof) for future Second Amendment cases. The debate between categoricalism and balancing, which had long been central to the evolution of First Amendment doctrine, again took center stage, this time with regard to the Second Amendment. In *Heller*, however, the categorizers prevailed over the balancers. In dissent, Justice Breyer took for granted the "individual" nature of the Second Amendment right, but criticized Scalia's majority opinion for failing to justify, or even identify, a standard of review to govern it.⁷ To fill the void, Justice Breyer proposed a Frankfurter-style balancing test. "The ultimate question" under Breyer's approach would be "whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."⁸

The majority was having none of this. Justice Scalia responded: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing'

approach.⁹ The majority instead embraced a categorical approach that explicitly and emphatically rejected any balancing of individual and government interests.¹⁰ And yet, much as Justice Black had done fifty years ago, the majority created categorical carve-outs to its categorical rule. In a passage that comes closer than anything else in *Heller* to being a roadmap for future gun regulation, the majority clarified that:

[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, 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.¹¹

In addition to these three carve-outs, the majority also denied Second Amendment coverage to “dangerous and unusual” weapons and weapons with no military purpose.¹² Thus, the majority created at least five carve-out categories: the mentally ill, felons, sensitive places, dangerous and unusual weapons, and weapons with no military purpose. Each of these categories could arguably be justified under Justice Breyer’s interest-balancing approach, since for each, the government could likely provide sufficiently weighty reasons for limiting them. But it is far from clear how they can be justified under the majority’s purported originalist-categorialist approach.

IV.

Heller’s Categorism Fails to Identify Core Second Amendment Values

What is most troubling about the majority’s carve-outs is not their existence or even their content, but the fact that they cannot be justified by reference to any possible core Second Amendment purpose or value. As noted, the remnants of categorism in free speech doctrine seem rooted in general understandings of the core values of the First Amendment. Thus, the government is strictly barred from directly discriminating against unpopular political viewpoints (the right to dissent being perhaps *the* core value of the Amendment), whereas non-political obscenity is completely unprotected, since it is too far removed from that core value. *Heller’s* categorical rules have no such value-based justification.

There are three major candidates for the core value of the Second Amendment: (1) protecting state militias from federal interference,¹³ (2) checking federal tyranny through a populace of armed citizens,¹⁴ and (3) enabling private self-defense against criminals and other threats to personal safety.¹⁵

The first of these candidates is the issue at the heart of the debate between the individual and militia-related views of the Amendment. Although the militia-based right view arguably prevailed in law and scholarship for nearly two centuries, the *Heller* Court flatly rejected it, and thus it cannot form a proper basis for any future Second Amendment categorism. At various points in its opinion, the majority did, however, endorse both of the two other possible candidates: the value of checking government tyranny¹⁶ and the value of armed, individual self-defense.¹⁷ But the majority did not choose between these two views of the core value of the Second Amendment, which lead to very different categorial results. Indeed, it is impossible to justify the majority’s categorial carve-outs under either view of the Amendment’s core values.

If the underlying purpose of the Second Amendment is the prevention of governmental tyranny, either by individually armed citizens or by organized militias, then it makes very little sense to hold—as the majority did—that the Second Amendment does not extend to “sensitive places” like government buildings. Indeed, arms-bearing in a government building would perhaps be the prototypical method of stopping government tyranny, like praying in a house of worship might be for the Free Exercise Clause. Nor, under the tyranny-prevention model, would it make sense to exclude from Second Amendment protection “dangerous and unusual” weapons like rocket launchers and grenades. Indeed, those would be *precisely* the kinds of “Arms” one would need in order to fight off or deter the U.S. military. The majority, seemingly aware of this tension, noted that “it may be true that no 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.”¹⁸ But of course it is not generalized “modern developments” that have limited citizens’ ability to bear devastatingly powerful arms against their government, but rather *laws* against owning such weapons. Those laws, under a categorialist anti-tyranny view of the Amendment, would be almost self-evidently unconstitutional.

Nor can the majority’s categories be justified under a self-defense reading of the Amendment. If personal self-defense is the core value of the Second Amendment, then it makes little sense to exclude from coverage, as the majority does, weapons with no military utility. Indeed, the military utility of a weapon should be completely irrelevant to a right whose purpose is *personal* self-defense. Nor does it make sense to categorically bar the mentally ill and felons from invoking a right to armed self-defense, as the majority does. While these two groups are subject to some legal restrictions, both groups presumably have a right to bodily integrity, have some rights under other Amendments (including the First), and—at least until *Heller*—had a common law right to self-defense, even *armed* self-defense. A balancer might well determine that the government’s legitimate interest in preventing felons and the mentally ill from possessing guns outweighs any right they have to armed self-defense, but this kind of interest-balancing approach is off limits to the originalist-categorialist.

The self-defense reading seems to be the majority’s preferred approach. But even holding aside the impossibility of reconciling the self-defense view and the majority’s categorial carve-outs, it is difficult to identify exactly what right of self-defense the majority means to categorically protect. After all, the common law has long recognized self-defense as a defense to civil and criminal liability. Does the Second Amendment constitutionalize this common law right? Or does it constitutionalize a right to *armed* self-defense, while leaving other forms of self-defense covered by the common law exception? The majority implies the latter, suggesting the odd conclusion that a person has a constitutional right to shoot an intruder, but not to stab him.

More to the point, what *kinds* of laws are vulnerable to constitutional challenge under the self-defense reading? Undoubtedly, *Heller’s* most widely recognized holding was the Court’s invalidation of the District’s ban on handguns, but the Court also struck down the District’s safe storage requirement, which required guns to be kept “unloaded and disassembled or bound by a trigger lock or similar device.”¹⁹ Undoubtedly, this law *effectively* burdened an individual’s right to use a gun in self-defense, since a legally stored gun would have to be unlocked and loaded before use. But instead of focusing on this cost (which the District argued was justified by its benefits, such as limiting unauthorized gun use by children), the majority struck down the trigger lock requirement because it did not contain an *explicit* self-defense exception. The District—joined by the Solicitor General on this point²⁰—argued that the law should be read, like any generally applicable law, as containing an implicit common law self-defense exception. The majority rejected this argument, saying that the trigger lock requirement “ma[de] it impossible for citizens to use [guns] for the core lawful purpose of self-defense and [was] hence unconstitutional.”²¹ Nor was the majority swayed by the existence of various Founding-era laws which, like the trigger lock requirement, effectively burdened the right to armed self-defense (for example, by requiring safe storage of gun powder) and which contained no explicit self-defense exception. The majority found that these laws either would not deter the use of weapons in self-defense, or would not be enforced against those who did use weapons for such purposes.²² The District of Columbia’s law enforcement officials, however, apparently could not be so trusted.²³

Conclusion

Despite their relatively bright lines, *Heller’s* categories create more questions than they answer. Most fundamentally, they raise the question of what the core values of the Second Amendment are. Because the majority opinion in *Heller* neither reflects nor enables a clear view of these constitutional values, its categorialism is deeply problematic. ☒

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1. 128 S. Ct. 2783 (2008). [↗](#)
2. *Id.* at 2821. [↗](#)
3. *Id.* at 2847. [↗](#)
4. Roughly speaking, strict scrutiny requires that any government interference with a right be narrowly tailored to further a compelling state interest. This standard has long been known as strict in theory but fatal in fact, because it was thought to be impossible to satisfy. Although the Court has emphasized in recent years that strict scrutiny is not always fatal, it remains an undoubtedly difficult test for a challenged statute to meet. [↗](#)
5. *Parker v. District of Columbia*, 478 F.3d 370, 394-401 (D.C. Cir. 2007). [↗](#)
6. 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. [↗](#)
7. *Heller*, 128 S. Ct. at 2868 (2008) (Breyer, J., dissenting). [↗](#)
8. *Id.* at 2854. [↗](#)
9. *Id.* at 2821 (majority opinion). [↗](#)
10. *Id.* at 2799. [↗](#)
11. *Id.* at 2816-17. [↗](#)
12. *Id.* at 2814 (denying coverage to weapons with no reasonable relationship to preservation of efficiency of well regulated militia); *Id.* at 2817 (denying coverage to dangerous and unusual weapons). [↗](#)
13. Brief for Petitioners at 21-22, 26, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 102223. [↗](#)
14. Respondent's Brief at 30-32, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 336304. [↗](#)
15. Brief Amicus Curiae of the Heartland Institute in Support of Respondent at 3-8, 11, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 405555. [↗](#)
16. *Heller*, 128 S. Ct. at 2798-99. [↗](#)
17. *Id.* at 2818; *see also id.* at 2847 (Breyer, J., dissenting). [↗](#)
18. *Id.* at 2817 (majority opinion). [↗](#)
19. D.C. Code Ann. § 7-2507.02 (LexisNexis 2001), *invalidated by Heller*, 128 S. Ct. 2783. [↗](#)
20. Brief for the United States as Amicus Curiae, *supra* note 6, at 31. [↗](#)
21. *Heller*, 128 S. Ct. at 2818. [↗](#)
22. *Id.* at 2819-20. [↗](#)
23. *See id.* at 2853-54 (Breyer, J., dissenting). [↗](#)

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