

An(other) Afterword on *The Bill of Rights*

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SUMMARY:

... The three reviews of *The Bill of Rights: Creation and Reconstruction* featured in the preceding pages radiate out in three remarkably different directions, but are tied together, it seems, by two threads. ... Professor Calabresi's wide-ranging meditation considers constitutional textualism generally; Professor Gerhardt highlights the particular type of holistic textualism featured in the book, placing particular emphasis on the implications of this interpretive method for impeachment issues; and Professor Cottrol notes the interesting connections between the Second Amendment and two other critical texts: the seventh provision of the English Bill of Rights of 1689 and Section 1 of the Fourteenth Amendment of 1866. ... The most convincing constitutional arguments are those in which different interpretive indicia point in the same direction -- when, for example, history and pre-*Boerne* case law reinforce the intratextual linkage between Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth; or when precedent and history strongly indicate that the word "appropriate" in these clauses was indeed understood as synonymous with its etymological cousin "proper" in the Necessary and Proper Clause; or when Congressional debates confirm that John Bingham self-consciously designed his key clauses to dovetail with language elsewhere in the Constitution; or when history and structure highlight the analytic linkage between freedom of "speech or debate" inside Congress under Article I, Section 6 and freedom of "speech" outside Congress under the First Amendment. ...

TEXT:

[*2347] The three reviews of *The Bill of Rights: Creation and Reconstruction* ¹ featured in the preceding pages radiate out in three remarkably different directions, but are tied together, it seems, by two threads. First, all three reviews reflect a great measure of generosity towards the book and its author. For that generosity of spirit -- and for the generosity of *The Georgetown Law Journal* and its willingness to devote so many pages to a conversation about this book -- I am profoundly grateful. Second, all three reviews respond in interesting ways to the book's use of constitutional textualism. Professor Calabresi's wide-ranging meditation considers constitutional textualism generally; ² Professor Gerhardt highlights the particular type of holistic textualism featured in the book, placing particular emphasis on the implications of this interpretive method for impeachment issues; ³ and Professor Cottrol notes the interesting connections between the Second Amendment and two other critical texts: the seventh provision of the English Bill of Rights of 1689 and Section 1 of the Fourteenth Amendment of 1866. ⁴ In the Afterword of my book, ⁵ I tried to begin a conversation about the particular brands of constitutional textualism that I had found myself deploying (along with other interpretive methodologies), and in more recent work, I have attempted to keep this conversation alive. ⁶ I am therefore delighted that all three reviewers seem interested in continuing the conversation. In this response, I shall offer a few more thoughts about constitutional textualism in light of these three thoughtful and generous reviews.

I. SOME THOUGHTS ON CALABRESI

Professor Calabresi raises so many excellent points that I fear it will be impossible to do justice to them all here. I shall focus on three main areas: first, his analysis of Justice Field's dissent in the *Slaughter-House Cases*; second, his discussion of the Black-Frankfurter debate and related issues of judicial restraint; and third, his thoughts on the topics of unenumerated rights and constitutional provisions beyond the Bill of Rights.

[*2348] A. *SLAUGHTER-HOUSE* AND NONDISCRIMINATION

First, Calabresi reminds us of the 1873 *Slaughter-House Cases*,⁷ in which only Justice Bradley stated clearly that the Fourteenth Amendment was designed to make applicable against states those fundamental rights and freedoms spelled out in the Bill of Rights (and elsewhere).⁸ Calabresi's reminder helps us see a deep implication of constitutional textualism -- namely, that the best reading of a constitutional text, in light of its clear public meaning and purpose, may not square with early judicial pronouncements and interpretations. What judges said in 1873 (in a rather odd and unrepresentative case) may or may not closely track what the words of the Fourteenth Amendment proclaimed and what Congress and the states agreed upon in 1866-68. This point is not unique to the Fourteenth Amendment. Only a decade after the adoption of the federal Constitution and the Bill of Rights, federal judges were consistently and enthusiastically upholding the now-infamous Sedition Act of 1798,⁹ which made it a crime to criticize the President. The judges' decisions thus violated the principles of limited federal power and freedom of speech that had previously been agreed upon and repeatedly embraced in text. Judges are often steeped in the law that they learned early on, and sometimes may fail to fully internalize fundamental changes to that law wrought in the course of their legal careers.¹⁰ As Dean Aynes has noted, some members of the *Slaughter-House* Court were not Republicans, and even some Republican members of the Court had apparently not been enthusiastic supporters of the Fourteenth Amendment in the 1860s.¹¹ What's more, the political climate of 1873 was markedly different from the climate of 1866.

Calabresi pays particular attention to Justice Field, who, it is perhaps worth noting, was a Democrat. (Not a single Democrat in the Thirty-Ninth Congress had voted for the Fourteenth Amendment.)¹² In *Slaughter-House*, Field ignored incorporation (perhaps because it did not directly bear on the facts of the case at hand) and instead emphasized the idea of nondiscrimination.¹³ To the extent that Professor Calabresi suggests that Field's nondiscrimination account might be the best overall and complete reading of the Privileges or Immunities Clause of the Fourteenth Amendment,¹⁴ I would demur (as would Field himself, later in life -- twenty years after *Slaughter-House*, in the 1892 case of *O'Neil v. Vermont*,¹⁵ [*2349] he explicitly endorsed the Bradley-esque idea of refined incorporation).¹⁶ Nondiscrimination can indeed be understood as part of the clause (as I explain on pages 178-79 of my book); but full protection of fundamental rights was at the core of the clause. As readers of the inside cover of the book can see with their own eyes, John Bingham's famous 1866 speech, on behalf of the words that he drafted, was captioned: "In support of the proposed amendment to enforce the Bill of Rights." A great many other leading Republicans at the time shared Bingham's views and said similar things.¹⁷

A proper textualist would seek confirmation of these claims in the words of the Amendment itself, above and beyond its legislative history. Thus, it is remarkably revealing and powerful that

the words of the key clause plainly echo the language of the First Amendment -- "shall," "make," "law," and "abridge" appear prominently in both places. These words stress full protection of fundamental rights, not merely equal (nondiscrimination) protection of civil rights generally. With these words, the framers of the Fourteenth Amendment obviously meant to prohibit, say, a repressive southern law that indiscriminately sought to muzzle all residents, black and white alike. Indeed, the key second sentence of the Fourteenth Amendment features intratextual references to no fewer than five different clauses of the antebellum Constitution. ("No state shall" echoes Article I, Section 10; the next clause borrows from the First Amendment; the language of "privileges" and "immunities" of "citizens" reworks language from Article IV; the phrase "citizens of the United States" resonates with the Preamble; and the Due Process Clause is an almost verbatim repetition of its predecessor clause in the Fifth Amendment.) All these references should cue careful readers that the first place to look for the fundamental rights to which the Amendment refers is not state law, as Field would have it, but the federal Constitution itself. And when we look to the fundamental rights, privileges, immunities, and freedoms spelled out in the Bill of Rights and elsewhere in the Constitution, we find that these rights often go beyond mere nondiscrimination. For example, no one may be denied due process -- even if this denial is sweeping and nondiscriminating.

In emphasizing Field's opinion in *Slaughter-House*, Calabresi seems to be influenced by the work of John Harrison,¹⁸ who has also noted Field's dissent as relevant to unlocking the meaning of the Privileges or Immunities Clause.¹⁹ Harrison links the clause to the Civil Rights Act of 1866,²⁰ but textually we should note that the words of the clause and the words of the Act do not overlap [*2350] much, in contrast to the obvious textual harmony between the clause and the rest of the Constitution, especially the First Amendment. Moreover, the words of the 1866 Act speak of the "full and equal" protection of rights,²¹ thus going beyond mere nondiscrimination. As Justice Bradley wrote in his circuit court opinion in *Slaughter-House*, the Amendment "[does] not merely [require] equality of privileges; but it demands that the privileges of all citizens shall be absolutely unbridged, unimpaired."²²

B. BLACK, FRANKFURTER, AND JUDICIAL RESTRAINT

Having briefly considered the Bradley-Field dialogue, let us turn to the later Black-Frankfurter dialogue, and to Calabresi's second point. How, he asks, should we think about the issues of judicial role raised by this second dialogue? Once again, textualism helps frame the issues here. Justice Black never quite said the following: "Okay, I admit that the sweeping words of the Privileges or Immunities Clause, as best read in light of their public meaning at the time of their adoption, range beyond rights explicitly set out elsewhere in the Constitution and Bill of Rights. But to the extent that these sweeping words range this far, they provide too little guidance for judges, and create the possibility of too much judicial mischief, as evidenced by post-1868 judicial developments, such as *Lochner*. So we as judges should ignore the best meaning of these words for reasons of prudence and self-restraint." Instead, Justice Black claimed that his incorporation-and-only-incorporation, no-more-and-no-less account was strongly supported by the text of the Amendment. In my book, I respond directly to Black on his own terms by saying that his argument is textually implausible; had the framers meant only the Bill of Rights, no more and no less, they chose rather odd language. By contrast, if (as I argue) they intended to protect both more and less than mechanical incorporation, the words they chose were remarkably apt --

perfect, really. ²³

Similarly, Frankfurter never quite said that the words of the Amendment, when best read, truly did encompass all the rights and freedoms set out in the Bill of Rights, but that judges should nevertheless refrain from following this textual command for reasons of prudence and self-restraint. (And this would have been an awkward argument, given that Frankfurter appeared to accept the idea that judges should enforce these rights and freedoms against the federal government, implicitly conceding that there was nothing in these rights that was inherently nonjusticiable.) ²⁴ Instead, Frankfurter argued that his approach kept faith with the text of the Fourteenth Amendment and its original intent. In my book, I respond to Frankfurter on his own terms, contesting his implausible [*2351] assertions about the Amendment's actual text and history. ²⁵

But my response thus far sets the stage for an argument for judicial restraint that Black and Frankfurter could have made, but did not (or at least not squarely) -- that, regardless of what the words of the Amendment were generally understood to mean when ratified, judges should underenforce the Amendment, lest they overenforce it. On this issue, textualism may be less definitive. The text itself does not always answer questions of justiciability, or tell us what mix of institutional enforcement, what degree of judicial deference, might be optimal. ²⁶ These are also questions for which structural and practical concerns may loom large, and actual historical experience with different regimes of interpretation may be relevant. In principle, we should be worried about both underenforcement and overenforcement of what the Constitution platonically means. Although my book frequently touches on issues of institutional enforcement, these issues are not my sole focus. I devote more pages to what the document means than to who should enforce it.

Let's begin by recognizing that the problem of judicial over- and underenforcement is hardly unique to the Fourteenth Amendment. Calabresi suggests that Bingham was a worse draftsman than Madison, because under Bingham's Amendment, judges have upheld what they should have invalidated (blessing Jim Crow in *Plessy*) and invalidated what they should have upheld (striking down labor laws in *Lochner*). But of course the same is true of Madison's Bill of Rights, under which judges upheld what they should have invalidated (blessing the Sedition Act of 1798 in a slew of cases) and invalidated what they should have upheld (holding free-soil laws unconstitutional in *Dred Scott*).

Given that judges are imperfect agents of constitutional enforcement, what should we do? To address the problem that judges might be tempted to uphold what they should invalidate, one obvious solution would be to offer the judiciary, and the citizenry at large, a clear account of the core meaning and purpose of various rights, so that judges will find it more difficult to slight this core. This, of course, is one of the main aims of my book.

Complementing this core-meaning strategy is a "departmentalist" view of interpretive competence, which valorizes the constitutional rights and duties of institutional actors other than judges and highlights the authority of these actors to check government misconduct. For example, in considering the infamous Sedition Act, we should remember that the Founders designed a system where grand juries could refuse to indict, petit juries could refuse to convict,

and presidents could pardon, even if judges were proconviction. And these are precisely the "departmentalist" points I make in the book.²⁷

I also mention Congress's role in enforcing Fourteenth Amendment fundamental [*2352] freedoms against states, above and beyond judicial enforcement.²⁸ What are we to do if the Supreme Court upholds repressive state laws and practices that it should invalidate? In the recent *Boerne* case, the Supreme Court said that Congress's role under Section 5 of the Fourteenth Amendment is *only* to provide remedies for *judicially*-defined Section 1 violations;²⁹ but as I have elsewhere made clear,³⁰ this cannot be right. Section 2 of the Thirteenth Amendment gives Congress power going beyond mere remedial enforcement of judicial interpretations of Section 1 of that Amendment. And what is true of Section 2 of the Thirteenth should likewise be true of Section 5 of the Fourteenth, given that the two sections are worded virtually identically, *in pari materia*; thus, Section 5 of the Fourteenth, properly construed, gives Congress power going beyond mere remedial enforcement of judicially-defined rights under Section 1. And so sometimes, even if judges have upheld a repressive state practice that they should have invalidated, Congress should be allowed to ride to the rescue.

The compelling intratextual linkage between the enforcement clauses of the Thirteenth and Fourteenth Amendments was utterly missed by the *Boerne* Court -- as was the strong intratextual harmony between the word "proper" in the Necessary and Proper Clause of Article I, and the word "appropriate" in Section 2 of the Thirteenth and Section 5 of the Fourteenth Amendments. The framers of these Amendments said again and again that Congress should have the same broad enforcement power here that the antebellum Court had affirmed under the Necessary and Proper Clause in cases like *McCulloch* and *Prigg*.³¹ (Given Calabresi's high regard for Madison, we should recall that at Philadelphia, Madison fought hard to give Congress, as well as federal courts, a check against oppressive state laws, but he lost this fight. Under the best reading of the Fourteenth Amendment, Bingham succeeded where Madison failed.)

So much for the problem of judicial underenforcement of rights against oppressive government. What about the problem of judicial overenforcement, in which willful judges make up their own outlandish rules and invalidate proper government action? Part of the implicit answer of my book is to highlight traditional legal modalities of argument designed to restrain willful judges. Textualism is of course one of these modalities, but not the only one.

C. UNENUMERATED RIGHTS AND THE CONSTITUTION BEYOND THE BILL

This, in turn, takes us to Calabresi's third point, which focuses attention on the very difficult question of unenumerated rights. Textualism may be especially helpful in sorting out the meaning of enumerated, textually specified rights; but what about other rights, waved at but not specified in the open-ended language [*2353] of the Privileges or Immunities Clause? Professor Calabresi conjures up the specter of judges "making up harmful new rights."³² My book does not place this problem at its center.

My reason is simple: I have sought to offer an account not of all of American constitutional law, or even of all of the Fourteenth Amendment, but only of "the Bill of Rights." To the extent that the Privileges or Immunities Clause ranges beyond refined incorporation of the first ten

amendments, it is, strictly speaking, beyond the scope of my book. Calabresi worries that this strict approach to the topic at hand "carves up our one Fourteenth Amendment . . . into two arbitrary halves."³³ He is right. He is also right to worry that my tight focus on the Bill of Rights tends to obscure important liberty-protecting and structural features of the original Constitution; they, too, have been largely pushed offstage. In partial defense, I can only say that I could not do everything at the same time, and that I hope in a future book to focus on the rest of the Constitution outside of the Bill of Rights -- including the meaning of the Privileges or Immunities Clause above and beyond refined incorporation.

However, my book does suggest a couple of ways -- not the only ways, but useful ways -- to think about unenumerated rights. First, in considering possible unenumerated rights, we can often begin by carefully pondering enumerated rights.³⁴ In some cases, judges may legitimately craft unenumerated rights to interpolate between enumerated rights, and thus fulfill the basic vision underlying and uniting these rights by creating a rational continuum of liberty. For example, the Sixth Amendment does not explicitly give a defendant a right to subpoena and present exculpatory physical evidence or to eyeball inculpatory physical evidence. But surely, once we understand the truth-seeking, innocence-protecting purpose underlying the textually enumerated rights to compel and confront "witnesses," these unenumerated rights concerning physical evidence follow *a fortiori*.³⁵ In order to do interpolation (or extrapolation) right, we must begin with a proper understanding of the textual data points and their underlying principles.

Second, the judicial task of discovering unenumerated rights can sometimes be clarified by "intertextual" analysis, in which judges seek to give meaning to an open-ended text like the Privileges or Immunities Clause by considering other legal texts, such as state constitutions or the Declaration of Independence, as evidence of what rights are viewed as fundamental in our society.³⁶ This technique resembles both the "declaratory" model of law-finding used by various nineteenth-century jurists (as I illustrate in chapter 7 of my book) and the approach put forth by Justice Scalia for the Court in the 1989 case of [*2354] *Stanford v. Kentucky*.³⁷ Thus, even the search for "nontextual" constitutional rights can gain some rigor and constraint by considering legal texts that may be outside the four corners of our Constitution, but are inside the four corners of our democracy and our legal tradition.

Let us now return to Calabresi's evident distaste for a Brennanite regime in which judges, in Calabresi's words, "make up harmful new rights and then impose them nationwide on the citizenry."³⁸ A faithful Brennanite would respond that judges should certainly not enforce "harmful" rights -- only "good" ones. But questions of value -- questions about, where to draw the precise line between "good" and "bad" rights -- are deeply contested in a well-run democratic society, and something important is lost when judges simply decide, by their own subjective lights, what is good and what is bad, and then impose their views on the rest of us. And so my response to Calabresi's concern is different from the Brennanite's (and I hope more congenial to Calabresi). I would highlight, not the word "harmful," but other words: "make up" and "new." Under the approaches to unenumerated rights suggested by my book (which, I repeat, are not the only possible approaches), judges could seek to avoid "making up" their own "new" rights by carefully considering the principles underlying the rights actually enumerated in the Constitution, and by paying close attention to rights already widely held to be fundamental by our people, as evidenced in important legal texts outside the Constitution.

II. SOME THOUGHTS ON GERHARDT

I now turn to Professor Gerhardt, who raises two interesting sets of points. First, he ponders the general issues raised by my particular brand of holistic textualism. Second, he proposes impeachment as an arena to test some of the methodologies employed in the book.

A. INTRATEXTUALISM

"Intratextualism" is my term for reading a given clause of the Constitution against the backdrop of other clauses in the document that use the same, or similar, words. For example, I have alluded above to interesting and important connections between the words of the First and Fourteenth Amendments and to obvious parallels between Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth.

Gerhardt offers a generally sympathetic account of this technique, but he raises a couple of concerns. First, he worries that intratextualism and other brands of holistic textualist analysis may yield "an almost limitless array of possible interpretations or readings" with "no standard for measuring or choosing [*2355] among plausible interpretations."³⁹ Second, he states that holistic textualism "arguably makes constitutional interpretation unwieldy," requiring "that the answer to any particular question of constitutional interpretation depend on the development of a comprehensive theory of the Constitution."⁴⁰

These concerns strike me as overstated. Remember that holistic textualism is not new or unique to me or my book -- as Gerhardt notes, it is a prominent feature of many of our greatest and most canonical cases, like *McCulloch* and *Martin v. Hunter's Lessee*. It is part of the intuitive constitutional grammar of all good constitutionalists today, even if many are un-self-conscious about it. The ultimate "standard" for judging holistic textual argument is not qualitatively different than the standard for judging any other kind of constitutional argument, be it a clause-bound textualist claim, or an assertion about original intent, or a claim about judicial doctrine, or an argument based on the Constitution's architectural structure.

In any given case, some points may be very easy to see, and rather significant. For example, the obvious intratextual point that the enforcement clauses of the Thirteenth and Fourteenth Amendments are *in pari materia* is no more mysterious than, say, the obvious textual point that the Due Process Clause regulates process rather than substance. Good lawyers will often make opposing arguments using the same basic building blocks -- text, history, precedent, and so on -- but in many cases, well-trained interpreters will find, at the end of the day, that one side's arguments are *better* arguments based on text, history, and so on. Although in some sense there is "an almost limitless array of possible interpretations" of case law, of original intent, or of the constitutional text construed holistically, when all is said and done, some interpretations are *better*. The most convincing constitutional arguments are those in which different interpretive indicia point in the same direction -- when, for example, history and pre-*Boerne* case law reinforce the intratextual linkage between Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth; or when precedent and history strongly indicate that the word "appropriate" in these clauses was indeed understood as synonymous with its etymological cousin "proper" in the

Necessary and Proper Clause; or when Congressional debates confirm that John Bingham self-consciously designed his key clauses to dovetail with language elsewhere in the Constitution; or when history and structure highlight the analytic linkage between freedom of "speech or debate" inside Congress under Article I, Section 6 and freedom of "speech" outside Congress under the First Amendment. In short, I think the key question is not about intratextualism and holism generally, but about specific intratextual and holistic arguments. Are they plausible, illuminating -- perhaps even compelling -- or do they seem strained and inappropriate? Thus, I would be concerned if Professor Gerhardt said that the particular *applications* of holistic textualism in my book were implausible, [*2356] or outlandish, or even simply wrong, all things considered. But Gerhardt does not say that, and so I pass over his first concern.

As to his second concern, I am also unmoved. Intratextualism does not always and invariably require a "comprehensive theory of the Constitution." ⁴¹ One need not have a comprehensive theory to note (as the *Boerne* Court failed to do) that the language of Section 5 of the Fourteenth Amendment is virtually identical to that of Section 2 of the Thirteenth, and to thereby infer that in parsing one of these clauses, a good interpreter should also ponder the other. Likewise, the connections between the First Amendment and the Speech or Debate Clause on the one hand, and the Fourteenth Amendment on the other, call for additional partial theories rather than a truly "comprehensive" theory.

But Gerhardt is right in thinking that I am a champion of constitutional holism, and that holism often requires a view of the entire document. This does not seem too much to ask. The document itself is remarkably compact. Good interpreters should know it backwards and forwards and sideways. This is far easier than, for example, mastering mountains of case law, or steeping oneself in serious political philosophy. Perhaps it is too much to expect busy judges to be familiar with the Constitution as a whole -- too many cases, too little time -- but if so, this raises real questions about judicial review in general, in which judges speak in the name of the Constitution and tell the rest of us what to do.

Even if familiarity with the whole Constitution is too much to expect of judges, it is surely not too much to expect of serious constitutional scholars. The real problem is not that it is too hard, especially what many constitutional scholars try to do instead of holistic textualism. The real problem, I suspect, is that many scholars -- and even many judges -- are less interested in the text of the Constitution than they are in philosophy or precedent. Here, I think they are mistaken. There is great richness in constitutional text, and much meaning and wisdom to be derived from painstakingly careful consideration of that text, both clause by clause and as a whole. Indeed, I believe that the Constitution's text, charitably but honestly construed, has generally been more normatively attractive and edifying than its case law, construed with comparable charity and honesty. This is not the place for a comprehensive proof of my belief, but my book provides considerable support for this belief where the Bill of Rights is concerned. For instance, the Bill, rightly construed, rendered the Sedition Act of 1798 unconstitutional, but the Supreme Court did not admit this until the 1960s; ⁴² the Bill, rightly construed, also supported incorporation of its rights against states by the Fourteenth Amendment, but the Supreme Court did not redeem this promise for many decades. Conversely, courts struck down many actions -- such as free-soil laws in *Dred Scott* -- that the Bill, rightly construed, permitted.

[*2357] B. IMPEACHMENT

With these general claims in mind, let us turn to Gerhardt's proposed testing ground of impeachment to see how much meaning and wisdom can be squeezed from the Constitution by paying careful attention to its text, clause by clause and holistically. There are at least three sets of questions here. First, *who* should have the last word on questions of fact and law in impeachment: the Senate or Article III judges? Second, *what* should the substantive standard be for impeachable misconduct? Third, *how*, procedurally, should impeachment trials be structured?

As to the first question, history, structure, prudence, and case law all seem to suggest that Article III judges should not ordinarily entertain a motion from a removed official seeking judicial review because he is innocent on the facts (he didn't do it) or on the law (even if he did do it, it is not an impeachable offense). Constitutional history shows that the Framers intentionally shifted impeachment from Article III courts to the Senate, so that controversial impeachment issues would be resolved by a sufficiently large and politically accountable body. As a matter of structure and prudence, it would be awkward for judges to try to reinstate, say, an already-ousted President; and when a judge is removed, there is something constitutionally unseemly about other judges trying to put him back in power (with full pay, of course), thereby nullifying the Constitution's main check on overweening judges. These points led the Supreme Court in the 1993 Walter Nixon case ⁴³ to declare impeachment issues generally off limits for Article III judges.

Constitutional text, carefully and holistically construed, confirms all this. The notion that an officer who has been impeached and removed may not seek reinstatement in an Article III lawsuit is not some weird exception to judicial review. The officer is fully entitled to judicial review of all relevant issues of fact and law -- *but this review occurs in the Senate itself, which sits as a court*. Note the obvious judicial language of Article I, Section 3 which gives the Senate the sole power to "try" all impeachments, with the power to "convict" and enter "judgment" in "Cases of Impeachment." This repeated judicial language makes clear that the Senate sits as judge and jury, and its rulings of fact and law therefore stand as *res judicata* in all other tribunals. Intratextual analysis confirms this. When we consult the language of Article III, we see that it exempts "Trials" in "Cases of Impeachment" from the ordinary rules of Article III demanding juries for all crimes. Why? Because "trials" of "cases" of impeachment are to take place and be finally decided in a different court, specified earlier in the document.

Now consider what counts as an impeachable offense. Constitutional text is rather helpful here, though complete analysis requires consideration of other interpretive tools as well. Article II, Section 4 reads as follows: "The President, [*2358] Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." A careful textualist should begin by noting the word "high." Is this word important? Intratextual analysis suggests that it is. In two other clauses talking about treason and other crimes -- the Article I, Section 6 Arrest Clause and the Article IV, Section 2 Interstate Extradition Clause -- the Constitution omits the word "high." Thus, it seems fair to assume that the Framers went out of their way to put this word in the impeachment-standards clause.

But how high must "high" be? Once again the text gives us some clues, if we read carefully. The text specifies "treason" and "bribery" as impeachable, and so one question we should ask is whether a given form of misconduct is as bad, or as "high" a misdeed, as these two textual exemplars.

If read in a blinkered, clause-bound fashion, Article II, Section 4 might seem to suggest that standards for impeaching presidents must be absolutely identical to standards for impeaching, say, cabinet officers or lower federal judges. After all, the clause lumps together presidential impeachments with all others (vice presidents, judges, justices, cabinet officers, inferior officers) and uses the same linguistic standard (high crimes) across the board. At first this argument seems strong. But when we go beyond narrow clause-bound analysis, some weaknesses of this view become visible.

Let's begin by noting that under Article I, Section 3, the Chief Justice presides at presidential impeachments and only presidential impeachments. One of the reasons for this is symbolic, marking presidential impeachments as distinct from all others. Now consider another patch of constitutional text implicating the Senate as a judge, of sorts. According to Article II, Section 2, "by and with the Advice and Consent of the Senate, [the President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and . . . other Officers of the United States." If we applied the same blinkered textualism to this clause, we would say that the Senate must give the exact same deference to a President's choice for Supreme Court Justice that it would give to a President's choice for his cabinet, and that the Senate should never apply a stricter standard to evaluate a nomination to the Supreme Court than it would apply when considering a nomination to a district court. After all, this clause lumps together all officers, high and low, executive and judicial, and uses the same linguistic standard (advice and consent).

But this has never been the Senate's view of the matter, and rightly so. The Senate has rejected blinkered textualism in favor of a more structural and holistic approach that ponders *all* the texts of the Constitution, and considers their interrelation. Other parts of the Constitution establish important differences between cabinet officers and judges. Cabinet officers are part of the President's executive branch team under Article II. They answer to him (quite literally, in the Article II, Section 2 Opinions Clause), and will leave when he leaves. Judges under Article III are not part of the President's team. They need [*2359] to be independent of the President, and they will not leave when he leaves. In light of these important constitutional differences, the Senate has always given the President far more leeway in naming his own executive team than in proposing judicial nominees. And even within a single branch, the Senate scrutinizes a nominee to the Supreme Court more intensely than a nominee to some lower court. Just ask Robert Bork.

Now apply this structural insight to the "High Crimes" Clause, and count the ways in which presidential impeachments are qualitatively different from all others. When senators remove one of a thousand federal judges, or even one of nine Justices, they are not transforming an entire branch of government. But that is exactly what they are doing when they oust America's only President, in whom all executive power is vested by the first sentence of Article II. In the case of a judge, a long and grueling impeachment trial itself inflicts no great trauma on the country -- but again, the case of a President is very different. (And don't forget the disruption of the Chief Justice's schedule.) Presidential impeachments involve high statecraft and international affairs in

a manner wholly unlike other impeachments; the entire world is watching. Most important, when senators oust a judge, they undo their own prior vote, given via advice and consent to judicial nominees. But when they remove a duly elected President, they undo the votes of millions of ordinary Americans given on Election Day. This is not something that senators should do lightly, lest we slide towards a kind of parliamentary government that our entire structure of government was designed to repudiate. Although the Philadelphia framers may not have anticipated the rise of a populist presidency, later generations of Americans restructured the Philadelphians' electoral college, via the Twelfth Amendment and other election reforms, precisely to facilitate such a presidency. Narrow arguments from the High Crimes Clause in isolation fail to see how holistic constitutional analysis must also take into account these post-Founding constitutional developments.

Recasting these points about constitutional structure into the language of policy, even if the Senate decides that offense X is an impeachable high crime, senators must further decide whether this offense warrants removal as a matter of sound judgment and statesmanship. In making this decision, they must be sensitive to the ways in which the presidency is a very different office from a federal district judgeship. Where extremely "high crimes" are implicated - treason or tyranny -- senators should probably be quicker to pull the trigger on a bad President, whose office enables him unilaterally to do many dangerous things. (A single bad judge, by contrast, is hemmed in by colleagues and higher courts.) But where borderline or low "high crimes" are involved, the Senate would be wise to spare the people's President -- especially if his crimes reflect character flaws that the people duly considered before voting for him, or if the people continue to support him even after the facts come to light.

Finally, let's consider the question of how the impeachment trial should [*2360] proceed. Gerhardt suggests that the Due Process Clause might not apply,⁴⁴ but this seems troubling. Textually, the clause encompasses all "persons," and the impeachment defendant is surely a person. Admittedly, he is a federal officer, but the Due Process Clause protects federal officers when sued in civil cases or when prosecuted in ordinary criminal cases; why should impeachment be different? More fundamentally, the clause itself may be best read as declaratory, textually specifying a commitment to fair procedures that would be implicit even in the absence of the clause. (Recall, for example, the language of the Preamble promising that the purpose of the document is to "establish Justice.")

Of course, to say that due process applies is not to say that Article III judges will decide what due process requires here; as we have seen, the Senate has a strong claim to be the judge of fact and law. And due process surely does not always require that procedures applicable in other legal proceedings must always apply in impeachment; impeachment is its own unique procedure, and what is due elsewhere is not always due here. But it would be a mistake to say that the *only* things due an impeachment defendant are spelled out in Article I. A conscientious senator who took her oath seriously and wanted to do the right thing legally would not be free to vote to deny the President notice of the charges against him, bar him from using a lawyer to defend himself, prevent him from confronting his accusers, and insist that the burden of proof rested upon him.

In the end, holistic textualism proves its worth in action in Gerhardt's chosen arena. Impeachment also highlights the important "departmentalist" fact that many important issues

under the Constitution are decided outside Article III courts, and some may even be nonjusticiable political questions. In these situations, Supreme Court precedent may be largely unavailable as a sensible focal point for sound decision making, but the text of the Constitution is always available. I submit that we should avail ourselves of its wisdom more often.

III. SOME THOUGHTS ON COTTRON

Finally, let me say a few words in response to Professor Cottrol's detailed analysis of the right to keep and bear arms in America. Cottrol links the Second Amendment to two other texts, namely, the English Bill of Rights of 1689⁴⁵ and the Fourteenth Amendment of 1866. Each linkage is methodologically illuminating.

A. INTERTEXTUALISM AND THE ENGLISH BILL OF RIGHTS

The American revolutionaries were heirs to a tradition of English liberty, Cottrol elegantly reminds us.⁴⁶ In pondering a text such as the Second Amendment, we should also pay close attention to predecessor texts on similar [*2361] topics -- in particular, the language of the English Bill of Rights of 1689. I heartily approve of Cottrol's reminder of the importance of what I call in my book "intertextualism" -- that is, reading the language of the United States Constitution against the backdrop of other important charters of liberty, like the English Bill of Rights, the Declaration of Independence, and state constitutions. Here is the language of the Second Amendment: "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." And here is the language of section 7 of the English Bill of Rights, which Cottrol quotes: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."

In my account of arms-bearing at the Founding, I tend to downplay the role of individual self-defense, and highlight collective arms-bearing and opposition to standing armies. Professor Cottrol offers a somewhat more individualistic account of the Founding, and perhaps he is right. He could legitimately point to the language from 1689 and its seeming emphasis on individual self-defense of individual "subjects." On the other hand, an intertextualist analysis might instead highlight the ways in which the Second Amendment's language *differed* from its English granddad in emphasizing the collective right of the militia/people and the collective concern about securing "a free State."

And when we widen the textual frame, we see strong concern about standing armies in both locations. The Second Amendment sits side-by-side with the Third Amendment, which is obviously concerned with soldiers and standing armies. Interestingly, section 7 of the English Bill of Rights also sat alongside an explicit provision reflecting hostility to standing armies in peacetime. In the emphatic words of section 6, "the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against the law." The textualist technique of judging a clause by its neighbors seems to me an interesting and often illuminating one. And when we apply this technique to the Declaration of Independence and state constitutions, in good intertextualist fashion, we find that arms-bearing clauses virtually always locked arms with other clauses regulating the military and expressing concern about standing armies.⁴⁷ Thus, the Second Amendment as originally drafted seems to me more about

the army than about hunting, more about collective than individual self-defense.

B. ARMS AND THE FOURTEENTH AMENDMENT

Cottrol also points to the strongly individualist language of Blackstone's *Commentaries*.⁴⁸ These *Commentaries* played an important role in our Constitution, and also play an important role in my book. But I suggest that the main influence of Blackstone came during Reconstruction, rather than at the Founding. [*2362] Many Founders had learned their law before Blackstone came along, and Blackstone of course had opposed American independence; this loyalty did not exactly endear him to those who risked their lives in the Revolution.⁴⁹ As the years faded, however, Blackstone's influence grew as later generations of Americans began their legal educations with his classic *Commentaries*.⁵⁰ And so, when the Reconstruction generation thought about arms, their thinking bore a strong Blackstonian, individual-rights imprint.

Cottrol nicely chronicles the importance of arms to the Reconstruction generation, and emphasizes the role of the Fourteenth Amendment in the story of arms in America. This emphasis, in his review of my book elsewhere, is hugely important -- and the reasons for this importance nicely tie together the threads of the conversation thus far. Return, for a moment, to the Black-Frankfurter debate highlighted by Calabresi. At the time of this debate, Frankfurter had precedent on his side, as the Supreme Court had not yet incorporated the vast bulk of clauses from the Bill. But today, precedent generally supports Black's view and my own insistence on refined incorporation. Thus, I proclaimed at the end of my book that my analysis of text and history generally confirmed current case law.

In matters of speech, press, religion, searches, and criminal procedure overall, this convergence is striking. But the issue of arms-bearing is much trickier, because the Supreme Court has not yet incorporated the Second Amendment. And so, for this issue, text and history do not mesh with current case law.⁵¹ The issue is trickier still because there is so little federal case law on the meaning of the Amendment as applied to the federal government. Thus, the possible consequences of Second Amendment incorporation remain uncertain. In light of this uncertainty, we need careful accounts from excellent scholars like Cottrol to help us decide whether we should modify existing case law in order to bring it into better alignment with constitutional text and history. My claim in the book, after all, is not that text and history are everything. But they are something -- something quite important, and something from which we can learn a great deal, if only we are willing.

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FOOTNOTES:

✚n1 AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

✚n2 Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, [87 GEO. L.J. 2273 \(1999\)](#).

✚n3 Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, [87 GEO. L.J. 2327 \(1999\)](#).

✚n4 Robert J. Cottrol, *Structure, Participation, Citizenship, and Right: Lessons from Akhil Amar's Second and Fourteenth Amendments*, [87 GEO. L.J. 2307 \(1999\)](#).

✚n5 AMAR, *supra* note 1, at 295-307.

✚n6 See Akhil Reed Amar, *Intratextualism*, [112 HARV. L. REV. 747 \(1999\)](#).

✚n7 [83 U.S. \(16 Wall.\) 36 \(1873\)](#).

✚n8 See *id.* at 114-18, 121-22 (Bradley, J., dissenting). For discussion, see THE BILL OF RIGHTS, *supra* note 1, at 210-12, 226-27.

✚n9 Act of July 14, 1798, ch. 74, [1 Stat. 596](#) (expired 1801).

✚n10 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 94-99 (1991).

✚n11 See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, [70 CHI.-KENT L. REV. 627, 655-78 \(1994\)](#).

✚n12 Field himself, however, was not, it seems, an opponent of the Amendment. See *id.* at 671.

✚n13 See [Slaughter-House Cases, 83 U.S. \(16 Wall.\) 36, 89-111 \(1873\)](#); see also Calabresi, *supra* note 2, at 2287-88 n.82.

✚n14 Calabresi, *supra* note 2, at 2288.

✚n15 [144 U.S. 323 \(1892\)](#).

✚n16 See *id.* at 361-63 (Field, J., dissenting). For discussion, see THE BILL OF RIGHTS, *supra* note 1, at 228.

✚n17 See AMAR, *supra* note 1, at 181-214.

¶n18 See generally John Harrison, *Reconstructing the Privileges or Immunities Clause*, [101 YALE L.J. 1385 \(1992\)](#) (examining the meaning of the Privileges or Immunities Clause).

¶n19 See [id.](#) at 1467-68.

¶n20 See *id.*, *passim*.

¶n21 Act of Apr. 9, 1866, ch. 31, § 1, [14 Stat. 27](#).

¶n22 [Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.](#), [15 F. Cas. 649, 652 \(C.C.D. La. 1870\)](#) (No. 8,408).

¶n23 See AMAR, *supra* note 1, at 174-80.

¶n24 See, e.g., [Davis v. United States](#), [328 U.S. 582, 594-623 \(1946\)](#) (Frankfurter, J., dissenting); [Harris v. United States](#), [331 U.S. 145, 155-82 \(1947\)](#) (Frankfurter, J., dissenting).

¶n25 See AMAR, *supra* note 1, at 188-93, 197-207.

¶n26 See *id.* at 178-79 ("Questions also remain about judicial competence to find unenumerated rights. . .").

¶n27 See *id.* at 83-88, 98-104.

¶n28 See *id.* at 175 n*.

¶n29 See [City of Boerne v. Flores](#), [521 U.S. 507 \(1997\)](#).

¶n30 See Amar, *supra* note 6, at 818-27.

¶n31 [41 U.S. \(16 Pet.\) 539 \(1842\)](#).

¶n32 Calabresi, *supra* note 2, at 2296.

¶n33 *Id.*

¶n34 See AMAR, *supra* note 1, at 299.

¶n35 AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 95, 132 (1997).

¶n36 See *THE BILL OF RIGHTS*, *supra* note 1, at 299.

¶n37 [492 U.S. 361, 369-72 \(1989\)](#) (interpreting "cruel and unusual punishment" by canvassing the pattern of enacted laws at the state and federal levels).

✚n38 Calabresi, *supra* note 2, at 2296-97.

✚n39 Gerhardt, *supra* note 3, at 2230.

✚n40 *Id.*

✚n41 *Id.*

✚n42 *See* AMAR, *supra* note 1, at 23 (citing [New York Times v. Sullivan, 376 U.S. 254 \(1964\)](#)).

✚n43 [United States v. Nixon, 506 U.S. 732 \(1993\)](#).

✚n44 Gerhardt, *supra* note 3, at 2337-42.

✚n45 1 W. & M. 2, ch. 2 (1689) (Eng.).

✚n46 Cottrol, *supra* note 4, at 2311.

✚n47 *See* AMAR, *supra* note 1, at 60-61.

✚n48 *See* Cottrol, *supra* note 4, at 2312-13.

✚n49 *See* AMAR, *supra* note 1, at 226 n.*.

✚n50 *See id.*

✚n51 Professor Calabresi is correct to note that above and beyond incorporation, where my views largely coincide with the modern Court's, my specific views about the proper meaning of the criminal procedure clauses diverge from the Court's. He is also right to note that my approach to church/state issues emphasizes liberty and equality/neutrality, whereas the modern Court has at times instead emphasized separation -- though here, I think, recent hopeful signs in the case law indicate that the Court is beginning to move in the right direction. *See* Calabresi, *supra* note 2, at 2290-92.