

## ARTICLES

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### OUR ANCHOR FOR 225 YEARS AND COUNTING: THE ENDURING SIGNIFICANCE OF THE PRECISE TEXT OF THE CONSTITUTION

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Thank you so much for inviting me to Notre Dame. As a Catholic, I appreciate what this university stands for—a mission of training people, to educate students to help others of all faiths and backgrounds. As a Judge, I appreciate what this esteemed law school has done to train students in the law, to teach them both the fundamentals and the big picture, to teach them what to know and how to think. In the pantheon of great American law schools, this school stands as one of the finest.

I am so grateful to Dean Newton for welcoming me here. I thank Stephanie Maloney and the *Law Review* for their hard work, wonderful organization, and gracious hospitality. I thank my great friend Professor Bill Kelley for helping to arrange my trip. Bill and I worked together at three different times—first in the Solicitor General’s office when he was an Assistant and I was what is now called a Bristow Fellow, second in Judge Starr’s independent counsel office in those unpleasant duties, and finally in the White House when I was Staff Secretary and Bill was Deputy White House Counsel. There is no finer public servant and no finer man. I am grateful to Bill for mentoring me and for his loyal friendship over the years.

The topics we have been discussing today with leading thinkers of the legal academy are fascinating and important. What explains constitutional change in the Supreme Court? How do we explain and understand past changes? How do we predict and know when there is to be future change?

When one comes to Notre Dame, whether for a law review symposium or for a football game or for both, your mind is drawn to fundamentals and

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history. This is a place that oozes history, and in that vein, I want to take a step back and focus on the text of our Constitution. I want to focus on that text in two dimensions. First, I want to explain how the text of the Constitution creates a structure—a separation of powers—that protects liberty. And in particular, I want to emphasize how that structure tilts toward liberty, how it creates legislative and executive branches with finely specified powers so as to protect individual liberty against oppressive legislation. Second, I want to focus on the role of the Supreme Court in that constitutional structure—and how the Court itself looks to the precise words of the constitutional text both to preserve the separation of powers established by the Constitution and to protect individual liberty. My overriding message will be that one factor matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence—and that one factor is the precise wording of the constitutional text. It's not the only factor, but it's the anchor, the magnet, the most important factor that directs and explains much of constitutional law, particularly in the realm of separation of powers.

#### I. A SEPARATE LEGISLATURE AND EXECUTIVE: A STRUCTURE THAT TILTS TOWARD LIBERTY

Let's begin with the structure established by the text. The Framers of the Constitution met in Philadelphia in the summer of 1787 because of dissatisfaction with the weak national government established under the Articles of Confederation.<sup>1</sup> Several problems had become apparent. The national government was too weak to defend the territory and security of the United States.<sup>2</sup> The national government had little ability to raise revenue by way of taxes so as to support the necessary defense efforts.<sup>3</sup> And the splintered nature of the country at that time hindered commerce and trade, including foreign trade, and thus hindered prosperity.<sup>4</sup>

A main goal, therefore, was to establish a strong central government able to protect security and promote prosperity.<sup>5</sup> At the same time, the Framers were keenly aware that the people within this new country consisted of many factions—those with property and those without, creditors and debtors, landed interests and manufacturing interests, and moneyed interests and many lesser interests. As Madison said in *Federalist 10*, “The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.”<sup>6</sup> Madison further explained that the Constitution had to “secure the public good and private rights” against

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1 MICHAEL LES BENEDICT, *THE BLESSINGS OF LIBERTY* 80–81 (1996). See generally AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009).

2 BENEDICT, *supra* note 1, at 80–81.

3 *Id.*

4 *Id.*

5 *Id.* at 81.

6 *THE FEDERALIST* NO. 10, at 49 (James Madison) (Ian Shapiro ed., 2009).

the danger of majority rule while “at the same time to preserve the spirit and the form of popular government.”<sup>7</sup>

How to do this? How to create a strong central government without infringing on individual rights? Did the Framers in Philadelphia simply dictate a bill of rights to protect individuals from the majority? No. That was not the first order of business because the Framers understood that a bill of rights without a structure to protect those rights would be largely meaningless. As a practical matter, such a bill of rights would be precatory for individual legislators and executives. The danger to liberty, the Framers knew, was concentration of power. As Madison explained in *Federalist 47*, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>8</sup> Madison explained that tyranny could come from a single executive in whom all powers are concentrated, or from a legislature that assembles all power in its hands, the definition of despotic government. So what is the opposite of concentration of power? Separation of power. Madison explained that “the preservation of liberty” requires that the “three great departments of power should be separate and distinct.”<sup>9</sup>

Consistent with Madison’s observations, we often remark that the Constitution’s separation of powers protects liberty. We say that structure protects liberty.

But what do we mean by that? I think people often say that without really thinking about what it means. Do we know what those high-minded platitudes mean in practice? How exactly does the separation of powers protect liberty?

First we need to know what we mean by liberty. And while there are many different conceptions of liberty, the liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression, in particular from the effects of legislation that would unfairly prohibit or mandate certain action by individual citizens, backed by punishment. There is certainly a conception of positive liberty—of entitlement to certain government benefits or support. And legislatures are equipped under our constitutional structure to provide that kind of benefit. But that is not what we are usually referring to when we say that the separation of powers protects liberty. The separation of powers primarily protects freedom *from* government action.

So we know what liberty we are referring to. How does the Constitution’s structure protect liberty? To answer that question we need to read the text.

In order to protect individual liberty and guard against the whim of majority rule, the Framers first made it very difficult to enact laws. There would be no one person—no king or queen—who could simply declare the

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7 *Id.* at 50.

8 THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

9 *Id.* at 246.

law.<sup>10</sup> Likewise, there would be no one body of legislators who could enact laws.<sup>11</sup> Rather, the Framers required the concurrence of three separate entities to enact legislation: the House, the Senate, and the President.<sup>12</sup> They provided, of course, for the possibility of the Legislature's overriding a presidential veto, but only with the concurrence of two-thirds of both houses of Congress.<sup>13</sup>

In order to enact tax laws, or to prohibit certain activities, or to regulate commerce, the national government would require action by three separate entities. In order to pass, legislation would require consensus and broad support. The system was designed to be difficult. Keep this in mind today. The Framers wanted it to be hard to pass legislation. Legislation that attained broad support was less likely to be oppressive—to unfairly benefit one faction at the expense of another. We can talk about whether we should alter that process by constitutional amendment, but the Constitution as ratified made legislation difficult to pass.

And there was more. Hard as it would be to enact legislation, the Framers were not content to rely on the protections of bicameralism and presentment alone. For laws that regulate private individuals and entities—laws that tell you that you cannot do something or must do something, backed by threat of an executive enforcement action and criminal punishment or civil sanctions—an enforcement entity separate from the Legislature would have to decide to in fact prosecute the violation of that law. This separate enforcement entity would be the President of the United States, as assisted by subordinate officers in the executive branch.<sup>14</sup> This is what we call the Executive's prosecutorial discretion—the ability to decide whether to prosecute violations and violators of certain laws.<sup>15</sup>

The Executive was simultaneously given an extraordinary and unfettered power to pardon.<sup>16</sup> Think about that: in one person alone is vested the power to pardon violations of federal law. And you might think, well, that is an enormous power to leave to one person; how does that make sense given that the Framers were so concerned about such a concentration of power? But it's actually consistent with the Framers' design when you keep in mind that the pardon power works only in the direction of liberty—it's a check to decide to protect someone's liberty against enforcement of what the Execu-

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10 See, e.g., U.S. CONST. art. I, § 1.

11 *Id.*

12 *Id.* art. I, § 7.

13 *Id.*

14 See *id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . . .”); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that Article II, Section 3 of the Constitution gives the executive branch prosecutorial power).

15 See *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”).

16 U.S. CONST. art. II, § 2, cl. 1.

tive deems an oppressive law, even if a prior Executive had decided to prosecute the individual for violating the law.

So as an individual citizen, your liberty—your freedom from coercive federal government action—cannot be infringed until legislation is enacted, which requires the concurrence of three entities—and until the Executive makes a separate, *independent* decision to prosecute violations of those laws. This system of multiple checks makes it even harder for a majority faction to exercise coercive power against individual citizens.

In its design and structure, the Constitution is tilted in the direction of liberty.

Now on this prosecutorial discretion point, some might initially think that the Executive has a duty to prosecute violators of every law, at least if there are resources to do so. Some might say that it's not for the President to decide not to prosecute violators of a law that Congress has duly enacted. In my view, the history and structure of the Constitution do not support that proposition. To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch—at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws regulating the executive branch. But the Take Care Clause has not traditionally been read to mandate executive prosecution of *all* violators of *all* federal laws.<sup>17</sup>

Our leading historical example is President Jefferson and the Sedition Act. We all know the rough outlines of the Sedition Act. In 1798, in the throes of the U.S. war against France, Congress supported by President Adams passed a law that said it would be a crime punishable by fine and up to two years imprisonment to “write, print, utter or publish,” or cause it to be done, or assist in “any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute,” among other things.<sup>18</sup> After he became President in 1801, President Jefferson decided that he would no longer pursue prosecutions against violators of the Sedition Act, against those who spoke ill of the government or high officials in that way. Most accept that Jefferson did not violate the Take Care Clause when he made that decision. The Take Care Clause encompasses at least some degree of prosecutorial discretion; it does not prohibit prosecutorial discretion.<sup>19</sup>

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17 See, e.g., *Cox*, 342 F.2d at 171 (noting that the President, through the Attorney General who acts as the “hand of the President,” retains “the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions”). See generally *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013).

18 Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (expired 1801).

19 See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . . .”); *Cox*, 342 F.2d at 171 (noting that the President, through the Take

But you may still have a nagging doubt, as I often do when I think about this issue. Does the President really have the power to decline to prosecute a violator of a law simply because of the President's belief that the law is oppressive? In my view, those nagging doubts largely go away when we consider the implications of the pardon power, and the interaction of the powers of prosecutorial discretion and the pardon power.<sup>20</sup> Everyone agrees that the pardon power gives the President absolute, unfettered, unchecked power to pardon every violator of every federal law.<sup>21</sup> Obviously, there are political checks against doing that, or against using the pardon power in an arbitrary manner.<sup>22</sup> But in terms of raw constitutional power, that is the power the President has.

Moreover, it is long settled that the power to pardon includes the power to pardon violations of a law at any time after commission of the act.<sup>23</sup> In other words, a pardon does not need to wait for a conviction.

Now if the President has the absolute discretion to pardon individuals at any time after commission of the illegal act, it necessarily seems to follow that the President has the corresponding power not to prosecute those individuals in the first place. After all, it would not make any sense to require the filing of a criminal indictment followed by a pardon instead of simply allowing the Executive not to file the criminal indictment in the first place. As Akhil Amar has cogently explained, the greater power to pardon encompasses the lesser power to decline to prosecute in the first place.<sup>24</sup>

At the same time that the Framers tilted toward liberty with the prosecutorial discretion and pardon powers, the Framers also created a check against unilateral executive decisions to restrain someone's physical liberty. In particular, Article I, Section 9 of the Constitution protects the

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Care Clause, has "free exercise of the discretionary powers . . . over criminal prosecutions").

20 See U.S. CONST. art. II, § 2 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

21 See *Ex parte Garland*, 71 U.S. 333, 380 (1866) ("The power thus conferred [by the Constitution] is unlimited, with the exception stated. . . . This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.").

22 See *Ex parte Grossman*, 267 U.S. 87, 106 (1925) ("[T]he Constitution does establish a system of checks and that the pardoning power does furnish a potential check upon some judicial actions. If the President abuses this power he may be impeached. It is, however, no more inherently unreasonable that the President should have the power to pardon criminal contempts than that he should have the power to pardon treason.").

23 *Ex parte Garland*, 71 U.S. at 380 ("[The President's pardon power] extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."); see also *Ex parte Grossman*, 267 U.S. at 104 ("The President may pardon all offenses against the United States except in cases of impeachment.").

24 AMAR, *supra* note 1, at 187–89.

right of habeas corpus, which allows executive detention only pursuant to laws passed by Congress, except in certain carefully cabined circumstances.<sup>25</sup>

So what is the unifying theme between the pardon and prosecutorial discretion powers on the one hand and the habeas corpus right on the other? The former grants unilateral power to the President.<sup>26</sup> The latter forbids unilateral power by the President.<sup>27</sup> What is the connective tissue? The answer is liberty. The constitutional structure is tilted toward liberty. The President can act unilaterally to protect liberty and free or protect someone from imprisonment; but with limited exceptions, the President cannot act, except pursuant to statute, to infringe liberty and imprison a citizen.

So the text of the Constitution creates a separation between the legislative power and the executive power.<sup>28</sup> And to enact legislation, moreover, the Constitution requires the concurrence of three separate entities.<sup>29</sup> A primary protection of liberty in our constitutional structure comes from the Framers' decisions on structure, decisions that we see when we read Article I<sup>30</sup> and Article II of the Constitution.<sup>31</sup> Those checks are central to protecting liberty.

And make no mistake, although resort to the precise constitutional text is sometimes dismissed as anachronistic, that precise constitutional text still controls how Congress and the President operate.<sup>32</sup> A President cannot say, well, the Constitution is outdated and has not adapted to the needs of the times, so I am going to ignore Congress and unilaterally decree a new criminal law prohibiting possession of certain semi-automatic rifles. Or I am going to ignore Congress and unilaterally pass a new decree banning forms of abortion. A Senate cannot say that the House of Representatives is too extreme and not representative of the population at large, so we the Senate are going to ignore the House and join with the President in passing some new tax legislation. The House cannot say that the Senate is outdated and should be bypassed because having two Senators per state regardless of population—giving the same number of votes to Delaware and California—violates the one-person, one-vote principle, so we the House are just going to ignore the Senate and join with the President in passing new environmental laws.

That does not happen—and it cannot lawfully happen. The precise text of the Constitution controls our structure, and we do not ignore the text of

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25 U.S. CONST. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

26 *See id.* art. II, §§ 2, 3.

27 *See id.* art. I, § 9.

28 *See id.* § 1 (vesting legislative powers in the U.S. Congress); *id.* art. II, § 1 (vesting the executive power in the President of the United States).

29 *See id.* art. I, § 7, cl. 2.

30 *See id.* art. I.

31 *See id.* art. II.

32 *See id.* art. I (prescribing the legislative powers of the U.S. Congress); *id.* art. II (prescribing the executive power of the President).

the Constitution simply because it was ratified 225 years ago, or may be outdated, or has not adapted to modern conditions.<sup>33</sup>

To be sure, the Constitution is not fixed in stone. There is an amendment process, articulated in Article V.<sup>34</sup> And that amendment process is meant to be used. The Twelfth Amendment,<sup>35</sup> the Seventeenth Amendment,<sup>36</sup> and the Twenty-Second Amendment,<sup>37</sup> to take three examples, have worked dramatic changes in our constitutional structure. But the text controls.

Even with all of those structural protections of liberty in place at the time of the Founding, concerns were raised in some quarters about the lack of a bill of rights. So the First Congress and the states decided to add a series of individual rights to the Constitution, what are now the First through Eighth Amendments.<sup>38</sup>

Even without a bill of rights, of course, the Legislature always has the power to decline to enact legislation for any reason, including that it violates principles that we care about: the freedom of speech,<sup>39</sup> or the freedom to keep arms,<sup>40</sup> or the protection against cruel and unusual punishments,<sup>41</sup> or

33 See generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

34 U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . .”).

35 *Id.* amend. XII (ratified June 15, 1804, the Twelfth Amendment outlined the process for electing the President: “The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves . . . . The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot, the President.”).

36 *Id.* amend. XVII (ratified April 8, 1913, the Seventeenth Amendment established direct election of U.S. Senators by popular vote: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”).

37 *Id.* amend. XXII, § 1 (ratified February 27, 1951, the Twenty-Second Amendment imposed a term limit on the President: “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once . . .”).

38 See *id.* amends. I–VIII.

39 *Id.* amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

40 *Id.* amend. II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”).



any other value or policy the Legislature deems important.<sup>42</sup> Now one could assume that future Congresses would always keep these values in mind, or at least have some very good reason to depart from them. But the First Congress wanted to establish some red lines *in the constitutional text*, over which future Congresses and Presidents could not cross, absent constitutional amendment.

So the Constitution was amended to tilt even further toward liberty.

So what is the significance and practical importance of having all of this written in the constitutional text? That's where the next chapter of our story begins.

## II. THE INDEPENDENT JUDICIARY: A FURTHER TILT TOWARD LIBERTY

The text of the Constitution tilts toward liberty in still another critically important way. Even in cases where a law is passed and the Executive prosecutes individual violators, the Congress and the Executive do not have the last word. Rather, the Constitution creates and empowers an independent Judiciary that has the power (with a jury) in justiciable cases to determine whether someone has in fact violated the law as alleged by the Executive.<sup>43</sup> Even more importantly, the Judiciary has the final word to independently determine whether the law itself violates the text of the Constitution in some way, for example, as a violation of habeas corpus<sup>44</sup> or as exceeding Congress's power under the Commerce Clause.<sup>45</sup>

Check after check after check after check. Bicameralism, presentment, executive discretion, pardon power, and on top of that independent judicial and jury determination of the facts, and independent judicial determination of the constitutionality of the law. Before the coercive power of the state may act upon you as an individual citizen, so many different checkpoints must be passed. Why? To protect individual liberty. To guard against faction, as Madison said.<sup>46</sup> To protect the minority against the majority, while at the same time creating a system that could function to protect security and enhance prosperity.

So the Constitution's structure protects liberty. The primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution: the separation of the power to legislate from the power to enforce from the power to adjudicate.<sup>47</sup> But it took a critical

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41 *Id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (emphasis added)).

42 *See, e.g., id.* art. I, §§ 7–8.

43 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

44 *See* Boumediene v. Bush, 553 U.S. 723, 732 (2008).

45 *See* United States v. Lopez, 514 U.S. 549, 551, 557 (1995).

46 THE FEDERALIST No. 10 (James Madison).

47 *See* THE FEDERALIST No. 47, at 245 (James Madison) (Ian Shapiro ed., 2009) ("One of the principal objections . . . to the Constitution, is . . . that the legislative, executive, and judiciary departments [are] separate and distinct . . . [N]o regard . . . seems to have been paid to this essential precaution in favor of liberty.").

moment early in our constitutional system to cement these principles firmly into the U.S. Reports.

The case was *Marbury v. Madison*.<sup>48</sup> We all have studied the case in law school, and we all think we know what it means. But in many ways, I think we spend too little time on *Marbury v. Madison* in the academy and in the legal profession. I think every time we re-read the text of the Constitution, which we should do regularly—and I mean word for word—we should also re-read *Marbury v. Madison* at the same time. For that case has profound lessons to this day about the status of the Constitution, how to interpret the Constitution, and the Judiciary's role vis-à-vis other branches in interpreting the Constitution.

From the early days of the Constitution, the courts were called upon to address claims by individuals that their rights were being impeded in violation of the Constitution.<sup>49</sup> And the judges therefore were called upon to have a method of assessing such claims, of interpreting and applying the Constitution. And from the beginning, the most important aspect of constitutional interpretation was not one's political philosophy, not one's policy views, but rather what were the precise words of the constitutional text.<sup>50</sup>

We all know that *Marbury* stands for the basic proposition that courts may review laws as applied in individual cases to determine whether the laws square with the Constitution: the power of judicial review.<sup>51</sup> But in the course of articulating that principle, Chief Justice Marshall opined on a number of critical points of constitutional interpretation that remain salient to this day.

Recall the basic facts. William Marbury had been nominated by President Adams to be a judge on the local D.C. court, which given D.C.'s unique status in the Constitution was a *federal* office that at that time carried a fixed term of five years.<sup>52</sup> Marbury had been confirmed by the Senate, and President Adams had signed his commission. But at the time President Jefferson took office in March 1801, Marbury had not yet received his commission, which had languished in the Secretary of State's office.<sup>53</sup> The question was whether delivery of the commission was necessary for Marbury's appointment;<sup>54</sup> if so, then President Jefferson had no intention of delivering the commission and allowing Marbury to serve as a judge.<sup>55</sup>

48 5 U.S. (1 Cranch) 137.

49 See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that the President does not have inherent authority to ignore a law passed by Congress); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (sustaining the Judiciary Act of 1802).

50 See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 222–38 (1995) (detailing the methods of constitutional interpretation employed by the early Court).

51 See *Marbury*, 5 U.S. (1 Cranch) at 177–79.

52 *Id.* at 154–55.

53 *Id.*

54 *Id.* at 157.

55 See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 4.

Marbury filed for a writ of mandamus in the Supreme Court.<sup>56</sup> Chief Justice Marshall wrote the unanimous opinion.<sup>57</sup> And let's put aside the question of what issues he should have reached, which itself is an interesting topic, but let's look at the issues he did reach and how he analyzed the issues.

Chief Justice Marshall first considered the question of whether Marbury had been validly appointed to his position as a D.C. judge.<sup>58</sup> How to analyze that question? Marshall began with the precise wording of the Constitution. He quoted Article II, Section 2 of the Constitution: "The president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."<sup>59</sup> And he quoted Article II, Section 3, which states that the President "shall commission all the officers of the United States."<sup>60</sup>

Reading that text, Marshall explained that the Constitution creates three separate steps before a principal officer is officially appointed—presidential nomination, Senate confirmation, and then the President's commissioning the officer.<sup>61</sup> In other words, just because you are confirmed by the Senate does not make you an officer; the President has one final discretionary step to complete, namely, the commissioning of the officer. At that point, the President could decide not to commission the officer, and the individual would not be appointed, notwithstanding having been nominated and confirmed. Keep that in mind for your future judicial appointment. After the Senate confirms you, make sure the President signs the commission.

But the next issue in *Marbury* concerned when an appointment is complete: when the President signs the commission or when the commission is delivered to the office holder.<sup>62</sup> President Jefferson's view was that the appointment was not complete until the commission was delivered to the office holder. Should the Supreme Court defer to the President's view on that question? Marshall said no. It was the duty of the courts to say what the law is, and in a justiciable case where an individual claims that the President has acted in a manner contrary to the Constitution, the Court has the final word, not the President.<sup>63</sup>

This is a critical aspect of *Marbury* that is often overlooked. The Court not only has the power of judicial review of legislation (as we will see); it also has the power to reject the President's interpretation of the Constitution.<sup>64</sup>

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56 See *Marbury*, 5 U.S. (1 Cranch) at 153.

57 *Id.*

58 *Id.* at 155.

59 *Id.* (quoting U.S. CONST. art. II, § 2, cl. 2).

60 *Id.* (quoting U.S. CONST. art. II, § 3).

61 *Id.* at 155–56.

62 *Id.* at 159–61.

63 *Id.* at 177.

64 See *id.* at 172–73 (rejecting Jefferson's assertion that the commission only became complete upon delivery).

And to analyze the question of when the appointment was complete—at the commission’s signing or at delivery—Marshall resorted to ordinary principles of interpretation, using the text, history, and structure of the Constitution, not to mention some common sense—to answer this ambiguity. He concluded ultimately that the appointment was final when the commission was signed, stating:

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.<sup>65</sup>

So from this aspect of *Marbury*, we find two bedrock points: First, the Court will not simply defer to the views of the President on a question of constitutional interpretation.<sup>66</sup> And second, in resolving questions of constitutional controversy, the Court will look to and heed the actual wording, the precise words, of the Constitutional text and the structure created by that text.<sup>67</sup> So *Marbury*, the Court reasoned, was entitled to hold the office for a term of five years and was entitled to a writ of mandamus.<sup>68</sup>

But there still were other questions for the *Marbury* Court to resolve, in particular: Was the Supreme Court the appropriate body to issue the writ of mandamus?<sup>69</sup> A statute—the Judiciary Act of 1789—gave the Supreme Court original jurisdiction over such mandamus actions.<sup>70</sup> But was that statute consistent with the Constitution?

How did Marshall resolve that question? He went back to the constitutional text and began by quoting Article III of the Constitution: “The supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”<sup>71</sup>

As Marshall noted, it had been argued that Congress had the authority to add to the original jurisdiction of the Supreme Court because the Constitution did not expressly prohibit Congress from doing so.<sup>72</sup> But Marshall would have none of that.

If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original

65 *Id.* at 162.

66 *See id.* at 167 (“The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.”).

67 *See id.* at 177–78.

68 *Id.* at 162.

69 *Id.* at 168 (“It remains to be enquired whether . . . [h]e is entitled to the remedy for which he applies. This depends on . . . the power of this court.”).

70 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73.

71 *Marbury*, 5 U.S. (1 Cranch) at 174 (quoting U.S. CONST. art. III, § 2, cl. 2).

72 *Id.*

jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.<sup>73</sup>

So Marshall concluded that the statutory grant of jurisdiction was contrary to the Constitution.<sup>74</sup>

One final question remained, however: the provision giving the Supreme Court original jurisdiction over mandamus actions had been enacted by Congress in the famed Judiciary Act of 1789.<sup>75</sup> Could the Supreme Court in essence declare an act of Congress unconstitutional and decline to follow it?<sup>76</sup>

Marshall said that was “a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest.”<sup>77</sup>

In resolving that question, Marshall made many observations about the nature of the Constitution that bear repeating:

Marshall made clear that the Constitution was not just an aspirational statement of principles, but rather was law.<sup>78</sup> It was written law that was to be interpreted according to traditional principles for interpreting written law.<sup>79</sup> At the same time, the Constitution was superior to ordinary legislation.<sup>80</sup>

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. . . .

. . . The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . .

. . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable . . . .

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.<sup>81</sup>

But did the Court have the power to enforce its understanding of the Constitution against a contrary interpretation by the Legislature?

Marshall took the question head on:

73 *Id.*

74 *Id.* at 176.

75 *See* Judiciary Act of 1789 § 13, 1 Stat. at 81.

76 *Marbury*, 5 U.S. (1 Cranch) at 176.

77 *Id.*

78 *See id.* at 176–77.

79 *See id.* at 174, 176–80.

80 *Id.* at 178.

81 *Id.* at 176–77.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.<sup>82</sup>

Marshall then went on to give many examples of how judicial review had to be part and parcel of a constitutional system with a written Constitution, a parade of horrors that could ensue if the written Constitution was unenforceable in court. He noted that the Constitution declared that “no tax or duty shall be laid on articles exported from any state.”<sup>83</sup> He hypothesized a tax on “export of cotton, of tobacco, or of flour,” and asked, “Ought judgment to be rendered in such a case? [O]ught the judges to close their eyes on the constitution, and only see the law[?]”<sup>84</sup> Marshall pointed out that the Constitution provided that “no bill of attainder or *ex post facto* law shall be passed.”<sup>85</sup> And he asked: Suppose “such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?”<sup>86</sup>

Marshall summed up:

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82 *Id.* at 177–78.

83 *Id.* at 179 (internal quotation marks omitted).

84 *Id.*

85 *Id.* (internal quotation marks omitted).

86 *Id.*

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? . . . How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

. . . .

Why does a judge swear to discharge his duties agreeably [sic] to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery.<sup>87</sup>

Marshall concluded with a textual and structural point:

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.<sup>88</sup>

So what are the primary lessons of *Marbury v. Madison*?

First, *Marbury* reminds us that the point of the Constitution is to establish a paramount law that will govern and trump ordinary legislation:

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 exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. . . .

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is

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87 *Id.* at 179–80.

88 *Id.* at 180.

on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

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>89</sup>

Second, on matters of constitutional interpretation—in that case, the question of whether an appointment was final when the commission was signed or delivered<sup>90</sup>—the Judiciary will not defer to the President.<sup>91</sup> The Judiciary exercises its own independent judgment in a justiciable case involving an individual's right and will enforce its own interpretation of the Constitution in a justiciable case. After *Marbury*, probably the two most significant cases in which the Judiciary stood up to the President were *Youngstown*<sup>92</sup> and *United States v. Nixon*.<sup>93</sup> In both cases, the President asserted a particular interpretation of the Constitution.<sup>94</sup> In both cases, the stakes were enormously high. In both cases, the Supreme Court stated in essence: we respect the views of the President, but we do not agree with his constitutional interpretation, and we therefore rule against him. He cannot seize the steel mills in the face of a congressional prohibition.<sup>95</sup> He cannot protect the Watergate tapes under a claim of absolute executive privilege.<sup>96</sup> Likewise, to President Clinton in *Clinton v. Jones*,<sup>97</sup> the Court stated, we disagree with you that Article II of the Constitution provides a temporary immunity from private civil suits while in office.

Third, on matters of constitutional interpretation—in that case, the question of whether Congress had appropriately defined the original jurisdiction of the Supreme Court—the Judiciary will not defer to Congress.<sup>98</sup> The

89 *Id.* at 176–77.

90 *Id.* at 162.

91 *Id.* at 177 (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

92 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

93 418 U.S. 683 (1974).

94 *Id.* at 703–05 (noting the President's claim of executive privilege); *Youngstown*, 343 U.S. at 587 (noting the President's asserted interpretations of the Vesting Clause and of the President's military power as Commander in Chief of the Armed Forces).

95 *Youngstown*, 343 U.S. at 589 (holding that the seizing of the steel mills was unconstitutional).

96 *See Nixon*, 418 U.S. at 686–87, 707.

97 520 U.S. 681, 692 (1997) (“Petitioner's principal submission—that ‘in all but the most exceptional cases,’ the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.” (internal citation omitted)).

98 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803).



Judiciary exercises its own independent judgment in a justiciable case. This, too, is a power the courts have exercised to the present day. To the Congress that enacted the Military Commissions Act,<sup>99</sup> the Court said: we disagree with you about the reach of the habeas corpus writ at Guantanamo.<sup>100</sup> Similarly, to the Congress that enacted the Affordable Care Act,<sup>101</sup> the Court said: we disagree with you that the Commerce,<sup>102</sup> Necessary and Proper,<sup>103</sup> or Tax Clauses<sup>104</sup> support a mandate to purchase a product or service. However, the Court ultimately did conclude that the statute could be read simply to impose only a tax incentive and not a legal mandate.<sup>105</sup> In the same case, the Court said: we disagree with you, Congress, that the federal government may coerce the states into losing their existing Medicaid funding if they fail to expand as directed in the Affordable Care Act.<sup>106</sup>

Fourth, in exercising its own independent judgment when analyzing the Constitution, the Court will focus intently on the precise words of the constitutional text. The *Marbury* Court did not ask what the best way to do things was. It did not seek to find the best policy. It might be, after all, that an appointment should be considered final after the Senate confirmation vote, or from the other direction, only when the commission is delivered. But the Court did not weigh such questions of policy. The Court asked what the precise words of the Constitution said, and the Court reasoned from the text of the document and the structure of the document established by that text.<sup>107</sup>

### III. MARBURY'S SHADOW

It's my submission that *Marbury v. Madison* continues to mark the proper approach for constitutional interpretation.

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99 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

100 *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (holding that the Military Commissions Act was not an adequate substitute for habeas corpus).

101 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).

102 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'").

103 *Id.* at 2593 (holding that the individual mandate cannot be upheld under the Necessary and Proper Clause).

104 *Id.* at 2599 ("A tax on going without health insurance does not fall within any recognized category of direct tax.").

105 *Id.* at 2600 ("[I]mposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.").

106 *Id.* at 2608 ("[T]he Medicaid expansion . . . portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding.").

107 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (stating that "the particular phraseology of the [C]onstitution" dictates the case's outcome).

To be sure, there have been eras where some have suggested that the courts should exercise extreme deference to the Legislature. This view is associated with Professor Thayer, Justice Frankfurter, and many others, but the fundamental flaw with this degree of constitutional deference is that it entails abdication of a constitutional responsibility assigned to the Judiciary.<sup>108</sup> As John Marshall stated, why even bother to have a constitution if it cannot be independently enforced by the Judiciary in individual cases?<sup>109</sup> To exercise their responsibilities and oaths, Marshall explained, courts cannot simply defer to the President's or Congress's interpretation of the Constitution.<sup>110</sup>

There are also areas where people claim that the precise words of the constitutional text do not matter or should not bind us. Indeed, there are some people today who think we should not be bound by the outmoded and outdated text. *Marbury*, of course, rejects that notion as well.<sup>111</sup> And, in my judgment, the Supreme Court throughout our history has rejected that notion and has insisted on the binding status of the constitutional text as law. Think of some modern examples from the last fifty years:

Consider *Powell v. McCormack*,<sup>112</sup> from 1969. The question was whether the House could exclude Adam Clayton Powell from the seat to which he had been elected.<sup>113</sup> The text of the Constitution lists only three apparent qualifications for being a House member: twenty-five years of age, seven years as a citizen, and an inhabitant of the state from which the representative is elected.<sup>114</sup> In deciding the case, Chief Justice Warren, writing for seven Justices of the Court—let me repeat, Chief Justice Warren, writing for seven Justices of the Court—conducted an extensive analysis of the Constitution's text and history, and the Convention and ratification debates.<sup>115</sup> And the Court said that its analysis "has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications *prescribed in the Constitution*."<sup>116</sup> Text matters.

Or consider the 1976 decision in *Buckley v. Valeo*, not the part about the constitutionality under the First Amendment of the campaign finance restrictions, but rather the constitutionality of the structure of the Federal Election Commission.<sup>117</sup> This was, of course, an entity developed in the heyday of

108 See, e.g., Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535 (1994) (discussing Justice Frankfurter's adjudicative methods, including criticisms of his extensive deference to Congress); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (discussing the history of the American constitutional doctrine and arguing for a more limited power of judicial review).

109 *Marbury*, 5 U.S. (1 Cranch) at 151.

110 See *id.*

111 *Id.* at 180.

112 395 U.S. 486 (1969).

113 *Id.* at 489.

114 U.S. CONST. art. I, § 2.

115 *Powell*, 395 U.S. at 532-47.

116 *Id.* at 550 (emphasis added).

117 *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976).

new-fangled, good-government institutions, which were in fashion in the 1970s and produced ugly first cousins to the Federal Election Commission, such as the independent counsel statute.<sup>118</sup> The statute in question in *Buckley* created a Federal Election Commission, with two members selected by the Speaker of the House, two members appointed by the Senate, and two members appointed by the President, subject to confirmation by both houses of Congress (I guess confirmation by one house was not enough).<sup>119</sup>

The Court—in part of its eight-Justice *per curiam* opinion, which all the Justices joined—held the Federal Election Commission unconstitutional under the Appointments Clause.<sup>120</sup> Listen to the words of the Court, and keep in mind that this opinion includes Justices from Rehnquist to Brennan to Marshall:

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. . . . But there is no need to read the Appointments Clause contrary to its plain language . . . . We are . . . told . . . that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act . . . . But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.<sup>121</sup>

Text matters.

Recall the 1983 decision in *INS v. Chadha*.<sup>122</sup> This was the case dealing with the constitutionality of the legislative veto. Legislative vetoes were the provisions that Congress, in the wake of the New Deal, routinely put into legislation in order to allow either one or both houses of Congress to vote down a particular agency action without going through the bicameralism and presentment procedures specified by the text of the Constitution. The basic idea behind the legislative veto, in other words, was: “Hey, things have changed since the Founding, so we should not be bound by that outdated text of the Bicameralism and Presentment Clauses.” Well, a large majority of the Supreme Court said, “No.”<sup>123</sup> Again, listen to the Court’s words, written by Chief Justice Burger, and joined by Justice Brennan and others:

[Some] undertake[ ] to make a case for the proposition that the one-House veto is a useful ‘political invention’ . . . . But policy arguments supporting

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118 The independent counsel statute is the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–99 (2006) (creating an independent counsel to investigate members of the executive branch, as determined necessary by the Attorney General); *see also* Morrison v. Olson, 487 U.S. 654 (1988) (upholding the constitutionality of the process of appointing the independent counsel, as set forth in the Ethics in Government Act of 1978). *See generally* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133 (1998).

119 *Buckley*, 424 U.S. at 113.

120 *Id.* at 140.

121 *Id.* at 124, 127, 134.

122 462 U.S. 919 (1983).

123 *Id.* at 959.

even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised. . . . [T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.<sup>124</sup>

Text matters.

Let’s remember the Court’s 1986 decision in *Bowsher v. Synar*.<sup>125</sup> There, the Court considered the constitutionality of the position of Comptroller General of the United States, who performed executive functions but could be removed only by the Congress.<sup>126</sup> In an opinion by Chief Justice Burger, which Justices Brennan, Powell, Rehnquist, and O’Connor joined, the Court held the restrictions on removal of the Comptroller General unconstitutional.<sup>127</sup> The Court noted that it had been argued that “‘[r]ealistic consideration’ of the ‘practical result of the removal provision’” meant that “the Comptroller General is unlikely to be removed by Congress.”<sup>128</sup> The Court responded: “The separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”<sup>129</sup> Text matters.

Then there is *Clinton v. City of New York*, the line-item veto case decided in 1998.<sup>130</sup> This was an opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justice Thomas, among others. The Court stated: “Congress cannot alter the procedures set out in Article I, §7, without amending the Constitution.”<sup>131</sup> Text matters.

Those landmark decisions show us that in structural and separation of powers cases, the text is critical. Contemporary standards of what’s good or decent or efficient do not control; the precise text of the Constitution controls. This constitutional textualism is not the unique province of the so-called conservative judges. Judges of all supposed ideological stripes have paid close attention to the text in structural and separation of powers cases. And these cases exemplify that textualism—constitutional textualism and statutory textualism—is politically and policy neutral when applied across the board.

To be sure, the constitutional text does not answer all questions. Sometimes the constitutional text is ambiguous, such as the Equal Protection and Due Process Clauses. No doubt that’s true. But in far fewer places than one

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124 *Id.* at 945, 951.

125 478 U.S. 714 (1986).

126 *Id.* at 717.

127 *Id.* at 736.

128 *Id.* at 730 (quoting from Justice White’s dissent) (internal citation omitted).

129 *Id.*

130 *Clinton v. City of New York*, 524 U.S. 417 (1998).

131 *Id.* at 446.

would think. As I like to say to my law clerks and my students, we should not strain to find ambiguity in clarity. And even in those areas where there is true ambiguity, that should not mean “anything goes.” Just because there are two reasonable readings of a constitutional provision or a statute does not mean that the gates are open to a completely free-form approach.

Some argue that a textualist approach means a cramped approach to individual liberty. I do not agree. Separation of powers cases are about protecting individual liberty, as the Court has often reminded us.<sup>132</sup> But even apart from that, when the constitutional text expressly protects an individual liberty—think of the Takings Clause, or Free Exercise of Religion Clause, or Confrontation Clause, or Right to Counsel Clause—then the courts cannot subtract from that. The text is actually a bulwark against watering down key protections of our liberty that are expressly set forth in the Constitution.

Before I conclude, it bears a brief mention, of course, that most structural and separation of powers disputes never reach court. And in those areas, most interestingly, the relevant political actors and the public tend not just to be textualists, but hyper-textualists.

When I met with Senator Byrd in my confirmation process—after we compared notes about our daughters, mine at the time being one year old and his being sixty-eight and sixty-four years old—he pulled out the Constitution and read to me word-for-word Article I, Section 9’s language about the power of the purse. Why did he do that? Because text matters (and because Senator Byrd cared a lot about the power of the purse).

In his confirmation hearings, Chief Justice Roberts famously said that the role of the judge is to be an umpire—to call balls and strikes the same way, no matter who is up at bat.<sup>133</sup> Of course, a fundamental premise of the vision of the judge as umpire is that the definition of the strike zone is the same for each umpire. And in modern constitutional law, as in modern baseball, unfortunately, some umpires employ a different strike zone in some cases. As enduring constitutionalists argue, however, paying close attention to the precise words of the constitutional text is a mainstream and long accepted mode of constitutional interpretation.<sup>134</sup> It is a strike zone we can all agree on. Employing it helps us achieve the ideal of the judge as umpire, respect the proper role of the Judiciary that our Framers envisioned, and protect individual liberty. Text matters.

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132 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Boumediene v. Bush*, 553 U.S. 723 (2008); *City of New York*, 524 U.S. at 449 (Kennedy, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

133 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Committee on the Judiciary*, 109th Cong. 55–56 (2005) (statement of Judge John G. Roberts).

134 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 155 (2010); William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1604–07 (2012).

