
ORDERED GUN LIBERTY: RIGHTS WITH RESPONSIBILITIES AND REGULATION

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I. RIGHTS WITH RESPONSIBILITIES AND REGULATION: THE CASE OF THE RIGHT TO BEAR ARMS AND GUN CONTROL

Most of the discourse concerning America’s political dysfunction, including the discussion in this Symposium, has focused on structures and powers. In

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this Article we take up the question of whether rights have also contributed to dysfunction. The question presented for our panel is: Has the Constitution fostered a pathological rights culture of rights without responsibilities and regulation? The case of the right to bear arms and gun control. In our recent book, *Ordered Liberty: Rights, Responsibilities, and Virtues*, we address arguments that our constitutional system takes individual rights too seriously, to the neglect of responsibilities, virtues, and the common good.¹ Most pertinent to this Article, we address criticisms that liberal theories of rights “exalt rights over responsibilities, licensing irresponsible conduct and spawning frivolous assertions of rights at the expense of encouraging personal responsibility and responsibility to community.”² Liberal theories, critics contend, “take rights too absolutely, to the subordination of responsibilities, virtues, and the common good.”³ Liberalism, critics claim, promotes “liberty as license” rather than securing “ordered liberty.”⁴

Our book answers these and other charges against liberal theories of rights. We propose an account of rights that takes responsibilities as well as rights seriously, permitting government to encourage responsibility in the exercise of rights but not to compel what it holds is the responsible decision. We defend our understanding of the relationships among rights, responsibilities, and virtues by applying that understanding to several matters of current controversy: reproductive freedom, the proper roles and regulation of civil society and the family, education of children, clashes between First Amendment freedoms (of association and religion) and antidiscrimination law, and rights to intimate association and same-sex marriage. Our book aims to provide a guiding framework for pursuing ordered liberty by taking responsibilities and civic virtues, as well as rights, seriously.⁵ In this Article, we take up one matter of controversy that our book does not address: the Second Amendment and its import for regulation of guns. We offer here some preliminary thoughts about “ordered gun liberty.”

Ordered Liberty focuses on cases protecting substantive basic liberties (or not) under the Due Process Clause, rather than more broadly covering the full universe of constitutional rights, including the Second Amendment. That focus reflects the fact that these cases raise the “culture war” issues that divide liberals from communitarians like Mary Ann Glendon⁶ and civic republicans like Michael Sandel.⁷ Moreover, the cases involve issues that have constituted

¹ JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 1 (2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2.

⁶ See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

⁷ See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A*

the most contested battlegrounds concerning rights, responsibilities, and virtues in recent years.

That focus explains why the book, as Gerard Magliocca observed, “mentions guns only in passing.”⁸ Specifically, our book mentions President Obama’s call for “more civility in our public discourse”⁹ in the aftermath of the shooting of Representative Gabrielle Giffords and others at a political rally in Tucson¹⁰ and quotes a comment on the absence of self-regulation by the gun industry: “The premise seems to be that if they’ve got the right to do something, then that’s the right thing to do.”¹¹ Magliocca aptly wonders “how the right identified in *Heller* [the individual right to bear arms] fits into [our] framework.”¹² We are grateful to him for posing this timely and important question. Indeed, if we had still been writing the book on December 15, 2012, the day after the Sandy Hook Elementary School shooting in Newtown, Connecticut,¹³ we likely would have included a fuller discussion of the individual right to bear arms. After all, that right is particularly well suited to our treatment of the “irresponsibility critique” of rights – that rights license irresponsible conduct and preclude government from promoting the responsible exercise of rights.¹⁴ Certainly, the charges of rights absolutism sound frequently in discussions of opposition to gun control. In his informative book, *Gunfight*, Adam Winkler details the “extremism that marks America’s current gun debate,” suggesting that, if one side seeks rights without regulation, the other seeks regulation without rights.¹⁵

In this Article, we sketch some preliminary thoughts about the individual right to bear arms in relation to responsibilities, virtues, and regulation. As we begin to think about such issues, we immediately confront a conundrum. On the one hand, there is no individual right that cries out more for governmental encouragement of responsibility concerning its exercise and for governmental regulation to promote safety and to protect from harm. On the other hand, there

PUBLIC PHILOSOPHY (1996); MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2009).

⁸ Gerard Magliocca, *Ordered Liberty and Guns*, BALKINIZATION (Feb. 20, 2013, 11:09 AM), <http://balkin.blogspot.com/2013/02/ordered-liberty-and-guns.html>, archived at <http://perma.cc/4L9U-ZYJ8>.

⁹ Helene Cooper & Jeff Zeleny, *Obama Calls Americans to a New Era of Civility*, N.Y. TIMES, Jan. 13, 2011, at A1.

¹⁰ FLEMING & MCCLAIN, *supra* note 1, at 43.

¹¹ *Id.* at 286 n.124 (quoting Erik Larson, *The Story of a Gun*, ATLANTIC, Jan. 1993, at 48).

¹² Magliocca, *supra* note 8.

¹³ James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1.

¹⁴ FLEMING & MCCLAIN, *supra* note 1, at 18-49.

¹⁵ ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 11-14 (2011).

is no individual right whose defenders more strenuously reject such governmental promotion of responsibility and regulation. Defenders of the individual right to bear arms, including the National Rifle Association (NRA), have been extremely effective in making slippery slope arguments: for example, that allowing evidently reasonable regulations will lead to disarmament.¹⁶ This type of slippery slope argument frequently takes hold in circumstances where citizens distrust the government, and such circumstances are not propitious for arguments about responsibility or reasonable regulation to promote safety and to prevent harm. And so, any attempt to relate the individual right to bear arms to responsibilities, virtues, and regulation will face serious obstacles. Still, the stakes are high enough to make it worthwhile to undertake the effort.

To put the challenges in stark relief, consider the following hypothetical slippery slope arguments against governmental regulations:

- Imagine a world in which people opposed motor vehicle registration laws out of fear that they were a first step toward governmental confiscation of all motor vehicles.
- Imagine a world in which people opposed draft registration laws on the ground that they would lead inexorably from involuntary military service to enslavement of all by the government.
- Imagine a world in which people opposed public education out of fear that government would brainwash people into surrendering their liberties.
- Finally, imagine a world in which people feared that laws requiring registration of title in land were an initial step toward governmental expropriation of all real property.

We likely would think that something was wrong in each of these worlds, perhaps too absolutist a conception of rights or too suspicious a conception of government. Perhaps we would frame what was wrong in terms of dysfunction, breakdown, or failure. Yet our world looks like these hypothetical worlds when it comes to gun rights proponents' arguments against reasonable gun control regulation.

Furthermore, the present public division over gun regulation illustrates how people may have sharply conflicting views about what is the "responsible" thing to do. For example, many people (ourselves included) believe that, in the wake of the school shooting in Newtown and all too many other public shootings, reasonable regulation of guns is both imperative and the responsible policy choice. Others argue that putting more guns in the hands of good and responsible citizens – in schools, on campuses, and elsewhere – is the solution.¹⁷ And, in fact, most changes in gun control laws since Newtown have

¹⁶ *Id.* at 8.

¹⁷ See, e.g., Wayne LaPierre, *Making Our Nation's School Children Safer*, NRA INST. FOR LEGIS. ACTION (June 1, 2013), <http://www.nra.org/news-issues/articles/2013/6/making-our-nations-school-children-safer.aspx>, archived at <http://perma.cc/FZ87-9GH4>.

loosened restrictions and regulations rather than tightening them.¹⁸ On the latter view, responsible citizens arm themselves in anticipation of violent sprees. On the former view, responsible citizens do not need weapons designed for military use and should support regulations to take those weapons out of commerce. All this debate confirms that the time is ripe for fuller analysis of the relationship between the individual right to bear arms and responsibilities, virtues, and regulation. That analysis reveals that, notwithstanding the rhetoric of rights absolutism, ordered gun liberty supports a “reasonable right to bear arms” that also recognizes the proper role of regulation.¹⁹

II. REVISITING GLENDON’S AND WEST’S CRITIQUES OF RIGHTS TALK AND CALLS FOR RESPONSIBILITY TALK

A. *The “Irresponsibility Critique” of Rights*

Just over twenty years ago, Mary Ann Glendon published *Rights Talk: The Impoverishment of Political Discourse*²⁰ and Robin West published *Foreword: Taking Freedom Seriously*.²¹ From fundamentally different perspectives, the conservative communitarian Glendon and the progressive feminist West articulated what we have termed the “irresponsibility critique” of rights and called for responsibility talk.²² Neither Glendon nor West wrote about gun rights talk in particular, but we can readily adapt their critiques to the individual right to bear arms that we see championed in the United States leading up to and in the aftermath of the Supreme Court’s 2008 decision in *District of Columbia v. Heller*.²³

¹⁸ Karen Yourish & Larry Buchanan, *State Gun Laws Enacted in Year Since Newtown*, N.Y. TIMES, Dec. 11, 2013, at A20. Moreover, the “counterreaction” to the initial “burst of gun-control legislation,” post-Newtown, appears to be spreading, with new laws “allowing weapons in all corners of society” and strengthening “Stand Your Ground laws.” Herbert Buchsbaum, *Amid Wave of Pro-Gun Legislation, Georgia Proposes Sweeping Law*, N.Y. TIMES, Mar. 25, 2014, at A14 (observing that while “there was a flurry of gun-control legislation” after Newtown, “in the 12 months immediately afterward, states passed 39 laws to tighten gun restrictions and 70 to loosen them”).

¹⁹ WINKLER, *supra* note 15, at 294.

²⁰ GLENDON, *supra* note 6.

²¹ Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

²² See GLENDON, *supra* note 6, at 17 (critiquing America’s “progress in making rights a reality,” while neglecting the responsibilities associated with these rights); West, *supra* note 21, at 47 (arguing for a “reformulation of liberal ideals in American culture that would take seriously not only the individual’s demand for rights but also the burdens of his responsibility”).

²³ 554 U.S. 570, 636 (2008) (holding that the District of Columbia’s ban on handgun possession violated the Second Amendment). For a very valuable account of the *Heller* case, see generally WINKLER, *supra* note 15, at 1-14. Joseph Blocher’s contribution to this Symposium is an insightful contribution to the analysis of gun rights talk. Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813 (2014).

In *Ordered Liberty*, we are critical of Glendon's analysis, arguing that she is ultimately wrong about rights talk as applied, for example, to the right to abortion.²⁴ Building upon West's analysis, we argue that the cases protecting the right to abortion, especially *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁵ leave more room for government to encourage responsible exercise of rights than Glendon acknowledged.²⁶ But here, in the context of the individual right to bear arms, Glendon's analysis of rights talk may have greater force (at least as of 2014, whatever might have been the case in 1991). In this Section, we distill several features of the irresponsibility critique of rights and sketch how they apply to gun rights talk. Strikingly, although Glendon did not write about the Second Amendment, she uncannily insinuated that the "lone rights bearer" she was criticizing was a gunslinger who "r[o]de into town."²⁷ Equally strikingly, while Roberto Unger (like West, a progressive critic of rights talk) did not write specifically about the individual right to bear arms, he uncannily characterized rights themselves as being like "a loaded gun that the rightholder may shoot at will in his corner of town."²⁸

First, Glendon criticizes the "illusion of absoluteness" in rights talk.²⁹ She contends that absolutist rights talk has led Americans carelessly to deploy "the rhetoric of rights" as though rights trump everything else and to develop a constitutional jurisprudence of rights isolated from "common sense," reasonable, and necessary limitations on rights in a system of "ordered liberty."³⁰ She suggests that liberal theories take rights too absolutely, to the exclusion of encouraging responsibility and inculcating civic virtue.³¹

As explicated below, we certainly see the illusion of absoluteness in gun rights talk. For gun rights advocates argue that the individual right to bear arms is a "fundamental right" triggering (pun intended) "strict scrutiny."³² This entails, on their view, that most common sense, reasonable regulations concerning guns are unconstitutional. They say this even in the face of Justice Scalia's statement in *Heller* that many traditional gun control regulations are

²⁴ FLEMING & MCCLAIN, *supra* note 1, at 56-72.

²⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁶ FLEMING & MCCLAIN, *supra* note 1, at 50-80. To be sure, *Rights Talk* predated *Casey*, but in subsequent writing Glendon continues to criticize the Court's abortion jurisprudence (including *Casey*) for its vision of rights, autonomy, and freedom. For discussion of Glendon's critique, see *id.* at 56-68.

²⁷ GLENDON, *supra* note 6, at 47-75.

²⁸ ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36 (1986).

²⁹ GLENDON, *supra* note 6, at 18-46.

³⁰ *Id.* at 177-83.

³¹ *Id.* at 14, 18-46.

³² *Voting "YES on 2" Means Getting the Gold Standard for Gun Rights in Louisiana*, NRA INST. FOR LEGISLATIVE ACTION, <http://www.nraila.org/YESon2> (last visited Mar. 18, 2014), archived at <http://perma.cc/JDP-5ZS3>.

“presumptively lawful,”³³ which hardly sounds like strict scrutiny automatically invalidating such regulations. We will return to the question of the appropriate level of scrutiny below.

Second, Glendon, like West and others in academia, political life, and popular media, argue that rights license irresponsibility. They claim that Americans increasingly invoke rights talk and shrink from responsibility talk, resulting in an explosion of frivolous assertions of rights and a breakdown of responsible conduct.³⁴ The problem is framed generally as “too many rights” and “too few responsibilities.”³⁵ In our book, *Ordered Liberty*, we distinguish two strands of the irresponsibility critique, “immunity” and “wrongness”:

The immunity critique recognizes that a legal right creates a realm within which one is free from coercion and not legally responsible or accountable to others for social costs or harms resulting from one’s actions. The problematic implications of this immunity are that rights are trumps, overriding the common good, and they insulate a right-holder from the moral scrutiny or disapproval of others. The wrongness critique observes that having a legal right to do something does not mean that it is the right thing to do. Regrettably, critics claim, rights talk suggests that the existence of a right implies the nonexistence of responsibilities constraining its exercise.³⁶

Both strands of the irresponsibility critique readily apply to gun rights talk. In this context we return to a comment on the absence of self-regulation by the gun industry: “The premise seems to be that if they’ve got the right to do something, then that’s the right thing to do.”³⁷ We use this quotation to illustrate the “gap between rights and rightness.”³⁸ A further premise seems to be that, if persons have an individual right to bear arms, then government may not moralize concerning responsible exercise of the right and may not regulate in an attempt to close that gap.

B. *The Immunity and Wrongness Critiques Applied to the Right to Bear Arms*

Gun rights advocates have effectively deflected the immunity and wrongness critiques or, in some cases, have even turned them against the critics themselves. First, we address the wrongness critique. Gun rights advocates seem to equate rights with rightness. On their view, they have a right to keep and bear arms and therefore it is right for them to do so. Notwithstanding the wrongness critique – that it is wrong and dangerous to

³³ District of Columbia v. Heller, 554 U.S. 570, 626-27 n.26 (2008).

³⁴ GLENDON, *supra* note 6, at 14-17; West, *supra* note 21, at 81-85.

³⁵ AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 161 (1993).

³⁶ FLEMING & MCCLAIN, *supra* note 1, at 5; *see also id.* at 30-49.

³⁷ *Id.* at 286 n.124 (quoting Larson, *supra* note 11, at 48).

³⁸ *Id.* at 39-43.

keep and bear arms without responsibility and without regulation – they valorize keeping and bearing arms, arguing that it is virtuous and responsible to do so. They argue, moreover, that keeping and bearing arms teaches responsibility. And they wish to transmit these values – such as respect for guns – to their children.³⁹ This is a right of virtuous, responsible citizens to defend themselves and their hearths and homes rather than being dependent upon government to do so. Furthermore, as they see it, keeping and bearing arms is part of American tradition and identity. It is part of their very picture of what it means to be an American. As Jimmie Rodgers puts it in the memorable song, “Pistol Packin’ Papa,” they “come from a shootin’ race.”⁴⁰

Second, we address the immunity critique. Gun rights advocates seem to think that they should be immune from governmental regulation and moralizing concerning the exercise of the right to keep and bear arms. Any criticism of keeping and bearing guns, and any call for reasonable regulation (even to protect children), is met with the slippery slope arguments discussed above – that regulation will inevitably lead to disarmament,⁴¹ or the oft-repeated adage that “outlawing” guns will mean that “only outlaws will have guns.”⁴² While some proponents of gun control have supported such disarmament, and thus have been characterized as gun control extremists, it has been clear since *Heller* that any governmental effort to impose civil disarmament is not in the realm of constitutional possibility.⁴³ Thus, post-*Heller*, this form of slippery slope argument is clearly tactical rather than rooted in any reasonable apprehension.⁴⁴ This form of slippery slope argument

³⁹ See *infra* notes 232-34 and accompanying text.

⁴⁰ JIMMIE RODGERS, PISTOL PACKIN’ PAPA (RCA Victor 1930). This song cleverly encapsulates many of the themes that we see today in the rhetoric and presuppositions of gun rights advocates. We reprint the lyrics of the song in the Appendix.

⁴¹ See, e.g., LaPierre, *supra* note 17 (“With the horrific series of mass murders culminating in the cold-blooded killing of children and teachers at the Sandy Hook Elementary School in Newtown, Conn., last December, this latest iteration of ‘gun control’ is entirely directed at making the sane pay the price for unthinkable acts committed by the insane. It is the root of the civil disarmament movement in America today.”). There seems to be a meme in the discourse: Do not think of it as “gun control”; think of it as “victim disarmament.” We see the slippery slope argument concerning disarmament not only among extremists like the NRA’s LaPierre but also among serious, reasonable scholars like Robert Cottrol. See, e.g., Robert J. Cottrol, *Second Amendment: Not Constitutional Dysfunction but Necessary Safeguard*, 94 B.U. L. REV. 835, 841 (2014) (suggesting that disarmament is the aim of gun control advocates).

⁴² See, e.g., *When Guns Are Outlawed, Only Outlaws Will Have Guns*, DEBATE, <http://www.debate.org/debates/When-guns-are-outlawed-only-outlaws-will-have-guns>. (last visited Mar. 18, 2014), *archived at* <http://perma.cc/ZG68-C7CJ>.

⁴³ WINKLER, *supra* note 15, at 9-11, 294 (“Private ownership of guns cannot be completely banned, and the civilian disarmament long desired by anti-gun people is now constitutionally impossible.”).

⁴⁴ *Id.* at 294-95.

from rights absolutists aims to silence the moral voice of the community calling for reasonable regulation and responsible exercise of the right to keep and bear arms – or at least to make it harder to raise that moral voice.

Worse yet, when people and government reject gun rights advocates' bid for immunity and raise the moral voice of the community – whether as individuals condemning gun violence and calling for gun control or as the government passing gun control laws – the gun rights advocates try to shame those people and the government. For example, in Dallas, Texas, during a recent event held by the local chapter of Moms Demand Action for Gun Sense in America, a gun rights organization called Open Carry Texas came to the parking lot outside with shotguns, hunting rifles, AR-15s, and AK-47s.⁴⁵ Indeed, some gun rights advocates, including Senator Ted Cruz, say that people who raise the moral voice of the community have no shame; they are callously exploiting tragedies like the Newtown massacre in making the case for gun control.⁴⁶ Nay, it is worse still: gun rights advocates commonly say that those who have raised the moral voice of the community and enacted gun control measures are *responsible* for the deaths in such massacres. As Larry Pratt of Gun Owners of America charged, gun control advocates have the blood of the victims of Newtown on their hands, because through their misguided gun control regulations they created gun-free zones like schools where madmen can work their mayhem without fear of themselves being shot. It would be better, the argument goes, to have people in schools armed rather than leaving them vulnerable.⁴⁷ As Wayne LaPierre of the NRA put it: “The *only* thing that stops a *bad* guy with a gun is a *good* guy with a gun.”⁴⁸

Finally, the upshot of all this is that the calls for gun control seem only to spur people to buy more guns.⁴⁹ Why? We suppose because the irresponsible

⁴⁵ Manny Fernandez, *A Face-Off Outside Dallas in the Escalating Battle over Texas' Gun Culture*, N.Y. TIMES, Nov. 12, 2013, at A14.

⁴⁶ Melanie Hunter, *Cruz: Obama Exploited Newtown Tragedy to Push Gun Control Agenda*, CNS NEWS (Jan. 21, 2013, 4:35 PM), <http://cnsnews.com/news/article/cruz-obama-exploited-newtown-tragedy-push-gun-control-agenda>, archived at <http://perma.cc/D42C-9RPZ>.

⁴⁷ Wayne LaPierre, Exec. Vice President, NRA, Remarks at an NRA Press Conference (Dec. 21, 2012) (“Politicians pass laws for Gun-Free School Zones. They issue press releases *bragging* about them. They post signs *advertising* them. And in doing so, they tell every insane killer in America that schools are their *safest* place to inflict maximum mayhem with minimum risk.”); Larry Pratt, *They Have Blood on Their Hands*, GUN OWNERS AM. (Dec. 16, 2012, 7:38 PM), <http://gunowners.org/a12152012.htm>, archived at <http://perma.cc/N829-923A>.

⁴⁸ LaPierre, *supra* note 47; see also Eric Lichtblau & Motoko Rich, *N.R.A. Envisions “a Good Guy with a Gun” in Every School*, N.Y. TIMES, Dec. 22, 2012, at A1 (quoting LaPierre, *supra* note 47).

⁴⁹ Michael Cooper, *Sales of Guns Soar in U.S. as Nation Weighs Tougher Limits*, N.Y. TIMES, Jan. 12, 2013, at A1.

slippery slope rhetoric concerning the fear of disarmament has been so effective.

C. *The Loci of Responsibility Talk Concerning the Right to Bear Arms*

There are several loci of responsibility talk in the discourse concerning the individual right to bear arms that we will consider. First, in the very conceptualization of the right holder. For example, there are references in *Heller* to the right of responsible gun owners: “The Second Amendment . . . surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁵⁰ Second, in the very conceptualization of the right. For example, one might speak of the right of responsible gun ownership.⁵¹ Third, in the conceptualization of the regulations surrounding the right. For example, one might defend responsible gun regulation.⁵² Fourth, in the conceptualization of the responsibilities of gun manufacturers.⁵³ One might decry gun manufacturers’ irresponsibility in marketing guns to children, and those manufacturers might retort by urging responsibility in the use of firearms (just as marketers of alcoholic beverages exhort consumers to drink responsibly). Fifth, in the conceptualization of the responsibilities of government. One view is that the first duty of government is to provide for the security of all and to protect people from harm.⁵⁴ Another view is that government should encourage responsible exercise of the right to bear arms. For example, a recently enacted Missouri law encourages school districts to educate children (beginning in first grade) concerning gun safety.⁵⁵

⁵⁰ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The American gun rights landscape is dotted with groups like the Michigan Coalition for Responsible Gun Owners, Doctors for Responsible Gun Owners, and Lawful and Responsible Gun Owners.

⁵¹ For example, in the aftermath of the Newtown mass shooting, Marco Rubio’s Senate office released a statement affirming his support for “the Second Amendment right to safely and responsibly bear arms.” Alex Conant, Press Sec’y for U.S. Senator Marco Rubio, *The Future of Gun Control*, MARCO RUBIO (Dec. 18, 2012), <http://www.rubio.senate.gov/public/index.cfm/fighting-for-florida?ID=6680e1e6-bd61-4f90-b56d-0f3cbd9c0600>, archived at <http://perma.cc/WMN9-2EZV>.

⁵² For example, Americans for Responsible Solutions, a group founded by Congresswoman Gabby Giffords and her husband Captain Mark Kelly after she was shot in Tucson, defines its mission as supporting “commonsense protections from gun violence” and “lawmakers willing to take a stand for responsible policies.” *About*, AMS. FOR RESPONSIBLE SOLUTIONS, <http://americansforresponsiblesolutions.org/about> (last visited Mar. 18, 2014), archived at <http://perma.cc/D8KN-V9JM>.

⁵³ Since the 1990s, more than thirty U.S. cities, counties, or states have filed suits against U.S. gun manufacturers claiming that they have failed to implement responsible sales practices. Mike McIntire & Michael Luo, *Gun Makers Shun Responsibility for Sales, Suits Show*, N.Y. TIMES, May 28, 2013, at A1.

⁵⁴ Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 908-09 (2014).

⁵⁵ *Mo. Gov. Signs Gun-Safety Course for First-Graders*, NEWS TRIB. (July 12, 2013), <http://www.newstribune.com/news/2013/jul/12/mo-gov-signs-gun-safety-course-first->

Sixth, in the conceptualization of the responsibilities of parents: for example, to keep firearms in safe places and to educate children concerning gun safety.⁵⁶ We will return to these matters below.

Finally, we see responsibility talk in the placement of responsibility for deaths in gun massacres. Proponents of gun control take the view that the widespread, easy availability of guns is partly responsible for these massacres, and that government has a responsibility to pass reasonable gun control regulations to provide security for all and to protect people from harm.⁵⁷ By contrast, as mentioned above, some proponents of gun rights take a different view: that supporters of gun control regulations are responsible for the massacres.⁵⁸ On this view, if only we had more guns in schools and in the hands of responsible citizens generally, we would have fewer massacres and less crime more generally.⁵⁹ As Jimmie Rodgers's "Pistol Packin' Papa" puts it: "The hold-up men all know me, and they sure leave me be; I'm a pistol packin' papa, and I ramble where I please."⁶⁰

III. ORDERED GUN LIBERTY: ANALOGIES BETWEEN SECOND AMENDMENT RIGHTS AND OTHER RIGHTS

With other rights, such as freedom of speech and the right to procreative autonomy, individuals can and do raise their voices to urge the responsible exercise of rights and, when the gap between rights and rightness seems too great, to urge regulation of or restriction upon rights.⁶¹ Justice Scalia's majority opinion in *Heller* acknowledged that "the Second Amendment right is not unlimited" and that reasonable regulations concerning the individual right to bear arms might pass constitutional muster, or at least left open the question whether such regulations might do so.⁶² As Winkler observes, *Heller* in one sense reaffirmed longstanding American practice of reasonable gun regulation; tellingly, in the flurry of post-*Heller* lawsuits challenging gun laws, only a few

graders, archived at <http://perma.cc/4WX4-L6CQ>.

⁵⁶ BRIAN KEVIN, GUN RIGHTS AND RESPONSIBILITIES 4 (2012).

⁵⁷ E.g., Nicholas D. Kristof, *Do We Have the Courage to Stop This?*, N.Y. TIMES, Dec. 16, 2012, at SR11. Winkler's book offers several examples of how shooters in some of these massacres got access to guns due to lax regulation, for example, through the "gun show loophole." WINKLER, *supra* note 15, at 73-76.

⁵⁸ See *supra* note 47 and accompanying text.

⁵⁹ See *supra* text accompanying notes 47-48; see also JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (3d ed. 2010) (arguing that increased gun ownership decreases crime).

⁶⁰ RODGERS, *supra* note 40.

⁶¹ FLEMING & MCCLAIN, *supra* note 1, at 43-45.

⁶² *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . .").

of the “over 150 federal court rulings” have invalidated such laws.⁶³ Responsible exercise of First Amendment rights is also relevant, as manufacturers of target-shooting video games offer the chance to use military weapons in virtual reality and prime consumers’ (including children’s) appetites for such weapons in real life.⁶⁴ The *New York Times* also reports that the “youth-marketing effort is backed by extensive social research and is carried out by an array of nonprofit groups financed by the gun industry.”⁶⁵

Constitutional law cases would support governmental moralizing about responsible exercise of the individual right to bear arms by analogy to moralizing encouraging responsible exercise of the right to procreative autonomy.⁶⁶ For example, the government might impose a waiting period before one may purchase a gun.⁶⁷ Indeed, back in the 1970s before the NRA had adopted such a hardline stance against gun regulation, it supported waiting periods; NRA Secretary Frank C. Daniel observed that “waiting periods have ‘not proved to be an undue burden on the shooter and the sportsman,’” and that a waiting period law “‘adequately protects citizens of good character.’”⁶⁸ Or government might distribute literature concerning the responsibilities of gun ownership and gun safety to prospective gun purchasers.⁶⁹

Furthermore, there may be analogies between gun ownership and driving.⁷⁰ To get a driver’s license, one has to pass a written test and a road test. The government might require applicants for gun permits to take a written test

⁶³ WINKLER, *supra* note 15, at 289.

⁶⁴ Mike McIntire, *Selling a New Generation on Guns*, N.Y. TIMES, Jan. 27, 2013, at A1 (listing “developing a target-shooting video game that promotes brand-name weapons” as one of the firearms industry’s strategies to “ensure its future by getting guns into the hands of more, and younger, children”).

⁶⁵ *Id.*

⁶⁶ For our analysis of governmental moralizing encouraging responsible exercise of the right to procreative autonomy, see FLEMING & McCLAIN, *supra* note 1, at 50-75.

⁶⁷ As of June 24, 2013, ten states and the District of Columbia have imposed waiting periods on the purchase of some or all guns. *Waiting Periods Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (June 24, 2013), http://smartgunlaws.org/waiting-periods-policy-summary/#footnote_13_5825, archived at <http://perma.cc/P39F-4C6S>.

⁶⁸ WINKLER, *supra* note 15, at 70 (quoting Alan Webber, *Where the NRA Stands on Gun Legislation*, AM. RIFLEMAN, Mar. 1968, at 22-23).

⁶⁹ The teaching materials for the firearms safety courses required in some states for receiving a gun permit typically include such responsibility talk. See, e.g., *infra* note 71.

⁷⁰ See Scott Burris, *Gun Violence: Lessons Learned from Car Crashes*, BILL HEALTH (Dec. 19, 2012), <http://blogs.law.harvard.edu/billofhealth/2012/12/19/gun-regulation-phlr-needed/#more-3721>, archived at <http://perma.cc/S63F-BNZK> (likening responsibility and regulation in gun use to the regulation of automobile safety); David Frum, *What If We Treated Guns Like Cars?*, DAILY BEAST (Sept. 17, 2013), <http://www.thedailybeast.com/articles/2013/09/17/what-if-we-treated-guns-like-cars.html>, archived at <http://perma.cc/FU8D-74XK> (arguing for gun regulation to improve public safety by citing successful improvements to auto safety achieved through regulation).

concerning the operation of guns and gun safety.⁷¹ Carrying the analogy further, the government might require applicants to demonstrate proficiency in gun operation and safety by passing a skills performance test.⁷² The requirements for concealed carry permits vary, but they are a good illustration.⁷³ Or, like owners of motor vehicles, gun owners might be required to carry liability insurance.⁷⁴

Some may resist the analogy between gun ownership and driving. They may say that there is a *right* to bear arms but no *right* to drive, only a privilege to do so, subject to governmental permission and regulation. But does anyone who draws this distinction seriously believe that if the Supreme Court of the United States held that there *is* a constitutional right to drive that its doing so would imperil any of the basic regulations of driving? Would they seriously argue that the government could no longer require driver's licenses (including the passage of written and road tests), impose reasonable safety regulations concerning automobile inspections and speed limits, or require the purchase of automobile liability insurance? The analogy holds.

More generally, many rights, even "fundamental" rights like the right to marry, are subject to numerous governmental regulations (including licensing), as we discuss in the next Part.

IV. THE MYTHS OF STRICT SCRUTINY FOR FUNDAMENTAL RIGHTS

In *Ordered Liberty*, we address the "absoluteness" critique of rights by considering arguments that "fundamental rights" trigger "strict scrutiny" under which regulations are practically automatically unconstitutional.⁷⁵ We do so in the context of the Due Process Clause (as well as the Equal Protection

⁷¹ See, e.g., N.Y. PENAL LAW § 400.00(f) (McKinney 2008) ("No license shall be issued or renewed except for an applicant . . . who has successfully completed a firearms safety course and test as evidenced by a certificate of completion issued in his or her name and endorsed and affirmed under the penalties of perjury by a duly authorized instructor . . ."); *NYS Pistol Permit Class*, FIREARMS TRAINING OF W.N.Y., <http://ftwny.com/coursedetails> (last visited Mar. 29, 2014), archived at <http://perma.cc/725L-75KY>; see also CONN. GEN. STAT. § 29-28(b)(1) (2009) (requiring applications for a handgun carry permit to complete a firearm training program); MD. CODE ANN., PUB. SAFETY § 5-306 (2013) (same); N.J. ADMIN. CODE § 13:54-2.4 (2013) (same); TENN. CODE ANN. § 39-17-1315 (2013) (same).

⁷² See sources cited *supra* note 71. These firearms safety courses include training in proficiency of use of the weapons, not just written instruction and exams.

⁷³ See, e.g., WIS. STAT. ANN. § 175.60(4) (West 2013) (providing training requirements for obtaining a license to carry a concealed weapon).

⁷⁴ Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1; Rob Hillenbrand, *Heller on the Threshold: Crafting a Gun Insurance Mandate* (Mar. 29, 2014) (unpublished note) (on file with the Boston University Law Review).

⁷⁵ FLEMING & MCCLAIN, *supra* note 1, at 237-41.

Clause).⁷⁶ Glendon argued that such arguments about rights manifest the “illusion of absoluteness”⁷⁷ and the “impoverishment of judgment.”⁷⁸

Dissenting in *Lawrence v. Texas*, Justice Scalia stated that, under the Due Process Clause, if an asserted liberty is a “fundamental right,” it receives “strict scrutiny” that almost automatically invalidates any statute restricting it.⁷⁹ He also wrote that if an asserted liberty is not a fundamental right, it is merely a “liberty interest” that gets rational basis scrutiny, a standard that is so deferential that the Court all but automatically upholds the statute in question.⁸⁰ *Lawrence* deviated from this regime. The Court did not hold that homosexuals’ right to autonomy was a fundamental right requiring strict scrutiny, nor did it hold that their right was merely a liberty interest calling for highly deferential rational basis scrutiny.⁸¹ Instead, the Court applied an intermediate standard – what we call “rational basis scrutiny with bite” – and struck down the statute forbidding same-sex sexual conduct.⁸² Consequently, Justice Scalia chastised the Court for deviating from the rigid two-tier framework that all but automatically decides rights questions one way or the other.⁸³

In *Ordered Liberty*, we debunk the myth of strict scrutiny for fundamental rights under the Due Process Clause (scrutiny that is so strict as to preclude regulation or governmental encouragement of responsible exercise of rights).⁸⁴ That myth has been propounded by opponents of substantive due process like Justice Scalia to make it harder to justify protecting rights of privacy or autonomy.⁸⁵ Supporters of substantive due process rights of privacy or autonomy have fallen for this myth and helped perpetuate it.⁸⁶ We show that the only case under the Due Process Clause ever to recognize a fundamental right implicating strict scrutiny – requiring that the statute further a compelling governmental interest and be necessary to doing so – was *Roe v. Wade*.⁸⁷ And we point out that those aspects of *Roe* were overruled in *Casey*, which

⁷⁶ *Id.* at 237-72.

⁷⁷ GLENDON, *supra* note 6, at 14, 40.

⁷⁸ *Id. passim.*

⁷⁹ *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

⁸⁰ *Id.* at 593-94.

⁸¹ *See id.* at 594.

⁸² FLEMING & MCCLAIN, *supra* note 1, at 267-69.

⁸³ *Lawrence*, 539 U.S. at 593-94 (Scalia, J., dissenting).

⁸⁴ FLEMING & MCCLAIN, *supra* note 1, at 237-72.

⁸⁵ *See, e.g., Lawrence*, 539 U.S. at 593-94 (Scalia, J., dissenting).

⁸⁶ *See* FLEMING & MCCLAIN, *supra* note 1, at 237-41 (“[L]iberal constitutional theorists who defend substantive due process typically love talk of ‘taking rights seriously,’ and it is no surprise that they might think that the best way to take rights seriously is to declare them to be ‘fundamental rights’ and subject restrictions upon or regulations of them to ‘strict scrutiny.’”).

⁸⁷ *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

substituted an “undue burden” test for strict scrutiny and pointedly avoided calling the right of a woman to decide whether to terminate a pregnancy a “fundamental right.”⁸⁸ Going through due process cases protecting liberty and autonomy – from *Meyer v. Nebraska*⁸⁹ through *Casey* and *Lawrence*, we show that due process jurisprudence is not so absolutist nor does it reflect such an impoverishment of judgment.⁹⁰

In summary, we conclude that:

[The] cases reflect what *Casey* and Justice Harlan called “reasoned judgment” concerning our “rational continuum” of “ordered liberty.” Indeed, they have involved judgment of the very sort that Glendon calls for and that Scalia would banish. The constitutional liberalism developed in our book does not seek to protect rights absolutely or to avoid judgment in interpreting rights. Instead, it justifies reasoned judgment, which protects important rights stringently but does not preclude government from encouraging responsibility or inculcating civic virtues.⁹¹

We take an analogous approach to the right to bear arms.

In the context of the Second Amendment, there is another version of the myth of strict scrutiny for fundamental rights. We acknowledge that Winkler has made a different version of this argument.⁹² One formulation is as simple as this – the individual right to bear arms is a fundamental right; therefore it triggers strict scrutiny (with well-nigh absolute protection); therefore restrictions upon or regulations of the right are presumptively unconstitutional.⁹³ In other formulations this claim is supplemented by the separate claim that the individual right to bear arms is analogous to other fundamental rights, like those protected under the First Amendment. The presupposition is that First Amendment rights receive strict scrutiny. Therefore, the argument continues, the fundamental right to bear arms gets strict scrutiny, and all restrictions upon or regulations of it are presumptively invalid.⁹⁴

⁸⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847, 876 (1993).

⁸⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399, 403 (1923).

⁹⁰ FLEMING & MCCLAIN, *supra* note 1, at 239-69.

⁹¹ *Id.* at 239.

⁹² Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. Adam Winkler, *The Right to Bear Arms and the Myth of Strict Scrutiny*, PRAWFS BLAWG (Feb. 2, 2008, 12:00 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/02/the-right-to-be.html>, archived at <http://perma.cc/GQ3T-PG8U> (“[J]ust because the Second Amendment might be read to protect an individual right does not mean that strict scrutiny is required.”).

⁹³ See WINKLER, *supra* note 15, at 219.

⁹⁴ See *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 834 (D.N.J. 2012), *aff’d sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (analogizing First and Second Amendment strict scrutiny).

The first obstacle to these arguments is that *Heller* did not say that the “fundamental right” of an individual to bear arms triggers strict scrutiny; to the contrary, it characterized many traditional gun control regulations as “presumptively lawful.”⁹⁵ This characterization itself is inconsistent with strict scrutiny. The second obstacle is that in many areas of constitutional law, “fundamental rights” do not actually receive the type of strict scrutiny that automatically invalidates regulations of them. We will mention several.

First, consider the First Amendment’s protection of freedom of speech. We should acknowledge that Joseph Blocher has extensively explored this matter in other work on categoricalism and balancing in First Amendment and Second Amendment analysis.⁹⁶ To be sure, content-based restrictions on expression have been held to be “presumptively invalid” and to receive strict scrutiny.⁹⁷ But content-neutral regulations of conduct that incidentally suppress expression have been subjected to a form of intermediate scrutiny.⁹⁸ The same is true with content-neutral time, place, and manner regulations.⁹⁹ Also some forms of expression, like commercial expression, have been subjected to a form of intermediate scrutiny.¹⁰⁰

We do not think that gun control regulations are analogous to content-based restrictions on expression that trigger strict scrutiny. They are more analogous to content-neutral regulations of conduct that receive a form of intermediate scrutiny. Indeed, many gun control laws are analogous to time, place, and manner regulations, which also get a form of intermediate scrutiny. We grant that people may think that they are expressing who they are through purchasing guns and even carrying them openly in public, but that hardly means that doing so is purely expression and not conduct subject to any regulation whatsoever.

⁹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 n.26 (2008).

⁹⁶ Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009) (comparing Justices Scalia and Breyer’s disagreement over a categorical versus a balancing approach in the Second Amendment context to Justices Black and Frankfurter’s disagreement over these approaches in the First Amendment context).

⁹⁷ *E.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 395 (1992).

⁹⁸ *E.g.*, *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (articulating a four-factor framework for analyzing such regulations that is more lenient than strict scrutiny).

⁹⁹ *E.g.*, *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981) (approving of content-neutral restrictions on time, place, and manner of speech that serve a “significant governmental interest”). In fact, some courts interpreting the Second Amendment have made this point. *See, e.g.*, *United States v. Marzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010).

¹⁰⁰ *E.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566-72 (1980) (applying an intermediate level of scrutiny to commercial expression); *see also Marzarella*, 614 F.3d at 96 (“Regulations on nonmisleading commercial speech trigger another form of intermediate scrutiny . . .”).

There is more to First Amendment fundamental rights than freedom of speech. There is also freedom of religion. But let us not forget the story of *Employment Division v. Smith*¹⁰¹ and the Religious Freedom Restoration Act (RFRA). In *Smith*, Justice Scalia's opinion said that laws challenged in First Amendment free exercise claims do not have to meet a "compelling interest" test (the test of strict scrutiny) and are not "presumptively invalid."¹⁰² In reaction, Congress passed RFRA to "restore the compelling interest test."¹⁰³ Then, in *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional as applied to state and local governments.¹⁰⁴ And so, according to the Supreme Court, First Amendment free exercise claims, though implicating a fundamental right, do not necessarily get strict scrutiny.

It is said that the right to vote is fundamental,¹⁰⁵ yet we have many regulations of voting, such as voter registration requirements. In recent years many have worried that voting laws justified as preventing voter fraud and in a sense furthering "responsible voting" – for example, voter identification laws – in fact are a form of voter suppression.¹⁰⁶ But, as far as we know, no one has gone so far as to argue that the requirement of voter registration itself violates the fundamental right to vote.

The analogies to basic gun control regulations are clear enough. Surely, for example, government may require registration by gun owners and conduct background checks as a prerequisite to purchasing a gun and require permits for open carry. Moreover, surely government may encourage people to vote and to exercise their right to vote responsibly by informing themselves of the candidates and the issues. By analogy, surely government may encourage people who wish to keep and bear arms to do so responsibly. Surely government may encourage gun education and gun safety. Surely, all this is permissible even if the right to bear arms, like the right to vote, is a fundamental right.

¹⁰¹ *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

¹⁰² *Id.* at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

¹⁰³ 42 U.S.C. § 2000bb (2006).

¹⁰⁴ *City of Boerne v. Flores*, 521 U.S. 507, 533-34, 536 (1997) (rejecting RFRA's requirement that "a State . . . demonstrate a compelling governmental interest and show that it has adopted the least restrictive means of achieving it," but leaving undecided whether the federal government must meet that standard).

¹⁰⁵ *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

¹⁰⁶ *See, e.g.*, Richard L. Hasen, *Voter Suppression's New Pretext*, N.Y. TIMES, Nov. 16, 2013, at A19 (describing arguments made by supporters of voter-ID and registration laws as "specious").

As noted previously, *Roe* said that the right of a woman to decide whether to terminate a pregnancy was a fundamental right that triggered strict scrutiny.¹⁰⁷ But, as also noted previously, *Casey* rejected strict scrutiny in favor of an undue burden standard.¹⁰⁸ Many scholars have written with illumination about guns, abortion, and the culture wars.¹⁰⁹ In rich and complex ways they have explored analogies between the right to abortion and the right to bear arms. *Heller* and *Roe* in some sense are opposing icons: the champions of *Heller* are dismayed by *Roe* and vice versa. Yet some have drawn parallels between the two.¹¹⁰ The battle over guns is not only about guns, just as the battle over abortion is not only about abortion. Instead, the battles are about (1) competing approaches to constitutional interpretation (originalism in *Heller* versus moral readings in *Roe*) and (2) competing pictures of American identity and values, culture wars, red states versus blue states, and the like. We do not intend to cover all of the ground in this fertile field of analogies. We focus on the irresponsibility critique of rights and analogies between guns and abortion with respect to it.

We briefly mention a few analogies between abortion regulations and gun control regulations (all of which involve governmental attempts to encourage responsible exercise of rights). Above, we mention waiting periods.¹¹¹ If it is permissible for government to encourage women contemplating having an abortion to deliberate conscientiously before doing so, it should be permissible for government to encourage persons contemplating purchasing a gun to exercise a sober second thought.¹¹² In both instances government may encourage conscientious deliberation and responsible reflection before exercising a right. We also alluded to informed consent. If it is permissible for government to seek to insure that women are making an informed decision before they have an abortion,¹¹³ it should be permissible for government to try

¹⁰⁷ *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

¹⁰⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847, 876 (1992).

¹⁰⁹ See, e.g., Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 98-101 (1997) (discussing the “congruence of rhetoric, political strategy, and regulatory proposals” between proponents of abortion rights and gun rights); Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1286-87 (2009) (discussing the intersection between abortion and gun-right claims by comparing the issues of partial-birth abortion and assault weapons).

¹¹⁰ See, e.g., J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (comparing *Heller* to *Roe*); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32 (arguing that the Court made the same “mistake” in *Heller* and in *Roe*).

¹¹¹ See *supra* note 67 and accompanying text.

¹¹² To be sure, waiting periods for gun purchases typically have been justified on the ground of allowing time to check out the purchaser because of potential harmful consequences if guns get into the hands of certain people.

¹¹³ *Casey*, 505 U.S. at 881-87.

to be sure that persons are making an informed decision before they purchase a gun. For example, government might inform people about the dangers of gun ownership by presenting statistics about the dangers of having a gun in one's home: statistics about gun deaths in the home each year, including gun deaths by suicide, accident, and homicide.¹¹⁴ Finally, if government may encourage alternatives to abortion,¹¹⁵ it should be permissible for government to encourage alternatives to keeping and bearing arms. For example, there are alternatives to buying a gun for self-defense, such as home security systems.

We also briefly sketch how a regret rationale might figure in gun control. *Casey* justified an informed consent scheme as a way to prevent the problem of women making an ill-informed decision and later experiencing "devastating psychological consequences."¹¹⁶ *Casey* also characterized abortion itself as an act "fraught with consequences" for the pregnant woman and many others (including, depending on one's perspective, the fetus).¹¹⁷ *Gonzales v. Carhart* went further by invoking *Casey*'s language about "consequences" to accept the "regret rationale" as justifying restrictions on the right to abortion.¹¹⁸ By analogy, one might argue that many who have purchased guns may not fully appreciate the consequences of gun ownership for themselves and others and may come to regret their decisions after the guns have been used to kill or wound people. Also analogous to *Carhart*'s invocation of the regret rationale to justify banning certain procedures for performing abortions, one might argue that a regret rationale supports banning certain weapons.¹¹⁹

Finally, we mention an analogy between sex education in schools and gun safety education in schools. Liberals and conservatives switch sides when it comes to sex and guns. With sex education, many conservatives want abstinence-only education, on the premise that there is no "safe" sex except sex "saved" for marriage; by contrast, liberals favor comprehensive sex education (combining abstinence with information about contraception), on the premise that at least some minors are going to have sex and should learn how to behave "responsibly" to protect themselves against the consequences.¹²⁰ With guns

¹¹⁴ See *infra* text accompanying notes 180-83 (summarizing statistics on gun-related injuries in the home).

¹¹⁵ *Casey*, 505 U.S. at 881-87 (upholding an informed consent provision that included informing a woman of alternatives to abortion).

¹¹⁶ *Id.* at 882.

¹¹⁷ *Id.* at 852.

¹¹⁸ *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007).

¹¹⁹ Elsewhere, we critically evaluate this appeal to the regret rationale in the *Carhart* majority opinion. See FLEMING & MCCLAIN, *supra* note 1, at 68-75. Further, we agree with Justice Ginsburg's dissent that, even if one (contrary to the weight of the evidence) gave credence to the argument about regret, under *Casey* the proper regulatory response would be to foster informed consent, not to ban a procedure outright with no health exception. See *Carhart*, 550 U.S. at 183-84 (Ginsburg, J., dissenting).

¹²⁰ See LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY,

many liberals want no guns in the home, while conservatives assume that guns are going to be around and want to protect against the consequences. Just as we support comprehensive sex education in the schools, so too we would support gun safety education in the schools.¹²¹

In sum, even when a “fundamental right” is in play, the Supreme Court has not applied “strict scrutiny” and automatically invalidated all regulations. The mistaken belief that it has done so derives from the general myth of strict scrutiny as well as the specific Second Amendment myth of strict scrutiny. Our aim in talking about the myth of strict scrutiny is not to make a doctrinal argument concerning interpretation of the Second Amendment. Rather, we are concerned with the illusion of absoluteness in gun rights talk and with bringing out the wide latitude that protecting an individual right to bear arms, like other rights, leaves for government to encourage responsible exercise of the right.

V. A FORM OF INTERMEDIATE SCRUTINY: THE TWO-STEP FRAMEWORK OF RECOGNIZING RIGHTS YET PERMITTING REGULATIONS

Given the recognition of an individual right to keep and bear arms in *Heller*, what is the most appropriate level of scrutiny for gun control measures? In *Ordered Liberty* we show that, contrary to Scalia’s dissent in *Lawrence*, the Court has not recognized two rigidly policed tiers of scrutiny, with strict scrutiny automatically invalidating laws and deferential rational basis scrutiny automatically upholding them.¹²² Instead, we demonstrate that the cases map onto a “rational continuum” of ordered liberty, with several intermediate tiers to be mentioned below.¹²³ In this Part, we are using the term “intermediate scrutiny” in a generic sense to encompass a range of standards, not in the specific sense of equal protection intermediate scrutiny doctrine.

Under *Heller*, the individual right to bear arms does not, on the one hand, trigger strict scrutiny for the reasons already given. Nor does it, on the other hand, entail deferential rational basis scrutiny. For one thing, Justice Scalia’s majority opinion rejected the latter in *Heller*.¹²⁴ For another, it is not appropriate where a “fundamental right” is in play, even if many traditional gun control laws are “presumptively lawful.”¹²⁵ Nor is straight balancing of

AND RESPONSIBILITY 256-89 (2006) (contrasting these two approaches to sex education, emphasizing their competing approaches to encouraging sexual and reproductive responsibility among adolescents).

¹²¹ One further analogy: If there is a right to stand your ground in self-defense where firearms are concerned, there should be an analogous right to self-defense where abortion is concerned. Eileen McDonagh’s work in developing such analogies has been illuminating and powerful. See EILEEN McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 7 (1996) (discussing “abortion as self-defense”).

¹²² See FLEMING & MCCLAIN, *supra* note 1, at 239-44.

¹²³ *Id.* at 241-44.

¹²⁴ *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

¹²⁵ *Id.* at 626-27 n.26.

interests (which Scalia attributed to Justice Breyer's dissent) appropriate where gun regulations are concerned; Scalia rejected it too in *Heller*.¹²⁶ Nonetheless, a more sophisticated, structured, and stringent form of balancing, akin to proportionality review (which is the standard for which Breyer actually argued¹²⁷), should not be off the table.

Instead, the choice is among other available frameworks like those we lay out in our “rational continuum” of ordered liberty. All of these lie between absolutist “strict scrutiny” and highly deferential rational basis scrutiny:

- Undue burden standard under the Due Process Clause
- Intermediate scrutiny under the Equal Protection Clause
- Forms of intermediate scrutiny under the First Amendment
- A form of intermediate scrutiny under the Due Process Clause
- Rational basis scrutiny “with bite” under the Equal Protection Clause or the Due Process Clause

Under all of these frameworks, the Court protects a right but allows room for regulation.

Which is the most apt framework for the individual right to keep and bear arms? Given *Heller*, we need a framework that acknowledges at once that (1) the right is a “fundamental right,” and yet (2) many regulations concerning it are “presumptively lawful.”¹²⁸ Several courts that have considered this question since *Heller*, not surprisingly, have adopted forms of intermediate scrutiny.¹²⁹ But we should recognize that there are several forms of intermediate scrutiny (those under the Equal Protection Clause, the First Amendment, and the Due Process Clause) and that they have been adopted for different reasons.

Consider the context in which intermediate scrutiny has been developed under the Equal Protection Clause. It has been applied to classifications based

¹²⁶ *Id.* at 634-35.

¹²⁷ *Id.* at 689-91 (Breyer, J., dissenting). Specifically, Justice Breyer argued that:

[A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the later. I would simply adopt such an interest-balancing inquiry explicitly.

Id.

¹²⁸ *See id.* at 626-27 n.26 (majority opinion).

¹²⁹ *E.g.*, *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (“[W]e will apply intermediate scrutiny here.”); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012) (“Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.”); *NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 205 (5th Cir. 2012) (“Unquestionably, the challenged federal laws trigger nothing more than ‘intermediate’ scrutiny.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011) (“Intermediate scrutiny is appropriate.”).

on characteristics that are not judged to be *suspect*, yet not deemed to be altogether *nonsuspicious* – neither like racial classifications on the one hand¹³⁰ nor like the regulation of businesses such as opticians on the other.¹³¹ Intermediate scrutiny has been applied to what one of us has called “somewhat suspicious classifications” like gender.¹³² The Court has also applied rational basis scrutiny “with bite” to some somewhat suspicious classifications such as sexual orientation.¹³³

With gender we apply intermediate scrutiny because, given the long history of gender-based classifications that denied women equal rights and responsibilities, we are suspicious of the ends that the government is promoting (they may be sexist) and we are suspicious of the fit between means and ends (the laws may be using gender as an inaccurate or unjustifiable proxy for other, more germane bases of classification).¹³⁴ Or, with sexual orientation, we apply rational basis scrutiny “with bite” because we are concerned that the government, instead of furthering a legitimate governmental purpose, may be expressing “animus” against or a “bare desire to harm” a politically unpopular group.¹³⁵ Or we take a more careful look because, as Justice Kennedy put it in another context, “we are beginning to understand” that “prejudice . . . rises not from malice or hostile animus alone,” but also “from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.”¹³⁶

¹³⁰ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (“At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny.’”).

¹³¹ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). *Williamson* articulated the classical formulation of deferential rational basis scrutiny: “It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” *Id.*

¹³² WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, *AMERICAN CONSTITUTIONAL INTERPRETATION* 1041-53 (5th ed. 2014). We describe gender as a “somewhat suspicious category.” *Id.* at 1049 (mentioning *Craig v. Boren*, 429 U.S. 190 (1976), which held that “to withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives”).

¹³³ *Id.* at 1051-52 (mentioning *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Romer v. Evans*, 517 U.S. 620 (1996)).

¹³⁴ See, e.g., *Craig*, 429 U.S. at 197-99.

¹³⁵ See, e.g., *Windsor*, 133 S. Ct. at 2681 (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.” (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973))); *Romer*, 517 U.S. at 632-35 (holding an amendment banning protection based on sexual orientation unconstitutional, in part because “the amendment seems inexplicable by anything but animus”).

¹³⁶ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2000) (Kennedy, J.,

Neither of these situations is present in gun control regulations. We are not suspicious of the government's proposed end to protect the security of all and to prevent harm (despite the slippery slope fear that government seeks to disarm its citizens). And only a paranoid person would think that gun control measures reflect animus against or a bare desire to harm gun owners. We grant, however, that some opposition to gun control measures is rooted in the idea that the means are not well suited to the ends.¹³⁷ For example, the "more guns less crime" folks make a version of this argument.¹³⁸ In any case, we would not argue for adopting the analytics of Equal Protection Clause intermediate scrutiny for analyzing gun control regulations.

We think two Due Process frameworks might be more analogous to the situation of the individual right to keep and bear arms than the Equal Protection frameworks for intermediate scrutiny just mentioned. The first is *Moore v. City of East Cleveland*'s¹³⁹ form of intermediate scrutiny. *Moore* did not officially articulate intermediate scrutiny as the framework for Due Process analysis. Still, it formulated the test as: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."¹⁴⁰ That sounds more like a form of intermediate scrutiny than strict scrutiny. Justice Powell added: "Of course, the family is not beyond regulation."¹⁴¹ Like *Moore*, many cases surrounding the legal regulation of the family demonstrate the following two-step framework:

1. Determine that the right in question – for example, the right to marry, the right to decide one's family living arrangements, or the right to parental liberty – is fundamental.
2. Conclude that even though the right is fundamental, it does not entail that reasonable regulations are unconstitutional.¹⁴²

Moreover, the regulations analyzed under such two-step frameworks typically are justified on the ground of protecting people (for example, spouses and children) from harm.¹⁴³ With the right to bear arms, Justice Scalia's opinion in *Heller* uses an analogous two-step:

concurring).

¹³⁷ WINKLER, *supra* note 15, at 35-43 (contending that some gun control "extremists" supported measures that would not have any positive effect and that some criticism was rooted in this recognition).

¹³⁸ See, e.g., LOTT, *supra* note 59.

¹³⁹ *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (Powell, J., plurality opinion).

¹⁴⁰ *Id.* at 499.

¹⁴¹ *Id.*

¹⁴² FLEMING & MCCLAIN, *supra* note 1, at 254-57 (assessing the standard of review applied by Justice Powell in his plurality opinion in *Moore*).

¹⁴³ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1943) (holding that parental and religious liberties are not immune from regulation, particularly where the safety of

1. State that the individual right to keep and bear arms is a fundamental right.
2. Acknowledge that, despite its being a fundamental right, many traditional gun control regulations are “presumptively lawful.”¹⁴⁴

Likewise, the regulations are commonly justified to protect people from harm. The analytics of such a two-step framework are different from the balancing that Justice Scalia rejected in *Heller*. We argue that a form of intermediate scrutiny analogous to that of *Moore* under the Due Process Clause is a strong candidate for the appropriate framework for thinking about rights and responsibilities under *Heller* for gun control regulation.

Let us note two additional similarities. First, in *Moore*, Justice Powell speaks of the Court’s recognition of the “private realm of family life” and of the constitutional protection of personal choice of family members forming a household.¹⁴⁵ In *Heller*, Justice Scalia stresses the home as a site of the family and the right to defend oneself and one’s family within the home.¹⁴⁶ Second, *Moore* also captures the intergenerational dimension of the constitutionally protected family, stressing that the extended family plays a role in rearing, educating, and inculcating values in children.¹⁴⁷ Similarly, social reproduction is evidently part of what, for many Americans, owning guns is about; those Americans celebrate intergenerational participation in hunting, recreational shooting, and so forth, and argue that such activities instill responsibility and virtues.¹⁴⁸

The second Due Process framework that is analogous to the situation of the individual right to keep and bear arms is the *Casey* undue burden standard. Again, *Roe* had applied strict scrutiny, but *Casey* rejected that in favor of an “undue burden” standard.¹⁴⁹ *Casey* states that “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”¹⁵⁰ Under an undue burden standard, regulations that seek to encourage responsible, conscientious exercise of the right in light of the potential consequences of that exercise are permitted. Regulations that seek to coerce the ultimate decision, however, are not.¹⁵¹ Accordingly, *Casey* found that informed consent requirements, reporting requirements, and a waiting requirement did not impose an undue burden on the right to make the ultimate

children is involved).

¹⁴⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 n.26 (2008).

¹⁴⁵ *Moore*, 431 U.S. at 499 (quoting *Prince*, 321 U.S. at 166).

¹⁴⁶ *Heller*, 554 U.S. at 628.

¹⁴⁷ *Moore*, 431 U.S. at 503-05.

¹⁴⁸ See, e.g., McIntire, *supra* note 64, at 2 (discussing arguments for “selling a new generation on guns” that emphasize “family” and “fun” and arguments that use of firearms “can teach ‘life skills’ like responsibility, ethics and citizenship”).

¹⁴⁹ See *supra* text accompanying notes 87-88.

¹⁵⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

¹⁵¹ FLEMING & McCLAIN, *supra* note 1, at 63-64.

decision.¹⁵² We would argue that the undue burden standard of *Casey* is also a strong candidate for the appropriate framework under *Heller* for gun control regulation. As suggested previously, we think that many gun control regulations are analogous to abortion regulations that have been upheld under an undue burden standard.¹⁵³

To recapitulate: Our aim in this Section is not to resolve any doctrinal problems in the interpretation of the Second Amendment after *Heller*. Instead, we are just trying to frame how the analysis should proceed concerning rights, responsibilities, and regulation. We turn next to an area where the applicable responsibilities are especially grave, and the justifications for regulation especially weighty: children and guns. Gun safety measures intended to protect children from the dangers of guns in the home should readily be upheld as constitutional, whether under a form of intermediate scrutiny or an undue burden standard.

VI. CHILDREN AND GUNS: PARENTAL RIGHTS WITH RESPONSIBILITIES

In this Part we address several issues about children, guns, and the Second Amendment. Again, our aim is not to resolve any particular doctrinal issues concerning interpretation of the right to bear arms, but rather to frame some of the issues in terms of rights, responsibilities, and regulation. The topic of children and guns concerns the intersection of Second Amendment rights with fundamental parental liberty, family privacy, children's own rights and needs, and governmental authority (as *Prince v. Massachusetts* put it) to enact reasonable regulations that protect children from harm or evils and further the "healthy, well-rounded growth of young people into full maturity as citizens."¹⁵⁴ This is the two-step approach to constitutional rights to which we referred above: the Court may speak of the rights at issue in the context of regulating guns to protect children as fundamental, but it quickly adds that such rights are not absolute and that the family is not immune from regulation.¹⁵⁵ Moreover, it bears emphasis that the state's authority to protect children and restrict parental liberty "as *parens patriae*" is particularly pertinent to the issue of gun regulation; this includes securing children's growth against dangers.¹⁵⁶

¹⁵² *Casey*, 505 U.S. at 879-901.

¹⁵³ See *supra* notes 107-19 and accompanying text. Finally, we should mention Adam Winkler's argument, pre-*Heller*, that state supreme courts protecting the right to bear arms under state constitutions had applied a form of rational basis scrutiny "with bite." Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 725-26 (2007).

¹⁵⁴ *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

¹⁵⁵ See *supra* notes 142-43 and accompanying text (outlining the two-step framework used in many cases surrounding the legal regulation of the family).

¹⁵⁶ *Prince*, 321 U.S. at 168-70.

A. *Keeping Children Safe from Guns in the Home*

Regulation to protect children from the dangers that guns pose relates, as we see it, to three spheres that are familiar from the Court's jurisprudence about the triangle of parent, child, and state: the home, the school, and the street (that is, public spaces where children may be when they are not at home or in school). Since the Newtown shooting, many proposed gun regulations aim to make children safer in schools; even prior to Newtown, highly publicized school shootings (such as at Columbine) intensified concerns by public authorities to keep children safe in schools.¹⁵⁷ *Prince* upheld a state labor law intended to protect children from dangers they might encounter on the street.¹⁵⁸ Today, in light of the dangers that gun violence in the streets poses to minors and young adults (particularly due to gang membership),¹⁵⁹ some regulations and public-private initiatives aim at reducing or eliminating guns in that context.¹⁶⁰ In this Article, we focus on guns in the home. We use this example because of the rhetorical emphasis on the home in constitutional jurisprudence concerning the family and (in *Heller*) the Second Amendment, and the focus on the home in absolutist gun rights claims about the risk of overweening governmental power reaching into the home.

In *Heller*, Justice Scalia speaks about a core Second Amendment right to use a handgun to protect oneself and one's family in the home, "where the need for defense of self, family, and property is most acute."¹⁶¹ Thus, one argument for gun rights is protecting children, keeping them safe from intruders and aggressors. Indeed, Winkler reports a marked shift in the NRA's philosophy from an earlier focus on hunting and recreational shooting (that is, a "traditional means of bonding between father and son") to, in recent decades, a focus on self-defense and protecting personal liberty, with the Second

¹⁵⁷ See Lloyd Vries, *Columbine Legacy: Schools Safer?*, CBS NEWS (Apr. 19, 2004, 12:28 PM), <http://www.cbsnews.com/news/columbine-legacy-schools-safer>, archived at <http://perma.cc/ER98-AZUM> (assessing how schools have responded with security measures after the Columbine school shooting).

¹⁵⁸ *Prince*, 321 U.S. at 168.

¹⁵⁹ See Joe Nocera, Op-Ed., *Unlearning Gun Violence*, N.Y. TIMES, Nov. 11, 2013, at A27 (reporting a statement by a researcher that "[i]f you are a gang member, your No. 1 fear is getting shot" (internal quotation marks omitted)).

¹⁶⁰ *Id.* (reporting efforts by organizations like CeaseFire and Save Our Streets to intervene to prevent gun violence and praising a public health, epidemiological perspective). President Clinton framed gun control as part of a broader crime prevention effort to "recover our Nation's streets from crime and violence," and "to provide security for our families and our children." Remarks on the Assault Weapons Ban, 34 WEEKLY COMP. PRES. DOC. 582, 582 (Apr. 6, 1998). For a critical evaluation of the 1994 assault weapons ban, see David Corn, *What the Fight over Clinton's Assault Weapons Ban Can Teach Obama*, MOTHER JONES (Dec. 21, 2012), <http://www.motherjones.com/politics/2012-12/bill-clinton-assault-weapon-ban-newtown-shooting>, archived at <http://perma.cc/493G-FZUJ>.

¹⁶¹ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

Amendment as a necessary bulwark to ensure guns for personal protection against criminals.¹⁶²

On the other hand, keeping children safe from guns in the home is one rationale used for regulating gun owners to the extent of requiring those with minors in the home to store their weapons safely and securely. As one research team put it (reported in an article by Jane Brody) “[p]arents . . . are the first line of defense for children” in this regard through “safe storage of firearms.”¹⁶³ One way to keep children safe from guns is just not to have them in the home, as the American Academy of Pediatrics recommends: “The absence of guns from children’s homes and communities is the most reliable and effective measure to prevent firearm-related injuries in children and adolescents.”¹⁶⁴ And of course, while parents could follow this rule voluntarily, *Heller* rules out mandating it.¹⁶⁵ How, then, may rights be linked with responsibility?

One way is through safe storage laws, or “child access prevention” (CAP) laws, which require adults to take measures to reduce children’s access to guns at home.¹⁶⁶ No doubt everyone (including readers of this Symposium) has seen news coverage with heartbreaking stories about unintentional deaths of young – and not so young – children, due to children shooting themselves or others with guns they found in the home lying within reach and loaded, rather than locked away and unloaded.¹⁶⁷ Sometimes, the gun was lying on top of a television set where parents either did not think a toddler knew the gun was stored, or thought the gun was out of the toddler’s reach; guns were also sometimes (temporarily) under a sofa cushion, on a chair, and so forth.¹⁶⁸

¹⁶² WINKLER, *supra* note 15, at 65-68.

¹⁶³ Jane Brody, *Keeping Guns out of Children’s Hands*, N.Y. TIMES, Aug. 17, 2004, at F7 (internal quotation marks omitted) (reporting the remarks of North Dakota State University researchers related to their efforts to teach children safe gun practices).

¹⁶⁴ *Firearm-Related Injuries Affecting the Pediatric Population*, 2012 PEDIATRICS e1416, e1416.

¹⁶⁵ *Heller*, 554 U.S. at 570 (invalidating a ban on handgun possession and recognizing “an individual right to possess a firearm . . . and to use that arm for traditionally lawful purposes, such as self-defense within the home”).

¹⁶⁶ See *Child Access Prevention Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Aug. 1, 2013), <http://smartgunlaws.org/child-access-prevention-policy-summary>, archived at <http://perma.cc/M2TP-JL6A> (providing an overview of Child Access Prevention laws). For an informative argument in favor of CAP laws as a way to avoid the “deadly consequences of irresponsible firearm storage,” since “not all gun owners are responsible and even responsible gun owners are not responsible one hundred percent of the time,” see Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47, 77 (1999).

¹⁶⁷ Reporter Joe Nocera chronicles these and other gun deaths and injuries in his blog, *Gun Report*. See Joe Nocera, *Gun Report*, N.Y. TIMES BLOGS, <http://nocera.blogs.nytimes.com/category/gun-report> (last visited Mar. 19, 2014).

¹⁶⁸ See Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, N.Y.

Consider the *New York Times* article, *Children and Guns: The Hidden Toll*, which featured a photo of a three-year-old boy, Lucas Heagren, smiling radiantly as his father, Joshua, helps him hold and learn how to fire a .22 rifle he gave Lucas for Christmas.¹⁶⁹ Five months later, Lucas found a pistol that his father generally kept under his mattress, but had temporarily put under the couch; his father was going out shooting that day, but was taking time to set up an inflatable swimming pool. Lucas died after he shot himself in the eye. The father was charged and convicted of negligent homicide and endangering children.

Many – indeed, millions – of children live in households with guns that are neither locked away nor kept unloaded.¹⁷⁰ Estimates vary, but one study concluded that between “20 percent to 50 percent of gun-owning parents engage in unsafe storage practices.”¹⁷¹ Why is safe storage so important? Not only do “[m]ore than three-fourths of unintentional firearm injuries to children occur in private dwellings,” but “[i]n most cases . . . children got their hands on a loaded gun in their own home or the home of a friend or relative.”¹⁷² It is not simply children who live in homes where guns are stored unsafely who are at risk of injury or death. The *Children and Guns* news article reported on a gun death of an eleven-year-old boy, Alex, whose mother sought to ensure that her children did not visit or play at homes where guns were stored. Alex was killed when he and a group of teenage boys “found a Glock pistol in an apartment closet . . . while searching for snack money,” and the gun went off when a fifteen-year-old boy was handling it.¹⁷³ In another case involving adolescents, Noah, a fourteen-year-old boy, was killed during a sleepover at the home of his

TIMES, Sept. 29, 2013, at A1.

¹⁶⁹ *Id.*

¹⁷⁰ See *Child Access Prevention Policy Summary*, *supra* note 166. As stated in the testimony of Juliet A. Leftwich:

Researchers have found that millions of children live in homes with easily accessible guns. A 2000 study of firearm storage patterns in U.S. homes found that “[o]f the homes with children and firearms, 55% were reported to have 1 or more firearms in an unlocked place, and 43% reported keeping guns without a trigger lock in an unlocked place.” A 2005 study on adult firearm storage practices in U.S. homes found that over 1.69 million children and youth under age 18 were living in homes with loaded and unlocked firearms.

Firearms Control Amendment Act of 2008: Hearing on Bill 17-843 Before the Comm. on Pub. Safety and the Judiciary Council of D.C., 17th Period (D.C. 1998) (testimony of Juliet A. Leftwich, Legal Director of Legal Community Against Violence), *archived at* <http://perma.cc/66CZ-CDHD>.

¹⁷¹ Brody, *supra* note 163 (internal quotation marks omitted) (reporting an estimate by North Dakota State researchers based on several studies); see also *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1419 (“In a study of gun-owning Americans with children under 18 years old, 21.7% stored a gun loaded, 31.5% stored a gun unlocked, and 8.3% stored at least 1 gun unlocked and loaded.”).

¹⁷² Brody, *supra* note 163.

¹⁷³ Luo & McIntire, *supra* note 168, at A1.

close friend, Levi, who lived with his grandparents, when the boys found a .45 caliber handgun behind a television set.¹⁷⁴ Although the grandfather “had always admonished” Levi “never to handle the weapons,” Levi “removed the magazine, pointed the gun at his friend and pulled the trigger,” evidently not realizing that there was still a round in the chamber.¹⁷⁵ Strikingly, Noah’s mother opposed the prosecution of Levi for reckless homicide, telling the court that “the adults who failed to properly secure the gun were the ones who should be punished.”¹⁷⁶ Ohio, the same state where Lucas lived, however, has no safe-storage law.¹⁷⁷

These stories have common features: parental admonitions not to touch guns were insufficient to prevent lethal injury, a point to which we turn below. Moreover, there is a gendered dimension to the problem: in the cases examined by the *New York Times*, “a common theme . . . was the almost magnetic attraction of firearms among boys.”¹⁷⁸ Indeed, the shooter was male in “all but a handful of instances,” and over eighty percent of the victims were male.¹⁷⁹

Besides unintentional injuries, there are other harms from guns in the home. A gun in the home increases the risk of youth suicide, which was the third leading cause of death for American teens ages fifteen to nineteen in 2009.¹⁸⁰ Firearms are “the most lethal” of the common methods used for attempting suicide, with a ninety-percent lethality rate.¹⁸¹ In 2010 “67.5% of all homicides were committed with a firearm,” and “[m]ost homicides occur[red] during interpersonal conflict, typically between relatives, friends, or acquaintances.”¹⁸² Young black men have the highest rates of firearm-related homicides of any demographic group.¹⁸³

In light of the risks posed to children from unsafe storage of guns in the home, one reasonable regulation is safe storage, or CAP laws. Such laws vary from state to state.¹⁸⁴ The strictest laws impose criminal liability on adults who

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1418.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *State Child Access Prevention to Guns*, SMART GUN LAWS (Jan. 3, 2012), <http://smartgunlaws.org/category/state-child-access-prevention-to-guns>, archived at <http://perma.cc/L3K2-P2WJ> (providing information on CAP laws in different states); McClurg, *supra* note 166 (detailing the history and variety of state CAP laws). Congress has considered, but not passed, federal CAP laws. See, e.g., *id.* at 50-51 (describing proposed Children’s Gun Violence Prevention Act of 1998).

negligently leave firearms accessible to children when a child may or is likely to gain access to a gun.¹⁸⁵ A larger number impose liability only when children actually gain access to the gun.¹⁸⁶ And other state laws impose liability only if the child uses the gun or carries it to a public place.¹⁸⁷ A minority of states have CAP laws.¹⁸⁸ Some other states simply impose criminal liability when a person intentionally, knowingly and/or recklessly provides firearms to minors.¹⁸⁹

These CAP laws seem to be effective in protecting children.¹⁹⁰ Similarly, education programs aimed at adults about safe storage seem to lead to more people storing guns safely.¹⁹¹ We believe that such CAP laws are a reasonable regulation aimed at preventing unnecessary injury and loss of life. Certainly, under *Prince*, the governmental interest in protecting children from harm justifies limits upon fundamental parental liberty and parental religious liberty.¹⁹² These safe storage laws, to put it another way, do not place an undue burden on gun rights. Unlike the law struck down in *Heller*, they do not require that guns be kept completely disassembled without any exceptions.¹⁹³ Nonetheless, the NRA rejects these laws as part of “gun grabbers’ wholesale attack on private gun ownership” and a step toward civil disarmament:

Responsible gun owners store their guns safely. For over a century, the National Rifle Association and other civic groups have done everything they can to encourage safe gun storage.

¹⁸⁵ Luo & McIntire, *supra* note 168, at A1; *Child Access Prevention Policy Summary*, *supra* note 166.

¹⁸⁶ See sources cited *supra* note 185.

¹⁸⁷ See sources cited *supra* note 185.

¹⁸⁸ Brody, *supra* note 163 (“Eighteen states have laws that make improper firearm storage a crime”); *Child Access Prevention Policy Summary*, *supra* note 166 (observing that only fourteen states and the District of Columbia have laws imposing criminal liability for negligent storage of a firearm).

¹⁸⁹ *Child Access Prevention Policy Summary*, *supra* note 166 (“Several states impose a weaker standard for criminal liability when a child is allowed to access a firearm. Fourteen prohibit persons from intentionally, knowingly, and/or recklessly providing some or all firearms to children.”).

¹⁹⁰ *Id.* See also McClurg, *supra* note 166, at 57 (citing study of the effects of CAP laws in 12 states). *But see* TASK FORCE ON CMTY. PREVENTIVE SERVS., FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), archived at <http://perma.cc/BK5F-S7YW> (finding statistically significant the apparent reduction in unintentional firearm deaths due to Florida’s CAP law, while noting that “overall, too few studies of CAP law effects have been done, and the findings of existing studies were inconsistent” and calling for “further high-quality research . . . to establish the relationship between firearm laws and violent outcomes.”).

¹⁹¹ Brody, *supra* note 163.

¹⁹² *Prince v. Massachusetts*, 131 U.S. 158, 166 (1943).

¹⁹³ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

Partly as a result, the fatal gun accident rate for both kids and adults has fallen to an all-time low. In spite of this, anti-gun politicians, and the anti-gun groups are working to turn “safe storage” into a tool for disarming the American public.¹⁹⁴

In effect the NRA rejects regulation in favor of exhorting adults to “do the right thing” or to close the gap between having a right and exercising it responsibility.¹⁹⁵ Thus the NRA concedes that with gun rights come the “duty” of storing guns safely, though it contends that “[h]ome safety is the responsibility of the family, not the state.”¹⁹⁶ But the reported rates of unsafe storage – or, dare we say, of irresponsible gun ownership – suggest that exhortation may not be enough.

The NRA also counters: educate, do not regulate. In effect it advocates relying on exhortation. The NRA has a widely used Eddie Eagle Firearm Safety program, which a number of state legislatures have endorsed¹⁹⁷ and school districts have adopted.¹⁹⁸ The four messages are: “If you see a gun: STOP! Don’t Touch! Leave the Area! Tell an Adult.”¹⁹⁹ The premise of this program is that guns are an inevitable part of life; children need to be taught how to behave around guns.²⁰⁰ In other words, you simply need to “gun proof” children, not treat guns as something dangerous and therefore bad.²⁰¹

¹⁹⁴ David Kopel, *The Hidden Agenda Behind Gun Storage Laws*, NRA INST. FOR LEGIS. ACTION (Oct. 5, 1999), <http://www.nra.org/news-issues/articles/1999/the-hidden-agenda-behind-gun-storage-la.aspx?s=hidden+agenda>, archived at <http://perma.cc/Y2TZ-8ZGT>.

¹⁹⁵ See *id.* (arguing that gun owners store their guns responsibly, and thus gun storage laws are not necessary).

¹⁹⁶ *Id.*

¹⁹⁷ E.g., Eddie Eagle Gun Safety Program, H.R. 293, 149th Gen. Assemb., Reg. Sess. (Ga. 1995-96) (adopting a resolution for “encouraging school systems in Georgia to adopt the Eddie Eagle Gun Safety Program of the National Rifle Association and commending the National Rifle Association for its development of this program”).

¹⁹⁸ In Virginia, for example, the Board of Education adopted the Elementary School Gun Safety Guidelines and Curriculum and provided that “[t]he curriculum guidelines shall incorporate principles of firearm safety accident prevention and the rules of the National Rifle Association’s Eddie Eagle Gunsafe Program.” See COMMONWEALTH OF VA., BD. OF EDUC., ELEMENTARY SCHOOL GUN SAFETY GUIDELINES AND CURRICULUM 1 (2011), archived at <http://perma.cc/K6VC-GW8H>. The Program is called “Finnigan Fox Says,” and has the slogans: “See a GUN? Leave It Alone, Leave the Area, Let an Adult Know!” *Id.*

¹⁹⁹ *Eddie Eagle: What Is the Eddie Eagle GunSafe Program?*, NRA (2012), <http://eddieeagle.nra.org>, archived at <http://perma.cc/5RTJ-6JZ2>.

²⁰⁰ For an unrelenting critique of the NRA’s approach and its gun safety program along these lines, see VIOLENCE POLICY CTR., JOE CAMEL WITH FEATHERS: HOW THE NRA WITH GUN AND TOBACCO INDUSTRY DOLLARS USES ITS EDDIE EAGLE PROGRAM TO MARKET GUNS TO KIDS (1997), archived at <http://perma.cc/P2Y7-L5RW>.

²⁰¹ *Id.* § 2 (“It’s hard to tell them that guns can be dangerous, without giving them that message that guns are bad, and that’s a delicate situation that we try to work around with . . . Eddie Eagle.” (quoting Jeffrey Poole, NRA, Managing Director of Shows and Exhibits)).

Studies, however, have not found these programs to be effective. As the American Academy of Pediatrics reports: “Gun avoidance programs are designed to educate children as a way of reducing firearm injury (e.g., Eddie Eagle, STAR); however, several evaluation studies have demonstrated that such programs do not prevent risk behaviors and may even increase gun handling among children.”²⁰²

One of the stories in the *New York Times* article on *Children and Guns* concerned an eleven-year-old boy who was so excited about gun safety class that night that he wanted to practice, and ended up killing his twelve-year-old sister.²⁰³ The Violence Policy Center, a sharp critic of the Eddie Eagle approach, offers more examples of children who had gun safety instruction nevertheless killing or injuring themselves or other children with a family gun.²⁰⁴ And three-year-old Lucas’s father thought he had taught Lucas to respect firearms and to handle his Christmas present only when an adult was present, just as thirteen-year-old Levi’s grandfather admonished him never to handle guns.

Some clues about why those parental admonitions and gun education programs might not be so effective may be found in the U.S. Supreme Court’s trio of cases explaining why the death penalty and mandatory life without parole for minors constitute cruel and unusual punishment.²⁰⁵ In *Miller v. Alabama*²⁰⁶ the Court observed certain differences between minors and adults that are applicable in other contexts. These differences help illustrate why addressing the risks that guns in the home pose to children is better achieved by supplementing gun education (focused on avoiding guns) with actual regulations requiring adults to take steps to keep children safe:

1. Children’s “lack of maturity” and “underdeveloped sense of responsibility” lead to recklessness, impulsivity, and heedless risk taking.²⁰⁷ For example, children may pick up and play with a gun, even if instructed not to do so.

²⁰² *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1420.

²⁰³ Luo & McIntire, *supra* note 168, at A1.

²⁰⁴ VIOLENCE POLICY CTR., *supra* note 200, § 3.

²⁰⁵ *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (finding mandatory “life without parole” sentences unconstitutional under the Eighth Amendment as applied to offenders who were under the age of eighteen when they committed their crimes); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that imposing “life without parole” on a minor who did not commit homicide violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (forbidding imposition of death penalty on minors who were under the age of eighteen when they committed their crimes). For background on these cases, see generally Sara E. Fiorillo, *Mitigating After Miller: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095 (2013).

²⁰⁶ *Miller*, 132 S. Ct. 2455 (2012).

²⁰⁷ *Id.* at 2458 (quoting *Roper*, 543 U.S. at 569) (internal quotation marks omitted).

2. Children “‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.”²⁰⁸ For example, even if parents and grandparents admonish children not to touch a gun unless an adult is present, children may do so anyway when they are with their peers. Or children may be vulnerable in their own home from unsafely stored guns as well as when they visit a home where guns are stored unsafely.

As the American Academy of Pediatrics elaborates: “Accompanying characteristics [of adolescence] may be curiosity, the strong influence of the peer group, rites of passage, belief in invincibility, impulsiveness, immaturity, mood swings, and substance abuse.”²⁰⁹ These characteristics and developmental differences between children and adults, gleaned from the study of child development and of neuroscience, suggest why lessons about gun safety may not be enough to make children “gun proof” or “gun safe” unless those lessons are reinforced by safe practices in the home.²¹⁰ As public health researchers put it in an article written in *Pediatrics*: “Because children cannot be made ‘gun safe,’ their environments must be made safe by removing the most dangerous guns.”²¹¹

Why not put the burden of responsibility for making the home safe on the parent/gun owner instead of making children responsible for dealing with guns they need not even encounter if guns were kept locked away? We would suggest that opposition to such laws illustrates where absolutist rights talk – rather than the Constitution itself – seems to be a problem.

A common response in discussions about whether the deaths caused by unsafe gun storage warrant a regulatory response is that the problem receives disproportionate attention, since more children die every year from swimming pool accidents than from accidental gun deaths.²¹² Thus, they contend that

²⁰⁸ *Id.*

²⁰⁹ *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1419.

²¹⁰ Brody, *supra* note 163 (reporting that North Dakota psychologists compared the NRA program with one they devised “that taught 4- and 5-year-old children behavioral skills to prevent firearm injuries,” and concluded that “such lessons were best taught at home, where most gun-related injuries occur”).

²¹¹ Judith Cohen Dollins & Katherine Kaufer Christoffel, *Reducing Violent Injuries: Priorities for Pediatrician Advocacy*, 94 *PEDIATRICS* 638, 646 (1994).

²¹² More than one person made this move when we presented this Article at the live Symposium. Adam Winkler provides a good example:

Perhaps the most powerful image in the gun control arsenal is of a young child finding her daddy’s gun and accidentally shooting herself or her little brother. Even here, however, the statistics show that the problem is far less pervasive than often believed. Less than 3 percent of firearms fatalities are caused by accidents, and only a fraction of these involved pre-adolescent children. Far more young children drown in swimming pools than die of accidental gunshot wounds.

accidental “shootings are ‘at the bottom of the list of causes of accidental harm to children.’”²¹³ Memorably, Gun Owners of America has asserted that “children are ‘130 percent more likely to die from choking on their dinner’ than from accidental gun shootings.”²¹⁴ Gun rights proponents make similar arguments about other things that are commonly found in homes and may be sources of harm to children. For example, in promoting the Eddie Eagle Safety Program as a way to protect children and promote safety, the NRA normalizes having guns in the home by stating that, “[l]ike swimming pools, electrical outlets, matchbooks and household poison, [firearms are] treated simply as a fact of everyday life.”²¹⁵ Why do gun control advocates, they counter, not regulate against these risks?²¹⁶ The swimming pool argument and similar ones about selective attention to risk supposedly demonstrate that what is really at stake is a “cultural war” over guns²¹⁷: some Americans don’t like guns, are uncomfortable around them, and hence, selectively target these childhood gun accidents rather than other sources of injury to children.

We offer several responses to this line of argument. The first is that these comparisons may rest on an undercounting of gun injuries. As the *Children and Guns* story found, many instances in which children harmed themselves or others were classified as homicides rather than accidents.²¹⁸ As one medical examiner explained: “Leaving a loaded weapon in an area where the child can easily access it is neglect in our mind. Therefore parents have failed to keep a child safe, and therefore it’s a homicide.”²¹⁹ A more accurate count, the reporters concluded, would make gun accidents “rise into the top five or six” causes of unintentional deaths among children ages one to fourteen.²²⁰ A further problem with comparing statistics is that a focus only on deaths ignores the many gun-related injuries to children, since “a vast majority of victims”

WINKLER, *supra* note 15, at 29-30.

²¹³ Luo & McIntire, *supra* note 168, at A1 (quoting an argument made by a rifle association).

²¹⁴ *Id.* (quoting statement on website of Gun Owners of America).

²¹⁵ *Eddie Eagle: What Is the Eddie Eagle GunSafe Program?*, *supra* note 199.

²¹⁶ *See id.* (implying that a gun is just another common household item, and thus should be treated as other potentially hazardous items that are not regulated).

²¹⁷ Sandy Levinson, for example, made this point at this Symposium in response to our Article. Sanford Levinson, Remarks at the Boston University Law School Symposium (Nov. 15, 2013).

²¹⁸ Luo & McIntire, *supra* note 168, at A1 (“When children are killed in unintentional shootings, medical examiners and coroners classify many as homicides, or even suicides. A detailed examination by *The New York Times* of death records, available in just a handful of states, found that official statistics appeared to understate the actual count by about half.”).

²¹⁹ *Id.* (quoting Dr. Lisa Kohler, who is a medical examiner in Summit County, Ohio, where the Lucas Heagren case occurred).

²²⁰ *Id.* (relying on data from the Center for Disease Control and Prevention for 2010).

from firearm accidents “do not die.”²²¹ A report presented in 2013 at the American Academy of Pediatrics National Conference, “United States Gunshot Violence: Disturbing Trends,” found that each year over 7000 children with gunshot wounds are admitted to hospitals in the United States.²²² The report also found that “states with higher percentages of household firearm ownership also tended to have higher proportions of childhood gunshot wounds, especially those occurring in the home.”²²³ Notably, eighty percent of the injuries involve the use of a handgun,²²⁴ the very weapon so prized by Americans (as Justice Scalia wrote in *Heller*) for defense of self and family in the home.²²⁵ Nearly a decade ago, Jane Brody observed that once one adds into the count the treatment of children in emergency rooms for “nonfatal injuries caused by a firearm,” a significant percentage of which were accidents, “firearm injuries to children remain a serious public health concern, and the sooner American families and communities recognize this and do something truly constructive to counter it, the better.”²²⁶ Notably, the recent report drew a comment from the chair of the Citizens Committee for the Right to Keep and Bear Arms that “debate about policies regarding handguns may be necessary.”²²⁷

Second, comparing pools, poisons, and so forth with guns seems to imply that no regulations or liability rules apply to these other things common to

²²¹ *Id.* More people now survive gunshot wounds “because of the spread of hospital trauma centers,” as well as “the increased use of helicopters to ferry patients, [and] better training of first-responders and lessons gleaned from the battlefields of Iraq and Afghanistan.” Gary Fields & Cameron McWhirter, *In Medical Triumph, Homicides Fall Despite Soaring Gun Violence*, WALL ST. J., Dec. 8, 2012, at A1. The authors caution that the declining homicide rates do not mean America has become less violent since “[t]he reported number of people treated for gunshot attacks from 2001 to 2011 has grown by nearly half.” *Id.*

²²² *About 7,500 Children Are Admitted to U.S. Hospitals Every Year with Gun Injuries: Study*, HUFFINGTON POST (Oct. 28, 2013, 4:59 PM), http://www.huffingtonpost.com/2013/10/28/children-gun-injuries_n_4171208.html, archived at <http://perma.cc/W3WK-S63U>.

²²³ *Id.* (internal quotation marks omitted).

²²⁴ *Id.*

²²⁵ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (“The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense].”).

²²⁶ Brody, *supra* note 163 (reporting a national study in *Pediatrics* that found that between the years 1993 and 2000, 22,661 children ages fourteen and younger “were treated in hospital emergency rooms in the United States for nonfatal injuries caused by a firearm,” and that “[m]ore than 43 percent of those injuries were accidents, and 41.5 percent were deliberate assaults”).

²²⁷ *About 7,500 Children Are Admitted to U.S. Hospitals Every Year with Gun Injuries: Study*, *supra* note 222 (reporting the view of Alan Gottlieb, who also stated that such a debate must include both the pros and cons of gun ownership, including that guns not only injure and kill, but also save lives).

homes, or that homeowners – or parents – have no duties with respect to these items. Take pools, for example. A sizeable body of case law involves litigation brought on behalf of injured or deceased children against homeowners owning pools; such litigation “is governed by traditional premises liability principles, particularly those applicable to trespassing children and social guests of all ages.”²²⁸ Such liability may be premised on inadequate supervision of minors in a pool, on the condition of the pool (including the “[a]bsence or inadequacy of safety or rescue equipment” at the pool), or on the failure to warn of certain dangers (such as diving into the pool).²²⁹ Further, precisely because “each year . . . too many young children are victims of drowning or near drowning” in swimming pools, and state legislatures “recognize[] this threat to the health and safety of children,” a number of states have pool safety laws that require safety barriers (such as fences), and that authorize drowning prevention education programs.²³⁰ Thus, swimming pools and their owners are not part of a law-free zone.

Simply because, for example, matches are commonly found in the home does not mean that parents may not be held liable when children discover them and cause a fire. Indeed, some courts have found parents guilty for criminal neglect and child endangerment when children are injured or die in such circumstances because “[e]very responsible adult should know that fire is a likely danger when children are left alone with access to matches.”²³¹ Consider also the example of household poison. Would anyone believe that parents had done enough to protect their children from such poisons if they merely engaged in an Eddie Eagle Gun Safety analogue, showing children household poison and warning them that, if they encounter it – perhaps by seeing the skull and crossbones sign – they should stop, don’t touch, leave the area, and tell an adult? Especially with children too young to read, and who explore the world by putting things in their mouths, the safer – and indeed expected – approach is to keep dangerous items out of the reach of children, whether through keeping them in a locked cabinet or otherwise out of reach.²³²

²²⁸ Robin Cheryl Miller, *Liability of Owner of Private Residential Swimming Pool for Injury or Death Occasioned Thereby*, 64 A.L.R. 5th 1, 1 (1998).

²²⁹ *Id.* at 1-3.

²³⁰ ARIZ. DEP’T OF HEALTH SERVS., OFFICE OF ENVTL. HEALTH, RESIDENTIAL POOL SAFETY NOTICE (2012), archived at <http://perma.cc/8DK5-2DU4> (summarizing the requirements of ARIZ. REV. STAT. ANN. § 36-1681 (2009)). For other state pool safety laws and state justifications for such laws, see, for example, Residential Swimming Pool Safety Act, FLA. STAT. ANN. § 515 (West 2007); CAL. DEP’T OF PUB. HEALTH, SAFETY GUIDE FOR HOME SWIMMING POOLS AND SPAS (n.d.), archived at <http://perma.cc/86DR-ESES>.

²³¹ See, e.g., *State v. Goff*, 297 Or. 635, 639 (1984) (upholding a jury verdict finding a parent guilty of child neglect where the parent “left unattended her 22-month-old child and eight-year-old child with no supervision for a period of five hours . . . in a home containing unlit matches and flammable material” and the children died in a fire).

²³² See, e.g., ILL. DEP’T OF CHILDREN & FAMILY SERVS., HOME SAFETY CHECKLIST FOR PARENTS AND CAREGIVERS (2013), archived at <http://perma.cc/FJ9C-2MRH>; Rosalyn

B. *Guns and Parental Liberty to Rear Children*

Our second point is about guns and parental liberty to rear children. For the NRA, unregulated gun ownership is part of what it means to be an American, and supporters want the ability to pass American values, including “respect for guns,” on to the next generation.²³³ In the words of Marion Hammer, the NRA’s first female president, who learned to shoot at the age of five:

Today, America has new enemies; enemies that are tearing at the fabric of our heritage and our society. Those enemies are moral decay, disrespect, parental neglect, dependence on government and phony quick-fix government solutions to complex social problems. America’s children are the victims of those enemies. Because we love our country, we have a duty to America’s youngsters. They are the future of America. We must teach them values and strengths. Teach them discipline, self-reliance, respect and honor. Teach them to love America and what it stands for. NRA’s Eddie Eagle Gun Safety program for young children is about much more than just teaching safety. Youngsters learn safety but they also learn respect for guns.²³⁴

Former NRA Chairman Charlton Heston also worried about transmitting gun ownership to the next generation and protecting Second Amendment rights for them.²³⁵

Hence, in addition to any rights under the Second Amendment, fundamental parental liberty to direct and rear one’s children under the Fourteenth Amendment – to pass along “cherished values, moral and cultural” – is also at stake.²³⁶ But, again, this parental liberty is not absolute. Returning to *Prince*, which addressed both parental liberty and religious liberty, constitutional jurisprudence distinguishes between belief and conduct: the law does not have to accept and exempt from regulation every parental act motivated by religious conscience where harm to children may ensue.²³⁷ Consider, in this regard, that although many states have spiritual treatment exemptions from medical neglect

Carson-DeWitt, *Keeping Your Child Safe from Accidents*, NYU LANGONE MED. CTR., <http://www.med.nyu.edu/content?ChunkIID=41384> (last updated Mar. 28, 2011), *archived at* <http://perma.cc/5DHL-ZPZ3>.

²³³ VIOLENCE POLICY CTR., *supra* note 200, § 1.

²³⁴ *Id.* (quoting a 1995 address by Marion Hammer to the American Legion).

²³⁵ *See id.* An *American Rifleman* September 1987 magazine cover featured “Heston surrounded by a multi-ethnic array of children” with the caption “Are Gun Rights Lost on Our Kids?” *See id.* § 1. In the article, Heston refers to “a nation of children, a couple of entire generations, that have been brainwashed into believing that the Second Amendment is criminal in origin, rather than framed within the Constitution.” *Id.*

²³⁶ *Moore v. City of E. Cleveland*, 431 U.S. 499, 504 (1976). As Justice Powell puts it in *Moore*, when explaining how the Court’s prior decisions protect the “sanctity” of the family: “It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.” *Id.* at 503-04.

²³⁷ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

laws, parental liberty under these laws is not unlimited; generally, medical care must be provided when necessary to protect the child from serious physical harm or illness.²³⁸ So while we can appreciate that for many parents, passing on traditions like hunting are vital to their way of life, we need not accept every parental act motivated by deep convictions about gun ownership and use as a way of life. Teaching children to respect guns is not precluded by laws requiring safe storing of guns to prevent children from harming themselves or others. For that matter, we do not believe that gun safety education aimed at adults and tied to the purchase and licensing of guns is an undue burden on gun rights, particularly where children will be in the adults' homes. It may be justified as an effective way to protect, or reduce risks to, children.²³⁹

C. *The Role of Marketing Guns*

Our third point concerns the role of the market in producing new customers. Let us not forget that along with reproducing a way of life – producing a next generation that values American freedoms, such as the right to bear arms – there is also an enormous commercial, economic interest at stake: gun manufacturers need the next generation to value and buy guns so they will be “replacement customers.”²⁴⁰ Gun manufacturers create advertisements aimed at children and presumably – since they cannot sell the guns directly to children – their parents. One advertisement in the online *Junior Shooters* magazine, for example, reads “Make Dad Jealous” and depicts a little girl who is encouraged to “spend the day shooting and improving your skills – without emptying dad’s wallet.”²⁴¹ Keystone Sporting Arms, for example, markets

²³⁸ See LESLIE HARRIS ET AL., CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 237-38 (3d ed. 2012) (giving an example of California’s spiritual treatment exemption and its qualification that a court shall not assume jurisdiction except when needed to protect a child from serious harm). We do not take a position in this Article about these exemptions, although we do note that the American Academy of Pediatrics strongly opposes them. Comm. on Bioethics, Am. Acad. of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS 279, 279 (1997) (“[C]hildren, regardless of parental religious beliefs, deserve effective medical treatment when such treatment is likely to prevent substantial harm or suffering or death.”).

²³⁹ Brody, *supra* note 163 (reporting in a follow-up study on a gun education program aimed at adults titled “Love Our Kids, Lock Your Guns” that “77 percent of participants, up from 48 percent, reported storing their guns in a locked compartment,” and “only 7 percent, down from 18 percent, said they were storing their guns loaded and unlocked” (internal quotation marks omitted)).

²⁴⁰ VIOLENCE POLICY CTR., *supra* note 200, § 1.

²⁴¹ Christina Wilkie & Nick Wing, *This Is What Happens When the Gun Industry Sees Kids as Customers*, HUFFINGTON POST (May 14, 2013, 8:29 AM), http://www.huffingtonpost.com/2013/05/14/gun-industry-kids_n_3248127.html, archived at <http://perma.cc/DK4Y-8QTB>; see also McIntire, *supra* note 64, at A1.

“Crickett: My First Rifle” with appealing ads featuring a boy aiming his rifle at the sunset with his faithful dog at his side.²⁴²

This advertising of guns to young children is a source of debate, particularly because some of the fatalities and injuries occur when children use child-size guns given to them by their parents.²⁴³ Last year, a five-year-old child accidentally shot and killed his two-year-old sister with his child-sized Crickett rifle. Rather than being stored safely, the rifle was “instead propped up in a corner with a bullet still inside.”²⁴⁴ That child lives in Kentucky, which has no minimum age requirement for possessing rifles or shotguns.²⁴⁵ Kentucky also exempts rifles and shotguns from the law prohibiting adults from giving children a handgun, and imposes no criminal liability for negligent storage of a firearm, even when such access causes injury or death.²⁴⁶ This tragic but preventable incident suggests the intersection of the social reproduction issue with the issue of parental responsibility, as well as whether “responsible” gun use by very small children is even possible. Thus, on one view, giving guns to small children is not questioned, because “[l]earning how to use a gun at a young age has been common for generations in rural Kentucky” and is seen as “an essential cultural component of rural tradition.”²⁴⁷ On another view (voiced by a pediatrician and coauthor of the American Academy of Pediatrics statement on guns and children), “certain things are simply too dangerous for young children to understand how to operate.”²⁴⁸

In this context gun advocates once again “push for education, not regulation.”²⁴⁹ With respect to education, consider this advice by Grits Gresham about how to use schools to reach children as future leaders and potential customers:

Unless you and I, and all who want a good climate for shooting and hunting, imprint our positions in the minds of those future leaders, we’re in trouble. . . . Schools should not be a problem as far as your business is concerned. In fact, they can be a huge asset. Think about it. Schools collect, at one point, a large number of minds and bodies that are important to your future well being. How else would you get these

²⁴² See *Crickett: My First Rifle*, CRICKETT RIFLES (2010), <http://crickett.com>, archived at <http://perma.cc/7G2N-HAXF>.

²⁴³ See *Guns Made for Kids Spark Safety Debate*, PBS NEWSHOUR (May 31, 2013), <http://www.pbs.org/newshour/extra/2013/05/guns-made-for-kids-spark-safety-debate>, archived at <http://perma.cc/Y874-YMQH>.

²⁴⁴ *Id.*

²⁴⁵ *See id.*

²⁴⁶ *Id.* (reporting information on Kentucky’s lax gun control laws).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* Notably, Keystone Firearms LLC itself promotes a gun safety program with messages like “[k]ids and guns are a dangerous combination” as well as messages for adults about safe storage. *Id.*

potential customers and future leaders together, to receive your message about guns and hunting, without the help of the schools? How much effort and expense would be involved? Schools are an opportunity. Grasp it.²⁵⁰

Even allowing for annual sales of the Bible, we do not think there is any comparable religious product associated with parental religious belief where marketers so keenly seek to reach new consumers. There is a reason that the Violence Policy Center has called Eddie Eagle “Joe Camel with Feathers.”²⁵¹ After all, he looks cool and shows up bigger than life at NRA firearms exhibits – even though the NRA claims “he does not appear where firearms are being used, displayed or sold” – as well as at gun safety programs hosted by gun sellers like Walmart.²⁵²

In addition to marketing guns made for children, gun manufacturers take steps to develop children’s interest in recreational use of firearms by donating guns, ammunition, and cash to various youth groups and by sponsoring shooting competitions.²⁵³ This youth-marketing effort stems from extensive market research funded by the gun industry, and conducted by nonprofit organizations that generated a “stronger emphasis on the ‘recruitment and retention’ of new hunters and target shooters.”²⁵⁴ Another part of this effort by firearms manufacturers is partnering with video game makers so that game sellers create websites that promote the actual weapons featured in the games.²⁵⁵ Video game manufacturers whet children’s appetite for guns, including military-type weapons.²⁵⁶

Unfortunately, here the Constitution – or at least the First Amendment absolutism of the current Supreme Court – may be a factor contributing to dysfunction in the gun control debate. In 2011, in *Brown v. Entertainment Merchants Association*,²⁵⁷ the Court struck down California’s attempt to limit the sale of violent video games to minors “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”²⁵⁸ One argument California made was that such a law would aid parental authority over children by making sure children had access to such games only if parents purchased them.²⁵⁹ The

²⁵⁰ VIOLENCE POLICY CTR., *supra* note 200, § 1 (quoting Grits Gresham, *Community Relations*, S.H.O.T. BUS., Sept./Oct. 1993, at 9).

²⁵¹ *Id.*

²⁵² *Id.* § 2 (explaining how Eddie Eagle is used to promote guns to children, and including photos of public appearances by Eddie Eagle).

²⁵³ McIntire, *supra* note 64, at A1.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).

²⁵⁸ *Id.* at 2732 (quoting CAL. CIV. CODE ANN. §§ 1746-1746.5 (West 2009)).

²⁵⁹ *Id.* at 2740.

majority found this overinclusive and insufficiently tailored, since it restricted children whose parents might not “care” if they purchased violent video games.²⁶⁰ Justice Scalia, author of the opinion, also said that there was no compelling evidence that playing such games had distinctively harmful effects on children, such as encouraging aggressive behavior.²⁶¹ He also noted that, contrary to any “longstanding tradition” of not exposing children to violent depictions in literature, American practice in schools has been the opposite.²⁶² Justice Alito, concurring, and Justice Breyer, dissenting, strongly – and we believe persuasively – argued that graphically violent interactive games were different and could have harmful effects on minors.²⁶³ Justice Breyer also persuasively appealed to the differences between minors and adults recognized in the Court’s jurisprudence to stress the vulnerability and susceptibility of children to these graphic and instructive forms of entertainment, precisely because video games are “excellent teaching tools.”²⁶⁴

D. *Guns and Public Health*

Finally, we want to make a fourth point about guns and public health. Medical organizations, such as the American Academy of Pediatrics, support efforts to educate the general public about the danger of guns and the increased risk of accidental injury and death associated with gun ownership.²⁶⁵ Some health experts look to epidemiology and public health ideas for constructive ways to address problems of gun violence in, for example, urban areas with gangs.²⁶⁶ For example, President Obama recently nominated Dr. Vivek Murthy for the office of Surgeon General. Murthy is, a member of Doctors for America, a group that identifies gun violence as a “public health crisis,” and that supports both gun control laws and “health care and evidenced [sic] based solutions to gun violence.”²⁶⁷ Intense opposition by the NRA, which has

²⁶⁰ *Id.* at 2741.

²⁶¹ *Id.* at 2739.

²⁶² *Id.* at 2736-38.

²⁶³ *Id.* at 2742, 2748 (Alito, J., concurring) (“[T]he Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before.”); *id.* at 2761, 2768 (Breyer, J., dissenting) (finding California’s interest compelling and that “[t]here are many scientific studies that support California’s view”).

²⁶⁴ *Id.* at 2767 (Breyer, J., dissenting).

²⁶⁵ *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1421.

²⁶⁶ Nocera, *supra* note 159, at A27.

²⁶⁷ DOCTORS FOR AMERICA, GUN VIOLENCE: WHAT DOES THE RESEARCH SAY? (n.d.), archived at <http://perma.cc/8AYT-KB9W>. For more on the nomination of Dr. Murthy, see Jeremy W. Peters, *Senate Balks at Obama Pick for Surgeon General*, N.Y. TIMES, Mar. 15, 2014, at A1.

dubbed Murthy a “rabidly anti-gun doctor” and a “radical gun grabber,”²⁶⁸ may “scuttle” that nomination, as Democrats from conservative states, up for reelection, fear voting for him – and against the NRA.²⁶⁹ But the NRA and gun rights proponents resist any public health framework that speaks of guns as dangerous because it makes it sound like guns – instead of criminals – are bad and dangerous.²⁷⁰ To the contrary, as we discuss above, they believe that guns should be accepted as a normal part of life, and one just needs to teach kids how to behave around them.²⁷¹

Medical organizations urge doctors to incorporate questions about “the presence and availability of firearms” into patient history inquiries.²⁷² If parents do have guns in the home, doctors should “counsel [them] about the dangers of allowing children and adolescents to have access to guns inside and outside the home.”²⁷³ In response to such medical efforts, Florida’s Firearm Owner’s Privacy Act aimed to shut down these types of questions, asserting – based on anecdotal evidence – that gun owners had been harassed and discriminated against by doctors when they would not answer a patient questionnaire about gun ownership.²⁷⁴ A court sustained a challenge by physicians, raising First Amendment rights about the practice of medicine and professional speech, pointing out that physicians routinely asked about guns, as they did about other risk factors, in order to counsel patients about safety.²⁷⁵ The law’s legislative history, the court observed, “reinforces the conclusion

²⁶⁸ *Obama’s Surgeon General Nominee Dr. Vivek Murthy Is a Radical Gun Grabber*, NRA INST. FOR LEGISLATIVE ACTION (Feb. 11, 2014), <http://www.nra.org/news-issues/in-the-news/2014/2/obama%E2%80%99s-surgeon-general-nominee-dr-vivek-murthy-is-a-radical-gun-grabber.aspx>, archived at <http://perma.cc/99T8-KYUL>; see also Emily Miller, *Obama’s Surgeon General Nominee Dr. Vivek Murthy Is a Radical Gun Grabber*, WASH. TIMES (Feb. 10, 2014), <http://www.washingtontimes.com/news/2014/feb/10/obamas-surgeon-general-nominee-dr-vivek-murthy-rad/?page=all#pagebreak>, archived at <http://perma.cc/MWF3-YVRQ>.

²⁶⁹ Peters, *supra* note 267, at A1; Paul M. Barrett, *How the NRA Defeated Obama’s Surgeon General Choice: 4 Blunt Points*, BLOOMBERG BUS. WK. (Mar. 17, 2014), <http://www.businessweek.com/printer/articles/189539-how-the-nra-defeated-obamas-surgeon-general-choice-4-blunt-points>, archived at <http://perma.cc/GNN4-NQ9R>.

²⁷⁰ See *Debunking the “Guns Don’t Kill People, People Kill People” Myth*, ARMED WITH REASON (Oct. 8, 2013), <http://www.armedwithreason.com/debunking-the-guns-dont-kill-people-people-kill-people-myth>, archived at <http://perma.cc/662H-VUDH> (providing counterarguments to the NRA’s argument that guns do not kill people, people kill people).

²⁷¹ See *supra* notes 200-01 and accompanying text.

²⁷² *Firearm-Related Injuries Affecting the Pediatric Population*, *supra* note 164, at e1421.

²⁷³ *Id.*

²⁷⁴ See *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1251 (S.D. Fla. 2012) (accepting physician plaintiffs’ argument that Florida’s Firearm Owner’s Privacy Act violated the First Amendment), appeal docketed, No. 12-14009 (11th Cir. Aug. 2012).

²⁷⁵ *Id.* at 1257, 1263.

that the law places restrictions on only one subject matter – firearm ownership” – and that it did so because it viewed policies (like that of the American Academy of Pediatrics) “encouraging and recommending that physicians ask about firearms” as a “problem that the law would rectify.”²⁷⁶ The court held that physicians should be able to engage in truthful, non-misleading speech to patients, including about guns and possible risks associated with them, and how to store them safely.²⁷⁷

We would argue that gun safety measures to protect children from the dangers of guns in the home should readily be upheld as constitutional, whether under a form of intermediate scrutiny or an undue burden standard.²⁷⁸ Again, while the U.S. constitutional framework affirms a private realm of family life and the privacy of the home, that privacy is not absolute and is not unduly burdened by medical practice aimed at taking a public health approach to ameliorating risks to children by encouraging responsible gun storage.

CONCLUSION: GUN RIGHTS WITH RESPONSIBILITIES AND REGULATION

Now that *Heller*²⁷⁹ and *McDonald*²⁸⁰ have invalidated two of the most restrictive gun control laws in the United States, we imagine that many of the remaining laws will survive the appropriate test, whether a form of intermediate scrutiny or an undue burden standard. Indeed, since those decisions, courts have upheld most gun laws against constitutional challenges²⁸¹ and we expect that they will continue to do so. We certainly would expect that most gun control measures proposed in the wake of the Newtown massacre would survive such scrutiny. Even so, the largest obstacle may be actually passing the measures in the first place. This should come as no surprise, because gun rights are taken very seriously in the United States. Gun rights proponents are well represented in the legislative bodies in this country. Few rights are more sacrosanct in our constitutional culture than the individual right to keep and bear arms. Recent efforts to pass responsible gun control regulations have proven the truth of the line from Jimmie Rodgers’s song, “Pistol Packin’ Papa”: “And if you don’t want to smell my smoke, don’t monkey with my gun!”²⁸²

²⁷⁶ *Id.* at 1261.

²⁷⁷ *Id.* at 1267.

²⁷⁸ We acknowledge that in *Heller* the Court rejected this rationale for the D.C. law, but that law was far more restrictive than the kinds of regulations we discuss in this Section. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁷⁹ *Id.* at 570.

²⁸⁰ *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010).

²⁸¹ See *supra* note 63 and accompanying text.

²⁸² RODGERS, *supra* note 40.

APPENDIX

*Pistol Packin' Papa*²⁸³

I'm a pistol packin' papa, and when I walk down the street
You can hear those mamas shoutin': Don't turn your gun on me!
Now girls, I'm just a good guy, and I'm goin' to have my fun
And if you don't want to smell my smoke, don't monkey with my gun!
Like a hobo when he's hungry, like a drunk man when he's full
I'm a pistol packin' papa, I know how to shoot the bull
The hold-up men all know me, and they sure leave me be
I'm a pistol packin' papa, and I ramble where I please
When I have that funny feeling, that lorryin'²⁸⁴ rambler call
I swing aboard some freight train, and I shoot my pistol off
Sometimes one shot will do me, sometimes takes four or five
Sometimes I shoot all around, before I'm satisfied
When you hear my pistol poppin', you better hide yourself some place
'Cause I ain't made it for stoppin', and I come from a shootin' race
My sweetheart understands me, she says I'm her big shot
I'm her pistol packin' daddy, and I know I've got the drop
You can have my Newport roadster, you can take my hard boiled hat
But you can never take from me my silver-mounted gat²⁸⁵
I'm a pistol packin' papa, I'm goin' to have my fun
Just follow me and you will hear the barking of my gun

²⁸³ *Id.*

²⁸⁴ Evidently means riding on a lorry, or "hoboing."

²⁸⁵ Slang for "pistol."