

# OWNING *HELLER*

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I. INTRODUCTION.....	1
II. <i>HELLER</i> DUBITANTE .....	2
III. <i>HELLER</i> AND STARE DECISIS .....	10
IV. OWNING <i>HELLER</i> .....	15

## I. INTRODUCTION

Recent historical research casts doubt on whether *District of Columbia v. Heller*<sup>1</sup> was rightly decided according to originalist methods. These new discoveries put originalists in a bind. Not the “faint-hearted originalists.”<sup>2</sup> They will be fine. They have already concluded that as between the need for stability in prior decision making, settled expectations, and the coherence of the law, some adulterated decisions must remain enforced for the greater good.<sup>3</sup>

No, these new discoveries are going to be hardest on stout-hearted originalists. The ones who declared *Heller* an original public meaning masterpiece.<sup>4</sup> The ones who cannot abide the weak soup of “living originalism,”<sup>5</sup> “framework originalism,”<sup>6</sup> or “inclusive originalism.”<sup>7</sup>

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1. 554 U.S. 570 (2008).

2. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”).

3. Of course, it may be that some originalists find that their hearts grow most faint when the precedent coincides with their ideological priors, but that’s an observation for a different paper.

4. See Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1128 (2009) (“For *Heller* is a significant triumph for exactly those principles that judicial conservatives have long espoused.”). Cf. David Harmer, *Securing a Free State: Why the Second Amendment Matters*, 1998 BYU L. REV. 55, 101 (1998) (“[T]he great weight of available evidence indicates that the Second Amendment means what it says[]”); Alfred J. Lechner, Jr., Commentary, 10 SETON HALL CONST. L.J. 853, 853 (2000) (“The Second Amendment means what it says.”).

5. See generally JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) (defining living originalism as a method of interpretation that is “faithful to the original meaning of constitutional text,” but also “consistent with a basic law whose reach and application evolve over time”).

6. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009).

7. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (defining “inclusive originalism” as allowing judges to look to “precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.”). For a discussion of

The ones who—when confronted with precedent that is historically unsound or unsupported (whatever their ideological inclinations)—believe that the precedent must go and a new, purer decision based on originalist reasoning must prevail.<sup>8</sup> It is these originalists who are going to struggle most with this new research on the right to keep and bear arms.

For them I can only say—deal with it. The Court owns *Heller* now. The Court cannot point to the linguistic usages of eighteenth-century Americans and claim their hands are tied, because all the linguistic evidence suggests the Court got it wrong. This does not mean the Justices must overturn *Heller*—there are plenty of cases in the constitutional canon that rest on shaky factual foundations<sup>9</sup>—but it does mean they must accept their role in fashioning working rules to implement the right to keep and bear arms. The Second Amendment is in the Court’s hands. How it develops—for good or ill—will be a function solely of the wisdom with which the Court articulates its mandates.

## II. *HELLER* DUBITANTE

The Second Amendment is one of the most recognized portions of the United States Constitution: “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>10</sup> For over 200 years, the Amendment was legally, if not politically, inert.<sup>11</sup> It was a right mediated by duties to participate in a militia; it was not motivated by private purposes like hunting, collecting, or self-defense. No firearm regulation was successfully cut down by the pen of a federal judge in those 200 years.<sup>12</sup> In reported

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different forms of “constitutional compromises” with and within originalism, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1284–86 (2019).

8. See *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 22 (2007) (“[T]he constitutional case against precedent is not absolute. But it is mostly absolute.”); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (“Stare decisis contradicts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation.”).

9. See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1465 (2004) (“In every important respect [the legend of *Lawrence v. Texas*, 539 U.S. 558 (2003)] is terribly incomplete or very questionable.”); Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court’s Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1320–21 (2002) (discussing some of the problems with the social science that underpinned *Brown v. Board of Education*, 347 U.S. 483 (1954)).

10. U.S. CONST. amend. II.

11. JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION AND THE FUTURE OF HELLER* 13 (2018).

12. See *United States v. Emerson*, 46 F. Supp. 2d 598, 614 (N.D. Tex. 1999), *rev’d*, 270 F.3d 203 (5th Cir. 2001); *United States v. Miller*, 26 F. Supp. 1002, 1003 (W.D. Ark. 1939), *rev’d*,

opinions, only Chief Justice Roger Taney<sup>13</sup> and Justice Clarence Thomas<sup>14</sup> clearly spoke of the right in individual, classical liberal terms. The one Supreme Court case to directly address the question in that time, *United States v. Miller*,<sup>15</sup> resonated with the militia-centric view.<sup>16</sup> Retired Justice Lewis Powell, Jr. delivered a speech lamenting handgun violence, and called for more handgun regulation, stating: “It is not easy to understand why the Second Amendment . . . should be viewed as creating a right to own and carry a weapon that contributes so directly to the shocking number of murders in our society.”<sup>17</sup> Retired Chief Justice Warren Burger was less restrained, calling the personal purposes reading of the Second Amendment a “fraud” perpetrated by lobbying organizations like the NRA.<sup>18</sup>

That all changed in 2008 in *District of Columbia v. Heller*, when a five to four majority of the Supreme Court held, for the first time, that the Second Amendment covers a right to keep and carry a firearm in the home for purely personal purposes like self-defense.<sup>19</sup>

In *Heller*, Justice Scalia applied his original public meaning originalism to the Second Amendment.<sup>20</sup> This was not your grandfather’s originalism—the originalism of Ed Meese and the Federalist Society in its salad days.<sup>21</sup> That “old” originalism sought to find the intentions of the likes of James Madison, Alexander Hamilton, and (even though he was not at the Constitutional Convention) Thomas Jefferson.<sup>22</sup> But old

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307 U.S. 174 (1939). This statement does not include the lower court case that led to *Heller*, of course. See *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007).

13. See *Dred Scott v. Sandford*, 60 U.S. 393, 416–17 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

14. See *Printz v. United States*, 521 U.S. 898, 938 (1997) (Thomas, J., concurring).

15. 307 U.S. 174 (1939).

16. *Id.* at 178.

17. Josh Getlin, *No Constitutional Right to Ownership, Ex-Justice Says in Speech: Powell Calls for Stricter Control on Handguns*, L.A. TIMES (Aug. 7, 1988), <http://www.latimes.com/archives/la-xpm-1988-08-08-mn-187-story.html>.

18. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 683 (2009) (quoting remarks of Burger in MacNeil/Lehrer Newshour: First Freedoms (PBS television broadcast Dec. 16, 1991)).

19. See *Heller*, 554 U.S. at 629.

20. See *id.* at 576–77.

21. See The Hon. Edwin Meese III, Attorney General of the United States, Address before the D.C. Chapter of the Federalist Society Lawyers Division at 3, 6, 8 (Nov. 15, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-15-1985.pdf> (describing “a jurisprudence of original intention”).

22. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 720 (2011) (“[I]n its early days, originalism was understood as a mandate to interpret the Constitution to mean what the Framers intended it mean . . . .”); see also Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing A “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1496 (2012) (“[W]hile the

originalism suffered crippling practical and theoretical problems.<sup>23</sup> Individual intentions are hard to identify and are unstable over time.<sup>24</sup> For example, Madison the Founder thought the Bank of the United States was unconstitutional, while Madison the President was not so concerned.<sup>25</sup> Plus, the Constitution did not have one drafter: it was drafted and debated in a convention, so multiply the opaque and varying intentions of one person by fifty-five (or thirty-nine if you only count the signers of the 1787 Constitution).<sup>26</sup> Further, even if these epistemic problems could be resolved, the intentions of the drafters are not what make the Constitution law.<sup>27</sup> So, although it remains the stuff of Twitter commentary and televised punditry, by the time of *Heller*, old originalism had slipped from the center of both originalist scholarship and jurisprudence.

Enter the “new” originalism. The “new” originalism substituted historical linguistics for the Framers’ intentions.<sup>28</sup> It relies upon two propositions. First, that linguistic meaning is fixed at the time the relevant language is ratified; second, that the linguistic meaning is determined by what ordinary speakers, writers, and listeners of language would have understood them to mean at that time.<sup>29</sup> This “new” originalism reflected

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writings of John Adams and Thomas Jefferson are considered evidence of the original intent of the Framers, neither man even attended the Philadelphia Convention.”).

23. Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 616 (2008) (“The old originalism succumbed to a series of criticisms—about the difficulty of aggregating individual intentions, about the inevitable incompleteness of the historical record-whose combined effect was to undermine its claim that only it offered an interpretive approach that avoided judicial subjectivity, judgment, and choice.”).

24. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087 (1989) (“One initial problem is whether we can determine the original intent with any confidence.”).

25. See Colby, *supra* note 22, at 722 (observing that the turn to a new originalist theory “helped to ameliorate the concerns about the illegitimacy of government by unexpressed intent . . .”).

26. See Farber, *supra* note 24, at 1089 (“The difficulty of determining the plausibility of a historical interpretation is increased by the need to interpret the collective views of a diverse group of individuals.”).

27. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 17–18 (1980)) (conceding that it is the “intention of the ratifiers, not the Framers,” that is actually the decisive issue); see also Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (“When we talk popularly about the framers’ intent, we really should be more precise and refer to the ratifiers’ intent[.]”). But see Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158 (2017) (arguing the Constitution is “the law of the United States as it stood at the Founding, and as it’s been lawfully amended since[.]” which may or may not involve text).

28. See James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 21–22 (2016), <https://www.yalelawjournal.org/forum/corpus-linguistics-original-public-meaning> (defining original public meaning originalism).

29. See *id.*

Justice Scalia's textualist commitment (which is not necessarily the same as originalist commitment<sup>30</sup>) that only the words as enacted and understood by the law giver—the people themselves<sup>31</sup>—are the law. "Words must be given the meaning they had when the text was adopted."<sup>32</sup>

This notion of a "fixed meaning," ascertainable by objective methods, immune to the whims of politics or judges is, and remains, new originalism's chief allure.<sup>33</sup> One cannot falsify "people should have rights to bear arms for individual self-defense." One can falsify "speakers of English in 1791 typically used the phrase 'bear arms' to mean for individual self-defense." And it is that falsifiable claim that Justice Scalia used to anchor his *Heller* opinion.<sup>34</sup>

In *Heller*, Justice Scalia began by stating "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."<sup>35</sup> He conceded that "[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."<sup>36</sup>

He then broke the Second Amendment in two, identifying the "operative" portion—"the right of the people to keep and bear Arms, shall not be infringed"—and a prefatory portion—"a well-regulated Militia, being necessary to the security of a free State . . . ."<sup>37</sup> Only if the operative portion was ambiguous was it necessary to resort to the prefatory portion.<sup>38</sup> Parsing the terms "people," "keep," "bear," and "arms," Justice Scalia concluded that the ordinary meaning of "keep and bear arms" to a person in 1791 was to keep and carry weapons for purposes of personal

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30. See Sachs, *supra* note 27 (discussing a method where one can be originalist without reference to text).

31. Or rather, those who count at the time, which in 1787 clearly did not include African-Americans or women, among others. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 230 (1980).

32. ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXT* 78 (2003).

33. Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, THE PANORAMA (Aug. 3, 2008), <http://thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/>.

34. See *Heller*, 554 U.S. at 570, 576–77.

35. *Id.* at 576 (citing *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

36. *Id.* at 576–77.

37. *Id.* at 577.

38. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 746 (2013) (noting that this applies a 19th century linguistic approach to an 18th century text, which alone is an unorthodox maneuver if the task is to find out how 18th century writers understood what was written).

confrontation.<sup>39</sup> He stated that because this meaning was unambiguous and indubitable, no resort to the preface for clarification was necessary.<sup>40</sup> The majority concluded, “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>41</sup>

But *Heller* did not mean to bring all regulation crashing down. The majority offered assurances that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>42</sup>

These “presumptively lawful regulatory measures” were merely “examples.”<sup>43</sup> Other, unidentified measures could arise in post-*Heller* litigation.

Justice Stevens challenged the majority’s conclusions about what the ordinary meaning of the term “bear arms.”<sup>44</sup> He first noted that “[t]he stand-alone phrase ‘bear arms’ most naturally conveys a military meaning unless the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, the most natural meaning is the military one . . . .”<sup>45</sup>

The majority admitted that the military interpretation was possible, but that a military or collective meaning was unambiguously understood only when the phrase was “bear arms against.”<sup>46</sup> Because the Second Amendment did not use the terms “bear arms against,” it was likely that a military meaning was not understood. But Justice Stevens pounced, stating that “[t]he Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used.”<sup>47</sup> The question was not how “bear arms” was most clearly or unambiguously used, but instead how the term “bear arms” was ordinarily used, which the

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39. *Heller*, 544 U.S. at 584, 595.

40. *Id.* at 578 n.4, 579.

41. *Id.* at 635.

42. *Id.* at 626–27.

43. *Id.* at 627 n.26.

44. *Id.* at 649 (Stevens, J., dissenting).

45. *Id.*

46. *Id.* at 586.

47. *Id.* at 649 n.11 (Stevens, J., dissenting) (citing *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (some internal quotation marks, footnotes, and citations omitted)).

linguistic evidence showed, was in a military sense.<sup>48</sup> Moreover, even if the term “bear arms” was ambiguous, the prefatory clause “a well-regulated Militia, being necessary to the security of a Free State” clarified its meaning.<sup>49</sup> The right was dependent on the institution of a well-regulated militia, not private purposes.

I have read the majority opinion in *Heller* numerous times, and on every reading it gets worse. Many writers, even ones who support the outcome, have howled at the undefended list of “presumably lawful regulatory measures” plunked down near the end like some originalist *deus ex machina*.<sup>50</sup> As Judge J. Harvie Wilkinson III wrote shortly after the decision, “[t]he *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.”<sup>51</sup> Troublesome too, is the jackalope manner in which Justice Scalia leverages mid-nineteenth century materials to justify an argument about eighteenth century linguistic meaning.<sup>52</sup> That is perfectly acceptable if *Heller* was candid about applying a living or evolutionary theory of constitutional law,<sup>53</sup> or perhaps some kind of trans-generational intratextualism,<sup>54</sup> but it is peculiar, if not outright heresy, for someone who famously celebrated the “dead” constitution.<sup>55</sup>

Unquestionably, this “triumph” of originalism contained fissures from the get-go.<sup>56</sup> Those cracks have grown ever wider<sup>57</sup> as ten years of

48. *Id.* at 649–50 (Stevens, J., dissenting).

49. *See id.* at 643–44.

50. *See* United States v. McCane, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (“In what could be described as the opinion’s *deus ex machina dicta*, *Heller* simply declared that nothing in it ‘cast[s] doubt on longstanding prohibitions on the possession of firearms by felons’ or various other gun control laws.”); *see also* Nelson Lund, *Civil Rights: The Heller Case*, 4 N.Y.U. J.L. & LIBERTY 293, 304 (2009) (“[W]ith regard to these exceptions to the right to arms, we seem to have a case of verdict first and trial later, if at all.”).

51. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009).

52. *See* Cornell, *supra* note 38, at 746.

53. Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1574 (2009) (“The living Constitution strongly supports the *Heller* majority’s recognition of an individual right to keep and bear arms.”).

54. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 890 (2001) (“[T]he words and deeds of the Fourteenth Amendment . . . when read in conjunction with the Second Amendment, support an individual right to have a gun in one’s home for self-protection[.]”).

55. *See* Scalia *Vigorously Defends a ‘Dead’ Constitution*, NAT’L PUB. RADIO (Apr. 28, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=90011526?storyId=90011526> (“Let’s cut it out. Go back to the good, old dead Constitution[.]”).

56. *See* Winkler, *supra* note 53, at 1557, 1558.

57. As Justice John Paul Stevens pointed out, just two years after *Heller*, scholarly consensus was that *Heller* got the history wrong. McDonald v. City of Chicago, 561 U.S. 742,

linguistic and historical research have steadily eroded Scalia's masterpiece.<sup>58</sup> Whereas a decade ago the linguistic briefing on the meaning of "bear arms" was confined to a sample of just 115 sources,<sup>59</sup> today, through big data sets of historical materials—like the Corpus of Founding Era American English ("COFEA"), the Corpus of Early Modern English ("COEME"), and Google books—historical and linguistic researchers can comb through billions of words to find these terms. What researchers discovered is devastating. After a scrupulous investigation of COFEA and COEME, Dennis Baron concluded that "[f]ounding-era sources almost always use *bear arms* in an unambiguously military sense."<sup>60</sup> Baron examined approximately 900 uses of the phrase "bear arms" and found only seven that were ambiguous or non-military.<sup>61</sup> He stated, "[n]on-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent."<sup>62</sup>

Lawyer and scholar, Neal Goldfarb, conducted his own review of the COFEA and COEME resources, and concluded that: "as to almost every important conclusion about the meaning of [the operative clause], *Heller* was mistaken."<sup>63</sup> Goldfarb searched for all occurrences of the word "arms" within four words of "bear" and its cognates. Of the 531 results, nearly 95% used the phrase in a military sense; only 2% used the phrase to mean carry weapons; and a meager 1.3% supported *Heller*'s holding that the ordinary meaning of "bear arms" was to carry weapons for personal confrontation.<sup>64</sup> "Contrary to what the Court said in *Heller*,"

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916 (2010) (Stevens, J., dissenting) ("If history, and history alone, is what matters, why would the Court not now reconsider *Heller* in light of these more recently published historical views?").

58. Neal Goldfarb, *Corpora and the Second Amendment: "bear arms" (part 1), plus a look at "the people,"* LAWNLINGUISTICS (Apr. 29, 2019), <https://lawlinguistics.com/2019/04/29/corpora-and-the-second-amendment-bear-arms-part-1-plus-a-look-at-the-people/> (observing that "in the decade since [*Heller*], information has become available" that now "render *Heller*'s confident generalization about *bear* and *arms* untenable.").

59. Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. & Jeffrey P. Kaplan, Ph.D. In Support of Petitioners at 24, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

60. Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 HASTINGS CONST. L.Q. 509, 510 (2019).

61. *Id.* at 510–11.

62. *Id.* at 510; see also Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 4, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280 ("[C]orpus linguistics researchers have unearthed a wealth of new evidence over the past decade showing that the phrase 'keep and bear arms' overwhelmingly had a collective, militaristic meaning at the Founding.").

63. Brief of Neal Goldfarb as Amicus Curiae in Support of Respondents, Arguing that as to the Second Amendment Issue, the Petition Should be Dismissed as Improvidently Granted at 2, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280.

64. *Id.* at 21; see also Neal Goldfarb, *The Coming Corpus Based Reexamination of the Second Amendment*, LAWNLINGUISTICS (May 28, 2018), <https://lawlinguistics.com/2018/05/28/>



Goldfarb concludes, “there is reason to think that in the Second Amendment, *bear arms* was used in its idiomatic military sense and that it would have been understood as conveying that sense.”<sup>65</sup>

Professor Alison LaCroix, together with linguist, Dr. Jason Merchant, searched the corpus on Google books for the term “bear arms” spanning from 1760 to 1795. Of the 181 texts that came up positive, just over 67.4% used the term in a collective sense, just over 18% used it in an individual sense, with the balance of usage undeterminable or heraldic.<sup>66</sup> “[C]onsulting actual historical sources suggests that the context of the Second Amendment had more to do with militias and magazines than with solo householders,”<sup>67</sup> LaCroix says. To most Founding-era English speakers, it appears, “the phrase ‘bear arms’ referred to an activity undertaken by groups of people, not only by individuals.”<sup>68</sup>

To their credit, individuals usually characterized as more gun-rights leaning concede the new evidence places *Heller*’s historical justification in doubt. Professors Josh Blackman and James C. Phillips have conducted their own research on the corpus and have found that “the overwhelming majority of instances of ‘bear arms’ was in the military context.”<sup>69</sup>

To be clear: it is not that the new evidence proves that “bear arms” is *exclusively* or *solely* used in a collective, military sense, but it confirms that the term is *overwhelmingly* used in a collective or military sense, which is the touchstone of “ordinary” meaning.<sup>70</sup> As Justice Scalia said in *Heller*, the judge must give legal effect to typical use, not idiosyncratic

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the-coming-corpus-based-reexamination-of-the-second-amendment/ (“[W]hat I’ve seen provides a substantial basis for challenging *Heller*’s interpretation of *keep and bear arms*.”); see also Goldfarb, *supra* note 58 (“[T]he corpus evidence points toward the conclusion that *bear arms* unambiguously conveyed the military meaning that the Supreme Court rejected[.]”).

65. Brief of Neal Goldfarb as Amicus Curiae in Support of Respondents, Arguing that as to the Second Amendment Issue, the Petition Should be Dismissed as Improvidently Granted, *supra* note 63, at 17. Even if the term “bear arms” is ambiguous, Goldfarb notes, the prefatory clause clarifies it as having a military, not a personal purposes meaning. See *id.* at 25–26.

66. LaCroix, *supra* note 33.

67. LaCroix, *supra* note 33.

68. LaCroix, *supra* note 33.

69. Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (Aug. 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/>.

70. Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 240 (2004) (advocating an “empirical” investigation of “actual evidence of usage” to determine, as between different usages, “which meaning was dominant”).

or parochial use.<sup>71</sup> The body of the distribution governs ordinary meaning, not the tail.<sup>72</sup>

### III. *HELLER* AND STARE DECISIS

So, if *Heller* appears to be so comprehensively wrong as a matter of original public meaning, why not chuck it out? This would seem to be Justice Thomas's view. In his concurrence in *Gamble v. United States*<sup>73</sup> last term, Thomas articulated a radical, but largely intellectually consistent position on *stare decisis*.<sup>74</sup> Where a decision is based on a demonstrably inaccurate assessment of historical linguistic fact, the Court is duty-bound to follow the original public meaning.<sup>75</sup>

In *Gamble*, the Court considered whether to retain the “separate sovereigns” exception to the Fifth Amendment’s Double Jeopardy Clause.<sup>76</sup> Terence Gamble (Gamble) was caught as a felon in possession of a firearm in violation of both Alabama state law and federal law.<sup>77</sup> Gamble pleaded guilty and was convicted in state court; the United States attorney then brought charges under the materially similar federal felon-in-possession statute.<sup>78</sup>

Gamble argued that the Fifth Amendment’s text: “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb” precluded two prosecutions for essentially the same crime.<sup>79</sup> The majority opinion noted that over one hundred and seventy years of precedent had upheld the “separate sovereigns” doctrine and that Gamble’s “muddle[d],” “spotty,” and “equivocal” historical evidence was insufficient to overcome the heavy presumption that it should be retained.<sup>80</sup>

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71. *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (“Normal meaning may . . . include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”); *see also* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173 (2008).

72. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 B.Y.U. L. REV. 1417, 1441 (2017) (“[F]requency is a crucial aspect of what distinguishes an ordinary meaning from some meaning that is perhaps grammatical but unordinary.”); *see also* Barnett, *supra* note 70, at 240 (“If possible, one should undertake a quantitative assessment to distinguish normal from abnormal usage.”).

73. 139 S. Ct. 1960 (2019).

74. *See id.* at 1981 (Thomas, J., concurring).

75. *See id.* at 1981–83.

76. *Id.* at 1964 (provides that the “dual sovereignty” principle allows for both state and federal governments to prosecute the offender, where the same conduct violates both state and federal law, without violating double jeopardy).

77. *Id.*

78. *Id.* at 1965 n.1 (stating that the parties assumed that the elements of both crimes were sufficiently similar to qualify as the “same offence”).

79. *Id.* at 1965.

80. *Id.* at 1969.

Justice Gorsuch wrote a dissent, applying the conventional test for when the Supreme Court should overturn its decisions, that is, “the quality of the decision’s reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”<sup>81</sup> He concluded that these “traditional” tools for giving effect to *stare decisis* failed in this case.<sup>82</sup>

Justice Thomas concurred. Like the majority, he found the defendant’s historical evidence unpersuasive on the meaning of the Double Jeopardy Clause.<sup>83</sup> But he used most of his opinion to announce a revolutionary view of horizontal *stare decisis* in the Supreme Court. According to Thomas, the “Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.”<sup>84</sup>

According to Thomas, our system is one of written law, not common law, and depends on a “key premise that words, including written laws, are capable of objective, ascertainable meaning.”<sup>85</sup> That objective meaning is “the original understanding of the relevant legal text.”<sup>86</sup> The original understanding is the only thing that is law. And because our written Constitution “is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict.”<sup>87</sup> His prescription was blunt: “When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.”<sup>88</sup>

Nutty?<sup>89</sup> Perhaps. But if originalism is something other than a form of identity politics,<sup>90</sup> or an intellectual disguise for political preference,<sup>91</sup> then we must contend with Justice Thomas’s challenge. And what better

81. *Gamble*, 139 S. Ct. at 2006 (Gorsuch, J., dissenting).

82. *Id.*

83. *Id.* at 1980 (Thomas, J., concurring).

84. *Id.* at 1981.

85. *Id.* at 1984.

86. *Id.* at 1985.

87. *Id.*

88. *Id.* at 1984.

89. As Justice Scalia explained: “I am a textualist. I am an originalist. I am not a nut.” Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NAT’L PUB. RADIO (Apr. 28, 2008, 7:32AM), <https://www.npr.org/templates/transcript/transcript.php?storyId=89986017>.

90. Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 400 (2011) (Identifying a preference for originalism where “irrespective of its particulars as a modality of legal analysis or . . . results . . . in actual cases, originalism is selected because it resonates with a set of cultural values that the respondent finds compelling.”).

91. See generally Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5 (2011).

way to sort out the consequences of this radical view of precedent and originalism, than as applied to one of originalism's darlings?

One response to Thomas is that *Heller*'s interpretation of "bear arms" is not "demonstrably erroneous" but falls within some band of what Thomas calls "honest disagreement" about the text's meaning.<sup>92</sup> This response presumes that there is a criterion for how large the "room for honest disagreement" should be.<sup>93</sup>

Common intuitions could supply the range of acceptable interpretations. For example, consider the terms "domestic violence" and "republican form of government" from Article IV. Intuitively, although rare uses of "domestic violence" could mean intra-family violence in 1791, it would seem strange that outliers could justify the constitutionality of federal military intervention in a case of spousal abuse.<sup>94</sup> Similarly, it feels odd to suggest Congress can impose one-party rule under the Guarantee Clause because a handful of partisans used "republican" to refer to a specific political party, rather than to a form of representative government. One answer would be that nothing about the *Heller* interpretation falls outside common intuitions about the band of disagreement, and so *Heller* is not a "demonstrably erroneous" precedent.

But the hazard of intuitions about reasonable disagreement is that they can become infected with post-hoc reasoning or presentist assumptions about usage.<sup>95</sup> Furthermore, if outlier uses of "bear arms" to mean "to bear arms for personal purposes" can create a zone of acceptable disagreement, then why can those same justifications not apply to "domestic violence" or "republican form of government" in Article IV? If reasonable disagreement about historical fact is nothing more than the perception of the judge, then much of the objective grounding originalism is meant to provide is illusory.<sup>96</sup>

But we need not rely solely on intuition. If statistical methods can provide information about language use; can they not also provide metrics for zones of reasonable disagreement? Instead of intuition, we could pin "honest disagreement" to something slightly more quantitative, like conventions among empiricists to determine whether the use falls

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92. See *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring) ("Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous.").

93. See Gries & Slocum, *supra* note 72, at 1434 (suggesting standard for ordinary meaning is a normative matter that can be informed, but not dictated, by linguistics).

94. See Thomas Lee & James C. Phillips, *Data Driven Originalism*, 167 U. PENN. L. REV. 261, 299 (2019) (finding that just under two percent of the use of "domestic violence" in period before 1979 was "indeterminate").

95. *Id.* at 288 ("Judges of our era are much more likely to be affected by our sense of contemporary usage, and thus to miss the effect of [linguistic] drift.").

96. *Id.* at 289 (cautioning that judicial intuitions about usage "are likely to be affected by . . . biases").

within some statistically accepted grouping of normality, whether it appears in the tail, or whether it is an outlier.<sup>97</sup> If that is the criteria, the evidence is pretty clear that speakers of English in 1791 overwhelmingly use “bear arms” to mean a military or collective activity, as opposed to a personal activity. “Bear arms” to mean non-collective use is rare, and for use for personal purposes, extremely rare to non-existent.

In sum, unless the range of possible interpretations over the 1791 meaning of “bear arms” is particularly broad—broader perhaps than the range supplied to other constitutional terms—it appears that “bear arms” to mean carry weapons for personal confrontation does not fall within the scope of “honest disagreement,” at least as an originalist matter.

Alternatively, *Heller* could have achieved the status of “super-precedent.” Scholars offer a number of different descriptions of super-precedents. Michael Sinclair describes them as “judicially unshakeable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally.”<sup>98</sup> Daniel Farber calls super-precedent “bedrock precedent” that have “become the foundation for large areas of important doctrine;” whose overturning would “create just the kind of uncertainty and instability that constitutions . . . are designed to avoid.”<sup>99</sup> Michael Gerhardt defines super-precedent as those constitutional decisions that:

- (1) have endured over time; (2) political institutions repeatedly have endorsed and supported; (3) have influenced or shaped doctrine in at least one area of constitutional law; (4) have enjoyed, in one form or another, widespread social acquiescence; and (5) are widely recognized by the courts as no longer meriting the expenditure of scarce judicial resources.<sup>100</sup>

Bruce Ackerman identifies super-precedents as those decisions that “crystallize fixed points in our constitutional tradition” which often have a greater weight than even the written text and which “should not be overruled or ignored in the course of doctrinal development.”<sup>101</sup> The common thread among these descriptions is that a super-precedent has become so integral to the American constitutional imagination that it

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97. See *id.* at 289–90, 293 (noting that advantage of reviewing a corpus linguistics for meaning is that it can be replicated and falsified).

98. Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 365 (2007).

99. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1181 (2006).

100. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1213 (2006).

101. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1752 (2007) (“[S]uperprecedents resemble formal amendments, which play a similar shaping role in the operational canon.”).

either cannot be overturned at all, or it can be overturned only after some extraordinary justification.<sup>102</sup>

Cases dealing with constitutional structure, including cases on judicial review or federalism are frequently thought of as super-precedential.<sup>103</sup> Other super-precedents are so entrenched that reconsideration would be cataclysmic—the cases declaring paper money constitutional, for example.<sup>104</sup> Some others, dealing with individual rights, have acquired such a mystique that their rightness cannot be questioned, and, indeed, constitutional methodology must be made to square with it. *Brown v. Board of Education* is such a case.<sup>105</sup>

Depending on the framework, *Heller*, like *Obergefell v. Hodges*,<sup>106</sup> or *Roe v. Wade*,<sup>107</sup> satisfies the test for super-precedent. *Heller* certainly has acquired a mystique. In some social and political circles, questioning the rightness of *Heller* is akin to questioning the rightness of *Brown*. The core holding of *Heller*, that the Second Amendment protects the right to keep and bear arms in the home for personal purposes like self-defense, is broadly popular and accepted.<sup>108</sup> It has obtained the express or tacit endorsement of many political leaders, from President Barack Obama<sup>109</sup> to local sheriffs.<sup>110</sup> If the unanimous decision in *Caetano v. Massachusetts* is any indication, there may be some acquiescence on the Court to its permanence, even among the *Heller* dissenters.<sup>111</sup>

But along other metrics, *Heller*, like *Obergefell* and *Roe*, fails as super-precedent. *Heller* is only ten years old (although there is no specific time frame by which a decision can obtain super-precedent status). It is a deeply polarizing opinion, with some individuals and

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102. I explore this idea merely as a descriptive statement. I have no commitments at present on what, if anything, should qualify as super-precedent.

103. See Gerhardt, *supra* note 100, at 1208–09 (identifying *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) in this vein).

104. See Farber, *supra* note 99, at 1181–82 (citing the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870)).

105. 349 U.S. 294 (1954).

106. 135 S. Ct. 2584 (2015).

107. 410 U.S. 113 (1973).

108. See BLOCHER & MILLER, *supra* note 11, at 177–78.

109. BLOCHER & MILLER, *supra* note 11, at 177–78.

110. See Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1293 (2008) (“Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.”).

111. See *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curium) (“The Court has held that ‘the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding’ . . . .” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008))).

groups, including the late Justice Stevens calling for its reversal.<sup>112</sup> *Heller* is not yet quite as legally (as opposed to politically) foundational to constitutional and sub-constitutional law in the same way that the Fourth Amendment case *Mapp v. Ohio*<sup>113</sup> is to criminal procedure, for instance.<sup>114</sup> In terms of legal impact, *Heller* has been relatively minor, striking down mostly outlier regulations, rather than restructuring the broad swath of American firearms regulation or recalibrating all of American self-defense law.<sup>115</sup>

Of course, to a stout-hearted originalist, whether *Heller* is ordinary, super-, or super-duper<sup>116</sup> precedent should not matter. To conform to demonstrably wrong precedent in defiance of the original understanding of the text is to exceed one's authority and violate one's constitutional duty.

A final response would be to reject Thomas's critique entirely, embrace "faint-hearted" originalism (or non-originalism) and apply *stare decisis* even for "demonstrably erroneous" precedent. Joseph Blocher and I have already written extensively that we do not think that conventional applications of *stare decisis* justify overturning *Heller*.<sup>117</sup> However, rejecting Thomas's premise altogether just leads us back into the debate currently in the Court over *stare decisis* itself, its constraining power, its relationship to originalism, and its equal application irrespective of political ideology.

#### IV. OWNING *HELLER*

Justice Scalia ended his *Heller* opinion by professing humility (and framing the dissenters as radicals): "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."<sup>118</sup> Although "[w]e are aware of the problem of handgun violence in this country," he wrote, "what is not debatable is that it is not the role of this Court to pronounce the Second Amendment

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112. See John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

113. 367 U.S. 643 (1961).

114. See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1734 (2013) (identifying *Mapp* among the "hit[s]" of super-precedent).

115. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1507 (2018) (discussing win rates of litigants).

116. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("[W]ould you think that *Roe* might be a super-duper precedent in light . . . of 38 occasions to overrule it?").

117. BLOCHER & MILLER, *supra* note 11, at 180–82.

118. *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

extinct.”<sup>119</sup> To non-originalists and *Heller* skeptics, this is likely the most grating part of the opinion, a revolution in Second Amendment doctrine sold as conservation.<sup>120</sup> (Although, to be fair, this is the rhetorical maneuver of nearly all revolutionaries.)<sup>121</sup>

Justice Scalia’s blame-the-Founders language exhibits what David Kairys and Judge Richard Posner have described as “the law made me do it” instincts of judicial officers.<sup>122</sup> Judges, including Justices, often want to foist responsibility for their decisions onto some other decision-maker—in this case, 1791 English-speakers.<sup>123</sup> If this new research on the Second Amendment is right, it will not do to continue saying “My hands are tied—this is what 1791 English-speakers understood” because they did not. And if that is the case, then one thing becomes inescapable: the Court owns *Heller*.

The corollary is that the Court owns everything that *Heller* begets, for good or ill. As Justice Kennedy once wrote “[t]he justifications for the case system and *stare decisis* . . . rest[s] upon the Court’s capacity, and responsibility, to acknowledge its missteps. It is our duty to face up to adverse, unintended consequences flowing from our own prior decisions.”<sup>124</sup> Justice Scalia was never afraid to suggest that the Court should own the consequences of its doctrine, especially if he thought the majority got it wrong.<sup>125</sup> If there are adverse, unintended consequences, and the original understanding does not require them, then the Court must figure out what is the best method for mitigating them.

None of this means that *Heller* is or should be overturned. There are other justifications, apart from original meaning, to retain *Heller*. But it does suggest that the Court cannot wash its hands of the doctrine if it is shoddy, unworkable, or suboptimal. Neither does owning *Heller* mean that the Justices must become super-legislators and traffic in non-legal

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119. *Id.* at 636.

120. This trope is common regardless of the ideology of the constitutional change that takes place. See Farber, *supra* note 99, at 1175 n.12 (“Like many who seek radical social change . . . those who attack basic precedents claim only to be restoring a ‘true’ but forgotten social order.”).

121. 2 SIMON SCHAMA, A HISTORY OF BRITAIN: THE BRITISH WARS 1603–1776 109 (2001) (“Revolutions invariably begin by sounding conservative and nostalgic, their protagonists convinced that they are suppressing, not unloosing, innovation.”).

122. DAVID KAIRYS ET AL., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE viii (David Kairys ed., 3d ed. 2010); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520 (2012) (referring to one type of judicial restraint as “the law made me do it”).

123. KAIRYS ET AL., *supra* note 122; Posner, *supra* note 122.

124. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting).

125. *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting) (“No reasons are given for this result; no acknowledgment of its consequences made.”).



tools to craft their decisions.<sup>126</sup> A court can bear responsibility for its decisions and still operate within the role morality that makes judicial decision-making different from legislative or executive decision-making.<sup>127</sup> But it does mean that the Court must think and consider very carefully how it treads in this area when some clear justification is absent.

Applying Lawrence Solum's terminology, the post-*Heller* linguistic research suggests all of *Heller* now operates within the "construction zone."<sup>128</sup> Any cue the Justices wish to take from the original understanding of the text must take into account that *Heller*'s conclusion about the original understanding of the text is almost certainly wrong. That means the plurality of different methodological tools available to the judge—not just text—is required to craft a workable doctrine. The product of this construction can be more or less deferential to political branches; it can be more or less cognizant of expert opinion on consequences; it can be more or less attentive to the effects on other constitutional institutions and actors.

My colleague, Neil Siegel, has written extensively about judicial statesmanship, and it seems particularly apt here. Whatever kind of tools the Justices use to fashion doctrine after *Heller*—whether they look to text, history, tradition, prudence, precedent or any of the recognized judicial modalities—the Justices must adopt an "ethic of responsibility"<sup>129</sup> and that puts them squarely "responsible for—as author of—the reasonably foreseeable social consequences of their official actions."<sup>130</sup> *Heller*'s legacy will be judged, not on how well it comports with the past, but how well the Justices direct its future.

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126. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 989 (2008) (stating that judicial statesmanship does not require achieving results with "reasoning inconsistent" with the reasoning common to the profession); cf. RICHARD POSNER, HOW JUDGES THINK 252–53 (2008).

127. See BLOCHER & MILLER, *supra* note 11, at 123; see generally PHILIP BOBBITT, CONSTITUTIONAL FATE 125–26 (1982).

128. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 472 (2013) ("The construction zone consists of constitutional cases or issues that cannot be resolved by the direct translation of the constitutional text into rules of constitutional law that determine their outcome.").

129. Siegel, *supra* note 126, at 997 (quoting MAX WEBER, POLITICS AS A VOCATION 47 (H.H. Gerth & C. Wright Mills trans., Fortress Press 1965) (1919)).

130. Siegel, *supra* note 126, at 997.