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## ARTICLES

### OF GUNS, ABORTIONS, AND THE UNRAVELING RULE OF LAW

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## INTRODUCTION

CONSERVATIVES across the nation are celebrating. This past Term, in *District of Columbia v. Heller*,<sup>1</sup> the Supreme Court held for the first time in the nation's history that the Second Amendment protects an individual right, unrelated to military service, to keep and bear arms.

I am unable to join in the jubilation. *Heller* represents a triumph for conservative lawyers. But it also represents a failure—the Court's failure to adhere to a conservative judicial methodology in reaching its decision. In fact, *Heller* encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.

In this Article, I compare *Heller* to another Supreme Court opinion, *Roe v. Wade*.<sup>2</sup> The analogy seems unlikely; *Roe* is the opinion perhaps most disliked by conservatives, while many of those same critics are roundly praising *Heller*. And yet the comparison is apt. In a number of important ways, the *Roe* and *Heller* Courts are guilty of the same sins.

Both decisions share four major shortcomings: an absence of a commitment to textualism; a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; a failure to respect legislative judgments; and a rejection of the principles of federalism. These failings have two things in common. First, each represents a rejection of neutral principles that counseled restraint and deference to others regardless of the issues involved. Second, each represents an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves.

The tale of the judiciary in American history is a story with high and low points from which it is difficult to draw a consistent lesson. There have been moments where the Court has heroically rejected judgments by the elected branches of government,<sup>3</sup> and moments where the Court shamefully refused to do so.<sup>4</sup> But if any one theme emerges when looking at the role of the courts in American his-

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<sup>1</sup> 128 S. Ct. 2783 (2008).

<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>4</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).

tory, it is this: when the channels of democracy are functioning properly, judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it.

These principles should be uncontroversial. Many of the most respected jurists in our nation's history have written against judicial imperialism. Consider Justice Brandeis's warning to judges that "we must be ever on our guard, lest we erect our prejudices into legal principles."<sup>5</sup> Or Justice Cardozo's admonition that the judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."<sup>6</sup> Or Justice Holmes's warning that a constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."<sup>7</sup>

It does no good to recount the Court's misadventures when it failed to heed these fundamental maxims of modesty, deference, and restraint. Suffice it to say the caution befitting the judiciary's interpretive task and unelected station is periodically forgotten—often to the accompaniment of short-term applause but at the expense of long-term institutional respect. In both *Roe* and *Heller* the Court claimed to find in the Constitution the authority to overrule the wishes of the people's representatives. In both cases the constitutional text did not clearly mandate the result, and the Court had discretion to decide the case either way. And in both cases the majority was challenged for exercising its discretion to promote the Justices' own policy preferences.

It is the solemn duty of judges on the inferior federal courts to follow, both in letter and in spirit, rules and decisions with which we may not agree. Our oath demands it, and our respect for the Supreme Court as an institution and for the able and dedicated individuals who serve on it requires no less. But esteem can likewise be manifest in the respectful expression of difference—that too is

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<sup>5</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>6</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921), *quoted in* Robert A. Sedler, *The Constitution, the Courts and the Common Law*, 53 *Wayne L. Rev.* 153, 157 n.11 (2007).

<sup>7</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

the essence of the judicial craft. *Roe* and *Heller* are by any measure two of the most important decisions of the modern judicial era. They now together cast a long shadow over contemporary constitutional law. Law's power to shape human conduct depends on its perceived legitimacy as much as on the threat of force that stands behind its commands.<sup>8</sup> Law is seen as legitimate only if it lays down rules applicable to all, rules that are enforced day-in and day-out, in good times and bad, for conservative and liberal ends, for policies the Justices like and for those they do not. *Roe* and *Heller* do not meet this basic requirement. Each decision discarded the tenets of restraint that alone make the application of neutral principles possible, and *Heller* found the Justices in both camps at odds with positions they had earlier and passionately espoused.

The dilemma is an especially acute one for Justice Antonin Scalia. No one has more consistently or eloquently exposed the flaws of the *Roe* decision. In his opposition, the Justice did far more than mount a challenge to the constitutional law of abortion. Rather, he took to task the whole methodology for which *Roe* stands. His is a powerful legacy—if, that is, *Heller* does not detract. To his credit, the Justice undertook the inquiry into the Framers' original intentions that was missing in *Roe*. While *Heller* can be hailed as a triumph of originalism, it can just as easily be seen as the opposite—an exposé of original intent as a theory no less subject to judicial subjectivity and endless argumentation as any other. *Roe*'s flaw was not just that it was anti-originalist, but that it was inimical to the values of textualism, self-restraint, separation of powers, and federalism as well. These values too were central to the Framers' design and intent. These values too are the solid foundation of conservative thought. Unlike the aggressive brand of originalism practiced in *Heller*, these values alone guarantee that the judiciary will resist the lasting temptation to enshrine its own preferences in law.

*Heller* has swept away these counsels of caution. It has left only originalism as the foundation of conservative jurisprudence. A set of reasonable tenets, each providing a separate check on judicial activism, has now been replaced by a singular focus on original understanding. Whereas once legal conservatism demanded that

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<sup>8</sup> See generally Tom R. Tyler, *Why People Obey the Law* (2006).

judges justify decisions by reference to a number of restraining principles, *Heller* requires that they only make originalist arguments supporting their preferred view. Yet originalism cannot bear the weight that the *Heller* majority would place upon it. Originalism, though important, is not determinate enough to constrain judges' discretion to decide cases based on outcomes they prefer. Some may see *Heller's* originalism as the answer to the judicial legislation practiced in *Roe*, but as I will show in this Article, the two approaches lead to the same bad consequences.

It is astonishing that two decisions supported by such different majorities would share so many of the same infirmities. Part I critiques *Roe* and *Heller* for recognizing a substantive right grounded in an ambiguous constitutional text. Part II argues that *Roe* did, and *Heller* will, lead the Court into a dense political thicket that it would do best to avoid. Part III discusses legislative and judicial competence, and argues that legislatures are better positioned to address the tough issues surrounding gun and abortion rights. Part IV contends that both *Heller* and *Roe* rejected the principles of federalism that conservatives ought to cherish.

Above all, I write in the hope that there are more important values at stake here than even rights to guns and choice. It may no longer be possible to judge a Supreme Court ruling by anything other than result. The time may have passed when judicial process matters. It may all be bottom line: gun rights enthusiasts rush to hail *Heller* as pro-choice advocates hailed *Roe*. Who can blame them? Many gun regulations may be quite ill-advised; many restrictions on abortion may be most intrusive. But before popping the champagne on the Supreme Court's latest edict, maybe someone should wonder whether we purchase today's victory at the cost of tomorrow's freedom. The largest threat to liberty still lies in handing our democratic destiny to the courts.

#### I. FASHIONING NOVEL SUBSTANTIVE RIGHTS

*Roe* and *Heller* share a significant flaw: both cases found judicially enforceable substantive rights only ambiguously rooted in the Constitution's text. I will first document some of the criticisms of *Roe* on this point. I will then show that these same criticisms can be made of the *Heller* decision.

## A. Roe

In 1973, the Supreme Court in *Roe v. Wade* and *Doe v. Bolton*<sup>9</sup> held that a woman's right to end her pregnancy was a fundamental one under the Fourteenth Amendment's Due Process Clause. In doing so, the Court set forth a rigid set of constitutional rules restricting the state's regulation of abortion. During the first trimester of pregnancy, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"; after the first trimester and prior to viability of the fetus, "the State . . . may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health"; while after viability, "the State . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>10</sup>

*Roe* has been criticized because of the absence of any relationship between this newly-discovered right to abortion and the text or structure of the Constitution. While the Court declared a right to personal privacy as the basis of its decision, it is a long trek from the liberty protected by due process to a general right of privacy; a longer journey still from a general privacy right to a specific right to induce an abortion; and a longer distance still from a right to abort a fetus to the elaborate trimester framework set forth in the Court's decision. Without some way to point to some evidence that the Constitution has anything at all to say about abortion, *Roe* was subject to the criticism that the Justices in the majority had simply enacted their policy preferences into constitutional law.

The Justices should never have attempted to find substantive rights in what was at best an ambiguous constitutional provision. The difference between substantive and procedural due process is an important one in Fourteenth Amendment law. To be sure, the point should not be pushed to extremes, as salutary substantive decisions like *Loving v. Virginia*,<sup>11</sup> *Pierce v. Society of Sisters*,<sup>12</sup> and

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<sup>9</sup> 410 U.S. 179 (1973).

<sup>10</sup> *Roe*, 410 U.S. at 164-65.

<sup>11</sup> 388 U.S. 1 (1967).

<sup>12</sup> 268 U.S. 510 (1925).

*Meyer v. Nebraska*<sup>13</sup> make clear.<sup>14</sup> But the dichotomy is there. When the concept of due process—which most naturally suggests procedure—is deployed to limit substantive political options, judges begin to assume a legislative mien. When the Constitution clearly and unequivocally enunciates an issue of substantive right, judges explicating those rights are at their most judicial.

The creation of *new* substantive constitutional rights is one of the biggest steps the Supreme Court can take. Society is a defined balance between individual and community. When rights are enumerated, courts are empowered to strike the balance; when they are not enumerated, or only ambiguously so, the balance is set by democracy. To confuse the two is to slight communal claims to shared values. Because the history of substantive due process rights is so laden with land mines,<sup>15</sup> the ground beneath the judicial foot in *Roe* should have been absolutely firm. *Roe* was a flawed decision because the Court found in the Due Process Clause a set of complex rules governing the substantive right to abortion that are not even remotely suggested by the text or history of the Fourteenth Amendment—or any other source that should bear on legal interpretation, as opposed to the legislative craft.

Quite apart from the Fourteenth Amendment, there is a broader point to be made about the judiciary's creation of substantive rights not explicit, or at best ambiguously indicated, in the constitutional text. Inasmuch as Article III does not provide the judiciary with prescriptive authority in the manner that Article I, Section 8, for example, provides the Congress, it behooves the judiciary to be cautious in creating for itself new substantive—and hence prescriptive—power that the Constitution did not clearly envision.

The Justices should thus never have divined a complicated set of directives regarding abortion in the sparsely worded Due Process Clause. On the Court itself, the dissenters in *Roe* and *Bolton* em-

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<sup>13</sup> 262 U.S. 390 (1923).

<sup>14</sup> The cases all overturned laws that represented the worst sort of bias toward racial (*Loving*), religious (*Pierce*), or ethnic (*Meyer*) minorities. It would be odd for defenders of *Heller* or *Roe* to use them as a basis for substantive rights creation. I am also not persuaded by the argument that because the Court prior to *Roe* announced certain non-textual rights—see, for example, *Skinner v. Oklahoma*, 316 U.S. 535 (1942)—that the Court in *Roe* and thereafter was free to embark upon a course of loose substantive rights recognition.

<sup>15</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

phasized the anti-textual nature of the decision. Finding “nothing in the language or history of the Constitution to support the Court’s judgment,” Justice White accused the majority of “simply fashion[ing] and announc[ing] a new constitutional right” and called the decision “an exercise of raw judicial power.”<sup>16</sup> Then Justice Rehnquist questioned whether a right of privacy forbade the Texas law at issue in *Roe*, arguing that “the ‘privacy’ that the Court finds here [is not] even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment . . . .”<sup>17</sup>

The original dissenters reiterated these and other critiques in subsequent abortion cases. In *Thornburg v. American College of Obstetricians & Gynecologists*,<sup>18</sup> Justice White argued that the principle of *stare decisis* did not justify continued adherence to *Roe*, for “decisions that find in the Constitution *principles or values that cannot fairly be read into that document* usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.”<sup>19</sup> White noted that “the [Constitution’s] text obviously contains no references to abortion, nor, indeed, to pregnancy or reproduction generally; and, of course, it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion.”<sup>20</sup> Justice White set forth his approach to constitutional interpretation, arguing that it is appropriate for the Court to safeguard specifically enumerated constitutional rights, but that

[w]hen the Court . . . defines as “fundamental” liberties that are nowhere mentioned in the Constitution . . . it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court

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<sup>16</sup> *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

<sup>17</sup> *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

<sup>18</sup> 476 U.S. 747 (1986).

<sup>19</sup> *Id.* at 787 (White, J., dissenting) (emphasis added).

<sup>20</sup> *Id.* at 789.

has done nothing more than impose its own controversial choices of value upon the people.<sup>21</sup>

In his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>22</sup> Chief Justice Rehnquist elaborated upon his earlier critique of the holding in *Roe*. Neither the Court's precedent nor "the historical traditions of the American people support the view that the right to terminate one's pregnancy is 'fundamental,'" the Chief Justice argued.<sup>23</sup> *Roe* was wrongly decided because "the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent 'with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does.'"<sup>24</sup>

Justice Scalia was not on the Court when *Roe* was decided, but he has criticized it unreservedly in the abortion decisions in which he has participated. The absence of any textual basis for *Roe* continued to be the flash point. In his concurrence in *Ohio v. Akron Center for Reproductive Health*,<sup>25</sup> Justice Scalia contended that "[the] right to abortion . . . is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution."<sup>26</sup> In his separate opinion in *Webster v. Reproductive Health Services*,<sup>27</sup> Justice Scalia argued for reversal of *Roe*, contending that "our retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court."<sup>28</sup> In his separate opinion in *Hodgson v. Minnesota*<sup>29</sup> Justice Scalia insisted that he would continue dissenting from what he described as "this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."<sup>30</sup> In his dissent in *Ca-*

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<sup>21</sup> Id. at 790.

<sup>22</sup> 505 U.S. 833 (1992).

<sup>23</sup> Id. at 951–52 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

<sup>24</sup> Id. at 953 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989) (plurality opinion)).

<sup>25</sup> 497 U.S. 502 (1990).

<sup>26</sup> Id. at 520 (Scalia, J., concurring).

<sup>27</sup> 492 U.S. 490 (1989).

<sup>28</sup> Id. at 535 (Scalia, J., concurring in part and concurring in the judgment).

<sup>29</sup> 497 U.S. 417 (1990).

<sup>30</sup> Id. at 480 (Scalia, J., concurring in the judgment in part and dissenting in part).

sey, in which the Court famously upheld the core holding in *Roe*, Justice Scalia reaffirmed his view that *Roe* was wrongly decided:

The issue [in this case] is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed.<sup>31</sup>

While *Roe* has had many defenders, to be sure,<sup>32</sup> criticism from outside the Court has been fierce. Some commentators were outraged that the Court did not hold that fetuses were persons under the Fourteenth Amendment, thus making legalized abortion unconstitutional.<sup>33</sup> The most common reaction, however, has been discomfort with the shaky legal foundation of the Court's judgment. Gerald Gunther professed his inability to find "a satisfying rationale to justify *Roe* . . . on the basis of modes of constitutional interpretation I consider legitimate."<sup>34</sup> According to Alexander Bickel, the Court "refused the discipline to which its function is properly subject. It simply asserted the result it reached. This is all the Court could do because moral philosophy, logic, reason, or other materials of law" could not resolve the question of whether abortion should be permitted.<sup>35</sup> Richard Epstein criticized "the comprehensive legislation which Mr. Justice Blackmun (with the concurrence of six brethren) has enacted in the name of the Due Process Clause of the Constitution."<sup>36</sup> John Hart Ely chastised the

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<sup>31</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>32</sup> See, e.g., Walter Dellinger & Gene B. Sperling, Abortion and the Supreme Court: The Retreat from *Roe v. Wade*, 138 U. Pa. L. Rev. 83 (1989); Ronald Dworkin, Unenumerated Rights: Whether and How *Roe* Should Be Overruled, 59 U. Chi. L. Rev. 381 (1992); Philip B. Heymann & Douglas E. Barzelay, The Forest and the Trees: *Roe v. Wade* and Its Critics, 53 B.U. L. Rev. 765 (1973).

<sup>33</sup> See, e.g., Robert M. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807 (1973); Charles E. Rice, The Dred Scott Case of the Twentieth Century, 10 Hous. L. Rev. 1059 (1973).

<sup>34</sup> Gerald Gunther, Commentary, Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects, 1979 Wash. U. L.Q. 817, 819.

<sup>35</sup> Alexander M. Bickel, The Morality of Consent 28 (1975).

<sup>36</sup> Richard A. Epstein, Substantive Due Process by any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 180.

Justices for issuing an opinion that “is *not* constitutional law and gives almost no sense of an obligation to try to be.”<sup>37</sup> Ely deplored the Court for announcing a “super-protected right . . . not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”<sup>38</sup> Before her elevation to the Supreme Court, then-Judge Ruth Bader Ginsburg—a passionate defender of legal equality for women—argued that “*Roe* ventured too far in the change it ordered”<sup>39</sup> and that the Court’s justification was “incomplete.”<sup>40</sup>

Remarkably, the criticism continues from all quarters and has not abated with the passage of time. The result in *Roe* remains without any rationale that its defenders could comfortably call home. Even defenders of *Roe* have admitted that the holding should have been reached on a different basis, though on what basis remains unclear. The recent and revealingly entitled book *What Roe v. Wade Should Have Said* contained a number of pieces by legal scholars, most of which were attempts by supporters of the outcome in *Roe* to put the Court’s judgment on surer constitutional ground.<sup>41</sup> Erwin Chemerinsky has argued that the opinion would have been better justified if it had protected the right to abortion as a “private moral judgment.”<sup>42</sup> Donald Regan,<sup>43</sup> Justice Ginsburg,<sup>44</sup> and others<sup>45</sup> have suggested that *Roe* should have been written as an equal protection case. For many observers, the decision “symbolized, more than any other case, the risk that constitutional law might be nothing more than judicial value judgments”; these

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<sup>37</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 947 (1973).

<sup>38</sup> *Id.* at 935–36 (footnote omitted).

<sup>39</sup> Ruth Bader Ginsburg, *Essay, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. Rev.* 375, 381 (1985).

<sup>40</sup> *Id.* at 382.

<sup>41</sup> See *What Roe v. Wade Should Have Said* (Jack M. Balkin ed., 2005).

<sup>42</sup> Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 *Buff. L. Rev.* 107, 126–28 (1982).

<sup>43</sup> See Donald H. Regan, *Rewriting Roe v. Wade*, 77 *Mich. L. Rev.* 1569 (1979).

<sup>44</sup> See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1199–200 (1992).

<sup>45</sup> See, e.g., Robin West, *Concurring in the Judgment, in What Roe v. Wade Should Have Said*, *supra* note 41, at 121, 121–35.

critics consider the case “our generation’s *Lochner* . . . the preeminent symbol of judicial overreaching.”<sup>46</sup>

The stakes of this debate can hardly be overstated. It is no exaggeration to say that *Roe* gave rise to the modern conservative legal movement. The decision came to stand for the worst kind of judicial overreaching; a generation of conservative lawyers came of age in its shadow. Conservatism was all those things that *Roe* was not, the movement’s virtues illumined by *Roe*’s vices. It became all the more crucial therefore that the conservative denunciation of *Roe* be accompanied by the principled application of those neutral principles that *Roe* had violated: textualism; structuralism; federalism; historicism; and plain old modesty and restraint. For the attack on *Roe* would appear over time to be hollow if its assailants were to practice an unprincipled activism of their own. So the challenge to conservatism was clearly to transcend the parties or interests or even the results involved, and to lead the way back to a rule of law whose distinct and separate nobility would discredit the stark forays into policy practiced by the judiciary in some of the more questionable periods of its history. Unfortunately, as I discuss in the next Section, conservatism has not met this challenge.

### B. Heller

There is now a real risk that the Second Amendment will damage conservative judicial philosophy as much as the Due Process Clause damaged its liberal counterpart. The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>47</sup> In those twenty-seven words, the Court found an individual, judicially-enforceable right—unconnected to military service—to keep and bear handguns at least for self-defense in the home.<sup>48</sup>

This has placed the very basis of the conservative attack on *Roe* at risk. After decades of criticizing activist judges for this or that defalcation, conservatives have now committed many of the same

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<sup>46</sup> Cass R. Sunstein, Comment, *in* What *Roe v. Wade* Should Have Said, *supra* note 41, at 248, 249.

<sup>47</sup> U.S. Const. amend. II.

<sup>48</sup> See *Heller*, 128 S. Ct. at 2817–18.

sins. In *Heller*, the majority read an ambiguous constitutional provision as creating a substantive right that the Court had never acknowledged in the more than two hundred years since the amendment's enactment. The majority then used that same right to strike down a law passed by elected officials acting, rightly or wrongly, to preserve the safety of the citizenry. To be sure, the *Heller* dissenters' claims of dedication to democratic processes can hardly be squared with decades of overturning legislative restrictions on abortion. Indeed, the new activism of the majority and new restraint of the dissents might cause both the advocates of gun activism and abortion activism from the bench to blush. The setback to conservative legal theory is, however, unique, because the vociferous opposition to *Roe* placed upon conservatives a special obligation to avoid the pitfalls that the search for congenial results presents.

It can, of course, be readily agreed that of the two decisions, *Roe* involved the more brazen assertion of judicial authority. *Heller* differs from *Roe* in important respects. Most strikingly, the text of the Constitution alludes to a right "to keep and bear arms," but it does not so much as mention a right to abortion. There is a big difference between when the text says something (whatever that something may be), and when it says absolutely nothing.

Second, the cases use history in markedly different ways. *Heller* made an extended inquiry into history to determine the "[n]ormal meaning" of the amendment as understood by people at the time it was written.<sup>49</sup> In contrast, *Roe* did not look to history to interpret an ambiguous textual phrase. Nor did it look to history for a tradition of protection for abortion—no such history exists. Instead, the Court's discussion of history was mostly spent explaining away ancient, common law and statutory prohibitions on abortion to prove that this history did not preclude finding a constitutional right to abortion.<sup>50</sup>

Next, *Heller* struck down a draconian law, one that completely banned handgun possession at home. That law was one of the strictest in the nation.<sup>51</sup> In contrast, the *Roe* Court struck down

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<sup>49</sup> Id. at 2788.

<sup>50</sup> See *Roe*, 410 U.S. at 129–41 (concluding that recent regulations on abortion were more restrictive than historical regulations).

<sup>51</sup> See D.C. Code § 7–2507.02 (2001); *Heller*, 128 S. Ct. at 2817–18.

Texas's prohibition on abortion *and* the much more moderate Georgia law that merely regulated abortion. The Court in *Roe* and *Doe* cut a wide swath through all sorts of state laws, while *Heller*, at least initially, cut down only the most extreme variety.

Finally, *Heller*'s actual holding is narrower than *Roe*'s. The rationale of its holding—that the Second Amendment embodies an individual right to bear arms—is sure to call many gun restrictions into question, but the application of that rationale, invalidating a statute forbidding handguns in the home for self-protection, is much narrower.<sup>52</sup> *Roe*, in contrast, established from the start a detailed trimester framework.<sup>53</sup> Unlike *Roe*, no page in *Heller* reads like a statute.

So *Heller* is not *Roe*. But to say that *Heller* was marginally more justified than *Roe* is not saying much—surely the bar of justification for judicial intervention has not been set so low. It would be a sad mistake for defenders of *Heller* to treat *Roe* as a floor, such that all decisions less egregious in their methods are in some way acceptable. This cannot be. The requirements of the rule of law are not so relative. Fidelity to true judicial values requires that judges impartially apply neutral principles of law, not merely be *more* principled than the other side.

Thus, despite a difference in the magnitude of judicial overreaching, the methodological similarities between *Roe* and *Heller* are large. Both cases interpreted ambiguous constitutional provisions and both claimed to find in them mandates that put to rest an extremely controversial issue of social policy, in the process overturning decisions by popularly elected officials. If there is a reasonable case for the majority's interpretation of the Second Amendment, there is also a reasonable case for the position taken by the dissenters. Stuart Taylor, for example, noted that he found Justice Scalia's argument for striking down the District of Columbia's handgun ban "persuasive. But then I studied the dissents by liberal Justices John Paul Stevens and Stephen Breyer and found them pretty persuasive, too."<sup>54</sup> Taylor found himself on the fence for an

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<sup>52</sup> Specifically, the Court only held that citizens have the right to keep an operable handgun at home for self-defense. *Heller*, 128 S. Ct. at 2818–19.

<sup>53</sup> See *Roe*, 410 U.S. at 164–65.

<sup>54</sup> Stuart Taylor Jr., *Torn by the Past: D.C. Gun Case Shows Shortcomings of Originalism*, *Legal Times*, July 7, 2008, at 44, 44.

obvious reason: namely that “the justices’ exhaustive analyses of the text and relevant history do not definitively resolve the ambiguity inherent in the amendment’s curious wording.”<sup>55</sup>

When a constitutional question is so close, when conventional interpretive methods do not begin to resolve the issue decisively, the tie for many reasons should go to the side of deference to democratic processes. For a court that decides to strike down legislation based on an interpretation of the Constitution that is only plausible and not incontrovertible will appear to the public to be exercising discretion. And when a court appears to be exercising that discretion in a way that arguably accords with the political preferences of the judges in the majority—as was the case in *Heller*—more members of the public lose faith in the idea that justice is blind. For as Taylor continues, “even though all nine justices claimed to be following original meaning, they split angrily along liberal-conservative lines perfectly matching their apparent policy preferences, with the four conservatives (plus swing-voting Justice Anthony Kennedy) voting for gun rights and the four liberals against.”<sup>56</sup> The upshot of all this argumentation is that both sides fought into overtime to a draw. And the argumentative exchange, even under the guise of an originalist inquiry, came perilously close to recreating *Roe*’s fundamental misapprehension—namely that law is politics pursued by other means.

What is lacking in *Heller* is what was lacking in *Roe*: the sort of firm constitutional foundation from which to announce a novel substantive constitutional right. Consider the text of the Second Amendment. Does the Amendment’s prefatory clause limit the scope of the right found in the operative clause, or merely explain its justification? Justice Scalia, rejecting the arguments made by professors of linguistics and English to the contrary,<sup>57</sup> dismissed quickly the possibility that the prefatory clause could restrict the operative clause,<sup>58</sup> and concluded that the right in the operative clause need only be “consistent with the announced purpose” in

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<sup>55</sup> Id. at 45.

<sup>56</sup> Id. at 44.

<sup>57</sup> See Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners, District of Columbia v. Heller, 128 S. Ct. 2783 (No. 07-290) [hereinafter Linguists’ Brief].

<sup>58</sup> *Heller*, 128 S. Ct. at 2789.

the prefatory clause.<sup>59</sup> Justice Stevens in his dissent called this approach “novel” and not in keeping with conventional interpretive methods.<sup>60</sup> He argued that rather than attempting to determine the meaning of the operative clause independently of the prefatory clause, and then checking to make sure that the meaning of the operative clause is “consistent with the announced purpose,” the Court should have read the two clauses together.<sup>61</sup> Both sides cite support for their vigorously defended positions.<sup>62</sup>

Is “keep and bear arms” a construction that refers specifically to military uses, or does it mean the personal right to possess and carry firearms? Justice Scalia brings forth founding era dictionaries and treatises, English and colonial laws, and legal scholarship supporting his claim that the phrase is not restricted to military uses,<sup>63</sup> while to buttress his opposing claim Justice Stevens marshals an amicus brief by linguistics professors, an eighteenth-century treatise on synonymous words, and a different edition of one of the same dictionaries on which Justice Scalia relies.<sup>64</sup>

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<sup>59</sup> Id. at 2790.

<sup>60</sup> Id. at 2826 (Stevens, J., dissenting) (“That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.”).

<sup>61</sup> Id. (quoting *Heller*, 128 S. Ct. at 2790 (majority opinion)).

<sup>62</sup> See id. at 2789–90 (majority opinion) (citing Fortunatus Dwaris, *A General Treatise on Statutes* 268–69 (Platt Potter ed., 1871); Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 42–45 (2d ed. 1874); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 814–21 (1998)); *Heller*, 128 S. Ct. at 2826 n.7 (Stevens, J., dissenting) (citing Dwaris, *supra*, at 268, 269; 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.04, at 146 (rev. 5th ed. 1992)).

<sup>63</sup> Id. at 2791–97 (majority opinion) (citing, *inter alia*, An Act for the Trial of Negroes, 1797 Del. Laws ch. XLIII, § 6, *in* 1 *The First Laws of the State of Delaware* 102, 104 (John D. Cushing ed., 1981 (pt. 1)); Pa. Declaration of Rights § XIII, *in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3082, 3083 (Francis Newton Thorpe ed., 1909); 4 William Blackstone, *Commentaries on the Laws of England* 55 (3d ed. 1769); 1 Timothy Cunningham, *A New and Complete Law Dictionary* (1771); 1 William Hawkins, *A Treatise of the Pleas of the Crown* 26 (1771); 1 Samuel Johnson, *A Dictionary of the English Language* 107 (5th ed. 1773); 30 *Journals of the Continental Congress* 349–51 (John C. Fitzpatrick ed., 1934); Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 *Tex. L. Rev.* 237, 261 (2004)).

<sup>64</sup> Id. at 2827–30 (Stevens, J., dissenting) (citing, *inter alia*, Linguists’ Brief, *supra* note 57, at 19; 1 Samuel Johnson, *A Dictionary of the English Language* (2d ed. 1755); 1 John Trusler, *The Distinction Between Words Esteemed Synonymous in the English Language* 37 (3d ed. 1794)).

As to pre-enactment history, the two sides went at it again. Each, not surprisingly, found the history to support its own view of the text. The majority looked to the British and American historical background of the Second Amendment, and determined that it confirms the conclusion that the Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>65</sup> Englishmen were “extremely wary of concentrated military forces run by the state” and “jealous of their arms” in light of Charles II’s and James II’s attempts to disarm their political opponents,<sup>66</sup> while the colonists had bad memories of George III’s attempts to disarm them.<sup>67</sup> The founders must indeed have thought the right to bear arms unconnected with military service fundamental, the majority stated.<sup>68</sup> Further, the Court argued that similar state constitutional amendments before (and after) the drafting of the Second Amendment reinforced its interpretation of the right at stake.<sup>69</sup> Justice Stevens countered by arguing that these state constitutional provisions each “embedded the phrase [‘keep and bear arms’] within a group of principles that are distinctly military in meaning.”<sup>70</sup> Focusing on the drafting history of the amendment, Justice Stevens found in it support for the claim that the Framers meant to limit the Amendment to military uses of weapons.<sup>71</sup> Some pre-Bill of Rights amendments proposed by several states deliberating ratification of the Constitution “focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies,” while others were worded more broadly, and would have protected a right to bear arms unconnected to military service.<sup>72</sup> “Faced with all of these options, it is telling that James Madison chose to craft the Second Amendment as he did. . . . [I]t is clear,” Justice Stevens argued, “that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms.”<sup>73</sup> The Amendment was motivated by “an overrid-

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<sup>65</sup> Id. at 2797 (majority opinion).

<sup>66</sup> Id. at 2798.

<sup>67</sup> Id. at 2799.

<sup>68</sup> Id. at 2798.

<sup>69</sup> Id. at 2802–03.

<sup>70</sup> Id. at 2834 (Stevens, J., dissenting).

<sup>71</sup> Id. at 2833–37.

<sup>72</sup> Id. at 2833.

<sup>73</sup> Id. at 2833–35.

ing concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger."<sup>74</sup>

The debate over post-enactment developments was every bit as lively. The majority cited post-enactment commentary on the Second Amendment,<sup>75</sup> post-Civil War legislative history,<sup>76</sup> as well as a number of nineteenth-century cases<sup>77</sup> all suggesting that the Amendment established an individual right to bear arms unconnected to military service. But the very range of sources consulted by the majority carries with it the danger of selectivity, that is, picking and choosing from a vast array of materials those that appear to support the preferred result. Justice Stevens criticized the sources as "shed[ding] only indirect light on the question before us, and in any event offer[ing] little support for the Court's conclusion."<sup>78</sup> Further, Justice Stevens argued that such sources were equivalent to "postenactment legislative history,"<sup>79</sup> against which Justice Scalia had inveighed in earlier cases, calling it a "contradiction in terms."<sup>80</sup> Justice Scalia defended "the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification,"

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<sup>74</sup> Id. at 2836.

<sup>75</sup> Id. at 2805–07 (majority opinion) (citing, inter alia, 2 Blackstone's Commentaries 143 (St. George Tucker ed., 1803); William Rawle, *A View of the Constitution of the United States of America* 122 (1825); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1891, at 747 (1833); Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery* 117–18 (1849)).

<sup>76</sup> Id. at 2809–11 (citing, inter alia, H.R. Rep. No. 41-37, at 7–8 (3d Sess. 1871) (statement of Rep. Butler); Joint Comm. on Reconstruction, H.R. Rep. No. 39-30, pt. 2, at 229 (1st Sess. 1866) (Proposed Circular of Brigadier General R. Saxton); Cong. Globe, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy); id. at 1073 (statement of Rep. Nye)).

<sup>77</sup> See id. at 2807–09 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490–91 (1850); *United States v. Sheldon* (Mich. 1829), in 5 *Transactions of the Supreme Court of the Territory of Michigan 1825–1836*, at 337, 346 (William Wirt Blume ed., 1940); *Aldridge v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen. Ct. 1824)).

<sup>78</sup> Id. at 2837 (Stevens, J., dissenting).

<sup>79</sup> Id. at 2837 n.28.

<sup>80</sup> Id. (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part)).

as “a critical tool of constitutional interpretation” necessary to a thorough and exhaustive inquiry into originalist meaning.<sup>81</sup>

With respect to precedent, Justice Scalia distinguished the cases—notably *United States v. Cruikshank*,<sup>82</sup> *Presser v. Illinois*,<sup>83</sup> and *United States v. Miller*<sup>84</sup>—appearing to view the Second Amendment right as a collective one,<sup>85</sup> while Justice Stevens contended that they foreclosed the Court’s interpretation.<sup>86</sup> And so on. I need not completely rehash the debate about the right at stake in *Heller*; the story is simple. For every persuasive thrust by one side, the other has an equally convincing parry.<sup>87</sup> The argumentative style of the debate would not be unfit for opposing advocates in a trial. Just as a plaintiff and a defendant each brings forth its expert witnesses who unequivocally testify in favor of their side’s view of the facts, so does each set of Justices marshal its authorities to cite for its preferred position on the Second Amendment’s meaning.

What is a neutral observer left with? Each of the points on which the two sides take issue ends inconclusively. It is hard to look at all this evidence and come away thinking that one side is clearly right on the law. After a careful analysis, Mark Tushnet has concluded that “the arguments about the Second Amendment’s meaning are in reasonably close balance,”<sup>88</sup> and that given this indeterminacy, people’s positions on the Second Amendment’s meaning will have more to do with their ideas about policy than with legal principle.<sup>89</sup> Tushnet’s thesis is borne out by the opinions in *Heller*. Each side seems to have—as Justice Scalia accused the majority of doing by relying on sociological studies in *Roper v. Simmons*<sup>90</sup>—“look[ed] over the heads of the crowd and pick[ed] out its friends.”<sup>91</sup>

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<sup>81</sup> Id. at 2805 (majority opinion) (emphasis omitted).

<sup>82</sup> 92 U.S. 542 (1875).

<sup>83</sup> 116 U.S. 252 (1886).

<sup>84</sup> 307 U.S. 174 (1939).

<sup>85</sup> *Heller*, 128 S. Ct. at 2812–16.

<sup>86</sup> Id. at 2842–46 (Stevens, J., dissenting).

<sup>87</sup> Cf. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 521–35 (1960) (describing contradictory canons of statutory interpretation as “thrusts” and “parries”).

<sup>88</sup> Mark V. Tushnet, *Out of Range: Why the Constitution Can’t End the Battle over Guns* xvi (2007).

<sup>89</sup> Id. at 116–17.

<sup>90</sup> 543 U.S. 551 (2005).

<sup>91</sup> Id. at 617 (Scalia, J., dissenting).

In this freewheeling enterprise, each side travels through time and across the ocean assembling its eclectic array of support for its position. While originalism has many virtues—chiefly an encouragement of historical inquiry and an emphasis on the lawmakers’ meaning—it was hardly intended to sanction such untethered inquiries into contradictory signals extending up to a century after the operative event. In the face of such equivocal evidence, plausibly supporting both the majority and dissenting positions, the choice before the Court was a discretionary one. *Heller* was wrong because the majority exercised its discretion to assert judicial supremacy in a manner, I will argue, that will place the courts in the same position envisioned by the judicial supremacists in *Roe*. Justice Stevens and his fellow dissenters should have prevailed—not because Justice Stevens’s analysis of the Second Amendment was more persuasive, but simply because it was equally so: “[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law.”<sup>92</sup>

*Heller* was not a case of statutory interpretation, where the Court is obliged to weigh close arguments and find the better answer. And even in the statutory arena, there exist interpretive maxims that accord the benefit of the doubt on the most difficult questions to Congress<sup>93</sup> and the states.<sup>94</sup> If *Heller* now stands for the opposite proposition—that ties in constitutional adjudication are to go to the interventionist—then *Roe*’s vision of judicial primacy will be well on its way. For, like *Roe*, *Heller* is not just a run-of-the-mill constitutional case defining the contours of a long-recognized right. Rather, the textual ambiguity in *Heller* goes to the very existence of an individual right, not its scope; the case involved the creation

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<sup>92</sup> *Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting) (citations omitted).

<sup>93</sup> See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 843–45 (1984) (explaining that, in cases of ambiguity, deference is given to the interpretation of the agency with whom Congress has entrusted enforcement of the statute).

<sup>94</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (finding that the clear statement rule requires that the federal government speak with clarity if it intends to override the traditional prerogative of the states when acting pursuant to the Commerce Clause in addition to Section 5 of the Fourteenth Amendment).

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of a new substantive constitutional right that had not been recognized in over 200 years.

If further evidence that *Heller* veered toward judicial lawmaking is needed, one can find it in the majority's statement:

[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>95</sup>

As Justice Breyer notes, the Court does not explain why these restrictions are embedded in the Second Amendment.<sup>96</sup> The Constitution's text, at least, has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy. The *Heller* majority seems to want to have its cake and eat it, too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right. In short, the Court wishes to preempt democracy up to point. But up to what point and why? Justice Scalia eloquently warned the majority in *Casey* that

[T]he American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, . . . then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.<sup>97</sup>

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<sup>95</sup> *Heller*, 128 S. Ct. at 2816–17 (majority opinion).

<sup>96</sup> *Id.* at 2869–70 (Breyer, J., dissenting).

<sup>97</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis omitted).

Thus the dangers of letting “value judgments” drive constitutional interpretation. *Roe* was rightfully criticized not simply because it was an anti-originalist opinion, but because it was anti-democratic, allowing the Justices to make “value judgments” that belonged to the people themselves.

Some observers may be tempted to view *Heller* as a revenge of sorts for *Roe*. One substantive constitutional right deserves another: a sort of judicial tit-for-tat.<sup>98</sup> Without *Heller*, the course of constitutional law may seem a one-way ratchet, where one side creates a succession of new rights, and the other has no counter. But payback is no solution to what ails constitutional law. For the game of dueling activist Constitutions will become too painful to watch, and the reputational loss to law from the programmatic assumption of political authority will become too great to bear.

To sum up: *Heller* represents a form of judicial activism that is new, yet familiar. The novelty results from *Heller*'s basis in originalism. But this new activism cannot be justified as an exercise in originalism because originalism did not dictate the outcome in *Heller*. To pretend otherwise is to close one's eyes to the subjective choices that originalism allows. Like the choice to consult sources that extend one century after the amendment's enactment in order to discover a meaning that was not apparent to the Court for over two centuries. Or the choice to cut loose from the Constitution a preamble that also reflected the Framers' views and that set the context in which the amendment was to be read. Or the choice to toss overboard like tea in Boston Harbor the Framers' insight of federalism and to ship the Framers' design of separation of powers out to sea. It was only by making these choices—so familiar in their pliability to substantive ends—that the majority in *Heller* found its originalist case to be conclusive.

For a time, conservatives offered a different way: a republican virtue of restraint that held in check the strongest of judicial wills. Now, both sides are playing the same game. The majority won the battle in *Heller*; the dissenters will win battles in the future, as judi-

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<sup>98</sup> See Richard A. Posner, In Defense of Looseness, *The New Republic*, Aug. 27, 2008, at 32, 33 (“The idea behind the decision . . . may simply be that turnabout is fair play. Liberal judges have used loose construction to expand constitutional prohibitions beyond any reasonable construal of original meaning; and now it is the conservatives' turn.”).

cial appointments become ever more shaped by the ebb and flow of politics and the sense that many of the great issues of the age, now including gun control, will be settled not by the ballot but in the courts. For when the fog of battle clears, it will be plain that the true casualty of *Heller* was the same casualty as in *Roe*: the right of the American people to decide the laws by which they shall be governed.

## II. DESCENDING INTO THE POLITICAL THICKET

*Heller* is similar to *Roe* for another reason: both decisions placed courts in the middle of political thickets. By finding an individual right to bear arms in the Second Amendment, the Court called into question the whole complex maze of federal, state, and local gun control regulations. As courts get drawn farther into the gun control thicket, they will be forced, as they were by *Roe*, to decide contentious questions without clear constitutional guidance.

### A. *Roe*

The notion of the thicket has a venerable lineage. Justice Frankfurter first cautioned the Court about the dangers of the thicket in the context of legislative apportionment.<sup>99</sup> He warned against delving into issues of “extraordinary complexity” that judges are not “equipped to adjudicate by legal training or experience or native wit,” and where the “contending forces of partisan politics” often meet.<sup>100</sup> Because of this, Justices Frankfurter and Harlan warned that the issue of apportionment was better left to the legislative branches as it had been for hundreds of years.<sup>101</sup> Justice Scalia, too, warned against the dangers of the thicket in his plurality opinion rejecting intervention into the treacherous area of political gerrymandering.<sup>102</sup>

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<sup>99</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>100</sup> *Baker v. Carr*, 369 U.S. 186, 323–24 (1962) (Frankfurter, J., dissenting).

<sup>101</sup> *Id.* at 268 (Frankfurter, J., dissenting); *id.* at 337 (Harlan, J., dissenting); see also *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting) (“What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible.”).

<sup>102</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 278–91 (2004) (plurality opinion).

The political process was badly unrepresentative, however, before the Warren Court's reapportionment decisions. No such malfunction was identified to justify the prospect of cascading litigation and the difficulties of extraction in the area of abortion law. Thus prescient warnings of the thicket have reverberated through conservative criticism of the Court's abortion jurisprudence since *Roe* was decided in 1973.

The full extent of *Roe*'s infirmities only became apparent with the passage of time, as courts were drawn further and further into an array of subsidiary technical questions regarding abortion. The Supreme Court alone has decided more than twenty-five cases involving abortion.<sup>103</sup> Lower courts have decided many more.<sup>104</sup> Courts have decided cases involving the constitutionality of informed consent requirements from the woman undergoing an abortion,<sup>105</sup> mandatory waiting periods,<sup>106</sup> parental notification and consent requirements,<sup>107</sup> spousal notification and consent requirements,<sup>108</sup> judicial bypass procedures for notification requirements,<sup>109</sup> a lack of funding for non therapeutic

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<sup>103</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); see also NARAL Pro-Choice Am. Found., U.S. Supreme Court Decisions Concerning Reproductive Rights 1965–2007, <http://www.prochoiceamerica.org/assets/files/Courts-SCOTUS-Choice-Cases.pdf> (listing cases).

<sup>104</sup> See Lynn D. Wardle, *Rethinking Roe v. Wade*, 1985 BYU L. Rev. 231, 238 & n.41 (1985) (noting that lower federal courts decided over 250 cases involving abortion between 1973 and 1985 alone).

<sup>105</sup> See, e.g., *Akron I*, 462 U.S. at 444.

<sup>106</sup> See, e.g., *id.* at 449–51.

<sup>107</sup> See, e.g., *Hodgson*, 497 U.S. at 422–23.

<sup>108</sup> See, e.g., *Casey*, 505 U.S. at 887–98.

<sup>109</sup> See, e.g., *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643–44 (1979).

abortions,<sup>110</sup> zoning ordinances excluding abortion clinics,<sup>111</sup> medical requirements for abortion procedures,<sup>112</sup> partial-birth abortion procedures,<sup>113</sup> and regulations regarding the disposal of fetal remains.<sup>114</sup> As one critic put it, “Every new round of abortion cases draws the federal judiciary more deeply into the morass of detail-regulation involving increasingly strained applications of the abortion privacy doctrine.”<sup>115</sup>

The Court’s entanglement is perhaps best exemplified by its decision in *Casey*. This decision is startling for the number of issues presented and their technical nature. The Court considered the constitutionality of the Pennsylvania spousal notification requirement, informed consent requirement, parental notification requirement and judicial bypass procedure, a medical emergency exception to these requirements, and requirements that facilities report various information about the woman, her medical history, and the physician performing the procedure.<sup>116</sup> The Court’s analysis of these issues was detailed, debatable, and inescapably arbitrary. The decision also demonstrates how far the Court had come since *Roe*. As the Court delved into subsidiary issues, the constitutional standard mutated to accommodate the broad array of issues and the need for judicial discretion in resolving them: it went from what was to have been the authoritative trimester framework in *Roe* to an eye-of-the-beholder “undue burden” test applied in *Casey*.<sup>117</sup>

It is almost inevitable that courts will get caught up in the thicket when ruling on issues such as these without clear constitutional guidance. Consider just one of the subsidiary questions cast up by *Roe*—that of parental consent. The Court considered parental consent requirements and judicial bypass procedures no less than eight

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<sup>110</sup> See, e.g., *Maier v. Roe*, 432 U.S. 464, 466 (1977).

<sup>111</sup> See, e.g., *W. Side Women’s Servs. v. City of Cleveland*, 573 F. Supp. 504, 506, 523–24 (N.D. Ohio 1983).

<sup>112</sup> See, e.g., *Planned Parenthood Ass’n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476, 494 (1983).

<sup>113</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007).

<sup>114</sup> See, e.g., *Akron Ctr. for Reprod. Health v. City of Akron*, 651 F.2d 1198, 1211 (6th Cir. 1981).

<sup>115</sup> Wardle, *supra* note 104, at 249.

<sup>116</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844, 900 (1992).

<sup>117</sup> *Id.* at 876.

times in sixteen years.<sup>118</sup> Initially in *Danforth*, the Court held that under the *Roe* framework, a “blanket provision” requiring written consent of a parent is unconstitutional during the first trimester because it gives a third party an “absolute, and possibly arbitrary, veto” over the abortion decision without a sufficient state interest to justify the requirement.<sup>119</sup> Three years later, the Court confronted a parental consent requirement that provided a judicial bypass procedure.<sup>120</sup> The Court held that such a requirement could be constitutional if the judicial bypass procedure provides the minor an opportunity to show that she is mature enough to make the abortion decision independently or that receiving an abortion is in her best interests.<sup>121</sup> States responded to these constitutional directives from the Court by amending their statutes and thereby presenting the Court with even more choices. For example, in *Hodgson*, the Justices disagreed over whether there were a different *constitutional* standard for one-parent versus two-parent notification requirements.<sup>122</sup> As Justice Scalia noted, “One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions.”<sup>123</sup> Finally, in *Casey*, the Court further refined the constitutional test by holding that it is constitutional for the state to require that parents give *informed* consent after a mandatory 24-hour waiting period because these requirements have “particular force with respect to minors.”<sup>124</sup>

The struggle over parental consent requirements shows how courts creating landmark rights inevitably become ensnared in sub-

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<sup>118</sup> *Id.* at 899–900; *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502, 510–19 (1990); *Hodgson v. Minnesota (Hodgson)*, 497 U.S. 417, 461, 497–501; *City of Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416, 440 (1983); *Planned Parenthood Ass’n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476, 490–94 (1983); *H.L. v. Matheson*, 450 U.S. 398, 406–11 (1981); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643–51 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–75 (1976).

<sup>119</sup> *Danforth*, 428 U.S. at 74.

<sup>120</sup> *Bellotti II*, 443 U.S. at 643–51.

<sup>121</sup> *Id.* (striking down parental consent requirement because judicial bypass procedure did not satisfy this standard).

<sup>122</sup> *Hodgson*, 497 U.S. at 420, 423 (upholding two-parent consent requirement with judicial bypass procedure).

<sup>123</sup> *Id.* at 480 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>124</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899–900 (1992).

sidiary questions. As states reacted to Supreme Court rulings and amended their abortion statutes, the Court was forced to draw finer and finer distinctions in order to determine the constitutionality of these provisions. Ultimately, and inevitably, the Court had created a detailed set of regulations resembling an Abortion Code. Whether the Court were acting more like a legislature or an agency may be unclear, but it was not performing as a court.

The dangers of entering such a morass are exceeded only by the difficulties of extrication from it. Repudiating *Roe* at this late date would leave egg on lots of faces. No one breathlessly anticipates the renunciation of decisions and doctrines in which the Justices over time have become deeply invested. But continuing to fine-tune abortion law is not a happy prospect either.

The volume and complexity of *Roe*'s progeny have consumed judicial resources. The technicality of the issues has forced courts to draw arbitrary lines. The volatility of the questions has made courts look value-laden and political. And many of the issues presented have forced courts to make decisions outside the realm of judicial competency.<sup>125</sup> Justice Scalia once described the Court's abortion jurisprudence as "wanderings in [a] forsaken wilderness" that the Court should "get out of"—an area "where we have no right to be, and where we do neither ourselves nor the country any good by remaining."<sup>126</sup> The potential now exists for the same to be said about the Court's new fling with the Second Amendment.

### B. Heller

Perhaps in some odd sense, the decision to create a new blockbuster constitutional right can be compared to the decision to launch an invasion. The landmark decision is the easy part; the difficulty comes in the aftermath. The flags flutter at the initial constitutional foray, and then the conflict settles down into a prolonged and politicized trench warfare, with the courts as the generals of both lines.

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<sup>125</sup> For example, in the Court's most recent abortion decision, the Court decided whether a certain type of partial-birth abortion procedure is ever safer than other types of partial-birth abortion and, therefore, medically necessary to preserve the health of the mother. *Gonzales v. Carhart*, 550 U.S. 124, 161–67 (2007).

<sup>126</sup> *Casey*, 505 U.S. at 986 n.4, 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

Just as in *Roe*, the Court in *Heller* is now facing a thicket of subsidiary issues that will thoroughly ensnare it if it applies anything but the most deferential standard of review.<sup>127</sup> The Court has invited future challenges by not defining the scope of the right to bear arms, by not providing a standard of review for firearms regulation, and by creating a list of exceptions to the newfound personal Second Amendment right. The cases filed since *Heller* and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire.

Some have praised *Heller* as a minimalist ruling,<sup>128</sup> for the Court purported to decide only two narrow issues: whether an “absolute prohibition of handguns held and used for self-defense in the home” is constitutional,<sup>129</sup> and whether a requirement that any lawful firearm in the home be disassembled or trigger locked, and thereby “kept inoperable at all times,” is constitutional.<sup>130</sup> The Court held that these prohibitions struck at the core of the newly personalized Second Amendment right, and therefore, are unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”<sup>131</sup> Because the District of Columbia laws at issue were some of the strictest in the country,<sup>132</sup> and in the Court’s mind clearly unconstitutional, the actual holding of the opinion does not provide much guidance for future cases. The Court did not even provide a standard of review.<sup>133</sup> Instead, by simply rejecting rational basis review and describing a

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<sup>127</sup> This also assumes that the Second Amendment will be incorporated against the states. For a full discussion of this assumption, see Section IV, *infra*.

<sup>128</sup> Cass Sunstein has suggested that *Heller*, like *Griswold v. Connecticut*, 381 U.S. 479 (1965), “is a narrow ruling with strong minimalist features.” See Cass R. Sunstein, Second Amendment Minimalism: *Heller* as *Griswold*, 122 Harv. L. Rev. (forthcoming) 3, 14, 20–21, available at <http://ssrn.com/abstract=1204942>. The whole point, however, is that *Griswold* did not remain confined to a right to use birth control in the bedroom, but foreshadowed the rise of *Roe* itself.

<sup>129</sup> *Heller*, 128 S. Ct. at 2822.

<sup>130</sup> *Id.* at 2817–18. The statute did not include a self-defense exception.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2818. The Court emphasized the restrictiveness of the ban: “handguns are the most popular weapon chosen by Americans for self-defense in the home, and a *complete prohibition* of their use is invalid.” (emphasis added).

<sup>133</sup> *Id.* at 2817–18 (holding that the D.C. law would be unconstitutional under any standard for enumerated rights and therefore not specifying the appropriate standard).

robust right to self-defense,<sup>134</sup> the Court created “an open invitation to challenge every gun law.”<sup>135</sup>

The Court did provide some guidance to lower courts by addressing potential limits on the right to bear arms, but what those limits are and what rationale now justifies them remain open—and litigious—questions. The Court suggested that laws prohibiting the carrying of concealed weapons would be constitutional because these laws had historically been lawful under analogous state constitutional provisions.<sup>136</sup> The Court also stated that

nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>137</sup>

Just how these regulatory exceptions came to be “presumptively lawful” and what other exceptions exist await future litigation. Perhaps the list of exceptions was an attempt to offer guidance and forestall future cases, similar to the Court’s attempt in *Roe* to tidy the landscape with a “clear” trimester framework. But just as the trimester framework did not fulfill this promise and save the Court from resolving complex medical and legislative issues, the Court’s guidance in *Heller* cannot possibly anticipate even a tiny fraction of the questions lurking in the complex array of firearms regulation across the United States.

The Court also recognized one important across-the-board limit on the right to bear arms: it only protects the types of weapons that are commonly used for “lawful purposes like self-defense” and al-

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<sup>134</sup> *Id.* at 2817–18 n.27 (rejecting rational basis). The Court also rejected Justice Breyer’s interest-balancing approach. *Id.* at 2821.

<sup>135</sup> Posting of Erwin Chemerinsky to CATO Unbound, *The Heller Decision: Conservative Activism and its Aftermath*, Reaction Essay, <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/the-heller-decision-conservative-activism-and-its-aftermath/> (July 25, 2008, 11:31); see also Glenn H. Reynolds & Brannon P. Denning, *Heller’s Future in the Lower Courts*, 102 *Nw. U. L. Rev. Colloquy* 406, 406 (2008) (noting that *Heller* did not specify a standard of review and therefore “litigants have a rare opportunity to write on a *tabula* much more *rasa* than is ordinarily the case in constitutional litigation”).

<sup>136</sup> *Heller*, 128 S. Ct. at 2816.

<sup>137</sup> *Id.* at 2816–17.

lows the prohibition of “dangerous and unusual weapons.”<sup>138</sup> This limit was not at issue in *Heller* because it involved a handgun prohibition. The Court reasoned that handguns were clearly within the types of weapons covered by the Second Amendment because they are the “most popular weapon chosen by Americans for self-defense in the home.”<sup>139</sup>

Although the limits that the Court announced were not directly at issue in *Heller*, they were quickly tested in the courts—the “avalanche of Second Amendment claims” has already begun.<sup>140</sup> The day that *Heller* was decided, suit was filed against the City of Chicago challenging its ban on handgun registration and its re-registration requirement for other firearms.<sup>141</sup> The next day, the National Rifle Association filed five lawsuits challenging handgun prohibitions in Chicago, in the suburbs of Chicago, and in public housing in San Francisco.<sup>142</sup> Many motions based on *Heller* were also filed in pre-existing criminal cases.<sup>143</sup> Some of these motions have already been denied by courts that have upheld the constitutionality of various gun control regulations, including a prohibition on the possession of firearms by felons,<sup>144</sup> a prohibition on the pos-

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<sup>138</sup> *Id.* at 2815–17.

<sup>139</sup> *Id.* at 2818; see also *id.* at 2817 (noting that handguns are the type of weapon “that is overwhelmingly chosen by American society for [self-defense]”).

<sup>140</sup> See Posting of Dennis A. Henigan to CATO Unbound, *The Heller Paradox: A Response to Robert Levy*, Reaction Essay, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/> (July 16, 2008, 10:01).

<sup>141</sup> Complaint, *McDonald v. City of Chicago*, No. 08-3645 (N.D. Ill. June 26, 2008); see also Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/new-case-tests-second-amendments-reach/> (June 27, 2008, 11:37).

<sup>142</sup> Complaint, *Nat’l Rifle Ass’n v. S.F. Housing Auth.*, No. 08-3112 (N.D. Cal. June 27, 2008); Complaint, *Nat’l Rifle Ass’n v. City of Chicago*, No. 08-3697 (N.D. Ill. June 27, 2008); Complaint, *Nat’l Rifle Ass’n v. City of Evanston*, No. 08-3693 (N.D. Ill. June 27, 2008); Complaint, *Nat’l Rifle Ass’n v. Village of Morton Grove*, No. 08-3694 (N.D. Ill. June 27, 2008); Complaint, *Nat’l Rifle Ass’n v. Village of Oak Park*, No. 08-3696 (N.D. Ill. June 27, 2008); see also Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/links-to-new-gun-rights-lawsuits/> (July 1, 2008, 17:52); NRA Press Release, *NRA Files Second Amendment Lawsuits in Illinois and California Following Supreme Court Ruling* (June 27, 2008), <http://www.nraila.org/Legislation/Read.aspx?ID=4053>.

<sup>143</sup> See Postings of Eugene Volokh to *The Volokh Conspiracy*, [http://www.volokh.com/posts/chain\\_1215395769.shtml](http://www.volokh.com/posts/chain_1215395769.shtml) (July 7–Aug. 5, 2008) (listing post-*Heller* court orders and decisions).

<sup>144</sup> See, e.g., *U.S. v. Robinson*, No. 07-CR-202, at \*1 (E.D. Wis. July 23, 2008) (denying motion to dismiss and upholding 18 U.S.C. § 922(g)(1) ban on possession of firearms by a felon).

session of firearms on post office property,<sup>145</sup> and a prohibition on the possession of machine guns.<sup>146</sup>

The cases and motions filed almost immediately after *Heller* may seem to have clear answers. In some, plaintiffs challenged handgun prohibitions that were similar to those at issue in *Heller* and are likely to be struck down. In others, criminal defendants challenged gun control regulations that were explicitly listed as “presumptively lawful” in *Heller* and are likely to be upheld. But even simple cases foreshadow complicated questions. For example, if the Second Amendment only protects a right to bear arms for the purpose of self-defense, what type of proof suffices that someone sought the weapon for some other purpose? What classes of persons may be presumed to possess a weapon for other than self-defensive purposes and what classes of weapons may be presumed non self-protective? Can a municipality that wants strict gun control regulations simply ban the possession of weapons outside the home—for example, in the car? Does the right to bear arms protect the possession of weapons for purposes other than purely self-defense—for recreational pursuits, for the protection of property, or for the protection of others?

Similar issues are raised by the “presumptively lawful” regulations. The Court stated that “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” are “presumptively lawful.”<sup>147</sup> What are the scope and rationale of these exceptions to the Second Amendment? Can a nonviolent felon be prohibited from owning firearms? What procedures must be followed before someone is constitutionally classified as “mentally ill” and thereby stripped of his Second Amendment rights? Would a park qualify as a “sensitive place” where guns could be banned in order to protect children even if it left other users of the park defenseless? Even the *Heller*

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<sup>145</sup> See, e.g., *U.S. v. Dorosan*, No. 08-042, at \*6 (E.D. La. June 30, 2008) (denying motion to dismiss and holding that *Heller* does not invalidate ban on firearms on U.S. Post Office property).

<sup>146</sup> See, e.g., *U.S. v. Fincher*, 538 F.3d 868, 874 (8th Cir. Aug. 13, 2008) (holding that Second Amendment does not protect right to possess machine guns).

<sup>147</sup> *Heller*, 128 S. Ct. at 2816–17 & n.26.

majority confessed that the “presumptively lawful” regulations leave scores of questions. In response to the criticism that *Heller* would create uncertainty, the Court reassured us that “there will be time enough to expound upon the historical justifications for those exceptions we have mentioned if and when those exceptions come before us.” But the Court’s statement is not reassuring at all; instead, it is an admission that there is a long hard slog ahead. Even if *Heller* itself sought to be simple, it has simply opened the door.

Just a few weeks after *Heller* was decided, the plaintiff in *Heller* filed a second lawsuit that tests the boundaries of the new individual right to bear arms and presents highly contestable issues.<sup>148</sup> While some of the questions were mooted when the D.C. Council repealed certain gun restrictions in an effort to head off congressional action,<sup>149</sup> the initial suit in *Heller II* is illustrative of the types of issues that are likely to arise. The plaintiffs challenged three main aspects of the amended D.C. statute: the prohibition of machine guns,<sup>150</sup> the requirements for registering guns,<sup>151</sup> and the restrictions on gun storage in the home.<sup>152</sup> This would have immediately drawn courts into ancillary issues left unanswered by *Heller*.

Although the Court in *Heller* suggested that the Second Amendment only protects weapons “in common use” and allows the prohibition of “dangerous and unusual weapons,” including machine guns, the plaintiffs argued that the D.C. statute’s ban on machine guns was too broad.<sup>153</sup> The definition of “machine gun” included any semiautomatic weapon “which shoots, is designed to shoot, or can be readily converted or restored to shoot . . . more than 12 shots without manual reloading,” even if the owner did not have a magazine with the capacity to shoot more than 12 shots

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<sup>148</sup> There were two other plaintiffs to the suit as well. See Complaint, *Heller v. District of Columbia (Heller II)*, No. 08-1289 (D.D.C. July 28, 2008). See also Posting of Lyle Denniston to SCOTUSblog, New Second Amendment case in D.C., <http://www.scotusblog.com/wp/new-second-amendment-case-in-dc/> (July 28, 2008, 17:31).

<sup>149</sup> See Local Rule 16.3 Report at 2, *Heller II*, No. 08-1289 (Oct. 2, 2008) (reflecting the parties’ agreement that the Second Firearms Control Emergency Amendment Act of 2008, if enacted permanently, moots Counts I and III of the Complaint).

<sup>150</sup> Complaint at 4–5, 8–9, *Heller II*, No. 08-1289.

<sup>151</sup> *Id.* at 5–6, 9.

<sup>152</sup> *Id.* at 6, 9–10.

<sup>153</sup> *Heller*, 128 S. Ct. at 2815–17 (discussing *United States v. Miller*, 307 U.S. 174 (1939)).

without manual reloading.<sup>154</sup> The plaintiffs, who had 6-cartridge and 10-cartridge magazines, argued that this interpretation of “machine gun” included guns that were protected by the Second Amendment because they were “in common use” for lawful purposes.<sup>155</sup> The plaintiffs argued further that semiautomatic pistols made up the majority of handguns possessed in the United States and, therefore, just as the handgun ban was unconstitutional in *Heller* because it prohibited an “entire class” of weapons lawfully used for self-defense, the D.C. machine gun ban also infringed on the core Second Amendment right.<sup>156</sup> This assertion would require the courts to decide *how many shots* a gun must be able to fire without manual reloading before it is too uncommon, and therefore, no longer protected by the Second Amendment. Such a line will to say the very least be arbitrary, but it is inevitable when dealing with detailed gun control regulations designed to test the constitutional limits of the Second Amendment. The constitutional standard could also require further refinements based on the ability of a semiautomatic weapon to be modified and converted into a validly prohibited weapon—a highly technical determination that is hardly answered by the Constitution or within most judges’ competence. As *Heller II* illustrates, the “in common use” standard is so vague as to provide an invitation to litigate. And because the weapons in common use for lawful purposes will inevitably change over time, even the answers provided by litigation will be inherently unstable.

The other allegations in the complaint presented similar types of issues. The plaintiffs argued that the gun registration requirements were onerous and the imposition of a fee for ballistic identification testing was unconstitutional.<sup>157</sup> They pointed to the requirements that gun owners take a written test, pass a vision test, have their fingerprints taken, undergo a background check, and pay a fee, that pistols be submitted for ballistics identification tests, and the potential delay these requirements would cause in issuing registrations.<sup>158</sup> The court was asked to decide whether each of these re-

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<sup>154</sup> D.C. Code § 7-2501.01(10) (2001); see also Complaint at 4, *Heller II*, No. 08-1289.

<sup>155</sup> Complaint at 3, *Heller II*, No. 08-1289.

<sup>156</sup> *Id.* at 3, 4–5, 8.

<sup>157</sup> *Id.* at 5–6, 9.

<sup>158</sup> *Id.* at 5–6, 7, 9.

quirements infringed on the right to bear arms for self-defense, even though they did not approach the complete ban at issue in *Heller*. All this sounds dangerously like the subsidiary issues considered in *Casey* under the “undue burden” test.

The other main allegation was that it was unconstitutional to require that guns be disassembled or secured by a trigger lock unless the gun were being used for self-defense against a “reasonably perceived threat.”<sup>159</sup> The addition of the self-defense exception was clearly in response to the Court’s decision in *Heller*, and it provoked a new set of questions about the effectiveness of trigger locks in preventing serious accidents in the home and the costs they impose on self-defense.<sup>160</sup> While the battle royal over the D.C. gun regulations was postponed because threatened congressional action caused the D.C. Council to repeal many of the restrictions,<sup>161</sup> the issues are bound to arise in other jurisdictions lacking the District’s special relationship with Congress. The echoes of *Roe* are eerie: legislative responses to judicial decisions posed more and more intricate questions to the courts. And similar to what happened in the abortion context, it is easy to see how answers to these questions will quickly turn into a constitutional gun control code, drafted by none other than the judiciary.

*Heller II* only begins to express the difficulty of the questions on the horizon. There are roughly six main types of gun-control regulations: laws regulating classes of weapons, the sale of weapons, gun dealers, gun ownership, mandated safety precautions, and crime detection measures.<sup>162</sup> The specific laws are much more complex and vary widely between federal, state, and local regulations. They include laws regulating assault weapons, large capacity ammunition magazines, handguns, types of ammunition, restrictions on who can purchase weapons including mental health, minimum age, and domestic violence restrictions, background check re-

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<sup>159</sup> *Id.* at 6, 9–10. See also D.C. Code § 7-2507.02 (as amended July 16, 2008 by the Firearms Control Emergency Amendment Act of 2008).

<sup>160</sup> See Part III *infra*.

<sup>161</sup> See D.C. Code § 7-2501.01 *et seq.* (“Second Firearms Control Emergency Amendment Act of 2008”).

<sup>162</sup> See Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws ii* (2008), available at [http://www.firearmslawcenter.org/library/reports\\_analyses/RegGuns.entire.report.pdf](http://www.firearmslawcenter.org/library/reports_analyses/RegGuns.entire.report.pdf) [hereinafter *Regulating Guns in America*].

quirements, mandatory waiting periods, restrictions on bulk purchases, licensing requirements for gun dealers, licensing for gun owners, registration requirements, restrictions on carrying concealed weapons, safety requirements such as trigger locks and minimum design specifications, crime detection measures such as ballistic identification requirements and retention of background check records, and prohibitions of guns in government buildings and universities.<sup>163</sup> This array of issues rivals and may exceed the number and complexity of subsidiary issues that were eventually decided by courts in the aftermath of *Roe*. Furthermore, these issues are apparent just on the face of current gun-control regulations, but it is likely that states will adjust their laws as Second Amendment cases are decided and will further test the constitutional limits. Just as in the abortion context, this will force courts to devise progressively narrower distinctions between permissible and impermissible regulations, thereby drawing them further into the quagmire.

Take the area of restrictions on firearm possession by perpetrators of domestic violence, where we would expect courts to show the most deference because of the obvious state interest in protecting potential victims of domestic violence abuse. Even in this area of greatest deference, questions abound and provide fodder for multiple lawsuits, no matter their likelihood of success. Can a legislature constitutionally prohibit persons who have been convicted of a “misdemeanor crime of domestic violence” from possessing firearms?<sup>164</sup> What if the offender did not use a firearm and only attempted to use physical force?<sup>165</sup> What if the offender has moved to a different state from the former victim? What if the offender has undergone extensive counseling and never committed a second of-

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<sup>163</sup> See *id.*, ii–xvii, 206 (summarizing gun control regulations by type and level of government); see also NRA Institute for Legislative Action, *Firearms Laws for [State]* (various dates), available at <http://www.nraila.org/GunLaws/> (summarizing gun control regulations by state).

<sup>164</sup> See 18 U.S.C. § 922(g)(8), (9) (2008). See also *Regulating Guns in America*, *supra* note 162, at 88–89.

<sup>165</sup> Federal law currently prohibits firearm possession by someone convicted of any offense that is a misdemeanor and involves “the use or attempted use of physical force” against a current or former spouse, child, or person with whom the offender has a child. 18 U.S.C. § 921(a)(33)(A) (2008). Some state and local laws provide broader prohibitions. See *Regulating Guns in America*, *supra* note 162, at 89–104.

fense? What if the offense was over 25 years ago? Is it constitutional for a state to strip all of these offenders of their Second Amendment right to self-defense in the home forever? Questions arise even in seemingly clear areas.

It is not as if the Justices in *Heller* were not warned. The problems the thicket presents—consuming judicial resources and forcing unending arbitrary decisions outside the realm of judicial competency—came to the forefront in the aftermath of *Roe* as courts got drawn into deciding complex abortion issues. It is astonishing that the Court has entered the gun-control thicket given the recency of its experience with *Roe*. Many of the Justices currently on the Court criticized the Court's immersion in abortion—a similarly contentious, technical, value-laden field—but seem content to replicate the difficulties the abortion quagmire created. It would be heartening to think the Court was chastened by its misadventure and determined not to repeat it. Perhaps the dissenters have been chastened, for they have sounded Scalia-like alarms about “the Court's unjustified entry into *this* thicket.”<sup>166</sup> But the majority has disregarded its own long decades of red flags. Rather than emulating *Roe*, *Heller* should have provided the corrective.

So now, predictably and inevitably, the litigation will take off. Courts across the country will face detailed questions about firearms regulations and will provide varied and often inconsistent answers. Circuit splits and open questions will persist for our lifetimes. And for what purpose? What justifies the judiciary asserting its primacy in yet another new arena? Surely not its greater expertise. Surely not, as in apportionment, a dysfunctional political process. As Justice Stevens observed in *Heller*, “no one has suggested that the political process is not working exactly as it should,” in firearms regulation.<sup>167</sup> Accordingly, the Court should honor the structure of our constitution, stay out of the thicket, and leave the highly motivated contestants in this field to press their agendas in the political process where the issue properly belongs and where for centuries it has remained.

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<sup>166</sup> *Heller*, 128 S. Ct. at 2846 n.39 (Stevens, J., dissenting).

<sup>167</sup> *Id.*

## III. IGNORING THE LEGISLATURE'S STRENGTHS

In addition to involving courts in complex inquiries best left to the political process, *Heller* and *Roe* are alike for a similar reason: the rights involved in both cases depend on judgments that legislatures are far better equipped than courts to make.

A. *Roe*

*Roe*'s problems began with how it read: more like a statute than a judicial opinion. In 1973, John Hart Ely called *Roe*'s detailed trimester framework a guideline "one generally associates with a commissioner's regulations."<sup>168</sup> Ely was no pro-lifer—he admitted that he agreed with *Roe*'s outcome and would "vote for a statute very much like the one the Court ends up drafting."<sup>169</sup> But as a constitutional lawyer, he could not abide the Court's approach. "[O]rdinarily," he wrote, "the court claims no mandate to second-guess legislative balances."<sup>170</sup> Justice Rehnquist's verdict was succinct. *Roe* was, he said, "judicial legislation."<sup>171</sup>

Later commentators have echoed this critique, noting several unfavorable consequences of *Roe*'s legislative character. First, by usurping the legislative role, the Court ignored the legislature's comparative expertise in assessing empirical claims and adjusting to changes in science and technology. Second, *Roe* shut down the political process by foreclosing legislative compromise and ignoring the lessons of community experience. Finally, the Court's legislative foray has had sociological and institutional effects—emboldening the pro-life movement and radicalizing public positions on abortion, while weakening the Court's legitimacy as an interpretative arbiter on sensitive cultural issues.

*1. Separation of Powers and Comparative Expertise*

Many scholars have noted that *Roe* was uncommonly aggressive, establishing a framework far beyond the issues presented by the *Roe* plaintiff. Lynn Wardle writes that the result is "a legal doctrine

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<sup>168</sup> Ely, *supra* note 37, at 922 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)).

<sup>169</sup> *Id.* at 926.

<sup>170</sup> *Id.* at 923.

<sup>171</sup> *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

that reads like a set of hospital regulations,” and that “[t]he legality of abortion is precisely the kind of policy issue that legislatures are well-suited to address, and that courts are not.”<sup>172</sup> This is because legislatures can assess competing factual claims, unconstrained by judicial rules on standing and evidence. Committee reports, expert testimony, and public debate all help legislatures sift through complicated facts to shape informed policy. As Ely wrote, it is “precisely because the claims involved are difficult to evaluate” that we should not trust courts “to guess about them.”<sup>173</sup>

In his *Roe* dissent, Justice Rehnquist foresaw that adopting a heightened standard of scrutiny would require courts to continually examine state laws and engage in a “conscious weighing of competing factors” to determine which restrictions on abortions are permissible.<sup>174</sup> These issues have included whether a state law definition of fetal viability conflicts with *Roe*;<sup>175</sup> whether states may prohibit saline amniocentesis abortions after the first trimester;<sup>176</sup> and what types of partial-birth abortions procedures are part of the abortion right.<sup>177</sup> Each of these issues involves complicated science and conflicting medical opinions: *Danforth*, for instance, required the Court to assess the risks and benefits of saline amniocentesis versus the abortifacient prostaglandin. In support of its law banning saline amniocentesis, Missouri presented evidence on the medical risks of the saline method, including rates of tissue destruction in the uterine cavity, bleeding coagulopathies, and maternal mortality rates.<sup>178</sup> The state noted that Japan (and the Yale-New Haven hospital, to boot) had banned this method because of health risks.<sup>179</sup> In response, Planned Parenthood presented evidence from

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<sup>172</sup> Wardle, *supra* note 104, at 261–62.

<sup>173</sup> Ely, *supra* note 37, at 935 n.89.

<sup>174</sup> *Roe*, 410 U.S. at 173–74 (Rehnquist, J., dissenting).

<sup>175</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976) (upholding a Missouri state law because it defined viability flexibly).

<sup>176</sup> *Id.* at 75–79 (striking down a state law that prohibited abortion by saline amniocentesis after the twelfth week of pregnancy).

<sup>177</sup> E.g., *Stenberg*, 530 U.S. at 930–932 (2000) (holding in part that a state statute was unconstitutional because it applied to dilation and evacuation and to dilation and extraction procedures).

<sup>178</sup> Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc., in Support of [John C. Danforth, Attorney General of Missouri] at 126, *Danforth*, 428 U.S. 52 (1976) (No. 74–1151).

<sup>179</sup> *Id.* at 126–27.

the HEW Center for Disease Control that analyzed the mortality rate per 100,000 legal abortions from 1972-1973 and showed that two other methods of abortion (which Missouri had not banned) were more dangerous than the saline method.<sup>180</sup> Further, the amici wrote that amniocentesis, a test to detect birth defects, is best given after the twelfth week of pregnancy, and that women seeking late-term saline abortions tend to have fewer financial and social resources than women who have their abortions earlier.<sup>181</sup>

What did the Court do with these thorny medical and social science questions? The district court deferred to the Missouri state legislature. But the Supreme Court swan-dived into the medical morass, deciding that the saline method is an accepted medical procedure and that the statute's language could ban future, safe abortion methods and the intra-amniotic injection of prostaglandin.<sup>182</sup> Therefore, the Court found the ban "unreasonable or arbitrary" and unconstitutional.<sup>183</sup>

Justice White dissented in part, urging that the Court uphold the saline ban "unless [the Court] purport[s] to be . . . the country's . . . *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States."<sup>184</sup> Later Justices have echoed this critique. In *City of Akron*, the Court held that a state could no longer require that all second-term abortions be performed in hospitals; although this regulation was reasonable to protect maternal health in 1973, it was not reasonable for this purpose in 1983.<sup>185</sup> Justice O'Connor objected to the Court's interference with Akron's city government and doubted that the Court was competent to make such calls without the resources of a legislature.<sup>186</sup>

*Akron* shows that not only is the science complicated, but it constantly advances, leaving courts scrambling in its wake. Ten years after *Roe*, one scholar noted that "[c]hanges in medical technology

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<sup>180</sup> Brief for Dr. David Acker et al., as Amici Curiae for Planned Parenthood of Central Missouri at 24-25, *Danforth*, 428 U.S. 52 (1976) (No. 74-1151).

<sup>181</sup> *Id.* at 30, 35.

<sup>182</sup> *Danforth*, 428 U.S. at 77-79.

<sup>183</sup> *Id.* at 79.

<sup>184</sup> *Id.* at 99 (White, J., concurring in part and dissenting in part).

<sup>185</sup> *City of Akron v. Akron Ctr. Reprod. Health (Akron I)*, 462 U.S. 416, 435-46 (1983).

<sup>186</sup> *Id.* at 455-56 (O'Connor, J., dissenting).

[had] already necessitated modification of [Roe's] model."<sup>187</sup> Legislatures can amend laws when medicine or social conditions change, while courts must wait for the right plaintiff and for direction from superior courts. Abortion is one area where "dramatic changes of circumstances are not only expected but common," and where we want to preserve the ability to tinker with regulations as our knowledge increases.<sup>188</sup> But because legislatures must act within *Roe* and *Casey*'s limits, governments cannot meaningfully debate policy even as science and social conditions change. The country is thus in a state of "willful blindness to evolving knowledge."<sup>189</sup> For example, recent studies suggest that abortion may have more lasting physical and emotional effects on women than previously thought.<sup>190</sup> And although *Roe* assumed a close relationship between women and their doctors,<sup>191</sup> abortion clinic staff members have testified that women rarely receive counseling at their clinics.<sup>192</sup> Neonatal studies now pinpoint when fetuses develop sensitivity to pain and other stimuli.<sup>193</sup> Finally, an uptick in government support may ease the burden of unwanted pregnancies; for example, since 1999, at least 40 states have enacted "Baby Moses" laws that let parents leave a newborn anonymously in state care.<sup>194</sup>

Of course legislatures need not accept these studies. In fact, they are perfectly free to reject them as flawed on any number of grounds. The point is to keep open the debate. Yet the Court in *Casey* moved in exactly the opposite direction, holding that controversial opinions—even if wrongly decided—have super-stare de-

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<sup>187</sup> Wardle, *supra* note 104, at 263 (citing *Akron I*, 462 U.S. at 431, 434).

<sup>188</sup> *Id.* at 262.

<sup>189</sup> *McCorvey v. Hill*, 385 F.3d 846, 853 (5th Cir. 2004) (Jones, J., concurring).

<sup>190</sup> *Id.* at 850–51 (citing Affidavits of More Than One Thousand Post-Abortive Women; Affidavit of David Reardon, Ph.D.) (reporting clinical findings that link abortion to physical and emotional problems for women).

<sup>191</sup> *Roe*, 410 U.S. at 163 ("[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.")

<sup>192</sup> *McCorvey*, 385 F.3d at 851 (Jones, J., concurring) (citing Affidavit of David Reardon, Ph.D.) (reporting that women receive little counseling at abortion clinics, and that counseling is heavily biased toward encouraging abortions).

<sup>193</sup> *Id.* at 852 (citing David H. Munn et al., Prevention of Allogeneic Fetal Rejection by Tryptophan Catabolism, 281 Science 1191 (1998)).

<sup>194</sup> E.g., Tex. Fam. Code Ann. § 262.301–07 (Vernon 2002). See also *McCorvey*, 385 F.3d at 851–52 n.5 (collecting statutes).

cis power. In *Casey*, the Court implied that the *Roe* rule should be upheld “whether or not mistaken.”<sup>195</sup> Because social forces will push back on divisive decisions, the Court should grant such cases “rare precedential force.”<sup>196</sup> So the Court is not only institutionally impaired but institutionally *committed* to maintaining the same rules as facts change on the ground.

## 2. *Political Process and Compromise*

When the Court acts legislatively, it interferes with the political process. Although judicial review requires some such interference, it is justified only when a legislature threatens a fundamental right or when the political process is broken. But *Roe* was not a “discrete and insular minority” case.<sup>197</sup> As Ely points out, women are underrepresented in legislatures, but not more than fetuses, and both sides of the abortion debate had been politically active before 1973, each side trading gains and losses and accommodations.<sup>198</sup> For example, Georgia passed a law in 1968 that permitted abortions for a broader range of reasons, but required that the abortion be performed in an accredited hospital and approved by a hospital committee.<sup>199</sup> Polls from the early 1970s to early 1980s show that about 20% of the public identified itself as pro-life, while 25% identified as pro-choice, with the rest somewhere in between.<sup>200</sup> It is generally recognized that state legislatures were liberalizing abortion rights when *Roe* was decided<sup>201</sup>—there was no political process defect that justified interference from on high.

Moreover, *Roe* shut down this process of legislative accommodation, polarizing the debate and making future compromise more difficult. In 1973, Ely doubted that *Roe* would generate much pro-

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<sup>195</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992).

<sup>196</sup> *Id.* at 867.

<sup>197</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>198</sup> Ely, *supra* note 37, at 933–34.

<sup>199</sup> See *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (describing the Georgia statute). The Court struck down these requirements.

<sup>200</sup> Michael W. McConnell, *How Not To Promote Serious Deliberation About Abortion*, 58 U. Chi. L. Rev. 1181, 1200 n.43 (1991) (book review) (citing Mary Ann Lamanna, *Social Science and Ethical Issues: The Policy Implications of Poll Data on Abortion*, in *Abortion: Understanding Differences* 1, 4 (Sidney Callahan & Daniel Callahan eds., 1984)).

<sup>201</sup> Ely, *supra* note 37, at 946.

test; in fact, he guessed that legislatures were happy to be free of the abortion problem.<sup>202</sup> But a decade later, one scholar observed that “[n]o other case . . . caused such a loud and sustained public outcry” and that “[t]he abortion debate has become an area of impasse, not argument.”<sup>203</sup> Public debate typically serves the important democratic function of educating people about an issue, but *Roe* changed the terms of the debate from fetal and maternal health, viability, and medical techniques to the proper role of courts in our society.<sup>204</sup>

Many scholars have commented on “*Roe* backlash”—how the pro-life movement was emboldened by the Court’s decision. As Robert Post and Reva Siegel argue, progressives were “[s]tunned by the ferocity of the conservative counterattack” that followed *Roe*.<sup>205</sup> Some people suggest that *Roe* might have led to increased violence at abortion clinics,<sup>206</sup> and to executive actions such as Nixon and Reagan’s decisions to cut U.S. funding for overseas programs that provided information on abortion.<sup>207</sup> When people feel they have no avenue through the democratic process, they may use much less desirable means to make their voices heard. Looking at polling data in the early 1990s, Michael McConnell predicted that if the abortion issue were returned to state legislatures, many people would support making abortion freely available early in a pregnancy or in cases of rape or incest, but would restrict later abortions and provide waiting periods, counseling, and parental notification.<sup>208</sup> Legislators would be expected to consider dangers to maternal health, the financial and emotional burdens of unwanted pregnancies, and the importance of protecting choice in intimate

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<sup>202</sup> *Id.* at 946–47.

<sup>203</sup> Chemerinsky, *supra* note 42, at 107, 109.

<sup>204</sup> See Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 *Alb. L. Rev.* 853, 876 (1999) (“The vice of judicial supremacy . . . has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (quoting Robert H. Jackson, *The Struggle for Judicial Supremacy* 321 (1941)))).

<sup>205</sup> Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373, 374 (2007).

<sup>206</sup> See Wardle, *supra* note 104, at 261.

<sup>207</sup> See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 *Duke L.J.* 891, 961 (2008).

<sup>208</sup> McConnell, *supra* note 200, at 1201–02.

decisions, and to weigh such things against the need to protect innocent and vulnerable unborn life. These are the kinds of compromises that legislatures, not courts, can and should craft.

Finally, these political and institutional consequences illustrate that separation of powers is not a nicety—it is the basis of our constitutional system. Alexander Bickel wrote that the Court undermines its own power when it strikes down legislation without a strong basis in principle.<sup>209</sup> Others have urged that the Court act with humility and avoid striking down democratically enacted laws when the laws have robust public support and there is a strong risk that the Court is wrong.<sup>210</sup> The result of judges-as-legislators, in Blackstone’s words, is “equity without law,” where rules come from nothing but each judge’s varying sentiments.<sup>211</sup> In the *Federalist Papers*, Alexander Hamilton warned that entangling the judicial, legislative, and executive powers would undermine democratic control of law and portend the end of liberty.<sup>212</sup>

### B. Heller

Justice Breyer’s dissent in *Heller* sounds familiar. He criticized the majority for acting like a legislature. He noted that courts typically defer to legislatures’ empirical judgments, and that legislatures are better than courts at analyzing facts. He acknowledged there is a right at stake, but finds that the D.C. regulation is reasonable. This sounds all too much like Justice Rehnquist in *Roe*, who would have upheld Texas’s law as a reasonable regulation of the Fourteenth Amendment’s due process right.<sup>213</sup> Justice Rehnquist’s dissent weighed in heavily on the defects of the judicial perspective and the virtues of the legislative craft. But in *Heller*, the calculus has not changed one whit. Every one of the in-

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<sup>209</sup> See Cass R. Sunstein, *Backlash’s Travels*, 42 Harv. C.R.-C.L. L. Rev. 435, 439 (2007) (quoting Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 69 (2d ed., Yale Univ. Press 1986) (1962)).

<sup>210</sup> *Id.* at 448.

<sup>211</sup> William Blackstone, *Commentaries on the Laws of England* 62 (1765).

<sup>212</sup> See *The Federalist* No. 78 (Alexander Hamilton) (quoting Baron de Montesquieu, *The Spirit of the Laws* 152 (Thomas Nugent Trans., Hafner Publ’g Co. 1949) (1748)).

<sup>213</sup> See *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) (“The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this.”).

firmities that Justice Rehnquist identified in *Roe*—the superior capacity of legislatures to evaluate facts, the narrow perspective that judges bring to contested social issues, and the straitjacket that a constitutional rule places on legislative compromise and changing information—is also present in *Heller*.

### 1. Separation of Powers and Comparative Expertise

Both *Roe* and *Heller* turn on complicated facts. Under the Court's new *Heller* rule, whether a state regulation passes constitutional muster depends on whether that regulation interferes with the Second Amendment's right to bear arms. Therefore, *Heller* (like *Roe*) has given birth to a balancing test that will force courts into the "conscious weighing of competing factors" as they decide which state interests are sufficiently strong and which regulations unduly burden the new right.<sup>214</sup>

Ironically, Justice Scalia deplores this sort of balancing. In *Heller*, he rebutted Justice Breyer's dissent by chiding that judges cannot balance away the core of an enumerated right. In the Second Amendment context, this core is the "lawful purpose of self-defense."<sup>215</sup> But the Court's dicta on the likely constitutionality of commercial sale regulations and felon possession bans sure looks like balancing: because the history is ambiguous, the opinion seems to announce that some state interests in safety outweigh some personal interest in gun possession. In this way, *Heller* reads like *Roe*, deciding issues not before the Court and making casual empirical assumptions to justify those decisions.

State courts that have ruled on state rights to bear arms have traditionally under-enforced the right by deferring to legislative regulations on guns. Adam Winkler, who has studied these decisions, suggests that state courts defer because courts are ill-suited to "prescrib[ing] workable standards of state conduct and devis[ing] measures to enforce them."<sup>216</sup> Winkler suggests that

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<sup>214</sup> Id. at 173–74 (Rehnquist, J., dissenting).

<sup>215</sup> *Heller*, 128 S. Ct. at 2818. Justice Scalia later crafts a more specific explanation of the core right: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 2821.

<sup>216</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 713 (2007) (quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1217 (1978)).

heightened judicial scrutiny in this area would raise “[p]rofound questions of institutional competence” because “[t]he debates over the effectiveness of various forms of gun control are dense, and the empirical data often conflicting, leaving courts understandably reluctant to engage with them.”<sup>217</sup> Winkler argues that judicial interference in complicated issues of social science may have particularly dangerous consequences where forcing states to ease gun restrictions could lead to more violent deaths.<sup>218</sup> And deference in the area of gun control should mirror judicial deference in areas like prison regulations, where complex security problems require that local officials have maximum flexibility to adapt to changing information and new threats.<sup>219</sup>

Two specific issues—trigger locks and concealed-carry laws—illustrate the inability of courts to decide issues of gun policy. First, the D.C. law at issue in *Heller* required residents to keep lawfully owned firearms “unloaded and disassembled or bound by trigger lock or similar device,” with some exceptions.<sup>220</sup> The Court concluded that the trigger lock requirement rendered guns inoperable, and impossible to use for the core right of self-defense. Therefore, the requirement was unconstitutional.<sup>221</sup> But the Court wrote that laws regulating the storage of guns (presumably to keep them beyond the reach of thieves and children) would likely be upheld.<sup>222</sup> The Court never explains why exactly safe storage laws are constitutional, or how they intrude less on Second Amendment rights than trigger locks do.

It is not even clear that trigger locks *do* render guns inoperable. During oral argument, the Justices asked about the details of trigger lock technology and how quickly gun users can disable the locks:

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<sup>217</sup> *Id.* at 713–14 (“Judges do not want, and are not especially competent, to sort out such disputes and settle intensely debated issues of social science.”).

<sup>218</sup> *Id.* at 714 (citing Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 *Wis. L. Rev.* 249, 264 n.94).

<sup>219</sup> *Id.*

<sup>220</sup> D.C. Code § 7-2507.02 (2001).

<sup>221</sup> *Heller*, 128 S. Ct. at 2817–18.

<sup>222</sup> *Id.* at 2820.

CHIEF JUSTICE ROBERTS: So how long does it take? If your interpretation is correct, how long does it take to remove the trigger lock and make the gun operable.

MR. DELLINGER: You—you place a trigger lock on and it has—the version I have, a few—you can buy them at 17th Street Hardware—has a code, like a three-digit code. You turn to the code and you pull it apart. That's all it takes. Even—it took me 3 seconds. . . .

CHIEF JUSTICE ROBERTS: . . . I'd like some idea about how long it takes.

MR. DELLINGER: It took me 3 seconds. I'm not kidding. It's—it's not that difficult to do it. That was in daylight. The other version is just a loop that goes through the chamber with a simple key. You have the key and put it together.<sup>223</sup>

In response, Justice Breyer made the sensible point that we may not want judges all over the country deciding how well trigger locks work.<sup>224</sup> *Heller*'s attorney conceded that legislatures can look to facts such as crime statistics and murder rates when regulating guns—for instance, presumably, deciding whether a university can ban handguns from dorms will require some fact-finding.<sup>225</sup> Presumably, courts will be assessing these factual findings too.<sup>226</sup>

Courts will also confront contested data on concealed-carry laws. In *Heller*, the Court noted that many nineteenth-century courts had upheld concealed-carry bans under the Second Amendment or state analogues.<sup>227</sup> This statement implies that concealed-carry bans are safe under *Heller*. But it is not clear why: preventing someone from carrying a handgun limits the Second Amendment's core right of self-defense. Once courts are in the business of second-

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<sup>223</sup> Transcript of Oral Argument at 83–84, *Heller*, 128 S. Ct. 2783 (No. 07-290). See also Brief for American Public Health Ass'n, et al. as Amici Curiae in Support of Petitioners at 26–27, *Heller*, 128 S. Ct. 2783 (No. 07-290) (discussing trigger locks that can be removed in one to three seconds).

<sup>224</sup> Transcript of Oral Argument, *supra* note 223, at 73–74.

<sup>225</sup> *Id.* at 81 (Alan Gura, Esq. speaking).

<sup>226</sup> *Id.* at 79.

<sup>227</sup> See *Heller*, 128 S. Ct. at 2794, n.9 (citing *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850); *Nunn v. State*, 1 Ga. 243, 250–51 (1846)).

guessing gun regulations, it makes sense to ask whether concealed-carry bans are reasonable, and the facts are highly disputed. Most prominently, research scientist John Lott argues that banning concealed weapons *increases* violent crime, and that “shall-issue” laws, which require states to issue concealed-carry permits to most people who ask, are associated with decreased violence.<sup>228</sup>

Several scholars have challenged Lott’s results in great detail. Ian Ayres and John Donohue criticize Lott’s research with twenty figures and thirty-four tables designed to challenge Lott’s statistical methodology and basic empirical claims.<sup>229</sup> Stephen Teret, a professor at the Johns Hopkins University School of Public Health, argues that Lott’s study “uses incorrect and discredited methodology.” He criticizes Lott for using arrest rates to predict crime rates; for not accounting for general downward trends in violent crime; for failing to explain why criminals would substitute property crimes for violent crimes like rape and murder; and for ignoring the possible effects of other gun laws, such as mandatory waiting periods and background checks.<sup>230</sup> Although the Court did not dive into this debate in *Heller*, future courts will have to.

A few weeks after *Heller*, the *New England Journal of Medicine* warned that “[t]he Supreme Court has launched the country on a risky epidemiologic experiment.”<sup>231</sup> For instance, the *Journal* noted that increased access to guns may increase rates of adolescent suicide.<sup>232</sup> I can imagine future courts analyzing contested empirical

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<sup>228</sup> See, e.g., John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (1998); John R. Lott, Jr., *Straight Shooting: Firearms, Economics and Public Policy* (2006); John R. Lott, Jr., *The Bias Against Guns: Why Almost Everything You’ve Heard About Gun Control is Wrong* (2003); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 *J. Legal Stud.* 1 (1997).

<sup>229</sup> See Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *Stan. L. Rev.* 1193 (2003).

<sup>230</sup> Stephen Teret, *Critical Commentary on a Paper by Lott and Mustard*, The Johns Hopkins Center for Gun Policy and Research (1996), <http://www.asahi-net.or.jp/~zj5j-gttl/teret.htm>. See also Mark Duggan, *More Guns, More Crime*, 109 *J. Pol. Econ.* 1086 (2001); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 *Int’l Rev. L. & Econ.* 239 (1998).

<sup>231</sup> Jeffrey M. Drazen et al., *Editorial, Guns and Health*, 359 *New Eng. J. Med.* 517, 517 (2008).

<sup>232</sup> *Id.* (citing David Hemenway, *Private Guns, Public Health* (2004); Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 *J. Trauma* 1029–35 (2007)).

studies on gun ownership and suicide to decide whether state gun regulations are reasonable. As in the abortion context, courts may be able to find an unreasonable limitation on gun ownership “simply by selectively string-citing the right social science articles.”<sup>233</sup> The incapacity of courts to sift through complicated data is exactly what Justices have lamented about *Roe*—for instance, Justice O’Connor noted that *Roe* requires courts, “[w]ithout the necessary expertise or ability, [to] pretend to act as science review boards.”<sup>234</sup> But no one has explained why judges would be any more suited to assessing data about gun control than they would about abortion. Indeed, the trigger lock and concealed-carry examples show that gun technology and crime data, just like the social and scientific data surrounding abortion, will constantly evolve and engender highly technical debate even among experts in the field.

With *Heller*, the Court shut down some of this debate. Regardless of the thicket problem, *Heller* takes legislative options off the table—options that empirical evidence may justify and constituent concerns and fears may warrant. According to the Court, state and local governments cannot require that handguns be disassembled or trigger-locked inside the home, but can restrict to a much greater extent whether and where gun owners carry their guns in public. So imagine a hypothetical city confronting the following crime data: high rates of accidental gun deaths and injuries in the home, high levels of domestic violence and suicide, and a high rate of street crime involving handguns purchased assertedly for home use. The city might want to restrict access to handguns in this case. A city government or state legislature could weigh the costs and benefits of this approach, take testimony, assess the latest studies, and reach some compromise to best address the city’s problems. The resulting law might still be poor policy, but a representative government has a right to make that call. Instead, the state or locality would have to follow *Heller*, which would keep it from considering new evidence and require that guns be readily available at home. As with abortion, the Court has thrust the nation into a state of willful blindness to evolving facts. And as with *Roe*, the Court

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<sup>233</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 991 n.6 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>234</sup> *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting).

has repositioned the debate from one centered on facts and policy to one focused on surviving multiple layers of judicial scrutiny.<sup>235</sup> The debate will thus become one in which lawyers will play an ever more prominent role, while ordinary citizens and many with practical experience concerning the merits and demerits of firearms legislation will see their role diminished.

## *2. Political Process and Compromise*

Next, as with abortion, there is no political process problem when it comes to gun control—in fact, debate over guns has been quite vigorous. The National Rifle Association currently has over four million members,<sup>236</sup> and advocacy groups for gun control, such as the Brady Campaign and the Coalition to Stop Gun Violence, are also strong. The latter group is comprised of forty-five national organizations that include child welfare advocates, religious associations, and public health professionals who work at the grassroots level to oppose gun violence.<sup>237</sup> These interest groups reflect the strong and varying views held by the public on this issue: polls taken just after *Heller* show that about 54% of Americans support stricter gun control laws, while 40% oppose them;<sup>238</sup> 27% think that stricter laws would reduce violent crime a lot, 21% think more laws would reduce violence somewhat, and 50% think stricter laws would not reduce violent crime at all.<sup>239</sup> This issue is clearly one that has engaged the electorate's attention, engendered intense feeling, and spawned muscular interest group participation. There is no reason to remove it from what is plainly a highly energized electorate and place it in the lap of the courts.

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<sup>235</sup> See, e.g., Paul Duggan & Mary Beth Sheridan, D.C. Legislation Would Remove More Gun Limits, Wash. Post, Sept. 13, 2008, at A1 (explaining that legislators' proposed changes to the D.C. gun laws "result from a careful review of [*Heller*]" and would result in "a dramatic shift in public policy" from D.C.'s long-standing policies on gun restrictions).

<sup>236</sup> NRA-ILA Website, Who We Are, And What We Do, <http://www.nraila.org/About/>.

<sup>237</sup> See Coalition to Stop Gun Violence Website, About Us, <http://www.csgv.org/site/c.pmL5JnO7KzE/b.3509221/>.

<sup>238</sup> Maurice Carroll, American Voters Oppose Same-Sex Marriage, 2008 Quinnipiac U. Polling Inst. 1, available at <http://www.quinnipiac.edu/images/polling/us/us07172008.doc>.

<sup>239</sup> Mental Health Measures Broadly Backed, But Culture Gets More Blame than Guns, <http://abcnews.go.com/images/US/1037a1VaTechGuns.pdf>.

Instead, the Court should have left these and other decisions to elected bodies. This is partly because legislatures are responsive; they can adjust gun regulations as social conditions change, as trigger lock technology improves, and as studies show more clearly whether gun control increases or decreases violent crime. Legislatures can also capture community experiences not easily expressed in empirical studies—for instance, local concerns about domestic violence, a desire to get guns off the streets, or parents’ worries about adolescent suicide or childhood accidents. Legislators are funnels for lots of information, and—perhaps most importantly—they are periodically elected and democratically accountable. Finally, legislators represent a broader cross-section of society than judges do: a teacher is not disqualified from serving in a legislature, but he is effectively disqualified from serving on a court. As Justice Scalia has argued, the Court “has no business imposing upon all Americans the resolution favored by the elite class from which the Members of [the Court] are selected.”<sup>240</sup> This is because judges not only bring to the Court a relatively narrow set of life experiences, but because judges, like most people, talk primarily to people within their own social and professional set. Their political decisions generally “reflect[] the views and values of the lawyer class.”<sup>241</sup>

Moreover, it is patently wrong to have an issue that will not only affect people’s lives, but could literally *cost* them their lives, decided by courts that are not accountable to them. Some studies suggest that restrictions on handguns reduce violent crime, and that overturning these laws may lead to increased rates of murder and suicide.<sup>242</sup> Absent the clearest sort of textual mandate, we should not entrust courts with such life and death decisions. As noted above, the sheer hubris of unelected and unaccountable judges taking over the legislative function on a sensitive political issue was at the core of conservative criticism of *Roe*. Justice Scalia, for instance, has criticized the Court for employing an “ad hoc nullification machine” that prevents one part of our democratic soci-

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<sup>240</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>241</sup> *Id.* at 652.

<sup>242</sup> See Jeffrey M. Drazen et al., *supra* note 231, at 517 (citing C. Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 *New Eng. J. Med.* 1615–20 (1991)).

ety—those morally opposed to abortion—from persuading the majority that its views are correct.<sup>243</sup> But no one has explained why either the Court’s hubris or its takeover is any more justified when gun regulation is at issue. Gun owners are hardly lacking for passionate advocacy in the political process. Legislatures can be expected to register this sentiment and to balance the legitimate desires of citizens to own guns with the legitimate concerns of citizens for their personal and family safety. Federal judges have no business striking down laws whenever they perceive a growing “national consensus”<sup>244</sup>—whether on abortions, guns, or any other hot-button social issue—and thereby disabling all other political viewpoints. Like citizens who oppose abortion, gun control advocates are now increasingly “deprived . . . of the political right to persuade the electorate” that their views are correct.<sup>245</sup>

This final point has nothing to do with empirical studies, but everything to do with the central point of the *Roe* dissenters’ lament. The dissenters in *Doe* and *Roe* made clear that trust and faith in our democratic system runs at its highest when broad participation throughout the body politic is permitted, and that there is a strong independent value—quite apart from any competence in dealing with facts—in having compromises that reflect people’s opinions.<sup>246</sup> The answers to some empirical questions may never be definitively known. But a great part of the value of leaving these questions to a legislature is simply the feeling of empowerment and satisfaction that people enjoy when they live under laws they have had some hand in producing. As with abortion, gun control is one area where “the answers to most of the cruel questions posed are political and not juridical.”<sup>247</sup> By removing this issue from the political process, the Court has short-circuited one of the primary

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<sup>243</sup> See *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part)).

<sup>244</sup> See Cass R. Sunstein, *supra* note 128, at 16 (arguing that *Heller* can be understood as a recognition of a changing “national consensus” on firearms regulation).

<sup>245</sup> See *Hill*, 530 U.S. at 741 (Scalia, J., dissenting).

<sup>246</sup> See *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (“[The abortion] issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.”).

<sup>247</sup> *Webster v. Reprod. Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

benefits of our democratic system—ensuring that “all participants, even the losers, [have] the satisfaction of a fair hearing and an honest fight.”<sup>248</sup> This exact infirmity in *Roe*, identified by conservatives again and again since the case was decided, is present in full force in *Heller*.

Finally, given that *Roe* and *Heller* employ such strikingly similar methodologies—relying on contested premises to create a new substantive right and to strike down a legislative act on a sensitive social issue—it is remarkable that no Justice in *Heller* even mentions *Roe*. Why, given the parallels between the two cases, is *Heller* so silent on *Roe*? I believe it is because once the comparisons to *Roe* begin, the inconsistencies in the approach of both conservatives and liberals on the Court become undeniable. For decades, conservatives and liberals have held just the opposite view on the relative capacities of courts and legislatures; in *Heller*, both contingents wheeled about to march in the opposite direction, with no explanation for the change in course. Conservatives may argue that turnabout is fair play. But their role as judges requires them to explain why guns and abortions belong in separate boxes, and why a methodology so unacceptable in one context is so appealing in another. There is no good answer to these questions. Once the similarities between *Roe* and *Heller* become apparent, the Court’s silence on *Roe* becomes deafening.

#### IV. DISREGARDING FEDERALISM’S VIRTUES

The Court’s impersonation of a legislature in *Heller* was not the decision’s final similarity to *Roe*. Both *Roe* and *Heller* also demonstrated a lack of respect for the constitutional division of powers between the federal government and the states. By raising the controversy over guns to the constitutional level, *Heller* continued *Roe*’s troublesome course of arrogating to the Court the power to override laws at the core of the residual police powers the Framers plainly allocated to the states.

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<sup>248</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

## A. Roe

It is important to remember just how sharp the criticism of *Roe* on federalism grounds actually was. The federalism-based critiques took two basic forms. First, conservatives denounced *Roe* for uprooting traditional state authority over abortion regulations. And second, conservatives faulted *Roe* for improvising a nationwide set of rules for abortions and thus extinguishing the many salutary benefits inherent in our federal structure: adaptation of local policies to local preferences, assimilation of actual experience within the content of the law, the protection of individual liberty through mobility and competition between the states, and the fostering of compromise and unity on divisive policy issues by avoiding a single constitutional approach.

Although much of this federalism-based opposition to *Roe* came from conservatives, the opposition was not necessarily to abortion as such. Instead, critiques of *Roe* from a federalist perspective can be seen as taking a more moderate position, arguing that the states were the proper forum for airing the admittedly powerful arguments on both sides of the abortion debate—arguments deserving of toleration and respect. That said, these critics were far from moderate in their attacks on *Roe* for casting aside the principles of federalism. It is the depth and intensity of this opposition that makes *Heller's* abandonment of federalism so very difficult to comprehend.

*1. Traditional State Authority*

*Roe* drew sharp criticism—and charges of judicial activism—for overriding the traditional police power of the states. There is no question that the regulation of abortions historically had fallen within the states' police power over the health, welfare, safety, and morals of the people.<sup>249</sup> Indeed, most states had regulated abortions

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<sup>249</sup> See, e.g., Wardle, *supra* note 104, at 232 (recognizing that abortion traditionally had been “the exclusive province of the states to regulate”); see also *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (“The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”).

from the mid-nineteenth century onward.<sup>250</sup> And until *Roe* was decided in 1973, the states' authority over abortion regulations remained plenary.<sup>251</sup> *Roe* washed away that settled landscape, nationalizing the abortion issue and invalidating existing legislation in nearly every state.<sup>252</sup> And while one might have expected *Roe* "to take account of [its] potential intrusiveness in areas of traditional state concern," the Court revamped the federal-state balance on abortion without so much as mentioning the demise of federalism that its decision portended.<sup>253</sup>

The *Roe* decision invited charges of activism—that is, that *Roe* had "usurped" decisionmaking authority constitutionally vested in the state governments."<sup>254</sup> Justice Rehnquist's dissent in *Roe* questioned how a fundamental right to abortion could be squared with the states' longstanding restrictions on the practice.<sup>255</sup> Justice White echoed those sentiments, observing that the Court's own recognition of historical abortion regulations in *Roe* "convincingly refute[d]" the traditional or fundamental nature of the abortion right in the United States.<sup>256</sup> Thus, *Roe*'s abandonment of the historical division of powers between state and federal governments made it appear that the Court had engaged "not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitu-

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<sup>250</sup> *Roe*, 410 U.S. at 174–75 (Rehnquist, J., dissenting); *id.* at 116 (majority opinion) ("The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century.").

<sup>251</sup> Clarke D. Forsythe & Stephen B. Presser, Restoring Self-Government on Abortion: A Federalism Amendment, 10 *Tex. Rev. L. & Pol.* 301, 338 (2006) [hereinafter Forsythe & Presser, A Federalism Amendment]; see also Clarke D. Forsythe & Stephen B. Presser, The Tragic Failure of *Roe v. Wade*: Why Abortion Should be Returned to the States, 10 *Tex. Rev. L. & Pol.* 85, 162 (2006) [hereinafter Forsythe & Presser, Tragic Failure] (noting that the states were actively enforcing, reaffirming, or reforming their prohibitions on abortions in the years preceding *Roe*).

<sup>252</sup> Terrance Sandalow, Federalism and Social Change, 43 *Law & Contemp. Probs.* 29, 35 (1980); Wardle, *supra* note 104, at 232.

<sup>253</sup> Sandalow, *supra* note 252, at 33; *id.* at 35 (noting that the opinions in *Roe* did not "consider the relevance of federalism to the appropriate decision").

<sup>254</sup> Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 *U. Chi. L. Rev.* 1484, 1487 (1987) (book review).

<sup>255</sup> See *Roe*, 410 U.S. at 174–77 (Rehnquist, J., dissenting).

<sup>256</sup> *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 793 (1986) (White, J., dissenting).

tional value preferences” to the detriment of “state electoral majorities.”<sup>257</sup>

## 2. *The Federal Design*

*Roe*'s conservative critics did not stop at denouncing the decision for disrupting the traditional authority of the states over abortion policy. They went on to assail *Roe* for ignoring the advantages of leaving the abortion issue to the states as well. One common critique was that *Roe* neglected an obvious benefit of the Framers' federal design: the states' ability to tailor their policies to local preferences and conditions, thereby tending to please more constituents than could be done with a single national rule.<sup>258</sup> Critics pointed out that abortion policy was particularly suited to reap the benefits of decentralized decision-making. For example, abortion involves controversial and fundamental moral value judgments on which reasonable people can differ from place to place.<sup>259</sup> And the issue does not fly under the radar. Whereas many issues decided below the national level may be too humdrum to excite civic participation, the salience of the abortion debate ensures that citizens will take advantage of their proximity to state political processes and promote localized abortion policies that satisfy their preferences.<sup>260</sup> As Justice Scalia observed:

[T]he division of sentiment within each state [on abortion] was not as closely balanced as it was among the population of the Nation as a whole [prior to *Roe*], meaning not only that more people would [have been] satisfied with the results of state-by-state

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<sup>257</sup> *Id.* at 793–94 & n.3 (White, J., dissenting).

<sup>258</sup> See McConnell, *supra* note 254, at 1493–94. For general discussions of this benefit of federalism and those that follow, see, for example, *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), and McConnell, *supra* note 254.

<sup>259</sup> See Robert H. Bork, *The Judge's Role in Law and Culture*, 1 *Ave Maria L. Rev.* 19, 24 (2003) (arguing that abortion should have been left “to the moral choice of the American people expressed in the laws of their various states”); Earl M. Maltz, *Individual Rights and State Autonomy*, 12 *Harv. J.L. & Pub. Pol'y* 163, 184 (1989).

<sup>260</sup> See Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 888, 900 (2006).

resolution, but also that those results would [have been] more stable.<sup>261</sup>

Thus, sensitivity to federalism should have counseled respect for local preferences. Instead, *Roe* foreclosed variation and “adopted an extraordinarily detailed set of restrictions on state power.”<sup>262</sup> In fact, by “imposing on all states a policy of unrestricted previability abortion, the Court obliterated the genius of structural pluralism.”<sup>263</sup>

*Roe* also generated substantial criticism for ignoring a second “happy incident” of our federal system, recognized famously by Justice Brandeis: experimentation and innovation in the natural laboratories of the states.<sup>264</sup> The issue is particularly fitting for experimentation in the states because it is a complex, multifaceted one involving, inter alia, elements of both medicine and morality.<sup>265</sup> If left to themselves, states could weigh innumerable variables in their abortion policies, beginning with the fundamental questions of how much to restrict abortions, at what stages of the pregnancy to do so, and what sorts of exceptions to allow.

Only the allowance of policy variations permits the assemblage of critical data, the comparisons of different laws and approaches, and the improved decision-making by state legislatures. Moreover, prior to *Roe*, the states affirmatively *were* exercising their power to innovate on abortion. The Court itself recognized that Georgia’s abortion statute—along with recent reforms in a number of other

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<sup>261</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); see also McConnell, *supra* note 200, at 1202 (observing that abortion policy—absent *Roe*—could exhibit “significant variations in the approaches taken from state to state”).

<sup>262</sup> Sandalow, *supra* note 252, at 36.

<sup>263</sup> Lynn D. Wardle, “Time Enough”: *Webster v. Reproductive Health Services* and the Prudent Pace of Justice, 41 Fla. L. Rev. 881, 936 (1989); see also *Casey*, 505 U.S. at 995 (Scalia, J., concurring in the judgment in part and dissenting in part) (“*Roe*’s mandate for abortion on demand . . . required the entire issue to be resolved uniformly, at the national level.”); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (“[*Roe*] impos[ed] . . . an order of priorities on the people and legislatures of the States.”); Maltz, *supra* note 259, at 187 & n.110.

<sup>264</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>265</sup> See, e.g., Forsythe & Presser, A Federalism Amendment, *supra* note 251, at 329 (“The states are in the best position to experiment and create the optimal policy with regard to abortion . . .”).

states—represented “new thinking about an old issue.”<sup>266</sup> In short, the prospect of different approaches to abortion was powerful in theory and was occurring in practice. The *Roe* decision significantly narrowed the scope of possible experimentation in the states. Of course, no one contends that *Roe* eliminated state-by-state improvisation entirely. For example, the Court subsequently permitted Connecticut to limit its Medicaid benefits for non therapeutic abortions,<sup>267</sup> and it allowed Pennsylvania to try coupling an informed consent requirement with a 24-hour waiting period.<sup>268</sup> But these examples themselves demonstrate that *Roe* limited the states’ experimentation on abortion policy to the margins. The “undue burden” test in *Casey* reaffirmed the impotence of states to address the core of the abortion issue—whether and how to limit previability abortions.<sup>269</sup> Innovation was further limited because the states operated under the constant threat of litigation after *Roe*. And facial challenges ensured that many state regulations never became operative, thus preventing any possibility of gleaning useful experiential data from them.<sup>270</sup>

Critics went on to fault *Roe* for overlooking a third benefit of federalism with respect to abortion, namely the inherent protection of fundamental liberties within our federal structure. Dividing power between the federal and state governments was intended to create “a double security” for “the rights of the people”<sup>271</sup>—to enable each level of government to check the other’s ability to encroach upon individual liberties and rights.<sup>272</sup> And by allowing for mobility between the states, our federal system secures a second

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<sup>266</sup> *Roe*, 410 U.S. at 116; id. at 139–40 (acknowledging that four states recently had repealed their criminal penalties for abortions performed early in the pregnancy, and fourteen other states had adopted some form of the less stringent Model Penal Code abortion statute).

<sup>267</sup> See *Maier v. Roe*, 432 U.S. 464 (1977).

<sup>268</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>269</sup> Id. at 877 (opinion of O’Connor, Kennedy, and Souter, JJ.).

<sup>270</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 978–79 (2000) (Kennedy, J., dissenting); Forsythe & Presser, *Tragic Failure*, supra note 251, at 159–60.

<sup>271</sup> *The Federalist* No. 51, at 323 (James Madison) (Isaac Kramnick ed., 1987).

<sup>272</sup> See, e.g., Maltz, supra note 259, at 173 (arguing that the Court’s approach in *Roe* “exemplifies its general disregard for federalism concerns in individual rights cases”). Contra Laurence H. Tribe, *American Constitutional Law* 1351 (2d ed. 1988) (asserting that abortion is too fundamental a liberty to be left to the states).

form of liberty—a democratic or common liberty.<sup>273</sup> This democratic liberty is the familiar right of persons to live, to go to work, and to raise their families in communities that reflect their own deepest moral and personal views. Prior to *Roe*, democratic liberty through mobility was particularly salient to the abortion issue because, for example, Pennsylvania could choose to restrict abortions, whereas neighboring New York could choose to allow abortions, even for Pennsylvanians.<sup>274</sup> But the Court in *Roe* renounced the benefits of democratic liberty by establishing a constitutional rule that was considerably harder to escape through mobility than a comparable rule at the state level.<sup>275</sup>

*Roe* also was harshly criticized for neglecting a fourth and final benefit of federalism: the ability to achieve compromise, and even national unity, on a divisive issue like abortion. As discussed above in the context of separation of powers, compromise between stark policy choices can often occur more easily within a legislature than within a court. But federalism fosters a different sort of compromise as well, in which citizens of different states can effectively agree to disagree by achieving their own policy objectives within their own jurisdictions. *Roe* effectively obliterated this possibility of compromise between states on matters of abortion policy. In fact, by ignoring state differences and elevating abortion policy to the national level, *Roe* cultivated divisiveness. Both opponents and proponents of abortion rights criticized the decision because it snuffed out a moderate position on abortion, one in which persons in each state could have tolerated and respected the thoughtful positions of persons in other states, despite their disagreements.<sup>276</sup> In-

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<sup>273</sup> See McConnell, *supra* note 254, at 1503.

<sup>274</sup> “For example, in 1971, the second year New York’s liberalized abortion law was in effect, 60% of the women having abortions in New York were nonresidents.” Ginsburg, *supra* note 39, at 380 n.36. Mobility is subject to financial and other constraints, of course. See Chemerinsky, *supra* note 42, at 117–18; Ely, *supra* note 37, at 936 n.94.

<sup>275</sup> See McConnell, *supra* note 254, at 1503.

<sup>276</sup> See, e.g., Forsythe & Presser, *Tragic Failure*, *supra* note 251, at 162–63 (“[*Roe*] made the abortion debate more divisive because it prevented resolution through the normal give and take of political and legislative discourse and decision”); Ginsburg, *supra* note 44, at 1208 (“*Roe* . . . halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue”); Wardle, *supra* note 263, at 927, 936 (arguing that *Roe* terminated

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stead, citizens of Oklahoma and Massachusetts, of Alabama and California, were forced to swear fealty to the national rule. That *Roe* produced persistent and intense controversy is ironic because *Roe* and its progeny declared their mission as one of promoting an amicable truce on the abortion issue.<sup>277</sup> History quickly contradicted those assertions. No one put it better than Justice Scalia:

Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. . . . Pre-*Roe*, moreover, political compromise was possible. . . . *Roe*'s mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. . . . [T]o portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian.<sup>278</sup>

*B. Heller*

Several members of the *Heller* majority have been among the most outspoken critics of *Roe*'s abandonment of federalist principles. Yet the *Heller* decision threatens to subvert federalism in precisely the same manner as *Roe*. The Court's nascent Second Amendment jurisprudence will inevitably upset the states' long-standing authority over gun regulations. *Heller*'s renunciation of federalist principles in the context of the Second Amendment is problematic for a number of reasons, not least of which is that gun

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the process by which a national consensus might have emerged on abortion when the Court mandated a national abortion policy).

<sup>277</sup> See *Roe*, 410 U.S. at 116 ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires . . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (asserting that decisions like *Roe* "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution").

<sup>278</sup> *Casey*, 505 U.S. at 995 (Scalia, J., concurring in the judgment in part and dissenting in part).

regulations are so tied to regional preferences and local concerns. Constitutionalizing the issue of firearms regulation will erode the diversity that geography and demography would otherwise produce. And the extent of that erosion will be entirely up to the Court. By contrast, the interventions of the Rehnquist Court marginally curtailed the powers of Congress under the Commerce Clause and Section 5 of the Fourteenth Amendment, but those interventions had the virtue of simultaneously opening up options for the individual states.<sup>279</sup> Put another way, the Rehnquist Court acted to protect the authority of one democratic institution from the overreaching of another. *Heller* cannot claim that advantage. Like *Roe*, *Heller* threatens to restrict both federal and state initiatives, thereby cementing the authority of the Court alone to decide the proper scope of gun restrictions throughout the country.

Of course, *Heller* itself invalidated only the firearm regulations operating in the District of Columbia, which is under the control of Congress and thus not subject to the same federalist concerns as the states. But the Court would hardly have gone to such great lengths to recognize a robust Second Amendment right if it did not plan to incorporate that right against the states as well.<sup>280</sup> *Heller* plainly signaled as much: the Court first noted that its 1875 decision in *United States v. Cruikshank* failed to incorporate the Second Amendment against the states. The Court then proceeded to all but label *Cruikshank*'s holding erroneous, observing that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases" and was decided at a time when the Court had not yet applied even the First Amendment to the states.<sup>281</sup> The Court in *Heller* also hinted broadly at its expectation of a future Second Amendment docket. The Court volunteered (less than subtly): "We may as well consider at this point (for we will have to consider eventually) *what* types of weapons [*United*

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<sup>279</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>280</sup> See, e.g., Chemerinsky, *supra* note 135; Robert A. Levy, *District of Columbia v. Heller: What's Next?*, Lead Essay, July 14, 2008, <http://www.cato-unbound.org/2008/07/14/robert-a-levy/district-of-columbia-v-heller-whats-next/> (agreeing that the Second Amendment "will no doubt be incorporated" against the states). With respect to the Court's jurisprudence on incorporating the Bill of Rights against the states, see, for example, *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

<sup>281</sup> *Heller*, 128 S. Ct. at 2813 n.23.

*States v. Miller* permits.”<sup>282</sup> It is difficult to imagine that the referenced future decisions will not focus on state regulations. Moreover, the majority drafted a list of “presumptively lawful regulatory measures,” many—if not all—of which are in place at the state level.<sup>283</sup> But enumeration presupposes something not enumerated,<sup>284</sup> so the Court’s list suggests that there are other state regulatory measures that it will find to be unlawful when, to the surprise of no one, it incorporates the Second Amendment against the states.

### *1. Traditional State Authority*

So the shadow is cast over the traditional authority of the states in the same manner that drew such heated criticism in *Roe*. *Heller* acknowledged that the regulation of firearms has historically fallen within the states’ police power over public safety;<sup>285</sup> indeed, the Court discussed both state constitutional provisions and state and local regulations dealing with firearms that were contemporaneous with the nation’s founding.<sup>286</sup> Congress has mostly respected states’ control of gun regulations in the years since the founding,<sup>287</sup> and the Court itself has previously been jealous of any such congressional interference.<sup>288</sup> But *Heller* gave us several reasons to suspect that the Court will show no more respect than *Roe* did to a long tradition of state legislative primacy.

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<sup>282</sup> *Id.* at 2815; see also *supra* text accompanying notes 136–146.

<sup>283</sup> *Heller*, 128 S. Ct. at 2816–17 & n.26.

<sup>284</sup> *Lopez*, 514 U.S. at 566.

<sup>285</sup> See *Heller*, 128 S. Ct. at 2813 (“States, we said, were free to restrict or protect the right under their police powers.”) (citing *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that the people must look to the states’ powers of “internal police” to protect the right to keep and bear arms); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power . . .”).

<sup>286</sup> See *Heller*, 128 S. Ct. at 2793–94, 2802–03 (recognizing early state constitutional provisions protecting gun rights); *id.* at 2819–20 (early regulations).

<sup>287</sup> But see, e.g., 18 U.S.C. §§ 921–930 (2006) (federal criminal statutes relating to firearms); 26 U.S.C. §§ 5801–5872 (2000) (federal statutes imposing excise taxes and registration requirements on limited categories of firearms); Legal Community Against Violence, *Federal Law Summary* (2008), <http://www.firearmslawcenter.org/content/FederalLawSummary.asp#keycongressionalacts> (describing federal firearms laws).

<sup>288</sup> See *Lopez*, 514 U.S. at 567 (holding that the Commerce Clause did not empower Congress to regulate guns in schools and that the opposite holding would have granted to Congress a “general police power of the sort retained by the States”).

First, the Court read early state constitutional provisions and local regulations to support the majority's own preferred reading of the Second Amendment. Consider for a moment the Court's treatment of founding-era state constitutions. It seems reasonable that provisions in those constitutions that expressly referred to a right of self-defense might have meant something different from the Second Amendment, which included no such express reference.<sup>289</sup> But the *Heller* majority summarily dismissed that sensible, textual theory as "worthy of the mad hatter."<sup>290</sup> Instead, the Court chose to read the different texts to mean the same thing.<sup>291</sup> If the Court is willing to deride its opponents for suggesting that texts with different words have different meanings when comparing state and federal gun provisions, can we not expect the Court to continue to override differences between state and federal policies in subsequent decisions? Consider also *Heller's* treatment of founding-era gun regulations. While *Heller* conceded the existence of a ban in colonial Boston against keeping loaded guns indoors, the Court effectively rewrote the text of that prohibition—as well as laws penalizing with a fine the firing of weapons in colonial cities like Philadelphia and New York—by reading a non-textual self-defense exception into the statute.<sup>292</sup> Again, does this signal anything less than the Court's determination to curtail the states' authority to enact their own policies controlling firearms?

Second, *Heller* failed to appreciate the traditional power of the states over firearm regulations because the Second Amendment itself can be seen to embody federalist principles. Under this view, the Amendment was drafted as a means of protecting the sovereignty of the states by safeguarding the states' militias against federal disarmament (but of course leaving the states to regulate the arms of their militias as they pleased).<sup>293</sup> But the majority dismissed

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<sup>289</sup> See *Heller*, 128 S. Ct. at 2825–26 (Stevens, J., dissenting) (pointing out the difference in meanings between the state and federal provisions).

<sup>290</sup> *Id.* at 2796 (majority opinion).

<sup>291</sup> See *id.* at 2795–96; see also *id.* at 2828–30 (Stevens, J., dissenting) (responding to the majority's attack on this point).

<sup>292</sup> See *id.* at 2819–20 (majority opinion); *id.* at 2848–50 (Breyer, J., dissenting) (discussing these regulations and questioning the majority's recognition of self-defense exceptions in the statutes).

<sup>293</sup> See *id.* at 2827 (Stevens, J., dissenting) (“[T]he ultimate purpose of the [Second] Amendment was to protect the States’ share of the divided sovereignty created by the

that historical, federalism-based interpretation through sheer *ipse dixit*: “The Second Amendment right, protecting only individuals’ liberty to keep and carry arms, did nothing to assuage Antifederalists’ concerns about federal control of the militia.”<sup>294</sup> Thus, while the Court may conceivably give more consideration to federalism in future cases extending beyond the District, *Heller* has already announced the majority’s lack of respect for traditional principles of federalism in connection with the Second Amendment. All the anguish over *Roe*’s displacement of traditional state prerogatives was forgotten. By the time the Court finishes explicating the full scope of its new Second Amendment right, the states’ power over guns may resemble little more than the fading grin of the Cheshire cat.

## 2. *The Federal Design*

The Court’s apparent willingness to constitutionalize the field of firearms also threatens to sacrifice—as in *Roe*—the many prospective benefits produced by different policies in different places under our federal structure. For one, *Heller* diminished the benefits of decentralized decision-making in adapting gun policies to local opinions and concerns. In particular, establishing a more uniform national gun policy through the Second Amendment would be particularly improvident because gun regulations are so uniquely tied to the different views and conditions among regions, individual states, and even smaller units of government.<sup>295</sup>

It should go without saying that preferences for gun regulations vary widely among regions within the United States. Even a cursory review reveals that firearm regulations tend to be stricter in

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Constitution.”); *id.* at 2822, 2831–36 & n.27 (same); Brief for N.Y. et al. as Amici Curiae in Support of Petitioners at 4, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (“A principal purpose of the Second Amendment is to function as a bulwark against federal intrusion into state sovereignty over militias. That purpose would be undermined, rather than supported, by interpreting the Amendment to authorize federal judicial review of state laws regulating weapons.”).

<sup>294</sup> *Heller*, 128 S. Ct. at 2804.

<sup>295</sup> See Richard A. Posner, In Defense of Looseness, *The New Republic*, Aug. 27, 2008, at 32; see also Drazen et al., *supra* note 231, at 517–18 (“Given the diversity of geography and population in the United States, lawmakers throughout the country need the freedom and flexibility to apply gun regulations that are appropriate to their jurisdictions.”).

coastal, northeastern, and a few midwestern states than in the mountain west and southern states, where antipathy to gun control runs deep and wide. For example, only seven states currently ban assault weapons: California, Connecticut, Hawaii, Massachusetts, Maryland, New Jersey, and New York.<sup>296</sup> The regional distribution of those states is readily apparent. And when the Brady Campaign to Prevent Gun Violence recently ranked the states based on the overall restrictiveness of their firearm regulations, the ten most restrictive states exhibited a similarly striking regional concentration: California, New Jersey, Connecticut, Massachusetts, Maryland, New York, Rhode Island, Hawaii, Illinois, and Pennsylvania.<sup>297</sup> These examples provide a flavor of the regional differences in gun laws throughout the nation and the corresponding benefits of decentralized firearm policies.

The marked differences among gun regulations in individual states also demonstrate the utility of allowing states to tailor their policies to local preferences. California, for instance, has enacted the following laws, among others: bans on assault weapons, large capacity ammunition magazines, and fifty caliber rifles; regulations of ammunition and non-powder guns; waiting periods for gun purchases; a limit of one handgun purchase per person per month; regulations of firearm dealers and gun shows; universal background checks for all firearm transfers; licensing requirements for handguns; and locking device requirements.<sup>298</sup> Montana and Arkansas, on the other hand, have enacted *none* of those policies.<sup>299</sup> And North Carolina, for example, operates somewhere in between: it regulates ammunition, non-powder guns, and gun dealers, and it

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<sup>296</sup> See *Regulating Guns in America*, supra note 162, at 20–21. Hawaii and Maryland ban assault pistols; the other five states ban assault weapons generally. The term “assault weapons” refers to “a class of semi-automatic firearms designed with military features to allow rapid and accurate spray firing.” *Id.* at 19.

<sup>297</sup> See Brady Campaign To Prevent Gun Violence, 2007 Brady Campaign State Scorecard Rankings, [http://www.stategunlaws.org/xshare/pdf/scorecard/2007/2007\\_scorecard\\_rankings.pdf](http://www.stategunlaws.org/xshare/pdf/scorecard/2007/2007_scorecard_rankings.pdf); Brady Campaign to Prevent Gun Violence, New Brady Scorecard Shows Most States Lack Common Sense Gun Restrictions (Jan. 31, 2008), [http://www.stategunlaws.org/xshare/pdf/scorecard/2007/2007\\_national\\_release.pdf](http://www.stategunlaws.org/xshare/pdf/scorecard/2007/2007_national_release.pdf) (describing the methodology of the state rankings and the categories of gun laws analyzed).

<sup>298</sup> See *Regulating Guns in America*, supra note 162, at 259–64 (presenting a table summarizing the gun regulations in the states and certain cities).

<sup>299</sup> See *id.*

also requires licenses for handguns, but it shares none of California's additional restrictions.<sup>300</sup>

Important distinctions also exist between policies at the state-wide and local levels, suggesting even further benefits of localized decision-making. For example, no state bans all types of handguns.<sup>301</sup> But some cities have enacted complete handgun bans, including Chicago (and some of its suburbs), San Francisco, and, of course, the District of Columbia.<sup>302</sup> Similarly, nearly every state issues permits to allow concealed carrying of weapons.<sup>303</sup> But a number of cities—including Chicago, Cleveland, Columbus, Hartford, New York City, and Omaha—restrict concealed carrying much more strictly than their respective states; some of those cities prohibit concealed carrying altogether, while others bar the practice with limited exceptions.<sup>304</sup> These local policies are undoubtedly premised on the perceived dangers associated with guns in urban environments, namely higher rates of violent crime (particularly homicides) involving firearms (particularly handguns).<sup>305</sup> Conversely, the absence of such restrictions in other localities may reflect the central place of firearms in the life of more rural communities.

Indeed, the connection between gun policy and local conditions was quite apparent in *Heller*. As Justice Breyer stressed in dissent, the District enacted its handgun ban to counteract the specific problems of gun violence in the “District’s exclusively urban environment.”<sup>306</sup> Thus, deference to the District’s judgment would have seemed “particularly appropriate” because that judgment was based on “particular knowledge of local problems and insight into appropriate local solutions.”<sup>307</sup> But the majority in *Heller* rejected such deference without even appearing to consider the important

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<sup>300</sup> See *id.*

<sup>301</sup> *Id.* at 40.

<sup>302</sup> *Id.* at 40 & nn.19, 21. San Francisco’s handgun ban has been held to be preempted by state law, although that ruling appears to have an appeal pending. See *id.* at 40 n.21.

<sup>303</sup> See *id.* at 206–08.

<sup>304</sup> See *id.* at 212–13.

<sup>305</sup> See, e.g., *Heller*, 128 S. Ct. at 2857 (Breyer, J., dissenting) (citing studies demonstrating these differences between urban and rural environments).

<sup>306</sup> *Id.* at 2855 (discussing the crime statistics in the District that prompted the initial passage of the handgun ban).

<sup>307</sup> *Id.* at 2860.

federalism interests that informed criticism of *Roe*. The variation in views that made a state-by-state approach seem desirable in the area of abortion law somehow became irrelevant to the majority in *Heller*. The *Heller* decision emphasized instead the severity of the District's handgun ban in comparison to other historical examples of statewide gun regulations.<sup>308</sup> But that emphasis completely failed to appreciate the distinctions between the local conditions faced by the District today and those faced by Georgia and Tennessee in the mid-nineteenth century. Thus, *Heller* set the Court on the path of ignoring and abandoning the benevolent effects of decentralized policy-making on gun regulations—just as the Court did with respect to abortions in *Roe*.

*Heller* also endangers, like *Roe* before it, another fundamental benefit of federalism: experimentation and innovation in the natural laboratories of the states. Experimentation among states and cities is critical to producing effective gun regulations. The persistence of gun violence in the schools, offices, malls, and fast-food restaurants of our country demonstrates that some creative thought is necessary. And state and local governments need the freedom to improvise and innovate and, in particular, to adapt their solutions to the unique circumstances in their own community.<sup>309</sup> Furthermore, innovative policies in one jurisdiction benefit not only that jurisdiction, but through the sharing of information and results, the nation as a whole. As discussed above, legislatures are in a better position than courts to weigh empirical evidence with respect to gun policies.<sup>310</sup> But that empirical data must come from somewhere. And that somewhere is the natural laboratory of federalism. Variations in policy between state and local governments provide results that legislatures can compare, thereby pushing the entire nation toward more efficacious solutions. One important example is the prickly issue of causation: do gun

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<sup>308</sup> See *id.* at 2818 (majority opinion); but see *id.* at 2851 (Breyer, J., dissenting) (noting that the District's prohibition was tailored more narrowly than the examples cited by the majority).

<sup>309</sup> See *id.* at 2861 (Breyer, J., dissenting) (arguing that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986))).

<sup>310</sup> See *supra* text accompanying notes 213–48.

restrictions cause more or fewer gun crimes?<sup>311</sup> More guns may equate to more violence or to more mutual deterrence, and judges, as noted, are in the least advantageous position to answer such thorny questions. Innovative policies could help to resolve the causation issue by showing how violence changes when regulations change in various settings.<sup>312</sup>

As was the case with abortion policies before *Roe*, states and cities were exercising their prerogative to innovate prior to the *Heller* decision. The District's handgun ban—no matter how unwise in the eyes of a majority of the Court—is a ready example of such an experiment. Richmond, Virginia presents an alternative, innovative technique for combating gun violence. Beginning in the late 1990s, Richmond “reduced firearm-related violence dramatically . . . not by making gun purchases more difficult—Virginia is one of the easiest places to legally buy a handgun—but by severely punishing all gun crimes, including those as minor as illegal possession.”<sup>313</sup> As expected, the results of those efforts have been shared with representatives from other cities who have visited Richmond to learn about its enforcement program.<sup>314</sup> Furthermore, in states like California, innovations at the local level have continuously spawned reforms at the state level.<sup>315</sup> And at the state level, for example, twenty-nine states have enacted legislation permitting concealed carrying of firearms since 1990.<sup>316</sup>

*Heller* threatens to curb this experimentation and its benefits. As with *Roe*, innovation now faces almost certain litigation. While the

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<sup>311</sup> See *Heller*, 128 S. Ct. at 2859 (Breyer, J., dissenting) (noting the difficulty of the causation issue).

<sup>312</sup> Cf. *id.* at 2858 (citing studies that analyzed the results of particular experiments, including “a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns,” and a “decrease in sexual assaults in Orlando when women were trained in the use of guns”).

<sup>313</sup> Gary Fields, *Going After Crimes—and Guns*, *Wall St. J.*, Aug. 5, 2008, at A12 (describing Richmond's efforts to achieve 100% prosecution of gun crimes through cooperation between local, state, and federal officials, and noting that other jurisdictions had instituted similar efforts).

<sup>314</sup> *Id.* (“Other cities, including Springfield and Peoria in Illinois have visited to see what Richmond is doing.”).

<sup>315</sup> *Regulating Guns in America*, *supra* note 162, at 5 & n.16. While some of the beneficial effects of local innovation may be muted in the large number of states that preempt local gun regulation, such state preemption laws are simply another data-producing policy experiment, see *id.* at 11–16.

<sup>316</sup> Winkler, *supra* note 216, at 702–03.

Court in *Heller* insisted that numerous policy options are still available to the District,<sup>317</sup> the lessons of *Roe* are clear: as the Court establishes a national set of restrictions on gun regulations, it will limit the space in which states and cities can innovate. Although Justice Kennedy was in the majority in *Heller*, he previously observed in *Lopez* the specific danger that a mere federal statute poses to beneficent local experimentation on gun regulations.<sup>318</sup> The threat of litigation under a federal constitutional rule increases that danger exponentially.<sup>319</sup> And as was the case after *Roe*, many jurisdictions are likely to respond to the *Heller* decision not with new and thoughtful solutions for the problems of gun violence, but with legislation aimed at evading the Court's decision. In fact, the District of Columbia revised its regulations after *Heller* in what appears to be the narrowest manner possible—and a manner that may still conflict with *Heller*'s announcement of a vigorous right to self-defense in the home.<sup>320</sup> Such efforts—provoked by the Court's overreaching—reposition resources that could be devoted to useful thinking into how to avoid lawsuits. *Heller* thus repeated the mistake of *Roe* and courts the same sad consequences.

The *Heller* decision also repeated *Roe*'s mistake of underestimating federalism's inherent capacity to protect liberty. Like the Court's recognition of a fundamental right to abortion in *Roe*, the Court's recognition of a robust Second Amendment individual right appeared to presume that states and cities cannot adequately protect the liberty to keep and bear arms. But that presumption ignored the protection of liberties in our federal system through diffusion of power, as well as mobility and competition between the states. Residents of the District who were unhappy with the handgun ban, for example, remain free to move to other localities more protective of gun rights. To be sure, moving anywhere is no small inconvenience, but staying put does not confer the right to have the law comply with one's own preferences. Under the Court's rigid

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<sup>317</sup> See *Heller*, 128 S. Ct. at 2822.

<sup>318</sup> See *United States v. Lopez*, 514 U.S. 549, 581–83 (1995) (Kennedy, J., concurring).

<sup>319</sup> *Heller*, 128 S. Ct. at 2868 (Breyer, J., dissenting) (“And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.”).

<sup>320</sup> See *supra* text accompanying notes 148–160.

national rule, moreover, no one will be able to exercise the liberty to live in a city in which handguns are prohibited. Because the Second Amendment is at best ambiguous in establishing a fundamental right to self-defense in the home, I have little doubt that Madison and Hamilton would describe the Court's rule, not the District's, as the greater infringement on liberty.

Finally, the *Heller* decision abandoned a fourth benefit of our federal structure: the possibility of state-by-state compromise on the controversial issue of gun control and the fostering of national unity around the positive principle of federalism. Just as *Roe* made the abortion issue significantly more divisive by taking the possibility of its resolution away from the states, *Heller* elevated the review of gun regulations to the national level, "where it is infinitely more difficult to resolve."<sup>321</sup> These efforts will serve only to make the debate over gun laws more intractable. Others have reacted to *Heller* by proposing that the decision may actually lessen divisiveness. Their theory is that *Heller* will encourage reasonable debate because the decision took the polarizing policy of handgun prohibitions off the table.<sup>322</sup> But those arguments merely replicate the failed predictions that *Roe* would resolve the abortion issue. As the Court blueprints its Second Amendment jurisprudence and subjects every state and local regulation to federal court review, the national controversy over gun policy will intensify. Placing issues in the courts is no safety valve, and it builds frustration in those whom judicial decisions disenfranchise.

So, *Heller* jettisoned the many benefits of federalism, and it did so despite the lessons of *Roe*. This course is both troubling and perilous. Federalism must remain more than a pliable means to substantive ends—treated as either a rhetorical device to be employed when convenient or a nuisance to be ignored when less so. It is disheartening that Justices who deplored decisions like *Roe* on federalism grounds ignore the constraints of federalism when the sub-

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<sup>321</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>322</sup> See, e.g., E.J. Dionne Jr., *Originalism Goes Out the Window*, *Wash. Post*, June 27, 2008, at A17 (statement of Paul Helmke, president of the Brady Campaign to Prevent Gun Violence) ("[*Heller*] will make gun control less of a 'wedge issue . . . .'"); Henigan, *The Heller Paradox*, *supra* note 140 (predicting that *Heller* "may make it easier for advocates of stronger gun laws to ensure that gun control is viewed as the public safety issue that it is, rather than as a divisive, cultural issue.").

stantive terrain shifts to firearms. It is disheartening that the dissenting Justices in *Heller* decline to apply their federalism-based critiques across the board, even on issues like abortion. The shoe must be worn when it pinches as well as when it comforts.<sup>323</sup> Uneven treatment denies dual sovereignty the respect it deserves and will fuel accusations of a policy-driven Court.

#### CONCLUSION

Law entrusts judges with responsibilities and society accords them its respect. In return, the social order asks of judges one basic thing—that they respect the parameters of those tasks the Constitution assigns them and observe the need for self-imposed restraint. All persons, be they teachers or carpenters, ministers or congressmen, gain stature within prescribed roles and are over time diminished by departures. A judge's view of law may be esteemed; a judge's view on policy is worth no more than any other. It is that simple compact that the rule of law embodies—we have been given much, but it comes with a warning. It is that warning *Roe* and *Heller* failed to heed.

In closing, I cannot help but recall Justice Scalia's lament in *Casey*:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.<sup>324</sup>

Yet, sixteen years later, the Court now takes an issue about which the nation is deeply divided and narrows democratic outlets, overlooks regional differences, and imposes a rigid national rule. *Heller* thus represents the worst of missed opportunities—the chance to ground conservative jurisprudence in enduring and consistent principles of restraint. The Constitution expresses the need

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<sup>323</sup> See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting).

<sup>324</sup> *Casey*, 505 U.S. at 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

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for judicial restraint in many different ways—separation of powers, federalism, and the grant of life tenure to unelected judges among them. It is an irony that *Heller* would in the name of originalism abandon insights so central to the Framers' designs. The losers in *Heller*—those who supported the D.C. handgun law, or, more accurately, supported the D.C. voters' right to enact it—have cause to feel they have been denied the satisfaction of a fair hearing and an honest fight. I hope only that my fondness for the Scalia of *Casey* and the restraint of Hand<sup>325</sup> and Holmes is grounded in more than nostalgia for days of judicial modesty gone by.

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<sup>325</sup> See Learned Hand, The Contribution of an Independent Judiciary to Civilization, in *The Spirit of Liberty* 163–64 (3d ed. 1960).