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Jesse D.H. Snyder

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What Prohibition Teaches About Guns and Abortion: How Alcohol Can Save Individual Rights

*Jesse D.H. Snyder**

I. INTRODUCTION

David Bowie once reflected, whether we like it or not, whether we know it or not, time changes us all: “Time may change me. But you can’t trace time.”¹ A women’s right to terminate a pregnancy through abortion and the right to bear arms are two sides of the same coin because of time. The rights are polarizing with dissimilar footholds in the Constitution. Those in favor of one right are generally opposed to the other right.² Yet because they are individual rights recognized by the Supreme Court, they are entwined like a double helix, resisting repulsion under a latent precept: reliance. In 1973, in *Roe v. Wade*, the Supreme Court prescribed the right for women to choose to terminate their pregnancies through abortion.³ *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed that individual right in 1992,⁴ and *Whole Woman’s Health v. Hellerstedt* did the same in 2016.⁵ This unenumerated right rests in the Due Process Clause of

*2015–2016 Law Clerk to the Honorable Jimmie V. Reyna of the United States Court of Appeals for the Federal Circuit; 2016–2017 to the Honorable Eugene E. Siler, Jr. of the United States Court of Appeals for the Sixth Circuit. Jesse earned his J.D., *summa cum laude*, from Texas Wesleyan University and his B.S. from the United States Air Force Academy. While in law school, he served as editor in chief of the *Texas Wesleyan Law Review*. After graduating from law school, he clerked for the Honorable Jorge A. Solis of the United States District Court for the Northern District of Texas. Jesse would like to thank Amy Depuy, Tyra Singleton, Alice Kwak, and the entire staff of the *Hastings Women’s Law Journal*. Finally, he would like to thank and recognize his wife, Amy, for her enduring support and strength as a proud patriot and advocate for equal rights.

1. DAVID BOWIE, *Changes, on HUNKY DORY* (Trident Studies 1972).

2. See, e.g., Amy Howe, *Last night’s presidential debate: The Supreme Court and the candidates*, SCOTUSBLOG (Oct. 20, 2016, 11:02 AM), <http://www.scotusblog.com/2016/10/last-nights-presidential-debate-the-supreme-court-and-the-candidates/>.

3. Stephen Wermiel, *SCOTUS for law students: Roe v. Wade and precedent*, SCOTUSBLOG (Dec. 2, 2016, 1:55 PM), <http://www.scotusblog.com/2016/12/scotus-for-law-students-roe-v-wade-and-precedent/>; *Roe v. Wade*, 410 U.S. 113, 164 (1973).

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (citations omitted).

5. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

the Fourteenth Amendment.⁶ In 2008, in *District of Columbia v. Heller*, the Supreme Court concluded that an individual has the right to possess a handgun in the home for self-defense.⁷ In 2010, *McDonald v. City of Chicago* applied that individual right against the states.⁸ The right to bear arms is, of course, housed in the Second Amendment.⁹ Although the two rights may seem discordant, like all individual rights recognized by the Supreme Court, they derive value and meaning by affording an individual the ability to push back against state action in derogation of those rights. The creation and enablement of an individual right gives rise to reliance that that right will endure among the oscillating panoply of other rights already dedicated to the public.¹⁰

Doubtless the Supreme Court can overrule constitutional precedent, but a study of jurisprudence in the area of individual rights reveals scant decisions that recognized an individual right and then scuttled expectations by expunging that right from the public.¹¹ If the Supreme Court were to consider negating the rights recognized in *Roe* and *Heller*, it must contend with the due-process consequences of upsetting the settled expectations of individuals.¹² Advocates in favor of either *Roe* or *Heller* have the challenge of explaining how excising individual rights impacts society writ large. Proponents of individual rights must be creative, directing the Court's attention to extrajudicial sources amid a dearth of apposite judicial decisions. And for that, Prohibition offers a glimpse into a world laboring in the absence of a once-recognized right. How society behaved during the only time a constitutional amendment was ratified and then repealed is instructive of what might happen if gun or abortion rights vanish.¹³

This paper argues that advocates should use the documented history of Prohibition to argue why courts should be circumspect before overruling decisions recognizing individual rights. In three parts, the paper outlines how the 2016 presidential election stirred frisson among proponents and

6. Casey, 505 U.S. at 846. ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.")

7. Amy Howe, *Last night's presidential debate: The Supreme Court and the candidates*, SCOTUSBLOG (Oct. 20, 2016, 11:02 AM), <http://www.scotusblog.com/2016/10/last-nights-presidential-debate-the-supreme-court-and-the-candidates/>; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

8. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (controlling opinion).

9. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.")

10. Akhil Amar, *The Court after Scalia: The despicable and dispensable exclusionary rule (Corrected)*, SCOTUSBLOG (Sept. 16, 2016, 1:57 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-the-despicable-and-dispensable-exclusionary-rule/>.

11. See *Casey*, 505 U.S. at 861-63 (citing *Lochner v. New York*, 198 U.S. 45 (1905); *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

12. See Amar, *supra*, note 10.

13. Compare U.S. CONST. amend. XVIII, with U.S. CONST. amend. XXI.

opponents of abortion and gun rights, discusses how Prohibition is apt when considering the effects of curtailing individual rights, and concludes by asserting that due process requires courts to adhere to precedent when individuals develop a reliance interest on recognized individual rights. In the end, alcohol may be the elixir that saves abortion and gun rights.

II. THE 2016 PRESIDENTIAL ELECTION AND THE WEAPONIZING OF INDIVIDUAL RIGHTS

Court opinions on gun control and access to abortion procedures are politicized issues that never seem to settle.¹⁴ Inveighers against those rights most likely take comfort in Justice Louis D. Brandeis's remarks that "no case is ever finally decided until it is rightly decided."¹⁵ But this position begs the question of when can individuals ever feel secure in recognized individual rights when each new justice on the Supreme Court invites "a [renewed] battle for the meaning of the Constitution"?¹⁶ Unlike abortion and gun control, same-sex marriage, interestingly, seems secure even though disagreement persists on its legal firmness.¹⁷

Roe and *Heller* transcend normative voting issues. The decisions have fomented advocacy groups and million-dollar industries dedicated to the preservation or eradication of the rights those cases have come to represent.¹⁸ Money goes, in part, to persuade voters why one cause is virtuous and the other leads to bedlam.¹⁹ The perception that *Roe* and *Heller* are fragile is buttressed by expenditures: causes attempting to persuade that either decision is correct outspend causes attempting to undermine the recognized right.²⁰

Parsing the legal reasons that moor the recognition of the right to own a handgun in the home for self-defense and the right to terminate a

14. See, e.g., Lyle Denniston, *Constitution Check: Might the Supreme Court overrule its own gun rights ruling?* NATIONAL CONSTITUTION CENTER (Sept. 22, 2016), <http://blog.constitutioncenter.org/2016/09/constitution-check-might-the-supreme-court-overrule-its-own-gun-rights-ruling/>; See Wermiel, *supra*, note 3.

15. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 223 (1952) (quoting Justice Brandeis that "no case is ever finally decided until it is rightly decided").

16. Michael Dorf, Symposium: *The wages of guerrilla warfare against abortion*, SCOTUSBLOG (June 27, 2016, 5:12 PM), <http://www.scotusblog.com/2016/06/symposium-the-wages-of-guerrilla-warfare-against-abortion/>.

17. See Wermiel, *supra*, note 3; Ryan Anderson, *Symposium: Judicial activism on marriage causes harm: What does the future hold?*, SCOTUSBLOG (June 26, 2015, 4:28 PM), <http://www.scotusblog.com/2015/06/symposium-ryan-anderson/>.

18. See, e.g., Suevon Lee, *By the Numbers: Comparing Spending by Gun Rights and Gun Control Interest Groups*, PROPUBLICA (Dec. 31, 2012, 8:59 AM), <https://www.propublica.org/article/by-the-numbers-comparing-spending-by-gun-rights-and-gun-control-interest-gr>; Steven Ertelt, *\$37M Spent on Election Abortion Ads, Pro-Lifers Outspent 3-1*, LIFE NEWS.COM (Nov. 15, 2012, 4:16 PM), <http://www.lifenews.com/2012/11/15/37m-spent-on-election-abortion-ads-pro-lifers-outspent-3-1/>.

19. *Id.*

20. See, *supra*, note 18.

pregnancy through abortion does not explain in full why people care about these issues. Commentators suggest that, although progressives would much like to overturn *Heller*, their chief aim is to restrict access to weapons as a means to promote public safety.²¹ To them, *Heller* threatens the prospect of a safe society irrespective of whether the right to bear arms has a foothold as a collective right or individual right.²² As for a woman's right to an abortion, commentators likewise conclude that "*Roe*'s continued uncertain status as settled precedent must lie outside legal reasoning":

Many commentators have observed that a variety of interest groups have gained and exerted political traction by using the issue of abortion as an organizing principle and rallying point. The intersection of anti-abortion political movements with pro-life moral values and religious teachings by the Catholic Church and others may have added to the power of the issue as a political rallying cry. A number of state legislatures have stoked the debate over abortion rights by annually passing new abortion restrictions or even partial or near-total bans, some clearly designed as vehicles for the court to reconsider *Roe*.²³

Public disagreement with *Roe* and *Heller* is not so much about constitutional law as it is about extrajudicial values.

During the 2016 presidential election, those two rights received outsized attention.²⁴ Amid the omnipresent vacancy on the Supreme Court, both candidates used the rights as unexpurgated rallying cries, suggesting that the election will secure the vitality of one right and presage the demise of the other.²⁵ Scholars feared the same:

If Justice Scalia is replaced by someone who favors abortion rights, *Roe v. Wade* will be more secure than it has been in decades. If Justices Ginsburg, Breyer, and Kennedy are replaced by Hillary Clinton, abortion rights will be protected for decades to come and the court likely will revisit some of its rulings that allowed restrictions on abortions. But conversely, if even two of these four seats are replaced by Donald Trump, it seems certain that there would be five votes to greatly limit abortion rights and I believe to overrule *Roe v. Wade*.

21. See Adam Winkler, *The Reasonable Right to Bear Arms*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-ii/the-reasonable-right-to-bear-arms-adam-winkler/interp/2> (last visited Dec. 13, 2016).

22. See *id.*; Cass R. Sunstein, *The Refounding Father*, THE NEW YORK REVIEW OF BOOKS (June 5, 2014), <http://www.nybooks.com/articles/2014/06/05/justice-stevens-refounding-father/>.

23. See Wermiel, *supra*, note 3.

24. Howe, *supra*, note 7.

25. *Id.*

....

Again, the current court is likely split 4-4 on the meaning of the Second Amendment. A Hillary Clinton victory would mean a court that is unlikely to extend gun rights and very well might overrule *Heller* and *McDonald*. A Donald Trump presidency would create a court committed to these decisions and would be likely to strike down many other laws regulating firearms.²⁶

But is fear a justifiable response? Is one right guaranteed to ascend, while the other is consigned to an inflection point toward demise? Certainly, the Supreme Court can overrule precedent. Still, in 239 years, the Court has overruled one of its constitutional decisions only 95 times.²⁷ Instances when the Court purged an individual right are vanishing small.

III. WHAT PROHIBITION, MORE THAN ANY COURT DECISION, TEACHES ABOUT INDIVIDUAL RIGHTS

Prohibition—not prior decisions—serves as the most appropriate model of what would happen if the Supreme Court overruled *Roe* or *Heller*. When the Court last scrutinized whether an individual right should be overruled in favor of state legislation, it could muster only two cases to demonstrate how widespread debate undermined past legitimacy: *Lochner v. New York* and *Plessy v. Ferguson*.²⁸

Lochner “imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation.”²⁹ When the Court overruled the substantive right to contract, the right was hardly an individual right because collective institutions used *Lochner* as a means to propagate unregulated, profit-maximizing behavior to the detriment of social welfare.³⁰ *Lochner* stood more for inhibiting regulation than for enabling individuals the freedom to contract. No uprisings about the loss of the right to contract occurred because individual welfare, in the Court’s view, depended on some market regulation.³¹

Plessy implicated the infamous “separate-but-equal rule for applying the Fourteenth Amendment’s equal protection guarantee.”³² As the Court reflected, “whatever may have been the understanding in *Plessy*’s time of

26. Erwin Chemerinski, *Chemerinsky: What will the presidential election mean for SCOTUS?*, ABA JOURNAL (Sept. 6, 2016, 7:45 AM), http://www.abajournal.com/news/article/chemerinsky_what_will_the_coming_election_mean_for_scutus.

27. Lyle Denniston, *Constitution Check: Might the Supreme Court overrule its own gun rights ruling?*, NATIONAL CONSTITUTION CENTER (Sept. 22, 2016), <http://blog.constitutioncenter.org/2016/09/constitution-check-might-the-supreme-court-overrule-its-own-gun-rights-ruling/>.

28. *Casey*, 505 U.S. at 861–62.

29. *Id.* at 861 (citation omitted).

30. *Id.* (citation omitted).

31. *Casey*, 505 U.S. at 862 (citation omitted).

32. *Id.* (citation omitted).

the power of segregation to stigmatize those who were segregated with a 'badge of inferiority,' it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal."³³ *Plessy* is anathema to individual rights, elevating collective-institutional justifications for segregation in denigration of the rights secured through the Reconstruction Amendments.

The aftermath of *Lochner* and *Plessy* had nothing to do with individuals coping with a loss of recognized rights; those cases represented improvement of individual rights. In the absence of case law evidencing what happens when a recognized right is removed from the public, Prohibition is an exemplar for when the public enjoys a right later taken away.

During the 1820s, a wave of religious revivalism ignited the temperance movement.³⁴ In 1838, Massachusetts passed a temperance law banning the sale of spirits in less than 15-gallon quantities.³⁵ Maine passed the first state prohibition law in 1846, and several states followed suit by the time the Civil War began in 1861.³⁶

The temperance movement gained momentum after the Civil War, avowing to fight "the perceived evils linked with alcoholic beverages."³⁷ In 1880, Kansas became the first state to pass a constitutional provision that prohibited the production and sale of alcohol.³⁸ The Supreme Court upheld the law because "it is not a determination for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination on that question."³⁹ In 1888, the Court narrowed that decision through the Commerce Clause, holding that states could not regulate liquor sales unless and until transportation of the liquor terminated in that forum.⁴⁰ In 1890, Congress responded by passing the Wilson Act, which gave states the power to regulate the importation of liquor to the same degree as they regulated in-state liquor:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use,

33. *Casey*, 505 U.S. at 863 (citation omitted).

34. *Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/topics/prohibition>.

35. *Id.*

36. *Id.*

37. Autumn R. Veatch, Comment, *Where Does the Commerce Clause End and the Twenty-first Amendment Begin Under Bainbridge v. Turner?*, 39 NEW ENG. L. REV. 111, 116 (2004).

38. See Russ Miller, Note, *The Wine is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2504 (2001).

39. Matthew B. Mills, Note, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-Granholm Era*, 81 IND. L.J. 1097, 1100 (2006) (citations omitted).

40. *Bowman v. Chicago & Nw. Ry.*, 125 U.S. 465, 499 (1888).

consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.⁴¹

Eight years later, the Supreme Court again scuttled Congress's efforts, concluding that the Wilson Act did not cover mail-order alcohol.⁴² As a result, "[m]ail order booze, of course, flourished."⁴³ Temperance advocates remained undeterred, persuading Congress in 1913 to pass the Webb-Kenyon Act, which prohibited the importation of liquor into any state with the intent to violate the laws of that state.⁴⁴ The Webb-Kenyon Act struck similar tones with what became Section two of the Eighteenth Amendment:

The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited.⁴⁵

The Court upheld the constitutionality of the Webb-Kenyon Act in 1917, two years before the beginning of nationalized Prohibition.⁴⁶ By that point, World War I had exacerbated xenophobia against the German brewing industry, leading one temperance politician to exclaim, "And the worst of all our German enemies, the most treacherous, the most menacing, are Pabst, Schlitz, Blatz and Miller."⁴⁷

Ratified on January 16, 1919, the Eighteenth Amendment prohibited the making, transporting, and selling of alcoholic beverages.⁴⁸ Proponents of the movement, in a manner eerily similar to the advocacy against *Roe* and *Heller*, exhorted that temperance would reduce crime and corruption,

41. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2002)).

42. Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 NOTRE DAME L. REV. 1563, 1569 (2004) (citation omitted).

43. *See id.* at 1569.

44. Webb-Kenyon Act, Pub. L. No. 68-398, 37 Stat. 699 (1913).

45. *Compare id.*, with U.S. CONST. amend. XVIII, § 2.

46. James S. Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917).

47. Evan Andrews, *10 Things You Should Know About Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/news/10-things-you-should-know-about-prohibition>.

48. Annenberg Classroom, *Prohibition of Liquor*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xviii> (last visited on Dec. 13, 2016); U.S. CONST. amend. XVIII.

decrease the need for welfare and prisons, and improve the health and welfare of Americans.⁴⁹

Agitation for repeal sparked “almost from the time [the Eighteenth Amendment] was adopted.”⁵⁰ Accounts attribute the Eighteenth Amendment to driving underground the lucrative alcohol business, creating a pervasive black market.⁵¹ According to some reports, “[i]t was only slightly more difficult to buy liquor under Prohibition than it had been prior to its passage.”⁵² Evidence shows that Prohibition encouraged disrespect for the law and strengthened organized crime.⁵³ Several states refused to enforce the Eighteenth Amendment.⁵⁴ New York City boasted more than 30,000 speakeasies, and Detroit’s alcohol trade was second only to the auto industry in contribution to its economy.⁵⁵ Chicago gangster Al Capone earned \$60 million annually from bootleg operations and speakeasies.⁵⁶ Illegal operations fueled a corresponding rise in gang violence, including the St. Valentine’s Day Massacre in Chicago in 1929, in which several men dressed as policemen killed a group from an enemy gang.⁵⁷

Against gangsters bootlegging and concomitant government corruption, President Warren G. Harding declared that Prohibition had devolved into a “nationwide scandal.”⁵⁸ The upshot of Prohibition included its disproportionate effect on the nation’s working class and poor because the high price of bootleg liquor margined out all but middle- and upper-class Americans.⁵⁹ Costs for law enforcement, jails, and prisons spiraled upward.⁶⁰ Estimates suggest that more than 10,000 people died of tainted booze during Prohibition.⁶¹

Prohibition ended with the ratification of the Twenty-First Amendment on December 5, 1933.⁶² In New Orleans, as the story goes, the occasion was honored with 20 minutes of celebratory cannon fire.⁶³ According to another apocryphal tale, President Franklin D. Roosevelt marked the occasion by downing a dirty martini.⁶⁴ Although a few states continued to

49. Classroom, *supra*, note 48.

50. Rutkin v. Reinfeld, 229 F.2d 248, 255 (2d Cir. 1956).

51. Classroom, *supra*, note 48.

52. See Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 283–84 (2004).

53. Classroom, *supra*, note 48.

54. Andrews, *supra*, note 47.

55. *Id.*

56. *Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/topics/prohibition>.

57. *Id.*

58. LAURENCE F. SCHMECKEBIER, THE BUREAU OF PROHIBITION 46 (1929).

59. *Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/topics/prohibition>.

60. *Id.*

61. Andrews, *supra*, note 47.

62. *Simpkins v. United States*, 78 F.2d 594, 595 (4th Cir. 1935); U.S. CONST. amend. XXI.

63. Andrews, *supra*, note 47.

64. *Id.*

prohibit alcohol after Prohibition, all had abandoned the movement by 1966.⁶⁵ The “noble experiment” failed.⁶⁶

Prohibition marks the only time that the states ratified a constitutional amendment only to repeal it after experience.⁶⁷ This unsuccessful foray, although initially approved by three-fourths of the states,⁶⁸ illustrates what happens when rights assumed to be retained by the people cease to exist. Instead of referring to the epoch as an effective execution of the constitutional amendment process, history labels the period as a failure.⁶⁹ Prohibition teaches that, when purged of an individual right, people carry on as if they still retain the right notwithstanding state action to the contrary. Confidence in governmental institutions erodes, and respect for the rule of law falls to a nadir.

Prohibition demonstrates that worries over underground arsenals, rebel uprisings, back-alley abortions, and civil disobedience are realistic if *Roe* and *Heller* are overruled. This is not to incite fear or create panic. Rather, the conclusion acknowledges the uneasy lawlessness that suffused Prohibition. If the Supreme Court or a committed three-fourths of the states seek to overrule *Roe* or *Heller*, they should expect pushback. Rebellion and protest are baked into the polity, and taking away previously granted rights is a convenient way to stimulate opposition against state action.⁷⁰

IV. WHY COURTS SHOULD HESITATE BEFORE CIRCUMSCRIBING PREVIOUSLY RECOGNIZED INDIVIDUAL RIGHTS

If past is prologue, Prohibition teaches that courts should be leery before circumscribing heretofore recognized individual rights upon which society now relies. Although the argument is handy that overruling *Roe* and *Heller* returns those issues to the states that position fails to mollify the reliance interests built up by individuals who have no desire to relocate at the peril of losing something they believe is constitutionally theirs.⁷¹ Even

65. *Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/topics/prohibition>.

66. Mills, *supra*, note 39.

67. Compare U.S. CONST. amend. XVIII, with U.S. CONST. amend. XXI.

68. U.S. CONST. art. V.

69. Mills, *supra*, note 39.

70. See, e.g., NCC Staff, *On this day: Shays' Rebellion was Thwarted*, NATIONAL CONSTITUTION CENTER (Jan. 25, 2017), <https://constitutioncenter.org/blog/on-this-day-shays-rebellion-was-thwarted>; NCC Staff, *The Seeds of Revolution: The Stamp Act Protests in Boston*, NATIONAL CONSTITUTION CENTER (Mar. 22, 2016), <http://blog.constitutioncenter.org/2016/03/the-seeds-of-revolution-the-stamp-act-protests-in-boston/>; Abigail Perkiss, *The Language of Protest: Race, Rioting, and The Memory of Ferguson*, NATIONAL CONSTITUTION CENTER (Dec. 3, 2014), <http://blog.constitutioncenter.org/2014/12/the-language-of-protest-what-we-talk-about-when-we-talk-about-ferguson/>.

71. Christina Cauterucci, *Trump Says Without *Roe v. Wade*, Women Could Just Visit Other States for Abortions*, SLATE (Nov. 14, 2016), http://www.slate.com/blogs/xx_factor/

“[f]or sound adherents of originalism, *stare decisis* kicks in when erroneous precedents—even outrageously erroneous precedents—have created real reliance interests that must be taken into account as a matter of proper judicial power and due process.”⁷²

Professor Akhil Reed Amar summarized how reliance on an individual right—even one resting on faulty constitutional principles—demands fealty by courts when the temptation presents itself to correct the prior case:

Even those judges and scholars who start with precedents need to understand the theory of precedent itself. Most of today's most important constitutional precedents come from the Warren Court. But the Warren Court itself tossed a vast number of precedents out the window—on Jim Crow, on malapportionment, on incorporation of the Bill of Rights, on organized prayer in the schools, on free speech, and on other topics besides. Was the Warren Court wrong to do this? Any principled advocate of precedent must honestly confront this question, yet almost none of our modern jurists or scholars has done so.

Here is my answer: The Warren Court did the right thing because the earlier cases were wrong as an original matter. The Constitution really does promise free speech, a right to an equal vote, racial equality, religious equality, and protection against violation by state governments of basic fundamental rights. No proper reliance interests stood in the way of righting earlier judicial wrongs and giving American citizens what the Constitution in fact promised them. Precedent itself requires taking the Warren Court seriously, and taking that Court seriously requires taking the Constitution itself seriously, which the Warren Court generally did, contrary to the view of its many uninformed critics, then and now.⁷³

Chief Justice Earl Warren was no longer on the Court by the time of *Roe*, and he had little to do with *Heller*. But the idea is axiomatic that courts must confront before overturning precedent the due-process interest of settled expectations of individual rights.

The Supreme Court has defined reliance as “the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.”⁷⁴ With the same holding true for the right to possess a firearm at home in self-defense, “[t]he Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured,

2016/11/14/trump_says_without_roe_v_wade_women_could_just_visit_other_states_for_abortions.html.

72. Amar, *supra*, note 10.

73. Amar, *supra*, note 10.

74. Casey, 505 U.S. at 846.

neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.⁷⁵ To suggest otherwise for either *Heller* or *Roe* is to ignore the documented plight of those impacted, often impecunious individuals unable to afford travel or secure alternative means to enjoy previously recognized rights.⁷⁶

To measure the cost on reliance, courts reviewing the circumscription of individual rights should fall back to what occurred during Prohibition when reliance interests were ignored. Advocates of individual rights should press how Prohibition ushered in an era of increased crime, rising costs to administer justice, willful disobedience by individuals and state actors, and a disproportionate impact on poor communities whose reliance interests are most chronic. Beyond articulating the documented lessons from Prohibition, advocates should prepare evidence to demonstrate how even the noblest of intentions can go awry when individual rights are threatened. Evidence of what self-help behavior may occur and how that behavior could evolve over a prolonged period of time will assist courts in understanding how feelings of entitlement to rights and desperation over their loss can produce deleterious effects on society writ large. Even if the individual right is constitutionally suspect, once a right is recognized and given to individuals, reliance builds and expectations change. Expectations shape social norms and act as figurative arms-control agreements to prevent chaos.⁷⁷ When the legal premise behind those expectations falters, either the conduct continues unlawfully or the social norms careen into chaotic tendencies until the status quo is reset. But, as Prohibition teaches, some expectations and reliance interests are never reset. Remembering a right once retained reflexively steers the polity back to the former homeostasis.

V. CONCLUSION

When confronted with the prospect of a revolving door of individual rights, the Supreme Court made its position clear: “Liberty finds no refuge in a jurisprudence of doubt.”⁷⁸ Returning to the question of when an individual can feel secure in his or her rights, the answer should always be when a reliance interest develops. It is no constitutional accident that *Lochner* and *Plessy* represent the only cases in which a conceivable argument develops that the Supreme Court upset settled expectations on individual rights. But, in those cases, the settled expectations benefited

75. *Casey*, 505 U.S. at 856.

76. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016).

77. Cf. Cass R. Sunstein, *The Refounding Father*, THE NEW YORK REVIEW OF BOOKS (June 5, 2014), <http://www.nybooks.com/articles/2014/06/05/justice-stevens-refounding-father/> (“Throughout American history, citizens have participated in the equivalent of an arms control agreement, in which they engage in a kind of mutual forbearance with respect to constitutional change.”).

78. *Casey*, 505 U.S. at 846.

collective-institutional interests to the detriment of individual welfare. For those hounding to overturn *Roe* and *Heller*, the best example of what could happen to society lies in Prohibition. The self-perceived right and entitlement to booze became the genesis for lawbreaking and cottage industries of unlawful conduct. Lawyers are the vanguard to prevent history from repeating itself. Once people believe they have a right and rely on that right to organize conduct, purging that right exacts a toll on society. The toll is far greater than the moral or political justification to preclude someone from drinking, having an abortion, or owning a weapon. Advocates in favor of individual rights should present evidence about why restraint over valor is prudent before overruling precedent that recognizes individual freedoms and liberties. By winning in court, society loses in the aggregate when rights are trampled.