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Disarmed by Time: The Second Amendment and the Failure of Originalism, 76 Chi.-Kent. L. Rev. 167 (2000)
DISARMED BY TIME: THE SECOND AMENDMENT AND THE FAILURE OF ORIGINALISM

DANIEL A. FARBER*

When the Almighty Himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

— The Federalist No. 37 (Madison)

INTRODUCTION

According to the received wisdom, the Second Amendment is little more than a footnote to the Militia Clauses of the Constitution, themselves virtually irrelevant to today's military. But this conventional view has been challenged by revisionist scholars. Now claiming the title of "standard model" for their own view, the revisionists contend that the framers had a far more sweeping vision of the right "to keep and bear Arms." In their view, the Constitution protects the individual's right to own guns for self-defense, hunting, and resistance to tyranny.

Unlike Madison, these scholars find no room for uncertainty

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2. For extensive citations to both the revisionists and their opponents, see 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 897-98 n.211 (3d ed. 2000). For a brief overview of the debate, see Chris Mooney, Showdown: Liberal Legal Scholars Are Supporting the Right to Bear Arms; But Will Historians Shoot Them Down?, LINGUA FRANCA, Feb. 2000, at 26. A bibliography appears in Robert J. Spitzer, Lost and Found: Researching the Second Amendment, 76 CHI.-KENT L. REV. 349, 385 app. (2000). Tribe himself now seems to be at least flirting with the revisionist view, although the tentativeness of his view may be indicated by the fact that he relegates the point to a somewhat tortuous footnote. See TRIBE, supra, at 901 n.221. I agree with Tribe's further assertion that acceptance of the revisionist view would be "largely irrelevant to contemporary gun control proposals." Id. at 902.
about the historical meaning of constitutional language. "The Second Amendment," we are told by one scholar, "is thus not mysterious. Nor is it equivocal. Least of all is it opaque." The meaning of the "right to bear arms," says another, "seems no longer open to dispute," and "an intellectually viable response...has yet to be made." The revisionists' confidence about the original understanding is the foundation for their reinterpretation of the Second Amendment. Yet, the appropriate role of original intent in constitutional law has been debated for the past two decades. That debate should, if nothing else, caution against this sense of certainty about the implications of historical materials for present-day constitutional issues such as gun control.

This Article will revisit the originalism debate with an eye to the Second Amendment. Part I discusses whether originalism is a practical approach to constitutional interpretation. Part II assesses whether originalism is a desirable approach even if it actually could be implemented. As the title of this Article indicates, originalism's flaws are thrown into sharp relief by the Second Amendment debate.

5. See Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi.-Kent L. Rev. 291, 292-93 (2000). A notable exception is L.A. Powe, Jr., Guns, Words, and Constitutional Interpretation, 38 Wm. & Mary L. Rev. 1311 (1997). Although it is not my purpose here to explore the full range of arguments regarding the Second Amendment, Dorf makes a strong case against an expansive reading.
7. For an earlier treatment of the originalism debate, see Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 373-97 (1990). To highlight the ways in which the Second Amendment falls prey to the classic, well-known criticisms of originalism, the organization of this essay deliberately tracks the portion of the 1990 book listing those criticisms, with some minor changes in headings. Despite the organizational similarities, there are only minor overlaps in the treatment of the issues, because the debate has developed in important ways over the past ten years.
Reading the historical record on the right to bear arms turns out to be a difficult exercise, full of perplexities.\(^8\) And even if we had a definitive answer that turned out to favor the revisionists, the claim that original intent should always trump contemporary legislative decisions is itself problematic. These defects in originalism are familiar to constitutional scholars. What may be less familiar is the almost uncanny way in which these flaws are reproduced in the literature on the Second Amendment.

Thus, history cannot provide the kind of unshakeable foundation for gun rights that some scholars have sought. Indeed, there is something profoundly amiss about the notion that the Constitution’s meaning today should be settled first and foremost by a trip to the archives. The effort to apply this notion to an issue as contemporary and hotly contested as gun control only serves to underline the fundamental peculiarity of the originalist approach to constitutional law.\(^9\)

Given the deep flaws in originalism, its continuing appeal may seem mysterious. For its more sophisticated adherents, as discussed in Part II, it may appeal as a value-neutral method of decision and as a solution to the counter-majoritarian difficulty—perhaps a solution they would admit to be flawed, yet better than the alternatives. As Part II explains, these arguments are ultimately unsatisfactory. For less sophisticated adherents, however, originalism may have another, more visceral appeal. It harkens back to an earlier, purer age, when today’s petty political concerns and squalid politicians were replaced with great statesmen devoted to high principle. This implicit appeal to a nobler, more heroic past may have particular resonance in the context of the Second Amendment, where it brings to mind visions of minutemen and frontier lawmen valiantly defending justice and freedom with their guns. These mythic versions of the past, however, can only obscure the all-too-real issues facing our society today. Being inspired by myth is healthy; being ruled by it is unsafe.

\(^8\) I will focus primarily on the Second Amendment itself, rather than the original understanding of the right to bear arms by the framers of the Fourteenth Amendment. Regardless of how the framers of the Fourteenth Amendment viewed the right to bear arms, it seems doubtful that it should apply to the states. In early cases, the Supreme Court refused to do so. The right to own a gun also does not qualify under the Court’s current tests, as “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), or “fundamental to the American scheme of justice,” Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

\(^9\) I do not mean to prejudge the policy issues involved in gun control, which are themselves hotly disputed. See, e.g., John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).
I. THE FEASIBILITY OF ORIGINALIST INTERPRETATION

Before turning to the question of whether the historical evidence should control the meaning of the Second Amendment, we may begin with the question of whether it can be controlling. In short, can judges and other decision makers determine the “original understanding” of the Second Amendment in a sufficiently unambiguous and accurate manner as to justify putting such heavy reliance on the historical record?

A. Methodological Problems

The first question is whether judges can determine the framing generation’s understanding of the Second Amendment with any confidence. Various methodological problems may make it difficult to do so, and, of course, if judges cannot determine original intent, they cannot make it the basis for interpretation.

Before considering the special problems of interpreting historical documents from past centuries, it is worth bearing in mind that interpretation is a difficult task even without these additional difficulties. The fundamental question is whether someone who keeps a gun for use in hunting or against burglars is “keeping and bearing arms” within the meaning of the Second Amendment. The Supreme Court has not found it easy to answer similar questions even without the extra burden of historical interpretation.

In a series of recent cases, for example, the Supreme Court has struggled to interpret seemingly commonplace phrases relating to the use and possession of guns. These cases involved contemporary statutes with none of the obscurities that impede our understanding of texts from the more distant past. Yet the Supreme Court found itself deeply divided on basic definitional questions. Is a person with a gun in the locked car trunk guilty of “carrying a firearm”? Yes, according to five Justices; absolutely not, said the four dissenters. Does a person under similar circumstances “use” the gun (another

10. The Amendment states that, “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.” U.S. CONST. amend. II.


phrase in the same statute)? No, said a unanimous Court. But does a person who trades a gun for drugs "use" the gun in a drug deal? Six Justices said yes; Justice Scalia and two others thought this was clearly wrong. Such interpretative problems accumulate compound interest as linguistic understandings and legal contexts shift over time. If we are not sure what Congress meant only a few years ago by references to carrying or using a firearm, we are likely to face even greater difficulties in determining what Congress meant two centuries ago by the phrase "keep and bear Arms."

Indeed, the historical inquiry required by originalism is not an easy one, as Justice Scalia has explained:

[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material. . . . Even beyond that, it requires an evaluation of the reliability of that material. . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time. . . . It is, in short, a task sometimes better suited to the historian than the lawyer.

Justice Scalia cannot be accused of overstating the burden that originalism places on judges. The difficulty of the necessary research is not to be minimized. To begin with, the historical record, while voluminous in some respects, is incomplete just where it would be most helpful. As background to the Second Amendment, we would like to know the original understanding of the Militia Clauses of the Constitution. It would be particularly useful to understand the views of the specific individuals who drafted or ratified the document. The documentary record is unsatisfactory on either score. As to the Constitutional Convention, our best source is Madison's notes. But the notes are far from being verbatim, including less than ten percent of the total proceedings. The records of the ratification debates are even worse, regarded by historians as paying scant attention to accuracy at best. The debates of the First Congress covering the Bill of Rights—including the Second Amendment—were not recorded at all in the Senate and were recorded in the House by one Thomas Lloyd. Lloyd's accuracy had never been good, and by 1789 his

13. See Bailey, 516 U.S. 137.
17. See id. at 22-24. Rakove reports that there were roughly two thousand actors in the various conventions. See RAKOVE, supra note 6, at 6.
“technical skills had become dulled by excessive drinking.”

Moving beyond the official debates, we also have access to a flood of published materials debating the Constitution, such as *The Federalist*. It is often unclear, however, how these materials were viewed by their readers; indeed, it is not necessarily clear who those readers might have been. We can also turn to the general intellectual context, but that too can be difficult to reconstruct and apply to specific legal issues. In short, the farther we get from the decision-making process itself, the more material we have available, but the harder it is to digest this material and evaluate its significance, particularly for amateur historians such as judges.

Evaluating these materials, along with the earlier American and English materials that provide their context, is no easy task. Judges, after all, are not chosen on the basis of their skills as historians—nor, on the whole, are law professors renowned for the depth of their historical knowledge of early-American history. By most accounts, for instance, the Supreme Court’s recent rulings on state sovereign immunity reflect a high degree of historical ineptitude. Historical interpretation is also made more difficult by the nature of democratic decision making: For law to be made, a majority or super-majority must favor it, but they need not agree among themselves about exactly what it means. Consequently, we have no reason to assume that any consensus about the meaning of the provision actually existed.

The difficulty of extracting clear messages from these messy historical materials is amply illustrated by Second Amendment scholarship. When examining the contending positions of these scholars, it is hard not to sympathize with a leading judge’s lament about the difficulty of working with legislative history:

A Sherlock Holmes could work through the clues, and those most reliable, and draw unerring inferences. Alas, none of us is a worthy successor to Holmes.... We hear in the debates what we prefer to hear—and our preferences differ widely. Even when all of us hear

19. See Rakove, supra note 6, at 133.
21. See Rakove, supra note 6, at 18-21.
the same thing, a search for these clues consumes resources but
does not yield rewards comparable to the effort invested.\textsuperscript{24}
This is not to say that historical interpretation is wholly
indeterminate. Rather, it is to question whether historical research is
a viable way for judges and lawyers to find definitive answers to
concrete legal questions.

To fully document this assertion with a detailed analysis of the
historical debate over the Second Amendment would be to write an
article—more likely a book—about Second Amendment history, not
an essay about originalism. But we can begin to see the problems that
judges would confront by considering some of the opposing assertions
that they would have to resolve. Consider, as examples, a half-dozen
of the dueling historical views that the judge would confront:

1. Claim: Madison gave his "imprimatur" to a description of
the Second Amendment by a fellow Federalist, Tench Coxe,
who described it as a guarantee against the confiscation of
private arms.\textsuperscript{25}
\textit{Riposte}: "Madison's letter is polite and general, not a
discussion of any substantive point Coxe made." Indeed,
Coxe's treatment of the establishment clause was quite
contrary to Madison's views, but Madison did not mention
the disagreement.\textsuperscript{26}

2. Claim: The framers did not contemplate extensive gun
regulation: "Well-regulated" meant well drilled or
practiced.\textsuperscript{27}
\textit{Riposte}: Every state had substantial gun regulation when the
Second Amendment was adopted.\textsuperscript{28}

3. Claim: "If any group of persons deserves the label 'pro-gun,'
it is \ldots the Founders themselves."\textsuperscript{29}

\textsuperscript{24} Frank H. Easterbrook, \textit{Text, History, and Structure in Statutory Interpretation}, 17
\textsuperscript{25} Barnett \& Kates, \textit{supra} note 4, at 1212.
\textsuperscript{26} WILLS, \textit{supra} note 1, at 215.
\textsuperscript{27} Barnett \& Kates, \textit{supra} note 4, at 1208.
\textsuperscript{28} Michael A. Bellesiles, \textit{Suicide Pact: New Readings of the Second Amendment}, 16
CONST. COMMENTARY 247, 253-56 (1999); see also Don Higginbotham, \textit{The Second
Amendment in Historical Context}, 16 CONST. COMMENTARY 263, 267-68 (1999) (discussing
extensive gun regulation by colonial governments).
\textsuperscript{29} Barnett \& Kates, \textit{supra} note 4, at 1214.
Riposte: Gun use was not widespread. Only fourteen percent of the population owned guns (many of which were broken).\textsuperscript{30}

4. Claim: “[T]he Framers’ militia was not an elite fighting force but the entire citizenry of the time: all able-bodied adult white males.”\textsuperscript{31}

Riposte: Leaders such as Hamilton and Washington realized the general militia was impotent and contemplated “a select corp of moderate size.”\textsuperscript{32} About forty percent of citizens were disbarred from militia service because of failure to demonstrate their loyalty.\textsuperscript{33}

5. Claim: Based on their own revolutionary experience, “the last thing the Framers would have done is to deny the People the means of armed insurrection.”\textsuperscript{34}

Riposte: Key framers like Madison, Hamilton, and Washington were horrified by insurrections and intended the Constitution to provide the means for suppressing them.\textsuperscript{35}

6. Claim: To “keep” arms in eighteenth-century usage meant to have them in one’s personal possession.\textsuperscript{36}

Riposte: To “keep” arms in eighteenth-century usage meant to hold them in a communal military arsenal.\textsuperscript{37}

Surely, there is much to be written—even more surely, more yet will be written—on all of these and many other similar issues. The question is not whether, in the end, some answers to these historical questions will prove to be more strongly supported by the record than others. Rather, the question is whether we think judges are likely to do a very good job in resolving these issues—a good enough job to justify using historical research as the means of deciding cases


\textsuperscript{31} AMAR & HIRSCH, supra note 1, at 170.


\textsuperscript{33} See Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 Const. Commentary 221, 228-29 (1999).

\textsuperscript{34} AMAR & HIRSCH, supra note 1, at 175.

\textsuperscript{35} See WILLS, supra note 1, at 208-10. Key Antifederalist leaders were also horrified at the thought of insurrection. See Cornell, supra note 33, at 240-41.

\textsuperscript{36} See Shalhope, supra note 30, at 279-80.

\textsuperscript{37} See WILLS, supra note 1, at 258-59.
regarding the Second Amendment or other constitutional issues.\textsuperscript{38} Given their limited time and training—not to mention their very mixed record in attempting to identify original intent in other areas—it seems hard to be optimistic about the prospects for success by these amateur historians in black robes.

\textbf{B. Was Originalism the Original Understanding?}

The question of originalism can itself be approached from an originalist perspective by asking whether the framers expected their intentions to control subsequent interpretation of the Constitution. This issue seems particularly relevant for the “original understanding” mode of originalism, which focuses on the way the text would have been understood by contemporary readers rather than on the intentions of the author.\textsuperscript{39}

If such readers were trying to be sure of the meaning of some part of the constitutional text, they would naturally bring into play whatever conventions existed at the time for interpreting such texts. Some, of course, would be general linguistic conventions, common to the whole community, but others might be more specifically legal. Thus, an eighteenth-century reader with legal training would presumably have expected the document to be interpreted in line with existing legal conventions, and those conventions would enter into his interpretation. For instance, if he expected the Constitution to be interpreted based on the views of its framers, such as Madison and Hamilton, a contemporary reader would have felt entitled to rely on their public statements, knowing that those statements would also carry weight with later interpreters. On the other hand, if he expected interpretation to be more pragmatic, his own understanding of the text’s legal meaning would place more weight on practical considerations to resolve ambiguities.

Like most historical questions, this one is not free from doubt. But the best scholarship on the subject suggests that the framing generation would not have expected interpretation to turn on the subjective intent of the “authors”—in this case, the drafters and ratifiers. Indeed, they probably would not have thought extrinsic

\textsuperscript{38} Originalism should be even less favored by devotees of nonjudicial constitutional interpretation. For those who view elected officials or ordinary citizens as major constitutional interpreters, it should seem even less likely that members of Congress or the average voter would be an astute interpreter of early American history.

\textsuperscript{39} See Lawson, \textit{supra} note 6, at 1834 (“[T]he Constitution’s meaning is its original public meaning.”).
evidence, such as the debates of the time, could be considered to resolve ambiguities.\textsuperscript{40} (The evidence is somewhat less clear on this point concerning the intent of the ratifiers, as opposed to the drafters in Philadelphia,\textsuperscript{41} but as we have seen, the historical record regarding the ratifiers' views is much less satisfactory, making reliance on those views difficult as a practical matter.) Indeed, even at the time, ratifiers in one state would have had little reason to know what had been said about the Constitution in the debates elsewhere.

If they would not have looked to the debates as dispositive evidence, how would the ratifiers or the "reasonable contemporary reader" have gone about interpreting the text? With respect to the Second Amendment, one much mooted question is whether the introductory purpose clause relating to the militia would have placed some limit on the operational "right to bear arms" clause.\textsuperscript{42} Eugene Volokh argues, for instance, that "the justification clause can't take away what the operative clause provides."\textsuperscript{43} On the other hand, the justification clause might arguably suggest a narrow reading of the operative clause. Thus, by analogy, the argument for limiting the First Amendment to explicitly political speech would surely be strengthened if that Amendment had been written like the Second, perhaps along the following lines: "A well-informed electorate being essential to a free state, the freedom of speech and of the press shall not be abridged."

For the originalist, the question should not be which of these lines of argument seems plausible today, but rather which interpretative strategy would have seemed stronger in the 1790s. Americans had had little experience in interpreting constitutional provisions at that point, but they were heirs to centuries of experience in the similar enterprise of interpreting statutes. Reasonable and well-informed lawyers might well have expected the same methods to apply to constitutional provisions, and this expectation would shape their understanding of constitutional language.


\textsuperscript{41} See Charles A. Lofgren, \textit{The Original Understanding of Original Intent?}, 5 CONST. COMMENTARY 77 (1988). Rakove argues originalism did not begin as a method of interpretation until some time after the Constitution had gone into effect. See RAKOVE, supra note 6, at 339-70.

\textsuperscript{42} For arguments against finding any such limiting effect, see, for example, Glenn Harlan Reynolds, \textit{A Critical Guide to the Second Amendment}, 62 TENN. L. REV. 461, 466-67 (1995); Van Alstyne, supra note 3, at 1242.

Such late-eighteenth-century legal readers might well have thought that the purpose of a provision could restrict its otherwise plain language. After a careful review of the early-American cases, Bill Eskridge found that courts felt free to go beyond statutory language and resort to the “equity of the statute.” For instance, in one case, the court said it did not feel “bound by the strictly grammatical construction of the words of the act” but would instead adopt a construction “free from those inconveniences which must flow from any other interpretation.” Similarly, Blackstone endorsed the principle that the law ceases where its purpose ends and maintained that courts must sometimes adapt statutes to circumstances unforeseen by the legislators. After another careful look at early Anglo-American practice, John Manning concurred that resort to the “equity of the statute” was an accepted canon of statutory construction before the Constitution was adopted, including “the judge’s power not only to extend, but also to restrict, statutory words in the name of equity.” The possibility of equitable construction would color a sophisticated reader’s approach to the constitutional text.

In short, to determine the original understanding, we need to take into account the interpretative methods that a contemporary reader might have employed. We need to remember, therefore, that an eighteenth-century reader—whether a member of Congress, a ratifier, or even a hypothetical reasonable person—would not necessarily have thought it appropriate to look to the Second Amendment’s legislative history. Such a reader might also have expected the right to bear arms to be construed restrictively in light of the express purpose of the Second Amendment to strengthen the militia.

At the very least, we have no reason to assume away these possible readings—and even if we would not be inclined to adopt similar methods of interpretation today, the relevant question for an

44. See William N. Eskridge, Jr., Textualism, the Unknown Ideal?, 96 Mich. L. Rev. 1509, 1523-26 (1998).
45. Id. at 1525 (citing Woodbridge v. Amboy, 1 N.J.L. 213, 214 (1794)).
46. See Eskridge, supra note 44, at 1523-24. Consider, for instance, the old chestnut about whether someone who murders the testator is entitled to take under the Statute of Wills. See Daniel A. Farber, Courts, Statutes, and Public Policy: The Case of the Murderous Heir, 53 SMU L. Rev. 31 (2000).
47. John F. Manning, The Equity of the Statute (2000) (unpublished manuscript, on file with author). Manning, it should be noted, does not agree that today’s federal judges are authorized to engage in equally loose construction, given our current understanding of the separation of powers.
originalist ought to be what method of interpretation shaped the understanding of the text by readers of the time. The eighteenth century was entitled to understand the import of texts in its own way rather than ours, and if we want to know how those texts were used at the time, it is those methods of interpretation we must consider. Of course, this only adds another layer of difficulty to the originalist's task.

C. The Ambiguity of "Intent"

Another difficulty of implementing originalism is deciding what level of intent we are interested in. At the most concrete level, we might consider the relevant intent or understanding to consist of a kind of checklist of allowable and prohibited acts—so that the ordinary reader of the Second Amendment would understand that it did or did not protect, for example, the use of muskets for hunting. But this way of thinking about intent is notoriously unsatisfactory.  

Focusing solely on the concrete applications anticipated by the framers makes it difficult or impossible to justify decisions, such as the school desegregation cases, that by common agreement were correct in their outcomes.  

As Mike McConnell points out, it is also important not to "confuse the founders' expectations about how the nation would be governed under the Constitution with the founders' understanding of the meaning of the Constitution." Yet, more abstract interpretations also raise problems. Moving from specific understandings about particular fact patterns to more general principles is no easy matter. Moreover, once we move away from explicit consensus about concrete applications to more general concepts, interpretation can become quite an open-ended process. For this reason, Judge Bork argued for keeping interpretation at a relatively low level of generality. Thus, when we say we are in


49. See Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 711-14 (1975).  


search of the "original understanding," it is not entirely clear what it is that we hope to find.

Part I.A considered the problems of determining whether a particular "intent" or "understanding" is well supported by the historical record compared to the alternatives. But even once we surmount those problems, we may discover that this was not, after all, the kind of intent (or understanding) that we were looking for. As Jack Rakove points out, much of the debate over the interpretation of the Second Amendment involves the extent to which we should restrict ourselves to the specific historical context of enactment, as opposed to considering the broad theories of government that were common at the time. The supporters of a narrow interpretation would prefer to define the original understanding at a low level of generality, while those seeking a broad interpretation would prefer to define the original understanding far more abstractly. There is no agreement on any general principle for choosing the right level of generality.

Supporters of a narrow construction might also charge their opponents with confusing expectations with meaning. Even granting the factual claims made in favor of a broad right to bear arms, advocates of narrow construction might argue, those factual claims are not probative of the original understanding. Suppose, for example, that the framers did believe that the militia would be constituted of the entire population and would keep their arms at home ready for use. Suppose, in addition, that they believed arming the militia would create a possible check against usurpation by the federal government and would aid individuals in exercising their rights to personal self-defense. Still, how do we tell whether these various beliefs were anything more than predictions about how things would work out, as opposed to an understanding of the meaning of the Amendment? If we had asked the framers this question, they might have thought we were engaging in the kind of hair-splitting they might have associated with medieval philosophy—yet implementing originalism requires us to make just these sorts of fine distinctions.

In the absence of any consensus about how to choose the right level of generality or distinguish meanings from expectations, originalists who agree about the historical facts can nevertheless

reach quite different legal conclusions. This makes originalism all the less likely to constrain judicial interpretation of the Constitution, which is one of its main goals.

D. The Problem of Stare Decisis

Most originalists agree that the original understanding is not everything: originalism must leave some room for the doctrine of stare decisis. As Henry Monaghan once explained, "The expectations [created by precedent] render unacceptable a full return to original intent theory in any pure, unalloyed form"; while "original intent may constitute the starting point" of interpretation, "some theory of stare decisis is needed to confine its reach." 54

More recently, Justice Scalia has also stressed stare decisis as a limit on originalism. Despite originalism's centrality in his thinking about judicial review, it plays little role in some of Justice Scalia's most notable opinions. For instance, he does not apply it to the First Amendment, an area in which he has been a staunch supporter of free speech. He defends his First Amendment decisions as applications of "long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible." 55 He defends this use of precedent because, given the existence of an ongoing system of law, originalism cannot hope to remake the world from scratch and must take as givens such settled points as the legitimacy of judicial review and the unconstitutionality of the Alien and Sedition Acts of 1798. Thus, Scalia says, "originalism will make a difference...not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones." 56


55. SCALIA, supra note 48, at 138 (1997).

56. Id. at 139. As examples of novel constitutional rights, Scalia points to:

- Cases discovering a novel constitutional right against statewide laws denying special protection to homosexuals.
- A novel constitutional right against excessive jury awards.
- A novel constitutional right against being excluded from government contracts because of party affiliation.
- A novel constitutional prohibition of single-sex state schools.
- A novel constitutional approval of federal appellate review of jury verdicts.

Id. His use of these examples is criticized in Jeffrey Rosen, Originalist Sin: The Achievement of Antonin Scalia, and Its Intellectual Incoherence, NEW REPUBLIC, May 5, 1997, at 26. It is very difficult to discern any principled distinction between what Scalia considers a novel right and what he considers merely as novel application of an established one.
Justice Scalia has also recognized a closely related restraint against reopening settled questions. Justice Scalia’s defense of the constitutionality of patronage is a good illustration of his use of tradition. In previous cases, the Court had held that hiring or firing public employees based on their party affiliation violated their First Amendment rights. In two 1996 cases, the Court applied this rule to government contractors. Justice Scalia’s dissent was joined only by Justice Thomas. Scalia protested that “like rewarding one’s allies, the correlative act of refusing to reward one’s opponents...is an American political tradition as old as the Republic.” In his view, this history was dispositive:

If that long and unbroken tradition of our people does not decide these cases, then what does? The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a “law abridging the freedom of speech” is either a matter of history or else it is a matter of opinion. Why are not libel laws such an “abridgement”? The only satisfactory answer is that they never were. What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?

More generally, Scalia insisted (quoting from his own dissent in an earlier case), “When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.” Rather than subjecting such practices to current constitutional doctrines, “such traditions are themselves the stuff out of which the Court’s principles are to be formed. They are...the very points of reference by which the legitimacy or illegitimacy of other practices is to be figured out.”

As with almost everything about the Second Amendment, there is controversy about the precise meaning of the current precedents. Akhil Amar, who has taken an expansive view of the right to bear

59. Umbehr, 518 U.S. at 688 (Scalia, J., dissenting).
60. Id. at 688-89.
61. Id. at 687 (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).
62. Id. at 687-88 (quoting Rutan, 497 U.S. at 95-96).
arms, concedes that the lower courts have firmly embraced the opposing view "that the Amendment was about a militia, not individually armed citizens," and as a "corollary that there is no individual right to bear arms." The Supreme Court jurisprudence is less recent and sparser, but is at least not inconsistent with the more recent consensus in the lower federal courts. The Supreme Court case most directly on point rejects a Second Amendment defense to a charge of possessing a sawed-off shotgun on the ground that "possession or use" of the weapon lacked any "reasonable relationship to the preservation or efficiency of a well regulated militia." That opinion is neither recent nor entirely unambiguous. But the current decisions of the federal circuit courts are unified in upholding gun control, and the Court has not chosen to revisit the issue in any of the many recent cases it has decided pertaining to firearms. In short, no federal gun control law has ever been declared a violation of the Second Amendment by a federal appellate court.

Does this line of authority, combined with the history of gun regulation in America, amount to the kind of precedent or "tradition of our people" that Scalia would respect? The only honest answer is that no confident answer is possible. Originalism simply offers no clear-cut answer to the problem of when the need for legal stability precludes recourse to the original intent. Scalia himself has provided no clear definition of binding traditions and no rule for applying stare decisis. What is required is seemingly an act of judgment—just the kind of value judgement that originalism was supposed to avoid. Perhaps Scalia would find the conventional understanding too entrenched to challenge; he reached a similar conclusion in the Eleventh Amendment area, where the conventional understanding seemed no more solidly established. Until he actually confronts the
issue, however, it is hard to be sure what he or any other originalist would actually decide.

II. NORMATIVE DIMENSIONS OF ORIGINALISM

Part I cast doubts on whether originalism provides a workable methodology for judges in deciding Second Amendment cases. Originalism requires them to make difficult historical judgments with little training in doing so; it gives no guidance about how concretely or abstractly to define the original understanding or about how to distinguish the framers’ understanding of the text from their expectations about its implementation; and it leaves open the difficult problem of when to relinquish original understandings in favor of precedent or tradition. Furthermore, as practiced today, originalism may not even correspond with the methods used by the framers themselves to understand the text. Consequently, the so-called “original understanding” may not reflect the understanding of the original framers of how the provision would be applied under new circumstances. In short, with the best will in the world, judges who practice originalism will find themselves in vast disagreement over the meaning of the Second Amendment. Thus, if originalism is intended to constrain judges, it is a failure.

But even apart from these difficulties of implementation, the question remains whether we would want to implement originalism even if we could. The Second Amendment is a good illustration of why we should not want to be bound by the original understanding. Originalists claim that only originalism can reconcile judicial review with majority rule and make the Supreme Court something other than a super-legislature. But in reality, the Justices do not need to give up their bar memberships and join the American Historical Society in order to do their jobs properly. The conventional methods of constitutional law are completely legitimate and adequate to the task at hand. Originalism’s greatest failing—in contrast to the conventional process of common-law decision making—is its inability to confront historical change. We should reject the originalist’s invitation to ignore all of the history that has transpired since 1790 when we interpret the Constitution.
A. Majoritarianism Concerns

Originalism has generally been tied to majoritarianism. As Edwin Meese once explained it, the logic is simple: “The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law.” Therefore, “[t]o allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.” Or as John Ely put it, under the originalist view “the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.”

It seems doubtful that the eighteenth-century ratification process was democratic enough to support this claim. One of the standard criticisms is that it represented only propertied white males. Moreover, there may be special reasons to be concerned about this lack of representativeness in connection with the Second Amendment itself. The Second Amendment may have been not merely “of the white people” and “by the white people” but also, at least to an extent, “for the white people.”

Carl Bogus has suggested that a major motivation for the Second Amendment may have been the militia’s role in suppressing resistance by slaves. Most of his evidence is admittedly circumstantial, based on the known weakness of the militia as a military force compared with its usefulness in slave patrols and putting down slave revolts. Besides the circumstantial evidence, however, Bogus does cite at least one disturbing piece of more direct evidence, in the form of Patrick Henry’s concern that Congress might prevent the use of the state militia “if there should happen an insurrection of slaves.” If Bogus’s evidence is not enough to brand the Second Amendment as proslavery, it is at least enough to remind

67. See RAKOVE, supra note 6, at 9.
69. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5-8 (1980).
71. See generally Bogus, supra note 32.
72. See id. at 372.
73. See id. at 339-42.
74. See id. at 332-33, 335.
75. Id. at 349 (quoting 3 DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 421 (Jonathan Elliot ed., 2d ed. 1891)).
us that not all of the framers’ motives were equally worthy of our respect.

Quite apart from these specific questions about the Second Amendment’s pedigree, originalism seems to misconceive the connections between majoritarianism, constitutionalism, and judicial review. Taking majority rule as the sole foundational constitutional norm, originalism struggles to justify judicial review as enforcing the decisions of an earlier and more potent majority. This concern about majoritarianism is quite understandable. Of course majority rule is crucial, and of course judges should exercise restraint in reviewing the work of elected officials. But we have sometimes seemed so preoccupied with the tension between judicial review and majority rule that it has threatened to become a fetish. When judicial review seemed to be a uniquely American institution, shared by no other democracy, perhaps it was natural to regard it as an anomaly in urgent need of justification. Today, this impulse seems anachronistic. Democratic governments around the world have now adopted judicially enforceable written constitutions featuring various protections for individual rights against majority action. What is in need of justification and legitimization now is less judicial review than its absence. We need not mangle our methods of constitutional

76. It is important to bear in mind that courts are not the only nonmajoritarian institutions in our system of government. Indeed, it is not clear that the Court is radically less “democratic” than the Senate, which is elected from incredibly malapportioned districts. As for accountability, the Court is not the only important national authority lacking direct political accountability: the Federal Reserve is nearly as free from accountability and arguably more important in setting national policy. Most Americans are affected more directly by the inflation and unemployment rates than by whether flag burning is legal or by whether the town hall can display a Christmas tree.

Furthermore, judges are only part of the governance system; they are not our rulers. To assume that the whole system can be legitimate only if each part would be legitimate standing alone is to commit what economists call the fallacy of composition. The attack on judicial review assumes that the idea of democratic legitimacy applies to each particular organ of government or each specific governmental policy considered in isolation, as opposed to the government as a whole. But legitimacy may be better considered a quality that attaches to the entire governance system rather than components. Even markedly nonmajoritarian features, like the United States Senate, do not imperil overall democratic legitimacy, though they may or may not function desirably. For further discussion of these issues, see DANIEL FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (forthcoming 2001).

77. See, e.g., Anthony Lester, _The Overseas Trade in the American Bill of Rights_, 88 _COLUM. L. REV._ 537 (1988). Since Lord Lester wrote, the trend has continued apace.

78. Consider an analogy. One of the core tenets of the American legal system is the importance of the jury. We place particular importance upon the jury in criminal cases, but even in civil cases, the jury’s role is protected by the federal Constitution and many state constitutions. One key function of the jury is to bring community values and judgment to bear on a case, rather than merely the elite opinions of judges. For this reason, as well as for more immediate practical reasons, everyone agrees that judges should not lightly overturn jury
interpretation out of anxiety about the legitimacy of judicial review.

Reliance on the norm of majority rule is a particularly bad argument for Second Amendment originalism. This argument may have some appeal when the courts use nonoriginalist reasoning to strike down laws with broad popular support. In that setting, a turn toward originalism actually would strengthen majority rule, albeit at the possible expense of other constitutional values. But here, the shoe is on the other foot. Second Amendment originalism aims not to strengthen majority rule but to weaken it by limiting the majority's right to legislate in an important area of public policy.

Some arguments for a broad reading of the Second Amendment pose a different kind of threat to majority rule. The "insurrectionist" argument for the right to bear arms celebrates armed revolt against the government—reading the Second Amendment to guarantee "the People's access to bullets as well as ballots." In a democracy, however, this almost inevitably means the right of a minority to rebel when it sees a threat to its fundamental rights, for the majority can protect itself quite adequately with ballots. If we accept the legitimacy of this minority threat to revolt, we place a restraint on majority rule. Even apart from the remote chance that the threat will be implemented, its mere existence places a restraint on majority rule. It was for this reason that, the last time the insurrectionist card was played, Lincoln argued that the real question was whether "any government so constituted"—any government "of the people, by the people, and for the people"—could long endure, or whether such a government must inevitably be subject to coercive threats by disgruntled minorities. If judicial review poses a countermajoritarian "difficulty," the insurrectionist reading of the Second Amendment threatens a counter-majoritarian debacle.

The effort to equate the original understanding with the will of the people, and to equate both with constitutionalism, is dubious in any event. In the context of the Second Amendment, however, it is particularly tenuous.

verdicts. Still, not infrequently, judges do overturn jury verdicts that they consider unsupported by the evidence. But no one obsesses about the "counter-juritarian" difficulty. No scholar finds it necessary to design a whole theory of civil procedure around the problem of explaining the legitimacy of this practice.

79. See AMAR & HIRSCH, supra note 1, at 171.

B. The Nature of the Judicial Role

Other arguments for originalism rest on the nature of the judicial role. Justice Scalia argues that originalism, despite its problems, is the only way to restrain judicial discretion. Speaking of the traditional common-law approach to judging, he says that it “would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy.”\textsuperscript{81} Scalia’s main priority is properly confining the role of judges—as he says in his response to Professor Gordon Wood: “I am sure that we can induce judges, as we have induced presidents and generals, to stay within their proper governmental sphere.”\textsuperscript{82} Note in this regard that one of his main arguments for originalism is that it counters the tendency of judges to be swayed by their personal predilections, which he calls the “principal weakness of the system.”\textsuperscript{83}

But Scalia is too quick to dismiss the common-law method, which is a central feature of American constitutional law.\textsuperscript{84} Even some writers with a strong originalist bent, like Michael McConnell, seem to acknowledge a role for common-law evolution.\textsuperscript{85} At least since Karl Llewellyn—if not since Holmes—American legal pragmatists have defended just this type of common-law reasoning.

The fullest recent attempt to justify this process comes from Cass Sunstein.\textsuperscript{86} He argues that we often make the best collective decisions (particularly collectively) on the basis of what he calls incompletely theorized agreements.\textsuperscript{87} These agreements represent a consensus on the proper outcome in a given case, with only a partial attempt to work out a theoretical justification.\textsuperscript{88} These incompletely theorized agreements are particularly prominent in law—enough so that for many lawyers, the only odd thing about the idea of an incompletely theorized agreement is that it seems to imagine the possibility of the

\begin{itemize}
  \item \textsuperscript{81} SCALIA, supra note 48, at 9.
  \item \textsuperscript{82} Id. at 133.
  \item \textsuperscript{83} Scalia, supra note 15, at 864.
  \item \textsuperscript{84} See David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877 (1996).
  \item \textsuperscript{86} See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).
  \item \textsuperscript{87} See id. at 4-5.
  \item \textsuperscript{88} See id. Sunstein is far from alone in advocating this pragmatic approach. For other prominent examples, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).
\end{itemize}
other kind! (What lawyer has ever negotiated a completely theorized agreement or even had reason to read one? Indeed, one of the least plausible aspects of the recent efforts to expand the Second Amendment is the attempt to portray it as embodying a complete theory of government.) As Sunstein explains, agreement about legal issues often "involves a specific outcome and a set of reasons that do not venture far from the case at hand. High-level theories are rarely reflected explicitly in law."89

Someone once defined an economist as someone who tries to prove that what is actually happening is theoretically possible. The efforts of legal philosophers to validate the common-law method have something of this flavor. The fact is that English courts have been using this method since the Middle Ages, and our Supreme Court has been deciding cases without the benefit of a grand theory since it issued its first opinion. It seems a little late in the day to argue that the method does not work. Orville and Wilbur may not have known much aeronautical theory, but the plane did get off the ground.

The real concern of the originalists is not that the process is nonfunctional but that it gives judges too much leeway.90 Judges do have leeway, which they sometimes exercise in ways that not all of us like. But this is a condition without a cure, other than simply killing the patient. In particular, originalism will not cure the problem of judicial discretion. In practice, recourse to original intent simply fails to place sharp constraints on judges. Scalia himself has not succeeded in purging his own decisions of personal value judgments, which flourish despite his attachment to originalism.91 Nor have the efforts of other members of the Court been successful in this regard—for instance, in the Eleventh Amendment area, the Court has come to historical conclusions that are almost unanimously rejected by scholars.92

89. SUNSTEIN, supra note 86, at 37.
90. See Lillian R. BeVier, The Moment and the Millennium: A Question of Time, or Law?, 66 GEO. WASH. L. REV. 1112, 1117 (1998) (explaining that textualists are "tenaciously devoted to an ideal of legitimacy that requires judicial decision making to be constrained by objective standards and criteria external to the judges themselves").
91. See David M. Zlotnick, Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology, 48 EMORY L.J. 1377, 1377-1426 (1999). According to Zlotnick, "Scalia's opinions ... can be best understood as the product of the three-way tension between a faithful application of his methodology, the ideological motivation for the methodology, and his distinct conservative political values on particular issues." Id. at 1425.
92. As Carlos Vazquez has observed, there is a "rare unanimity" among legal scholars that the Eleventh Amendment decisions are unsupported by original understanding. See Vazquez, supra note 23, at 1694.
The Second Amendment once again provides an apt illustration of the defects of originalism. If the original understanding is to constrain judicial discretion, it must be possible to ascertain that understanding in a reasonably indisputable way. But, as we saw in Part I.B, it is not even possible to give a clear-cut definition of what constitutes the original "understanding," as opposed to the original "expectation" or the original "applications" associated with a constitutional provision. And having cleared that hurdle, formidable difficulties confront the originalist judge, as we saw in Part I.A—including a historical record that combines enormous volume with frustrating holes in key places, a complex intellectual and social context, and a host of interpretative disputes. If we do not trust judges to correctly interpret and apply their own precedents—a skill which they were supposedly taught in law school and have practiced throughout their professional lives—it is hard to see why we should trust them to interpret and apply a mass of eighteenth-century archival documents.

C. Fidelity and Change

Originalism is an effort to fix the meaning of the Constitution once and for all at its birth. But there is an opposing view, one most eloquently expressed by Justice Holmes:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.93

The Second Amendment is among the provisions of the Constitution that seem most to call out for Holmes's approach—for the historical changes relating to the right to bear arms have been far-reaching indeed.

Some of those changes relate directly to the two subjects of the Second Amendment: firearms and the militia. There is first of all the disappearance of the kind of militia contemplated by the framers. As Akhil Amar explains, perhaps with some regret:

[T]he legal and social structure on which the amendment is built no longer exists. The Founders' juries—grand, petit, and civil—are still around today, but the Founders' militia is not. America is not Switzerland. Voters no longer muster for militia practice in the town square.94

Another relevant change is the development of professional police departments, which limit the need for individuals and groups to engage in self-help.95 Because these changes, unanticipated by the framers, undermined the asserted original purpose of the Second Amendment, its application today becomes problematic.96

Apart from these changes relating directly to the Second Amendment's subject matter, broad changes in the constitutional landscape are also relevant. One watershed is the Civil War, which undermines the insurrectionist argument that armed revolt is a constitutionally sanctioned check on federal power.97 Perhaps one should just say that the constitutionality of insurrection was decisively rejected. One might even cite in this regard the decisive ruling on this point at the Appomattox courthouse in the case of Grant v. Lee—a "ruling" of more decisive constitutional importance than many a Supreme Court decision or even some constitutional amendments.

Perhaps there may be those who reject the validity of the decision at Appomattox even today. What cannot be disputed as a lesson of the Civil War, however, is that insurrection is not an acceptable practical check on the federal government. Quite apart from the question of whether insurgents could defeat a modern army, the Civil War suggests that the costs of exercising this option would simply be unbearable: if a similar percentage of the current population died during such an insurgency today, we would be talking about five million deaths.98 Brave talk about insurrection is one thing;

95. See Dorf, supra note 5, at 320-23.
96. On the effect of these changed circumstances, see H. Richard Uviller & William G. Merkel, The Second Amendment in Context: The Case of the Vanishing Predicate, 76 CHI.-KENT L. REV. 403, 537-49 (2000); see also Dorf, supra note 5, at 320-23.
97. See Dorf, supra note 5, at 318-20.
paying the butcher’s bill” is quite another. Perhaps the framers can be forgiven for failing to appreciate this reality; it is harder to excuse similar romanticism today.

The Civil War also transformed our concept of the relationship between the state and federal government. The Second Amendment, at least if revisionist scholars are to be believed, was based on the threat a powerful national government posed to liberty. But one effect of the Civil War was to cement the federal government’s role as a guarantor of liberty. Since the time of the Fourteenth Amendment, rather than state and local communities being seen as bulwarks of freedom against the federal leviathan, the federal government has been pressed into service to defend liberty. The Fourteenth Amendment arose in part out of a sense of the obligation of the federal government to protect the rights of its citizens, by force if necessary, whether the threat came from a foreign nation or a state or local government.99

Thus, rather than entrusting liberty to the “locals,” the Fourteenth Amendment calls into play federal judicial and legislative power to ensure that the states respect individual rights. This realignment of the federal government as friend rather than threat to liberty underlies much of our modern Supreme Court jurisprudence and a plethora of twentieth-century civil rights legislation. This fundamental reassessment of the relationship between federal power and liberty would make independent state and local militias as much a threat to liberty as a protector.

If the insurrectionist argument is at odds with the lessons of the Civil War, the self-defense argument for constitutional protection clashes with the modern regulatory state. It is a commonplace that the New Deal was a “watershed” in the development of the regulatory state,100 enough so to lead one prominent theorist to build a whole theory of constitutional interpretation around this shift.101 But the New Deal was only the beginning. In the 1960s and 1970s came a new wave of legislation covering matters such as consumer protection, discrimination law, and the environment.102 As a result, we live in a world where citizens routinely rely on the federal

99. See Farber & Sherry, supra note 7, at 301-05.
101. The reference, of course, is to Bruce A. Ackerman, We the People: Foundations (1991).
102. For a survey of these developments, see Rabin, supra note 100, at 1272-95.
government rather than self-help to protect them against a host of threats.

Today, we expect federal protection against everything from potentially dangerous traces of pesticides in our foods to unwanted sexual overtures in the workplace. In this context, the notion that the government cannot protect us from the dangers of firearms seems like an odd relic of an earlier laissez-faire period. Indeed, it seems peculiar at best to say that the government can constitutionally protect us from one kind of hostile environment—coworkers displaying lewd pictures—but not from a more dramatic kind of hostile environment—neighbors carrying Uzis.

The point here is not that the Second Amendment is an anachronistic text that ought to be ignored, or that its interpretation should necessarily be narrowed in light of these later developments. It is not even that these later developments are fundamentally correct. What is wrong with originalism is that it seeks to block judges from even considering these later developments, which on their face seem so clearly relevant to the legitimacy of federal gun control efforts. But try as they may, it seems unlikely that judges can avoid being influenced by these realities.

**CONCLUSION**

What do we learn about originalism from the Second Amendment debate? What do we learn about the Second Amendment from the originalism debate?

One set of lessons relates to constitutional interpretation. The Second Amendment shows how the standard academic criticisms of originalism are not just academic quibbles: they identify real and troubling flaws. The debate about the Second Amendment vividly illustrates critical problems with originalism:

- The historical record concerning the right to bear arms is difficult for non-historians such as judges to evaluate, requiring a high level of historical expertise to evaluate the credibility and import of the evidence.\(^{103}\)
- Originalism might not accurately reflect the way in which contemporary readers understood the document; in particular, it may underestimate their willingness to contemplate limiting the "right to bear arms" clause in light

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103. *See supra* Part I.A.
of the purpose clause.\textsuperscript{104}

- The original understanding of the Second Amendment can be defined at different levels of generality, and the interpretation will depend on the choice of level as well as on how we distinguish the original "understanding" from mere original "expectations."\textsuperscript{105}

- Originalism, to be a realistic option, must acknowledge stare decisis, yet it does not provide us with clear guidance about whether the current Second Amendment case law should stand.\textsuperscript{106}

- Although originalism claims simply to be enforcing the will of "We the People," the Second Amendment shows how originalism can undermine majority rule.\textsuperscript{107}

- Because of the difficulties judges would face in basing their decisions on purely historical grounds, originalism would not eliminate the role of personal values in judging.\textsuperscript{108}

- Originalism forces us to ignore the ways our world has changed since the eighteenth century: the Civil War and its aftermath have cut the ground away from the notion of insurrection as a protection of liberty against federal power; and the New Deal and its aftermath have created a world in which we customarily turn to the regulatory state rather than to self-help to protect ourselves from threats.\textsuperscript{109}

It would, in short, be a serious mistake for judges to use originalism as their recipe for interpreting the Second Amendment or other ambiguous constitutional language. The fact that the arguments against this approach are familiar does not make them any less damaging.

At a more fundamental level, however, the lesson is not simply that originalists are wrong about how judges should read the Constitution. More importantly, they are wrong about the nature of the Constitution itself. In general, disputed constitutional provisions cannot simply be applied on the basis of whatever examples were discussed at the time, and so it is natural for originalists to attempt, instead, to reconstruct the theories underlying those provisions. This

\textsuperscript{104} See supra Part I.B.
\textsuperscript{105} See supra Part I.C.
\textsuperscript{106} See supra Part I.D.
\textsuperscript{107} See supra Part II.A.
\textsuperscript{108} See supra Part II.B.
\textsuperscript{109} See supra Part II.C.
effort to theorize constitutional provisions is quite evident with the Second Amendment originalists we have discussed, but it is equally clear in the efforts of other originalists to find in the original understanding some unified theory of executive power or of federalism. But to look for an underlying theory is to misconceive the nature of the constitutional enterprise. Unlike physics, law does not lend itself to a "standard model" or a grand unified theory.

While the framers were indeed "concerned with such fundamental questions as the nature of representation and executive power," they were also engaged in "a cumulative process of bargaining and compromise in which a rigid adherence to principle yielded to the pragmatic tests of reaching agreement and building coalitions." In short, they were doing their best to create a viable set of democratic institutions, a task that required the utmost attention to both principle and pragmatism. Their task was not to agree on a theory but to create the basis for a working democracy. We hardly do justice to the spirit of their undertaking if we treat the resulting document as their Constitution alone rather than being ours as well. The last thing they would want would be for us to be ruled by false certainties about their intentions. Unfortunately, that is an invitation we have received all too often with respect to the Second Amendment.

110. See Rakove, supra note 53, at 143-52, passim (discussing use of high-level theoretical constructs by advocates of a broader reading of the Second Amendment).
111. RAKOVE, supra note 6, at 14.
112. Id. at 15.