The New Doctrinalism in Constitutional Scholarship and Heller v. District of Columbia

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THE NEW DOCTRINALISM IN CONSTITUTIONAL SCHOLARSHIP
AND
DISTRICT OF COLUMBIA V. HELLER

BRANNON P. DENNING*

In the run-up to oral arguments in District of Columbia v. Heller,¹ the Bush Administration outraged many gun rights advocates when the Solicitor General filed the Government’s *amicus* brief.² Though it endorsed an individual right interpretation, the Administration’s brief urged the U.S. Supreme Court to overturn the D.C. Circuit’s decision, which invalidated the strict ban on handguns,³ and remand for reconsideration under a more lenient standard of review.⁴ Gun rights supporters viewed the Government’s position as a betrayal, in part, because of a sense that where an individual right is recognized, nothing less than “strict scrutiny”—requiring the government to demonstrate that a law is “narrowly tailored to achieve a compelling governmental interest”⁵—follows from that recognition.⁶ At oral argument,⁷ and in the opinion itself,⁸ there was considerable discussion of the proper standard of review.

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⁵ For a summary of the Bush Administration’s argument, see Brief for the United States as Amicus Curiae at 8, *Heller*, 128 S. Ct. 2783 (Jan. 11, 2008) (No. 07-209), 2008 WL 15701: [T]he Second Amendment, properly construed, allows for reasonable regulation of firearms, must be interpreted in light of context and history, and is subject to important exceptions . . . . Nothing in the Second Amendment properly understood—and certainly no principle necessary to decide this case—calls for invalidation of the numerous federal laws regulating firearms. When . . . a law directly limits the private possession of ‘Arms’ in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny that considers (a) the practical impact of the challenged restriction on the plaintiff’s ability to possess firearms for lawful purposes (which depends in turn on the nature and functional adequacy of available alternatives), and (b) the strength of the government’s interest in enforcement of the relevant restriction.

⁶ See *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting) (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

The controversy over the proper standard of review in *Heller* coincides with a renewed interest among scholars in the formation and application of doctrine. What I am calling the “New Doctrinalism” in constitutional scholarship focuses less on controversies over the fixing of constitutional meaning and more on the rules courts develop to “implement,” as Richard Fallon described it, those constitutional commands. In this brief essay, I describe the New Doctrinalism and explain the potential payoff for constitutional law using *Heller* as a case study.

**DEFINING THE NEW DOCTRINALISM**

With much of the focus on empiricism and interdisciplinarity, to suggest that doctrinal scholarship, especially in constitutional law, is worthy of study requires some explanation and a defense. The scholars engaged in the New Doctrinalism are not simply describing, with critical analysis, cases that make up particular areas of constitutional law. Rather, the New Doctrinalism’s focus is on macro-level doctrinal formation—how the Court takes general propositions about constitutional meaning and constructs rules that enable it to decide particular cases.

In his 2001 book, for example, Richard Fallon states that in most cases, the Court does not choose between originalist and nonoriginalist interpretive methods; rather, it applies rules developed in prior cases or adjusts those rules to take account of new circumstances. Professor Fallon’s book provides a veritable safari of the types of doctrinal tests employed in constitutional cases.
Fallon’s work was followed by a number of articles that developed and extended his insights. In 2004, for example, Mitchell Berman’s *Constitutional Decision Rules* urged scholars to reconceive constitutional interpretation as a two-stage process.\(^{14}\) In stage one, judges fix constitutional meaning, using any one of a number of interpretive methodologies recognized as legitimate.\(^{15}\) Then, once the “constitutional operative proposition” is established, “decision rules” are generated; these rules form the backbone of doctrine that permits the implementation of the operative proposition.\(^{16}\)

Building on Berman’s work, Kermit Roosevelt discussed “constitutional calcification,” which explored how doctrine degrades over time, requiring adjustments or, in some cases, radical revision as doctrinal rules become unsuitable to implement constitutional commands.\(^{17}\) Occasionally, Roosevelt noted, the rules and the operative propositions are conflated, with the result that rules are taken as constitutional commands.\(^{18}\) Thus, he argues, does the Constitution meld with the Court’s gloss on it.\(^{19}\) Careful separation of operative propositions and rules, he argues further, can sensitize scholars and judges to the danger of conflating the Constitution with doctrine and prevent internalization of constitutional “commands” that are no more than tools used by the judiciary to decide cases.\(^{20}\)

Other scholars are now focusing on particular doctrinal areas. For example, Richard Fallon and Adam Winkler have taken a close look at “strict scrutiny.”\(^{21}\)
They have discovered what closer observers of the Court have noticed in opinions: that there are one, two, many forms of strict scrutiny. And not all are “fatal in fact,” as Gerry Gunther famously put it. Winkler has also done a study demonstrating further that finding a “fundamental right” or an “individual right” does not ipso facto result in a court applying strict scrutiny. Calvin Massey has suggested that the Court’s haphazardly-applied equal protection standards of review have made doctrine in that area unstable, and he recently examined the role that inquiries into governmental purpose play in constitutional law.

Other contributions to doctrinal scholarship include Dan Coenen’s examination of what he terms “subconstitutional rules” that promote interbranch dialogue. Paul Horwitz has examined judicial deference in a variety of constitutional contexts. David Strauss has forcefully argued that doctrinalism has normative advantages over other forms of constitutional interpretation. And, in G. Edward White, doctrine has found its own historian. This is, of course, an incomplete list:

31. My intent is to be illustrative, not comprehensive. My apologies to any other New Doctrinalists or fellow travelers not listed here. For my own contribution, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 *Wm. & Mary L. Rev.* (forthcoming 2008).
34. Charles Fried, *Constitutional Doctrine*, 107 *Harv. L. Rev.* 1140 (1994); Charles Fried,
Kagan, and Kathleen Sullivan have also contributed to our understanding of constitutional doctrine in particular areas. And if the New Doctrinalism’s practitioners constitute a veritable pantheon of constitutional law’s leading scholars, then Laurence Tribe looms, Zeus-like, over them all!

THE CASE FOR THE NEW DOCTRINALISM—AND THE CASE AGAINST

This renewed interest in doctrine should be welcome for a number of reasons. First, the New Doctrinalism provides a focal point for discussions of the Court’s work product by scholars with different views on the proper method for interpreting the Constitution. It provides a mechanism for implementing what Cass Sunstein described as “incompletely theorized agreements” about meaning, and a way for those agnostic on the originalism vs. nonoriginalism debate, or those uninterested in arid historical arguments about constitutional meaning, to discuss the Court and its work.

For example, suppose two scholars agree the Commerce Clause not only empowers Congress to act, but also implicitly limits the ability of states to discriminate against interstate commerce. They disagree, however, on the reason for why that implicit limit exists. Scholar A might think that it exists because the Framers intended the Commerce Clause to limit state power in that way; Scholar B, though, might simply regard anti-discrimination as a necessary check on parochialism that maximizes utility for all states and for the country as a whole. The New Doctrinalism offers a way for both scholars to focus on what form the decision rules implementing the anti-discrimination principle should take. If nothing else, recent doctrinal scholarship advances constitutional law beyond the stalemated (and stale) debates between originalists and nonoriginalists that have dominated constitutional theory for more than a generation.


Second, a renewed focus on doctrine also harkens back to the initial project of the Legal Realists—to test “paper” rules against the “real” rules courts applied to decide cases, and then adjust the former accordingly if there is a gap between the two.\footnote{39} The Legal Realists were primarily concerned with private law subjects; but just as Herman Oliphant, in the words of his famous essay, hoped close study could enable “a return to stare decisis,” the same might be true of a close study of constitutional doctrine as well.\footnote{40} Any meaningful normative critique of the Court’s work must depend on an accurate descriptive account of what, in fact, the Court does when it decides cases. And describing precisely what the Court does with its decision rules has already yielded some surprises, e.g., that strict scrutiny can take different forms in different situation types.\footnote{41}

Third, good doctrinal scholarship also represents a form of empiricism, which is a refreshing change of pace from some of the constitutional theory that, in the past, was so abstract as to border on the ethereal. John Hart Ely once quipped that such scholarship seemed animated by the expectation of reading a Court opinion holding, “We like Rawls, you like Nozick. We win, 6-3.”\footnote{42} The empiricism may be a little soft, but it’s a start.

Fourth, by separating the oft-confounded fixing of meaning and design of standards of review, the New Doctrinalism offers an opportunity to reflect on the choices open to judges when creating rules of decision and to articulate and debate the proper criteria for such rules. These criteria, not surprisingly, figure prominently in the recent writings.\footnote{43} Debates over doctrinal rules, moreover, can furnish a convenient platform for consideration of larger questions of institutional competence and judicial review that are too often posed in the abstract.\footnote{44}


\footnote{40. Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71 (1928).

\footnote{41. See supra note 21.


\footnote{43. See, e.g., Berman, supra note 14, at 93–96 (discussing “six analytically distinct factors or families of factors that might appeal to a judge considering whether, and how, to form a constitutional decision rule—considerations I label adjudicatory, deterrent, protective, fiscal, institutional, and substantive”); Roosevelt, supra note 17, at 1658–67 (discussing “institutional competence,” “costs of error,” “frequency of unconstitutional action,” “legislative pathologies,” “enforcement costs,” and “guidance for other governmental actors” as factors in the formation of decision rules).

\footnote{44. For discussions of institutional competence in constitutional adjudication, see Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation (2006), and Fallon, Judicially Manageable Standards, supra note 21, at 1280–96, 1309–12.}
Fifth, because the New Doctrinalism focuses on the work product of the courts and the tools judges fashion to dispose of constitutional cases, it carries with it the possibility of bridging the much-discussed gap between judges and lawyers on the one hand, and academics on the other. It might even create a useful feedback mechanism between the Supreme Court and lower courts. Doctrinal scholarship’s focus on the craft of rule formation can sensitizelower courts to the scope and content of Supreme Court doctrine, highlight choices made or avoided by the doctrine, and alert judges to gaps in the doctrine.

Further, if the New Doctrinalism is extended, as it should be, to the lower courts, then scholars can furnish evidence of the lower courts’ application (or lack of application) of decision rules, highlight doctrinal areas in need of clarification, and identify rules that require alteration. It might also alert the Supreme Court to areas in which lower courts are declining to implement the Court’s own doctrine. This lower court resistance might be caused in part by a shrinking case load that reduces the chance lower courts will be called to account for ignoring the Court.

Doctrinal scholarship could also assist practitioners in framing arguments to courts. Exposing practitioners to the different standards of review that can arise in various situation types might enable them to frame questions and tests more precisely.

The New Doctrinalism may even have some payoff for teachers of constitutional law. Stressing the Court’s role of creating—and lower courts’ roles in applying—decision rules can alert students to the discretion that Justices and judges have in enforcing constitutional commands. Examining lower court cases shows that much often remains after “blockbuster” Supreme Court cases, and that judgcing the standard of review can create confusion in the lower courts. Stressing decision rules also furnishes a way to introduce topics like institutional competence and requires students to think critically about the factors that do (or should) influence a court’s choice in doctrine. Moreover, such skills are transferable and offer a response to the student who asks (as they often do) whether the course has any connection to their future practice.

Finally, if we are ever to create space for members of the elected branches (and ordinary voters) to make constitutional arguments, it is important that no one feel obligated to imitate Court-speak. Attention to the values of the “thin Constitution” should not depend on the ability to recite and apply all of the

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Court’s various doctrinal tests that thicken it. 49 “Judicial overhang” can stunt consideration of constitutional questions by legislatures and stymie the creation of “populist constitutional law.”50 Separation of the “doctrine” from “the document,” as Akhil Amar once put it,51 can make clear that not all constitutional conversations must occur in a judicial voice.

Of course, what would thesis be without antithesis? The New Doctrinalism is already producing critical literature. Responding to one of Richard Fallon’s papers, Roderick Hills argued that meaning and doctrine are not easily separated and that New Doctrinalist efforts to convince us otherwise are “seductively misleading” because they represent another attempt to achieve “noninstrumental certainty in the law.”52 For Hills, “the meaning of a constitutional provision is in its implementation,” and to pretend otherwise is to “talk in empty, metaphysical abstractions.”53 Daryl Levinson similarly argues against a “rights essentialism” that “assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value,” which is “corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of the real world.”54

Levinson wrote his article before the latest wave of New Doctrinalist scholarship, which avoids the “rights essentialism” trap because it does not view rule formation or implementation as “corrupting” the constitutional commands.55 Both the fixing of meaning and the formation of implementing rules are seen as essential parts of adjudication.

As for Hills’s critique, I don’t think Fallon or anyone else views operative propositions and decision rules as wholly unrelated. The rules shape the judicially-enforced content of the operative proposition, just as the presence or absence of legal remedies shapes the perception of a “right.” And yet it also seems to me that that assessing meaning—say, from an historical perspective—is a different enterprise than deciding how a judge should deploy that meaning in concrete cases—even if the rules necessarily shape the nature of that judicial meaning.

At the very least, the extent to which meaning and doctrine are separable or inextricably intertwined strikes me as a debate worth having. Simply by

49. For the contrast between the “thin” and “thick” Constitutions, see id. at 9–14.
50. Id. at 57–65 (discussing ways in which “judicial overhang” inhibits legislative consideration of constitutional values).
53. Id. at 175.
55. See Roosevelt, supra note 17, at 1711–12. Roosevelt does point out that meaning can be “warped” by a conflation of rules and operative propositions—by mistaking the rules themselves for the commands. Id.
providing a critique, the New Doctrinalism has opened up a new discussion in constitutional scholarship, which many think has grown rather stale over the years.

Heller and the New Doctrinalism

Which brings us back to Heller. For years, the debate over the Second Amendment rarely progressed beyond the historical: did the Framers intend the Amendment to guarantee an individual right or a “collective” or “state’s right”? Since the courts were disinclined to engage the constitutional dimension of gun control, this debate was largely academic; thus, no one gave much thought to the proper standard of review. To the extent anyone considered it, there seemed to be an assumption that “strict scrutiny” would follow from the individual rights reading. Because it was widely assumed that “strict” scrutiny was well-nigh fatal to any law to which it was applied, gun control proponents and opponents both had a stake in settling the individual/collective rights question.

At first, the initial posture of the debate over the Amendment seems to confirm Hills’ and Levinson’s argument that constitutional meaning is determined by rules, rather than the other way around. But as New Doctrinalist scholarship has shown, strict scrutiny is not necessarily the default standard of review for provisions of the Bill of Rights that indubitably guarantee “individual” rights. Moreover, as Adam Winkler argued, in states where individual gun rights are clearly established in state constitutions, strict scrutiny has not followed as a matter of course. In addition, studies have shown that several different tests travel under the label “strict scrutiny,” but courts do not apply them in the same way. Winkler’s argument was that one could support the individual rights interpretation of the Second Amendment without dooming “reasonable” gun control legislation. The Bush Justice Department agreed in part, arguing for something less than strict scrutiny to apply to federal gun laws—to the dismay of many gun rights supporters.

56. For an excellent summary of the debate, circa the mid-1990s, when the debate heated up again, see Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461 (1995).
58. See id. at 72.
59. See Gunther, supra note 23.
60. See Winkler, supra note 24.
63. Winkler, supra note 61, at 732.
64. See Brief of the United States, supra note 4, at 8. The Solicitor General’s brief was
The first draft of this Essay proceeded on the assumption that the majority was likely to be explicit about the standard of review that was or ought to have been applied to the District’s ban on handguns, and either affirm or reverse on that basis. My first clue that something else might occur was during oral argument when Chief Justice Roberts asked whether prescribing a standard of review was really necessary.\textsuperscript{66} Apparently the Chief Justice convinced the majority, because its opinion was not explicit about the standard that it used to evaluate the District’s gun ban or about the standard that the lower courts ought to employ in future cases.\textsuperscript{67} That said, I think that one might be inferred from hints in the opinion. Consider the following:

First, perhaps obviously, the Court affirmed the lower court,\textsuperscript{68} and did not—as the Government had requested\textsuperscript{69}—remand for reconsideration under a different standard of review.\textsuperscript{70}

The majority rejected the use of any rational basis standard of review, calling it inappropriate for a “specific, enumerated right” like the Second Amendment.\textsuperscript{71} “If all that was required,” Justice Scalia wrote, “to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”\textsuperscript{72} The majority also rejected the balancing approach of Justice Breyer, who discussed the appropriate standard of review extensively.\textsuperscript{73} The majority wrote:

We know of no other enumerated constitutional right whose core protection has been subject to a freestanding ‘interest-balancing’ approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.\textsuperscript{74}


\textsuperscript{65} See supra note 2.
\textsuperscript{66} Transcript of Oral Argument, supra note 7, at 44 (asking “why in this case we have to articulate an all-encompassing standard”).
\textsuperscript{68} Id.
\textsuperscript{69} See Brief for the United States, supra note 4, at 9–10.
\textsuperscript{70} See \textit{Heller}, 128 S. Ct. at 2821–22.
\textsuperscript{71} Id. at 2817–18, 2817 n.27.
\textsuperscript{72} Id. at 2818 n.27.
\textsuperscript{73} Id. at 2821.
\textsuperscript{74} Id.
stanching that violence.\textsuperscript{75} “[T]he enshrinement of constitutional rights,” Justice Scalia wrote, “necessarily takes certain policy choices off the table.”\textsuperscript{76}

And yet, as the majority made clear, not all gun control laws are presumptively unconstitutional.\textsuperscript{77} Specifically, the majority mentioned “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”\textsuperscript{78} The Court also limited the right by defining “arms” to exclude “dangerous and unusual weapons.”\textsuperscript{79}

Responding to Justice Breyer’s criticism of the Court’s reticence to explicitly embrace a particular standard of review, Justice Scalia defended the majority’s position on the ground that \textit{Heller} “represents this Court’s first in-depth examination of the Second Amendment.”\textsuperscript{80} The pieces of the opinion, however, suggest that the Court at least adopted a form of intermediate scrutiny, if not strict scrutiny tempered by categorical exclusions of certain persons and arms (e.g., felons and machine guns or other “unusual” weapons) from the scope of the right.\textsuperscript{81}

But there is a cost to the Court’s ambiguity on this point. Lower courts may refuse to infer a standard from the clues the Court provided, as I have here, and may find it easier to narrow \textit{Heller} or even avoid it altogether. Unless the Court is willing to monitor the lower courts by accepting cases for review, the failure of the Court to articulate an explicit standard of review could impair the robust implementation—in the Fallonian sense—of the right.\textsuperscript{82}

In contrast to the majority’s reticence to talk about a standard of review, Justice Breyer’s dissent laid his approach out in some detail.\textsuperscript{83} Criticizing the respondents’ call for strict scrutiny as “impossible,”\textsuperscript{84} Justice Breyer would adopt an “interest-balancing inquiry” that he explains would avoid the rigid dichotomy of strict scrutiny versus rational basis.\textsuperscript{85} He would, in other words, balance the interest of those who wish to own guns for self-defense against the interest of the government in restricting gun ownership to combat violent crime, noting that

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 2822.
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.} at 2816–17.
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 2817.
\item \textsuperscript{80} \textit{Id.} at 2821. Therefore, Justice Scalia added, “one should not expect it to clarify the entire field.” \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 2817.
\item \textsuperscript{82} For more on this point, see Glenn Harlan Reynolds & Brannon P. Denning, \textit{Heller’s Future in the Lower Courts}, Nw. U. L. REV. (forthcoming 2008).
\item \textsuperscript{83} \textit{See Heller}, 128 S. Ct. at 2847–70 (Breyer, J., dissenting).
\item \textsuperscript{84} \textit{Id.} at 2851 (arguing “true” strict scrutiny is “impossible” because “almost every gun-control regulation will seek to advance . . . a ‘primary concern of every government—a concern for the safety and indeed the lives of its citizens’” that would justify restrictions on civil liberties) (quoting United States \textit{v.} Salerno, 481 U.S. 739, 755 (1987)).
\item \textsuperscript{85} \textit{Id.} at 2852.
\end{itemize}
perhaps violent crime feeds the need of otherwise law-abiding citizens to own
guns for self-defense in the first place. 86 But, and this was especially important in
Heller, Justice Breyer would “defer[] to a legislature’s empirical judgment in
matters where a legislature is likely to have greater expertise and greater
institutional factfinding capacity.”87

Given the deference in Justice Breyer’s formulation, he would find the
District’s ban passed muster. 88 After reviewing the highly contested empirical
evidence, Justice Breyer concluded that the evidence consisted of “studies and
counterstudies that, at most, could leave a judge uncertain about the proper policy
collection.”89 But, he concluded, “legislators, not judges, have primary
responsibility for drawing policy conclusions from empirical fact.”90 For that
reason, Justice Breyer’s dissenting opinion was not a concurring opinion,
especially because, in his view, private self-defense was only a secondary aim of
the Amendment,91 and there were no superior alternatives to the ban.92 There was
no “clearly superior, less restrictive alternative,” wrote Justice Breyer, because
“the ban’s very objective is to reduce significantly the number of handguns in the
District.”93

Justice Breyer was correct to criticize the majority for the lacunae in the
reasoning that accompanied its conclusion that although the District’s gun did not
pass muster, not all gun controls were unconstitutional.94 At the same time, his
methodology is open to criticism. For example, as scholars have noted, balancing
tests, like Justice Breyer’s, often appear more transparent than they actually are.95
Further, it is odd to “balance” a right against presumed governmental interests.
Rights are usually thought of by citizens as trumps that aren’t to be merely
balanced away in an opaque judicial equation.96 If the District is not required to
exert effort to justify its draconian gun policy, then one wonders why Justice
Breyer made a point of referring to the Second Amendment as embodying an
individual right in the first place.

86. Id. (“Any answer would take account both of the statute’s effects upon the competing
interests and the existence of any clearly superior less restrictive alternative.”).
87. Id.
88. Id. at 2870.
89. Id. at 2860.
90. Id.
91. Id. at 2847.
92. Id. at 2864.
93. Id.
94. Id. at 2868–69 (arguing that “[t]he majority’s methodology is . . . substantially less
transparent than” the interest-balancing approach); id. at 2869–70 (asking what justifies the
majority’s presumption that certain gun controls were constitutional or that certain arms were
excluded).
95. See, e.g., T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE
L.J. 943 (1987); Denning, supra note 31 (criticizing the Court’s use of balancing in the dormant
Commerce Clause doctrine).
96. See, e.g., Brannon P. Denning & Glenn H. Reynolds, Five Takes on District of Columbia
But ultimately the point is neither whether Winkler’s—or any other scholar’s—conclusions are unassailable,97 nor whether the Bush Administration’s, Justice Breyer’s, or the *Heller* majority’s standard of review is the best one to apply to cases implicating Second Amendment rights. The point is simply that *Heller* and the Second Amendment furnish an unusually clear case of the importance of choosing standards of review and of the enormous discretion courts have in designing and applying them—especially where a majority of the Supreme Court has declined to specify a single standard.

General statements about constitutional commands do not decide cases; courts must develop tools for implementing those commands. The New Doctrinalism promises study of those commands and offers, I submit, a useful framework for analyzing and critiquing the Supreme Court and the constitutional law it makes.

97. *See, e.g.*, Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and “Reasonable Regulation,”* 75 *Tenn. L. Rev.* 137 (2007) (responding to Winkler). For example, I have doubts about some of Strauss’s claims about the normative superiority of the common law method to fix constitutional meaning. *See supra* note 29.