

2019

The Second Amendment as a Fundamental Right

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "The Second Amendment as a Fundamental Right" (2019). *Faculty Publications*. 1950.
<https://scholarship.law.wm.edu/facpubs/1950>

Copyright c 2019 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The Second Amendment as a Fundamental Right

by TIMOTHY ZICK^{1*}

Introduction

The Second Amendment has been suffering from an inferiority complex. Litigants, scholars, and judges have complained that the right to keep and bear arms is not being afforded the respect and dignity befitting a “fundamental” constitutional right. They have asserted that, both on its own terms and relative to rights in the same general class, the Second Amendment has been disrespected, under-enforced, and orphaned. They have argued that courts have treated the Second Amendment as “peripheral,” “fringe,” “anachronistic,” “second rate,” and “second-class.”² The Second Amendment has been described as “the Rodney Dangerfield of the Bill of

* John Marshall Professor of Government and Citizenship, William & Mary Law School. I would like to thank Joseph Blocher and Eric Ruben for providing thoughtful comments on a draft of the Article. I would also like to thank the Giffords Law Center and the *Hastings Constitutional Law Quarterly* for organizing the symposium “*Heller* at 10: A Symposium on the Last – and Next – Decade of the Modern Second Amendment.”

1. See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting) (arguing that the Second Amendment has been treated less favorably than other constitutional rights); Amicus Curiae Brief of National Rifle Association of America in Support of Petitioner at 22, *Walker v. United States*, 136 S. Ct. 2387 (2016) (No. 15-1027) (“The rights secured by the Second Amendment are not second-class rights, and this Court should grant certiorari to ensure that they are not relegated to that disfavored status.”).

2. See *Mance v. Sessions*, 896 F.3d 390, 395–96 (5th Cir. 2018) (Willet, J., dissenting) (“Constitutional scholars have dubbed the Second Amendment ‘the Rodney Dangerfield of the Bill of Rights.’ As Judge Ho relates, it is spurned as peripheral, despite being just as fundamental as the First Amendment. It is snubbed as anachronistic, despite being just as enduring as the Fourth Amendment. It is scorned as fringe, despite being just as enumerated as the other Bill of Rights guarantees.”); Robert J. Cottrol, *Taking Second Amendment Rights Seriously*, 26 HUM. RTS. 5, 5 (Fall 1999) (“[T]he Second Amendment has become the Rodney Dangerfield of the Bill of Rights . . .”). Note that the Cottrol article was published a decade *before* the Supreme Court recognized an individual’s right to keep and bear arms. For those unfamiliar with the comedian Rodney Dangerfield and his “no respect” routine, see *Rodney Dangerfield*, WIKIPEDIA, https://en.wikipedia.org/wiki/Rodney_Dangerfield (last visited January 28, 2019).

Rights” and even compared to Rosa Parks—i.e., a constitutional right that is forced to sit at “the back of our constitutional bus.”³

This Article assesses the full range of “second-class” claims. I concede at the outset that comparisons across constitutional provisions, which most “second-class” claims invite or entail, are a complicated exercise.⁴ Among other things, they suggest some agreed-upon normative basis for determining whether or when particular rights are being disrespected or under-enforced. The baselines for making such claims are far from clear, and they involve contested normative judgments.⁵ However, judged according to all of the benchmarks at our disposal—conceptual, qualitative, quantitative, and doctrinal—“second-class” claims generally fall short.

Indeed, reviewing the available evidence, the Article generally rejects “second-class” claims as either false or significantly overstated. Many of the claims are based on false premises, including the notion that the Supreme Court and lower courts immediately and aggressively expand the scope of fundamental rights once they are recognized, that all fundamental rights are created and enforced equally, that the absence of strict scrutiny is demonstrative of lower-class status, and that low success rates demonstrate under-enforcement.⁶ As recognized in *District of Columbia v. Heller*⁷ and interpreted in the lower courts, the Second Amendment exhibits all the hallmarks of a fundamental constitutional right. It is a non-economic, individual dignity right that is considered “implicit in the concept of ordered liberty.”⁸

3. See Cottrol, *supra* note 2. See also John Yoo & James C. Phillips, *The Second(-Class) Amendment*, NAT'L REV. (Nov. 19, 2018), <https://www.nationalreview.com/2018/11/supreme-court-second-amendment-rights/>.

4. See Darrell A. H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 37 (2018) (observing that among other things such comparisons require controlling for variations among rights and rendering them “interchangeable”).

5. *Id.* at 36–37 (“Inescapably, whether you think the Second Amendment is being over- or under-enforced, or optimally enforced, is a normative judgment dependent on other factors.”).

6. See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (observing that strict scrutiny has not been a reliable or consistent indicator of fundamentality); Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L. J. 1434 (2018) (examining success rates in Second Amendment cases).

7. 554 U.S. 570 (2008).

8. See *id.* at 628–29. See also *McDonald v. Chicago*, 561 U.S. 742, 761, 767 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Constructed in the image of the Free Speech Clause and analogized in those terms by many courts,⁹ the right to keep and bear arms exerts a powerful influence on constitutional discourse and political outcomes.¹⁰ To be sure, success rates for Second Amendment claims have been low, and lower courts have not generally interpreted *Heller* broadly. However, the available evidence does not show that either the results or the restraint are the product of judicial hostility, resistance, or political ideology.¹¹ Indeed, many “second-class” claims appear to be disagreements with the merits of lower court interpretations of *Heller* or criticisms of the manner in which the Court itself defined and limited the right to keep and bear arms in the first place. While it is true that *Heller* has been “narrowed from below,” it is not true that this narrowing was either unauthorized by the Supreme Court or unreasonable.¹² Indeed, as Richard Re has observed, “even if lower courts have not adhered to the best reading of *Heller*, they have interpreted the decision reasonably.”¹³

As this Article is going to print, one of the standard “second-class” claims—that the Supreme Court has abandoned or “orphaned” the Second Amendment—has already been answered.¹⁴ While the Supreme Court has indeed been silent for a decade, thus leaving to lower courts the task of constructing Second Amendment doctrines, the Court has recently granted certiorari in a Second Amendment case.¹⁵ Even before the Court granted review, it was clear that the Court had not abandoned the Second Amendment for all time.¹⁶ Indeed, its decade-long silence was not exceptional. Other fundamental rights have experienced greater

9. See *Heller*, 554 U.S. at 582, 595 (invoking First Amendment); David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017) (discussing court’s reliance on First Amendment in Second Amendment decisions).

10. See generally Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014).

11. See *infra* Parts II and III.

12. Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 GEORGETOWN L.J. 921, 961 (2016).

13. *Id.* at 962.

14. See Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17, 20 (2018) (“The oracular Court has maintained a resolute silence now for nearly a decade, while the notionally ‘inferior’ priesthood has been charged with providing answers to a plethora of concrete cases.”).

15. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), cert. granted, WL 271961.

16. See Josh Blackman, *Justice Thomas: Second Amendment is not a ‘Second-Class Right,’* NAT’L REV. (Dec. 8, 2015), <http://www.nationalreview.com/article/428173/justice-thomas-second-amendment-not-second-class-right-josh-blackman> (“By refusing to intervene when lower courts disregard the right to keep and bear arms, the Supreme Court has done exactly what Chicago wanted, and abdicated this cornerstone of the Bill of Rights.”).

abandonment, and some even apparent exile. Thus, nothing about the Supreme Court's post-*Heller* treatment of the Second Amendment suggested its "second-class" status.¹⁷

In short, if there were a "Rodney Dangerfield Award" for fundamental constitutional rights, the Second Amendment would not currently be a very strong contender. In any event, our experience with fundamental rights shows that what courts have made of the Second Amendment in its first decade will not dictate what the right will become in subsequent decades. For firearms proponents, there are reasons to be optimistic in this regard. The Second Amendment's inferiority complex has led to calls for recognition of a kind of super-right, one defined in absolute terms and buttressed by the most rigid standards.¹⁸ In light of the Second Amendment's actual status, such exhortations represent a significant and ultimately unwise over-compensation. Whatever it becomes, by whatever dynamics will ultimately affect it, the Second Amendment's path should be determined according to an accurate assessment of both its actual and relative status among fundamental constitutional rights. Its development should not be the product of over-compensation by the Supreme Court.

Part I provides a basic typology of the various "second-class" claims that have been advanced by litigants, scholars, and judges. "Second-class" arguments may be largely strategic or rhetorical—a means of goading, or perhaps guilt-tripping, the Supreme Court into reviewing and invalidating laws that burden Second Amendment rights.¹⁹ Part I instead treats the claims as substantive and normative. It identifies four types of "second-class" claims: conceptual, doctrinal, enforcement-related, and attitudinal. Critics complain that the Second Amendment has not been properly conceptualized or defined as a fundamental right, has been subjected to "second-class" doctrinal treatment, has been under-enforced by courts; and has been marginalized and disrespected owing to judicial bias. The remainder of the Article challenges these four general claims.

17. See, e.g., Ilya Shapiro & Matthew Larosiere, *The Supreme Court is too Gun-Shy on the Second Amendment*, WALL ST. J. (Jan. 2, 2019), <https://www.wsj.com/articles/the-supreme-court-is-too-gun-shy-on-the-second-amendment-11546473290>. The claim that the Supreme Court has "abandoned" the Second Amendment is discussed in Part V.D.

18. See, e.g., Todd E. Petty, *The N.R.A.'s Strict Scrutiny Amendments* (U. Iowa Legal Studies Research, Paper No. 2018-17, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244081&download=yes (analyzing N.R.A. proposals to amend state constitutions to provide that Second Amendment burdens must survive strict scrutiny and describing them as an attempt to build "an iron wall around" gun rights).

19. See Darrell A. H. Miller, *The Second Amendment and Second-Class Rights*, HARV. L. REV. BLOG (Mar. 5, 2018), <https://blog.harvardlawreview.org/the-second-amendment-and-second-class-rights/> (suggesting that such claims may be rhetorical).

Part II argues that judged according to traditional indicia of constitutional rights in general, and fundamental rights in particular, the Second Amendment has been conceived and defined as a fundamental right. In *Heller* itself and post-*Heller* lower court decisions, the Second Amendment has been conceptualized as a non-absolute, but strongly constituted, constitutional right that can sometimes trump ordinary policy concerns. In these basic and minimal respects, at least, the Second Amendment bears the hallmarks of a fundamental constitutional right.

Part III focuses on “second-class” enforcement claims. It carefully reviews all of the available qualitative and quantitative literature on the subject of Second Amendment enforcement and concludes that the available evidence does not support several “second-class” enforcement claims. The evidence does not support claims of outright hostility and widespread resistance to *Heller* or to Second Amendment claims and claimants. It is the case that some lower court decisions express the sort of institutional concerns that sometimes indicate under-enforcement of constitutional norms.²⁰ However, these statements are equally likely to be associated with principles of judicial restraint or judicial minimalism. Further, *Heller*’s own ambiguities may be responsible for lower court reticence to expand Second Amendment rights beyond the parameters the Court established. The data show that Second Amendment success rates are notably low.²¹ However, that fact alone does not demonstrate either under-enforcement of the right to keep and bear arms itself or a comparative disadvantage with regard to other constitutional rights.²² Evidence of ideological or attitudinal bias affecting Second Amendment claims is also weak.²³ Finally, the evidence shows that in Second Amendment cases, courts are using standards and methodologies that are common to fundamental rights claims.²⁴ The available data strongly suggest that the Second Amendment is being legalized and normalized as part of the Constitution’s existing system of fundamental rights. That process will continue as the Supreme Court and lower courts decide more Second Amendment cases.

Part IV more directly addresses claims that the Second Amendment has been treated as “second-class” *relative to other fundamental constitutional*

20. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

21. See, e.g., Ruben & Blocher, *supra* note 6.

22. See discussion *infra* Part IV.B.

23. See generally Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WILL. & MARY BILL RTS. J. 827 (2017) (observing that available empirical evidence does not support the claim that gun rights cases are politically charged).

24. See Ruben & Blocher, *supra* note 6.

rights. The claim that all fundamental rights are created and enforced on equal terms is demonstrably false. Moreover, within the existing rights hierarchy, both on its own terms and relative to other fundamental rights in its class, the Second Amendment is hardly a B-list right. To sharpen the comparative lens, the Part focuses in particular on a favorite comparator for Second Amendment “second-class” claimants—the Free Speech Clause. It first compares the two rights in their respective first decades of enforcement. It then assesses “second-class” claims against contemporary free speech and other fundamental rights standards. These comparisons offer important, but perhaps surprising, insights in terms of current arguments for “first-class” status on behalf of the Second Amendment. One insight is that the real source of “second-class” claimants’ angst is *Heller* itself, which appears to articulate a rather narrow conception of the right to keep and bear arms. Another is that treating every law or regulation that incidentally burdens Second Amendment rights as subject to heightened scrutiny would provide *favored*, not equal, treatment for the right to keep and bear arms. In short, it would produce an anomaly in the fundamental rights hierarchy: a kind of super-right. The Part concludes with a critical assessment of the claims that the Second Amendment has been orphaned, abandoned, or neglected, particularly relative to other fundamental rights. In this sense, as in others, “second-class” claims overreach.

The Article’s Conclusion briefly looks forward to the Second Amendment’s second decade and beyond. The substance and status of fundamental rights can change markedly over time. The scope and meaning of the Second Amendment has not been settled in its first post-recognition decade, any more than the Free Speech Clause was forever defined by the same era. The Supreme Court will soon clarify, and likely expand, the scope of the right to keep and bear arms. However, like other rights in its class, the Second Amendment is not likely to become the absolute right that some advocates desire. The right to keep and bear arms is likely to operate much as freedom of speech and other fundamental rights do—as a strong trump in some cases, but a right that is subject to certain limits in the name of other rights or public interests. Those limits and interests ought to be carefully considered against a backdrop that paints an accurate picture of the Second Amendment in its first decade.

I. A Typology of “Second-Class” Claims

The claim that the Second Amendment is, or has been treated as, a “second-class” constitutional right takes many forms.²⁵ This Part develops a basic typology of such claims. It assumes that there is substance to the “second-class” claims—in other words, that they are not merely rhetorical or instrumental complaints intended to influence judicial or public opinion (although they may serve that purpose as well).²⁶ “Second-class” arguments can be somewhat difficult to define and separate. They are not always precisely drawn. They also share in common a comparative component, which often suggests either (a) all fundamental rights are treated equally,²⁷ or (b) there is indeed a hierarchy of rights and the Second Amendment has been improperly relegated to its cellar.²⁸ The first of these complaints is demonstrably false, and the Article disputes the second. In any event, some useful distinctions can be drawn and these allow for a holistic analysis of “second-class” claims. There are four types or forms of “second-class” claim: conceptual, enforcement-related, doctrinal, and ideological. This Part describes the basic claim types. The remainder of the Article critically analyzes “second-class” claims in all their forms.

A. Conceptual

One version of the “second-class” critique is that the Second Amendment has not been properly conceptualized or defined as a fundamental constitutional right. The basic complaint is that the Second Amendment has not been properly elevated, in conceptual terms, to “fundamental” status.²⁹

25. See Miller, *supra* note 19 (suggesting that such claims may be rhetorical, descriptive, or normative).

26. See *id.* (suggesting that some “second-class” claims may be merely rhetorical).

27. See *Peruta v. California*, 137 S. Ct. 1995, 1999 (Thomas, J., with whom Gorsuch, J. joins, dissenting) (“The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights.”).

28. See Petitioners’ Reply Brief at 2, *Bonidy v. United States Postal Service*, 136 S. Ct. 1486 (2016) (No. 15-746) (“This Court’s review is further warranted because the deferential form of intermediate scrutiny applied by the panel majority below is inconsistent with this Court’s precedents regarding how infringements on fundamental rights are analyzed and demonstrates how the lower courts are turning the Second Amendment into a second-class right.”).

29. See, e.g., *Peruta v. County of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (“The Second Amendment is not a ‘second-class’ constitutional guarantee.”); *Voisine v. United States*, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting) (“In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to ‘relegat[e] the Second Amendment to a second-class right.’” (quoting *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari))); *Silvester v.*

This form of “second-class” argument is based, in part, on the notion that constitutional rights—in particular “fundamental” rights—are part of a distinct class of rights. These rights, which exhibit certain indicia of fundamentality, are entitled to special—and equal—treatment by courts.³⁰

In its most extreme form, this form of “second-class” claim asserts that the Second Amendment is not being accorded the status of a “right” at all, in the sense that it does not constrain government action within its domain. In its more particular form, the argument is that the Second Amendment has not been conceptualized as a strong trump on certain governmental actions. Rather, it has operated as one among many competing policy considerations that legislatures take into account.

These claims require a basic understanding of what it means to assert that something is, or is not, a constitutional “right.” The more specific form assumes that there are common and agreed-upon indicia of fundamentality as the concept pertains to rights. Conceptual and definitional claims, like other “second-class” arguments, have a comparative aspect. They rest in part on the premise that relative to other rights of the same class, the Second Amendment has been conceptually misinterpreted or disfavored.

B. Doctrinal

Another form of “second-class” argument focuses explicitly on doctrinal comparisons between the Second Amendment and other fundamental constitutional rights, including the First Amendment’s free speech right. Critics have argued that Second Amendment doctrine, which has developed in the lower courts, is not appropriate for a fundamental right.³¹ Some have also asserted that the Supreme Court’s failure to clarify

Becerra, 138 S. Ct. 945, 952 (Thomas, J., dissenting) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”); *Peruta*, 137 S. Ct. at 1999 (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting) (“I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.”). See also Transcript of Oral Argument at 35–39, *Voisine*, 136 S. Ct. 2272 (2016) (No. 14-10154); Josh Blackman, *Justice Thomas Speaks Truth to Power: Second Amendment is not a Second-Class Right*, JOSH BLACKMAN’S BLOG (Mar. 1, 2016), <http://joshblackman.com/blog/2016/03/01/justice-thomas-speaks-truth-to-power-second-amendment-is-not-a-second-class-right/> (referring to a “rank double standard” and concluding that “Thomas’s questions from the bench are meant to illicit [sic] the subjugation of the Second Amendment”).

30. See, e.g., *Young v. Hawaii*, 896 F.3d 1044, 1051 (9th Cir. 2018) (“we remain ever mindful not to treat the Second Amendment any differently from other individual rights.”).

31. See Petitioners’ Reply Brief at 2, *Bonidy*, 136 S. Ct. 1486 (No. 15-746) (“This Court’s review is further warranted because the deferential form of intermediate scrutiny applied by the panel majority below is inconsistent with this Court’s precedents regarding how infringements on fundamental rights are analyzed and demonstrates how the lower courts are turning the Second

Second Amendment doctrines has disfavored or disadvantaged the right to keep and bear arms vis-à-vis other fundamental rights.³²

Doctrinal “second-class” claims are related to enforcement claims, which are discussed below.³³ The basic premise is that courts have applied more lenient doctrinal frameworks or standards to Second Amendment claims than either fundamental status dictates or a comparative assessment of like-situated fundamental rights reveals to be correct.³⁴ This is part of the basis for the conceptual claim that the Second Amendment rests at or near the bottom of the Constitution’s fundamental rights hierarchy. Through either active misinterpretation or neglect, critics have claimed, the Second Amendment has been doctrinally disfavored.

As we will see, like other “second-class” claims, comparative doctrinal claims pose analytical challenges. While there are some overarching themes and methods, the Supreme Court has developed fundamental rights doctrines in an essentially *ad hoc* manner. We can certainly rely on the existence of categorical rules, interest balancing, and levels of scrutiny to some degree. However, precise comparisons across fundamental rights are difficult. Nevertheless, we can identify and compare the doctrinal conceptions or methods that are articulated and held to apply to different fundamental rights.

Amendment into a second-class right.”); Petition for Writ of Certiorari at 12, *Jackson v. City of San Francisco*, 135 S. Ct. 2799 (2015) (No. 14-704) (“[E]ven after this Court’s admonishment that the Second Amendment may not ‘be singled out for special—and specially unfavorable—treatment,’ courts continue to do just that. Whether through summary reversal or plenary review, this Court should use this opportunity to put an end to this disturbing trend.” (citation omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778–79 (2010))).

32. See *Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting) (“The Court’s refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court’s willingness to summarily reverse courts that disregard our other constitutional decisions.”). As Justice Thomas wrote in another case:

The Court has not heard argument in a Second Amendment case in over seven years—since March 2, 2010, in *McDonald v. Chicago*, 561 U.S. 742 (2010). Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.

Peruta, 137 S. Ct. at 1999 (Thomas, J., dissenting).

33. See *infra* Part I.C.

34. See *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2799–800 (Thomas, J., dissenting) (“Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document . . .”).

C. Enforcement

A central “second-class” claim is that the lower courts, and again the Supreme Court by virtue of its neglect, have “underenforced” the Second Amendment in its first decade.³⁵ This claim focuses primarily on actual results in court cases—wins and losses. However, it is related to the conceptual and doctrinal claims, in the sense that the latter are presumably influencing case results. Underenforcement has been a common refrain in petitions for certiorari.³⁶ It has also been emphasized in academic literature.³⁷

Enforcement claims rely heavily—although not exclusively—on the notably low success rates of Second Amendment claimants. They also rely on things such as the “overall effect and tenor” of lower court decisions and an impression that courts are approaching Second Amendment claims with unwarranted skepticism.³⁸ Some critics paint a rather dystopian vision of the

35. See generally Sager, *supra* note 20 (discussing concept of under-enforced constitutional norms).

36. See, e.g., Brief for National Rifle Association of America as Amici Curiae Supporting Petitioners for Writ of Certiorari at 16, Friedman, 136 S. Ct. 447 (No. 15-133) (“Rather than perform their duty to enforce the Constitution, lower courts are attempting to eradicate the Second Amendment by disregarding the Bill of Rights and the precedents of this Court.”); Brief for the American Civil Rights Union as Amici Curiae Supporting Petitioners at 4, *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (No. 12-845) (“The court below also embraced stepchild, second class status for the Second Amendment, contrary to both *Heller* and *McDonald*.”); Petitioners’ Reply Brief at 2, *Bonidy v. U.S. Postal Serv.*, 136 S. Ct. 1486 (2016) (No. 15-746) (“This Court’s review is further warranted because the deferential form of intermediate scrutiny applied by the panel majority below is inconsistent with this Court’s precedents regarding how infringements on fundamental rights are analyzed and demonstrates how the lower courts are turning the Second Amendment into a second-class right.”); Petition for Writ of Certiorari at 12, *Jackson v. City of San Francisco*, 135 S. Ct. 2799 (2014) (No. 14-704) (“[E]ven after this Court’s admonishment that the Second Amendment may not ‘be singled out for special—and specially unfavorable—treatment,’ courts continue to do just that. Whether through summary reversal or plenary review, this Court should use this opportunity to put an end to this disturbing trend.” (citation omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778–79 (2010))); Reply Brief for Petitioner at 3, *Nat’l Rifle Ass’n of Am. v. McCraw*, 134 S. Ct. 1365 (2014) (No. 13-390) (“We urge this Court to grant review in this case both to reaffirm that the Second Amendment’s guaranty is not a ‘second-class’ fundamental right and to establish that responsible, law-abiding 18-to-20-year-old adults are not second-class citizens.”).

37. See, e.g., Kopel & Greenlee, *supra* note 9, at 196 (2017) (concluding, based on qualitative assessment, that lower courts are generally under-enforcing the Second Amendment); Robert J. Cottrol & George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 GEO. J.L. & PUB. POL’Y 17, 33 (2016) (arguing that lower courts are “undercutting . . . Supreme Court precedent” in a way that is suggestive of “something other than a desire to control crime”); Michael P. O’Shea, *The Steepness of the Slippery Slope: Second Amendment Litigation in the Lower Federal Courts and What It Has to Do with Background Recordkeeping Legislation*, 46 CONN. L. REV. 1381, 1425 (2014) (characterizing the “tenor” of lower court Second Amendment decisions as “deeply skeptical, bordering on hostile, to claims that the Second Amendment limits government action”).

38. See O’Shea, *supra* note 37, at 1409–10.

Second Amendment's enforcement in the lower courts. They argue that there is an "assault on gun rights" by lower courts, and accuse judges of effectively "rewriting" *Heller*.³⁹ Some have even argued that lower courts have engaged in a form of "massive resistance" to *Heller*, and suggested that they are in open rebellion against the Court's decision.⁴⁰ Finally, some have placed the problem of under-enforcement at the feet of the Supreme Court. They argue that the Court has been complicit, owing to the fact that in the face of lower court resistance it has "abdicated" its judicial role by failing to intervene and defend *Heller* and *McDonald*.⁴¹

Like other "second-class" claims, under-enforcement argument assume—but generally do not state or provide—a comparative benchmark. Thus, there is presumably some level of Second Amendment enforcement that "second-class" critics would consider appropriate or optimal. In order to make comparisons, there is also presumably an optimal enforcement level for other fundamental rights. It is possible to compare success rates across constitutional rights claims. However, without the requisite benchmarks, these comparisons cannot demonstrate underenforcement. That does not mean they are wholly unedifying. Along with success rates, they represent evidence to consider in terms of how and when the right to keep and bear arms is being enforced.

39. See, e.g., Editorial, *Waiting for Justice Gorsuch*, WALL ST. J. (Feb. 23, 2017), <https://www.wsj.com/articles/waiting-for-justice-gorsuch-1487893991> [<https://perma.cc/VCU6-SBYS>] (referring to a "lower-court assault on gun rights"); Charles C. W. Cooke, *The Fourth Circuit Runs Roughshod Over Heller and the Second Amendment*, NAT'L REV. (Feb. 22, 2017), <http://www.nationalreview.com/article/445145/fourth-circuit-decision-maryland-assault-weapons-ban-constitutional-travesty> [<https://perma.cc/349K-XLAC>] (suggesting "the Fourth Circuit has taken it upon itself to rewrite *Heller*").

40. Petition for Writ of Certiorari at 24, *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (No. 15-133); Petition for Writ of Certiorari at 3, *Jerejian*, 134 S. Ct. 2134 (No. 13-827) (describing "lower courts' massive resistance to *Heller*"); Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 673 (2014) ("In the wake of the Supreme Court's *District of Columbia v. Heller* ('*Heller I*') and *McDonald v. Chicago* decisions that clarify, expand, and protect Second Amendment rights, federal and state inferior courts have been engaging in massive resistance." (citations omitted)); Editorial, *Massive Gun Resistance*, WALL ST. J. (Apr. 12, 2013), <https://www.wsj.com/articles/SB10001424127887324600704578402760760473>. Commentators have drawn explicit comparisons between post-*Heller* decisions and resistance to the Court's decision in *Brown v. Board of Education*. See Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. F. 223, 224 (2014); David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?*, 127 HARV. L. REV. F. 230, 230 (2014). See also Cottrol & Mocsary, *supra* note 37, at 30 (claiming that some courts have "defied decades of fundamental rights jurisprudence").

41. See Blackman, *supra* note 16 ("By refusing to intervene when lower courts disregard the right to keep and bear arms, the Supreme Court has done exactly what Chicago wanted, and abdicated this cornerstone of the Bill of Rights.").

Notwithstanding these concerns, it is possible to assess certain aspects of “second-class” enforcement claims, including the importance of the overall success rate and factors influencing that rate.⁴² One thing this evidence shows is that merely tabulating wins and losses does not suffice to demonstrate that the Second Amendment has been under-enforced. Another is that focusing solely on court decisions does not account for sub-constitutional legislation that, at present, strongly supports gun rights.⁴³

D. Ideological

Arguments about the tone, tenor, or hostility of lower court decisions point to a final form of “second-class” claim. Ideological claims posit that judges have viewed and treated the Second Amendment as “second-class” owing to partisan attitudes or personal biases. In other words, they assert that judges are predisposed to rule against Second Amendment claimants, and may even view the claimants themselves as “second-class.”

Some critics assert that biases rooted in partisan ideology consign the Second Amendment to second-tier status. One form of this argument is that the low success rate for Second Amendment claims can be traced to the political party of the president who nominated the judge deciding the case.⁴⁴ There are other measures of partisan ideology, but the basic claim is that ideology is driving the Second Amendment down.

Others point to class-based biases, specifically the purported elitism of judges on the federal bench. Thus, Professor Glenn Harlan Reynolds claims that the relative lack of protection for Second Amendment rights stems from the fact that federal judges are drawn from an elite, educated, privileged pool of individuals who do not hold such rights in high regard. He argues that the Second Amendment is regarded as second-class by “members of the chattering class,” who care more about things like freedom of speech than gun rights.⁴⁵ According to Professor Reynolds, protection for gun rights has come almost exclusively from “the two branches of the government that are not reserved for wealthy people with postgraduate degrees.”⁴⁶ Professor Sanford Levison articulated a similar criticism long before *Heller*, arguing

42. See Ruben & Blocher, *supra* note 6.

43. See Miller, *supra* note 4, at 39–40 (observing that states and localities express political sentiments about the appropriate scope of gun rights).

44. See O’Shea, *supra* note 37, at 1421 (claiming that lower court decisions reveal “a profound partisan divide”). *But see* Samaha & Germano, *supra* note 23, at 861 (concluding that ideology “might play a small role” in resolving gun rights claims).

45. *Heller: Past, Present, and Future*, 40 CAMPBELL L. REV. 361, 367 (Spring, 2018) (comments of Professor Glenn Harlan Reynolds).

46. *Id.*

that the “elite” bar and legal academy had declined to embrace a robust interpretation of the Second Amendment.⁴⁷

These arguments might be considered possible causal explanations for “second-class” enforcement of the Second Amendment. The typology treats them as a separate genre of claim, however, owing to the fact that they represent an alleged perspective on the Second Amendment that views the right to keep and bear arms as less legitimate than other fundamental rights.

II. The Second Amendment as a “Fundamental Right”

As discussed in Part II, a general complaint, common to all of forms of “second-class” arguments, is that the Second Amendment is not being accorded the dignity, respect, and regard typically shown fundamental constitutional rights. This begs a few preliminary, but important, questions. What does it mean to say that something is a constitutional “right”? What does it mean to assert that a constitutional right is “fundamental”? The point of asking these questions is not to engage deeply with philosophical or theoretical accounts of rights. However, in order to have a general framework for understanding the various types of “second-class” claims, we ought first to identify the indicia or standards relating to the purported class of rights to which the Second Amendment belongs.

A. Constitutional Rights – Conceptions and Characteristics

It might seem self-evident that the individual right to keep and bear arms has been defined and conceptualized as a fundamental constitutional right. After all, *Heller* expressly recognized the right and *McDonald* described it as “implicit in the concept of ordered liberty” and hence applicable to the states. Yet some forms of “second-class” argument appear to be based on the idea that there is something different, and less favorable, about (in particular) judicial perceptions of the Second Amendment.

Some of these complaints relate to *Heller* itself, which arguably recognized a relatively narrow constitutional right. Understanding, in broad terms, what constitutional rights are can help contextualize the Second Amendment as a constitutional right. There is a vast and growing philosophical literature on moral and legal rights. It is not my intention to open that can of worms. The focus here will be far more general in nature. The idea is to start from first and general principles, and then progress to more specific aspects of “second-class” claims.

As Professor Fred Schauer recently observed, “the common positive law approach to rights, an approach seemingly reflected in our ordinary

47. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

discourse about rights, is to formulate rights in somewhat general terms but to understand the rights as so formulated as subject to being overridden or outweighed by other and especially weighty considerations.”⁴⁸ In a general sense, *Heller* defined and conceptualized the Second Amendment in this manner—i.e., in general terms and subject to certain exceptions. Thus, for example, the decision observed that only firearms in “common use” are protected, felons can be dispossessed of firearms, and firearms can be banned in “sensitive places” such as schools.⁴⁹ *Heller* explicitly rejected so-called “interest balancing” in Second Amendment cases.⁵⁰ However, it also took care to describe the right being recognized as one that is not absolute.⁵¹ Thus, in common with other rights, the right to keep and bear arms can seemingly be overridden—either by competing or conflicting individual rights or by public concerns.

As discussed below, this is essentially what Ronald Dworkin appeared to mean when he once described constitutional rights as “trumps.”⁵² Dworkin defined constitutional rights as moral claims against government, subject to override in some instances, but only for very weighty reasons.⁵³ To be sure, the degree to which the Second Amendment acts as a “trump” remains a point of very serious contention. However, *Heller* and *McDonald* both made clear that the Second Amendment cannot be traded off in ways that, say, non-rights may be. Thus, for example, an individual has a right to keep and bear arms in the home for self-defense—seemingly regardless of the dangers or harms a political community might ascribe to this particular activity. The same obviously cannot be said of *all* forms of activity engaged in within the home.

Professor Jack Balkin has offered a different perspective on the meaning of constitutional rights. He conceptualizes constitutional rights as “a form of discourse, a way of thinking about the needs of social order and human liberty in the context of a changing world.”⁵⁴ According to Balkin, constitutional rights are also “a source of power—first, because they are a powerful form of rhetorical appeal, and second, because the enforcement of

48. Frederick Schauer, *Rightful Deprivations of Rights* 9 (Va. Public L. and Legal Research Paper No. 2018-43, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221184.

49. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

50. *Id.* at 635.

51. *See id.* at 626.

52. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977). For a critique of the conception of rights as “trumps,” see generally Jamal Greene, *Foreword: Rights as Trumps?*, 132 *HARV. L. REV.* 28 (2018).

53. DWORKIN, *supra* note 52, at 191.

54. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 *N.Y.U. L. REV.* 1, 53 (2004).

rights recognized by the state is backed up the power of the state.”⁵⁵ This characterization of rights as a source of power helps to explain why so much energy is devoted to advocating and defending on behalf of constitutional rights. As Balkin observes: “For the discourse of rights is the discourse of power, the restructuring of rights is the restructuring of power, and the securing of rights is the securing of power.”⁵⁶

The Second Amendment has clearly been conceptualized as a constitutional right in these respects as well. It is, and has been for some time, an important part of American cultural, political, and constitutional discourses. The American public broadly supports the right recognized in *Heller*.⁵⁷ As a result, the Second Amendment has substantial rhetorical appeal. Indeed, some commentators have expressed the concern that Second Amendment rhetoric has contributed to dysfunctional policy debates concerning gun rights and gun control.⁵⁸

Whether or not that is so, there is no denying the force of Second Amendment arguments. Like other constitutional rights, the Second Amendment has been “a terrain of struggle in a world of continuous change.”⁵⁹ Thus far, firearms proponents have been able to cash in on the rhetorical power of the right to keep and bear arms. One measure of their success has been legislative receptiveness to Second Amendment arguments and appeals. Particularly in state legislatures, the right to keep and bear arms has been treated as anything but “second-class.”⁶⁰ Countless state laws preserve and protect Second Amendment rights, and legislatures in many states are deterred from passing gun control measures. Whatever problems Second Amendment claims may be experiencing in courts in terms of claimant success rates, strong majoritarian preferences have produced a markedly different narrative in state and federal legislatures.⁶¹

55. Balkin, *supra* note 54, at 53–54.

56. *Id.* at 54.

57. This was true even prior to the Supreme Court’s decision in *Heller*. See Jeffrey M. Jones, *Americans in Agreement With Supreme Court on Gun Rights*, GALLUP (June 26, 2008), <https://news.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx> (noting that three in four Americans polled agreed that the Second Amendment protects an individual right to keep and bear arms).

58. See Blocher, *supra* note 10. See also Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569 (2006); Dan Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003).

59. Balkin, *supra* note 54, at 57.

60. See Blocher, *supra* note 10, at 814 (noting *Heller*’s effect on passage of gun control laws).

61. Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992).

Like other constitutional rights, the right to keep and bear arms, again as defined in *Heller* and in state and federal laws, is backed by the power and authority of the state. The National Rifle Association and other civic groups stand committed to defending and expanding Second Amendment rights, which are part of a broad constitutional movement that produced *Heller* and *McDonald*.⁶² The movement has an obvious strategic interest in convincing its participants and others that Second Amendment rights have been mistakenly conceptualized as “second-class.” However, the Second Amendment bears the basic hallmarks of other rights in the broad class of constitutional rights.

B. Indicia of Fundamentality

“Second-class” claimants may assert that although it has the basic characteristics of other constitutional rights, the Second Amendment has not been conceptualized as a “fundamental” constitutional right. This claim concedes that certain rights are treated as special, in terms of their recognition, prestige, and enforcement. It belies the notion that all rights are created equal, or that the Supreme Court has never ranked constitutional rights. In fact, the ranking of constitutional rights has long been a central aspect of our constitutional jurisprudence.

How, then, are we to determine which rights are conceived of as special or “fundamental”? Dictionary definitions can be misleading, if not downright inaccurate. According to Merriam-Webster, for example, a “fundamental right” is “a right that is considered by a court (as the U.S. Supreme Court) to be explicitly or implicitly expressed in a constitution (as the U.S. Constitution).”⁶³ A Note accompanying the definition states: “A court *must* review a law that infringes on a fundamental right under a standard of strict scrutiny. A fundamental right can be limited by a law *only* if there is a compelling state interest.”⁶⁴

Both the definition and accompanying Note are incorrect. Not all rights that are expressed, either explicitly or implicitly, in the U.S. Constitution are treated as “fundamental.” Even with respect to those deemed worthy of the label, as discussed below “strict scrutiny” is not always—or indeed even typically—the governing standard.⁶⁵ A law student who relied on this

62. DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2015).

63. THE MERRIAM-WEBSTER DICTIONARY NEW EDITION (2016).

64. *Id.*

65. See Fallon, *supra* note 6 (observing that strict scrutiny has not been a reliable or consistent indicator of fundamentality).

particular definition and understanding of “fundamental” rights on a constitutional law exam would not do very well.

At the same time, even the most astute law students and lawyers might reasonably be confused about the correct definition. The problem, as one commentator has observed, is that “the Supreme Court has never bothered to define with any precision what counts as a ‘fundamental right.’”⁶⁶ As another scholar has noted, there is no single “unifying principle for assessing the fundamentality of rights.”⁶⁷ Rather, fundamental rights jurisprudence is the product of “a pastiche of constitutional interpretation.”⁶⁸

Three general standards or indicia of fundamentality have been expressed or implied by the Supreme Court:

First, following footnote four of *United States v. Carolene Products Co.*, we might consider all of the individual rights guaranteed in the first eight amendments in the Bill of Rights to be fundamental. Second, we might alternatively view all of the provisions of the Bill of Rights that have been incorporated to apply against the states to be fundamental; the test for incorporation asks if a right is fundamental to American political institutions and our system of justice. Finally, we might define as fundamental those rights that have been thought of as ‘preferred rights’ because of their role in promoting human dignity or democratic self-government.⁶⁹

When applying these various approaches, the Court has relied on analogies and precedents to populate or round out the category of “fundamental” rights. Thus, insofar as a right resembles or shares the characteristics of a right already recognized as fundamental, it is more likely to be accorded the same status.

We could also take a more philosophical approach to defining fundamentality. Again following Ronald Dworkin, we might say that

66. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 228 (2006).

67. Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 MIAMI L. REV. 101, 106 (2002).

68. *Id.* at 112. The problem appears to be universal. See W. Kent Davis, *Answering Justice Ginsburg’s Charge That the Constitution Is ‘Skimpy’ in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 954 (1998) (noting that the terms “human rights,” “freedoms,” “fundamental human rights,” “fundamental freedoms,” “rights and freedoms,” and “fundamental rights” appear to be used interchangeably around the world).

69. Winkler, *supra* note 66, at 228 (internal citations omitted).

although not all constitutional rights represent moral rights of sufficient weight to constrain government in most circumstances, “those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen.”⁷⁰ For Dworkin, these rights “mark off and protect” a category of distinctive interests, and hence cannot typically be sacrificed to majority preferences or considerations of general utility.⁷¹ Hence they prevail “over the kind of trade-off argument that normally justifies political action.”⁷² In sum, a constitutional right might be considered “fundamental” if in at least some circumstances it operates as a strong trump against governmental action.

Whatever standard one adopts, the Second Amendment as conceived in *Heller* and *McDonald* readily qualifies as “fundamental.” First, it is among the rights expressly listed in the Bill of Rights. As the Court has indicated, all such rights are presumptively fundamental.

Second, the right to keep and bear arms is also “fundamental” under the Court’s “incorporation” doctrine.⁷³ Under that doctrine, which the Court has used to determine which provisions of the Bill of Rights are to be applied to states and localities as well as the national government, the Court asks whether the right is considered to be “implicit in the concept of ordered liberty” or “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁷⁴ In *McDonald v. City of Chicago*, the Supreme Court held that the individual right to keep and bear arms recognized in *Heller* was fundamental according to these standards.⁷⁵ The Court rejected the government’s arguments to the contrary, expressly characterizing them as a plea to treat the Second Amendment as a “second-class” right.⁷⁶ This, said the Court, would be “inconsistent with the long-established standard we apply in incorporation cases.”⁷⁷

70. DWORKIN, *supra* note 52, at 191.

71. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 31 (2006).

72. *Id.*

73. *McDonald v. City of Chicago*, 561 U.S. 742, 758–67 (discussing development of “incorporation” doctrine).

74. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

75. *McDonald*, 561 U.S. at 767–68 (holding that Second Amendment right is fundamental and thus incorporated against states).

76. *Id.* at 180.

77. *Id.* at 181.

Not exactly. Under the incorporation standard, not *all* of the rights expressly provided for in the Bill of Rights are considered “fundamental.” Although Justice Black encouraged his colleagues to incorporate the Bill of Rights provisions *in toto*, the Court declined to do so, engaging instead in a process of “selective” incorporation.⁷⁸ Under this approach, the Third Amendment’s protection against quartering of soldiers, the Fifth Amendment’s grand jury indictment requirement, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment’s prohibition on excessive fines are not yet considered “fundamental.”⁷⁹ Thus, some Bill of Rights provisions are indeed “second-class,” at least from an incorporation standpoint. However, *McDonald* makes quite clear that the Second Amendment is not among them.

Third, *Heller* and *McDonald* recognized a relation between personal self-defense, individual autonomy, and the right to keep and bear arms. In that respect, the Second Amendment right resembles other (un-enumerated) fundamental rights such as abortion, contraception, and marriage. It is a right related to the preservation of life, and hence of human dignity. Although *Heller* and *McDonald* characterized the core of the Second Amendment right in terms of self-defense, it did not rule out additional justifications. For instance, the Second Amendment might be characterized as a “political process” right entitled to special consideration by the courts, in the sense that it preserves citizen self-government in the face of tyrannical state actions.

Finally, under the Dworkinian conception of fundamentality, *Heller* created a strong moral claim of right. With regard, *at least*, to regulations of commonly kept firearms used for self-defense in the home, the rights-bearing individual has a “trump” or strong claim that cannot be outweighed by ordinary political considerations. This means that courts can and will invalidate laws that burden or infringe upon such activity. This conception does not mean the Second Amendment protects only such actions, but rather that it is most likely to operate as a strong “trump” against state burdens or infringements as to this aspect of the right. And this, indeed, is how *Heller* defined the Second Amendment right—not in terms of its totality, but in terms of its core, with future construction to follow.

Another indication that the Second Amendment has been conceptualized or defined as “fundamental” relates to the fact that it was fashioned in the image of the undoubtedly “first-class” free speech right set forth in the First Amendment. *Heller* sought to burnish the Second Amendment’s “fundamental” status by analogy.

78. See, e.g., *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

79. See *McDonald*, 561 U.S. at 765 n.13 (discussing non-incorporated rights provisions).

The *Heller* Court enhanced the Second Amendment's historical pedigree by explicitly comparing its origins to those of the First Amendment. Both provisions, the Court asserted, codified pre-existing rights, and both were the product of a long dormancy followed by renewed judicial engagement.⁸⁰

The Court also invoked the Free Speech Clause in addressing the Second Amendment's scope. It observed that just as the Free Speech Clause's protection extends to modern forms of communication (such as speech on the Internet), so too must the Second Amendment's scope extend beyond the types of arms available at the founding.⁸¹ At the same time, the Court observed that the Second Amendment, again like the First Amendment, does not protect *all* exercises of the right.⁸² Both rights are considered fundamental, but non-absolute.

Finally, in terms of methodology, the Court rejected calls for an interest-balancing approach to Second Amendment rights—i.e., a weighing of the individual's right to keep and bear arms against the state's interests in regulating such activities.⁸³ Once again, the majority opinion invoked the free speech example: "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."⁸⁴ The Court also rejected any form of "rationality" review for Second Amendment burdens, arguing that this form of low-level review had never been applied in the free speech context.⁸⁵

As noted, fundamentality-by-analogy is a common way to establish the fundamental status of a constitutional right. The Court's effort to associate the Second Amendment with the First Amendment has borne considerable fruit. In construing the Second Amendment, many lower courts and scholars

80. *District of Columbia v. Heller*, 554 U.S. 570, 592, 625–26 (2008).

81. *Id.* at 582.

82. *Id.* at 595.

83. As commentators predicted, however, some interest balancing was inevitable. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–83 (2009) (explaining distinction between categoricalism and balancing approaches and how this might affect interpretation of Second Amendment); Mark Tushnet, *Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 421–22 (2009) (explaining that some balancing in Second Amendment doctrine is inevitable).

84. *Heller*, 561 U.S. at 635.

85. *Id.* at 628 n.27.

have expressly invoked the First Amendment's doctrines and principles.⁸⁶ Following *Heller's* lead, they have borrowed aspects of the First Amendment to model the Second Amendment.

In sum, the Second Amendment has been conceptualized and defined as a fundamental constitutional right under all of the existing standards and approaches. The right to keep and bear arms, which operates as a strong "trump" at its core, has been recognized as "implicit in the concept of ordered liberty" and characterized as central to personal dignity and self-defense. It has been compared to, and indeed modeled upon, the First Amendment's free speech guarantee. Given that the Supreme Court and many lower courts have conceived of the Second Amendment in these explicit terms, conceptual and definitional "second-class" claims fall flat.

Despite all these considerations, some "second-class" critics maintain that the Second Amendment has not been conceived of as "fundamental" in an important respect. Specifically, they argue that an important aspect of fundamentality has generally been missing from lower court decisions—namely, application of a "strict scrutiny" standard. As discussed further below, it is true that lower courts have not regularly applied that level or degree of scrutiny to firearms regulations. The reasons for this are varied, and will be addressed.

At the conceptual or definitional level, the strict scrutiny argument is inherently flawed. For one thing, as noted earlier, the argument that fundamental status *automatically* triggers strict judicial scrutiny is descriptively false.⁸⁷ Thus, with regard to all of the provisions of the Bill of Rights, the Court has applied strict scrutiny in the context of only *two* rights—the First Amendment and the Due Process Clause.⁸⁸ And even in those two contexts, strict scrutiny has not been consistently applied.⁸⁹ Thus, for example, content-neutral regulations of speech are subject to an intermediate standard of review.⁹⁰ So are regulations of commercial speech.⁹¹ To take another example, under the Free Exercise Clause, neutral and generally applicable laws that burden religious exercise are essentially treated as

86. See TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* 210–26 (2018) (examining the intersection of free speech and Second Amendment doctrines).

87. See Fallon, *supra* note 6 (noting that strict scrutiny has not been a reliable or consistent indicator of fundamental rights status or enforcement).

88. Winkler, *supra* note 66, at 229.

89. *Id.* at 232.

90. *E.g.*, *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (adopting a framework for analyzing such regulations that is more lenient than strict scrutiny).

91. *E.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566–72 (1980) (applying an intermediate level of scrutiny to commercial expression).

unreviewable or subject to minimal judicial scrutiny.⁹² In sum, very few of the rights enumerated in the Bill of Rights actually trigger strict scrutiny.⁹³

Nor have burdens on other fundamental rights relating to personhood and dignity, including the right to vote, the right to marry, and the right to privacy, generally given rise to strict scrutiny.⁹⁴ With regard to privacy rights rooted in the Due Process Clause, only *Roe v. Wade* recognized a fundamental right that, at least initially, involved a strict scrutiny standard.⁹⁵ This specific aspect of *Roe* was later overruled in *Planned Parenthood v. Casey*, which substituted the “undue burden” standard for strict scrutiny and did not explicitly characterize the right to abortion as “fundamental.”⁹⁶ “Incidental” burdens on these and other fundamental rights receive either a lower level of scrutiny or in some cases *none at all*.⁹⁷ Finally, certain classes of claimants, including convicted felons, can have their fundamental rights burdened or denied altogether under a form of rationality review.⁹⁸

As some commentators have observed, the myth that strict scrutiny applies in the case of fundamental rights is rhetorically useful. For instance, as James Fleming and Linda McClain have argued, it has been used by opponents of substantive due process to discourage recognition and protection for fundamental privacy and autonomy rights.⁹⁹ Today, the strict scrutiny myth is being used by proponents of gun rights, who are demanding that burdens on such rights be treated with a “first-class” strict scrutiny standard rather than some watered-down “second-class” level of judicial review.¹⁰⁰ However, the argument relies on the same debunked myth—that strict scrutiny applies whenever fundamental constitutional rights are implicated or burdened.

92. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

93. Winkler, *supra* note 66, at 233 (noting that “there is no strict scrutiny found in Fourth Amendment doctrine, Sixth Amendment doctrine, or in the case law emerging from the incorporated provisions of the Eighth Amendment”).

94. *Id.* at 236.

95. *Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

96. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 847, 876 (1993).

97. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996)

98. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987).

99. James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights With Responsibilities and Regulation*, 94 B.U. L. REV. 849, 862–63 (2014) [hereinafter Fleming & McClain, *Ordered Gun Liberty*]. *See also* JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 267–69 (2013) [hereinafter FLEMING & MCCLAIN, ORDERED LIBERTY].

100. *See* Fleming & McClain, *Ordered Gun Liberty*, *supra* note 99, at 863–64 (discussing strict scrutiny arguments in Second Amendment context).

The Second Amendment's relationship to strict scrutiny remains unclear. *Heller* made clear that the right to keep and bear arms was, like other fundamental rights, not an absolute guarantee. However, it recognized that the core right of self-defense was to be preserved. As we will see, some lower courts have interpreted this to mean that burdens on the "core" of the Second Amendment right are subject to strict scrutiny. What about other burdens? *Heller* expressly rejected a general "interest balancing" approach, but also did not assign any standard of scrutiny to be applied in Second Amendment cases.

The Court's rejection of interest balancing is in tension with its strong reliance on the First Amendment's free speech right, application of which frequently involves that very methodology.¹⁰¹ Thus, if lower courts are applying standards of review that invite interest balancing, have they really conceived of the Second Amendment as less than "fundamental" relative to rights like the freedom of speech?

As free speech doctrines show, interest balancing may be consistent with fundamentality. Professor Dworkin, who characterized fundamental rights as "trumps," did not rule out some balancing. Indeed, he expressly disagreed with the position "that the State is *never* justified in overriding [a fundamental] right."¹⁰² Dworkin conceded that the government might override a fundamental right "when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit."¹⁰³ What the government cannot do, he asserted, is override such a right "on the minimal grounds that would be sufficient if no such right existed."¹⁰⁴ Thus, Dworkin appeared to allow for both limiting constructions of fundamental constitutional rights and, in some cases, the balancing of collective interests against moral claims of right.

What "trumps" appear to do, in the case of fundamental rights, is to increase the government's burden for overriding the right. In other words, fundamentality provides a form of special protection for, or extra weighting of, particular rights. Once a right qualifies as "fundamental," a priority is established in its favor and competing collective interests are generally required to yield.¹⁰⁵ This conception of fundamentality suggests that the degree of special protection or weight does not have to be uniform. Thus, rights can be characterized as "stronger" or "weaker," depending on the

101. See Blocher, *supra* note 82, at 379 (noting the parallel concerns in the First Amendment and Second Amendment contexts).

102. DWORKIN, *supra* note 52, at 191.

103. *Id.*

104. *Id.* at 191–92.

105. *Id.* at 197–98.

justifications deemed sufficient to override them. As one commentator explains, “courts employ a host of standards and categorical rules in fundamental rights cases, with strict scrutiny only used from time to time.”¹⁰⁶

As discussed further below, this accurately describes the current system of fundamental rights under the U.S. Constitution. *Heller* and *McDonald* adopted this general understanding of fundamentality. The decisions recognized a non-absolute individual right to keep and bear arms. They characterized a number of restrictions on the right as “presumptively lawful.”¹⁰⁷ Although both *Heller* and *McDonald* disclaim interest balancing, the Court recognized some exceptions to Second Amendment coverage. These appear to be based, in part, on a weighing of interests. For example, the presence of firearms in “sensitive places” is presumably not only an historical anomaly, but also a public safety hazard.

III. Second Amendment Enforcement

Part II addressed some conceptual and definitional claims concerning the status of the Second Amendment. However, many “second-class” claims focus in particular on how the Second Amendment has been enforced in the lower courts and, to a lesser degree, by the Supreme Court. Although it does not definitively refute underenforcement claims, a systematic review of the available evidence shows that the Second Amendment has been enforced in a manner commensurate with its status as a fundamental constitutional right. This conclusion applies, in particular, to the doctrines and standards used in Second Amendment cases. Although the low success rate of Second Amendment claims raises underenforcement concerns, it does not demonstrate that the right to keep and bear arms is being disfavored, discriminated against, or actively resisted by the lower courts. Indeed, it is just as plausible to assert that lower courts have interpreted *Heller*’s various lacunae reasonably.¹⁰⁸

A. Qualitative Studies

The Second Amendment’s power and influence as a constitutional right extends beyond the courtroom. Legislatures that support Second

106. Winkler, *supra* note 66, at 239. As Professor Winkler observes, “the old adage about laws infringing fundamental rights being subject to strict scrutiny remains a favorite of scholars, judges, and law students. And it is flatly wrong . . . It is time the fundamental truth be told: laws infringing upon fundamental rights are subject to strict scrutiny, but only some of those rights, only some of the time, and only when challenged by some people.” *Id.*

107. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 n.26 (2008).

108. *See Re*, *supra* note 12, at 962 (“But even if lower courts have not adhered to the best reading of *Heller*, they have interpreted the decision reasonably.”).

Amendment rights do not pass laws restricting the right to keep and bear arms. Indeed, many have enacted significant protections that go beyond what *Heller* suggests. Thus, in assessing its enforcement, it is somewhat artificial to focus solely on how the Second Amendment has fared in the courts. Nevertheless, many “second-class” critics have complained specifically about this particular aspect of Second Amendment enforcement.

Because the Supreme Court has not revisited the actual substance of the Second Amendment right since *Heller*, it has fallen to the lower courts to construct the constitutional rules and doctrines that govern the regulation of firearms in the United States.¹⁰⁹ During the past decade, courts have decided more than one thousand cases involving Second Amendment rights.¹¹⁰ We now have both qualitative and quantitative evidence bearing on the “second-class” enforcement issue. This Section provides a critical review of the available qualitative literature, while the next Section focuses on existing quantitative studies.

Qualitative analyses generally conclude that lower courts have enforced the Second Amendment in a manner that reflects a “second-class” status.¹¹¹ Some of those analyses have been impressionistic, thus providing relatively weak or thin evidence of “second-class” enforcement. Others have been more holistic and detailed, but still fall short of demonstrating significant deviations in terms of fundamental rights doctrines and standards.

One study concludes, based on a brief review of only *three* federal courts of appeals cases involving challenges to public carry laws, that courts are under-enforcing the Second Amendment.¹¹² The authors identify two cases upholding, and one case invalidating, such restrictions.¹¹³ *Heller* did not explicitly address public carry regulations. Nevertheless, the authors characterize one of the decisions as “defiant,” in part owing to its application of an intermediate standard of scrutiny (which the authors view as closely resembling rational basis review in application).¹¹⁴ While one can certainly

109. See Re, *supra* note 12, at 962 (“Much as an ambiguous statute amounts to a lawmaking delegation to executive agencies, *Heller* effectively delegated interpretive power to the lower courts.”) (footnote omitted).

110. See Ruben & Blocher, *supra* note 6.

111. See Kopel & Greenlee, *supra* note 9, at 196 (concluding based on qualitative assessment that some lower courts are misapplying *Heller* and, in certain contexts, under-enforcing the Second Amendment); Cottrol & Mocsary, *supra* note 37 (arguing that lower courts are “undercutting . . . Supreme Court precedent” in a way that is suggestive of “something other than a desire to control crime”); O’Shea, *supra* note 36, at 1425 (characterizing the “tenor” of lower court Second Amendment decisions as “deeply skeptical, bordering on hostile, to claims that the Second Amendment limits government action”);

112. Cottrol & Mocsary, *supra* note 37.

113. *Id.* at 30–31.

114. *Id.* at 31–32.

criticize some public carry decisions as incorrect applications of *Heller* or complain about the degree of judicial scrutiny, evidence from just three decisions hardly supports the conclusion that courts have “outright defied decades of fundamental-right jurisprudence.”¹¹⁵

Examining the first half-decade of post-*Heller* decisions in the lower federal courts, Michael O’Shea perceives some “genuine threats to the constitutional right to keep and bear arms.”¹¹⁶ Despite *Heller* and *McDonald*, O’Shea argues, evidence shows that the Second Amendment is being treated as an “underenforced constitutional norm”—a right that courts, primarily for institutional reasons, have declined to fully enforce.¹¹⁷

O’Shea presents evidence that lower courts are concerned about reaching beyond what *Heller* expressly holds. Some courts have openly expressed concerns about the potential social costs of judicial errors with regard to misinterpreting *Heller*—in particular, the potential for violence.¹¹⁸ However, it is not clear that expressing these concerns demonstrates widespread institutional underenforcement. Indeed, the concerns expressed might just as plausibly be characterized as resting on traditional principles of judicial restraint or minimalism.¹¹⁹ *Heller* recognized a right to keep and bear arms and identified its “core,” but it did not purport to exhaustively define the fundamental right to keep and bear arms. Indeed, it expressly disclaimed any intention to do so.¹²⁰ In light of the under-defined and under-theorized right, some courts have proceeded with caution in adjudicating claims that extend beyond the apparent core. As Richard Re has observed, although *Heller* has indeed been “narrowed-from-below,” judged by standard methods of “vertical stare decisis,” lower court treatments of the decision have been reasonable and defensible.¹²¹

Perhaps this is why Professor O’Shea’s “second-class” enforcement claim seems to be based less on institutional underenforcement arguments than on what he refers to as the “tenor” and “orientation” of the lower courts “in prominent cases.”¹²² Even in this respect, however, the evidence of underenforcement is thin.

115. Cottrol & Mocsary, *supra* note 37, at 30.

116. O’Shea, *supra* note 37, at 1384.

117. *Id.* at 1411–12. See Sager, *supra* note 20, at 1239–40.

118. O’Shea, *supra* note 37, at 1413–14.

119. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001) (describing a method of deciding cases narrowly and/or shallowly).

120. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasizing that in its “first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field”).

121. Re, *supra* note 12, at 962.

122. O’Shea, *supra* note 37, at 1414.

Summarizing only “prominent” federal court decisions, and only “at a general level,” O’Shea identifies certain contexts, including restrictions on open carry outside the home, in which he claims courts have not properly enforced the Second Amendment. However, of the *five* decisions in this context that he discusses, two that initially upheld restrictions on open carry were reversed on appeal. Of the *five* additional decisions O’Shea analyzes, which upheld other restrictions on the right to keep and bear arms, one of those was later reversed on appeal. Even assuming all of these decisions were correctly characterized as “prominent” (for instance, one case involved a challenge to a registration fee), this means that a total of *seven* federal court decisions upheld firearms regulations of various sorts.

O’Shea’s study does not consider the holdings or “tenor” of Second Amendment claims in cases that he does not deem “prominent.” It seems likely that in some, or perhaps even many, of those cases the restrictions were upheld pursuant to one of *Heller*’s categorical exemptions (for example, felon dispossession) or perhaps did not raise a significant Second Amendment issue.¹²³ Further, the O’Shea study shows that in the first five years after *Heller*, five lower courts did invalidate firearms regulations.¹²⁴ This means that *in total*, the study identified seven “prominent” cases in which federal courts upheld firearms restrictions, and five decisions in which courts invalidated them. As discussed further below, tallying judicial dispositions cannot tell us whether the Second Amendment is being appropriately enforced. However, if we are keeping score, even in the most “prominent” cases the results do not indicate “genuine threats” to the Second Amendment.

This analysis does not suggest that decisions in O’Shea’s study indicate a robust or enthusiastic judicial *embrace* of the Second Amendment. Some lower courts have arguably misinterpreted or misapplied *Heller*. Of course, that also happens outside the Second Amendment context. In some cases, courts have expressed reservations about interpreting the right to keep and bear arms such that it applies in non-sensitive public places or includes a right to keep and bear assault-style weapons. However, these concerns did not always result in the refusal to recognize or enforce Second Amendment rights. Moreover, as suggested earlier, courts may have proceeded with caution not out of any hostility to or bias against the Second Amendment, but rather out of concerns relating to extension of a unique fundamental right whose exercise may result in the use of offensive or defensive deadly force. Reasonable readers of the “prominent” decisions in O’Shea’s study can

123. See Ruben & Blocher, *supra* note 6, at 1471–86 (discussing various types of claims).

124. O’Shea, *supra* note 37, at 1419–20.

disagree about whether their “tenor” was pragmatic or minimalistic, as opposed to “deeply skeptical, bordering on hostile” to the Second Amendment.¹²⁵

Finally, two collaborators read *all* of the Second Amendment decisions from the federal courts of appeals during the first 8 years post-*Heller*.¹²⁶ Their general descriptions of appeals court decisions suggest that the right to keep and bear arms is being enforced in a manner similar to—in fact, in many circuits is being modeled upon—the First Amendment free speech right.¹²⁷ Thus, the study shows that federal appeals courts have generally adopted a two-part test to adjudicate Second Amendment claims, with robust protection provided at the core of the right and lesser but still significant protection outside that domain.¹²⁸ On its face, at least, this sort of doctrinal framework is familiar to fundamental rights adjudication.

To be sure, the study takes issue with the interpretation of *Heller*, and the Second Amendment more generally, in a few circuits and with respect to certain types of regulations—particularly limits on firearms outside the home (again, an issue neither *Heller* nor *McDonald* explicitly address).¹²⁹ However, the study does not describe a fundamental right that is routinely being subjected to rational basis or other non-fundamental rights standards. Although it suggests some difficulty in the lower courts in terms of parsing *Heller* and determining the Second Amendment’s boundaries, it does not demonstrate that the Second Amendment is being treated as a “second-class” or non-fundamental right.

The qualitative studies suffer from various deficiencies. Some are based on such a small sample of cases that they provide only impressionistic data. Others review a subset of cases—“prominent” ones, for example—without taking into account the broader landscape of Second Amendment litigation. Still others have broader coverage in terms of sample size, but highlight what seem to be outlier examples of alleged misinterpretation or doctrinal deviation. The studies leave out a lot of litigation, most notably at the state level. Finally, none of the qualitative studies offers any comparative benchmark by which to measure enforcement of the Second Amendment.

125. O’Shea, *supra* note 37, at 1425.

126. Kopel & Greenlee, *supra* note 9.

127. *See id.* at 274–75 (discussing choice of level of scrutiny).

128. *See id.* at 212–14 (describing two-part test).

129. *See id.* at 265 (discussing Third Circuit’s treatment of Second Amendment rights outside the home); *id.* at 268 (discussing Ninth Circuit’s analysis of right to concealed carry outside the home); *id.* at 288–96 (criticizing Second Circuit’s approach to Second Amendment claims, which only applies heightened scrutiny to “substantial burdens” on Second Amendment rights).

B. Quantitative Studies

Scholars have begun to produce significant empirical evidence concerning Second Amendment claims. Eric Ruben and Joseph Blocher have published an empirical study of the thousand-plus lower court decisions (state and federal, trial and appellate) handed down since *Heller*.¹³⁰ The authors do not purport to resolve whether Second Amendment enforcement has been “second-class” in any normative sense.¹³¹ However, several of their conclusions do tend to refute, or at least raise significant doubts concerning, claims that courts have subjected the Second Amendment to disfavored treatment.

“Second-class” arguments frequently begin, and not infrequently end, by pointing to the very low success rate of Second Amendment claims. As Ruben and Blocher acknowledge, “the vast majority of Second Amendment claims fail. Of the 1,153 Second Amendment challenges in the database, only 108 were not rejected, for an overall success rate of 9 percent.”¹³² But they argue that the low success rate “does not show that the right is being underenforced.”¹³³ Instead, the authors conclude that the data “shows that the low rate of success probably has more to do with the claims being asserted than with judicial hostility to the right.”¹³⁴

Nearly a quarter of the challenges, they note, were to felon-in-possession laws and all but one percent of such challenges failed.¹³⁵ Indeed, the authors write, “a clear majority of the challenges—742 of 1,153—arose in criminal cases, in which defense counsel might be expected to raise any nonsanctionable defense. The low rate of success in those cases (six percent) and the 126 cases involving pro se litigants (two percent) pulls down the

130. See Ruben & Blocher, *supra* note 6.

131. See *id.* at 1449 (“To be clear, these arguments are not purely empirical. Saying that a right is systematically underenforced involves at least two steps: a conclusion about how stringently it should be enforced, and an assessment of how it actually is enforced in practice. Parties in the gun debate disagree about both of these things, but our focus in this Article is the latter.”).

132. *Id.* at 1472.

133. *Id.* at 1507.

134. *Id.* But see Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?* (NYU School of Law, Public Law Research Paper No. 18-43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247773 (draft on file with author); *id.* at 105–06 n. 16 (“Given the plausible causation theories and limited information, however, we are not quite ready to agree that [Ruben & Blocher’s data] ‘shows that the low rates of success [for Second Amendment claims] probably has more to do with the claims being asserted than with judicial hostility to the right.’”).

135. See Ruben & Blocher, *supra* note 6, at 1507.

success rate as a whole.”¹³⁶ As other commentators have observed, these kinds of claims “are, bluntly speaking, outstanding losers.”¹³⁷

Ruben and Blocher also find that “[t]he success rate of Second Amendment claims is highly correlated with who makes them, and whether and how they are represented.”¹³⁸ They report that “civil litigants succeeded two and half times more often than criminal defendants,” while civil plaintiffs with legal representation “had a success rate of 40 percent in the federal appellate courts.”¹³⁹ The authors attribute these success rates to case selection: “civil attorneys are selecting better cases to litigate.”¹⁴⁰

Other empirical studies cast doubt on the significance of the success rate in Second Amendment cases. Professors Samaha and Germano, who have focused in particular on the influence of judicial ideology in Second Amendment, free speech, and other constitutional cases, make three points that are salient to this form of “second-class” enforcement claim.

First, they note that comparisons across constitutional or litigation areas raise distinctive conceptual and other challenges.¹⁴¹ Even accepting that success rates are a valid benchmark of comparison, Samaha and Germano observe, this does not mean that “equalization of success rates is justified.”¹⁴² “Standing alone,” they write, “differences do not prove that judges are erring.”¹⁴³ Second, even granting that success rates are a valid point of comparison, the Second Amendment’s low success rate does not set it apart from other rights and constitutional provisions.¹⁴⁴ Third, as Samaha and Germano note, “last place doesn’t necessarily mean second class.”¹⁴⁵

Ruben and Blocher’s study also sheds some light on other aspects of “second-class” enforcement claims. Unsurprisingly, their data suggest that

136. Ruben & Blocher, *supra* note 6, at 1507.

137. See Samaha & Germano, *supra* note 23, at 860.

138. Ruben & Blocher, *supra* note 6, at 1509.

139. *Id.*

140. *Id.*

141. See Samaha & Germano, *supra* note 134, at 104–05 (noting complications in comparing success rates across fields of litigation).

142. *Id.* at 112.

143. *Id.* This is at least a partial response to the argument that under “heightened” levels of judicial scrutiny in other areas, constitutional rights claims are highly successful. See George Mocsary, *A Close Reading of an Excellent Distant Reading of Heller in the Courts*, 68 DUKE L.J. 41, 52–53 (2018) (suggesting that success rates in Second Amendment cases ought to be compared to other claims subject to heightened scrutiny).

144. See, e.g., James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WILL. & MARY L. REV. 35, 58 (2016) (reporting low success rates for regulatory takings claims in state courts); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 428–29 (2012) (reporting low success rates for certain Fourth Amendment claims).

145. See Samaha & Germano, *supra* note 134, at 112.

lower courts have paid close attention to *Heller*'s recognition of Second Amendment limitations and exemptions. Indeed, they note, *Heller*'s discussion of "presumptively lawful" regulations was relied upon in 60 percent of the challenges in the study.¹⁴⁶ Other empirical work confirms that the lower courts are indeed paying very close attention to what *Heller* said.¹⁴⁷

Thus, a mere tally of Second Amendment wins and losses does not establish "second-class" enforcement. As Ruben and Blocher show, the success rate does not take into consideration the nature of the claims pursued, the identity of the challengers, the courts and court systems in which their claims are adjudicated, and many other important variables.

Evidence from the Ruben and Blocher study also supports Part II's argument that the Second Amendment, as enforced, has been conceptualized as a "fundamental" constitutional right. For example, their review of the data "suggests that, within successful challenges, where the court finds that a law infringes on the "core" or "central component" of the right, the burden on the government increases."¹⁴⁸

Further, the Ruben and Blocher study shows that just as they have in the case of other fundamental rights, courts have applied varying levels or degrees of scrutiny to regulations of Second Amendment rights—and sometimes, again as in other constitutional areas, have failed to identify any specific standard of scrutiny.¹⁴⁹ Further, Ruben and Blocher conclude that burdens on the "core" of the Second Amendment right have consistently been subject to strict scrutiny, while other burdens have received either intermediate scrutiny or have been invalidated without specification of a specific standard.¹⁵⁰ All of this is wholly consistent with judicial enforcement of fundamental rights.

As additional evidence of fundamental conception and enforcement, Ruben and Blocher's data show that in some courts a tiered scrutiny regime

146. See Ruben & Blocher, *supra* note 6, at 1488.

147. See Samaha & Germano, *supra* note 23, at 872 (finding positive and statistically significant Supreme Court case score in gun rights cases).

148. See Ruben & Blocher, *supra* note 6, at 1499.

149. *Id.* at 1499–1500.

150. As Ruben and Blocher observe:

In 94 percent of the successful challenges where the court found that the burden was not on the core of the right, the court applied intermediate, as opposed to strict, scrutiny. Meanwhile, courts applied intermediate scrutiny only 14 percent of the time when a burden did fall on the core of the right. Otherwise, the court applied strict scrutiny (29 percent) or, more commonly, granted relief without making clear what standard the court was applying (57 percent).

Ruben & Blocher, *supra* note 6 at 1499–1500.

has begun to emerge.¹⁵¹ Their study shows that intermediate scrutiny “has been the most prevalent form of scrutiny,” with federal appellate courts applying that standard 79 percent of the time, federal district courts doing so 74 percent of the time, and state appellate courts applying intermediate scrutiny 68 percent of the time.¹⁵² Moreover, the authors concluded that “[c]ontrary to the common assertion, application of intermediate scrutiny has not invariably been fatal to Second Amendment claims.”¹⁵³ At the same time, they concluded that although strict scrutiny resulted in a higher rate of invalidation of firearms regulations, “strict scrutiny was far from fatal to challenged weapons laws.”¹⁵⁴ As discussed further in Part IV, the seeming breakdown of tiered scrutiny is not unusual.¹⁵⁵ Indeed, it has become increasingly common across a range of fundamental rights.

Finally, Ruben and Blocher’s data examine cross-circuit disparities in terms of the success of Second Amendment claims. The authors found a federal circuit disparity, but they attributed it largely to the fact that only a few states, located in certain circuits, had enacted the kind of strict gun control laws that were likely to be invalidated.¹⁵⁶ Thus, Ruben and Blocher conclude: “The relatively high proportion of successes in the Second, Fourth, Seventh, Ninth, and D.C. Circuits is consistent with the view that these courts are not in open rebellion against the Second Amendment.”¹⁵⁷ Indeed, although one cannot really quantify *class-based* “second-class” claims, these results certainly suggest that “elite” circuits are not overtly unfriendly to Second Amendment claims.

Critics of the Ruben and Blocher study insist that the data do not support the claim that the Second Amendment is being properly enforced.¹⁵⁸ However, they do not provide a baseline from which to determine whether the right to keep and bear arms is actually being “underenforced.” Consequently, the critiques suffer from the same general infirmity as other “second class” enforcement claims. For example, although *Heller* does not resolve the issue, some critics of the Ruben and Blocher study assume a

151. Ruben & Blocher, *supra* note 6, at 1494.

152. *Id.* at 1496.

153. *Id.*

154. *See* Ruben & Blocher, *supra* note 6, at 1496.

155. *See infra* Part IV.B.

156. *See* Ruben & Blocher, *supra* note 6, at 1497 (“Within federal courts of appeals, about 96 percent of successes came out of the Second, Fourth, Seventh, Ninth, and D.C. Circuits—far higher than the 54 percent (119 of 219) of Second Amendment cases heard by those circuits.”).

157. *Id.*

158. *See* David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. 79 (2018); Mocsary, *supra* note 143. The critics also make more granular empirical claims about the manner in which the authors collected and coded decisions in Second Amendment cases.

“correct” answer to the scope of public carry rights and then fault lower courts for not enforcing their preferred interpretation.¹⁵⁹ Others do not contest the data itself, but suggest that judges are hiding or masking their hostility to Second Amendment rights and defying *Heller*.¹⁶⁰ But of course, such claims are not falsifiable. In any event, lower courts are not always shy about indicating explicit disagreements with Supreme Court precedents.¹⁶¹ Thus, if there is open judicial hostility to *Heller*, we might expect to see it more transparently expressed.

Like the available qualitative data, quantitative data do not paint a picture of a disrespected right or courts engaged in massive resistance to *Heller* or the Second Amendment. The individual right to keep and bear arms, as enforced in lower courts, exhibits traits that are common to the broader class of fundamental rights. The Second Amendment that has emerged is non-absolute and subject to specific and perhaps additional coverage exceptions. Courts have generally applied either strict or intermediate scrutiny to Second Amendment burdens. Ruben and Blocher’s data suggest that the right to keep and bear arms is nuanced and variable.¹⁶² The Second Amendment can be a strong trump, in the sense that it prevents government from regulating the right to keep and bear arms in certain circumstances. This occurs, as one would expect, when the core of the Second Amendment right is implicated. And when that occurs, the government’s burden of justification generally increases.

These are all familiar attributes of fundamental constitutional rights. The data depict a Second Amendment that is becoming normalized, “legalistic,” and methodologically nuanced.¹⁶³ The right to keep and bear arms is being assimilated, sometimes more slowly than its proponents would like, into the family of fundamental constitutional rights.

C. Judicial Ideology

Some studies have also attempted to isolate and assess the extent to which judicial ideology has affected Second Amendment enforcement. Although this factor cannot be ruled out, the existing data do not demonstrate

159. *E.g.*, Kopel & Greenlee, *supra* note 9, at 9–10 (critiquing circuit court decisions on this ground).

160. *See* Mocsary, *supra* note 143, at 42–43.

161. *See* Re, *supra* note 12, at 963–64 (citing examples of lower court criticisms of Supreme Court decisions concerning the right of habeas corpus).

162. *See* Ruben & Blocher, *supra* note 6, at 1507 (“The doctrinal landscape is more diverse, nuanced, and interesting than many suppose.”).

163. *Id.*

that ideology or preference exert a strong influence on outcomes in Second Amendment cases.

Professor O'Shea's study, which was discussed earlier, examined the political party of the judges who wrote Second Amendment opinions during the five-year study period.¹⁶⁴ O'Shea identified what he described as "a profound partisan divide," with Democrat-appointed judges almost uniformly upholding firearms regulations and Republican-appointed judges voting to invalidate them.¹⁶⁵ Like other commentators, Professor O'Shea fails to consider that *Heller* and other pro-firearms decisions might also be characterized as the result of judicial partisanship. In the world of "second-class" claims, partisanship seems to explain only the *losses*, and not the *wins*, of firearms proponents.

In any event, Professor O'Shea highlighted some significant caveats. For example, he acknowledged that "a fair number" of the cases involved claims by convicted felons, which again *Heller* essentially foreclosed. This significantly reduced the probative value of these decisions.¹⁶⁶ O'Shea also acknowledged that Republican-appointed judges "have authored many important opinions *rejecting* plausible Second Amendment claims or expressing skepticism about broadened Second Amendment rights."¹⁶⁷

Professor O'Shea was not attempting to demonstrate a statistically significant ideological effect. More modestly, he concluded based on his study that "judges selected by Republican presidents occasionally held that government action violates the Second Amendment while judges selected by Democratic presidents essentially never did so."¹⁶⁸ However, as Professor O'Shea seems to acknowledge, that is not a valid empirical demonstration of partisan or ideological bias.

Indeed, the real problem, as empiricists have observed, lies in isolating the various factors—in addition to judicial ideology—which might lead to such results. Thus far, more rigorous quantitative studies have failed to reveal any "profound partisan divide." Although the data show that Second Amendment claims lag behind other types of constitutional claims in terms of attracting votes from Democrat-appointed judges, they do not isolate ideology or preference in a strong causal sense.¹⁶⁹

164. Ruben & Blocher, *supra* note 6, at 1443–1447.

165. *Id.* at 1444.

166. *Id.* at 1501. See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

167. O'Shea, *supra* note 37, at 1423.

168. *Id.*

169. See Samaha & Germano, *supra* note 134, at 111–12 (noting that while there is an ideological effect, its causes are not clear).

In a study that compares various constitutional claims, including abortion, affirmative action, and gun rights, Professors Samaha and Germano observe that judicial ideology appears to play a relatively minor role in terms of explaining Second Amendment case outcomes.¹⁷⁰ Specifically, they conclude that “the variable identifying judges as Democratic or Republican appointees is not a statistically significant predictor in gun rights cases.”¹⁷¹

Samaha and Germano reach a similar conclusion in a follow-up study focusing on the same constitutional areas, but this time limiting their study of the Second Amendment to *civil* claims.¹⁷² The authors conclude that while judicial ideology may contribute to the disparities in success rates across constitutional claims, they “cannot make much progress on why gun rights claims might fare worse than certain other claims.”¹⁷³ They observe that “plausible explanations are available that have nothing to do with judges disliking gun rights, and existing data cannot rule out those alternatives.”¹⁷⁴ They conclude that in comparative claims studies like their own, “finding

170. See Samaha & Germano, *supra* note 23, at 861 (concluding that “the summary statistics indicate that commercial speech claims are like gun rights claims in that ideology might play a small role, while ideology might play a large role in abortion rights, establishment clause, and anti-affirmative action claims”). (The authors caution that, in part owing to the prevalence of criminal claims in the database, “judicial support for gun rights claims is so terribly low that this field of litigation might not be amenable to grouping with other claims.”)

171. *Id.* at 865.

172. Samaha & Germano, *supra* note 134, at 106–07. (As the authors note, the high number of criminal cases in the Second Amendment database may skew success rates, owing to the actions of appointed counsel who may “adopt implausible legal positions when facing serious penalties.”)

173. *Id.* at 103.

174. *Id.* With regard to the low success rate of Second Amendment claims, Professors Samaha and Germano surmise as follows:

Among the possibilities worth considering are stakes and resources. Perhaps, for example, the litigation arm of the gun rights movement is generally better financed than other constitutional litigation shops, and can afford to litigate claims that are unlikely to prevail. And perhaps a high fraction of litigation losses are tolerable for this class of litigants because persistent litigation maintains high expected costs for regulators who otherwise would like to innovate with new gun policies—and perhaps litigation losses can be used to promote the cause to gun owners, who may be reminded that judges are not willing to establish their preferred gun policies and who may then increase their material support for the broader cause. Or perhaps gun rights claimants and lawyers are relatively more committed to their cause, are less influenced by a global litigation plan of some organizing body, and are not dissuaded by judicial rejection. But again, the factors that might make gun rights litigation special will have to be explored in future work.

Samaha & Germano, *supra* note 23, at 860–61, n.176.

distinctive voting patterns among Democratic and Republican appointees is closer to the beginning of the investigation than the end.”¹⁷⁵

Nor has evidence of “elite” or professional bias materialized. As noted earlier, both pre- and post-*Heller*, some commentators have asserted that such bias causes courts to view and treat Second Amendment claims and claimants as “second-class.”¹⁷⁶ However, these claims have not been backed by actual evidence. Moreover, some of the complaints have been directed solely at *federal appellate* judges. That leaves the puzzle of why Second Amendment claims frequently fail in *state* courts as well, where presumably the same professional and elite biases do not exist or are at least less pronounced. Such impressionistic “second-class” claims provide little in the way of actual evidence that the Second Amendment has been forsaken or disrespected by judges owing to their attitudinal biases.

In sum, quantitative studies have not produced any convincing evidence that the Second Amendment is being under-enforced by lower courts, much less that it is the object of resistance or rebellion. The data cannot rule out that some courts may be hostile to or biased against Second Amendment claims. However, the burden properly lies with those who would point to mere impressions, attitudinal factors, or the general “tenor” of decisions to demonstrate that the Second Amendment has been under-enforced.

IV. The Second Amendment’s Comparative Status

One of the central premises of “second-class” arguments is that the Second Amendment has not been treated with the respect and regard accorded other fundamental constitutional rights. This is evident, critics complain, in terms of the standards applied to Second Amendment claims, the relative degree of enforcement of the right to keep and bear arms, and the overall treatment of Second Amendment claims in lower courts and the Supreme Court. As noted earlier, comparative assessments across a range of constitutional rights raise special difficulties. However, in the broad terms “second-class” critics typically adopt, it is possible to subject comparative claims to some meaningful scrutiny. Four general conclusions follow: (1) the notion that all rights are created equal is false; (2) insofar as we have a hierarchy of fundamental rights, the Second Amendment sits closer to its top than to its cellar; (3) substantive comparisons to other rights in the same class, including the freedom of speech, do not establish the Second Amendment’s “second-class” status; and (4) judged relative to other

175. Samaha & Germano, *supra* note 134, at 112.

176. See O’Shea, *supra* note 37.

fundamental constitutional rights, the Supreme Court has not “orphaned” or abandoned the Second Amendment.

A. The Fallacy of Equality and the Hierarchy of Fundamental Rights

“Second-class” claims are based, in part, on the notion that there is, or at least ought to be, no hierarchy of rights under our Constitution. The Second Amendment, the argument goes, is entitled to the same status, standards, and enforcement as other recognized constitutional rights. And since all constitutional rights are created equal, it is wrong to subject any of them to differential treatment. Simply put, to borrow a phrase from the first Justice Harlan, with regard to constitutional rights “there is no caste here.”¹⁷⁷

The trouble with this form of the “second-class” argument is that it is “demonstrably false.”¹⁷⁸ Not all constitutional rights are created equal—a fact demonstrated, ironically, by the very concept of “fundamental” rights.

Not even all of rights in the sub-class of “fundamental” rights enjoy equal status. That is because fundamental constitutional rights have long been explicitly and implicitly ranked. For instance, as noted earlier, within the class of fundamental rights, *incorporated* rights are “fundamental” in a special sense: By virtue of their unique status, these rights enjoy broader scope and enforcement than the sub-class of “second-class” *un-incorporated* rights. Since the 1930s, *economic* rights have been disfavored vis-à-vis *non-economic* rights.¹⁷⁹ Moreover, some consider the class of *enumerated* fundamental rights—those explicitly set forth in the text, as in the Bill of Rights—to be more legitimate than the class of “*un-enumerated*” fundamental rights that includes the right to abortion and other “privacy” rights.¹⁸⁰

These distinctions are all familiar to constitutional jurisprudence and theory. With respect to each distinction, the Second Amendment is clearly on the “preferred” side of the line. It is an incorporated, non-economic, and textually explicit constitutional right. Insofar as there are “classes” of constitutional rights, the Second Amendment possesses all of the basic hallmarks of a “first-class” right.

Public discourse about fundamental rights demonstrates the existence of a hierarchy and, again, confirms the Second Amendment’s high rank

177. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

178. *Miller*, *supra* note 19.

179. *See* *U.S. v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938) (describing framework for application of heightened judicial scrutiny).

180. *See, e.g.*, ROBERT BORK, *THE TEMPTING OF AMERICA* (1990).

within that hierarchy. As Professor Miller notes, the decisions in *Roe v. Wade*¹⁸¹ and *Colgrove v. Battin*¹⁸² were both handed down in 1973. Although both are significant decisions in terms of fundamental rights, most Americans could not pick *Colgrove* out of a precedential lineup. (The decision held that there is no Seventh Amendment right to a twelve-member jury in civil cases.). Professor Miller observes: “I have yet to see cable news pundits lament the demise of the twelve-member jury, or read of a Twitter war raging over the meaning of ‘in suits at common law . . . the right of trial by jury shall be preserved’ or learn of grass-roots mobilization to restore the original understanding of the Seventh Amendment.”¹⁸³

In terms of public recognition and political salience, *Heller* and the Second Amendment are much closer to *Roe* and the abortion right than to *Colgrove* and the jury trial right. As mentioned earlier, *Heller* and the Second Amendment have fundamentally altered public discourse about gun control. Public and legislative support for gun rights is very high, in both real and relative terms. If there were a Rodney Dangerfield Award, the Third Amendment, which has been ignored by the Supreme Court and is one of the few un-incorporated rights in the Bill of Rights, would be a solid contender. However, the Second Amendment, which has the sustained attention of courts, officials, and the public, would not even be in the running.

A relatively short list of constitutional rights tends to dominate the field. Professor Miller sums things up: “Free speech, the right to keep and bear arms, equal protection, due process, privacy—these are the sexy rights. Everything else is B-list.”¹⁸⁴ One might round out this list with a few other rights, including the right to vote and the free exercise of religion, both of which can also make a plausible claim to “A-list” status. However, Professor Miller is surely correct about two things: the fundamental rights “A-list” is short, and the Second Amendment is definitely on it.

B. Within-Class Status

Some “second-class” claimants might accept the foregoing general premises, yet still argue that the Second Amendment has been disfavored or disrespected relative to other fundamental rights in its class. One prominent version of this argument is that relative to other rights in the class, courts have framed the Second Amendment differently or subjected it to less favorable standards.

181. 410 U.S. 113 (1973).

182. 413 U.S. 149 (1973).

183. Miller, *supra* note 19.

184. *Id.*

Part III offered a partial answer to this concern, in terms of judicial enforcement of the Second Amendment. The data suggest that Second Amendment claims are being assimilated into the family of fundamental constitutional rights. Thus, familiar standards and frameworks, including the concept of “tiered” scrutiny, have now developed in the Second Amendment area as they have in other fundamental rights contexts.

From this perspective, the real problem that gun control opponents have encountered is not that their claims are being treated differently by courts, but rather that they are being normalized within a fundamental rights doctrine that has long exhibited ambiguities and inconsistencies. For example, one common “second-class” complaint has been that courts are not consistently applying “heightened scrutiny” to gun control measures. However, as scholars have observed, the tiered scrutiny regime has not held up across a range of fundamental constitutional rights.¹⁸⁵ As Jamal Greene has noted, “[e]ach particular fundamental right . . . bears its own bespoke doctrinal formula.”¹⁸⁶ This reality significantly complicates arguments that a particular fundamental right is being disfavored relative to other members of the class. As Professor Miller has observed, “[n]o right can be an outlier if every right is in a class by itself.”¹⁸⁷

Insofar as fundamental constitutional rights are concerned, there is no mandatory script or set of magic words we can look for in assessing their relative strength or status. As discussed in Part II, strict scrutiny has *never* been a reliable indicator of fundamentality. Thus, its absence in most Second Amendment cases does not demonstrate differential or unequal treatment.

Indeed, standards and frameworks applied to other fundamental rights generally undermine arguments about the Second Amendment’s disfavored treatment. Thus, even “substantial” burdens on the free exercise of religion are permissible, so long as they result from application of laws or regulations that are “neutral and generally applicable.”¹⁸⁸ Strict scrutiny is reserved for laws that purposefully target or discriminate against religion.¹⁸⁹ Since 1992, abortion rights have been governed by an “undue burden” standard that grants government broad power to regulate most aspects of abortion and prohibits only laws that have the purpose or effect of denying women’s

185. See Miller, *supra* note 19 (suggesting that “the tiers of scrutiny are crumbling for every right”).

186. Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144 (2016).

187. Miller, *supra* note 19.

188. *Employment Div. Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

189. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (applying heightened scrutiny to local ordinances that singled out religious rituals).

access to abortion services.¹⁹⁰ Some recent Due Process Clause “privacy” cases do not explicitly adopt *any* particular standard of scrutiny.¹⁹¹ When judged according to the standard of scrutiny applied, lower courts have treated Second Amendment claims at least as favorably—and in some cases arguably more favorably—than these other fundamental rights claims.

As these examples also show, fundamental rights are not always the strong trumps that gun rights proponents apparently believe them to be. Thus, the “fundamental” right to marry is subject to a variety of state and federal regulations that have not raised any serious constitutional questions. Despite the fact that the right to vote is fundamental, the Supreme Court has upheld even *lifetime* bans on felon voting rights.¹⁹² This shows that classes of individuals sometimes enjoy variable fundamental rights. For example, with respect to incarcerated persons, the right to vote can be denied, the right to marry cannot, and freedom of speech can be abridged when it is deemed reasonably necessary to further legitimate penological interests.¹⁹³

Within the sub-class of “fundamental” constitutional rights, the Court has developed a messy milieu of doctrines, standards, and approaches. In this context, claims of differential treatment are difficult if not impossible to maintain. Indeed, insofar as Second Amendment decisions are largely using some form of tiered scrutiny approach, with at least some regulations subject to fatal forms of scrutiny, the right to keep and bear arms is arguably receiving *more* protection than, say, free exercise of religion or the right to abortion. In sum, if standards of review are suggestive of status, the Second Amendment is not among the most disfavored rights in the fundamental rights class.

C. Freedom of Speech – Then and Now

As discussed earlier, when the Court recognized the individual right to keep and bear arms in *Heller*, it repeatedly invoked the Free Speech Clause as a model or analogy. Freedom of speech is a natural right for “new” rights to aspire to. No other right displays the same degree of magnetism and influence—in public discourse, scholarly writing, or judicial decisions—as

190. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (upholding various state regulations on abortion) with *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (invalidating a state effort to severely restrict access to abortion services).

191. See e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas sodomy law did not survive even rationality review); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (failing to specify standard of review under Equal Protection Clause or Due Process Clause).

192. See *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

193. See *Turner v. Safley*, 482 U.S. 78, 94–95 (1987).

the Free Speech Clause.¹⁹⁴ Some have warned against analogizing the Second Amendment to the First Amendment for purposes of constructing constitutional doctrines.¹⁹⁵ However, since “second-class” arguments often focus on the preferred status of free speech, the comparison is worth examining. In some important respects, the analogy demonstrates the opposite of what “second-class” claimants apparently intend. The right to keep and bear arms and the free speech right share more in common than “second-class” critics typically acknowledge or seem to realize.

1. *The Free Speech Clause’s First Decade*

Between ratification and recognition, both Second Amendment and First Amendment rights experienced extended periods of jurisprudential dormancy. In decisions handed down during the nineteenth and twentieth centuries, the Supreme Court indicated that the right to keep and bear arms was narrow and perhaps limited to militia service.¹⁹⁶ From its ratification in 1791 through the *Heller* decision in 2008, the Court did not recognize a fundamental constitutional right to keep and bear arms. Similarly, the Court did not engage with the Free Speech Clause until 1919, when it handed down a series of famously speech-restrictive decisions.¹⁹⁷ Prior to that, the Court had suggested that freedom of speech and press might prohibit only prior restraints on expression.¹⁹⁸ In their pre-recognition eras, the Court interpreted the right to keep and bear arms and freedom of speech quite narrowly.

With regard to the Second Amendment, *Heller* changed the landscape dramatically when it recognized an individual right to keep and bear arms. *McDonald*, which was handed down shortly thereafter, significantly expanded the scope of Second Amendment enforcement by placing the right in the category of “fundamental” rights applicable to the states. These two

194. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787–1800 (2004) (discussing cultural and other aspects of the “magnetism” of the free speech right).

195. See e.g., TIMOTHY ZICK, *THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS* 203–41 (2018); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 51 (2012).

196. See *Presser v. Illinois*, 116 U.S. 252, 254–65 (1886) (upholding ban on armed paramilitary parades); *United States v. Miller*, 307 U.S. 174 (1939) (upholding federal gun control law).

197. See e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211, 216 (1919); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

198. *Patterson v. Colorado*, 205 U.S. 454 (1907).

decisions represent an obvious starting point for assessing the right to keep and bear arms as a “fundamental” right.

In terms of the Free Speech Clause, the point of judicial recognition arguably occurred not in 1919, when the Court first engaged with the free speech right, but rather when the Court first signaled that freedom of speech was “fundamental” in the sense that it applied to the states. This occurred in 1925, in *Gitlow v. New York*.¹⁹⁹ To be sure, in terms of the development of fundamental rights jurisprudence, *Gitlow* was decided very early. The Court did not begin to develop a coherent approach or framework with respect to “fundamental” rights until more than a decade later.²⁰⁰ Some might argue that to truly compare apples to apples, the Second Amendment must be compared to the *contemporary* Free Speech Clause. That comparison is discussed below. However, we can still learn something—perhaps a lot—from a comparison of the two rights in their respective “first decades.” From the data discussed earlier, we have a sense of how the Second Amendment has been enforced during its first decade. How did the Supreme Court and lower courts approach freedom of speech in the first decade after it was recognized as a “fundamental” constitutional right?

We can begin assessing the free speech analogy by examining the principal Supreme Court decisions. *Heller* and *Gitlow* are very different decisions, but they also share important things in common. As in *Heller*, the Court’s recognition of the free speech right in *Gitlow* came with some caveats. In the course of *upholding* a state law that criminalized communications advocating the overthrow of government by violent means, the Court observed:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.²⁰¹

199. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

200. See *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

201. *Gitlow*, 268 U.S. at 666.

As discussed earlier, *Heller* makes the same point about the Second Amendment—i.e., that the right, although fundamental, is not absolute.

Like *Heller*, *Gitlow* highlighted some historical and other exceptions to free speech coverage. Thus, the Court observed that “a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means.”²⁰² Further, it emphasized that freedom of speech “does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties.”²⁰³ So, the free speech right, like the right to keep and bear arms, was thought to be subject to longstanding exceptions.

There were also some important differences in how the Court characterized the rights in *Heller* and *Gitlow*. *Heller* embraced a more robust conception of Second Amendment rights than the *Gitlow* Court adopted concerning freedom of speech. In *Gitlow*, the Court emphasized that while freedom of speech is “an inestimable privilege in a free government,” without limitations, “it might become *the scourge of the republic*.”²⁰⁴ (It is impossible to imagine similar words being used in *Heller* to describe the Second Amendment). Thus, the Court concluded, the idea that “a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.”²⁰⁵

Like *Heller*, *Gitlow* also addressed the nature and scope of judicial review. Recall that *Heller* disclaimed “interest balancing” and rational basis review. By contrast, *Gitlow* observed that the state’s determination that certain communications advocating the overthrow of the government ought to be suppressed was entitled to “great weight,” and indeed that “[e]very presumption is to be indulged in favor of the validity of the statute.”²⁰⁶ The Court wrote: “We cannot hold that the present statute is an *arbitrary or unreasonable* exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.”²⁰⁷ It reasoned that “[s]uch utterances, by their very nature, involve danger to the public peace and to the security of the State. They

202. *Gitlow*, 268 U.S. at 666.

203. *Id.* at 667–68.

204. *Id.* at 667.

205. *Id.*

206. *Id.* at 668.

207. *Id.* at 670.

threaten breaches of the peace and ultimate revolution.”²⁰⁸ At the outset, then, *Gitlow* embraced a form of rationality review for the nominally “fundamental” free speech right. Now, this was obviously long before the Court adopted a “tiered” approach to judicial review of burdens on constitutional rights.²⁰⁹ However, at the outset, fundamentality did not entail a rigorous form of judicial scrutiny, and indeed allowed government to restrict speech in furtherance of public safety, order, and other communal interests.

Far from envisioning a strong trump against governmental speech regulation, *Gitlow* held that syndicalism laws could be “applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute.”²¹⁰ Unlike *Heller* and *McDonald*, which recognized self-defense as the core justification for the Second Amendment right, *Gitlow* did not even articulate a value that would presumptively outweigh the state’s interests. Thus, as long as the government had a non-arbitrary basis for concluding that speech posed some danger to public safety, the Court concluded that governments could criminalize it—even absent any real showing of “clear and present danger.”²¹¹

Gitlow’s framing and conception of the free speech right made it more likely that the Supreme Court and lower courts would reject most free speech claims. That is precisely what occurred. I examined all of the reported federal and state cases (trial and appellate) invoking the First Amendment’s Free Speech Clause between 1925 and 1935—in effect, the first decade of the provision’s post-incorporation enforcement.²¹² Discarding decisions that did not significantly implicate or discuss the merits of First Amendment claims yielded approximately two dozen published opinions.²¹³ The sample size is obviously small—too small to perform any meaningful empirical analysis. In comparison, there have been more than *one thousand* post-*Heller* Second Amendment decisions.²¹⁴

208. *Id.* at 669.

209. *Carolene Products*, 304 U.S. at 152 n.4.

210. *Gitlow*, 268 U.S. at 670.

211. *Id.* at 671.

212. I conducted the following Westlaw search: adv: “first amendment” & (speech OR “freedom #of speech” OR “speech clause” or “first amendment” OR “gitlow v. new york”) & DA (aft 06-08-1925 & bef 06-08-1935).

213. The search terms captured a large number of Twenty-first Amendment cases, as well as some cases involving the free exercise of religion.

214. Reuben & Blocher, *supra* note 6. There are several possible explanations for the difference. Most prominently, in the 1920s and 1930s, there were no interest groups, much less entire industries devoted to constitutional litigation. Further, *Gitlow* clearly emphasized the limited

Although the sample size is small, it is still revealing. Consider the Supreme Court's own review of First Amendment claims in the initial decade. During the first post-incorporation decade, the Supreme Court handed down just three free speech decisions²¹⁵—not quite an “orphaning” of the right, as Justice Thomas might say, but certainly not far from it.²¹⁶

One of these cases was *Whitney v. California*, decided in 1927.²¹⁷ *Whitney* involved a challenge to California's Criminal Syndicalism Act, which criminalized willfully organizing and becoming a member of a group assembled to advocate, teach, or aid and abet unlawful acts of force or terrorism as a means of effecting political change.²¹⁸ The Court upheld Anita Whitney's conviction, even though she denied joining the Communist Labor Party with intent to aid or abet acts of syndicalism by the group.²¹⁹

The Court's analysis consisted of a total of three paragraphs. The first emphasized that the free speech right “does not confer an absolute right to speak, without responsibility, whatever one may choose” and specifically does not cover “utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.”²²⁰ The second paragraph declared that the state's determination that communications and assemblies furthering syndicalism “must be given great weight,” that “[e]very presumption must be indulged in favor of the validity of the statute,” and that the law may not be declared unconstitutional “unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.”²²¹ The third and final paragraph applied these standards to uphold the application of the syndicalism law to Whitney's

scope of free speech and press rights. This too likely depressed litigation of First Amendment claims. By contrast, Professors Reuben and Blocher found an above-average appeal rate in Second Amendment cases. *Id.* at 1474. They surmised that the trend is related, in part, to the overall lack of success in Second Amendment litigation. Thus, litigants may have brought more Second Amendment claims “due to uncertainty in the doctrine (whether real or perceived), strongly motivated or overconfident litigants, or some other reason hard to pin down with our data.” *Id.* In the context of what we might call the modern culture of constitutional litigation, which includes dedicated advocacy and interest groups willing to fund Second Amendment cases, federal and state reporters have predictably swelled with decisions.

215. The Court also decided a free press case. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (invalidating state law on the ground that it constituted a prior restraint on the press).

216. See *infra* Part IV.D. (discussing whether the Second Amendment has been “orphaned” by the Court).

217. *Whitney v. California*, 274 U.S. 357 (1927).

218. *Id.* at 359–60.

219. Although the record below indicated that Whitney had not even raised any First Amendment claim, the Court decided to entertain it on appeal. *Id.* at 360–61.

220. *Id.* at 371.

221. *Id.*

expressive activities.²²² Even Justice Brandeis, who wrote a stirring and now-famous concurrence extolling the values of freedom of speech, ultimately concluded that *Whitney* had effectively waived her First Amendment claims.²²³

The Court decided one other syndicalism case during the post-incorporation decade. In *Fiske v. Kansas*, the Court distinguished *Gitlow* and *Whitney* on the ground that the record before it did not contain sufficient evidence that the Industrial Workers of the World had advocated or taught the necessity of criminal syndicalism.²²⁴ *Fiske* was a brief, unanimous, and straightforward application of the Court's earlier syndicalism precedents.

The only other free speech case decided during the first post-incorporation decade was *Stromberg v. California*.²²⁵ The case involved a 19-year-old summer camp supervisor who allegedly directed camp attendees to display a red flag—a reproduction of the flag of Soviet Russia—as part of a daily camp ceremony.²²⁶ The camp supervisor was convicted by a jury of violating a state law banning such displays when done for the purpose of opposing organized government, inviting anarchistic action, or aiding propaganda of a seditious character.²²⁷ The Court emphasized that freedom of speech is not an “absolute” right, and that it is subject to various coverage exceptions.²²⁸ It concluded that the state law could generally be applied against the camp supervisor's activities, but owing to vagueness concerns could not be applied to acts of displaying the flag “as a sign, symbol or emblem of opposition to organized government.”²²⁹

Unlike *Heller*, *Gitlow* and *Whitney* delegated very little interpretive authority to the lower courts. Based on those precedents, several lower courts upheld state syndicalism and sedition laws.²³⁰ One court—the Ohio Supreme Court—was not yet convinced that the Free Speech Clause actually applied against the states, although it briefly analyzed and rejected the free speech claim anyway.²³¹

222. *Whitney*, 274 U.S. at 372.

223. *Id.* at 379–80 (Brandeis, J., concurring).

224. *Fiske v. Kansas*, 274 U.S. 380, 387 (1927).

225. *Stromberg v. California*, 283 U.S. 359 (1931).

226. *Id.* at 362.

227. *Id.* at 361.

228. *Id.* at 368–69.

229. *Id.* at 369–70.

230. See *State v. Kassay*, 126 184 N.E. 521 (Ohio Sup. Ct. 1932); *State v. Boloff*, 7 P.2d 775 (Ore. Sup. Ct. 1932); *Carr v. State*, 166 S.E. 827 (Ga. Sup. Ct. 1932); *Comm. v. Goodman*, 16 Pa. D. & C. 253 (1931); *Comm. v. Lazar*, 103 157 A. 701 (Pa. Super. Ct. 1931).

231. See *Kassay*, 126 N.E. at 525 (stating that Bill of Rights was “not applicable to the states”).

As in the Second Amendment context, lower court decisions took a consistent approach to early free speech claims. Typically, they began by observing that the free speech right was not absolute.²³² The decisions then expressed deference to legislative judgments with regard to the need to criminalize communications constituting syndicalism and sedition.²³³ Some tried their hand at applying the Court's "clear and imminent danger" standard, which had been adopted in the World War I era cases, but did not engage in anything we might consider heightened scrutiny.²³⁴ In all of these cases, the First Amendment claim was rejected.

Free speech claimants were nearly as unsuccessful in other contexts. For example, a federal district court upheld the exclusion from the mails of the *Revolutionary Age*, a Communist publication, on the ground that its content was "indecent."²³⁵ Under the federal postal laws, material that incited arson, murder, or assassination could be deemed non-mailable on the ground that it was "indecent."²³⁶ The court rejected the publisher's First Amendment claim, reasoning that "use of the mails is a privilege" rather than a right, and that the postal authorities could exclude publications that even implicitly advocated violence.²³⁷

Similarly, the D.C. Circuit held that the Federal Radio Commission acted reasonably when it rejected a broadcaster's application for renewal of a radio license.²³⁸ The court interpreted the First Amendment as prohibiting prior restraints on publication, while "leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare."²³⁹ With regard to the First Amendment, the court stated that the only question was whether the federal statute was a "reasonable exercise of

232. See *Kassay*, 126 N.E. at 525 ("The right of free speech is fundamental, but it is not absolute."); *Boloff*, 7 P.2d at 780 ("It is clear that freedom of speech is not an absolute right without limitation."); *Carr*, 166 S.E. at 829 (quoting *Gitlow* concerning non-absolute nature of the free speech right).

233. See *id.* ("The question is therefore legislative, and only becomes justiciable when challenged on the ground that the statute has no reasonable relation to an existing evil."); *Boloff*, 7 P. 2d at 776 ("it is the province of the Legislature to declare what acts are injurious to the public welfare and to prohibit them by legislative enactment as crimes"); *Lazar*, 157 A. at 703 (discussing legislative deference in incitement cases).

234. See, e.g., *Boloff*, 7 P. 2d at 784 ("When the threatening language has progress [sic] to the point that it is creating a clear and present danger of action, the state need not wait until the blow is struck, but may proceed to protect the public peace."); *Lazar*, 157 A. at 703 (applying "clear and present danger" standard).

235. *Gitlow v. Kiely*, 44 F.2d 227, 232 (S. D. N.Y. 1930).

236. *Id.*

237. *Id.* at 229.

238. *Trinity Methodist Church v. Fed. Radio Com.*, 62 F.2d 850, 852 (D.C. Cir. 1932).

239. *Id.*

governmental control for the public good.”²⁴⁰ Since the record showed that the broadcaster had communicated attacks on the courts, Jews, and the Catholic Church (among others), the court held that the agency acted in the public interest in denying its license renewal application.²⁴¹

In another case, a federal district court upheld a criminal contempt of court conviction on the ground that the defendant’s publication of a series of articles having to do with racial politics would have the tendency or effect of prejudicing jurors in a pending criminal trial.²⁴² Responding to the defendant’s claim that he had a right to comment on pending criminal proceedings, the court wrote that freedom of speech and press “are necessarily limited to avoid trespasses upon other rights of equal dignity.”²⁴³ The court also observed that these rights were “not paramount to other privileges guaranteed the citizen under the Constitution,” including the right to trial by jury.²⁴⁴

During this period, arguments about the hierarchy and status of different constitutional rights were already being presented to courts. In one case, the Wisconsin Supreme Court upheld an order enjoining a defendant, then on a crusade to expose the producers of oleomargarine in the state, from publishing lists of such producers.²⁴⁵ In response to the claim that the order violated the Free Speech Clause, the court observed:

This argument proceeds upon the theory that the right of free speech, for some reason not defined, rests upon a different basis than other rights guaranteed to the citizen by the Constitution. While the right of free speech may in popular estimation be accorded a higher rank than other rights guaranteed to the citizen by the Constitution, in a legal and constitutional sense the right of free speech is of no greater dignity than the right to life, liberty, property, trial by jury, freedom of conscience, and other rights guaranteed to the citizen by the Constitution.²⁴⁶

Arguments about “first-class” and “second class” rights, and the rankings of rights, were thus already gaining some currency in the courts. In this instance, the free speech right was being put “in its place” as just one

240. *Trinity Methodist Church*, 62 F.2d at 852.

241. *Id.*

242. *United States v. Sullens*, 36 F.2d 230, 238 (S.D. Miss. 1929).

243. *Id.*

244. *Id.*

245. *John F. Jelke Co. v. Hill*, 247 N.W. 576, 582 (Wis. Sup Ct. 1932).

246. *Id.*

among many fundamental rights entitled to no greater weight than others in its class. Regarding the merits of the claim, the court wrote simply: “One may not, under the cover of free speech, wrongfully do injury to the business of another.”²⁴⁷

Defendants in defamation and libel cases were also generally unsuccessful. This was, of course, well before the Supreme Court’s decision in *N.Y. Times Co. v. Sullivan*, which required that state libel laws conform to First Amendment standards.²⁴⁸ At the time, lower courts relied on the Supreme Court’s statement in *Gitlow*, that the rights of free speech and press were not absolute, and held that publishers were responsible for any reputational harms—including harms suffered by public officials—that were caused by their false statements.²⁴⁹

The Minnesota Supreme Court upheld a state public nuisance procedure, similar to one later invalidated by the Supreme Court of the United States as a prior restraint, as applied to a newspaper.²⁵⁰ “There is no constitutional right,” the court explained, “to publish a fact merely because it is true.”²⁵¹ Indulging “every reasonable presumption” in favor of the validity of the statute, the court concluded that the public nuisance law was a legitimate exercise of the state’s police power.²⁵²

One federal court of appeals reversed a criminal libel conviction against a newspaper which was based upon publication of a report alleging police misconduct.²⁵³ The decision was based on the court’s finding that the article did not meet the statutory definition of libel rather than any constitutional right or principle.²⁵⁴ The appeals court did find that the district court erred in rendering a verdict based upon its *personal* belief that the press had overstepped its proper bounds by criticizing public officers.²⁵⁵ However, the same appeals court also upheld a contempt order against the defendant, who had published an article criticizing the conduct of his bench trial on the libel charge.²⁵⁶

247. *Hill*, 247 N.W. at 666–67.

248. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

249. *See, e.g., Pentuff v. Park*, 138 S.E. 616, 621–22 (N.C. Sup. Ct. 1927) (upholding libel judgment).

250. *State v. Guilford*, 219 N.W. 770 (Minn. Sup. Ct. 1928).

251. *Guilford*, 219 N.W. at 462.

252. *Id.* at 460, 463.

253. *Francis v. Virgin Islands*, 11 F.2d 860 (3d Cir. 1926).

254. *Id.* at 862.

255. *See id.* at 863 (“The courts of the Virgin Islands are not instrumentalities for the regulation of the public press.”).

256. *Id.* at 865.

Finally, during the period under review, a New York trial court invalidated revocation of the charter of a local chapter of the American Legion based upon the “spirit if not the very letter” of the state and federal constitutions.²⁵⁷ Specifically, the court concluded that the national organization’s revocation of the charter, based on positions the chapter took on matters of public concern, unreasonably inhibited the local chapter’s freedom of speech.²⁵⁸ The court did not elaborate further on the First Amendment issue.

As noted earlier, firearms proponents would undoubtedly argue that the Court’s initial hostility to free speech claims reflects the fact that doctrines relating to constitutional rights—including free speech—were still in their infancy. That fact would, of course, significantly limit the force of any argument that relied on a comparison of the success rates or records in First Amendment and Second Amendment cases in their respective first decades.

That, however, is not the point of this comparative exercise. Rather, it is intended to contextualize the claim that the Second Amendment has been *especially* or *uniquely* disfavored during its first post-recognition decade.

Arguments about the proper rank or station of constitutional rights have been circulating for a very long time. Free speech proponents once had to argue that the First Amendment ought not to be consigned to “second-class” status. The class of fundamental rights was new and small, and free speech claimants were staking a claim to the top of the rights hierarchy, or at least equal respect and dignity.

Relative to the Second Amendment in its initial decade, in its first post-recognition decade, the Free Speech Clause was subject to greater restrictions and a much deeper level of skepticism from federal and state courts. The Free Speech Clause was interpreted as protecting a non-absolute right that was circumscribed by a number of coverage exceptions, and enforced under a very deferential standard of judicial review. As noted, some courts even treated litigants to lectures about how the free speech right was not special. At least judged by today’s standards, during its first enforcement decade, freedom of speech was arguably itself a “second-class” right.

There is an even more important general lesson to be drawn from the First Amendment’s first enforcement decade. Fundamental rights do not come fully formed straight out of the box. They develop over very long periods of time. Thus, although free speech was an anemic right at its origins, the situation for free speech claimants began to improve somewhat

257. *Gallaher v. American Legion*, 277 N.Y.S. 81, 85 (Sup. Ct. N.Y. Cty. 1934).

258. *Id.* at 85.

in the decade subsequent to the one under consideration. Claimants began to win some important cases, and these precedents established what would later become basic pillars of the modern free speech right.²⁵⁹ However, it would be another *three decades* before freedom of speech would become “fundamental” in the sense we now tend to think of it—a strong trump against content-based regulations of political speech, and a more general limitation on government efforts to censor or burden expression.²⁶⁰

For those presently concerned about the supposed “second-class” status of the Second Amendment, first decades ought to be considered mere snapshots in time. They certainly do not dictate what a right will ultimately become. Some rights flourish over time, as the Free Speech Clause certainly has in many respects. Others do not fare as well. The first decade of Free Speech Clause enforcement does not debunk but informs the “second-class” complaints of contemporary gun control opponents. What the Second Amendment has been in its first post-recognition decade may turn out to be very different from what the right eventually becomes. The Article returns to this theme in Part VI, its conclusion.

2. *The Contemporary Free Speech Clause*

The free speech history lessons are notable, and lessons drawn from them can provide context or perspective concerning modern Second Amendment “second-class” claims. However, what firearms proponents really seem to be after is the supposed “gold standard” treatment accorded to claims under the Free Speech Clause. Measured against the modern free speech right, critics complain, courts have substantially disfavored the right to keep and bear arms.²⁶¹

Insofar as the Supreme Court’s attention to free speech claims goes, critics have a point—but only up to a point. The Court’s docket, particularly

259. During the five years immediately following the Article’s study period, the Hughes Court decided a number of cases in which free speech, press, and assembly claims were successful. *See, e.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938) (invalidating conviction for distributing literature on the public streets); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (same). It was also during this period that the Supreme Court indicated, in its famous footnote in *United States v. Carolene Products*, that courts ought to review burdens on First Amendment rights with special care. During this period, the Court sometimes referred to First Amendment rights as “preferred.” 304 U.S. 144, 152 n.4 (1938).

260. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–72 (1964) (opining on the “central meaning” of the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (narrowing the categorical exclusion for speech that incites violence).

261. *See, e.g.,* Mance v. Sessions, 896 F.3d 390, 395–96 (5th Cir. 2018) (Willet, J., dissenting) (“Constitutional scholars have dubbed the Second Amendment ‘the Rodney Dangerfield of the Bill of Rights.’ As Judge Ho relates, it is spurned as peripheral, despite being just as fundamental as the First Amendment.”).

in recent years, has featured a significant number of free speech claims.²⁶² Thus, freedom of speech has clearly not been “orphaned” by the Court, in the way some have argued the Second Amendment has been.

However, several aspects of the free speech comparison are a result of either caricaturing free speech doctrine or misunderstanding its scope. In addition to admitting various coverage exceptions, the Free Speech Clause actually permits a wide range of restrictions on expressive activity.

For example, the notion that strict scrutiny is always—or even ordinarily—applied to free speech claims is false. Moreover, while it is true that strict scrutiny is usually fatal when applied to speech regulations—as it has been for core burdens on Second Amendment rights—it is not the case that all or most speech regulations are subject to this standard. Only laws that target or single out speech based on its subject matter or viewpoint—a relatively small category—are subject to this standard of review.²⁶³ Among other contexts, strict scrutiny does not apply to content-neutral time, place, and manner regulations, restrictions on expressive conduct, spending conditions that restrict speech, regulations of government employee speech, restrictions on the speech of public school students, many campaign finance regulations, and so on.²⁶⁴

Under modern First Amendment doctrine, an “intermediate” level of scrutiny frequently applies. Under that standard, freedom of speech can be, and often is, *outweighed* by a range of governmental interests—public order, public safety, residential privacy, workplace efficiency, educational pursuits, and even pure aesthetics.²⁶⁵ Moreover, as in the case of other fundamental rights, “tiered” scrutiny is becoming a less reliable indicator of whether these and other interests will ultimately prevail. Thus, in some recent free speech

262. See GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT’S FIRST AMENDMENT* (2017).

263. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). See, e.g., *Texas v. Johnson*, 491 U.S. 397, 411–12 (1989) (applying strict scrutiny to law targeting political speech).

264. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (recognizing right of “privacy” in some “confrontational settings”); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (upholding federal funding restrictions on abortion counseling by physicians at funded programs); *FCC v. Pacifica*, 438 U.S. 726 (1978) (upholding order limiting time of day when indecent speech could be broadcast on the radio); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding restrictions on overnight camping in national parks); *Frisby v. Shultz*, 487 U.S. 474, 484 (1984) (recognizing residential privacy and tranquility as substantial interests); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969) (allowing school officials to restrict speech that disrupts learning); *United States v. O’Brien*, 391 U.S. 367, 371 (1968) (upholding conviction for public burning of draft card).

265. See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 5052 (1987) (observing that, despite the Supreme Court’s use of language suggesting heightened scrutiny of time, place, and manner restrictions and content-neutral restrictions on speech mixed with action, the Court often applies a deferential standard in such cases).

cases, the Court has applied intermediate scrutiny that resembles strict scrutiny—and vice versa.²⁶⁶ Further, the Court has also developed a “government speech” principle that allows the state to explicitly discriminate against private speech—notwithstanding the general rule prohibiting content discrimination—where the government acts as a speaker rather than as a regulator of expression.²⁶⁷ One wonders how opponents of firearms restrictions would react to a similar doctrine in the Second Amendment context.

Thus, not even the Free Speech Clause is always and everywhere treated as a “first class” fundamental right—at least according to one of the standards relied upon by gun rights proponents. It is no answer to say that gun regulations must *all* be treated as “content-based” by analogy to the Free Speech Clause and thus subject to strict scrutiny. The entire point of gun control laws is to address the subject matter of guns, whereas only a narrow class of laws offends the First Amendment’s core content-neutrality principle. The same form of argument would result in treating *all* laws that regulate private property as a violation of the Takings Clause or the Due Process Clause, and *all* laws that regulate the subjects of marriage or voting as subject to strict scrutiny owing to the fact that these laws implicate a fundamental right.

First Amendment doctrines, like those now developing around the Second Amendment, are far more complex and nuanced than “second-class” claimants often suggest. The demand for strict scrutiny for *all* regulations of Second Amendment rights is not a plea for parity with the Free Speech Clause. Rather, it is an argument for a baseline of judicial scrutiny that does not apply to *any other* fundamental constitutional right, including freedom of speech.

To be sure, despite the foregoing limitations, the Free Speech Clause is special. For a variety of reasons unique to its text, history, and cultural salience, the free speech right has expansionist tendencies.²⁶⁸ Although the Court long ago abandoned the label “preferred” as it relates to freedom of speech, in some respects the Free Speech Clause remains first among equals.

266. See, e.g., *McCullen v. Coakley*, 134 S. Ct 2518, 2531–32 (2014) (invalidating abortion clinic buffer law under intermediate scrutiny); *Williams-Yulee v. Fla. Bar*, 135 S. Ct 1656, 1657 (2015) (upholding content-based regulation of judicial campaign speech). See also Floyd Abrams, *When Strict Scrutiny Ceased To Be Strict*, SCOTUSBLOG, <http://www.scotusblog.com/2015/04/symposium-when-strict-scrutiny-ceased-to-be-strict>.

267. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248 (2015) (concluding that specialty license plates were government speech and that state could thus discriminate based on content in approving them).

268. See generally Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018) (discussing the expansionist tendencies of freedom of “speech”).

Once we strip away arguments about strict scrutiny and particular doctrines, what firearms proponents seem to want is the same degree of respect and regard for the right to keep and bear arms that is generally accorded the freedom of speech. So long as there is a preferred fundamental right in this sense, anything else will, by definition, look “second-class.”

However, the quest for free speech-like specialness is problematic. The modern free speech right is a function of a unique history and distinctive attributes. To simplify greatly, owing to the textual and conceptual capaciousness of “speech” and the ubiquity of communicative activity, it is relatively easy to argue that laws implicate and regulate freedom of speech. As a result, freedom of speech has burrowed into vast and increasingly expansive areas of regulation, politics, and culture. Further, free speech rights have long been a cornerstone of American democracy. They have facilitated social movements, political mobilization, and broad constitutional change.²⁶⁹

Over time, the currency of free speech arguments and their influence on social and political discourse have contributed to what Fred Schauer calls the “magnetism” of the Free Speech Clause.²⁷⁰ Owing to their salience and influence, free speech claims seem to be irresistible to litigants and judges. In these general respects, then, free speech is indeed special. It is little wonder, then, that proponents of gun rights—along with advocates and defenders of equal protection, free exercise, and other constitutional rights—have frequently invoked the Free Speech Clause as a model and as a means of enforcement.²⁷¹ Like the free speech right, proponents of gun rights and other fundamental rights claim that their right is antecedent—a necessary condition for the enjoyment of other rights.²⁷²

The quest by firearms proponents for free speech-like specialness raises important questions about the modern conception of both rights. The Free Speech Clause’s magnetism poses some acute problems for the system of constitutional rights. For example, critics have argued that the free speech right crowds out other arguments, colonizes other areas of law, alters non-free speech constitutional doctrines, and threatens broad regulatory agendas.²⁷³ To be sure, the Second Amendment would not likely pose the

269. See ZICK, *supra* note 86, at ch. 5 (discussing the role of freedom of speech in the Civil Rights Movement).

270. See Schauer, *supra* note 194.

271. See generally ZICK, *supra* note 86.

272. *Id.* at 6 (explaining free speech antecedence).

273. There is an expansive, and growing, literature devoted to these problems. See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 176–82 (2016) (discussing the Free Speech Clause’s deregulatory power); Leslie Kendrick, *First Amendment Expansionism*, 56 WILL.

same set of problems were it to act like the Free Speech Clause. However, an exalted Second Amendment could pose some unique problems of its own. It could, as some have suggested, distort constitutional discourse and deter reasonable gun control measures.²⁷⁴ Broad interpretations of public carry rights could also inhibit free speech and assembly, or complicate law enforcement.²⁷⁵ Owing to these and other concerns, some might argue that instead of leveling the Second Amendment *up* to make it as special as free speech, we ought to consider leveling the Free Speech Clause *down*.

The analogy firearms rights proponents have drawn to freedom of speech is more complicated than is often appreciated. The history of the free speech right shows that in its first decade, freedom of speech was a rather anemic fundamental right. Judged according to contemporary standards, courts have not subjected Second Amendment claims to foreign or disfavored doctrinal rules but rather have applied doctrines that in many respects resemble those applied in free speech contexts. Moreover, the fact that the Second Amendment has not (yet) attained the same veneration and magnetism as the Free Speech Clause does not mark it as “second-class.” Any difference in status or magnetism relates more to the unique experiences and attributes of the free speech right than to any grand conspiracy—judicial or otherwise—to deprive the Second Amendment of its rightful place in the hierarchy of fundamental rights.

D. “Orphaned,” Abandoned, and Neglected Constitutional Rights

One final complaint, associated most closely with Justice Thomas, is that the Supreme Court has abandoned the Second Amendment by failing to review lower court decisions and elaborate on its meaning.²⁷⁶ As noted earlier, now that the Court has granted certiorari in a Second Amendment case, that claim will itself have to be abandoned.²⁷⁷ Still, the concept of abandoning or orphaning fundamental rights merits some attention. Although we do not know why the Supreme Court accepted review in the

& MARY L. REV. 1199 (2015) (critiquing the tendency of the Free Speech Clause to colonize other areas of law).

274. See, e.g., Blocher, *supra* note 10.

275. See, e.g., Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018) (discussing intersection between free speech and Second Amendment rights in context of public protests and demonstrations); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015) (discussing intersection between Fourth Amendment and open carry laws).

276. See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting) (“The right to keep and bear arms is apparently this Court’s constitutional orphan.”).

277. See *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), cert. granted. 2019 WL 271961.

recent case, it may have done so out of a concern that it was shirking its constitutional duty to elaborate on the meaning of a constitutional right. Correcting that misperception may influence how much ground the Court thinks it needs to make up. This Section examines what it means to say that a constitutional right has been orphaned, abandoned, or neglected. It shows that the Second Amendment has not been subjected to any untoward or exceptional treatment in this regard either, particularly relative to how other fundamental constitutional rights have been treated by the Court.

Of course, nothing compelled the Court to take any Second Amendment cases. There are non-abdication explanations for the Court's failure to review gun rights claims for the past decade. Perhaps there was some uncertainty on the Court regarding how the Second Amendment's doctrinal rules ought to be constructed. Allowing lower courts to sort these rules out in the first instance could be very helpful in terms of future decisions and interpretations. Or perhaps the justices could not agree on a proper case to take, or circuit split to address, or were concerned about how their colleagues might interpret the Second Amendment.²⁷⁸ They may also have been aware that the political process has generally produced robust protection for gun rights, thus reducing the need for judicial action. Or they may have been concerned that a broad interpretation of the Second Amendment, for instance one relating to public carry rights, could have negative consequences in terms of public safety. All of these factors, and others, likely reduced the incentives for Supreme Court intervention.

There is no established standard or metric for determining whether or when the Court has orphaned, abandoned, or neglected a constitutional right. If orphaning a right means to permanently abandon it, that is clearly not the case with regard to the Second Amendment. It seems likely that the Court will continue to add Second Amendment cases to its future docket.

As the life cycle of other fundamental rights shows, a decade-long silence does not a constitutional orphan make. Moreover, fundamental rights can be abandoned or neglected at birth, only to be reunited with the family of fundamental rights later on. Finally, in terms of doctrinal neglect, the Second Amendment has not suffered nearly the long-term effects that other rights, or certain aspects of them, have experienced.

It might make sense to think of the Second Amendment as having been "orphaned" or abandoned during the long era prior to *Heller*, during which the Court failed to recognize an individual right to keep and bear arms. On this view, *Heller* actually rescued the Second Amendment from its initial abandonment. We might say the same thing about the Free Speech Clause,

278. See Levinson, *supra* note 14, at 23–24 (discussing reasons for the Court's reticence).

which the Court essentially abandoned until the first quarter of the twentieth century when it addressed World War I era sedition cases. Judged according to this historical standard, a decade—or even three—of silence pales in comparison to the abandonment of these provisions in their early years.

The true orphans of the Constitution, it would seem, are those that have been forever abandoned or effectively banished from the class of fundamental rights. There are several obvious examples. Owing to its effective abandonment, one commentator has dubbed the Third Amendment, which restricts the quartering of soldiers in private homes, “the Rodney Dangerfield of the Bill of Rights.”²⁷⁹ Judge Robert Bork famously dismissed the Ninth Amendment’s reservation of rights not enumerated elsewhere in the Constitution as an “inkblot.”²⁸⁰ The Fourteenth Amendment’s Privileges and Immunities Clause was effectively abandoned in 1873, when the *Slaughterhouse-Case* held that it did not protect a broad range of fundamental rights.²⁸¹

Moreover, certain fundamental rights have been orphaned or abandoned through absorption or collapse into other provisions. The equality and substantive rights aspects of the Privileges and Immunities Clause are now performed by the Equal Protection Clause and the Due Process Clause, respectively. Looking to the First Amendment, the Supreme Court has not based any decision on the Assembly Clause in more than three decades.²⁸² Ditto the Petition Clause, which the Court long appended to the Assembly Clause before turning it into a right of expressive association.²⁸³ The Press Clause has received more attention from the Court, but like the assembly and

279. See Glenn Harlan Reynolds, *Foreword: The Third Amendment in the 21st Century*, 82 TENN. L. REV. 491, 491 (2015) (“For many years, the Third Amendment to the Constitution has been the Rodney Dangerfield of the Bill of Rights, getting no respect.”).

280. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 97–98 (2000) (quoting Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing before the *S. Comm. on the Judiciary*, 101st Cong. 117 (1989) (testimony of Robert Bork), reprinted in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 441 (Randy E. Barnett ed., 1993)).

281. *Slaughterhouse-Case*, 83 U.S. 36 (1873). The Court did rely on the Privileges and Immunities Clause in *Saenz v. Roe*, 526 U.S. 489 (1999), which held that the right to interstate travel was protected by the provision. However, it has refused to re-engage with the clause in other respects, including incorporation of fundamental rights. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

282. See Ashutosh Bhagwat, *The Democratic First Amendment* 110 NW. U. L. REV. 1097, 1098 (2016).

283. See JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

petition rights the Court has more or less collapsed freedom of the press into the Free Speech Clause.²⁸⁴

To be sure, the Court has not altogether ignored these “expressive” rights. Some decisions have at least referenced the Assembly Clause.²⁸⁵ However, the Court has not expressly elaborated or constructed the meaning of the Assembly Clause, or accepted “Assembly Clause” cases for review. Further, the Court has often written about the *values* served by a free press; but that has not resulted in any distinctive interpretations of freedom of the press.²⁸⁶ Finally, the Court has indicated that the Petition Clause more or less overlaps with the Free Speech Clause, and declined to elaborate further. The general approach has been to collapse all of these rights into a fictional “Free Expression Clause.”²⁸⁷

Thus, some enumerated constitutional rights have indeed been orphaned or abandoned by the Supreme Court. However, the Second Amendment has not experienced anything like this kind of treatment. The Court has clearly not forever abandoned the provision or abdicated its role as the final interpreter of its meaning. Even before the recent grant, the Supreme Court had not treated the Second Amendment as anachronistic, indecipherable, or ancillary to some other constitutional right.

The real complaint appears to be that the Court has *neglected* the Second Amendment by failing to address its meaning during the past decade. Free Speech Clause proponents could have made a similar argument during the decades after that provision was recognized as a fundamental right. As discussed earlier, in the first decade the Court accepted only three cases for review, and its decisions did not add anything of substance to the interpretation of the free speech right.

Recognizing a fundamental right and subsequently failing to elaborate its meaning is a rather mild form of neglect when judged according to the experience of other rights and aspects of those rights. For example, the Supreme Court first interpreted the Free Exercise Clause in 1878, in *Reynolds v. United States*.²⁸⁸ Reviewing a federal prosecution for bigamy, the Court narrowly construed the free exercise right to prohibit Congress from restricting or punishing a person’s religious *beliefs*, but to permit it to broadly regulate *conduct* through criminal and other laws. Twelve years

284. See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 416 (2013).

285. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

286. See Sonja West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

287. ZICK, *supra* note 86, at 77–78.

288. 98 U.S. 145 (1878).

later, in dicta, the Court reaffirmed the belief/conduct distinction.²⁸⁹ And there matters stood, until the Court incorporated the free exercise right in the 1940s.²⁹⁰ It would be another two decades before the Court finally abandoned the belief/conduct distinction and adopted a form of heightened scrutiny for free exercise claims.²⁹¹ If neglect is measured in decades, the Second Amendment has a very long way to go.

Other constitutional rights have suffered from extensive post-recognition neglect. For example, the Court suggested in the 1960s, and then again in the 1980s, that there is a right of “intimate association.”²⁹² However, in the ensuing decades, it has not elaborated on the scope or substance of the right.²⁹³ The right sometimes makes a cameo appearance, as it did in the Court’s recent marriage equality decision, but otherwise remains a mystery.²⁹⁴

The Court has also neglected, for varying periods, specific aspects or dimensions of fundamental rights. This has been true of several aspects of the Free Speech Clause. For example, although the Court held in 1969 that public school students enjoyed free speech rights, it did not elaborate on those rights for almost two decades.²⁹⁵ During the 1960s, the Court indicated that public university students enjoy robust free speech rights.²⁹⁶ However, the Court has not taken many free speech cases in that context since. As a result, it has largely been left to lower courts to ascertain, for example, what constitutional standard applies to student speech and how the First Amendment applies more generally on public university campuses.²⁹⁷ Finally, again in the free speech area, in 1942 the Court cast “purely

289. See *Davis v. Beason*, 133 U.S. 333 (1890).

290. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940).

291. *Sherbert v. Verner*, 374 U.S. 398, 405–06 (1963).

292. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (relying on marital association to invalidate restrictions on distribution and receipt of contraceptive information); *Roberts v. Jaycees*, 468 U.S. 609 (1984) (referring to the right, but not elaborating upon it).

293. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (tracing the origins of the right but noting that its parameters are unclear).

294. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–600 (2015) (observing that same-sex couples have the same right as opposite-sex couples to enjoy intimate association).

295. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

296. See *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The Court has addressed issues relating to recognition of student groups and funding issues. *Healy v. James*, 408 U.S. 169 (1972); *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995); *Board of Regents v. Southworth*, 526 U.S. 1038 (1999). However, none of these precedents address standards specific to university student speech.

297. See John D. Inazu, *The Purpose (and Limits) of the University*, UTAH L. REV. (2018); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801 (2017).

commercial advertising” outside the domain of the First Amendment.²⁹⁸ There it languished until 1976, when the Court concluded that commercial speech was entitled to some First Amendment protection.²⁹⁹

There are other examples of rights, or aspects of rights, that the Court has neglected for far longer than a decade if not abandoned altogether. Since 2008, the Supreme Court has essentially left it to lower courts to flesh out the meaning of the right to habeas corpus in cases involving suspected terrorists.³⁰⁰ The original Constitution contains a prohibition on state impairment of contracts.³⁰¹ However, the Court’s early interpretation of this provision led to the right’s effective abandonment or at least its severe neglect in subsequent decades.³⁰²

Judged in relation to these examples, the Court’s initial silence regarding Second Amendment rights has been neither unusual nor a cause for marked concern. It is not indicative of the kind of abandonment or severe neglect that other fundamental rights have experienced. A decade is not a very long time in terms of the life span of a constitutional right. In comparative terms, the argument that the Court had “orphaned” the Second Amendment or subjected it to severe neglect was at least premature. It should not encourage or suggest making up for lost ground in future Second Amendment cases.

Conclusion – The Second Amendment’s Second Act

The principal burden of this Article has been to assess the merits of various claims that the Second Amendment, as it has been interpreted and enforced, is a “second-class” constitutional right. As the foregoing analysis shows, fundamental rights are dynamic constructs. As the experiences of the Free Speech Clause, the Free Exercise Clause, and other fundamental rights suggest, what the Second Amendment has been in its first decade will not determine what it will become in its second decade and beyond.

The dynamics that affect constitutional rights tend to play out over the course of long periods of time, and in response to a variety of influences and circumstances.³⁰³ As Professor Jack Balkin has observed:

298. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

299. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761–62 (1976).

300. *See* Levinson, *supra* note 14, at 24 (suggesting that the Court has been absent from the debate over habeas corpus rights of alleged enemy aliens after *Boumediene v. Bush*, 553 U.S. 723 (2008)).

301. U.S. CONST. art. I, §10.

302. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934).

303. *See generally* ZICK, *supra* note 86.

Rights are not simply a fixed set of protections that the state affords or fails to afford. Rights are a terrain of struggle in a world of continuous change—a site of ongoing controversies, a battleground where the shape and contours of the terrain are remade with each victory. Rights, and particularly fundamental rights, far from being fixed and immovable, are moving targets. They are worth fighting over because the discourse of rights has power and because that discourse can be reshaped and is reshaped through intellectual debate and political struggle.³⁰⁴

Fundamental rights can retract or expand, depending on their unique dynamics. The right to contraception, which was first characterized as an aspect of the privacy of the marital relationship, was extended to unmarried persons and then to minors.³⁰⁵ The scope of the right to abortion, first recognized in *Roe*, was diminished as a result of the Court's decision in *Casey*.

Fundamental rights can also experience peaks and valleys. Think of the wild ride of the Free Exercise Clause, which started out as a narrow ban on suppression of belief, morphed into a fundamental right protected under heightened judicial scrutiny, and is now once again a relatively narrow prohibition on certain types of discriminatory measures.³⁰⁶

As discussed, freedom of speech offers still another case study in the transformation of fundamental rights. From its humble beginnings, the free speech right has vaulted all the way to the top of the fundamental rights hierarchy. The change in status was a result of decades of activism, litigation, political and cultural upheaval, public discourse, and doctrinal change.

Firearms proponents who are presently concerned about the status of the right to keep and bear arms can take some comfort in these transformation narratives. *Heller's* legacy has thus far not been what firearms rights proponents—and, frankly, opponents—had expected. However, the Second Amendment will not become an “inkblot.” It is not going to be collapsed into some other constitutional right, or abandoned for all time. Indeed, its second act, in terms of Supreme Court review, is just

304. Balkin, *supra* note 54, at 53–54.

305. See *Griswold v. Connecticut*, 381 U.S. 479, 483; *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

306. Compare *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (applying heightened scrutiny to free exercise claim), with *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990) (declining to apply heightened scrutiny to certain free exercise claims).

beginning. The Second Amendment seems likely to retain its “A-list” status, and may even improve its position in the hierarchy of fundamental rights.

Predictions are perilous. However, it seems likely that the Supreme Court will ultimately recognize some form of Second Amendment right to carry firearms in public. It may also invalidate certain burdensome restrictions on non-core aspects of the Second Amendment, including those that limit self-defense outside the home. It also seems likely to eventually address the issue of whether the Second Amendment allows states to ban assault-style rifles or other types of arms. Given the current makeup of the Court, it does not seem a stretch to predict that in its second decade the Second Amendment’s scope will expand—perhaps to a considerable degree.

Of course, it is also possible that the Second Amendment will experience a different sort of life cycle. There may be peaks and valleys. The right to keep and bear arms may expand incrementally. Along with notable victories, firearms proponents may experience some setbacks. As it decides on the proper course, the Supreme Court ought not to do so under the mistaken impression that the Second Amendment and the *Heller* decision are targets of resistance, hostility, or rebellion in the lower courts. They ought not to feel hurried to stem a tide of resistance that does not exist, or to correct a course not actually traveled. There is no constitutional “orphan” to rescue.

The Second Amendment is not now, and is not likely to be, a “second-class” fundamental right. Its fate will ultimately depend on the dynamic influences that have affected other fundamental rights and situated them within our dynamic system of constitutional rights. In its second decade and beyond, as the Second Amendment becomes a permanent member of the class or family of fundamental constitutional rights, the process of normalizing the right to keep and bear arms—politically, doctrinally, and theoretically—will continue to unfold in the ordinary course. That process ought not to be influenced by a desire to over-compensate for purported lost opportunities or lost time.