

# On Constitutionalism

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As we are gathered here to celebrate the inauguration of a new journal devoted to the Constitution and its interpretation, this is an appropriate occasion to remind ourselves of some basic principles of our Constitution and of constitutionalism more generally. I begin with an observation so fundamental, so straightforward and obvious, that it could be controversial only in the most elite law schools. That observation, to which I will devote considerable attention, is that ours is a written Constitution. When I say ours is a written constitution, I refer, of course, to the actual Constitution, the Constitution of the United States, the document reprinted in this little pamphlet in my hand. I do not refer to the legion of Supreme Court decisions interpreting the Constitution, applying it to particular factual situations, and in many cases providing us with an extended exegesis on its meaning. Those decisions are not the Constitution; as a practical matter, they are reasonably reliable guides to its application in future cases, but they are not the Constitution itself. To maintain otherwise is to ascribe to the Supreme Court a doctrine of infallibility it has never claimed for itself.

Because our own Constitution looms large in our conception of what the word “constitution” means, it has become uncommon now to see the word used in its underlying sense, as referring to the natural structure of a thing. That was the sense in which the Founders could complain, in the Declaration of Independence, that King George and others had “combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws.” So you see, we had a constitution before anyone had undertaken to

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write it down, indeed before we had declared our independence. In modern American political discourse, however, “constitution” means, first and often last, a code of super-laws. That the Framers did give us such a code—a written constitution—has special consequences for how our government should work.

### **The Nature and Advantages of Our Written Constitution**

From antiquity, people have committed to writing the rules designed to govern their affairs. A most basic reason for preferring a written to an oral record has been to facilitate communication across time. The spoken word, being ephemeral, is subject to mistake or misstatement in its retelling; when precision is important, people memorialize their intentions in writing. A will is a familiar as well as a venerable example. For centuries the common law has encouraged that a testament be drafted, executed, and administered in accordance with strict procedural formalities to ensure that the true intentions of the deceased may be ascertained and followed after—sometimes long after—his demise. Both to reduce the danger of fraud and to minimize the probability of error, we have long learned to prefer the written word.

The usefulness of a written document is not, of course, limited to situations in which the lawgiver—and a testator is, within his sphere, a lawgiver—can no longer speak. The law also encourages the use of written agreements—contracts—particularly when significant time may pass between formation of the contract and performance of its terms. Although the contract normally need not carry the drafter’s instructions from the tomb in the manner of a will, it can address a related problem arising from communication across time. The intentions and preferences of a person entering into an agreement may change as his circumstances change, and it would be both unfair and inefficient to allow a contracting party opportunistically to avoid the consequences of a bargain upon which another may reasonably have relied. A court may analyze a written contract to discern the mutual intentions of the parties, and to give effect to their promises and expectations as of the time of their agreement. Whereas the problem addressed by a written will is evidentiary, the written contract addresses problems both evidentiary and behavioral.

A statute, another form of written law, accomplishes a similar goal. One advantage of a statute over common law is that (putting

to one side the possibility of inartful drafting) there should be little question what a statute requires of those to whom it is addressed. Just as a contract creates private law between the parties, a statute constitutes an agreement of a public sort among the legislators and between the government and its citizens. Legislators and the executive are democratically accountable to the public for the laws they enact, and the courts take care that the statute not operate differently from what the governed reasonably had understood. It was these aspects of written law—immutability and notice—that prompted Hammurabi to publish his Code (ca. 1780 B.C.), and that later prompted the Roman Consuls to issue the Twelve Tables (ca. 450 B.C.), even though they were only codifying customary law for the young Republic.

There is a rich literature, read by all educated men at the time of the framing of our Constitution, that envisioned contract—that is, an agreement freely entered—as the ideal if not the actual foundation of all legitimate government, indeed as the foundation of society itself. In these Enlightenment conceptions of the social contract, Rousseau and Montesquieu, Hobbes and Locke, imagine each citizen voluntarily ceding to all others, or to the polity, or to a particular leader, the unrestrained liberty of a state of nature in exchange for the security necessary to the tranquil enjoyment of life, especially security in one's property. John Locke, the most influential social contract theorist in the North American colonies, was an Englishman, and his thinking clearly reflected his experience under the British constitution.

At the time Locke published his *Second Treatise of Government* in 1690, few governments in the world could assert a more just claim to having struck the proper balance between freedom and security—to have arrived at the proper replication of the social contract—than His Majesty's Government at London. To be sure, Holland in the seventeenth century was a crucible of individualism, religious pluralism, and economic liberty; and Spain had combined mercantilism and monarchy to extend its influence across the continents. Although the English enjoyed neither the freewheeling *laissez faire* of the Dutch nor the Spaniards' flow of tribute from colonies rich in gold and slave labor, it was the rights of Englishmen—and particularly the right to be represented in the councils of government—that the Americans wanted, demanded, and finally took up arms against their King to secure.

The Framers, of course, rejected the idea of monarchy for their new union. More important for our topic is their rejection of the unwritten British constitution. That constitution is more accurately described as uncodified, for large parts of it are in fact written, starting with Magna Carta (1215). The British Constitution comprises the 800-year accretion of organic statutes, such as the Act of Settlement (1701); laws and customs concerning the composition of the Parliament; political conventions; case law; and commentary; all founded upon the supremacy of Parliament and the rule of law.

The American Framers really had no choice but to produce a written constitution, in order solemnly and credibly to assure the states—large and small, free and slave—that their conflicting interests would be accommodated, and their continuing sovereignty respected. Thus, the Constitution not only established the roles and functions of the national government: legislative, executive, and judicial, separated in keeping with the teachings of Montesquieu, Locke, and Blackstone. It also specifically enumerated the powers of each branch, identified those matters for which national authority would supplant state authority, and attended to such administrative matters as succession and apportionment. A common misconception holds that only with the later addition of the first ten amendments, the Bill of Rights, did the Constitution include guarantees of individual liberties. As Madison pointed out during the debates over ratification, “the Constitution proposed by the Convention contains . . . a number of such provisions,” including the prohibition of *ex post facto* laws, the availability of habeas corpus, and the right to a jury trial in the state where the crime was committed.<sup>1</sup> And within two years, of course, the Bill of Rights itself was added to the document.

Because the Framers bequeathed us a written constitution, it behooves us to review the advantages and disadvantages that come with that legacy. As with wills, contracts, and statutes, our Constitution should provide a durable statement of what the basic law is; of what the Framers would communicate could they still do so; of the bargain our ancestors struck, and we implicitly assumed, as part of our American heritage; of how our Government should work and of the constraints upon its actions.

<sup>1</sup>THE FEDERALIST No. 84 (James Madison).

One of our nation's most influential jurists, Chief Justice John Marshall, assessed the virtues of the written Constitution in his seminal opinion in *Marbury v. Madison*.<sup>2</sup> Recall that John Adams, the lame-duck President and a Federalist, had nominated William Marbury to be a justice of the peace in the District of Columbia, and the Federalist-dominated Senate had confirmed him. That was on March 3, 1801, just one day before the presidency and control of the Senate shifted to the Democratic Republican Party, which had prevailed in the election of November 1800. President Thomas Jefferson, upon entering office a few days later in March, found that Marbury's commission had not been delivered and he refused to send it. Marbury filed suit in the Supreme Court of the United States to compel James Madison, Jefferson's Secretary of State, to deliver the commission so that Marbury could take office and draw his pay.

Chief Justice Marshall transformed this seemingly mundane dispute over one man's entitlement to an inferior post into the authoritative statement of what the judiciary is to do when faced with a conflict between the Constitution, on the one hand, and a statute and an executive action on the other. You see, Marbury, invoking an Act of Congress conferring jurisdiction upon the Supreme Court to issue a writ of mandamus to a "person[ ] holding office under the Authority of the United States," sought a writ directing Madison to deliver the commission. The Court held Marbury was entitled to his commission and the Secretary of State could be directed by a writ of mandamus to deliver it, but then concluded the Supreme Court could not issue the writ because that would be an exercise of original, rather than appellate, jurisdiction, and Article III confined the original jurisdiction of the Supreme Court to a limited class of cases—not including Marbury's. As such, there was a conflict between the jurisdiction the Congress had granted to the Court and that which the Constitution permitted. Chief Justice Marshall took the occasion to announce "that a law repugnant to the constitution is void; and that courts, as well as other departments are bound by that instrument." As Professor Susan Low Bloch has observed:

This was a masterful opinion. Only by asking the questions in the order he used, with jurisdiction last, and by creatively finding a conflict between Section 13 of the Judiciary Act

<sup>2</sup>*Marbury v. Madison*, 5 U.S. 137 (1803).

and Article III of the Constitution, could Marshall assert the judicial power to review acts of both the legislative and the executive branches without ordering anyone to do anything—and thereby avoid the risk of defiance.<sup>3</sup>

And therein lies the origin of judicial review—the power of a court to declare invalid an act of the legislature or of the executive—as a necessary concomitant of a written constitution. Marshall’s reasoning, however well-accepted, is not without its difficulties. He wrote:

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.<sup>4</sup>

This theory, which Marshall later described as “essentially attached to a written constitution,”<sup>5</sup> avoids neatly the question who decides whether a law is indeed repugnant to the Constitution.<sup>6</sup>

That said, judicial review is with us still, and *Marbury v. Madison* is a foundation-stone of our legal system, built as it is upon a written constitution. And Chief Justice Marshall’s observations about the reason for enacting a written constitution are of great relevance to our topic:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.<sup>7</sup>

<sup>3</sup>*The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 610–611 (2001).

<sup>4</sup>*Marbury*, 5 U.S. at 176.

<sup>5</sup>*Id.*

<sup>6</sup>See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 210–11 (3d ed. 2000).

<sup>7</sup>*Marbury*, 5 U.S. 175–76.

A written constitution is not without its arguable disadvantages. Indeed, the virtues of such a document—its immutability, its constraint upon government action—could become drawbacks when rapid action is necessary or desirable.<sup>8</sup> Moreover, a written Constitution imposes upon judges the difficult task of interpreting and applying the text to circumstances that could not have been imagined by the Framers. What role for the First Amendment in regulating the airwaves?<sup>9</sup> Is using thermal imaging technology to penetrate the walls of a home a “search”?<sup>10</sup> That these questions are difficult, however, does not mean we should give them short shrift and capitulate to those who either do not conceive or care not to apprehend how the constraints of a written Constitution protect our liberty.

Regardless whether one prefers the constrained government bequeathed by the Framers or an activist, more freewheeling government like that of the contemporary United Kingdom, there can be no question about what our Constitution established. It is a written document. It carefully enumerates and circumscribes the powers and duties of each branch of the national government, of the national government in relation to the states, and of both with respect to individuals. And because that is what we have, and what federal judges swear to uphold and defend, we ought to be faithful to it and, as we are sworn to do, decide cases “agreeably to the Constitution and laws of the United States,” and thus preserve the advantages of having a written constitution.

### **Fidelity to the Written Constitution**

To be faithful to our written Constitution, a jurist must recognize and respect the limiting nature of its terms. Granted, what a term such as “due process” requires in a particular circumstance is not always clear. Nevertheless, there should be no question at all about whether a 34-year-old or a naturalized citizen may become President of the United States. That the terms giving rise to most questions of constitutional meaning lie somewhere between inherent ambiguity and mathematical certainty is no excuse from the duty of fidelity

<sup>8</sup>*But cf.* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (the Constitution is “not a suicide pact”).

<sup>9</sup>*E.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386–90 (1969).

<sup>10</sup>*See* *Kyllo v. U.S.*, 533 U.S. 27 (2001).

to the text. Rather, to be faithful to the written Constitution a jurist must make it his goal to illuminate the meaning of the text as the Framers understood it.<sup>11</sup> To be sure, there will be disagreements even among principled jurists whose only goal is fidelity to the text, but with the aid of historical sources such disagreements will be confined to the ordinarily narrow and determinate zone within which competing constructions of a word or phrase are reasonable.

Through most of the history of the Republic, judges were faithful in their subservience to the text of the Constitution. That is not to say that fidelity to the text was a uniform and consistent practice at the Court. Consider the *Dred Scott* case,<sup>12</sup> in which the Court for the first time in the 56 years since *Marbury* invalidated an Act of Congress. The Congress had enacted the Missouri Compromise in 1820, prohibiting slavery in the Louisiana Territory north of Missouri. Scott's previous owner had taken Scott from Missouri to a territory in which slavery had been outlawed by the Compromise and then back to Missouri, where the owner sold Scott to Sandford. Scott brought an action in federal court seeking his freedom, claiming that he became a free man by virtue of his presence in the territory where the Congress had outlawed slavery. The Court held that the Congress was without power to divest Scott's previous owner of his property interest in Scott, and hence the Missouri Compromise was void.

What is striking about the decision is its apparently willful obtuseness in ascertaining what the Constitution requires. In observing that the "right of property in a slave is distinctly and expressly affirmed in the Constitution,"<sup>13</sup> the Court cited provisions of the Constitution that did not carry the weight of that idea.<sup>14</sup> And that

<sup>11</sup>*But cf.* *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom").

<sup>12</sup>*Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>13</sup>*Id.* at 451.

<sup>14</sup>The Court cited clauses reserving to the states the right to import slaves until 1808 and requiring states to return escaped slaves, *Dred Scott*, 60 U.S. at 411, 451–52, neither of which establish an individual's right of property in a slave so as to override state or federal law denying recognition of such a right.

is only the most infamous example of the opinion's violence to the principle of faithful interpretation of the written Constitution. Even more egregious was its limitation of the provision giving Congress power "to dispose of and make all needful rules and regulations respecting the territory . . . of the United States" (Article IV, § 3) to apply only to property ceded to the national government by the states in the aftermath of the Revolution, not to property, such as the Louisiana Territory, obtained from a foreign nation.<sup>15</sup>

Despite sporadic departures like *Dred Scott*, respect for the text of the Constitution was the norm from *Marbury* through the first third of the twentieth century. But the Great Depression and the determination of the Roosevelt Administration placed the Supreme Court's commitment to the Constitution as written under severe stress in the 1930s, and it was then that the wheels began to come off.

Among the powers granted to the Congress in the Constitution is the power "[t]o regulate commerce . . . among the several states."<sup>16</sup> From early in the history of the Republic, this authority was recognized to extend to articles in commerce among the states, while jurisdiction over health, safety, or other exercises of the police power was reserved exclusively to the states.<sup>17</sup> The Clause was deemed broad enough, therefore, to allow regulation not only of ferries and railroads that transported goods in interstate commerce,<sup>18</sup> but also of ancillary facilities, such as stockyards, described as "a throat through which the current [of commerce] flows."<sup>19</sup> The power did not encompass regulation of child labor, however, because "the use of interstate transportation was [not] necessary to the accomplishment of harmful results."<sup>20</sup> Desirable though a prohibition upon child labor may have been, therefore, the Congress was without power to enact it. A contrary result would have allowed the Congress to regulate almost anything pursuant to its power over interstate commerce, regardless whether the subject regulated was within the police power of the states.

<sup>15</sup>*Id.* at 432–42.

<sup>16</sup>U.S. CONST. art. I, § 8.

<sup>17</sup>*Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>18</sup>*Shreveport Rate Cases*, 234 U.S. 342 (1914).

<sup>19</sup>*Stafford v. Wallace*, 258 U.S. 495 (1922).

<sup>20</sup>*Hamer v. Dagenhart*, 247 U.S. 251 (1918).

During the 1930s, President Roosevelt proposed and the Congress enacted New Deal legislation in the teeth of the Court's prior decisions explicating the limits of the written Constitution. In effect, the President and the Congress dared the Court to strike down laws with strong popular support. Then President Roosevelt announced, after his landslide victory in 1936, his plan to "pack" the Supreme Court—that is, in the name of efficiency, to add another seat to the Court for each active justice over the age of 70, which would have given him six additional appointments. The Court-packing plan was voted down overwhelmingly by the Senate, but until then the threat of some change in the composition of the Court must have added to the strain placed upon the Justices' adherence to their announced understanding of the Constitution. After all, the power of the sword of Damocles is not that it falls, but that it hangs.

It was under the threat of the Court-packing plan that the Justices decided *NLRB v. Jones & Laughlin Steel Corp.*,<sup>21</sup> upholding the power of the Congress to require employers to recognize and bargain with unions representing their employees. The Court's loose reasoning appears entirely too familiar from our contemporary perspective: strikes and other labor strife burden interstate commerce; therefore, employer-employee relations are subject to the power of the Congress to regulate interstate commerce.

In context, however, it is clear that the decision was a stark break from the Court's precedent. Whereas the Court had previously determined that the national government could not intrude upon the police power of the states by proscribing child labor, it now threw open the door to national regulation of employment relations—and much more. Not only interstate commerce but anything that affects interstate commerce came within the reach of the Congress. Indeed, not until *United States v. Lopez* in 1995 did the Court find another federally regulated subject beyond the reach of the Commerce Clause, and that was the possession near a school of a gun that was not shown to have moved in interstate commerce.<sup>22</sup>

I have singled out the Court's interpretation of the Commerce Clause not because it is extreme but because it is illustrative. To take another example, the Constitution carefully separates legislative

<sup>21</sup>*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>22</sup>*United States v. Lopez*, 514 U.S. 549 (1995).

and executive powers. “All legislative powers herein granted shall be vested in a Congress of the United States,”<sup>23</sup> whereas “[t]he Executive Power shall be vested in a President of the United States of America.”<sup>24</sup> From that clear demarcation the Court had once inferred there must be a limit upon the ability of the Congress to delegate lawmaking functions to the executive branch. By delegating its legislative function the Congress avoids political accountability—therein lies the appeal of delegation—and frustrates the Framers’ purpose in separating governmental powers. Accordingly, in the years before *Jones & Laughlin* the Supreme Court invalidated delegations of legislative power that contained no “intelligible principle to which the person or body authorized to take action is directed to conform.”<sup>25</sup> After the watershed New Deal cases expanding the reach of the Congress through the commerce power, however, the Court never again found an Act of Congress, however open-ended, to violate the Non-Delegation Doctrine.<sup>26</sup>

Not only structural constraints in the written Constitution have been disregarded; even precepts within the Bill of Rights have been blinked away. The Takings Clause of the Fifth Amendment, which provides that the Government may not take private property except for a public use, and then only if it pays just compensation, provides no protection against a regulation that deprives the nominal owner of most of the economic value of his property.<sup>27</sup>

At the same time that the Court redacted the textual limits upon the authority of the Congress to regulate, it has interlined the Constitution with new rights, which is to say new limits upon government, of its own devising. In so doing, the Court acts as a council of revision with a self-determined mandate. Its decisions are frankly legislative in character: invalidating acts of the national and state legislatures on grounds that are not to be found in the Constitution, and on its own initiative placing new obligations upon the federal

<sup>23</sup>U.S. CONST. art. I, § 1.

<sup>24</sup>U.S. CONST. art. II, § 1.

<sup>25</sup>*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>26</sup>*Whitman v. American Trucking Associations*, 531 U.S. 457, 474–75 (2001).

<sup>27</sup>Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (“[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking”).

and state governments. However one might approve of the Court's decisions as matters of policy, they have only the merest pretense of comporting with the Constitution as it was written.

Consider the Court's 1965 pronouncement of a constitutional right to privacy in *Griswold v. Connecticut*.<sup>28</sup> A long-neglected state statute made unlawful the use of "any drug, medicinal article, or instrument for the purpose of preventing conception."<sup>29</sup> The Planned Parenthood League of Connecticut and several physicians challenged the law as infringing upon their clients' privacy. Of course, the Constitution is not silent on the topic of privacy. The Fourth Amendment establishes a specific, but limited right

of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.<sup>30</sup>

This constitutional limitation upon government being insufficient by itself to the task at hand, the Court invalidated the statute for invading what it perceived to be "the zone of privacy created by several fundamental constitutional guarantees," to wit:

The right of association contained in the penumbra of the First Amendment[;]

The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner[;]

The Fourth Amendment[;]

The Fifth Amendment [which] in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment[; and]

The Ninth Amendment [which] provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>31</sup>

<sup>28</sup>*Griswold v. Connecticut*, 381 U.S. 479.

<sup>29</sup>*Id.* at 480.

<sup>30</sup>U.S. CONST. amend. IV.

<sup>31</sup>*Griswold*, 381 U.S. at 484.

Thus, while a jurist devoted to the Constitution as written might conclude that the document says nothing about the privacy of “intimate relation[s] of husband and wife,”<sup>32</sup> and thereby remits the citizenry to the political processes of their respective states, the Court managed to find a multitude of sources for such a right, albeit not in mere words but in the imagined “penumbras” and “emanations” from various tangentially relevant clauses.<sup>33</sup>

*Griswold* is not an aberration. Just last year the Court determined that, because most states do not allow the execution of a mentally retarded murderer, those that do are inflicting a cruel and unusual and, therefore, unconstitutional punishment.<sup>34</sup> This is as frankly a legislative decision as the Court has ever rendered. It has nothing to do with the constitutionality of capital punishment and everything to do with the Justices’ personal senses of decency. My quarrel, mind you, is not with the policy the Court adopted in this or any of the cases I have mentioned—on which I express no view—but with the Court’s making such choices for us, notwithstanding the lack of any sound basis in the Constitution for doing so.

The question remains whether this freewheeling style of constitutional decisionmaking, in which the document itself plays only a cameo role, is to be a permanent feature of constitutional law, or whether we can regain the virtues of a written constitution. If history is any guide, then reform is not likely to spring from any branch of the federal government.

If renewed fidelity to the Constitution as written is possible—and I think it is—then it will come only through a change in the legal culture. The ranks of scholars and judges advocating greater fidelity to constitutional text is still small but it is growing. Scholars are attending more to the original meaning of at least some of the clauses of the Constitution instead of focusing exclusively upon the Court’s prior decisions. I daresay there has been more study of the Commerce Power and the Non-Delegation Doctrine in the last 10 years

<sup>32</sup>*Id.* at 482.

<sup>33</sup>*Id.* at 484. What is worse, there was an argument from the text of the Constitution available to a Court intent upon striking down the Connecticut statute. Judge Posner has suggested that the role of the Catholic Church in the survival of the statute should have raised concerns under the Establishment Clause. See RICHARD A. POSNER, *SEX AND REASON* 326 (1992).

<sup>34</sup>*Atkins v. Virginia*, 536 U.S. 304 (2002).

than in the prior half-century. Like archaeologists, legal and historical researchers have been rediscovering neglected clauses, dusting them off, and in some instances even imagining how they might be returned to active service. As the new legal scholarship gains acceptance, and students are exposed to the competing vision it represents, they will as lawyers begin to present more textual arguments, some of which may eventually win acceptance in the courts.

The career of the Second Amendment provides a contemporary glimpse of this process. For two decades a cadre of textually minded law professors bemoaned the short shrift given to the right arguably conferred by the Second Amendment upon individuals—as opposed to the “militia,” now known as the National Guard—“to keep and bear arms.” Because academic lawyers so assiduously ignored its text, Sanford Levinson of the University of Texas Law School dubbed it “the embarrassing Second Amendment.”<sup>35</sup> As new historical scholarship on the meaning of the Amendment gained acceptance, however, one of the least textually constrained members of the legal academy, Professor Laurence Tribe, recently revised his treatise to say that the Second Amendment does indeed protect the right of the individual to bear arms.<sup>36</sup> And now let the litigation begin: With criminal charges relating to simple possession of a firearm potentially subject to a constitutional defense, there can be little doubt that defense lawyers will argue the Second Amendment and thereby force the courts to sort out its implications for contemporary state and federal regulation of firearms.

As you can see, the process of refocusing attention upon the text of the Constitution depends crucially upon the generation and distribution of historically sound scholarship concerning the meaning of the Constitution the Framers wrote. And on that note, I applaud the Cato Institute for providing a new and surely destined to be influential forum for that scholarship—the Cato Supreme Court Review.

<sup>35</sup>Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

<sup>36</sup>See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 898–99 n.213, 901–02 n.221 (3d ed. 2000).