

# JUSTIFYING PERCEPTIONS IN FIRST AND SECOND AMENDMENT DOCTRINE

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## I

### INTRODUCTION

Public perceptions motivate policymakers. They regulate to preserve certain perceptions, such as that of a fair judiciary, and to prevent others, such as public offense. They also respond when the public perceives a danger—for example, from gun violence. But what is the role of perceptions in defending regulations challenged as violating constitutional rights? Intuition may suggest that trying to shape perceptions should have a minimal role, if any at all, in the constitutional analysis. But existing doctrines paint a more nuanced picture, sometimes categorically rejecting and other times permitting shaping perceptions as a valid reason to regulate.

Legal scholarship has explored the interplay between public perception and the law,<sup>1</sup> but has not compared the ways First and Second Amendment doctrine

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1. The literature is dense, and this footnote can only capture some notable exemplars. Amitai Aviram has observed that laws can “manipulate” risk perceptions in ways that contribute to social welfare, though he takes no normative view on that phenomenon. Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006). Adam M. Samaha offers an insightful theoretical framework for assessing “appearance justifications” for policies such as campaign finance limits and broken windows policing. See Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012). Expressive theories of law focus on how the law expresses values and attitudes—which of course can influence public perceptions. They have been used to justify, among other things, doctrine implementing the Equal Protection Clause, which according to expressive theories precludes government policies “express[ing] a divisive conception of citizens—a conception that represents their racial, ethnic, religious, or other parochial identities as more important than their common identity as citizens of the United States.” Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–34 (2000). But see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (critiquing expressive theories of law). This article discusses several specific areas where public perceptions animate policymaking. A notable area that is not covered in detail herein, but which has been addressed in other scholarship, is regulating the electoral system to avoid the perception of corruption. Nathaniel Persily, Kelli Lammie, and Stephen Ansolabehere have used empirical evidence to explore (and challenge) whether regulating the campaign finance system or requiring voter identification actually affect the public’s perception of corruption. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004); Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public*

treat perception-based justifications. This article begins to fill that gap. The comparison is increasingly relevant after the Supreme Court's landmark Second Amendment decision in *District of Columbia v. Heller*<sup>2</sup> because courts are looking to the First Amendment for guidance as they implement the right to keep and bear arms.<sup>3</sup> Thus, it makes sense to consider the two Amendments in tandem even if, as this article concludes, the comparison highlights reasons to treat them differently.

Categorical rules in First Amendment free speech doctrine block regulations intended to influence certain perceptions. To take one example, the government generally cannot regulate speech simply because it would be perceived as offensive.<sup>4</sup> Yet regulating speech to influence other perceptions is not categorically barred. Preserving certain public perceptions, like that of judicial integrity, can justify speech regulations under heightened scrutiny without the need to prove actual harm—imminent or otherwise—to a fair justice system.<sup>5</sup>

In the Second Amendment context, meanwhile, as doctrine has developed in the nine years since the Supreme Court articulated an individual right to keep and bear arms in *Heller*,<sup>6</sup> some courts have accepted preserving perceived safety from armed violence as a legitimate reason to regulate. Most prominently, the Seventh Circuit upheld a ban on assault weapons and large capacity magazines in part because the ban “reduces the perceived risk from a mass shooting, and makes the public feel safer as a result.”<sup>7</sup> The validity of that objective was questioned, including by Justices Clarence Thomas and Antonin Scalia, who dissented from the denial of certiorari in the case.<sup>8</sup> What role, if any, the perception of safety should play in Second Amendment analysis is an open issue, ripe for scholarly attention.

This article proceeds in three parts. Part II sets the stage by defining “perception,” and observing how in circumstances in which no constitutional

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*Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008) (using survey evidence to suggest that voter identification requirements would not improve the perception of electoral integrity, in contrast to arguments made by litigants, and later the Supreme Court, in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)).

2. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

3. *See id.* at 595, 635; *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 707–08 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010); *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007).

4. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

5. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

6. 554 U.S. 570.

7. *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (Easterbrook, J.), *cert. denied*, 136 S. Ct. 447 (2015); *see also Southerland v. Escapa*, 176 F. Supp. 3d 786, 792 (C.D. Ill. 2016).

8. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *see also Kolbe v. Hogan*, 813 F.3d 160, 182–83 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016); *Friedman*, 784 F.3d at 420 (Manion, J., dissenting); NRA ILA, *Gun Ban Upheld, Federal Appellate Court Uses “Feelings” To Justify It*, DAILY CALLER (May 4, 2015, 4:52 PM), <http://dailycaller.com/2015/05/04/gun-ban-upheld-federal-appellate-court-uses-feelings-to-justify-it/> [http://perma.cc/38WN-DHYJ].

right is implicated deferential standards of review are generally indifferent to whether regulations are intended to shape perceptions.

Part III turns to speech regulations, where limiting speech to shape perceptions has been declared categorically unconstitutional, but only in certain circumstances. Part III considers one theory of First Amendment doctrine—that its goal is to smoke out ideological censorship<sup>9</sup>—which may explain the seemingly inconsistent approach.

Part IV shifts to consider firearm restrictions intended to preserve the perception of safety. Second Amendment doctrine has not settled the question of when, if ever, influencing perceptions can justify arms restrictions, and courts will look to the First Amendment for doctrinal guidance. First Amendment doctrine likely would reject preserving the perception of safety as a valid regulatory objective for a speech restriction. But historical weapons regulations and distinct Second Amendment values and risks suggest that perceived safety has a more legitimate regulatory role in the firearm context. Part IV concludes by discussing some pragmatic considerations, like avoiding baseless perceptions, which may limit when and how perceived safety can justify a gun safety regulation.

## II

### PUBLIC PERCEPTIONS AND NON-RIGHTS-INFRINGING REGULATION

“Perception” is a broad term that calls for an operable definition. This part provides one before observing how in a wide array of government actions not triggering heightened judicial scrutiny, perceptions can and do animate regulation without presenting constitutional difficulties.

#### A. Defining Perception

“Perception” is used consistently in both legal and common parlance to mean “[a]n observation, awareness, or realization, usu[ally] based on physical sensation or experience; appreciation or cognition.”<sup>10</sup> Perception is ubiquitous in human experience. When a person hears controversial speech, the person may perceive the speech to be offensive.<sup>11</sup> When a person observes judicial candidates soliciting election contributions, the person may perceive corruption in the judiciary.<sup>12</sup>

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9. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

10. *Perception*, BLACK’S LAW DICTIONARY (8th ed. 2004); see also *Perception*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/140560> [<https://perma.cc/SPO8-PJAF>] (last visited Aug. 9, 2016) (defining “perception, n.” to mean “[t]he process of becoming aware or conscious of a thing or things in general; the state of being aware; consciousness; (spiritual) understanding”); *Perception*, RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1999) (defining “perception” as “the act or faculty of apprehending by means of the senses or the mind; cognition; awareness”).

11. See *infra* notes 27–30 and accompanying text (discussing case law regarding restrictions on offensive speech).

12. See *infra* notes 56–57 and accompanying text (discussing case law regarding restrictions on judicial speech).

When a person believes a stranger is carrying a firearm, the person may perceive danger.<sup>13</sup> When a person considers a regulatory regime aimed at a risk, the person may perceive the community to be safer because of the regulation.<sup>14</sup>

Perceptions have consequences, which is one reason why they factor into regulatory choices. The person perceiving a comment to be offensive may become upset or confront the speaker. The person perceiving judicial corruption may lose faith in our systems of government or not pursue a legal claim in court. The person perceiving danger because a stranger may be carrying a gun may leave the area or suppress valuable, but controversial speech that could provoke the stranger. The person perceiving a safer community because of a regulation may have more confidence that the government is doing its job and may feel greater liberty because of the regulation.

Perceptions, moreover, frequently are based on “the actor’s knowledge of the actual circumstances”<sup>15</sup> and are accurate proxies for reality. A judge accepting campaign contributions may, in fact, be more prone to partiality in a subsequent case. A perception can even be lifesaving. Psychologist Paul Slovic has observed that “[t]he ability to sense and avoid harmful environmental conditions is necessary for the survival of all living organisms.”<sup>16</sup> The suspected gun carrier may be armed and dangerous, presenting an increased risk of serious harm.

On the flip side, perceptions can be imperfect, misconstruing observations or exaggerating the extent of a risk.<sup>17</sup> In part, this can reflect incomplete information and mental shortcuts derived from personal experience, education, and cultural norms.<sup>18</sup> The judge soliciting donations may not become corrupt and the suspected gun carrier may not be ill-intentioned or irresponsible.

The inconsistent correlation between perceptions and reality has led some commentators to prefer a more scientific approach to regulation than one responding to perceptions.<sup>19</sup> But the Constitution does not always mandate that approach and perceptions often inform policymaking.

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13. See *infra* notes 162, 163, and 189 and accompanying text (discussing survey results about perceived safety and public carry).

14. See *infra* note 23 and accompanying text (discussing example of regulatory regimes intended, at least in part, to make public feel safer).

15. BLACK’S, *supra* note 10.

16. PAUL SLOVIC, *THE PERCEPTION OF RISK* 220 (2000).

17. See BLACK’S, *supra* note 10 (noting that perceptions can be based on an actor’s “erroneous but reasonable belief in the existence of nonexistent circumstances”).

18. One mental shortcut that is frequently discussed in the literature on risk perceptions is the “availability heuristic”: “people think a risk is more serious if an example can be readily brought to mind.” Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1124 (2002) (reviewing SLOVIC, *supra* note 16); see also *id.* at 1125–28 (discussing the availability heuristic as part of the review). This mental shortcut may explain why infrequent, highly salient events, like school shootings, play such a large role in public risk perceptions. For one discussion of how cultural norms may affect risk perceptions, see Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003).

19. See, e.g., Sunstein, *supra* note 18.

## B. Perception-Based Regulations Not In Tension With Constitutional Rights

Responding to “common concerns and preserving the general tranquility” is a central goal of our system of democratic government,<sup>20</sup> which necessarily requires government officials to be attentive to how the public perceives the world. Constitutional jurisprudence, thus, does not prevent most policies based on (or seeking to preserve or shape) perceptions. Absent circumstances that trigger “more searching judicial inquiry,”<sup>21</sup> most laws aimed at that objective must only pass the rational basis test. So long as the government can show that legislation is rationally related to a legitimate government interest, the law surpasses the basic constitutional threshold. That, of course, is a low bar.<sup>22</sup>

Frequently, there is nothing “illegitimate” or “irrational” about regulating to shape perceptions. Many examples exist of non-rights infringing policies intended, at least in part, to change or preserve public perceptions, and that objective does not undermine their constitutionality.<sup>23</sup>

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20. THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]f it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, it must . . . be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart.”).

21. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). According to *Carolene Products*, three categories of policies call for “more searching judicial inquiry”: those (1) “within a specific prohibition of the Constitution, such as those of the first ten amendments,” (2) that “restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or (3) that are “directed at . . . discrete and insular minorities.” *Id.*

22. The Supreme Court has described rational basis review as “a paradigm of judicial restraint . . . . [A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–315 (1993).

23. The regulation of hazardous waste through the Superfund statute provides one oft-cited example. *See* Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)). Extensive commentary addresses how the law and related regulations were in part a response to public perceptions. *See, e.g.*, DIV. OF ENVTL. HEALTH ASSESSMENT, N.Y. STATE DEP’T OF HEALTH, LOVE CANAL FOLLOW-UP HEALTH STUDY 15 (2008) (“It was difficult to conclude from the results of these efforts, however, whether exposure to chemical wastes dumped at Love Canal was associated with any adverse health effects.”); LOIS MARIE GIBBS, LOVE CANAL: THE STORY CONTINUES . . . 51 (1998) (describing studies showing no health effects from hazardous waste in Love Canal, New York as “a bunch of baloney”); AARON WILDAVSKY, BUT IS IT TRUE? (1995); Gina Bari Kolata, *Love Canal: False Alarm Caused by Botched Study*, 208 SCIENCE 1239 (1980); *see also* EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS 96-97 (1987) (noting that the Environmental Protection Agency’s “priorities appear more closely aligned with public opinion than with estimated risks,” with the top public concern being chemical waste disposal). That fact, however, does not affect the policies’ constitutionality under deferential standards of review. For example, courts have rejected challenges to the retroactive imposition of costs and the classification of chemicals as “hazardous” under the Superfund regime in conclusory fashion, simply noting that such government action is not irrational, arbitrary, or capricious. *See, e.g.*, *Hüls Am. Inc. v. Browner*, 83 F.3d 445, 453 (D.C. Cir. 1996) (holding that the Environmental Protection Agency must show only that there “might” be “a significant health hazard for the surrounding community . . . no matter how remote the possibility” in order to classify a substance as “extremely hazardous” in a way that is not “arbitrary and capricious”); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733–34 (8th Cir. 1986) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)) (rejecting a challenge to retroactive imposition of costs noting that “judgments about the wisdom of such legislation remain within the exclusive province

The role of public perceptions in animating or justifying a policy achieves more doctrinal significance, however, when the law or regulation is in tension with constitutional rights, such as the rights to free speech and to keep and bear arms. The following discussion considers those circumstances.

### III

#### PUBLIC PERCEPTIONS AND FIRST AMENDMENT SPEECH DOCTRINE

Intuitively and in practice, a law justified by its effect on public perceptions is scrutinized much more closely when a constitutional right is implicated. The judiciary plays a gatekeeping role in that situation through judge-made doctrines designed to weed out unconstitutional infringements.<sup>24</sup> First Amendment free speech doctrine applies a “mix of balancing and categorical tests” to determine the scope of protected conduct and whether regulating protected conduct is constitutionally permitted.<sup>25</sup> Significantly, categorical tests sometimes reject and other times permit shaping public perceptions as a legitimate rationale for regulating speech. Regulating speech to prevent offensiveness is generally off limits, but with longstanding exceptions, such as when the speech is classified as “fighting words” or the audience is captive. Shaping other perceptions, meanwhile, like those relating to the integrity of the judiciary or food safety, have not been categorically proscribed and have justified speech regulations under heightened scrutiny. This part explores a few ways First Amendment doctrine deals with perception-based justifications.

#### A. Offensiveness, Integrity, And Dissonant Tests For Perceptions In Speech Cases

Nowhere is First Amendment doctrine more categorically skeptical of restricting speech to influence public perceptions than when the perception at issue is offensiveness. In *FCC v. Pacifica Foundation*,<sup>26</sup> the Court stated categorically that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”<sup>27</sup> *Pacifica* considered a lawsuit against a

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of the legislative and executive branches”).

24. See 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1031 (1971) (quoting James Madison, House of Representatives Debates (June 8, 1789)) (“If [rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive [branch] . . .”).

25. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U.L. REV. 375, 379 (2009). Professor Joseph Blocher described:

Generally, balancing approaches set the individual’s interest in asserting a right against the government’s interest in regulating it, attach whatever weights are appropriate for the context, and determine which is weightier. In contrast, categoricalism prohibits this kind of weighing of interests in the individual case and asks only whether the case falls inside certain predetermined, outcome-determinative lines.

*Id.* at 381.

26. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

27. *Id.* at 745.

broadcaster for airing George Carlin’s “Filthy Words” monologue in violation of a restriction on “indecent” material.<sup>28</sup> Although the Court upheld the regulation on narrow grounds,<sup>29</sup> it declared a general rule that offensiveness is off limits as a regulatory justification. The Court explained its rule as reflecting the “central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”<sup>30</sup>

Other First Amendment cases similarly suggest that perceptions—especially those related to offensiveness—cannot justify a speech restriction. In *Boos v. Barry*,<sup>31</sup> the Supreme Court viewed with extreme skepticism the proposition that the government had a constitutionally salient interest in “shield[ing] diplomats from speech that offends their dignity.”<sup>32</sup> The Court struck down a law prohibiting signs within 500 feet of a foreign embassy that tended to bring a foreign government into “public disrepute,” refusing to make exceptions where a foreign diplomat, as opposed to any other person, was the target of insulting speech.<sup>33</sup> Although couched in a strict scrutiny analysis, the Court relied on categorical reasoning about its “longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience” and the need to provide “adequate ‘breathing space’ to the freedoms protected by the First Amendment.”<sup>34</sup>

Similarly, in *Forsyth County v. Nationalist Movement*,<sup>35</sup> the Court struck down a permitting scheme for demonstrations that granted discretion to a local official to adjust a fee depending on anticipated expenses for maintaining public order.<sup>36</sup> The Nationalist Movement desired to protest the federal holiday honoring Martin Luther King, Jr. and sued Forsyth County after being charged a \$100 fee.<sup>37</sup> Ruling in favor of the Nationalist Movement, the Court noted that the mere fact that speech “might offend a hostile mob” could not save the content-based restriction.<sup>38</sup>

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28. *Id.* at 729–30.

29. *See infra* note 48 and accompanying text.

30. *Pacifica*, 438 U.S. at 745–46.

31. *Boos v. Barry*, 485 U.S. 312 (1988).

32. *Id.* at 320.

33. *Id.* at 322.

34. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988)). *Falwell*, and later *Snyder v. Phelps*, 562 U.S. 443 (2011), shielded defendants from tort liability for intentional infliction of emotional distress. In both cases, it was alleged that the defendants’ non-violent but highly offensive expressive conduct caused emotional anguish, but the Court protected the conduct, holding that speech generally cannot be restricted solely because it is upsetting or even hurtful. *See Snyder*, 562 U.S. at 458; *Falwell*, 485 U.S. at 55–56 (quoting *Pacifica*, 438 U.S. at 745–46).

35. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

36. *Id.* at 124–25.

37. *Id.* at 127.

38. *Id.* at 134–35; *see also id.* at 142 (Rehnquist, C.J., dissenting) (characterizing majority opinion as rejecting a “kind of ‘heckler’s veto’”).

*Brandenburg v. Ohio*<sup>39</sup> has implications for the perception of safety and thus is important for comparing First and Second Amendment doctrine. In that case, the Supreme Court overturned the conviction of a leader in the Ku Klux Klan for advocating violence at a rally, holding that advocacy cannot be proscribed because it encourages violence “except where such advocacy is directed to inciting or producing imminent lawless activity and is likely to incite or produce such action.”<sup>40</sup> Perceived risk of harm, in other words, would be insufficient. Any other standard “sweeps within its condemnation speech which our Constitution has immunized from governmental control.”<sup>41</sup>

The cases discussed thus far exemplify situations in which First Amendment doctrine rejects perception-based justifications, but in other contexts, doctrine accepts influencing perceptions as a legitimate reason to regulate speech. *Chaplinsky v. New Hampshire*,<sup>42</sup> for example, held that a State lawfully can punish offensive speech rising to the level of “‘fighting’ words,” or “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>43</sup> Such speech falls outside the protection of the First Amendment altogether.<sup>44</sup> Other exceptions to the ordinary rule against prohibiting speech perceived as offensive include libels<sup>45</sup> and obscenity<sup>46</sup> which, along with fighting words, have long been subject to regulation.<sup>47</sup> *Pacifica* established a further distinction, when “[p]atently offensive” speech is broadcast into the home so as to confront a listener without warning.<sup>48</sup>

Although *Pacifica* involved offensive speech in “the privacy of the home,” a realm treated specially across doctrines,<sup>49</sup> the Supreme Court has also allowed perceived offensiveness to factor into First Amendment analysis outside the home. In *Hill v. Colorado*,<sup>50</sup> offensiveness gained constitutional salience in a sensitive context (protests and “sidewalk counseling” outside abortion clinics) where hearing the speech was unavoidable.<sup>51</sup> At issue was a ban on protesters or “counselors” approaching within eight feet of another person near the entrance to a medical facility.<sup>52</sup> The Court noted favorably the State’s interest in protecting

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39. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

40. *Id.* at 447.

41. *Id.* at 448.

42. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

43. *Id.*, at 571–72.

44. See Kagan, *supra* note 9, at 416.

45. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

46. *Miller v. California*, 413 U.S. 15 (1973).

47. In *Chaplinsky*, the Court noted that these restrictions “have never been thought to raise any Constitutional problem.” *Chaplinsky*, 315 U.S. at 572.

48. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

49. See Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1304–10 (2009) (describing “the home’s constitutional preeminence”).

50. *Hill v. Colorado*, 530 U.S. 703 (2000).

51. *Id.* at 708.

52. *Id.* at 707. Specifically, the ban applied within 100 feet of the entrance and was motivated by protesters at abortion clinics. *Id.*; see also *id.* at 715 (“[T]he legislative history makes it clear that [the



patients from “the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its context) by physically approaching an individual at close range.”<sup>53</sup> The Court observed that “the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.”<sup>54</sup>

*Pacifica* and *Hill* represent exceptions to the categorical rule that applies when offensiveness is invoked to justify speech restrictions. Perceptions other than offensiveness, however, face no categorical restriction. In *Williams-Yulee v. Florida Bar*,<sup>55</sup> the Supreme Court considered the government’s interest in preserving the “public perception of judicial integrity” in the context of a Florida bar association rule prohibiting judges from personally soliciting campaign funds.<sup>56</sup> Even though “[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition [or] lend itself to proof by documentary record,” the Court concluded that it was a “genuine and compelling” interest and rejected the challenge after applying heightened scrutiny.<sup>57</sup>

*United States v. Alvarez*<sup>58</sup> similarly considered the perception of integrity, this time of military awards. At issue was whether the Stolen Valor Act, which proscribed falsely claiming receipt of a military decoration, violated the First Amendment.<sup>59</sup> The government defended the law as a means of preserving the “public’s general perception of military awards,”<sup>60</sup> which a plurality deemed “beyond question” and “compelling.”<sup>61</sup> The Court ultimately declared the content-based regulation unconstitutional, however, because the government failed to present evidence that the Act actually furthered its legitimate interest.<sup>62</sup> The opinion repeated many principles regarding protecting unpopular viewpoints,<sup>63</sup> raising the specter that the Court suspected that the true purpose of

law’s] enactment was primarily motivated by activities in the vicinity of abortion clinics.”).

53. *Id.* at 718 n.25.

54. *Id.* at 716. This exception to the normal rule also was applied in *Ward v. Rock Against Racism*, in which the Court accepted the government’s interest “to retain the character of the Sheep Meadow [in Central Park] and its more sedate activities” as “significant” and content-neutral, upholding regulations on sound amplification at a nearby bandshell. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 796 (1989).

55. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

56. *Id.* at 1662, 1666. Chief Justice Roberts, writing for a four-judge plurality, applied strict scrutiny to the restriction. *Id.* at 1665 (plurality opinion). Justices Breyer and Ginsburg would have applied a less exacting scrutiny. *Id.* at 1673 (Ginsburg, J., concurring in part and concurring in the judgment).

57. *Id.* at 1667 (plurality opinion); *see also id.* at 1683 (Kennedy, J., dissenting) (“States have a compelling interest in seeking to ensure the appearance . . . of an impartial judiciary . . .”); *id.* at 1685 (Alito, J., dissenting) (“Florida has a compelling interest in making sure that . . . its citizens have no good reason to lack confidence that its courts are performing their proper role.”). Justice Scalia, joined by Justice Thomas, “accept[ed] for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial.” *Id.* at 1677 (Scalia, J., dissenting).

58. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

59. *Id.*

60. *Id.* at 2549 (plurality opinion).

61. *Id.*

62. *Id.*

63. *See, e.g., id.* at 2543 (“[A]s a general matter, the First Amendment means that government has

the law was discrimination against an unpopular message such as one in opposition to the military, not preserving an important perception.<sup>64</sup>

In another context, cases applying the “secondary effects” doctrine, courts have treated as content-neutral and upheld speech regulations because of the noncommunicative impact of expressive conduct—like decreasing property value<sup>65</sup>—that seems to turn on public perceptions. The doctrine is most frequently associated with the adult entertainment industry, where the Supreme Court has recognized that “preserving the character of [a city’s] neighborhoods” can justify zoning ordinances barring adult-oriented businesses.<sup>66</sup>

To take a final example with close parallels to secondary effects cases, in *American Meat Institute v. U.S. Department of Agriculture*,<sup>67</sup> an en banc panel of the D.C. Circuit embraced preserving the perception of food safety, framed as “individual health concerns,” as a “substantial” interest justifying a law requiring meat distributors to provide country-of-origin labeling (COOL).<sup>68</sup> Again, the perception-based interest was not barred by a categorical rule. Instead, the Court evaluated whether the government’s interest was “substantial” under the balancing test usually reserved for commercial speech restrictions.<sup>69</sup> The Court held that several aspects of the government’s interest combined to make it “substantial.”<sup>70</sup> One aspect was “the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak.”<sup>71</sup> That interest turns primarily on public risk perceptions and their consequences.<sup>72</sup> Despite the fact that the United States Department of Agriculture expressly did not view COOL as providing safety benefits—imported foods and domestic foods alike must meet the same safety standards<sup>73</sup>—the Court nonetheless credited the

no power to restrict expression because of its message, its ideas, its subject matter, or its content.”) (alteration in original) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)).

64. The Court has been protective of anti-military viewpoints in the past—speech banned by the Stolen Valor Act could have fallen into the same category. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O’Brien*, 391 U.S. 367 (1968) (burning draft cards).

65. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

66. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). The secondary effects doctrine is highly controversial and the recent Supreme Court ruling in *Reed v. Town of Gilbert* has called its legitimacy into question. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Nonetheless, courts have continued to apply the doctrine, at least in the context of regulations on adult entertainment businesses. *See, e.g., BBL Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (finding that *Reed* did not “upend[]” established doctrine for regulation of businesses offering sexually explicit entertainment).

67. *Am. Meat Inst. v. U.S. Dep’t. of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

68. *Id.* at 23.

69. *Id.* (applying “substantiality” standard from *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

70. *Id.*

71. *Id.*

72. *See id.* at 24 (noting that legislators thought consumers wanted to “choose American meat on the basis of a belief that it would in truth be better”).

73. *See, e.g., Mandatory Country of Origin Labeling*, 74 Fed. Reg. 2658, 2679 (Jan. 15, 2009) (to be codified at 7 C.F.R. pt. 60) (“[T]he COOL program is neither a food safety or traceability program, but rather a consumer information program. Food products, both imported and domestic, must meet the food safety standards of the FDA and FSIS.”); *see also Mandatory Country of Origin Labeling*, 78 Fed.

“decision to empower consumers to take possible country-specific differences in safety practices into account” and upheld the law.<sup>74</sup>

The treatment of perceptions by speech doctrine ranges from rejection to embracement, varying by context and the precise perception at issue. Categorical rules preclude regulating to shape some perceptions, but not others. The next subpart discusses one theory of First Amendment doctrine that may explain the discrepancies.

## B. Explaining The Varied Treatment Of Perceptions In First Amendment Cases

How can the varying approaches to perception-based justifications in free speech cases be explained? The words of the First Amendment (“Congress shall make no law . . . abridging the freedom of speech”<sup>75</sup>) do not provide any explanation of what the “freedom of speech” entails or a prescription for the tests and categories that judges invoke to implement it. It does not, for example, say that regulating to prevent offense is categorically off limits or that other “content-based” restrictions are constitutional if they are “narrowly tailored” to advance a “compelling” government interest. Nor does it say that certain disfavored content-based categories of speech, like fighting words, are subject to less (or no) First Amendment protection.<sup>76</sup>

Scholars and judges have spilled buckets of ink explaining the normative underpinnings of the “freedom of speech” and relating those underpinnings to judicial doctrine, resulting in various theories.<sup>77</sup> This subpart considers perception-based justifications against the backdrop of one such theory, articulated most famously by then-professor Elena Kagan. Kagan theorized that speech doctrine is oriented toward smoking out government motives that run counter to a crucial First Amendment principle: it is impermissible to suppress speech based on animus toward a particular viewpoint or idea.<sup>78</sup> This theory has appeal for many reasons, not least because, as Kagan has shown, it does a good

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Reg. 31,367, 31,372 (May 24, 2013) (stating “COOL is not food safety related”).

74. *Am. Meat Inst.*, 760 F.3d at 25. Later, after the United States government conceded to the World Trade Organization that “human health and safety are not part of the objectives pursued by the COOL measure,” the World Trade Organization authorized \$1 billion in retaliatory tariffs. Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ VII.581 WTO Doc. WT/DS384/R (adopted Nov. 18, 2011). Congress subsequently abandoned much of the COOL regime. See Associated Press, *Meat Labeling Law Repeal Leaves Buyers in Dark About Product Origins*, NBC NEWS (Jan. 4, 2016, 10:04 AM), <http://www.nbcnews.com/business/consumer/meat-labeling-law-repeal-leaves-buyers-dark-about-product-origins-n489771> [<https://perma.cc/8URG-JUR2>].

75. U.S. CONST. amend. I.

76. See Kagan, *supra* note 9, at 472–73.

77. See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001) (describing some theories).

78. Kagan, *supra* note 9; see also FALLON, *supra* note 77, at 94 (“[V]irtually all of the leading theories [for the free speech clause] would hold it impermissible, albeit for different reasons, for the government to attempt to stifle communication based on its hostility to particular ideas.”).

job explaining both doctrine and outcomes.<sup>79</sup> Moreover, this analysis demonstrates an important point as we shift to the Second Amendment: Freedom of speech doctrine is understood as implementing speech-specific principles and thus may not translate to the very different context of the right to keep and bear arms.

Understood through a motive-hunting lens, the varied treatment of perceptions in First Amendment cases can come into focus. Regulation to prevent offensiveness automatically raises a red flag since a person's perception that speech is offensive treads perilously close to forbidden animus toward unpopular viewpoints. It thus calls for a categorical rule, and only narrowly drawn exceptions can pass muster. One such narrowly drawn exception that the judiciary has accepted is when an audience is relatively captive—exhibited in *Pacifica* and *Hill*. In that limited circumstance, the government is given the benefit of the doubt that it is acting to protect the interests of the captive listeners, not to censor unpopular viewpoints. Restricting advocacy of violence similarly raises a red flag. Incitement doctrine, which requires actual harm to be imminent (not just perceived), reflects another safeguard against “motives based on ideology.”<sup>80</sup>

In contrast, other speech restrictions seeking to shape perceptions may pose less risk of belying ideological censorship and therefore do not require a categorical rule. In *Williams-Yulee*, preserving the perception of judicial integrity through a restriction on personal campaign solicitations by judges did not present a significant risk of viewpoint discrimination.<sup>81</sup> The Supreme Court did not apply a categorical prohibition on that perception-based objective and the government was able to defend the law under means–end scrutiny without showing any actual connection between the campaign solicitations and corruption.

Similarly, in *American Meat Institute*, preserving the perception of food safety and thereby preventing market disruptions by requiring the inclusion of factual information about country of origin did not, under a motive-hunting explanation, belie governmental animus toward any viewpoint. In light of experience with market consequences when perceptions of food safety drop, the asserted

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79. Kagan, *supra* note 9. Of course, no theory can synthesize all case law or capture all of the Amendment's normative underpinnings. Another conception of First Amendment doctrine is speaker-based, and “understands the primary value of the First Amendment to reside in its conferral of expressive opportunities on would-be communicators” to enhance “autonomy” and other desirable qualities. *Id.* at 424. Another is audience-based and sees the primary value of the First Amendment to reside in enabling the public audience “to arrive at truth and make wise decisions, especially about matters of public import.” *Id.* Also, it is worth noting that Kagan is not the only scholar to suggest that motive hunting is the goal of First Amendment scrutiny. Professor Jed Rubenfeld, for example, has defended a principle for why First Amendment doctrine often is, and in his view should be, focused on rooting out illegitimate governmental purposes: because that is the best way “to honor a simple principle” underlying the First Amendment, that individuals have a “right to their opinion.” Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 818 (2001).

80. Kagan, *supra* note 9, at 433, 436–37.

81. *Cf. id.* at 444 (“[T]he Court would treat differently a law prohibiting the use of billboards for all political advertisements and a law prohibiting the use of billboards for political advertisements supporting Democrats.”).

perception-based interest was accepted as a legitimate justification for country-of-origin labeling.<sup>82</sup>

In *Alvarez*, the Supreme Court struck down the Stolen Valor Act, though not by way of a categorical rule preventing the government from regulating to preserve “the public’s general perception of military awards.”<sup>83</sup> Indeed, the Court deemed that interest “compelling.”<sup>84</sup> But criminalizing false statements about receipt of military awards, the thrust of the law, was not “actually necessary” to achieve that interest—counter-speech, for example, could suffice.<sup>85</sup> Under a motive-hunting explanation, the outcome in *Alvarez* suggests that strict scrutiny was sufficient to smoke out the government’s viewpoint-based motive, perhaps to suppress anti-military sentiment.<sup>86</sup>

Theories of First Amendment doctrine—like the motive-based theory—rely on speech-centric underpinnings such as that the government “must remain neutral in the marketplace of ideas” to explain judicial doctrine.<sup>87</sup> The next part considers whether the same doctrinal tests are necessary to implement the Second Amendment and its distinct values.

#### IV

##### PUBLIC PERCEPTIONS AND SECOND AMENDMENT DOCTRINE

Before the Supreme Court recognized an individual Second Amendment right to keep and bear arms in *District of Columbia v. Heller*,<sup>88</sup> regulating firearms to preserve the perception of safety would present few, if any, difficulties under the federal constitution. Similar to regulating other risks, like hazardous waste, that objective would raise more questions of policy than of federal constitutional law. But in *Heller*, the Supreme Court clarified that the judiciary must scrutinize gun regulations more closely than it would other risk-reducing measures. The Court established one categorical rule—the government cannot ban the possession of handguns in the home<sup>89</sup>—but largely left the creation of judicial doctrine on other issues to the lower courts.

This part shows how evolving Second Amendment doctrine leaves the door open to regulating to preserve the perception of safety. Unlike the speech context, which likely would categorically reject that objective, historical arms restrictions and the distinct values and risks associated with the Second

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82. Cases involving the secondary effects doctrine can be similarly explained. Motive analysis, “although not answering all questions” about the doctrine, “provides the most coherent general account of prevailing doctrine.” *Id.* at 472. Secondary effects doctrine can be understood as “emerg[ing] from the view that it is relatively easy in cases involving secondary effects to isolate the role played by hostility, sympathy, or self-interest.” *Id.* at 490.

83. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).

84. *Id.*

85. *Id.*

86. *See supra* note 64 and accompanying text.

87. *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

88. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

89. *Id.*

Amendment do not require the same approach. Nevertheless, relying on perceived safety raises practical difficulties associated with a hard-to-prove and subjective interest that will limit its applicability in many circumstances. This part concludes by considering a few such difficulties.

#### A. Second Amendment Doctrine After *District of Columbia v. Heller*

Unlike First Amendment doctrine, Second Amendment doctrine has not benefited from decades of Supreme Court case law. Two years after *Heller*, in *McDonald v. City of Chicago*,<sup>90</sup> the Supreme Court “incorporated” *Heller*’s holding to apply against state and local governments.<sup>91</sup> Then, in 2016, the Supreme Court issued a two-page per curiam opinion rejecting the Massachusetts Supreme Court’s conclusion that stun guns are unprotected by the Second Amendment because they were not in common use in 1789, reasoning plainly rejected in *Heller*.<sup>92</sup> Those three cases represent the entire universe of Supreme Court precedent since the Court articulated the individual right to keep and bear arms.

*Heller* provided limited doctrinal cues to guide lower courts in subsequent cases involving regulations less stringent than handgun bans. At first glance, Justice Antonin Scalia’s majority opinion seems to call for an originalist analysis. The Court set out to reconstruct how the language of the Second Amendment would be understood by “ordinary citizens in the founding generation,”<sup>93</sup> purporting to reject an “interest-balancing” approach.<sup>94</sup> Based on that reconstruction, the majority concluded that self-defense is the “core” and “central component” of the right, but the right is not unlimited.<sup>95</sup> Among other things, “longstanding” firearm restrictions, like “prohibitions on the possession of firearms by felons and the mentally ill,” are “presumptively lawful.”<sup>96</sup> The majority provided a non-exhaustive list of other presumptively lawful regulations, including “prohibitions on carrying concealed weapons,” “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.”<sup>97</sup> The history-focused approach in *Heller*, including cautionary language regarding “longstanding regulatory measures,” was

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90. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

91. *Id.* at 791 (incorporating *Heller*).

92. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

93. *Heller*, 554 U.S. at 576–77. Public meaning originalism posits a static interpretation of the constitution based on “the original meaning of the text, not what the original draftsmen intended.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Guttmann ed., 1997).

94. *Heller*, 554 U.S. at 634–35.

95. *Id.* at 599, 630 (emphasis omitted).

96. *Id.* at 626–27 & n.26.

97. *Id.*

repeated by the plurality in *McDonald*,<sup>98</sup> and seemed to establish certain categorical exceptions to Second Amendment coverage.

Yet, *Heller* also left the door open to interest balancing, such as intermediate or strict scrutiny, by concluding that the District of Columbia handgun ban would fail “any of the standards of scrutiny that we have applied to enumerated constitutional rights.”<sup>99</sup> Similarly, in several places the *Heller* majority invoked the Supreme Court’s First Amendment jurisprudence,<sup>100</sup> which contemplates both categorical rules and balancing tests.<sup>101</sup>

In light of the dearth of precedent and the fact that *Heller* and subsequent Supreme Court cases have left “the Nation without clear standards” for implementing the Second Amendment right,<sup>102</sup> lower courts have developed their own doctrine.<sup>103</sup> After *Heller*, “historical meaning enjoys a privileged interpretive role” in the Second Amendment analysis,<sup>104</sup> but originalism has not been the primary means of deciding cases. Rather, lower courts have coalesced around a two-step test that involves both historical analysis and interest balancing:

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. 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.<sup>105</sup>

Consistent with the high court’s statements about “presumptively lawful” regulations, at step one lower courts often find that “longstanding” regulations do not raise any Second Amendment problems.<sup>106</sup> Otherwise, step two, “some

98. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

99. *Heller*, 554 U.S. at 628–29.

100. *See, e.g., id.* at 635 (“Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew.”); *id.* at 595 (“Of course the right was not unlimited, just as the First Amendment’s right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose.*”) (citing *United States v. Williams*, 553 U.S. 285 (2008)).

101. *See supra* note 25 and accompanying text.

102. *Heller*, 554 U.S. at 718 (Breyer, J., dissenting); *see also id.* at 719 (“I find it difficult to understand the reasoning that seems to underlie certain conclusions that [the majority] reaches.”); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 *YALE L.J.* 852, 858 (2013) (noting that the *Heller* majority “refuse[d] to explain how such a history-centered test may operate in litigation”).

103. *But see Heller II*, 670 F.3d 1244, 1271–74 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“In my view, *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.”).

104. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

105. *See United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (footnote omitted) (citation omitted).

106. *See, e.g., Heller II*, 670 F.3d at 1253 (“[A] regulation that is ‘longstanding,’ which necessarily means it has long been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment.”); *Marzarella*, 614 F.3d at 91 (“[L]ongstanding limitations are exceptions to the right to bear arms.”); *see also Blocher, supra* note 25, at 413 (“*Heller* categorically excludes certain types of ‘people’ and ‘Arms’ from Second Amendment coverage, denying them any constitutional protection whatsoever.”).

form of means-end scrutiny,<sup>107</sup> tends to be outcome determinative. Typically, the scrutiny applied is “intermediate,” which requires that a policy be “substantially related” to the achievement of an “important governmental objective.”<sup>108</sup>

Most important for the purposes of this article, the analysis as it stands now does not clearly preclude regulating to preserve the perception of safety. Indeed, the inquiry leaves the door open for the government to assert a range of regulatory interests to defend gun laws, one of which may be preserving perceived safety. The next subpart discusses when this interest would arise in practice, before exploring questions about its legitimacy.

## B. Regulatory Interests And The Second Amendment

Under doctrine applied by the majority of lower courts, the government’s interest in firearm regulation is a factor to be considered as one component of means–end scrutiny. Justice Breyer, in his *Heller* dissent, predicted that “almost every gun-control regulation will seek to advance . . . a ‘primary concern of every government—a concern for the safety and indeed the lives of its citizens.’”<sup>109</sup> That was the interest set forth by the government in *Heller*<sup>110</sup> and, true to form, has been the interest relied upon in almost all Second Amendment cases thereafter.<sup>111</sup>

107. *Marzzarella*, 614 F.3d at 89.

108. *Intermediate Scrutiny*, BLACK’S LAW DICTIONARY, *supra* note 10; *see, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) (asking whether a “may issue” statute is “substantially related” to an “important” government interest).

109. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1470 (2009) (“[V]irtually every gun control law is aimed at . . . preventing violent crime, injury, and death.”).

110. *See Heller*, 554 U.S. at 689 (Breyer, J., dissenting) (noting that D.C. regulation on handguns at issue in *Heller* sought to advance “a concern for the safety and indeed the lives of [D.C.’s] citizens.”) (quoting *Salerno*, 481 U.S. at 755); Brief for Petitioners at 45–46, *District of Columbia v. Heller* 554 U.S. 570 (2008) (No. 07-290).

111. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 437 n.17 (3d Cir. 2013) (“New Jersey has asserted that the interests served by the Handgun Permit Law . . . include ‘combating handgun violence,’ ‘combating the dangers and risks associated with the misuse and accidental use of handguns,’ and ‘reduc[ing] the use of handguns in crimes.’”) (alteration in original) (quoting Brief for Appellees at 34, *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (No. 12-1150)); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“The State [Maryland] explains that, by enacting the handgun permitting scheme . . . the General Assembly endeavored to serve Maryland’s concomitant interests in protecting public safety and preventing crime . . . .”); *Kachalsky*, 701 F.3d at 97 (“As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.”); *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1, 10 (D.D.C. 2015) (“Defendants argue that the District of Columbia’s ‘good reason’/ ‘proper reason’ requirement reasonably furthers its important governmental interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public and to reduce the disproportionate use of such weapons in the commission of violent crimes.”), *vacated*, 808 F.3d 81 (D.C. Cir. 2015); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (“[San Diego] has an important and substantial interest in public safety and in reducing the rate of gun use in crime.”), *rev’d*, 742 F.3d 1144 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016); Defendants’ Opposition To Plaintiffs’ Application for a Preliminary and/or Permanent Injunction at 2, *Grace v. District of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016) (No. 15-2234) (may issue law justified by interest in “prevent[ing] crime and promot[ing] public safety”).



Public safety, moreover, is indisputably legitimate, “important,” and “compelling.”<sup>112</sup> For most gun regulations, unless they are categorically constitutional, such as “longstanding” restrictions,<sup>113</sup> or categorically barred, like handgun bans,<sup>114</sup> they are deemed constitutional under heightened scrutiny if they sufficiently further the government’s interest in preventing injuries, deaths, and crime.

But the fit between the government’s interest in public safety on the one hand, and a given regulation on the other, is often in dispute. For example, one popular regulatory scheme limits concealed carry permits to applicants who can show some special need to carry a handgun in public.<sup>115</sup> Most courts have upheld these so-called “good cause” policies either as regulating conduct falling outside the bounds of the Second Amendment,<sup>116</sup> or under heightened scrutiny on the basis that they sufficiently further the usual state interest—enhancing public safety.<sup>117</sup> But gun-rights litigants (and some judges) contest the empirical evidence showing that “good cause” regimes actually achieve that interest. A district judge in the District of Columbia concluded that the link was “not conclusive.”<sup>118</sup> “[T]here is [no] relationship, let alone a tight fit,” he wrote, “between reducing the risk to other members of the public and/or violent crime and the District of Columbia’s ‘good reason’/‘proper reason’ requirement.”<sup>119</sup> That opinion was vacated and reflects a minority view that may not prevail on appeal,<sup>120</sup> but it raises the question whether, in circumstances where experts dispute the safety benefits of a law or resource restraints hamper the government’s ability to conclusively establish those safety benefits,<sup>121</sup> any other public interests can fill the gap. As a practical matter, it is under those circumstances that perceived safety would, and has, come up.

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112. See, e.g., *Kachalsky*, 701 F.3d at 97 (“As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention.”).

113. *Heller*, 554 U.S. at 626–27.

114. *Id.* at 628–29.

115. See, e.g., N.J. STAT. ANN. § 2C:58-4 (West 2017) (requiring applicant to demonstrate a “justifiable need to carry a handgun”); N.Y. PENAL LAW § 400.00 (McKinney 2017) (requiring applicant to demonstrate “proper cause,” interpreted to mean a “special need for self-protection,” *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

116. See *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc).

117. See, e.g., *Drake v. Filko*, 724 F.3d 426, 437 n.17 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky*, 701 F.3d at 97.

118. *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1, 10 n.11 (D.D.C. 2015), *vacated*, 808 F.3d 81 (D.C. Cir. 2015).

119. *Id.* at 11.

120. *Id.* At the time of publication, cases challenging the constitutionality of the District of Columbia permitting scheme were still pending in the Court of Appeals. See *Grace v. District of Columbia*, No. 16-7067 (D.C. Cir.); *Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir.).

121. As a result of an appropriations rider, the federal government’s ability to study the effect of regulation on firearm deaths and injuries is greatly limited. See Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, PSYCHOL. SCI. AGENDA (Feb. 2013), <http://www.apa.org/science/about/psa/2013/02/gun-violence.aspx> [<https://perma.cc/6RAA-72AB>].

In *Friedman v. Highland Park*, the Seventh Circuit considered the constitutionality of a ban on assault weapons and large-capacity magazines, and the parties vigorously disputed whether the ban actually enhanced public safety.<sup>122</sup> Writing for a two-judge majority, Judge Frank Easterbrook observed that “assault weapons with large-capacity magazines can fire more shots, faster” than other guns and then concluded that they “can be more dangerous in aggregate.”<sup>123</sup> The Court also considered evidence showing that assault weapon bans “reduce the share of gun crimes involving assault weapons” and that a link exists between “the availability of assault weapons [and] gun-related homicides.”<sup>124</sup> The majority discounted counterarguments that the large market for assault weapons outside the area of the ban (Highland Park, Illinois) undercut any safety benefit.<sup>125</sup> Then the Court invoked the government’s interest in preserving perceived safety:

If it has no other effect, [the] ordinance may increase the public’s sense of safety. Mass shootings are rare, but they are highly salient, and people tend to overestimate the likelihood of salient events. If a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that’s a substantial benefit.<sup>126</sup>

*Friedman* was criticized on a number of grounds, not least of which was the perception-of-safety holding.<sup>127</sup> A dissenting judge opined that “perhaps” an interest in perceived safety would suffice, but there was “no evidentiary basis” for its connection to the regulation at issue.<sup>128</sup> When the Supreme Court denied certiorari in the case, Justice Clarence Thomas, joined by Justice Scalia, dissented and made a similar point. “If a broad ban on firearms can be upheld based on conjecture that the public might *feel* safer (while being no safer at all), then the Second Amendment guarantees nothing.”<sup>129</sup> Again, the critique was qualified by the fact that the Seventh Circuit relied on “conjecture” about whether the ban actually made people feel safer.<sup>130</sup>

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122. *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015).

123. *Id.* at 411.

124. *Id.*

125. *Id.* at 411–12.

126. *Id.* at 412 (citing Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35 (1993)); George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 275–76 (2001); *see also* Southerland v. Escapa, 176 F. Supp. 3d 786, 792 (C.D. Ill. 2016) (citing *Friedman* for proposition that government’s interest in “alleviating the public of its fear of gun violence” is “substantial”).

127. *See* sources cited *supra* note 8. The opinion was also criticized for departing from the two-step test for Second Amendment challenges. *See, e.g.*, *Kolbe v. Hogan*, 813 F.3d 160, 182–83 (4th Cir. 2016), *reh’g en banc granted*, 636 F. App’x 880 (4th Cir. 2016), and *on reh’g en banc*, 849 F.3d 114 (4th Cir. 2017). However, the discussion of perceived safety in *Friedman* is similar to what one might expect as part of intermediate scrutiny at step two of the analysis.

128. *Friedman*, 784 F.3d at 420 (Manion, J., dissenting).

129. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari).

130. *See id.*

But a threshold question suggested by a Fourth Circuit judge in a subsequent case<sup>131</sup> is whether preserving the perception of safety *ever* can justify a restriction on the right to keep and bear arms. As First Amendment doctrine shows in the context of speech restrictions, influencing some perceptions can be categorically rejected and others accepted as legitimate grounds to regulate. In other words, whether preserving perceived safety is valid in the Second Amendment context may not be as simple as asking whether the public's interest in feeling safe from armed violence is "important" for the purposes of intermediate scrutiny.<sup>132</sup>

Because courts deciding novel Second Amendment questions have looked to First Amendment doctrine for guidance,<sup>133</sup> the next subpart revisits First Amendment doctrine and how it likely would treat the public interest of preserving the perception of safety. Then, it considers significant distinctions that counsel against simply importing the First Amendment rules.

### C. Should Preserving Perceived Safety Be Treated The Same In Second Amendment Doctrine As It Would Under First Amendment Doctrine?

The Supreme Court has held that even speech advocating violence, which certainly could make people perceive themselves to be less safe, must be accompanied by imminent harm before it can be constitutionally regulated.<sup>134</sup> It is not a long stretch from that established rule to the conclusion that speech generally cannot be restricted to preserve the perception of safety.

One might argue, in light of many courts' reliance on First Amendment doctrine to implement the Second Amendment right, that the same conclusion should apply automatically when guns are the regulatory target.<sup>135</sup> Yet longstanding regulations contemplate the legitimacy of arms restrictions based on the perception of safety in ways that the First Amendment does not, and Second Amendment values (to the extent they are clear from *Heller* and *McDonald*) and risks differ from First Amendment values and risks in ways that implicate the perception of safety. Indeed, the rights are not just different, but can be in tension. These considerations counsel against rote importation of First Amendment rules in this context and suggest that preserving the perception of safety may have a more legitimate place in the Second Amendment analysis.

#### 1. Longstanding Arms Restrictions Relating to Perceived Safety

*Heller* emphasized the importance of "longstanding" regulatory measures, which are presumptively valid.<sup>136</sup> Historical analysis also may be instructive about

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131. See *Kolbe*, 813 F.3d at 182–83.

132. None of the judges considering the issue in *Friedman* disputed the importance of feeling safe from armed violence. As discussed in the next part, feeling safe from armed violence has long justified arms restrictions and can be central to enjoying other liberties, like the freedom of speech.

133. See cases cited *supra* note 3.

134. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

135. See, e.g., David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 461–64 (2014).

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

whether the government's interest in preserving perceived safety should be permitted to justify firearm regulations.<sup>137</sup> In particular, a categorical rule against regulating to protect the sense of safety would run up against historical restrictions, unique to the weapons context, intended to do just that.

From medieval England to early America the law governing the carrying of weapons in public was especially attuned to perceived safety. The English Statute of Northampton, passed in 1328 to restrict carrying weapons in public, was intended (at least in part) to prevent fear of violence.<sup>138</sup> In 1405, Henry IV instructed that public carry can be prohibited “whereby . . . any of the people [are] disturbed or put in fear.”<sup>139</sup> More than 170 years later, in 1579, Elizabeth I issued a proclamation urging enforcement of the public carry restriction because “her Majesties good qu[i]et people, desirous to live in peaceable manner, are in feare and danger of their lives.”<sup>140</sup> In 1716, William Hawkins wrote that “where a Man arms him[s]elf with dangerous and unu[s]ual Weapons, in [s]uch a Manner as will naturally cau[s]e a Terror to the People,” he commits “an Offence at the Common Law” and violates “many Statutes.”<sup>141</sup> In 1769, William Blackstone wrote that “riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land.”<sup>142</sup>

American colonies and states similarly justified carry restrictions as a means to prevent fear of armed violence. New Jersey and Massachusetts provide two examples. In 1686, New Jersey enacted *An Act Against Wearing Swords, &c.*, which prohibited “wearing Swords, Daggers, Pistols, Dirks, Stilladoes, Skeines, or any other unusual and unlawful Weapons” because, among other things, people are “put in great [f]ear.”<sup>143</sup> Similarly, a 1790s Massachusetts law gave

137. See Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 35, 36 (Stephen E. Gottlieb ed., 1993) (“History can illuminate the nature and strength of a state interest and also may suggest the degree of ‘fit’ between a challenged regulation and its objective.”).

138. Riding or Going Armed in Affray of the Peace Act 1328, 2 Edw. 3, c. 3 (Eng.), reprinted in 1 THE STATUTES OF THE REALM 258 (mandating that individuals “bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in [f]airs, [m]arkets, nor in the presence of the [j]ustices or other [m]inisters, nor in no part elsewhere, upon pain to forfeit their [a]rmour to the King, and their [b]odies to prison at the King’s pleasure”).

139. 2 CALENDAR OF CLOSE ROLLS, HENRY IV, 1402–1405 526 (A.E. Stamp ed., 1929) (issuing the proclamation on July 16, 1405, in Westminster); see also ABRAHAM FRAUNCE, THE LAWIERS LOGIKE EXEMPLIFYING THE PRAECEPTS OF LOGIKE BY THE PRACTISE OF THE COMMON LAWE 56 (1588) (citing to 2 Edw. 3, c. 3 (Eng.)) (noting that carrying weapons “not usually worne and borne . . . will strike a feare into others that be not armed”).

140. BY THE QUENNE ELIZABETH I: A PROCLAMATION AGAINST COMMON USE OF DAGGES, HANDGUNNES, HARQUEBUZES, CALLIUERS, AND COTES OF DEFENCE 1 (1579).

141. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716).

142. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*148–49 (emphasis added).

143. THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 289 (Aaron Leaming & Jacob Spicer eds., 1758).

justices of the peace the authority to arrest “such as shall ride or go armed offensively, to the fear or terror of the good citizens.”<sup>144</sup>

Under the longstanding-restriction test, similar public-carry regulations—and their baked-in fear-prevention rationale—may fall outside the protection of the Second Amendment altogether.<sup>145</sup> But they also are significant in that they show a tradition of regulating to preserve a community’s perception of safety from armed violence that is in opposition to a categorical rule barring restrictions aimed at that same objective.

## 2. Second Amendment Values

First Amendment doctrine is understood to implement distinctive, speech-specific principles such as that the government “must remain neutral in the marketplace of ideas.”<sup>146</sup> Those principles, which can explain the treatment of perceptions in free speech cases, do not underlie the right to keep and bear arms and there is no reason to assume that the First Amendment’s rules are needed to protect Second Amendment principles.

Like with the First Amendment, the words in the Second Amendment are of limited utility for identifying underlying values, especially after *Heller* instructed that the first half of the Amendment (“A well regulated Militia being necessary for the security of a free State”)<sup>147</sup> does not establish a militia-centric underpinning for the right. We must look elsewhere, and another obvious place is *Heller* itself, which held that the “inherent right of self-defense” is “central to the Second Amendment right.”<sup>148</sup>

Self-defense has to be an important consideration after *Heller*, but its helpfulness in deciding the boundaries of the Second Amendment is limited for at least two reasons. First, the government has long played a significant role in regulating both weapons and self-defense—including to preserve the perception of safety<sup>149</sup>—the extent of which reflects an important difference between the First and Second Amendment rights. The First Amendment assumes that the state should not play a role in determining the content of speech. The Second Amendment does not embody as robust an assumption with respect to weapons and self-defense. Indeed, even while private firearm possession is protected, the state continues to play a large role in setting the boundaries of what “arms” are

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144. 1795 Mass. Acts 436. For a contemporary analysis of the statute, see 1 WILLIAM CHARLES WHITE, *A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS* 116 (1809). Professor Saul Cornell provides other examples in his contribution to this symposium. See Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 *LAW & CONTEMP. PROBS.*, no. 2, 2017.

145. See sources cited *supra* note 106.

146. *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

147. U.S. CONST. amend. II.

148. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). In other places in the opinion, the Court declared “self-defense” to be the “core” and “central component” of the right. *Id.* at 599, 630 (emphasis omitted); see also *McDonald v. City of Chicago*, 561 US 742, 767 (2010).

149. See *supra* Part IV.C.1.

permissible<sup>150</sup> and what counts as lawful self-defense.<sup>151</sup> And as Professor Lawrence Rosenthal has discussed, the government's regulatory authority over the right to keep and bear arms appears on the face of the Second Amendment, in its reference to a "well *regulated* Militia."<sup>152</sup> Of course, some extreme regulations are categorically off limits under the Second Amendment,<sup>153</sup> but deciding other categorical rules based on the self-defense holding in *Heller*—such as whether the government can regulate to preserve the perception of safety—is made more difficult by the historically accepted regulatory authority that was undisturbed by enumerating the right in the Second Amendment.

Second, as Professors Joseph Blocher and Darrell A.H. Miller have recently shown, *Heller*'s emphasis on "self-defense" is indeterminate, failing to resolve the question of what precise values underlie the Second Amendment right.<sup>154</sup> Blocher and Miller identify three possible values: autonomy, democracy, and personal safety. The autonomy view "is primarily concerned with the liberty of self-reliance."<sup>155</sup> The democracy view posits that gun rights are primarily to prevent government tyranny.<sup>156</sup> The personal safety view is closest to the "marketplace of ideas" logic that animates First Amendment doctrine. It suggests that the "right to threaten violence through the keeping and bearing of arms . . . contributes to personal safety in roughly the same way that speech contributes to truth."<sup>157</sup> This perspective is epitomized by the slogan that "[t]he only thing that stops a bad guy with a gun is a good guy with a gun."<sup>158</sup>

Indeed, of these three views, the marketplace perspective would be most opposed to a government objective of preserving perceived safety. The "marketplace of violence," to provide an effective deterrent, would require that individuals perceive the threat of armed violence. Governmental meddling to shape perceptions about that threat would be off limits, just as ideological censorship is when it comes to the marketplace of ideas.

Yet, all three views of the Second Amendment, in their strongest forms, conflict not only with regulations to preserve perceived safety, but also those

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150. *Heller* held that the Second Amendment protects arms in common use "for lawful purposes." 554 U.S. at 624. Even this broad articulation permits significant governmental involvement—both to regulate arms not "in common use" (thereby preventing them from becoming "common") and to establish what "purposes" are "lawful."

151. As Professor Miller shows in this symposium, the boundaries of self-defense have always been drawn by the state. See generally Darrell A. H. Miller, *Self-Defense, Defense of Others, and The State*, 80 LAW & CONTEMP. PROBS., no.2, 2017.

152. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U.L. REV. 1187, 1230–40 (2015).

153. *Heller* established one such regulation: bans on handguns. 554 U.S. at 570.

154. Joseph Blocher & 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, 347–54 (2016).

155. *Id.* at 348.

156. *Id.* at 350.

157. *Id.* at 352.

158. *Id.* at 353 (alteration in original) (quoting Eric Lichtblau & Motoko Rich, *N.R.A. Envisions 'a Good Guy With a Gun' in Every School*, N.Y. TIMES (Dec. 21, 2012), <http://www.nytimes.com/2012/12/22/us/nra-calls-for-armed-guards-at-schools.html> [<https://perma.cc/ZF3X-4KRK>]).

directly seeking to reduce actual violence, which of course is a widely accepted rationale for arms restrictions. In other words, they each could present an obstacle to the sorts of safety regulations long accepted as valid by the courts, complicating any effort to use the self-defense rationale in *Heller* to derive a categorical rule about regulations seeking to preserve the perception of safety. A court would understandably hesitate before accepting, without additional theorizing, a presumptive link between a regulation intended to preserve perceived safety and the violation of some self-defense-related principle.<sup>159</sup>

### 3. Second Amendment Risks

The principles underlying the First and Second Amendments are different and thus call for different doctrinal rules. The risks associated with the two rights are also distinct; indeed, gun carrying and use can undermine perceived safety and chill other liberties in ways speech does not. These risks underscore both why firearms can have such an intense impact on perceived safety and why a categorical rule against regulation to preserve perceived safety is less appropriate in the Second Amendment context than speech context. Relatedly, they highlight why a court could find this interest substantial enough to justify a weapon restriction under heightened scrutiny.

One need not look far to find examples in which people carrying firearms cause others to feel unsafe and chill discourse, thereby erecting barriers in the marketplace of ideas.<sup>160</sup> In fact, this is one of the primary reasons many people oppose allowing concealed carry on college campuses. According to four national organizations of teachers, professors, colleges, and universities, “[s]tudents and faculty members will not be comfortable discussing controversial subjects if they think there might be a gun in the room.”<sup>161</sup> A recent survey at Kansas University corroborated that sentiment: ninety percent of faculty indicated that allowing concealed carry by students would make them feel less safe,<sup>162</sup> eighty percent said

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159. For this same reason, explaining Second Amendment doctrine by reference to motive analysis, like the one Kagan argued guides First Amendment speech doctrine, *see* Kagan, *supra* note 9, is almost impossible. Without knowing the precise values underlying the Second Amendment, we cannot derive an illegitimate governmental motive that doctrine should “smoke out.”

160. *See, e.g.,* Diana Reese, *Moms Demonstrate for Gun Control, Armed Men Stage Counter-Protest in Indiana*, WASH. POST: SHE THE PEOPLE (Mar. 29, 2013), <https://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/29/moms-demonstrate-for-gun-control-armed-men-stage-counter-protest-in-indiana/> [<https://perma.cc/P826-3P52>] (armed demonstrators at 2013 rally in Indianapolis organized by Moms Demand Action for Gun Sense in America); Marc Tran, *Men with Guns Swell Protest Crowds Outside Obama Meetings*, GUARDIAN (Aug. 17, 2009, 9:04 PM), <https://www.theguardian.com/world/2009/aug/18/gun-protests-obama> [<https://perma.cc/ZSL3-C3MV>] (armed protestors in Phoenix on August 16, 2009, where President Obama was speaking about healthcare reform); Igor Volsky, *Men With Loaded Rifles Intimidate Moms Gathered at Gun Safety Rally*, THINKPROGRESS (Mar. 28, 2013), <https://thinkprogress.org/men-with-loaded-rifles-intimidate-moms-gathered-at-gun-safety-rally-82fcbcd00a73#.hknneitw> [<https://perma.cc/B6YF-FPRD>] (organizer of gun safety rally “unsettled” by presence of armed counter-protesters and “would have to think twice before holding another event”).

161. Am. Ass’n of Univ. Professors et al., *Joint Statement Opposing “Campus Carry” Laws* (Nov. 12, 2015), <http://www.aaup.org/sites/default/files/CampusCarry.pdf> [<https://perma.cc/HS56-QRLA>].

162. *See* GARY BRINKER, DOCKING INST. OF PUB. AFFAIRS, KANSAS BOARD OF REGENTS COUNCIL OF FACULTY SENATE PRESIDENTS CAMPUS EMPLOYEES’ WEAPONS SURVEY 37 (2016)

it would “negatively impact [their] course and how [they] teach,” and seventy-seven percent believed it would “limit[] . . . academic freedom to teach the material and engage with the students in a way that optimizes learning.”<sup>163</sup>

Similarly, legal scholars have concluded that firearms can diminish speech protected by the First Amendment. Professor Miller observed that

the presence of a gun in public has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange. . . . Even if everyone is equally armed, everyone is deterred from free-flowing democratic deliberation if each person risks violence from a particularly sensitive fellow citizen who might take offense.<sup>164</sup>

Professor Gregory Magarian likewise opines that firearms can “undermine debate by fostering a climate of mistrust and fear.”<sup>165</sup>

Thus weapons, because of their potential to diminish others’ perceived safety, may inhibit the “marketplace of ideas” protected by the First Amendment. The right to keep and bear arms, as Justice Stevens wrote in his *McDonald* dissent, is “dissimilar from [other liberty interests] in its capacity to undermine the security of others.”<sup>166</sup> Words can be threat-neutral, but firearms cannot.<sup>167</sup> This distinction explains why *Heller* and *McDonald* blessed broad restrictions on firearms that would never apply to speech, like the complete withdrawal of Second

(“Kansas Employees’ Survey”).

163. *Id.* at 32. The general sentiment among faculty regarding concealed carry was also reflected in a letter from 40 professors to the Kansas Legislature. They wrote that allowing concealed carry “will make us and our students feel less safe,” “will compromise the open door policy many of us maintain,” and “will make students less open to working together with others whom they may not know well.” See *University Distinguished Professors Issue Statement on Weapons Policy*, K-STATE TODAY (Dec. 2, 2015), <http://www.k-state.edu/today/announcement.php?id=23727> [<https://perma.cc/LU6Z-X7TH>].

164. Miller, *supra* note 49, at 1309–10 (2009) (citing Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 704 (2007)) (“Whereas robust protection of free speech . . . serves democracy, if everyone had access to howitzers and machine guns, representative democracy would likely be harder, not easier, to achieve.”).

165. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 95 (2012). See also FIRMIN DEBRABANDER, DO GUNS MAKE US FREE? DEMOCRACY AND THE ARMED SOCIETY 98 (2015) (“A gun fundamentally severs its bearer from the community of his peers; it causes others to treat him with trepidation and fear—if they approach him at all.”); Tran, *supra* note 160 (quoting political scientist Fred Solop of Northern Arizona University as noting that the presence of guns at political rallies is “quite scary for many people” and “creates a chilling effect in the ability . . . to carry on honest communication”).

166. *McDonald v. City of Chicago*, 561 U.S. 742, 894 (2010) (Stevens, J., dissenting); see also *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (“The risk inherent in firearms . . . distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others.”).

167. Research shows that the human brain reacts to firearms the same way that it reacts to snakes, and quite differently than the brain reacts to threat-neutral objects. Elaine Fox, Laura Griggs, & Elias Mouchlianitis, *The Detection of Fear-Relevant Stimuli: Are Guns Noticed as Quickly as Snakes?*, 7 EMOTION 691 (2007). Meanwhile, so-called “weapon focus effect” is a “well-known cognitive bias” in which weapons “receive more fixations and longer fixations than do other hand-held objects.” Adam T. Biggs, James R. Brockmole, & Jessica K. Witt, *Armed and Attentive: Holding a Weapon Can Bias Attentional Priorities in Scene Viewing*, 75 ATTENTION PERCEPTION & PSYCHOPHYSICS 1715, 1716 (2013).



Amendment rights from certain categories of potentially dangerous people.<sup>168</sup> At minimum, the dynamic between “arms” and “speech”—ambivalent at best, antagonistic at worst—counsels against rote importation of doctrinal rules crafted to protect the “marketplace of ideas,” such as the First Amendment’s requirement of imminent harm before advocacy of violence can be constitutionally restricted. Further, the extremely salient risks presented by firearms enhance the strength of the government’s interest to preserve perceived safety through regulation.

Yet, even if the government is permitted to regulate firearms to preserve the perception of safety, the government would still need to show that such a regulation passes heightened scrutiny. The remainder of the article considers some practical difficulties that could arise in that analysis.

#### D. Pragmatic Considerations And The Perceived Safety Rationale

Longstanding weapon regulations aimed at preserving the perception of safety can fall outside the boundaries of Second Amendment coverage altogether.<sup>169</sup> If not longstanding, however, the regulation must pass muster under heightened scrutiny, where pragmatic difficulties could arise. This subpart discusses a few such difficulties: proving the connection between a regulation and perceived safety; distinguishing trivial from meaningful effects on perceived safety; dealing with baseless perceptions; and accounting for non-uniform perceptions.

##### 1. Proving the Connection Between a Regulation and Perceived Safety

The two dissenting opinions in *Friedman* highlighted the problem of proving the connection between a regulation and the public’s sense of safety.<sup>170</sup> Conjecture about whether a policy achieves its regulatory objective may suffice for rational basis review, but more should be required when a constitutional right is implicated. A related difficulty is distinguishing between trivial and meaningful impacts on perceived safety. Even if a survey showed that 100 percent of Highland Park, Illinois residents would feel safer if assault weapons were banned, how much safer would they feel? And how much is sufficient to restrict the Second Amendment right?

Courts often do not answer such questions with the rigor we desire, “frequently adopting an astonishingly casual approach” to evaluating government interests.<sup>171</sup> Sometimes, for example, they simply assume a law advances the government’s purported interest.<sup>172</sup> But this judicial practice does

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168. *McDonald*, 561 U.S. at 786; *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

169. See sources cited *supra* note 106.

170. See *supra* notes 128–130 and accompanying text.

171. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007); see also *id.* at 1322 (“Sometimes, . . . the Supreme Court labels interests as compelling on the basis of little or no textual inquiry.”).

172. For example, in *Crawford v. Marion County Election Board*, the Supreme Court did not address the extent of the effect of a voter identification law on safeguarding voter confidence, 553 U.S. 181 (2008),

not make it doctrinally appropriate. Litigants and courts have various tools to support the connection between a given regulation and the asserted state interest, including historical precedent, provable effects of the regulation, other empirics, or (at minimum) reasoned analysis.<sup>173</sup>

The Supreme Court has accepted, for example, history and tradition as a substitute for an empirical showing of difficult-to-measure government interests.<sup>174</sup> This approach may be particularly appealing in Second Amendment doctrine, which already emphasizes the importance of history and tradition. For example, the law has historically restricted public carry where it undermines the perception of safety,<sup>175</sup> and that legal history could inform the analysis of modern restrictions that are not deemed presumptively lawful, but aimed at that same objective.

Another approach would be to look for objectively discernible byproducts relating to perceived safety. In the challenge to country-of-origin labeling on food products, for example, the court considered economic impacts of decreased public safety perceptions.<sup>176</sup> Similarly, in the “secondary effects” cases, courts look to tangible adverse effects related to regulated speech, such as decreased property values.<sup>177</sup> This tactic appears in other areas of law, too, like tort law, which generally requires some outward showing before recovering for a subjective harm in order to “distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other.”<sup>178</sup>

Litigants in Second Amendment cases could make a similar showing. The survey of Kansas University faculty, for example, gauged the intensity of the decrease in perceived safety if campus carry were allowed by asking faculty if they would change the way they taught.<sup>179</sup> In Texas, meanwhile, at least one professor has quit because of campus carry, noting that allowing concealed carry on campus “does scare people away; it scares me away.”<sup>180</sup> A longtime dean followed suit, citing campus carry as his reason for accepting employment

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apparently deciding it was “almost self-evidently true,” *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (discussing *Crawford*).

173. See Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 313–14 (2014) (alteration in original) (footnotes omitted) (“Without such ‘footing in the realities of the subject addressed by the legislation,’ those asserted interests would be ‘impossible to credit’ as ‘legitimate public purpose[s],’ rather than ‘unsubstantiated assumptions’ or constitutionally proscribed objectives, such as sheer ‘animus.’”).

174. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567–68 (1991) (plurality opinion) (concluding that “protecting societal order and morality” is a “substantial” governmental interest on the basis of historical analysis); see also O’Connor, *supra* note 137, at 36 (finding that historical analysis in *Barnes* “indicated that Indiana’s interest [in preventing indecency] was in fact substantial and allayed fears that the state’s . . . statute might have been designed to suppress specific expressive conduct”).

175. See *supra* Part IV.C.1.

176. See *supra* notes 68–74 and accompanying text.

177. See, e.g., *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 55 (1976).

178. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997).

179. See *supra* notes 162–163 and accompanying text.

180. Tom Dart, *University of Texas Professor Quits over State’s ‘Campus Carry’ Gun Law*, GUARDIAN (Oct. 8, 2015, 5:10 PM), <https://www.theguardian.com/us-news/2015/oct/08/university-of-texas-professor-quits-campus-carry-gun-law> [<https://perma.cc/VRM3-QUR8>].

elsewhere.<sup>181</sup> Others initiated a lawsuit against the school.<sup>182</sup> Such empirical evidence and anecdotes may not perfectly mirror the extent of a change in perceived safety, but they provide a much closer approximation than mere speculation.

## 2. Baseless Perceptions

Another objection, separate from measuring the change in perceived safety, is that a shift in perceived safety may be baseless. Indeed, a major critique of public risk perceptions generally is that they may be constrained by mental shortcuts and cultural influences, sometimes conflicting with expert assessments.<sup>183</sup>

One might respond that the perception of safety is itself worth preserving, even if baseless. All things being equal, people prefer living in a community they perceive to be safe. And perceived insecurity can lead to societal harms, such as chilling political discourse.<sup>184</sup>

Yet, accommodating baseless safety perceptions would be a steep price to pay for regulating an enumerated right, not to mention setting potentially dangerous precedent.<sup>185</sup> Thus, courts understandably will be careful with this rationale. In practice, they may be more comfortable relying on perceived safety when there also is empirical evidence of safety benefits of a regulation, even if the evidence is contested. *Friedman* reflects that context—the Seventh Circuit turned to perceived safety only after discussing contested evidence of the safety benefits of an assault weapon ban.<sup>186</sup> Under those circumstances, community perceptions of safety could, in effect, break the tie about the actual safety benefits of the law. Of course, limiting the role of perceived safety in this way would exclude some situations where no empirical studies exist, a community perceives itself to be safer with a given restriction, and the feeling is not baseless. But such a tradeoff is nothing new in constitutional doctrine.<sup>187</sup>

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181. See Matthew Watkins, *UT Architecture Dean Cites Campus Carry as a Reason for Departure*, TEX. TRIB. (Feb. 25, 2016, 2:34 PM), <https://www.texastribune.org/2016/02/25/ut-architecture-dean-cites-campus-carry-reason-dep/> [<https://perma.cc/6J25-BHFV>].

182. See Complaint, *Glass v. Paxton* (W.D. Tex. July 6, 2016) (No. 16-cv-845).

183. See Kahan & Braman, *supra* note 18; Sunstein, *supra* note 18.

184. Cf. Sunstein, *supra* note 18, at 1168 (“The mere fact of fear is a social loss, in some cases a large one, and as we have seen, fear is likely to have a range of ripple effects.”).

185. Two recent examples of discriminatory policies proposed in response to baseless safety concerns are laws restricting bathroom access based on biological gender and a proposal to ban Muslims from immigrating to the country. See Anne Blythe, *Federal Judge Has Lots of Questions About HB2*, NEWS & OBSERVER (Aug. 1, 2016, 4:23 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article93112007.html> [<https://perma.cc/LA23-UPNJ>]; Jenna Johnson, *Donald Trump Is Expanding His Muslim Ban, Not Rolling It Back*, WASH. POST (July 24, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/> [<https://perma.cc/DQF2-YP8E>].

186. See *supra*, notes 122–126 and accompanying text.

187. See FALLON, *supra* note 77, at 6–7 (describing how some doctrinal tests produce an “overenforcement” of ultimate constitutional meaning”).

### 3. Non-Uniform Perceptions

Another doctrinal consideration is that even if a court accepted that a community reasonably feels safer with a given firearm regulation, that sentiment may not be uniform across communities. Returning to the public carry example, the University of Kansas survey shows that some communities will overwhelmingly correlate restricting public carry with enhanced safety. A similar correlation might be expected in metropolitan areas unaccustomed to gun culture where “peoples’ insecurity would rise to unbearable levels if they perceived that a good percentage of the people walking next to them on the street, sitting next to them on a subway train, or waiting on line with them at a parking garage were armed with a concealed handgun.”<sup>188</sup> Other firearm-related conduct, or the marketing of certain types of firearms (like assault weapons), may have similar impacts on perceived safety in some places.

One would expect rural areas and communities more accustomed to guns, however, to view regulation differently than a university or New York City. In fact, nationwide polls show a closer divide between those who perceive safety decreases or increases when more people carry firearms than the response yielded by the Kansas University survey.<sup>189</sup> Similarly, some states have loosened concealed carry restrictions while others have tightened them, all in the name of public safety, further evidence that communities perceive the connection between restrictions and public safety differently.

Reliance on perceived safety to justify weapons regulation, then, could inject geographic variability into the constitutional analysis. To what extent can, or should, Second Amendment doctrine accommodate such local and regional variation? Should Second Amendment doctrine be like obscenity doctrine, which allows for regional variation in the form of “contemporary community standards?”<sup>190</sup> “It is neither realistic nor constitutionally sound,” the Court explained in *Miller v. California*, “to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”<sup>191</sup>

On one hand, such regional variation is generally disfavored in constitutional analysis. Rights are presumed to apply uniformly. On the other hand, some Supreme Court language, as well as the history of local and regional gun

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188. JAMES B. JACOBS, CAN GUN CONTROL WORK? 224 (2002).

189. Shortly after the Roseburg, Oregon mass shooting on October 1, 2015, a slight majority of respondents in a nationwide Gallup poll said that the country would be safer if more people carried concealed weapons. See Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015), <http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx> [<https://perma.cc/HJC7-4745>]. Less than a year later, a nationwide Quinnipiac University poll reached the opposite conclusion when respondents were asked a similar question: 52 percent said they would feel less safe and 40 percent said they would feel safer if more people carried guns. See Quinnipiac University, *Overwhelming Support for No-Fly, No-Buy Gun Law, Quinnipiac University National Poll Finds; Support for Background Checks Tops 90 Percent Again* (Jun. 30, 2016), <https://poll.qu.edu/national/release-detail?ReleaseID=2364> [<https://perma.cc/Z44F-GMCV>].

190. *Miller v. California*, 413 U.S. 15, 24 (1973).

191. *Id.* at 32.

regulation, suggest that Second Amendment doctrine, like obscenity doctrine, might be an exception to the general rule. In particular, Justice Samuel Alito's opinion in *McDonald* observed that "conditions and problems differ from locality to locality and . . . citizens in different jurisdictions have divergent views on the issue of gun control."<sup>192</sup> The Second Amendment, Alito continued, does not eliminate the "ability to devise solutions to social problems that suit local needs and values."<sup>193</sup> Moreover, given the importance of tradition in Second Amendment analysis, permitting localized and regionalized tailoring would accord with a long history of varying firearm regulations based on differing local or regional security concerns.<sup>194</sup>

## V

### CONCLUSION

Perceptions often animate regulations and sometimes are relied upon to defend them against constitutional challenge. The First and Second Amendments present good case studies of this phenomenon in rights-impinging contexts. First Amendment doctrine generally rejects the use of some perceptions, like preventing offensiveness, as legitimate rationales for regulating speech. But other perceptions, like the perception of the integrity of the judiciary, are fully embraced. In the end, whether a perception will be rejected or accepted is best explained by looking to the distinct principles underlying the First Amendment right.

Preserving the perception of safety would almost certainly be rejected as a justification for a speech restriction, but that does not mean it must be off the table as a justification for a gun restriction. The applicability of First Amendment rules in the Second Amendment context is not automatic given the vastly different history, principles, and costs associated with the Second Amendment right. Such differences should inform any effort to transplant doctrine from one constitutional area to another. Indeed, perceived safety has a more legitimate role justifying firearm regulations than speech regulations. In the end, whether perceived safety plays a meaningful role in justifying future firearm regulations will likely turn on whether litigants and courts can address the practical challenges such a regulatory rationale presents.

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192. *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010).

193. *Id.* at 785.

194. *See id.* at 927 (Breyer, J., dissenting) (second alteration in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) ("'[P]rimarily, and historically,' the law has treated the exercise of police powers, including gun control, as 'matter[s] of local concern.'"); Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82, 90–107 (2013) (describing the longstanding American tradition of firearm localism); *id.* at 125–32 (discussing commentary and case law showing that incorporated constitutional rights do not always apply uniformly across jurisdictions); Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 *YALE L.J.F.* 121 (2015) (showing how regulatory models and jurisprudence relating to firearms differed between the antebellum South and other regions of the country).