High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment

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Like the First, Fourth, Fifth, and Fourteenth Amendments, the Second Amendment stirs fervent debate among legal academics and the American public. Unlike these Amendments, however, the Second Amendment has received very little treatment from the Supreme Court until recently. In District of Columbia v Heller*, the Court established that the "right of the people to keep and bear Arms" includes the right to bear arms for self-defense. Without further guidance from the Court, lower courts have struggled to consistently and uniformly determine when the Constitution permits gun regulations in spite of the Second Amendment.*

To provide clarity, this Comment offers a new framework for analyzing Second Amendment cases by drawing upon the First Amendment, a close cousin of the Second Amendment. In particular, courts should evaluate gun regulations by determining the value of the underlying regulated gun, similar to how courts ascertain the value of certain speech in the free speech context. The salient question for guns is: To what extent does the gun further the self-defense purpose announced by the Supreme Court? To make this determination, this Comment proposes a set of objective factors—including a gun's close-range capabilities, compactness, collateral damage risk, and the ease with which it can be wielded—thus cordoning off the shortcomings of the First Amendment's arguably subjective framework. After explaining how free speech jurisprudence offers useful lessons for Second Amendment analysis, this Comment applies that approach to a nascent issue percolating among lower courts: whether the Second Amendment includes a right to sell a firearm.

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INTRODUCTION

The Supreme Court ushered in a dramatic shift in Second Amendment jurisprudence in *District of Columbia v Heller*,[1] holding that the Second Amendment protects the right to bear arms for "the core lawful purpose of self-defense."[2] This decision made clear that possession of a firearm need not be tethered to service

1 554 US 570 (2008).
2 Id at 630.

in a militia.[3] But the Court left open significant questions regarding what exactly that newly defined right entails.[4] For this reason, federal courts continue to struggle when analyzing Second Amendment cases.[5] Despite the confusion among lower courts, the Supreme Court has not intervened to provide clarity,[6] much to the disappointment of the public[7] and even some of the justices.[8] One particularly topical issue that merits resolution is whether there is a Second Amendment right to sell a firearm.[9] Indeed, the Court may consider related issues next term in its first gun case in nearly a decade next term.[10]

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3 "Guns" and "firearms" are used interchangeably throughout this Comment.

4 See *Heller*, 554 US at 635 ("[O]ne should not expect [*Heller*] to clarify the entire field."). See also Joseph Blocher and Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U Chi L Rev 295, 323–47 (2016).

5 See Ilya Shapiro and Matthew Larosiere, *The Supreme Court Is Too Gun-Shy on the Second Amendment* (Wall St J, Jan 2, 2019), archived at http://perma.cc/K94D-V4GM ("The federal circuits can't even agree on how to evaluate Second Amendment challenges, let alone what the result should be.").

6 See id ("[T]he complete judicial disaccord on gun rights in the decade since *Heller* has met with a deafening silence from the justices.").

7 See id (arguing that it is "high time for the [C]ourt to begin making sense of Second Amendment law"). See also Linda Greenhouse, *A Call to Arms at the Supreme Court* (NY Times, Jan 3, 2019), archived at http://perma.cc/PH7U-HT2K.

8 Justice Clarence Thomas recently dissented from a denial of certiorari, criticizing lower courts for "resisting this Court's decisions in *Heller* and *McDonald* and [ ] failing to protect the Second Amendment to the same extent that they protect other constitutional rights." *Silvester v Becerra*, 138 S Ct 945, 950 (2018) (Thomas dissenting from denial of certiorari). See also Ariane de Vogue, *Thomas, Conservatives Impatient at Supreme Court's Inaction on 2nd Amendment* (CNN, Feb 23, 2018), archived at http://perma.cc/9Y29-G5HC. Justice Thomas also asked his first question at oral argument in over ten years because, in the words of a former clerk, "he chose to ask a question he obviously thought his colleagues hadn't paid enough attention to: whether the constitutional protections in the Second Amendment were being taken seriously enough." Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court* (NY Times, Feb 29, 2016), archived at http://perma.cc/C5BX-QF9H.

9 See Shapiro and Larosiere, *The Supreme Court Is Too Gun-Shy* (cited in note 5).

10 See generally *New York State Rifle & Pistol Association, Inc v City of New York*, 883 F3d 45 (2d Cir 2018), cert granted, 139 S Ct 939 (2019). However, the case may be mooted because, after the Court granted certiorari, New York amended the law at issue and subsequently argued that the case is moot, an argument hotly contested by opposing counsel for the gun group. See Corrine Ramey and Jess Bravin, *New York City Asks Supreme Court to Drop Gun Case* (Wall St J, July 8, 2019), archived at http://perma.cc/39X7-74XT. How the Court will resolve this mootness question will likely implicate the *Munsingwear* vacatur doctrine, which "addresses what to do with a court of appeals decision when the case becomes moot while it is pending on review by a higher court." Pattie Millett, *Practice Pointer: Mootness and* Munsingwear *Vacatur* (SCOTUSblog, June 10, 2008), archived at http://perma.cc/VJM6-2BV9. The Court will consider the mootness question on October 1, 2019, at their first post-summer conference. See Stephen Wermiel, *SCOTUS*

Whether the Second Amendment affords protection to the right to sell firearms has potentially significant implications for the gun industry. In the United States, there has been a significant surge in gun manufacturing in recent years. In 1986, the total number of firearms manufactured in the United States was 3,040,934.[11] By 2016, that number had increased significantly, reaching an all-time high of 11,497,441.[12] This growth is coupled with a marked decrease in the rate of gun ownership by household. In 1973, for example, 47 percent of households owned guns compared to only 31 percent in 2014.[13] Thus, more guns are concentrated in fewer households.[14] Recent developments in technology—namely, the advent of 3-D printing technology—might compound this concentration.[15]

Faced with these realities, many politicians and activists have sought to restrict citizens' ability to purchase and use firearms and related accessories. For example, after the October 2017 mass shooting in Las Vegas,[16] Democrats in Congress tried to pass a bill outlawing bump stocks—"an accessory that can effectively turn a semiautomatic rifle into a machine gun."[17] To that end, President Donald J. Trump issued a regulation banning the possession and sale of bump stocks.[18] Democrats continue to push

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for Law Students: Battling over Mootness (SCOTUSblog, Aug 29, 2019), archived at http://perma.cc/L4AX-264H.

[11] Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Firearms Commerce in the United States: Annual Statistical Update 2018* *1 (2018), archived at http://perma.cc/J9WQ-VEM4.

[12] More recent data is unavailable as of the writing of this Comment. See id.

[13] Tom W. Smith and Jaesok Son, *General Social Survey Final Report: Trends in Gun Ownership in the United States, 1972–2014* (National Opinion Research Center at the University of Chicago, Mar 2015), archived at http://perma.cc/37AP-U759.

[14] See Harry Enten, *There's a Gun for Every American. But Less Than a Third Own Guns* (CNN, Feb 15, 2018), archived at http://perma.cc/QX5G-6C5T.

[15] Consider James B. Jacobs and Alex Haberman, *3D-Printed Firearms, Do-It-Yourself Guns, & the Second Amendment*, 80 L & Contemp Probs 129, 147 (2017) (detailing the effect 3-D printed guns will have on firearms production and gun violence once "technology improves and cost falls").

[16] See Julie Turkewitz and Jennifer Medina, *Las Vegas Police Release Final Report on Massacre, with Still No Idea of Motive* (NY Times, Aug 3, 2018), archived at http://perma.cc/BZ23-6NT5.

[17] See Nicholas Fandos and Thomas Kaplan, *Frustration Grows as Congress Shows Inability to Pass Even Modest Gun Measures* (NY Times, Feb 15, 2018), archived at http://perma.cc/66FY-YD5W.

[18] See Charlie Savage, *Trump Administration Imposes Ban on Bump Stocks* (NY Times, Dec 18, 2018), archived at http://perma.cc/D7UB-FLN9.

for aggressive reform at the federal level.[19] Additionally, a host of states are unveiling new, restrictive gun regulations,[20] including California's Senate Bill No 1100, which raises the minimum age to purchase any gun from a licensed dealer from eighteen to twenty-one.[21] For some, even these relatively strict gun laws may not be enough.[22]

This wave of new regulations (and surge in pro-regulation public opinion[23]) inevitably portends litigation over their constitutionality. In order to evaluate these regulations, courts must first address an underlying and more fundamental inquiry: Is there a Second Amendment right to sell firearms?[24]

This Comment's objectives are twofold. First, it aims to provide a coherent framework for analyzing gun regulations in general because the Supreme Court has yet to do so. In doing so, this Comment does *not* intend to radically alter the outcomes of cases. Nor does it argue normatively that certain guns should be regulated. Instead, its proposal is merely prescriptive. Specifically, this Comment argues that courts should decide which gun regulations deserve constitutional protection by adopting the high-, low-, and no-value framework from the First Amendment's free speech doctrine. This comparison is apt because courts already frequently invoke the First Amendment when evaluating

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19 See Sheryl Gay Stolberg, *Texas Shooting Brings New Urgency to Gun Debate in Congress* (NY Times, Sept 1, 2019), archived at http://perma.cc/9XJU-YLK; Reid J. Epstein, *Democrats Plan to Pursue Most Aggressive Gun-Control Legislation in Decades* (Wall St J, Nov 9, 2018), archived at http://perma.cc/K42P-5WMN.

20 See Maggie Astor and Karl Russell, *After Parkland, a New Surge in State Gun Control Laws* (NY Times, Dec 14, 2018), archived at http://perma.cc/A64R-C6JM.

21 California Senate Bill No 1100, 2017–2018 Sess (Sept 28, 2018).

22 See, for example, Tim Arango and Jennifer Medina, *California Is Already Tough on Guns. After a Mass Shooting, Some Wonder If It's Enough* (NY Times, Nov 10, 2018), archived at http://perma.cc/SK2S-BYVW.

23 National polling data indicates strong support for stricter laws governing gun sales among citizens. Gallup reported in 2018 that 67 percent of respondents would like "laws covering the sale of firearms" to be "more strict," compared to 4 percent who would like them to be "less strict." *Guns* (Gallup, 2018), archived at http://perma.cc/CQR9-55XQ. The 67 percent favoring stricter gun laws is the highest it has been since 1993. Id.

24 This Comment will not discuss commerce power arguments. Some may argue that the Commerce Clause, US Const Art I, § 8, cl 3, poses an independent bar to Congress's power to regulate gun sales. However, this Comment will proceed on the relatively safe assumption that Congress is not barred from regulating gun sales under the Commerce Clause. See Don B. Kates Jr, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich L Rev 204, 205 n 4 (1983) ("Clearly, the commerce power provides Congress jurisdiction to prohibit the continued importation of firearms, their domestic manufacture for interstate sale or their sale after travel in interstate commerce.").

gun regulations[25] and because of the doctrinal similarities between the two amendments.[26] Second, this Comment seeks to analyze whether there is a right to sell a firearm according to that framework.

With those objectives in mind, Part I begins by discussing seminal Second Amendment cases and their significance for gun and gun sale regulations. Part II argues that courts should resolve Second Amendment cases by borrowing the high-, low-, and no-value framework developed in First Amendment jurisprudence. In the First Amendment context, the right to the freedom of speech is limited based on the value of the speech at issue. This Part argues that courts should adopt this framework in the context of the Second Amendment and condition the right to bear arms on the value of the gun at issue, in particular the value (if any) that the particular gun contributes to the intended exercise of the Second Amendment. Next, Part III turns to the question of whether there is a right to sell a firearm. This Part begins by laying out the current approaches used by lower courts addressing whether such a right exists. Finding that there is no individual right to sell a firearm, this Part concludes by applying the proposed framework for analyzing Second Amendment cases to determine when certain gun sales regulations merit protection from courts and when they do not. Finally, Part IV addresses potential objections to this proposal.

I. THE SUPREME COURT AND THE SECOND AMENDMENT

The Second Amendment to the US Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[27] For over two hundred years, this provision was understood by judges, lawyers, scholars, and civilians across the political spectrum to refer to a right to bear arms connected

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[25] See Part II.B.

[26] See Part II.A.

[27] US Const Amend II.

to militia service.[28] This interpretation allowed substantial gun regulation to persist since America's birth in a variety of forms.[29]

Everything changed when the Court declared in the landmark cases *District of Columbia v Heller* and *McDonald v City of Chicago*[30] that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense."[31] No longer was the Second Amendment right to keep and bear arms conditioned on militia service.[32] The following discussion examines *United States v Miller*[33] (the seminal case that preceded *Heller*), *Heller* itself, and *McDonald*.

The old rule, announced in *Miller*, reflected the view that Second Amendment rights depended on the existence of militia service. In *Miller*, the Court faced a constitutional challenge to provisions in the National Firearms Act that prohibited the transportation in interstate commerce of shotguns with barrels shorter than eighteen inches without proper registration and a stamp affixed to them.[34] The Court upheld the statute because the defendant failed to show that his possession of the gun bore "some reasonable relationship to the preservation or efficiency of a well regulated militia."[35] Defining a more general principle, the Court held that "[w]ith obvious purpose to assure the continuation and

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[28] Joseph Blocher and Darrell A.H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of* Heller 60 (Cambridge 2018) ("Conservative Chief Justice Warren Burger [ ] insisted that individual rights claims under the Second Amendment are 'the subject of one of the greatest pieces of fraud—I repeat the word "fraud"—on the American public by special interest groups that I have ever seen in my lifetime.'"). But see, for example, Don B. Kates, *A Modern Historiography of the Second Amendment*, 56 UCLA L Rev 1211, 1215 (2009) ("Modern legal writing on the Second Amendment right to arms overwhelmingly recognizes that it guarantees a right of law-abiding, responsible adults to possess arms for self-defense."); Randy E. Barnett, Book Review, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex L Rev 237, 277 (2004) (arguing that the militia-based interpretation of the Second Amendment is belied by statements made during its ratification, Congress's consistent treatment of the Amendment, and current federal statutes).

[29] See, for example, Blocher and Miller, *The Positive Second Amendment* at 13–50 (cited in note 28) (mapping the bevy of regulations from the colonial era to the present and revealing how those regulations manifested in both segregationist and abolitionist states, the North and South, and urban and rural communities).

[30] 561 US 742 (2010).

[31] Id at 749–50.

[32] See Blocher and Miller, *The Positive Second Amendment* at 73 (cited in note 28) ("The right to keep and bear arms [after *Heller*] undoubtedly extends beyond the militia.").

[33] 307 US 174 (1939).

[34] See id at 175.

[35] See id at 178.

render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[36]

About seventy years later, a 5–4 Court decided *Heller*,[37] establishing a right to bear arms for the purpose of self-defense and striking down a ban on handguns in the District of Columbia.[38] Writing for the majority, Justice Antonin Scalia conducted an extensive analysis of the textual structure of the Amendment,[39] the definitions and understandings of key words and phrases such as "[a] well regulated Militia"[40] and "keep and bear Arms,"[41] and the significance of analogous state constitutional provisions at the time of ratification.[42] The majority distinguished *Heller* from *Miller* on the grounds that the latter "stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons."[43] Justice Scalia further noted that "[i]t is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment."[44]

In concluding that the Second Amendment protects one's right to bear arms for "the core lawful purpose of self-defense,"[45] Justice Scalia rejected a Second Amendment interest-balancing test: "Like the First [Amendment], it is the very *product* of an interest balancing by the people."[46] The Court knew of "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[47] Thus,

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36 Id.

37 In the interim, the Court heard relatively few Second Amendment cases and not once did a court of appeals strike down a law on Second Amendment grounds. Clark Neily, District of Columbia v. Heller*: The Second Amendment Is Back, Baby*, 2007–2008 Cato S Ct Rev 127, 140.

38 See *Heller*, 554 US at 635.

39 See id at 577 ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.").

40 See id at 595–97.

41 See id at 581–91.

42 *Heller*, 554 US at 600–03.

43 Id at 623.

44 Id.

45 Id at 630.

46 *Heller*, 554 US at 635 (emphasis in original).

47 Id at 634.

the Court held that the text of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[48]

By articulating, for the first time, an individual right to bear arms for self-defense, *Heller* unleashed a fury of challenges to test the "boundaries and strength of the right" over the next decade.[49] *Heller* made clear that an *absolute* ban on handguns was unconstitutional and among those "certain policy choices [that are] off the table."[50] But what policies does *Heller* leave on the table? Justice Scalia preserved lawmakers' ability to regulate guns because, "[l]ike most rights, the right secured by the Second Amendment is not unlimited," and history illustrates that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[51] Although not "clarify[ing] the entire field," [52] the Court expressly left intact "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [ ] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms."[53]

Significantly, this list of "presumptively lawful regulatory measures" did "not purport to be exhaustive." [54] And notwithstanding the two dissents' vehement disagreement with much of

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[48] Id at 592.

[49] See Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 Duke L J 1433, 1439 (2018) (noting that over one thousand challenges have been brought since *Heller*).

[50] *Heller*, 554 US at 636. See also Bob Ballinger, et al, *Where the Rubber Meets the Road: A Dialogue*, 67 Ark L Rev 113, 145 (2014) (According to moderator Nate Coulter, "[T]he U.S. Supreme Court, while striking down the D.C. ban on handguns, at least impliedly recognized that some firearms restrictions could be imposed.").

[51] *Heller*, 554 US at 626.

[52] Id at 635.

[53] Id at 626–27.

[54] Id at 627 n 26.

what the majority said,[55] all of the justices ostensibly agreed that, in whatever form the Second Amendment right exists, it has limits.[56]

The Court extended *Heller*'s holding in *McDonald v City of Chicago*, which incorporated the Second Amendment against the states through the Fourteenth Amendment.[57] Justice Samuel Alito, writing for the majority, reiterated that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day."[58] Like in *Heller*, however, he cautioned that "incorporation does not imperil every law regulating firearms."[59]

Heller and *McDonald* left a "vast *terra incognita*" for the lower federal courts to chart.[60] The "general consensus is that *Heller* failed to provide a framework by which lower courts could judge the constitutionality of gun control,"[61] and since *McDonald* the Court has avoided clarification.[62] While clearly imposing a moratorium on *absolute* bans on handguns, these cases explicitly indicate that other, less extreme gun regulations may pass constitutional muster.

II. FREE SPEECH AS A LENS FOR ANALYZING GUN REGULATIONS

Second Amendment jurisprudence among the lower courts is in "disarray."[63] Part III discusses one such area in which courts struggle—whether there is a right to sell a firearm—but the purpose of this Part is to first advance a new framework for evaluating Second Amendment cases. In it its simplest terms, this Comment argues that courts should import the First Amendment's

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55 See *Heller*, 554 US at 640 (Stevens dissenting) (arguing that the Second Amendment right should be limited to the maintenance of a "well regulated Militia" and "that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes"); id at 681 (Breyer dissenting) (expanding on Justice John Paul Stevens's dissent and arguing "that the protection the Amendment provides is not absolute" and that, even based on the majority's view, the DC law in question is still constitutional).

56 See Blocher and Miller, *The Positive Second Amendment* at 84 (cited in note 28).

57 *McDonald*, 561 US at 750. See also Blocher and Miller, *The Positive Second Amendment* at 97 (cited in note 28) ("[T]he dominant understanding of the Second Amendment changed from a federalism provision designed to protect states from the federal government to a private-purposes right that federal judges could use to strike down state laws.").

58 *McDonald*, 561 US at 767.

59 Id at 786.

60 *United States v Masciandaro*, 638 F3d 458, 475 (4th Cir 2011).

61 Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 NYU L Rev 375, 378 (2009).

62 See Shapiro and Larosiere, *The Supreme Court Is Too Gun-Shy* (cited in note 5).

63 Andrew R. Gould, Comment, *The Hidden Second Amendment Framework within* District of Columbia v. Heller, 62 Vand L Rev 1535, 1550 (2009).

free speech framework to analyze gun regulations. The Constitution protects different forms of speech to varying degrees depending on the underlying speech at issue: whether the speech is high value, low value, or obscene. By analogy, courts ought to treat guns the same way and afford certain guns more or less protection based on whether they are of high value, low value, or what this Comment refers to as no value. The purpose of this proposal is primarily to provide courts with a uniform vocabulary for analyzing gun regulations—not to offer a disposition-altering test. Once courts can converse in the same terms, they can then more coherently delineate the bounds of the Second Amendment. Understanding that some may be skeptical of this proposal, Part IV addresses potential concerns.

A. Why the First Amendment Provides an Apt Analogy

The First Amendment instructs that "Congress shall make no law . . . abridging the freedom of speech."[64] The Founders, according to Justice Louis Brandeis, "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[65] Despite the First Amendment's prominent place in constitutional law and its broad, unqualified language, the Supreme Court has carved out many forms of speech that do not enjoy free speech protection,[66] including incitement to imminent lawless action, fighting words, defamation, perjury, blackmail, commercial speech, true threats, solicitations to commit crimes, and obscenity.[67] Like these limits to free speech, there are limits to the Second Amendment.

For better or worse, "the First and Second Amendments have often been considered close cousins."[68] The First Amendment, like the Second Amendment, confers fundamental, legally enforceable rights, but it does so with "plain text [that] is not really all that

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64 US Const Amend I.

65 *Whitney v California*, 274 US 357, 375 (1927) (Brandeis concurring).

66 See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765 (2004) (tracking the many categories of speech that do not implicate the First Amendment and how the legal profession does and should treat them).

67 See generally id. See also *Which Types of Speech Are Not Protected by the First Amendment?* (Freedom Forum Institute), archived at http://perma.cc/QM8U-B84M.

68 Blocher, 84 NYU L Rev at 379 (cited in note 61) (noting that the First and Second Amendment are the two areas of law that most emphasize the distinction between categoricalism and interest balancing).

plain."[69] Consequently, using the First Amendment to justify "extra-textual constraints" on the Second Amendment serves to better define the law and make it work in practice.[70] This Part therefore analogizes to the First Amendment to articulate an understanding of the Second Amendment that is practically (and theoretically) viable.

B. Preexisting Analogies to the First Amendment in Second Amendment Cases

Courts should borrow from the First Amendment when interpreting the Second Amendment not only because of their similarities, but also because courts routinely rely on such analogies.[71] The *Heller* Court invoked analogies to the First Amendment throughout the majority opinion. First, the Court noted that the phrase "right of the people" as used in the First and Fourth Amendments "unambiguously refer[s] to individual rights, not 'collective' rights."[72] Later, the Court rejected the view that the Second Amendment protects only eighteenth-century arms, in part because "the First Amendment protects modern forms of communications."[73] The Court referred to the First Amendment elsewhere,[74] but the majority's observation that "the right [to keep and bear arms] was not unlimited, just as the First Amendment's right of free speech was not" is most relevant.[75] Lower courts, too, have "begun to adapt First Amendment doctrine to the Second

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69 Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 Tex L Rev See Also 137, 143 (2013).

70 See id:

> First Amendment analogs [to the Second Amendment] bolster the case for constitutional construction, that is, the development of doctrine designed to make the text work as law. . . . Appeals to the First Amendment . . . help provide cover for Second Amendment decision rules that will inevitably depart from the strict grammatical meaning of the Second Amendment's operative terms.

71 See Blocher, 84 NYU L Rev at 399 (cited in note 61) ("[S]cholars, litigants, and courts often have presumed that the First and Second Amendments are closely and meaningfully related."). For an account of why and when analogy in the Second Amendment analysis is appropriate, see Blocher and Miller, *The Positive Second Amendment* at 135–37 (cited in note 28).

72 *Heller*, 554 US at 579.

73 Id at 582.

74 See id at 591, 625–26, 634–35.

75 Id at 595.

Amendment context."[76] These analogies have manifested in two (nonexhaustive) categories.

The first category includes arguments that the First Amendment has limits, so the Second Amendment can too. For example, in *United States v Chafin*,[77] discussed in Part III.B, the Fourth Circuit justified its finding that no Second Amendment right to sell a firearm exists by pointing to the Court's holding that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." [78] Similarly, in *Ezell v City of Chicago*[79] (*Ezell II*), discussed in Part III.D, Seventh Circuit Judge Ilana Rovner argued in a concurrence that minors' Second Amendment rights can be limited much like minors' First Amendment rights are limited.[80]

Arguments in the second category contend that, because the First Amendment is written in broad strokes compared to the relatively narrow framing of the Second Amendment, the Second Amendment should be construed more narrowly. Whereas the First Amendment is "abstract" and written to apply generally, the Second Amendment is "specific as to whose rights are protected and what those rights are."[81] Thus, the Second Amendment does not, in the Ninth Circuit's view, "independently protect[ ] commercial sellers of firearms."[82]

The above shows that courts consistently rely on the First Amendment for guidance in Second Amendment cases but do so in an ad hoc fashion. Drawing on the theme of comparing Second

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76 *Ezell v City of Chicago*, 651 F3d 684, 706–07 (7th Cir 2011) (*Ezell I*) (collecting cases and scholarship).

77 423 Fed Appx 342 (4th Cir 2011).

78 See id at 343, citing *United States v 12 200-Foot Reels of Super 8mm Film*, 413 US 123, 128 (1973).

79 846 F3d 888 (7th Cir 2017).

80 *Ezell II*, 846 F3d at 904–07 (Rovner concurring). But see Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings"*, 92 Neb L Rev 537, 571–84 (2014) (arguing, by analogy to the First Amendment, that courts should read *Heller*'s sensitive places exception to the Second Amendment *narrowly*).

81 See *Teixeira v County of Alameda*, 873 F3d 670, 688 (9th Cir 2017) (*Teixeira III*).

82 Id. But see *Konigsberg v State Bar of California*, 366 US 36, 49–51 & n 10 (1961) (arguing that the First Amendment, written in absolute terms, is not unlimited just as the "equally unqualified command of the Second Amendment" is not unlimited as in *United States v Miller*).

Amendment cases to First Amendment doctrine,[83] the sections that follow expand one plausible and useful analogy: like obscene "speech," which garners no constitutional protection, certain guns—no-value guns—deserve no constitutional protection. By contrast, so-called low-value guns merit some constitutional protection, while high-value guns deserve the most rigorous constitutional protection.

C. Introduction to Free Speech Doctrine

A good starting point for discussing the different categories of speech is *Chaplinsky v New Hampshire*,[84] in which the Court upheld a statute that criminalized saying "offensive, derisive or annoying word[s]" to others in public, also known as "fighting words."[85] *Chaplinsky* was the first case that "explicitly identified the existence of low-value categories of speech."[86] In addition to fighting words, the Court noted other categories of speech that it considered low value[87] and thus undeserving of constitutional protection because they formed "'no essential part of any exposition of ideas,' and possessed 'such slight social value as a step to truth that any benefit that may be derived from [its expression was] clearly outweighed by the social interest in order and morality.'"[88] As a result, a "functionalist distinction between high- and low-value speech" emerged.[89] While the Court has reined in the fighting words doctrine under *Chaplinsky*,[90] it continues "to invoke the *Chaplinsky* dicta that low-value speech was speech 'the

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83 See, for example, *Heller*, 554 US at 635; *Chafin*, 423 Fed Appx at 343; *Teixeira v County of Alameda*, 2013 WL 4804756, *6 (ND Cal) (*Teixeira I*); *Pena v Lindley*, 898 F3d 969, 1008 (9th Cir 2018) (Bybee concurring in part and dissenting in part).

84 315 US 568 (1942).

85 Id at 569, 573.

86 Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv L Rev 2166, 2173 (2015).

87 *Chaplinsky*, 315 US at 572 (listing "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" as part of this category).

88 See Lakier, 128 Harv L Rev at 2174 (cited in note 86), quoting *Chaplinsky*, 315 US at 572.

89 Lakier, 128 Harv L Rev at 2174 (cited in note 86).

90 See generally Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 Marq L Rev 441, 551 (2004) ("[T]he Supreme Court itself has worn down the fighting words doctrine into a shadow of itself.").

prevention and punishment of which have never been thought to raise any Constitutional problem.'"[91]

The court expounded on another category of speech—or rather, unprotected speech, called "obscenity"—in *Roth v United States*.[92] In *Roth*, the Court upheld a conviction for violating a federal obscenity statute[93] because the conviction was based on material not protected by "constitutional safeguards."[94] Only those ideas with "the slightest redeeming social importance" enjoy constitutional protection.[95] And obscenity, according to the Court, was "utterly without redeeming social importance."[96] Borne of this case then is a "modern classification of obscenity as not being speech at all."[97] In descending order of value, then, there is high-value speech, low-value speech, and obscenity—or no-value speech.[98]

About fifteen years after *Roth*, the Supreme Court decided a pair of cases on the same day to shed more light on the obscenity category. In *Miller v California*,[99] the Court created the controlling test for what constitutes obscenity, which requires a trier of fact to evaluate the following:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[100]

With this new test, a majority of the Court, "for the first time since *Roth*," settled on "concrete guidelines to isolate 'hard core'

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91 Lakier, 128 Harv L Rev at 2211 (cited in note 86).

92 354 US 476 (1957).

93 See id at 479 & n 1, citing 18 USC § 1461.

94 *Roth*, 354 US at 492.

95 Id at 484.

96 Id.

97 Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 615 n 146.

98 See Larry Alexander, *Low Value Speech*, 83 Nw U L Rev 547, 547 & n 1 (1989) ("Several theories of freedom of speech divide speech into the categories of 'high value,' 'low value,' and 'no value.'").

99 413 US 15 (1973).

100 Id at 24 (quotation marks and citations omitted).

pornography from expression protected by the First Amendment."[101] In doing so, the Court carved out obscene pornography as a narrower subset of the larger class of pornography, which is generally protected by the First Amendment.[102]

The same day *Miller v California* came down, the Court decided *Paris Adult Theatre I v Slaton*,[103] which it remanded in light of *Miller*.[104] At issue was a movie theater that displayed pornographic films. The Georgia Supreme Court held that the films should have been enjoined from exhibition because "the sale and delivery of obscene material to willing adults is not protected under the first amendment."[105] Building on this holding, the US Supreme Court "categorically disapprove[d] [of] the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[106] The Court made clear that a state's important interest in regulating obscenity is broad.[107] To that end, "States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions."[108]

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[101] Id at 29. "[H]ard core" sexual conduct is "specifically defined by the regulating state law, as written or construed." Id at 27. Although, as the dissent notes, there is ambiguity in this term: "'I could never succeed in [defining it] intelligibly,' but 'I know it when I see it.'" Id at 39 (Douglas dissenting). See also William T. Goldberg, Note, *Two Nations, One Web: Comparative Legal Approaches to Pornographic Obscenity by the United States and the United Kingdom*, 90 BU L Rev 2121, 2123–26 (2010) (discussing the evolution of obscenity law between *Roth* and *Miller*).

[102] *Miller*, 413 US at 18 n 2 ("Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language.").

[103] 413 US 49 (1973).

[104] Id at 54–55.

[105] Id at 53.

[106] Id at 57.

[107] *Paris Adult Theatre*, 413 US at 57 ("Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults . . . this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material.").

[108] Id. See also *12 200-Foot Reels*, 413 US at 128–29 (upholding the seizure by customs officers of plaintiff's obscene material based on a federal law that prohibited the importation of obscene material, regardless of any intended private or commercial use). But see *Sable Communications of California, Inc v Federal Communications Commission*, 492 US 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment.").

While *Paris Adult Theatre* stands for the proposition that obscene material, as nonspeech, can be prohibited from commerce, most obscene adult pornography can be possessed without restriction, even though the sale of the same material would be unlawful.[109] Interestingly, the Court treats child pornography differently by holding that both its sale and possession are illegal.[110] This special treatment stems from the Court's creation of a separate no-value category of speech for child pornography.[111]

In summary, the Supreme Court has "long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment."[112] But, in order "to protect explicit material that has social value, [the Court has] limited the scope of the obscenity exception, and [has] overturned convictions for the distribution of sexually graphic but nonobscene material."[113] Importantly, this is a narrow limitation: "[T]he obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" [114] So *Chaplinsky*, *Roth*, *Miller v California*, *Paris Adult Theatre*, and their progeny stand for the proposition that certain "hard core" pornography falls into a category of obscenity that, not constituting speech, does not fall under the First Amendment's protection.[115] The sections that follow

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[109] See *Stanley v Georgia*, 394 US 557, 568 (1969) (holding "that the First . . . Amendment[ ] prohibit[s] making mere private possession of obscene material a crime"). See also *United States v Williams*, 553 US 285, 288 (2008) ("[W]e have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.").

[110] See *Osborne v Ohio*, 495 US 103, 111 (1990) ("Ohio may constitutionally proscribe the possession and viewing of child pornography."). But see generally *Ashcroft v Free Speech Coalition*, 535 US 234 (2002) (striking down a law as unconstitutional that banned *virtual* child pornography—pornography that appears to exhibit minors but is created with youthful-looking actors or through computer-imaging technology).

[111] *New York v Ferber*, 458 US 747, 763–64 (1982) ("Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.").

[112] *Williams*, 553 US at 288.

[113] Id.

[114] See *Brown v Entertainment Merchants Association*, 564 US 786, 792–93 (2011) (collecting cases).

[115] Many scholars have strongly rebuked the current framework. See, for example, David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U Pa L Rev 111, 115 (1994) ("[T]he Court's obsession with preserving the public/private line in sexual speech is not only contrary to, but has actually inverted two of the most basic principles of First Amendment jurisprudence."); Javier Romero, Comment, *Unconstitutional Vagueness and Restrictiveness in the Contextual Analysis of the Obscenity Standard:*

articulate what the equivalent of these categories would look like in the Second Amendment context and argue that courts should adopt that framework.[116]

D. The Current State of Second Amendment Law

Heller did not clearly demarcate the bounds of the "right of the people to keep and bear Arms."[117] Specifically, the Court did not equip lower courts with a framework to evaluate gun regulations, short of outright handgun bans like the one at issue in *Heller*. The Court ensured that its holding left many common gun regulations unscathed.[118] Therefore, in the wake of *Heller*, the question has become which regulations, both historical[119] and forthcoming,[120] survive constitutional scrutiny. Lower courts are only beginning to determine the breadth of the Second Amendment's protection under *Heller* and how to appropriately evaluate Second Amendment challenges. Accordingly, this Section briefly attempts to illustrate the landscape of lower courts' interpretive approaches to the Second Amendment.

Most circuits employ a two-step test to analyze claims brought under the Second Amendment. In the oft-cited *United States v Marzzarella*,[121] the Third Circuit stated its "two-pronged approach" as follows:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, our inquiry is complete.

A Critical Reading of the Miller *Test Genealogy*, 7 U Pa J Const L 1207, 1209 (2005) (criticizing the *Miller v California* test and arguing "that there is no practical way of defining obscenity that does not create significant constitutional infirmities"). See also generally Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Scribner 1995). But see Sunstein, 1986 Duke L J at 618–24 (cited in note 97) (discrediting opponents of pornography bans and ultimately arguing that such bans serve to enhance the freedom of expression). Even courts are hesitant about this legal regime. See, for example, *Mishkin v New York*, 383 US 502, 516–17 (1966) (Black dissenting) (reiterating his "objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read"). See also Part IV.A.

116 See Part II.E.

117 US Const Amend II.

118 *Heller*, 554 US at 626–27 (discussing broadly those regulations left intact).

119 See note 29.

120 See notes 17–22 and accompanying text.

121 614 F3d 85 (3d Cir 2010).

> If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.[122]

Of note, the court arrived at this test by analogizing to First Amendment challenges, in which the "preliminary issue" is "whether the speech at issue is protected or unprotected."[123] Nearly every circuit has followed suit and adopted a version of the *Marzzarella* test.[124]

The anomalous circuits—the First and Eighth—have not expressly adopted a two-step framework. The First Circuit instead purports to "hew[ ] closely and cautiously to *Heller*'s circumscribed analysis and holding."[125] While the First Circuit acknowledged but declined to adopt the *Marzzarella* test,[126] the Eighth Circuit has not expressly mentioned *Marzzarella* in its Second Amendment opinions.[127] However, Second Amendment scholars summarizing case law among the circuits have interpreted the Eighth Circuit's case law as conforming to a two-step framework.[128]

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[122] Id at 89. For a fuller discussion of the two-part test, see generally David B. Kopel and Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 SLU L J 193 (2017).

[123] See *Marzzarella*, 614 F3d at 89, citing *United States v Stevens*, 533 F3d 218 (3d Cir 2008), affd 559 US 460 (2010).

[124] See *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d 242, 254 (2d Cir 2015) (adopting a "two-step rubric" that "broadly comports with the prevailing two-step approach of other courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits"); *United States v Chovan*, 735 F3d 1127, 1136 (9th Cir 2013) ("We adopt the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella* . . . among other circuits."); *United States v Greeno*, 679 F3d 510, 518 (6th Cir 2012); *GeorgiaCarry.Org, Inc v Georgia*, 687 F3d 1244, 1260 n 34 (11th Cir 2012); *National Rifle Association of America, Inc v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F3d 185, 194 (5th Cir 2012); *Heller v District of Columbia*, 670 F3d 1244, 1252 (DC Cir 2011) (*Heller II*); *United States v Reese*, 627 F3d 792, 800–01 (10th Cir 2010); *Ezell I*, 651 F3d at 701–04; *United States v Chester*, 628 F3d 673, 680 (4th Cir 2010).

[125] *Powell v Tompkins*, 783 F3d 332, 347 n 9 (1st Cir 2015). See also Kopel and Greenlee, 61 SLU L J at 266–67 (cited in note 122) (discussing the First Circuit's Second Amendment approach); Sarah Ludington, et al, Heller *in the Lower Courts*, 40 Camp L Rev 399, 404 (2018) (noting that the First Circuit "focuses more on text, history, tradition, and precedent").

[126] See *Powell*, 783 F3d at 347 n 9.

[127] Ludington, et al, 40 Camp L Rev at 404 (cited in note 125) ("[T]he Eighth Circuit has not, at this point, adopted the two-step test."). But see *United States v Adams*, 914 F3d 602, 610–11 (8th Cir 2019) (Kelly concurring) (discussing and applying the *Marzzarella* test).

[128] See, for example, Kopel and Greenlee, 61 SLU L J at 243 (cited in note 122).

Despite such near-uniform acceptance of the *Marzzarella* test, some judges have cast doubt on the validity of the approach.[129] Much of the contention with the two-step framework concerns the second step, which courts have used to apply intermediate scrutiny instead of strict scrutiny.[130] For example, then–Circuit Judge Brett Kavanaugh argued:

> *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny. To be sure, the Court never said something as succinct as "Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations." But that is the clear message I take away from the Court's holdings and reasoning in the two cases.[131]

Judge Kavanaugh's issue with the *Marzzarella* framework lies not directly with a determination of what conduct falls within the Second Amendment's ambit, but rather what implications such a determination holds.

The following sections aim to provide a sensible way for courts to determine what guns the Second Amendment protects. The proposal does not aim to upset the conventional two-step framework currently employed by most circuits, nor does it necessarily endorse such a test.[132] In the event that the two-step framework is rejected by the first Second Amendment case the Court will hear in nearly a decade, *New York State Rifle & Pistol Association, Inc v City of New York*,[133] the following proposal still provides courts with an important and useful framework for thinking about which guns are even worthy of protection in the first place. If a gun is not of the type contemplated by the Amendment, then there is no constitutional bar to regulating its sale,

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[129] See, for example, *Tyler v Hillsdale County Sheriff's Department*, 775 F3d 308, 318 (6th Cir 2014) ("There may be a number of reasons to question the soundness of this two-step approach."), revd and remd, 837 F3d 678 (6th Cir 2016) (en banc).

[130] See E. Garret Barlow, United States v. Reese *and Post*-Heller *Second Amendment Interpretation*, 2012 BYU L Rev 391, 405 & n 86 ("The First, Third, Fourth, Seventh, Tenth, and D.C. Circuits have all applied intermediate scrutiny to Second Amendment challenges since the *Heller* decision in 2008.").

[131] *Heller II*, 670 F3d at 1271 (Kavanaugh dissenting).

[132] That said, Part II.F will walk through how this proposal would be implemented into the conventional two-step approach.

[133] 883 F3d 45 (2d Cir 2018), cert granted, 139 S Ct 939 (2019).

possession, or use.[134] Under Judge Kavanaugh's logic, this framework helps to "to define the scope of the right and assess gun bans and regulations."[135] In the context of a two-part *Marzzarella* test, which has garnered near-unanimous support among the circuits, the following proposal provides a way to decide "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[136] In either event, the following framework can be applied usefully and consistently.

E. Importing the First Amendment's Free Speech Framework into the Second Amendment

This Section argues that courts should import the framework used to evaluate free speech to the Second Amendment context to determine what types of gun regulations are constitutionally permissible.

At the outset, a comparison of pornography and guns is instructive. Both can be possessed, commoditized, and sold. The utility of each comes primarily (though not exclusively) from its possession, not from its sale.[137] As with most pornography, *possession* of guns is constitutionally protected.[138] And finally, both have a dominant presence in American society.[139] Syllogistic argument suggests that because the *sale* of obscene or low-value adult pornography does not enjoy unqualified constitutional protection,[140]

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[134] See *Heller*, 554 US at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."). See also id at 627 (citation omitted):

> We also recognize another important limitation on the right to keep and carry arms. . . . [T]he sorts of weapons protected were those "in common use at the time." . . . We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

[135] *Heller II*, 670 F3d at 1271 (Kavanaugh dissenting).

[136] *Marzzarella*, 614 F3d at 89.

[137] See Part IV.B (unpacking the concern that the sale of pornography, unlike the sale of guns, is the very exercise of one's constitutional rights).

[138] But see note 110 (possession of child pornography is not protected).

[139] Compare notes 11–15 and accompanying text, with Clay Calvert and Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 Cardozo Arts & Enter L J 247, 254 (2004) (reviewing statistics on the prevalence of pornography in American society and economy).

[140] See *Paris Adult Theatre*, 413 US at 53; Lakier, 128 Harv L Rev at 2173 (cited in note 86).

neither do the sales of all guns. But to which gun sales ought this logic apply? More broadly, which guns merit more stringent constitutional protection? Which guns are low value? Which are "obscene"?

To help resolve these thorny questions, this Part argues that courts should apply the high-value/low-value/obscene framework from the First Amendment context to the Second Amendment by judging the value of a gun relative to its ability to further "the core lawful purpose of self-defense."[141] In the First Amendment context, speech is valued according to the degree to which that speech furthers the purposes of the First Amendment.[142] In the words of Justice Oliver Wendell Holmes Jr, free speech serves to protect the "free trade in ideas,"[143] more commonly referred to as the "marketplace of ideas."[144] Accordingly, because it is sacrosanct and "at the heart of the First Amendment's protection,"[145] political speech is highly protected by the First Amendment.[146] By contrast, speech that serves functions other than enhancing the marketplace of ideas is given less stringent protection.[147]

The same analysis holds true in the Second Amendment context: guns should be valued relative to the degree to which they further the purposes of the Second Amendment. That purpose, authoritatively interpreted in *Heller*, is the protection of the right to bear arms *for self-defense*.[148] Guns serving this self-defense purpose, such as the handguns in *Heller*, are high value; these guns

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[141] *Heller*, 554 US at 630.

[142] See Part II.C.

[143] *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

[144] See Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591, 616–19 (1982) (discussing the "marketplace-of-ideas concept").

[145] See *First National Bank of Boston v Bellotti*, 435 US 765, 776 (1978) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[146] See *National Association for the Advancement of Colored People v Claiborne Hardware Co*, 458 US 886, 913 (1982) (recognizing that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'").

[147] See notes 66–67 and accompanying text (discussing the many carveouts to the First Amendment's free speech protection).

[148] A critical premise of this analogy is that most gun ownership in the United States is, in fact, rooted in the self-defense purpose of the Second Amendment, which justifies ignoring the militia-based purpose. If this were not the case, then all of the guns discussed below arguably would further the militia purpose of the Amendment, merit constitutional protection, and obviate the utility of this analogy. But it is likely because most gun ownership is *unconnected* to a militia that *Heller* broadened the Amendment's purpose to

are the Second Amendment counterparts to political speech from the First Amendment context. At the other end of the Second Amendment's protection, as is the case with some forms of speech, are those guns that functionally serve little to no self-defense purpose.

To make these determinations about whether a gun is high value, low value, or no value, courts should consider the following "Self-Defense Factors": a gun's effectiveness in close-range use, its compactness, the ease with which it can be wielded quickly, and the collateral damage risk it poses.[149] This Comment does not argue that these Factors are exhaustive or scientifically precise. They are simply representative of the types of considerations on which courts ought to focus to ascertain the value of a gun. That said, these factors are designed to enable courts to place guns not along a continuum of value but into clearly defined buckets: high-value, low-value, and no-value.[150]

These rigid demarcations are more workable too. Unlike the subjective considerations in the First Amendment context, such as "community standards," "prurient interest[s]," "patently offensive" works, and "literary, artistic, political, or scientific value,"[151] these objective Self-Defense Factors are capable of impartial application. This also mitigates the concern of the morally laden obscenity analysis,[152] which is notoriously difficult to apply without injecting one's own moral judgment.[153]

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include a self-defense purpose. It would be futile to assume otherwise given that the "possession of a weapon by an individual no longer bears any relationship to an effective militia." Keith A. Ehrman and Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U Dayton L Rev 5, 39 (1989).

149 See, for example, Sam Hoober, *Choosing a Home Defense Gun: Pistol, Rifle or Shotgun?* (USA Carry, May 1, 2018), archived at http://perma.cc/AQN9-75JQ (suggesting that guns that one "can operate quickly, efficiently and safely, and shoot accurately" are effective for home defense).

150 See Part IV.D (rejecting the appropriateness of a continuum approach for this framework).

151 *Miller*, 413 US at 24.

152 See note 115.

153 Justice Potter Stewart somewhat infamously remarked that in deciding what constitutes obscenity: "I know it when I see it." *Jacobellis v Ohio*, 378 US 184, 197 (1964). One author "paraphrased and unpacked" this to mean "I know it when I see it, and someone else will know it when they see it, but what they see and what they know may or may not be what I see and what I know, and that's okay." Goldberg, Note, 90 BU L Rev at 2123 (cited in note 101).

1. "High-value" guns.

High-value guns are guns most suitable for purposes of self-defense. To conclude that a gun is a high-value gun, a court should expect most if not all of the Factors (a gun's effectiveness in close-range use, its compactness, its ability to be wielded quickly, and the collateral damage risk it poses) to be met. In particular, these guns are highly compact, inflict contained damage, and are easy to wield quickly relative to alternatives. This category includes handguns and certain shotguns. The handgun class contains "[s]ingle shot pistols, multi-barreled pistols, revolvers, semi-automatic pistols, and automatic pistols."[154] For this reason, the handguns at issue in *Heller* are unquestionably high-value guns.[155] Shotguns, well-designed for self-defense, also fall into the umbrella category of high-value guns.[156] Guns in this category deserve the strongest Second Amendment protection because the possession of these guns is fundamental to the core purpose of the Second Amendment. Accordingly, as Part II.F explains, regulations of high-value guns must meet strict scrutiny.

2. "No-value" guns.

At the opposite end of the spectrum are "no-value" guns or arms[157]—the counterpart to the obscenity category in the First

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[154] *What Are the Types of Handguns* (Laws.com), archived at http://perma.cc/P2PL-MTPH.

[155] See *Heller*, 554 US at 629 (noting that handguns are ideal for self-defense because they are "easier to store in a location that is readily accessible in an emergency," they "cannot easily be redirected or wrestled away by an attacker," they are "easier to use for those without the upper-body strength to lift and aim a long gun," and they "can be pointed at a burglar with one hand while the other hand dials the police"). See also Kyle Mizokami, *What Is the Best Gun for Self Defense?: Semi-Automatic vs. Revolver* (The Natl Interest, Apr 12, 2018), archived at http://perma.cc/7CX3-997Z ("Compact and easy to secure, handguns are ideal weapons for defending one's own home."). Of course, there are those who argue that using guns in self-defense is a rare occurrence in America. See, for example, Josh Sugarmann, *Guns Are Rarely Used in Self-Defense* (HuffPost, Dec 6, 2017), archived at http://perma.cc/WQ9M-A7TT. And, as the majority in *Heller* notes, some might reject categorizing handguns as high-value guns: "We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution." *Heller*, 554 US at 636.

[156] See Kyle Mizokami, *5 Best Guns for Home Defense (Glock, Ruger and Beretta Make the Cut)* (The Natl Interest, Jan 26, 2018), archived at http://perma.cc/G9J7-34Q3 (suggesting the Beretta 1301 Shotgun as good for home defense).

[157] See *Heller*, 554 US at 581 (defining, by reference to several dictionaries, "arms" to include more than just guns). See David B. Kopel, Clayton E. Cramer, and Joseph Edward Olson, *Knives and the Second Amendment*, 47 U Mich J L Ref 167, 168 (2013) ("[T]he

Amendment context. These are weapons that serve no reasonable self-defense purpose. These guns lack most if not all of the Factors: they are highly ineffective at close-range encounters, typically large, difficult to wield, and pose a great risk of collateral damage. Adopting the language of *Miller v California*, no-value weapons, "taken as a whole, lack[ ] serious [self-defense] value."[158] Weapons like chemical weapons, rocket launchers, pipe bombs, and even tanks fall into this category because they cannot reasonably be said to advance a self-defense purpose, assuming self-defense refers to defense of "one's self, family, and property,"[159] as opposed to, say, the defense of a country. Like traditional obscenity, which does not even constitute "speech" under the First Amendment, these no-value weapons do not even qualify as "arms" under the Second Amendment.[160] *Black's Law Dictionary* defines "self-defense" as "[t]he use of force to protect oneself, one's family, or one's property from a real or threatened attack."[161] Use of a rocket launcher to repel a home intruder would likely cause the homeowner just as much harm as it would the intruder, defeating any *self*-defense purpose.

This category is roughly coterminous with the Supreme Court's prohibited "dangerous and unusual weapons" category.[162] As the Ninth Circuit described it, a weapon is deemed "dangerous and unusual" based on "whether the weapon has uniquely dangerous propensities and whether the weapon is commonly possessed by law-abiding citizens for lawful purposes."[163] The Third Circuit, summarizing the approach of "all of the federal circuits," said "the most logical reading is that 'dangerous and unusual' describes certain categories of weapons, and not the manner in which the weapons are used."[164] What is clear from these understandings is that the relevant inquiry is one that focuses more on

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Second Amendment does not protect the right to keep and bear firearms. The Amendment protects 'arms,' of which firearms are only one category.").

158 413 US at 24.

159 See Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S Cal L Rev 547, 555 (2009).

160 See Miller, 91 Tex L Rev See Also at 142 (cited in note 69) ("[S]ome kinds of dangerous or unusual devices—a vial of anthrax, for example—is not, and cannot be, a Second Amendment 'arm.'").

161 *Black's Law Dictionary* 1565 (West 10th ed 2014).

162 *Heller*, 554 US at 627.

163 *Fyock v City of Sunnyvale*, 779 F3d 991, 997 (9th Cir 2015).

164 *United States v One Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial Number LW001804*, 822 F3d 136, 143 (3d Cir 2016).

the capabilities and intended purpose—or "value"—of the gun, and less on how one individual may choose to use a gun. The only scenarios in which no-value weapons, as defined by the Self-Defense Factors, could reasonably be used in self-defense would be apocalyptic, which is also why several laws heavily restrict or ban weapons of this nature.[165] As is true for obscenity and other no-value speech categories, no-value guns deserve the lowest protection.[166] This is, in part, why regulations of no-value guns must only meet a rationality standard of review, as discussed in Part II.F.

3. "Low-value" guns.

In between high-value and no-value guns are low-value guns. Tracking the First Amendment analogy, low-value guns might be described as those guns that have "such slight [self-defense] value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order" and public safety, for example.[167] Unlike no-value guns, these guns will be associated with some, but not all, of the Self-Defense Factors. Moreover, this category should include those guns that could be used in self-defense but, in practice, are not well-suited to that end.[168] Put differently, the relevant inquiry is whether the primary purpose of a gun—evaluated through the lens of the Factors—is self-defense.

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165 See, for example, Michael B. de Leeuw, et al, *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 Harv Black Letter L J 133, 147 & n 81 (2009) ("Including assault weapon bans, at least thirty-six states, the District of Columbia, Puerto Rico, and the federal government have adopted categorical bans on various types of heavy weaponry, including machine guns, rocket launchers, and chemical and biological weapons."); *United States v Tagg*, 572 F3d 1320, 1326 (11th Cir 2009) ("[T]he pipe bombs at issue were not protected by the Second Amendment.").

166 This determination does not run afoul of how courts already think about these issues. See, for example, *United States v Skoien*, 614 F3d 638, 641 (7th Cir 2010) ("Categorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others.").

167 *Chaplinsky*, 315 US at 572.

168 This point should not be mistaken as implying that a gun must be the best for purposes of self-defense in a *relative* sense. Within the range of high-value pistols, some pistols will fare better for self-defense than others. For example, one pistol equipped with night sights that increases its accuracy and reduces its collateral damage risk would not alone make all other pistols low value. See Salvatore, *Night Sights on Handguns: Useful or Unnecessary?* (USA Carry, Oct 13, 2017), archived at http://perma.cc/F8WG-N9AB. Low-value guns are those guns that *independently* serve very little self-defense purpose, but arguably could serve *some* self-defense purpose.

Sniper rifles, machine guns, and assault rifles would fit the bill. Sniper rifles, for example, are highly accurate, leading to a very low risk of collateral damage.[169] But sniper rifles are also highly ineffective in close-range situations—a quality crucial to repelling an attacker in self-defense. Finally, courts should apply intermediate scrutiny to regulations of low-value guns, as outlined in Part II.F.

Admittedly, because the low-value category might include guns commonly used for hunting, these regulations could impinge on a separate *hunting* purpose. Although roughly four in ten gun owners cite hunting as the major reason for their gun ownership,[170] the Supreme Court has never read the Second Amendment to afford protection of this particular form of gun ownership.[171] Therefore, applying this Comment's framework to account for such a purpose would be inapposite, especially given the lack of consensus among academics on the issue.[172] It bears keeping in mind that this proposal, itself an interpretation of the Second Amendment, remains faithful to the "hallowed canon of constitutional interpretation: that the Constitution is a floor, not a ceiling."[173] In other words, if the categorization of certain hunting guns as low-value guns is politically unpalatable, a legislature is free to prescribe exceptions for guns used for hunting purposes, or simply not regulate low-value guns in the first place. In fact, several states' constitutions do confer separate constitutional

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169 See Lewis Page, *Snipers—Cowardly Assassins, or Surgical Soldiers?* (The Register, Nov 28, 2008), archived at http://perma.cc/5ZYE-28RT.

170 See Kim Parker, et al, *The Demographics of Gun Ownership* (Pew Research Center, June 22, 2017), archived at http://perma.cc/GKS6-DKZA.

171 In *Heller*, the Court noted only in dicta that most Founding-era citizens viewed the "ancient right of individuals to keep and bear arms" as "more important for self-defense and hunting" than it was for preventing the elimination of the militia. *Heller*, 554 US at 599. But the Court's conclusion—that the Amendment's textual elements taken together "guarantee the individual right to possess and carry weapons in case of *confrontation*"—did not speak of or apply to gun ownership for hunting. Id at 592 (emphasis added).

172 Compare Joseph Blocher, *Hunting and the Second Amendment*, 91 Notre Dame L Rev 133, 137 (2015) (arguing that "there is little evidence that the framers, ratifiers, or general public either intended or believed the Second Amendment to cover hunting"), with Ryan Notarangelo, *Hunting Down the Meaning of the Second Amendment: An American Right to Pursue Game*, 61 SD L Rev 201, 205 (2016) (arguing "that the Amendment protects a right to keep and bear arms for the purpose of hunting").

173 Louise Weinberg, *Our* Marbury, 89 Va L Rev 1235, 1382 (2003).

rights to hunt, and this Comment's proposal would counsel against constitutional invalidation of such provisions.[174]

A regulation or ban on the possession of a low-value gun would likely, although only slightly, infringe upon the core Second Amendment right to bear arms. Significantly, a possession ban could still pass constitutional muster when courts apply intermediate scrutiny, as noted in Part II.F. Assault weapons,[175] which this Comment argues are low-value guns, are illustrative.

Generally, an assault weapon is low value because, while it is capable of being used for self-defense, its primary purpose is one other than self-defense.[176] Assault weapons pose significant collateral damage risks and suffer from portability limitations given their size,[177] although some disagree.[178] A brief look at two circuit courts' treatment of assault weapons helps justify this categorization.

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[174] See Stephen P. Halbrook, *The Constitutional Right to Hunt: New Recognition of an Old Liberty in Virginia*, 19 Wm & Mary Bill Rts J 197, 198 (2010) (noting that "ten states recognize hunting as a constitutional guarantee, and proposed amendments are pending in other states").

[175] The expansiveness of the category of "assault weapon" is often hotly debated and obscured. See, for example, Jeff Daniels, *Definition of What's Actually an "Assault Weapon" Is a Highly Contentious Issue* (CNBC, Feb 21, 2018), archived at http://perma.cc/V55T-7EC6. Because the categorization of assault weapons depends in large part on how an individual or state statute defines "assault weapon," it would be ill-advised to lay out a single definition. Accordingly, courts should be cognizant of a state statute that defines assault weapons in broad terms such that the definition encapsulates high-value guns. Alternatively, a state might conceivably write a narrow definition that includes only no-value guns. New York recently defined assault weapon as one that "contains any one of an enumerated list of military-style features, including a telescoping stock, a conspicuously protruding pistol grip, a thumbhole stock, a bayonet mount, a flash suppressor, a barrel shroud, and a grenade launcher." *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d at 249.

[176] See, for example, *Kolbe v Hogan*, 849 F3d 114, 127 (4th Cir 2017) ("Although self-defense is a conceivable use of the banned assault weapons, [Maryland's] evidence reflects—consistent with the Supreme Court's *Heller* decision—that most individuals choose to keep other firearms for that purpose."); *Friedman v City of Highland Park*, 784 F3d 406, 411 (7th Cir 2015) ("True enough, assault weapons can be beneficial for self-defense . . . [b]ut assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate.").

[177] See Sabienna Bowman, *Arguments That the AR-15 Is for Home Defense Are Insane* (Bustle, June 12, 2016), archived at http://perma.cc/4BU4-QB5V ("If you are attempting to use [the AR-15] for self-defense if someone is attacking you and your family, it's not the best move; bullets are going to be flying everywhere, and the potential to hit a family member, a neighbor, a pet, or even yourself seems dangerously high.").

[178] See Wesley Messamore, *5 People Who Used an AR-15 to Defend Themselves, and It Probably Saved Their Lives* (Mic, Sept 24, 2013), archived at http://perma.cc/LXF8-LPJ5 ("AR-15s do save lives and for some, make great self-defense weapons.").

The Second Circuit upheld two laws that banned possession of semiautomatic assault weapons.[179] First, the court inquired under the first-step of the *Marzzarella* test[180] whether the regulated guns were "in common use" and "typically possessed by law-abiding citizens for lawful purposes" such that the law impinged on Second Amendment rights.[181] Analyzing whether assault weapons are typically possessed for lawful purposes forced the Second Circuit to look to "the *subjective* motives of gun owners," which the court could not "cleanly resolve[ ]."[182] Instead, it simply assumed "that these laws ban weapons protected by the Second Amendment."[183] Moving to the second step under *Marzzarella*'s test—selecting and applying the appropriate means-end scrutiny—the Court selected intermediate scrutiny because while the laws at issue "implicate[d] Second Amendment rights" they did "not to the same extent as the laws at issue in *Heller* and *McDonald*."[184] Because the court found that the law satisfied intermediate scrutiny,[185] the prior assumption about the guns being protected was nondeterminative.[186]

The en banc Fourth Circuit also upheld a ban against a number of assault weapons; however, it went further, definitively holding that the Second Amendment does not protect these weapons under the first step of the *Marzzarella* approach.[187] Specifically, the court held that the banned assault weapons are "among those arms that the Second Amendment does not shield" because they are similar to "weapons that are most useful in military service."[188] By comparing the regulated guns to military-approved

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179 See *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d at 252–53.

180 See notes 121–24 and accompanying text.

181 *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d at 255–56, quoting *Heller*, 554 US at 625, 627.

182 *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d at 256 (emphasis added).

183 Id at 257.

184 Id at 257–58.

185 Id at 261 ("Though 'intermediate scrutiny' may have different connotations in different contexts, here the key question is whether the statutes at issue are 'substantially related to the achievement of an important governmental interest.'") (citations omitted).

186 *New York State Rifle and Pistol Association, Inc v Cuomo*, 804 F3d at 263.

187 See *Kolbe*, 849 F3d at 135.

188 Id.

M16 rifles,[189] the court obviated the need to answer several difficult questions raised by *Heller*.[190] But even accepting the Second Circuit's assumption that these arms were protected, the law "readily survives" intermediate scrutiny.[191] At least two other circuits have similarly upheld the constitutionality of bans on assault weapons.[192]

These cases highlight two critical points. First, application of the proposed framework would only rarely alter the *outcomes* in these cases. For example, under the current framework, a court would find that an assault weapon is a low-value gun because it poses a substantial risk of collateral damage and lacks optimal portability.[193] As a low-value gun, the proposed framework suggests that assault weapons do enjoy some protection, albeit less than high-value guns. While this conflicts with the Fourth Circuit's view that the Second Amendment does not cover assault weapons,[194] the difference is inconsequential because this Comment's framework still instructs application of intermediate scrutiny. And both the Second and Fourth Circuits have already held that these bans pass intermediate scrutiny. Thus, this Comment's framework would also uphold these bans. The approach proposed by this Comment is preferable to the courts' current modes of analysis because it is objective and principled, and does not require assuming away the issue as the Second Circuit did or obviating difficult questions as the Fourth Circuit did. By relying on this framework, courts can use a uniform vocabulary in discussing Second Amendment cases.

Second, the cases reveal that even in the absence of a clear, universally applicable framework, courts still reach the same outcomes. This reality quells concerns that courts utilizing this Comment's framework would improperly rely on regional biases given the Second and Fourth Circuit's similar results. Again, the utility of this Comment's paradigm comes in its potential to homogenize

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189 See id at 136–37 (discussing and applying *Heller*'s instruction for what constitutes a gun "like" an M16 rifle).

190 See id at 135–36.

191 *Kolbe*, 849 F3d at 130.

192 See, for example, *Friedman*, 784 F3d at 410; *Heller II*, 670 F3d at 1247–48.

193 Of course, this determination is subject to caveats depending on the definition of the assault rifle at issue. See note 175.

194 See *Kolbe*, 849 F3d at 135.

the way in which courts analyze Second Amendment cases, not to dramatically change outcomes.[195]

F. The Applicable Standards of Review under the Proposed Framework

There remains the question of what standards of review courts must employ to evaluate regulations for guns in each of these three categories. Because nearly every circuit has adopted the *Marzzarella* test,[196] this Section discusses the appropriate standards of review through the lens of that test.

Using the proposed framework to establish what category of gun is at issue, courts can proceed with relative ease through the *Marzzarella* test.[197] Recall from Part II.D that courts first ask "whether the challenged law impinges upon a right protected by the Second Amendment—that is, whether the law regulates conduct that falls within the scope of the Second Amendment's guarantee."[198] A law regulating a no-value gun would not impinge on any Second Amendment right because the Second Amendment protects the right to bear arms for self-defense and no-value guns serve no self-defense purpose.[199] While *Heller* rejected rational basis review as insufficiently protective of the right to keep and bear arms,[200] arguably no-value guns present no such problem because

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[195] See text accompanying notes 25–26.

[196] See note 124 and accompanying text.

[197] To some extent, the reliability of the test currently used by lower courts remains open ended, an issue beyond this Comment's scope. See Anderson, Note, 82 S Cal L Rev at 555 (cited in note 159); Blocher, 84 NYU L Rev at 378 (cited in note 61).

[198] *National Rifle Association*, 700 F3d at 194. See also note 124.

[199] See Part II.E.2.

[200] See *Heller*, 554 US at 628 n 27.

they don't implicate the Second Amendment.[201] Functionally, then, most laws regulating no-value guns will be permissible.[202]

A regulation of the sale of a high-value gun would, by contrast, impinge on the right clearly protected by the Second Amendment to possess a gun quintessentially intended for self-defense. Low-value guns would nominally pass the first step because such guns serve some nonnegligible self-defense purpose, thus implicating some Second Amendment protection.

For high- and low-value guns, courts must then turn to the second step and "determine whether to apply intermediate or strict scrutiny to the law, and then [ ] determine whether the law survives the proper level of scrutiny."[203] The "prevailing view" is that the "appropriate level of scrutiny 'depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.'"[204] A court's prior determination as to the value of the gun at issue makes this straightforward. A regulation on high-value guns would be subject to strict scrutiny because it "threatens a right at the core of the Second Amendment."[205] A regulation on low-value guns would be subject to intermediate scrutiny because it "does not encroach on the core of the Second Amendment."[206] This is because the *core* of the Amendment is protection of the use and acquisition of guns for self-defense—namely, high-value guns. Any concern that regulations on the possession or sale of low-value guns will hinder the exercise of a person's right to bear arms for self-defense is undermined by the fact that access to and use of high-value guns remain

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[201] This conclusion conforms to lower courts' views. The Second Circuit, citing several other circuits, found the following:

> Given *Heller*'s emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).

United States v Decastro, 682 F3d 160, 166 (2d Cir 2012).

[202] See Andrew Peace, Comment, *A Snowball's Chance in* Heller*: Why* Decastro*'s Substantial Burden Standard Is Unlikely to Survive*, 54 BC L Rev E-Supp 175, 178 & n 31 (2013) (collecting cases showing how rational basis "rarely leads to the invalidation of laws").

[203] *National Rifle Association*, 700 F3d at 194. See also note 124.

[204] *National Rifle Association*, 700 F3d at 195, quoting *Chester*, 628 F3d at 682.

[205] *National Rifle Association*, 700 F3d at 195.

[206] Id.

highly protected under this framework and because low-value guns themselves do little in the way of self-defense.

While this Comment does not intend to lead to drastically different new holdings in Second Amendment cases,[207] that is not to say the Comment's analysis would have no effect. In particular, the two-step test as applied by this Comment would call into question the Second Circuit's holding in *New York State Rifle & Pistol Association, Inc v City of New York*, which the Supreme Court will hear next term.[208] The law at issue regulated handguns—high-value guns under this Comment's proposal[209]—yet the Second Circuit chose to apply intermediate scrutiny.[210] This Comment would counsel for the application of strict scrutiny, which may have altered the outcome of the case.

The foregoing discussion aims to provide plausible demarcations between high-value, low-value, and no-value guns. By relying on this framework, courts can easily navigate the two-part test already utilized in most circuits. If adopted, this proposal would assist courts in developing and clarifying the muddled Second Amendment jurisprudence[211] in a more methodical, and less ad hoc, fashion. In that vein, Part III discusses a specific example in which courts can apply this framework.

III. WHETHER THERE IS A RIGHT TO SELL A FIREARM

Under this new framework for analyzing Second Amendment cases, courts can more uniformly address tricky questions posed by the Second Amendment. This Part is dedicated to a discussion of an issue currently percolating among lower courts: whether the Second Amendment grants individuals the right to sell firearms. The Supreme Court has yet to reach this issue. Part III.A discusses why the text of the Constitution fails to provide an answer to this question. Then, Parts III.B–D lay out the approaches lower courts employ, noting the slightly different dispositions reached depending on the framing of the legal issue presented. Ultimately, Part III.E argues that the lower court cases addressing this issue can be read coherently to support the existence of a

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207 See notes 193–95 and accompanying text.

208 See notes 9–10 and accompanying text.

209 See Part II.E.1.

210 *New York State Rifle & Pistol Association, Inc v City of New York*, 883 F3d at 55–62 ("[T]he [law at issue] 'pass[es] constitutional muster' under intermediate scrutiny.").

211 See, for example, Shapiro and Larosiere, *The Supreme Court Is Too Gun-Shy* (cited in note 5) (discussing the lack of uniformity in Second Amendment jurisprudence).

right to acquire and use a gun, but not an independent right to sell a firearm. Finding no right to sell firearms, courts can easily apply the framework from Part II to determine when regulations of gun sales pose constitutional problems, specifically when they inhibit the right to own or use a gun for self-defense.

A. Textual Analysis: What Do "Keep" and "Bear" Entail?

Both Justice Antonin Scalia's majority opinion and Justice John Paul Stevens's dissenting opinion in *Heller* include lengthy discussions of the text of the Second Amendment. Each offers a competing view of whether "to keep and bear Arms" refers to militia service.[212] These discussions are only somewhat instructive on whether there is a Second Amendment right to sell a firearm. But before reaching the more difficult question of whether the text of the Second Amendment implies a right to sell a firearm, a brief discussion on why the text fails to provide explicit support for such a right is in order.

The text of the Second Amendment itself does not embed in it a right to sell a firearm. The *Heller* majority concluded that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons'"[213]—the phrase "was simply a common way of referring to possessing arms, for militiamen *and everyone else*."[214] As for "bear arms," the majority concluded that "bear" means "carry," but the presence of "arms" meant that the phrase "refers to carrying for a particular purpose—confrontation."[215] The Court quoted Justice Ruth Bader Ginsburg's dissent in a prior case defining "carries a firearm" in a federal statute to mean "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."[216] The majority used these definitions to support its main argument that the Amendment does not require a militia-based interpretation because "bear arms" "in no way connotes participation in a structured military organization."[217]

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212 US Const Amend II.

213 *Heller*, 554 US at 582.

214 Id at 583 (emphasis in original).

215 Id at 584.

216 Id, quoting *Muscarello v United States*, 524 US 125, 143 (1998) (Ginsburg dissenting).

217 *Heller*, 554 US at 584.

In contrast, Justice Stevens argued in dissent that the phrase "to keep and bear Arms" entails a right "to possess arms if needed for military purposes and to use them in conjunction with military activities."[218] The dissent took issue with the majority treating "keep" and "bear" distinctly, arguing instead that "to keep and bear" creates a unitary right.[219] Consequently, "the 'right to keep and bear Arms' protects only a right to possess and use firearms in connection with service in a state-organized militia."[220] The dissent further noted that "bear arms" "is derived from the Latin *arma ferre*, which, translated literally, means 'to bear [*ferre*] war equipment [*arma*].'"[221]

Both opinions agree that "to keep and bear" connotes "to possess." But notably absent in both opinions is an interpretation that "keep and bear" means "acquire." As scholars have argued, if "you consult a dictionary, whether printed in 1791 or 2013, 'keep' means 'have,' 'bear' means 'carry'"—neither mean "acquire."[222] Because "acquire" refers to "*gain*[*ing*] possession,"[223] a right to acquire a gun goes beyond the textual bounds of the Amendment that covers only *possessing* a gun and not obtaining one. This argument holds true even though, taken to the extreme, it would likely render the right to bear arms for self-defense nonexistent: without the ability to acquire a gun, one could never possess a gun for the purpose of self-defense.

Even conceding that "keep and bear" entails a right to acquire a gun, there is even less textual ground for asserting that "keep and bear" means "sell." If "acquire" is sufficiently analogous to "keep and bear," then the *most* analogous term to "acquire" in a commercial context would be "buy." Buying connotes the acquisition of a good,[224] whereas selling entails relinquishing a good in return for money.[225] While selling may help others acquire a gun, the very act of selling a gun is the opposite of acquiring a gun, at least from the perspective of the seller. Thus, "sell" is far detached from "keep and bear."

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218 Id at 646 (Stevens dissenting).

219 Id.

220 Id.

221 *Heller*, 554 US at 64

222 Miller, 91 Tex L Rev See Also at 142 (cited in note 69).

223 *Black's Law Dictionary* 28 (West 10th ed 2014) (emphasis added).

224 Id at 1429 (defining "purchase" as "[t]he acquisition of an interest in real or personal property by sale"). See also id at 241 (defining "buy" by reference to "purchase").

225 See id at 1567 (defining "sell" as "[t]o transfer (property) by sale").

An analysis of the plain text of the Amendment elucidates the increasingly weak inferences that must be drawn to reach the conclusion that the text provides for a right to sell a firearm. In the judgment of the Ninth Circuit, "Nothing in the specific language of the Amendment suggests that sellers fall within the scope of its protection."[226] To be sure, the absence of express textual support does not preclude the existence of such a right. But given textual silence on the matter, lower courts must decide whether the right exists elsewhere.

B. The Fourth Circuit Explicitly Rejects a Constitutional Right to Sell a Firearm

In *United States v Chafin*, the Fourth Circuit expressly found that a constitutional right to sell a firearm does not exist.[227] Cory Chafin was convicted of "selling a firearm to a person [while] knowing or having reasonable cause to believe that such person is an unlawful user of drugs."[228] Specifically, Chafin, a drug user, sold an AK-47 (that he himself bought illegally) to his friend, another drug user.[229] Chafin objected to his indictment and subsequent conviction on the grounds that it violated his Second Amendment rights under *Heller*.

In an unpublished opinion, the Fourth Circuit rejected Chafin's claims. Citing *Heller*, the court emphasized that the Second Amendment is not "unlimited."[230] It also invoked a *Marzzarella*-style test.[231] Under the Fourth Circuit's articulation of that test, courts should first conduct a historical analysis to determine "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[232] If the conduct falls outside the Amendment's scope then the law is constitutional. If the conduct falls within the Amendment's scope, however, the courts should move on to the second step, and apply an "appropriate form of means-end scrutiny."[233]

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226 *Teixeira v County of Alameda*, 873 F3d 670, 683 (9th Cir 2017) (*Teixeira III*).

227 423 Fed Appx at 344.

228 Id at 343, citing 18 USC § 922(d)(3).

229 *Chafin*, 423 Fed Appx at 343.

230 Id at 344, quoting *Heller*, 554 US at 595.

231 See notes 121–24 and accompanying text.

232 *Chafin*, 423 Fed Appx at 344, quoting *United States v Chester*, 628 F3d 673, 680 (4th Cir 2010).

233 Id.

In *Chafin*, the court never reached this second step because the historical inquiry under the first step evinced no support that "the Second Amendment was understood to protect an individual's right to sell a firearm."[234] Accordingly, the court held that the Second Amendment "does not necessarily give rise to a corresponding right to sell a firearm."[235]

C. The Ninth Circuit Also Explicitly Rejects a Constitutional Right to Sell a Firearm

Applying similar logic, the Ninth Circuit upheld a county ordinance that required firearm retailers to obtain a conditional use permit to sell firearms and prohibited sales of firearms "near residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores."[236] The many iterations of the litigation, discussed below, helpfully illustrate both sides of the argument regarding whether a constitutional right to sell a firearm exists.

The case began in *Teixeira v County of Alameda* [237] (*Teixeira I*), when the district court upheld the ordinance in the face of as-applied and facial challenges brought by plaintiffs seeking to operate a firearm store in a prohibited area. The court, as in *Chafin*, applied a *Marzzarella*-inspired two-step test.[238] The court found that the plaintiffs' claims did not survive the first step, which ended the court's inquiry.[239] Specifically, the ordinance was constitutional because it was "quite literally a 'law[ ] imposing conditions and qualifications on the commercial sale of arms,' which the Supreme Court identified as a type of regulatory measure that is presumptively lawful."[240] In light of the fact that the Supreme Court and the Ninth Circuit have not specified the

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[234] *Chafin*, 423 Fed Appx at 344 (emphasis omitted).

[235] Id. While unpublished, a district court within the Fourth Circuit found *Chafin*'s observations "persuasive" when it concluded that "[a]n individual's decision to give or sell a firearm to another person does not directly bear on the individual's capacity to possess firearms in her own right." *United States v Conrad*, 923 F Supp 2d 843, 852 (WD Va 2013). See also *Teixeira III*, 873 F3d at 690 n 24 (citing *Chafin* favorably).

[236] *Teixeira III*, 873 F3d at 673.

[237] 2013 WL 4804756 (ND Cal).

[238] See id at *5, quoting *National Rifle Association of America, Inc v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F3d 185, 194 (5th Cir 2012). See also notes 121–24 and accompanying text.

[239] *Teixeira I*, 2013 WL 4804756 at *5.

[240] Id at *6, quoting *Heller*, 554 US at 626–27.

full scope of rights under the Second Amendment, the district court concluded that those courts have "not extended the protections of the Second Amendment to the sale or purchase of guns."[241] Absent a clear Second Amendment protection conferred on gun retailers in the sale of firearms, plaintiffs were limited to showing that the ordinance infringed on their "core right to possess a gun in the home for self-defense articulated in *Heller*."[242] They failed to make this showing.[243]

In *Teixeira v County of Alameda*[244] (*Teixeira II*), a divided panel of the Ninth Circuit reversed and struck down the ordinance for infringing on what it saw as the concomitant right to sell a firearm contained within the Second Amendment's right to bear arms for self-defense.[245] Unlike the district court, the panel found that the first step of the analysis—whether the historical understanding of the Second Amendment covers the alleged conduct—was met.[246] Ultimately it held that "[i]f 'the right of the people to keep and bear arms' is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear."[247] In other words, "the right to purchase and to sell firearms is part and parcel of the historically recognized right to keep and to bear arms."[248] Having satisfied the first step, the court proceeded to apply the second step of determining and applying the appropriate level scrutiny. The court concluded that some heightened level scrutiny was appropriate, a level that the ordinance failed to survive.[249] Writing separately in partial dissent, Judge Barry G. Silverman agreed with the district court that the plaintiffs failed to state a Second Amendment claim because "[c]onspicuously missing from this lawsuit is any honest-to-God resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby."[250]

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241 *Teixeira I*, 2013 WL 4804756 at *6.

242 Id.

243 See id at *5–8.

244 822 F3d 1047 (9th Cir 2016).

245 Id at 1053–56.

246 Id at 1055 ("The historical record indicates that Americans continued to believe that such right included the freedom to purchase and to sell weapons.").

247 Id.

248 *Teixeira II*, 822 F3d at 1056.

249 See id at 1056–64.

250 Id at 1064 (Silverman concurring in part and dissenting in part).

Rehearing the case en banc in *Teixeira v County of Alameda*[251] (*Teixeira III*), the Ninth Circuit declared that "[n]othing in the text of the Amendment, as interpreted authoritatively in *Heller*, suggests the Second Amendment confers an independent right to sell or trade weapons."[252] The court also highlighted a different historical account of the Second Amendment than that in *Teixeira II*, concluding that during the Founding era the Second Amendment was understood to protect only the *possession* of firearms, not the sale of firearms.[253] The court drew further support from the fact that their conclusion was "consistent" with *Chafin*.[254] Notably, the *Teixeira III* court offered a limiting principle for its view that there is no right to sell a firearm: "As with purchasing ammunition and maintaining proficiency in firearms use, the core Second Amendment right to keep and bear arms for self-defense wouldn't mean much without the ability to acquire arms."[255] Thus, while *Teixeira III* stands for the proposition that the right to *sell* a gun does not inhere in the Second Amendment, it also arguably lends support for the proposition that the right to *acquire* a gun is a necessary corollary to the right to bear arms for self-defense.

Presented with an opportunity to clarify *Teixeira III*'s holding, the Ninth Circuit "bypass[ed] the constitutional obstacle course of defining the parameters of the Second Amendment's individual right in the context of commercial sales."[256] In *Pena v Lindley*,[257] the court confronted a regulation requiring that, in order for people to sell certain guns, the guns must incorporate certain modern innovations to minimize accidental discharges and embed in shell casings information about the firing gun.[258] The court did "not need to reach the question of whether these limitations fall within the scope of the Second Amendment's right to bear arms because, even assuming coverage, these provisions

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251 873 F3d 670 (9th Cir 2017).

252 Id at 683.

253 See id at 683–87.

254 Id at 690 n 24.

255 *Teixeira III*, 873 F3d at 677 (quotations omitted). The court found support for this conclusion from a century-old Supreme Court of Tennessee case holding that "[t]he right to keep arms[ ] necessarily involves the right to purchase them." Id at 678, quoting *Andrews v State*, 50 Tenn 165, 178 (1871).

256 *Pena v Lindley*, 898 F3d 969, 976 (9th Cir 2018).

257 898 F3d 969 (9th Cir 2018).

258 Id at 973.

pass constitutional muster."[259] In so holding, the court relied on similar logic to that in *Teixeira III*: the law "only regulates commercial sales, not possession, and does so in a way that does not impose a substantial burden on [p]urchasers."[260] Despite the Ninth Circuit's limited clarification of the bounds of this rule, district courts in its circuit had already hewed close to *Teixeira III*'s logic before the case was decided,[261] a trend likely to persist moving forward.[262] As will become clear in the sections that follow, the Ninth Circuit's view is arguably uncontradicted by any available precedent in other circuits.

D. The Seventh Circuit Holds There Is a Right to Use a Gun, but Implicitly Rejects the Existence of a Right to Sell One

In contrast to the Ninth and Fourth Circuits, the Seventh Circuit seems more amenable to a Second Amendment right to sell a firearm based on its case law protecting the right to *use* firearms. The litigation in *Ezell v City of Chicago*—*Ezell I*[263] and *Ezell II*[264]—helps illustrate the circuit's approach to this distinct but highly relevant question: whether there is a right to use firearms inherent in the right to possess them for self-defense. This right is related to a theoretical right to sell a firearm because without being able to acquire firearms, no one would be able to use them for self-defense purposes. Instinctively, one might assume that if there is a right to acquire and use a gun, there is also a right to sell a gun. But as this Section makes clear, the ability

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259 Id.

260 Id.

261 For example, before *Teixeira III*, one district court rejected plaintiffs' claim that "they have the right to manufacture and sell firearms within the state . . . without interference from the federal government." *Montana Shooting Sports Association v Holder*, 2010 WL 3926029, *21 (D Mont). To that end, the court noted that "*Heller* said nothing about extending Second Amendment protection to firearm manufacturers or dealers. If anything, *Heller* recognized that firearms manufacturers and dealers are properly subject to regulation by the federal government under existing federal firearms laws." Id. See also *Bauer v Harris*, 94 F Supp 3d 1149, 1155 (ED Cal 2015) ("Under any level of scrutiny, the [gun sales regulation at issue] is constitutional because it places only a marginal burden on 'the core of the Second Amendment,' which is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'").

262 A state judge recently issued an extensive dissenting opinion endorsing *Teixeira III*. See *The Gun Range, LLC v City of Philadelphia*, 2018 WL 2090303, *10–12, 15 (Pa Commw) (Pellegrini dissenting).

263 651 F3d 684 (7th Cir 2011).

264 846 F3d 888 (7th Cir 2017).

to acquire and use a gun is conceptually distinct from a right to sell one.

In *Ezell I*, the Seventh Circuit struck down as unconstitutional a Chicago ordinance that banned firearm ranges within the city because the ordinance infringed on "the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."[265] The court explained that the right to possess firearms "wouldn't mean much without the training and practice that make it effective."[266]

Following *Ezell I*, Chicago replaced "the range ban with an elaborate scheme of regulations governing shooting ranges."[267] The two zoning regulations at issue in *Ezell II* rendered only 2.2 percent of the city's acreage available for firing ranges.[268] The Seventh Circuit decision in *Ezell II* reiterated that range training "lies close to the core of the individual right of armed defense."[269] Applying *Ezell I*'s framework, the *Ezell II* court again struck down as unconstitutional Chicago's new regulations.[270]

Ezell I and *Ezell II* thus collectively stand for the proposition that gun regulations cannot eliminate one's ability to use a gun. In the *Ezell* cases, the regulations directly affect one's ability to exercise his or her core Second Amendment rights. As the *Teixeira III* court made clear, regulations that affect gun *sales*, as opposed to gun use, are "therefore entirely unlike the *Ezell* cases."[271]

E. Harmonization of the Lower Courts' Cases

The *Ezell* cases are hardly at odds with *Teixeira III* and *Chafin*. The Seventh Circuit did not speak definitively on whether a right to *sell* a firearm exists, leaving the Ninth and Fourth Circuits as the lone courts that have.

More pointedly, the Fourth, Ninth, and Seventh Circuits all support the existence of a right to acquire a firearm while simultaneously rejecting the existence of a right to sell a firearm. In each case, the court functionally answered the question: Does the

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265 *Ezell I*, 651 F3d at 708.
266 Id at 704.
267 *Ezell II*, 846 F3d at 890.
268 Id.
269 Id at 893.
270 See id at 898.
271 *Teixeira III*, 873 F3d at 681.

regulation in question substantially inhibit the use or acquisition of firearms? The firing ranges regulation in *Ezell* "severely limit[ed] Chicagoans' Second Amendment right to maintain proficiency in firearm use."[272] The gun store regulations in *Teixeira*—which made it slightly more difficult to sell a firearm while still maintaining ample means for consumers to buy and use guns—did not.[273] It would be unsurprising for these courts to reach the same conclusions if in reverse positions.

In fact, in *Teixeira III*, the Ninth Circuit explicitly distinguished its facts from those in *Ezell*:

> Chicago's zoning regulations at issue in [*Ezell II*] so "severely limit[ed] where shooting ranges may locate" that "*no* publicly accessible shooting range yet exist[ed] in Chicago." As a result, the zoning regulations, "though not on their face an outright prohibition of gun ranges, nonetheless severely restrict the right of Chicagoans to train in firearm use at a range." No analogous restriction on the ability of Alameda County residents to purchase firearms can be inferred from the complaint in this case.[274]

For this reason, if the Ninth Circuit faced a complete ban on gun sales, it would most likely conclude that such a law "'would be untenable under *Heller*,' because a total prohibition would severely limit the ability of citizens to *acquire* firearms."[275] The Ninth Circuit thus preserved the already-existing right to bear arms for self-defense because one cannot defend themselves with a gun without possessing one. The court did not, however, create a new, independent right to sell a firearm conferred on gun sellers.[276] At the most, it created a limited right to acquire a gun, distinct from a right to sell one.

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[272] *Ezell II*, 846 F3d at 890.

[273] See *Teixeira III*, 873 F3d at 679 ("But potential gun buyers in Alameda County generally . . . *do* have access to a local gun store just 600 feet from where Teixeira proposed to locate his store.").

[274] See id (citations omitted), quoting *Ezell II*, 846 F3d at 894.

[275] See *Teixeira III*, 873 F3d at 688 (citations omitted), quoting *Marzzarella*, 614 F3d at 92 n 8.

[276] See *Teixeira III*, 873 F3d at 688.

Similarly, if the Seventh Circuit faced a *Teixeira*-like regulation on gun stores,[277] the court would likely uphold such a regulation provided that it was not a "severe encroachment" on people's right "to acquire and maintain proficiency in firearm use."[278]

Therefore, current case law does not evince the existence of an independent right to sell a firearm. Rather, if a gun sales regulation so severely infringes on one's right to acquire and use a gun, then such a law is unconstitutional for violating individuals' core Second Amendment right to bear arms for self-defense.

This harmonization comports with the holdings of district courts within the Seventh Circuit post-*Ezell*. For example, the Northern District of Illinois initially said that "[t]he Second Amendment does not expressly address a right to sell firearms" and the "[c]ourt does not need to resolve that issue now."[279] However, in a later iteration of the same case after *Ezell II*, the same judge concluded that "the Second Amendment right to keep and bear arms for self-defense necessarily includes the right to acquire a firearm, and that this right is implicated by local laws directly or functionally banning firearm sales."[280] Thus, the court implies that if a right to sell firearms exists, it exists only as a bar to functional *bans* on gun sales—but not as a bar to all regulations that fall short of a functional ban. Consistent with this reasoning, other cases in the Northern District of Illinois have argued, at least in passing, that restrictions on the commercial sale of firearms are "presumptively valid."[281]

In sum, despite their discrete holdings, the Fourth, Ninth, and Seventh Circuits all support a single, underlying message: there is no individual right to sell a firearm conferred by the Constitution, even though there is a right to acquire and use one. The Fourth and Ninth Circuits agree that no independent right to sell a firearm exists, but the "opposing view" in the Seventh Circuit

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277 In fact, Illinois Governor J.B. Pritzker signed into law a regulation requiring dealers to obtain state certification to sell guns. Litigation is likely to arise challenging this new regulation. Compare Mike Riopell, *Gov. J.B. Pritzker Signs Law Requiring State Licensing of Illinois Gun Dealers; Rifle Association Threatens Lawsuit* (Chicago Tribune, Jan 17, 2019), archived at http://perma.cc/G6H7-DXMT, with *Teixeira III*, 873 F3d at 673 (concerning a regulation that, among other things, required "firearm retailers to obtain a conditional use permit before selling firearms").

278 *Ezell II*, 846 F3d at 893.

279 *Kole v Village of Norridge*, 941 F Supp 2d 933, 944–45 (ND Ill 2013).

280 *Kole v Village of Norridge*, 2017 WL 5128989, *9 (ND Ill).

281 See *Chicago Gun Club, LLC v Village of Willowbrook, Illinois*, 2018 WL 2718045, *6 (ND Ill), citing *Heller*, 554 US at 626–27 & n 26. See also *Second Amendment Arms v City of Chicago*, 135 F Supp 3d 743, 752 (ND Ill 2015).

can arguably be read consistently with the Fourth and Ninth Circuits. Their only ostensible disagreement is over the degree to which the government can inhibit one's ability to acquire guns. Even then, all the cases can be read to support the existence of a right to acquire a firearm, but not an independent right to sell a firearm. Given the apparent absence of such a right, the next Section applies this Comment's proposed framework to evaluate when gun sales regulations are constitutionally permissible.

F. Courts Can Draw on the First Amendment to Resolve Which Sales and Regulations Merit Protection

Under the framework presented in Parts II.E–F, the key issue courts must consider when evaluating a gun sale regulation is the value of the gun subject to the regulation. Sales of high-value guns deserve the strongest Second Amendment protection because the possession of these guns, often realized through purchasing such gun, is fundamental to the core purpose of the Second Amendment. By contrast, no-value guns deserve the lowest protection in the gun-sales context.

The slightly more complex question arises with low-value guns. Regulations of the sales of low-value guns would likely be constitutionally permissible (subject to intermediate scrutiny),[282] because limiting the acquisition of such guns by regulating sales does not impinge on the use of a gun for self-defense. This is true because a limitation on the acquisition of low-value guns says nothing of the acquisition of high-value guns. More concretely, if a court upheld limits on the sales of low-value assault weapons, as many courts have,[283] an individual still has ample means of acquiring (through purchase) high-value guns whose sales are to be protected under this framework. Moreover, a court is still free to invalidate a regulation on the sale of low-value guns if it fails to satisfy intermediate scrutiny.[284] Consider that if the possession of certain low-value guns can be banned, then logically the sales of those same guns can also be regulated—or even eliminated, if legislators so desire.

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[282] See Part II.F.

[283] See Part II.E.3.

[284] See Part II.F (contending that low-value gun regulations must meet intermediate scrutiny).

The implication of this approach is that individuals have greater constitutional protection to sell certain guns, but not others. This protection does not flow from an independent constitutional right to sell a firearm but from the core right to acquire, use, and possess firearms for self-defense. The Teixeiras of the world that want to sell guns may therefore need to confine their sales to only high-value guns if legislators choose to regulate low- or no-value guns. Alternatively, would-be gun sellers can challenge the constitutionality of their respective states' gun regulations on those guns and argue that the applicable standard of review for each type of firearm is not satisfied. Just as a bookstore complies with different laws for novels and pornography, so too can gun stores adjust their sales practices depending on the value of the gun at issue.

IV. BOLSTERING THE CASE FOR ANALOGIZING THE FIRST AMENDMENT TO THE SECOND AMENDMENT

Understanding that this Comment's proposal may give some readers pause, this Part aims to dispel four plausible counterarguments to the proposal's adoption. First, this Part addresses how some of the shortcomings of the First Amendment doctrine are mitigated by its use in the Second Amendment context. Next, it addresses any concerns that gun sales are not constitutionally analogous with the sale of speech. This Part also argues that potentially paradoxical results stemming from this framework are tolerable. Finally, it addresses the argument that the value of guns should be assessed along a continuum as opposed to the value categories proposed in this Comment.

A. The First Amendment Framework Is More Effective in the Second Amendment Context

Critics may assert that the high/low/no-value categorization of speech in the First Amendment context is itself riddled with complications. One scholar argues that the division between high-, low-, and no-value speech assumes that "for purposes of 'freedom of speech' values, 'speech' resides in an object, such as a printed page, a frame of film, or a series of sounds, rather than in the derivation of meaning from the object by the audience or in

the intended meaning of the speaker."[285] The author then proceeds to explain why that assumption is "erroneous" in the First Amendment context.[286] But even assuming its truth for argument's sake, the Second Amendment framework suffers no such problem. The assumption that the "value" of a gun resides in an object—the gun itself—is precisely the point of this Comment's proposal. There is no need or use for looking elsewhere; a judge simply looks at the physical characteristics and capacities of the gun being regulated to satisfy the inquiry.[287]

Another common criticism of the First Amendment's free speech doctrine is how subjective the analysis can be.[288] Reasonable minds can and do disagree about the prudence of relegating obscene, hardcore pornography to the no-value category. If one asks different scholars why some speech is obscene and why other speech is not, you will often get different answers.[289] And simply "know[ing] it when [you] see it"[290] can be deeply unsatisfying. By contrast, relegating certain guns to the no-value category is based on clear, principled Self-Defense Factors. Most people would not sincerely argue that a rocket launcher is effective for self-defense.

B. Gun Sales, Like the Sale of Certain Speech, Are Expressive for the Purposes of the Second Amendment

Part III.F's discussion of the sale of guns relies at least implicitly on the assumption that the sale of guns shares the same relevant features as the sale of certain speech, such as pornography.[291] One potential limitation is that the sale of pornography is, arguably, the conveyance of constitutionally protected speech. In other words, the sale is expressive for purposes of the First Amendment because, for some, pornography has artistic or social

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[285] Alexander, 83 Nw U L Rev at 547 (cited in note 98).

[286] Id.

[287] See notes 149–53 and accompanying text (discussing the Self-Defense Factors).

[288] See, for example, Lakier, 128 Harv L Rev at 2204 (cited in note 86) (noting the problem in *Chaplinsky* that "in linking the constitutional status of different kinds of speech to a judgment of their 'social value' or lack thereof, the opinion existed in considerable tension with what was then emerging as a central principle of the modern jurisprudence—namely, the principle of content neutrality").

[289] See, for example, note 115.

[290] See *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart concurring). See also note 153.

[291] See notes 137–39 and accompanying text.

value,[292] whereas the sale of guns is not expressive. Some may consequently conclude that equating gun sales to sales of certain forms of speech is inapposite because in the speech context, sales are more important than in the gun context. The following discussion challenges the underlying assumption that there is no "expressive" element inherent in selling a gun.

For example, the plaintiffs in the *Teixeira* cases tried to advance a comparable argument when they said that the logic supporting protection for speech applies to selling firearms: "[G]un stores are in the same position as bookstores, print shops, and newspapers."[293] The court rejected this argument. Unlike gun store owners, who are not exercising their Second Amendment rights when they sell guns, bookstore owners (or the like) are exercising their First Amendment rights when they sell books.[294] The First Amendment's protection of speech entails both speakers *and* listeners.[295] In other words, protecting merely one's right to speak, "without more . . . would assuredly not satisfy the First Amendment."[296] Thus, "[s]elling, publishing, and distributing books and other written materials is [ ] *itself* expressive activity," giving bookstore owners "freestanding rights" under the First Amendment.[297] The same principles, the argument goes, do not naturally apply to the Second Amendment and gun store owners.

This Comment challenges that line of argument and therefore preserves the integrity of the analogy to the First Amendment by suggesting that selling a gun *is* expressive for the Second Amendment's purposes. When a speaker speaks without an audience, arguably he has not "expressed" himself in the way intended by the First Amendment. The relevant "expressive" element is aimed at preserving the spread of truth and discourse, something impossible without speakers *and* listeners. Similarly, in the Second Amendment context, the "expressive" nature of the Amendment aims at preserving the right to bear arms for self-defense, something impossible without guns owners who can procure guns from gun sellers. A gun seller then is at least indirectly expressing

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[292] See *United States v Williams*, 553 US 285, 288 (2008). Notwithstanding this premise, courts are still willing to say certain obscene, pornographic content lacks any social value.

[293] *Teixeira III*, 873 F3d at 688.

[294] See id at 688–90.

[295] See id at 688–89.

[296] Id at 688.

[297] See *Teixeira III*, 873 F3d at 688.

her support for the Second Amendment's purpose of preserving individual self-defense by providing buyers the opportunity to buy a firearm. On these grounds, one can justify the result in *Teixeira III* because there the expressive value of the plaintiffs' guns was low given the already-ample access to guns that buyers in the Alameda County gun market enjoy.[298] Had the plaintiff tried opening a gun store exclusively dedicated to selling handguns—the quintessential high-value gun[299]—this Comment counsels that those sales have highly expressive value under the Second Amendment and are afforded the highest constitutional protection.

C. Reconciling That One Can Possess a Gun, but Not Buy That Same Gun

A situation could arise in which a legislature bans the sale of a low-value gun but still allows the possession of that same gun. Many would quickly object: How can I own this gun if I can't buy it? The doctrinal response is that the ability to restrict gun sales is within the legislature's power. Moreover, the purportedly nonsensical consequences are irrelevant for the doctrinal analysis. This Comment argues that the Second Amendment protects the right to bear arms for the purpose of self-defense. Low-value guns are not for that purpose, so this complaint is misguided.

Even if this answer is unsatisfying, it is also worth noting that the legal system tolerates the paradox of being allowed to possess something while not being able to commercially procure that same thing in other contexts, namely with marijuana and prostitution. In the District of Columbia and Vermont, people can use and consume marijuana yet are prohibited from purchasing the same.[300] Some offer the rejoinder that, unlike marijuana, "[g]uns do not grow on trees."[301] But because 3-D printed guns are becoming a reality, people can essentially "grow" their own guns

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[298] See id at 679; note 273 and accompanying text.

[299] See Part II.E.1.

[300] See DC Code § 48-904.01(a)(1)(A)–(D). See also Chantal Da Silva, *Vermont Becomes Ninth State to Legalize Marijuana, but Getting Pot Might Be Tricky* (Newsweek, Jan 23, 2018), archived at http://perma.cc/GF6L-PEKR (discussing the passage of a comparable law in Vermont).

[301] Brief Amicus Curiae of Citizens Committee for the Right to Keep and Bear Arms in Support of Appellants Seeking Reversal, *Teixeira v County of Alameda*, No 13-17132, *3 (9th Cir filed Mar 21, 2014) (available on Westlaw at 2014 WL 1279414).

now, undermining this claim.[302] The law also allows people to engage in intimate consensual sexual conduct,[303] even though the law does not allow people to pay for that same conduct.[304]

D. A "Continuum of Value" Approach Is Inappropriate for Second Amendment Jurisprudence

Some may assert that the First Amendment employs a continuum of value approach, as opposed to a categorical approach, such that any analogue to the free speech doctrine must similarly adopt a continuum approach. This argument is inconsistent with how courts and scholars treat the First Amendment and, even if it were consistent, this Comment's proposal is well-served by employing a categorical, not a continuum-based, approach.

While at least one federal court has viewed the First Amendment framework along a continuum of value, the Supreme Court has not expressly approved of such an approach and scholars have criticized it.[305] Attempting to view guns as existing on a continuum of value, as opposed to existing in categories of value, runs the risk of subjective adjudication that this Comment seeks to avoid.[306] As in the free speech context, the "Court must instead draw a series of lines" because "judgments about the meaning" or value of a gun, "must by necessity reject any universal rule that all meaning is idiosyncratic."[307] Judges determining for themselves where along a continuum of value a gun falls (importantly without any clear legal implications of that "idiosyncratic" determination) is antithetical to the objective analysis at which this

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[302] See Susannah Cullinane and Doug Criss, *All Your Questions about 3D Guns Answered* (CNN, Aug 2, 2018), archived at http://perma.cc/EQY6-WFSR.

[303] See *Lawrence v Texas*, 539 US 558, 578–79 (2003).

[304] See Jacqueline Motyl, Comment, *Trading Sex for College Tuition: How Sugar Daddy "Dating" Sites May Be Sugar Coating Prostitution*, 117 Penn St L Rev 927, 935 (2013) (noting that prostitution is criminalized in forty-nine of the fifty states).

[305] See *United States v Hilton*, 167 F3d 61, 70 (1st Cir 1999) ("[S]exually explicit material may be seen to fall along a constitutional continuum entitling it to varying degrees of protection."). But see Karen Weiss, Note, *"But She Was Only a Child. That Is Obscene!" The Unconstitutionality of Past and Present Attempts to Ban Virtual Child Pornography and the Obscenity Alternative*, 70 Geo Wash L Rev 228, 238 (2002) ("[T]he continuum analysis causes the reader to lose sight of the critical differences among obscenity, adult pornography, and child pornography."). For a discussion of how First Amendment analysis appears to incorporate both "rule-like categorical approaches and standard-like balancing approaches," see David S. Han, *Transparency in First Amendment Doctrine*, 65 Emory L J 359, 361 (2015).

[306] See notes 151–53 and accompanying text.

[307] See Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 Hastings Communication & Enter L J 275, 287 (1998).

Comment is aimed. For these reasons, the high-value, low-value, and no-value categories should be viewed as firm, although not wholly inflexible, categorizations.

CONCLUSION

Courts tackling Second Amendment issues should draw from the First Amendment, as they often already do. Under that approach, courts confronting gun regulations should first consider what type of gun underlies the regulation at issue: Is it a high-value, low-value, or no-value gun? This determination turns on how effective a gun is for self-defense by examining the Self-Defense Factors. Under the popular two-step approach, courts can then move to the second step and apply strict scrutiny for high-value gun regulations, intermediate scrutiny for low-value gun regulations, and rational basis review for no-value gun regulations.

As the Supreme Court has yet to reverse its long record of upholding various restrictions on the freedom of speech, there is little compelling constitutional reason for treating the Second Amendment differently. The importance of clarifying Second Amendment doctrine cannot be understated: despite frequent invocation of the Second Amendment in political and even casual social discourse, there are no clearly defined limits or expectations to which legislatures must conform. By making uniform the analytical framework for Second Amendment cases, courts can better develop and define Americans' Second Amendment rights.

Importantly, this Comment is merely prescriptive in nature. It does not purport to make the normative claim that guns should be commercially restricted or prohibited from commerce or use. Quite to the contrary, the sale and possession of high-value guns deserves robust constitutional protection because those guns are essential to realizing the core right to bear arms for self-defense. Those guns that fall in the low-value and obscene categories begin to lose the *constitutional* basis for their protection—even though compelling extraconstitutional reasons may exist for such protection. This Comment only seeks to offer a framework that will help courts define the constitutional bounds of challenged gun regulations. Ultimately, the American electorate must decide whether to enact any regulations on the sale of guns in those constitutionally permissible contexts.