# ARTICLES

# THE OBJECTS OF THE CONSTITUTION

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"The object of the constitution
was to establish three great departments of government;
the legislative, the executive, and the judicial departments."[1]

"The United States,
in their united or collective capacity,
are the OBJECT
to which all general provisions in the Constitution
must necessarily be construed to refer."[2]

## INTRODUCTION

The Constitution empowers and restricts different officials differently. A constitutional claim is a claim that a particular government actor has exceeded a grant of power or transgressed a restriction. But because different government actors are vested with different powers and bound by different restrictions, one cannot determine *whether* the Constitution has been violated without knowing *who* has allegedly violated it. The *predicates* of judicial review inevitably depend upon the *subjects* of judicial review. Current practice speaks, euphemistically, of challenges to "statutes," thus obscuring the subjects of constitutional claims. But the Constitution does not prohibit statutes; it prohibits actions—the actions of particular government actors. Thus, every constitutional inquiry should begin with the subject of the constitutional claim. And the first question in any such inquiry should be the *who* question: *who has allegedly violated the Constitution?*

This Article's predecessor, *The Subjects of the Constitution*,[3] demonstrated the analytical power of this seemingly innocuous question. To begin with, the *who* question reveals constitutional culprits, triggering the essential backstops of constitutional accountability. If the Constitution has been violated, the People must know who has violated it, so that they can know whom to blame, whom to vote against, whom to impeach.[4]

But that is not all. The *who* question also establishes the two basic forms of judicial review. In the typical constitutional case, the legislature will make a law, the executive will execute it, and someone will claim that his constitution-

1. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329 (1816) (Story, J.).

2. THE FEDERALIST NO. 83, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

4. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 428-29 ("[T]he two greatest securities [that the people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion, . . . and, *second*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.").

al rights have been violated. The first question to ask such a claimant is *who has violated the Constitution?* The legislature, by making the law? Or the executive, by executing it?

This fundamental dichotomy, between judicial review of *legislative* action and judicial review of *executive* action, is the organizing dichotomy of constitutional law. It is this dichotomy that the Court has obscured with its anthropomorphic trope that "statutes"—rather than government actors—violate the Constitution. And it is this dichotomy that the Court has been grasping for with its muddled distinction between "facial challenges to statutes" and "as-applied challenges to statutes." Properly understood, *a "facial challenge" is nothing more nor less than a challenge to legislative action, and an "as-applied challenge" is nothing more nor less than a challenge to executive action.*

Judicial review of legislative action and judicial review of executive action are two fundamentally different enterprises—formally, structurally, temporally different. And these basic differences dictate both the structure and the substance of judicial review. Clear thinking about the *who* question thus solves deep jurisdictional riddles. And the solutions to these riddles, in turn, have profound feedback effects on the substantive scope of constitutional rights and powers.

To demonstrate all this, *The Subjects of the Constitution* took as its primary examples the Commerce Clause, Section 5 of the Fourteenth Amendment, and the six clauses of the First Amendment. These examples were apt, because each of these clauses is written in the active voice, with the same express subject. Under each of these clauses, there can be only one answer to the *who* question: Congress. But the examples chosen were also, in a sense, the easiest clauses for this approach. Most clauses, unfortunately, are not so clear.

This Article picks up where its predecessor left off. The predecessor established the primacy of the *who* question; this Article shows how to answer it. Part I begins with the intellectual primogenitor of this approach: Chief Justice Marshall's masterful opinion for the Court in *Barron v. Baltimore*. It then presses beyond *Barron*, using Marshall's method to address the questions that he left unanswered. Part II analyzes several of the passive-voice clauses of the Bill of Rights, in the first systematic effort to identify their implied *objects*. As it turns out, these objects form a pattern, which amounts to a central, structural theme of the Bill of Rights that has long been overlooked. Part III turns to Section 1 of the Fourteenth Amendment. Its key sentence, unlike the bulk of the Bill of Rights, is written in the active voice, with an explicit subject ("State"), but the *who* question is nevertheless quite subtle, because the sentence does not specify the relevant *branch* of state government. This Part shows how the answer informs the incorporation debate. It builds on Akhil Amar's insight that the Bill of Rights underwent "refinement" when incorporated against the states

by the Fourteenth Amendment,[5] and it identifies perhaps the most important refinement of all: refinement of the actors bound by the Bill—refinement of its *objects*.

In short, this Article and its predecessor amount to a new model of constitutional review, a new lens through which to read the Constitution. This approach begins with a grammatical exercise: identifying the subjects and objects of the Constitution. But this is hardly linguistic casuistry or grammatical fetishism. The subjects and objects of the Constitution are not merely features of constitutional *text*; they are the very pillars of constitutional *structure*. The very words "federalism" and "separation of powers" are simply shorthand for the deep truth that the Constitution empowers and restricts different governmental actors in different ways. Indeed, this is the primary strategy that the Constitution deploys to constrain governmental power; more than any other principle of institutional design, the Framers pinned their hopes on the axiom that ambition may counteract ambition.[6] And so, in allocating each governmental power—and in "giv[ing] to each [branch] a constitutional control over the others"[7]—the first question was, inevitably, *who?*[8] To elide the *who* question is to overlook the central feature of our constitutional structure. And it is this structure, above all, that is the object of the Constitution.[9]

## I. THE TWO DIMENSIONS OF THE *WHO* QUESTION

Every government official is bound by the Constitution. "[United States] Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, [are] bound by Oath or Affirmation, to support th[e] Consti-

5. *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

6. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 320-25.

7. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 2, at 308.

8. *See* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 4 (6th ed. 2009) ("The most important implementing decisions [at the Constitutional Convention] were those defining the powers of the national government, allocating representation among the states, and distributing responsibilities between the national legislature and the national executive."); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 268 (1988) ("[I]t is striking how often the language of the United States Constitution protects important rights against one level or branch of government but not against the others.").

9. *See supra* notes 1-2 and accompanying text.

tution . . . ."[10] It binds them all, and any of them might violate it. Any branch of state or federal government could be the answer to the *who* question.

But—and this is the crucial point—*the Constitution restricts these different actors differently*.[11] Some constitutional clauses restrict the actions of Congress; others restrict the actions of the President; still others restrict the actions of the judiciary; yet others restrict the actions of the corresponding branches of state governments. These restrictions differ in their subject matter from clause to clause. But even more important, they differ in their fundamental form. The universe of actors that can violate the Constitution is large, but the universe that can violate *any given clause* is substantially smaller. Each clause is carefully tailored, not only to its subject matter, but also to its *subject*—that is, to the governmental actor that it addresses and binds.

The Constitution binds six sorts of entities, so there are six sorts of entities that can violate the Constitution, six possible answers to the *who* question: (1) Congress; (2) the President; (3) the federal courts; (4) state legislatures; (5) state executives; and (6) state courts.[12]

10. U.S. CONST. art. VI, cl. 3.

11. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("[The Constitution] organizes the government, . . . assigns, to different departments, their respective powers . . . [and] establish[es] certain limits not to be transcended by those departments.").

12. In theory, two clauses of the Constitution may bind individuals directly and thus may be violated by individuals. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *id*. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); *see also* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155 (1992) ("The Thirteenth Amendment's abolition of slavery and involuntary servitude speaks directly to private, as well as governmental, misconduct; indeed, it authorizes governmental regulation in order to abolish all of the vestiges, 'badges[,] and incidents' of the slavery system." (alteration in original) (quoting The Civil Rights Cases, 109 U.S. 3, 35-36 (1883) (Harlan, J., dissenting))); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 403-04 (1993) ("[T]he Thirteenth Amendment clearly applies to that private action: Slavery, the Amendment commands, shall not exist. . . . [B]ut I suggest the Amendment also and relatedly prohibits certain kinds of state *in*action."); Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995) ("The text [of the Twenty-First Amendment] actually forbids the private conduct it identifies, rather than conferring power on the States as such."); *id*. at 220 ("The upshot is that there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws . . . ."). Because these clauses are so exceptional—no Supreme Court case has ever held that an individual, in a purely individual capacity, has violated the Constitution—this category may, for present purposes, be set aside. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments."); Tribe, *supra*, at 219 (noting "the principle that our Constitution's provisions, even when they don't say so expressly, limit only some appropriate level

These six can, of course, be divided across two dimensions, reflecting the two great structural themes of the Constitution, separation of powers and federalism. So the potential answers to the *who* question may be categorized as federal (Congress, the President, the federal courts) versus state (state legislatures, state executives, state courts); and they may be categorized as legislative (Congress, state legislatures), executive (the President, state executives), and judicial (federal courts, state courts).

All of this is, on one level, utterly familiar. After all, in the typical law school curriculum, the subject of Constitutional Law I is constitutional structure. The entire course is, in a sense, dedicated to asking *who* questions and categorizing the answers across these two dimensions. But in Constitutional Law II, this analysis is largely forgotten. The study of constitutional *rights* is almost entirely limited to the *scope* of the rights, and the great structural questions, the *who* questions—*rights against whom?*—are almost entirely overlooked.[13]

It was not always so. Chief Justice Marshall knew that the rights provisions of the Constitution, no less than the structural provisions, have specific *objects*—that they bind some government actors and not others. One of his most masterful, most understudied opinions elucidates just this point.

This Part will begin with Marshall's opinion in *Barron v. Baltimore*[14] to recover Marshall's conclusions and Marshall's method. Then it will move beyond *Barron*, applying Marshall's method to the questions that he did not answer.

### A. Barron v. Baltimore

Some clauses bind federal actors; other clauses bind state actors; and still other clauses bind both. Sometimes it is easy to tell, because some clauses are written in the active voice, with express subjects. "*Congress* shall make no law . . . ."[15] "No *State* shall . . . ."[16] These clauses explicitly indicate *who* is bound—federal or state—and thus who can violate these clauses.

But not all cases are so simple. Many of the most important constitutional clauses are written in the passive voice. As incomparable grammarian Bryan

of *government*" (footnote omitted)); *see also* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1769 (2010) ("[T]he Constitution includes hardly any rules that apply directly to private people. . . . The standard way to express the foregoing observation is to say that constitutional rules apply only to state action and not to private action.").

13. *See* McConnell, *supra* note 8, at 268 ("[I]t is striking how often the language of the United States Constitution protects important rights against one level or branch of government but not against the others. . . . It is also striking that the courts typically disregard these limits and protect rights against government action generally."); Rosenkranz, *supra* note 3, at 1222-23 n.38.

14. 32 U.S. (7 Pet.) 243 (1833).

15. U.S. CONST. amend. I (emphasis added); *see* Rosenkranz, *supra* note 3, at 1250-73.

16. U.S. CONST. amend. XIV, § 1 (emphasis added).

Garner explains, "The unfailing test for passive voice is this: you must have a *be*-verb . . . plus a past participle (usually a verb ending in *-ed*)."[17] This was well understood at the time of the Framing,[18] and the Bill of Rights is rife with such passive-voice formulations: "be infringed,"[19] "be quartered,"[20] "be violated,"[21] "be held,"[22] "be subject,"[23] "be compelled,"[24] "be deprived,"[25] "be taken,"[26] "be informed,"[27] "be confronted,"[28] "be preserved,"[29] "be . . . reexamined,"[30] "be required . . . imposed . . . inflicted."[31] These clauses are easy to identify.

But the actors to whom they apply are not. Each of these clauses does have an identifiable subject, but the distinctive feature of the passive voice is that "the subject of the clause doesn't perform the action of the verb."[32] In the passive voice, the grammatical subject is not the "logical subject,"[33] the "doer,"[34] the "agent."[35] The passive voice can take a prepositional phrase that answers the *who* question expressly—with its *object*—as in: "shall not be prohibited *by the Congress*."[36] But this sort of prepositional phrase is usually omitted, thus inviting the question *by whom*?[37] As Garner explains, "in the passive form, it's

17. BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 612 (3d ed. 2009).

18. *See* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755) ("The passive voice is formed by joining the participle preterite to the substantive verb, as *I am loved*.").

19. U.S. CONST. amend. II.

20. *Id.* amend. III.

21. *Id.* amend. IV.

22. *Id.* amend. V.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* amend. VI.

28. *Id.*

29. *Id.* amend. VII.

30. *Id.*

31. *Id.* amend. VIII.

32. GARNER, *supra* note 17, at 612; *see also* JOHNSON, *supra* note 18.

33. SYLVIA CHALKER & EDMUND WEINER, THE OXFORD DICTIONARY OF ENGLISH GRAMMAR 379 (rev. ed. 1998) ("To overcome the ambiguity of the word *subject*, traditional grammar sometimes qualified the word. Thus in addition to a *grammatical subject* there might be a *logical subject*, particularly with a passive verb.").

34. *Id.*

35. *Id.*

36. U.S. CONST. art. I, § 9, cl. 1 (emphasis added).

37. *See* HARRY SHAW, MCGRAW-HILL HANDBOOK OF ENGLISH 12-13 (4th ed. 1978) ("When a verb appears in the passive voice, the actual performer of the action appears either in a prepositional phrase at the end of the sentence or is not specifically named at all."); H.W. FOWLER & R.W. BURCHFIELD, THE NEW FOWLER'S MODERN ENGLISH USAGE 576 (rev. 3d ed. 2000) ("In passive constructions the active subject has become the passive agent, and

possible to omit the actor altogether—a prime source of unclarity," a "fail[ure] to say squarely who has done what."[38]

Only a few scholars have noted the pervasive constitutional use of the passive voice, most deeming it unfortunate and imprecise.[39] And it is true that almost all of the clauses written in the passive voice do not expressly answer the *by whom* question. But it does not follow that such clauses are terminally ambiguous. To the contrary, despite the passive voice, grammatical and structural logic often point to particular, identifiable constitutional actors.

Chief Justice Marshall applied just such logic in *Barron v. Baltimore*.[40] The issue in that case was whether the Takings Clause "restrain[s] the legislative power of a state, as well as that of the United States."[41] The question was difficult, because, like most of the Bill of Rights, the Takings Clause is written in the passive voice: "[N]or shall private property *be taken* for public use, without just compensation."[42] This clause invites the question *taken by whom?*

Conventional wisdom may have it that the passive voice is ambiguous, but Chief Justice Marshall was undeterred. He knew that the Constitution must be read as a whole. Looking to the original, pre-amendment Constitution as a Rosetta stone, he began by juxtaposing two sections of Article I. He noted that Section 9 is written, like the Takings Clause, in "general terms," which is to say the passive voice.[43] It provides, for example, that "[n]o Bill of Attainder or ex

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the agent is (in this case) preceded by *by*. In practice, however, in the majority of passives, the *by*-agent is left unexpressed . . . .").

38. GARNER, *supra* note 17, at 612-13; *see also* ALONZO REED & BRAINERD KELLOGG, HIGHER LESSONS IN ENGLISH 199 (New York, Clark & Maynard 1880) ("The passive voice may be used when the agent is unknown, or when, for any reason, we do not care to name it . . . .").

39. *See* David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1134 (2006) (noting that "the Constitution did not explicitly answer the question" of who may suspend the writ of habeas corpus); *id.* at 1224 ("The Constitution did not say [who would count votes], as it spoke delphically in the passive voice ('the Votes shall then be counted')." (quoting U.S. CONST. art. II, § 1, cl. 3)); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1269 (2004) ("Like many of the Constitution's empowerments and limitations, [Article I, Section 9, Clause 2,] is written somewhat awkwardly, in passive voice . . . ."); Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 27 (1968) (noting that the passive voice of the phrase "the votes shall then be counted" in the Twelfth Amendment breaks one of the "cardinal rules of draftsmanship"); Laurence H. Tribe, eroG .v hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 279 (2001) ("The Framers should have listened to the time-honored injunction to avoid the passive voice. 'Shall then be counted'—by whom?"); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 250 (1998) ("Like most of the Constitution's provisions, the Takings Clause requires that a plaintiff allege governmental action to state a claim, though the Clause's use of the passive voice obscures the actors to whom the Clause is directed . . . ." (footnote omitted)).

40. 32 U.S. (7 Pet.) 243 (1833).

41. *Id.* at 247.

42. U.S. CONST. amend. V (emphasis added).

43. *Id.* at 248.

post facto Law *shall be passed*."[44] But the very next section of the Constitution includes a clause identical in subject matter but different in *subject*: "No *State* shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ."[45] This clause, unlike the Section 9 version, is written in the *active* voice, and it has a clear subject: "State." Marshall reasoned that the passive-voice version of this clause must not restrict states, because otherwise the active, "No State shall" version would be superfluous.[46] Thus, Article I, Section 9, "however comprehensive its language, contains no restriction on state legislation."[47]

The next step was to generalize the principle. Chief Justice Marshall had already adopted a presumption of *semantic* consistency years before in *McCulloch v. Maryland*.[48] But in *Barron*, Marshall adopted an equally important presumption of *grammatical* consistency:

> If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the state; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.
>
> We search in vain for that reason.[49]

So Marshall's analysis of Article I, Section 9, could be applied throughout the document—even to provisions ratified after the original Constitution. He thus derived an essential principle of constitutional interpretation, a partial answer to the *by whom* question: "limitations on power, if expressed in general terms"—the passive voice—"are naturally, and . . . necessarily applicable to the government created by [the Constitution itself]"—that is, *to the federal government, not to the states*.[50]

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44. U.S. CONST. art. I, § 9, cl. 3 (emphasis added).

45. *Id.* art. I, § 10, cl. 1 (emphasis added).

46. *See Barron*, 32 U.S. (7 Pet.) at 248-49.

47. *Id.* at 248.

48. *See* 17 U.S. (4 Wheat.) 316, 414-15 (1819); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 755-58 (1999).

49. *Barron*, 32 U.S. (7 Pet.) at 249.

50. *Id.* at 247. One special set of clauses, which might be called "interpretive clauses," constitutes an important exception to the rule. There are at least two such clauses. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not *be construed* to deny or disparage others retained by the people." U.S. CONST. amend. IX (emphasis added). And the Eleventh Amendment provides: "The Judicial power of the United States shall not *be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI (emphasis added); *see* Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL'Y 475, 480 (2009) ("These two amendments are rules of construction, rules of interpretation; here the Constitution is giving explicit instruction regarding the proper methods for its own interpretation."). These clauses give their interpretive instructions in the passive voice, raising the question *construed by whom?* But because these are instructions for the interpretation of the Constitution, the logic

The point is a structural one as well as a grammatical one; as always, constitutional structure and constitutional grammar are mutually reinforcing. Indeed, Alexander Hamilton had made the same point years before, both structurally and grammatically, by all-caps double entendre: "The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer."[51] The federal *government* is the object of the implied preposition; the federal *structure* is the object of the Constitution.

This analysis answered the Takings Clause question at issue in *Barron*, because the Takings Clause, like Article I, Section 9, is written in the passive voice. And the same logic applied equally to the rest of the Bill of Rights, almost all of which is likewise written in the passive voice. Thus, the Bill of Rights binds only the federal government, not the states.

And Marshall's converse point was equally important. Article I, Section 10, unlike Section 9, is written in the active voice, and the emphatic first words of each clause are "No *State* shall."[52] As Marshall noted, "the restrictions contained in [Article I, Section 10,] are *in direct words . . . applied to the states*."[53] And here, too, Marshall's presumption of grammatical consistency allowed him to generalize the principle: "[I]n every inhibition intended to act on state power, words are employed which directly express that intent . . . ."[54] In other words, when the Constitution restricts the states, it does so expressly, usually with the words "No State shall." The subject of such clauses is the subject of Part III.

of *Barron* does not apply. The logic of *Barron* is that when the Constitution *limits power* in the passive voice, it is limiting the power of the government that it created, the federal government. But when the Constitution provides instructions for its own interpretation, a different logic applies, a logic driven by Article VI. The Supremacy Clause provides: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. And: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." *Id.* art. VI, cl. 3. If the Constitution—including the interpretive clauses of the Ninth and Eleventh Amendments—is the supreme law of the land, and state actors as well as federal actors are bound to support it and required to interpret it, then it must be that state actors as well as federal actors are obliged to obey those interpretive clauses, even though they are written in the passive voice. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 904 (2008); *cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2153 (2002) ("[S]ubstantive enactments and their corresponding interpretive methodology cannot be unmoored from one another. Thus, federal statutes must be read using federal methodology, and state statutes must be read using state methodology, regardless of whether the venue is state or federal court.").

51. THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 2, at 502.

52. U.S. CONST. art. I, § 10 (emphasis added).

53. *Barron*, 32 U.S. (7 Pet.) at 249 (emphasis added).

54. *Id.*

Most constitutional law casebooks give *Barron v. Baltimore* short shrift. And the leading federal courts casebook—which covers almost 2000 cases—does not mention *Barron* even once.[55] But even if the Fourteenth Amendment has diminished the practical effect of its holding, *Barron*'s lessons about constitutional structure and interpretive method remain vital.

In *Barron*, Chief Justice Marshall recognized what so many subsequent Justices and scholars have not: the *who* question cannot be skipped over. It is indeed, as Marshall insisted, "of great importance."[56] To answer it, Marshall employed a holistic textual approach, presuming logical, structural, and grammatical consistency throughout the document.

He thus developed some of the most basic canons of constitutional interpretation. And by applying those canons, he discovered and elaborated the crucial distinction between clauses that bind federal actors and clauses that bind state actors.

### B. *Beyond* Barron

But the vertical, federal/state dichotomy, the federalism dichotomy, is not a complete answer to the *who* question. Another dimension of the question is equally important. The other dimension of the *who* question is the horizontal, separation of powers dimension.

Do the federal clauses bind *all* branches of the federal government? Or are some of them limited to two branches, or one? Most such clauses are written in the passive voice, so they do not expressly specify a particular branch of the federal government. Do they necessarily bind all three?

Likewise, do the state clauses apply to all branches of state government? These clauses are written in the active voice, but the most important ones say only "No State shall,"[57] without specifying a particular branch. Again, the question remains: which branch or branches of state government are potential answers to the *who* question?

*The Subjects of the Constitution* demonstrated that judicial review of a legislative act is structurally different from judicial review of an executive act.[58] Judicial review of a legislative act is inherently "facial," whereas judicial review of an executive act is inherently "as-applied." This structural difference implies fundamental doctrinal differences, both jurisdictional and substantive. So, it is essential to know whether any given clause binds a legislature (federal

55. *See* FALLON ET AL., *supra* note 8, at xxix (table of cases).

56. *Barron*, 32 U.S at 247.

57. U.S. CONST. art. I, § 10, cls. 1-3; *id.* amend. XIV, § 1 ("*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)).

58. *See* Rosenkranz, *supra* note 3, at 1229.

or state), an executive (federal or state), a judiciary (federal or state), or some combination.

*Barron* does not answer this question, but it does point the way.

#### 1. *Federal subjects*

Some federal clauses are written in the active voice with an explicit subject, and so such clauses have only one possible answer to the *who* question. For example, Congress is the subject of the First Amendment: "Congress shall make no law . . . ."[59] But most federal clauses are not so easy; as *Barron v. Baltimore* teaches, many of them are written in the passive voice, raising the question *by whom?*

*Barron* answered part of this question by juxtaposing the active-voice Ex Post Facto Clause with the passive-voice Ex Post Facto Clause. It is possible to answer the rest of the question using the same technique. As Marshall demonstrated, the subjects of the active-voice clauses can help identify the implicit objects of the passive-voice clauses.

##### a. *The objects of Article I, Section 8*

Article I, Section 8, enumerates the powers of Congress. The section is written in the active voice, with a clear, single, distributed subject: "*The Congress* shall have Power . . . ." This simple textual fact dictates both the structure and the substance of judicial review under, for example, the Commerce Clause, as demonstrated in *The Subjects of the Constitution*.[60] But in light of Chief Justice Marshall's canon of grammatical consistency, Article I, Section 8, can also illuminate the rest of the Constitution. In particular, it is instructive to study the sorts of *verbs* that appear in Article I, Section 8, to see the sorts of *actions* that Congress is empowered to take. In other, passive-voice clauses, the nature of the predicate may imply the identity of the unwritten subject.

The Constitution vests "legislative Powers" in Congress,[61] and so most of the verbs in Article I, Section 8, signify things that can be done by making laws. Congress has the power "[t]o *regulate* Commerce,"[62] which it can exercise by making a law that constitutes such a regulation.[63] It has power "[t]o *establish* an uniform *Rule* of Naturalization, and uniform *Laws* on the subject of

59. U.S. CONST. amend. I; *see* Rosenkranz, *supra* note 3, at 1250-73.

60. *See* Rosenkranz, *supra* note 3, at 1273-81.

61. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

62. *Id.* art. I, § 8, cls. 1, 3 (emphasis added) ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

63. *See* Rosenkranz, *supra* note 3, at 1273-81.

Bankruptcies throughout the United States."[64] Establishing rules and laws is the essence of legislation. Congress has power to "*make Rules* concerning Captures on Land and Water,"[65] and "*make Rules* for the Government and Regulation of the land and naval Forces."[66] Again, for a legislature, making rules is accomplished by passing laws. Likewise, Congress has power "[t]o exercise exclusive Legislation" in the District of Columbia.[67] And most importantly, Congress has power "[t]o *make* all *Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[68]

Even the verbs in Article I, Section 8, that are not synonyms for "make law" are generally actions that are fully accomplished, formally, by the making of a law. For example, Congress has power "[t]o constitute Tribunals inferior to the supreme Court."[69] But this is not, fundamentally, a power to construct courthouses. The verb "to constitute" and the object "tribunals" combine to signify a legal rather than physical act—not building a courthouse but imbuing a court with jurisdiction.[70] Intratextual linkages confirm the point. In Article III, the same power is described as the power to "ordain and establish" lower courts.[71] These verbs, too, like the verb "to constitute," sound not in construction but in jurisdiction.[72] And the three of them—"ordain," "establish," "constitute"—of course bring to mind the Preamble: "We the People of the United States . . . do *ordain* and *establish* this *Constitution* . . . ."[73] Here, too, the action is essentially jurisdictional—something that is accomplished not by physical actions but by legal ones.[74]

64. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

65. *Id.* art. I, § 8, cl. 11 (emphasis added).

66. *Id.* art. I, § 8, cl. 14 (emphasis added).

67. *Id.* art. I, § 8, cl. 17.

68. *Id.* art. I, § 8, cl. 18 (emphasis added).

69. *Id.* art. I, § 8, cl. 9.

70. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850) ("Congress[,] having the power to establish the courts, must define their respective jurisdictions. . . . Courts created by statute can have no jurisdiction but such as the statute confers.").

71. U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

72. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) ("Take, for example, the power 'to *establish* post offices and post roads.' This power is executed by the single *act* of making the establishment." (emphasis added)).

73. U.S. CONST. pmbl. (emphasis added).

74. *See id.* art. VII; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5 (2005) ("These words did more than promise popular self-government. They also embodied and enacted it. Like the phrases 'I do' in an exchange of wedding vows and 'I accept' in a contract, the Preamble's words actually performed the very thing they described. Thus the Founders' 'Constitution' was not merely a text but a deed—a *constituting*. We the people *do* ordain."); *cf.* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 6 (2d ed. 1975) ("[T]o

The text of the First Amendment underscores the point. In a document remarkable for its brevity, the First Amendment foregoes an apparent shortcut. It does not say: "Congress shall not *establish* a religion, or *prohibit* the free exercise thereof, or *abridge* the freedom of speech . . . ." Instead, it converts these verbs to participles, modifying a *legislative object*: "Congress shall make no *law* establishing . . . or prohibiting . . . or abridging." And this formulation is, of course, a deliberate inversion of the Necessary and Proper Clause[75]: "*Congress shall* have power . . . [t]o *make* all *Laws* which shall be necessary and proper . . . ."[76] In short, most everything that Congress is empowered to do, or forbidden to do, is in the nature of making a law.[77]

This is as one would expect. Congress is vested with "legislative Powers."[78] And in Article I, Section 8, the answer to the *who* question is clear; it is written in the active voice with an explicit subject: Congress.[79] Thus, predicates explicitly associated with Congress are primarily[80] synonyms of "make law."

### b. *The objects of Article I, Section 9*

With this point in mind, reconsider the passive-voice clauses that Chief Justice Marshall confronted in *Barron*. At first glance, it might have been tempting to say that such clauses bind everyone—that these are rights against the world. But, of course, they are not. To begin with, even though they do not

utter the sentence (in, of course, the appropriate circumstances) is not to *describe* my doing of what I should be said in so uttering to be doing or to state that I am doing it: it is to do it. . . . What are we to call a sentence or an utterance of this type? I propose to call it a *performative sentence* or a performative utterance, or, for short, a 'performative.'" (footnotes omitted)).

75. *See* AMAR, *supra* note 5, at 39; Rosenkranz, *supra* note 3, at 1288.

76. U.S. CONST. art. I, § 8, cls. 1, 18 (emphasis added).

77. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 412-13 ("Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the Convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.").

78. U.S. CONST. art. I, § 1.

79. *See* Rosenkranz, *supra* note 3, at 1273-81.

80. A handful of clauses in Article I, Section 8, have verbs that may sound more like physical actions than legal ones. *See, e.g.*, U.S. CONST. art. I, § 8, cls. 1, 5 ("The Congress shall have Power . . . [t]o *coin* Money . . . ." (emphasis added)); *id.* art. I, § 8, cls. 1, 10 ("The Congress shall have Power . . . [t]o define and *punish* Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ." (emphasis added)). But even these clauses must be read through the lens of the Necessary and Proper Clause, which makes clear that Congress's power is exclusively legislative—the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" these more active-sounding powers. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 413-14.

say so explicitly, these clauses bind only *government* actors, not private actors.[81] Moreover, they do not bind *all* government actors; they apply only to the *federal* government, as Marshall deduced in *Barron*.[82] But if textual and structural logic limits passive-voice clauses to *government* actors, and limits them further to *federal* government actors, then perhaps textual and structural logic limits them further still—to *particular* federal actors: legislative, executive, or judicial.

Indeed, applying Marshall's canon of grammatical consistency, it may be presumed that the same sorts of "legislative" predicates of Article I, Section 8, will be associated with Congress throughout the Constitution. So, even in clauses written in the passive voice, the nature of the predicate may sometimes signify that Congress is the implied object of the clause.

To see the point in practice, it is best to begin where Marshall began, with the Ex Post Facto Clause of Article I, Section 9: "No Bill of Attainder or ex post facto Law shall be passed."[83] This clause is written in the passive voice, inviting the question *passed by whom?* As Marshall deduced, the answer must be federal, not state. But which branch of the federal government is bound by the clause?

In the passive voice, the subject does not answer the *who* question, but here, of course, it provides an unmistakable clue. "No *Bill* . . . or . . . *Law* shall be passed." The Constitution does not give the President the power to pass bills or laws.[84] The Constitution does not give the courts power to pass bills or laws.[85] "All *legislative* Powers . . . granted [by the Constitution are] vested in a *Congress* . . . ."[86] It is Congress that has power "to *make* all *Laws* which shall

81. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments."); BeVier & Harrison, *supra* note 12, at 1769 ("[T]he Constitution includes hardly any rules that apply directly to private people. . . . The standard way to express the foregoing observation is to say that constitutional rules apply only to state action and not to private action."); Tribe, *supra* note 12, at 219 (noting "the principle that our Constitution's provisions, even when they don't say so expressly, limit only some appropriate level of *government*" (footnote omitted)).

82. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833); *supra* Part I.A.

83. U.S. CONST. art. I, § 9, cl. 3.

84. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States . . . .'" (omission in original)); *cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[The Constitution] permits no delegation of [legislative] powers.").

85. *Cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts lack power to create federal common law crimes). There was no need for the Ex Post Facto Clause to extend to federal courts, because federal courts lack the power to create crimes at all.

86. U.S. CONST. art. I, § 1 (emphasis added).

be necessary and proper."[87] And, in the clearest intratextual echo of the Ex Post Facto Clause, Article I, Section 7, provides that "[e]very *Bill . . . pass[es]* the House of Representatives and the Senate . . . before it becomes a *law*."[88] Thus, despite the passive voice, there is only one possible answer to this *who* question: only Congress can violate this Ex Post Facto Clause.

History confirms the point. Blackstone explicitly defined an ex post facto violation as an inherently legislative act.[89] And, indeed, an early draft of the Ex Post Facto Clause was written in the active voice: "*The legislature* shall pass no bill of attainder, nor any *ex post facto* laws."[90] (This draft anticipated the active-voice formulation of the First Amendment: "Congress shall make no law . . . ."[91]) The Committee of Style flipped the Ex Post Facto Clause and adopted the passive voice without explanation,[92] but it retained the telltale legislative language: "pass," "bill," and "law." The *Federalist Papers* confirm the point.[93] And the Court held as much just a few years later.[94]

So, there are generally six possible answers to the *who* question. But this clause—despite its passive voice—binds only one. Text and history show that the Ex Post Facto Clause (like the First Amendment) binds Congress and Congress alone.[95]

87. *Id.* art. I, § 8, cl. 18 (emphasis added).

88. *Id.* art. I, § 7, cl. 2 (emphasis added).

89. 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (defining an ex post facto enactment as, "when after an action (indifferent in itself) is committed, the *legislator* then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it" (emphasis added)).

90. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) (1836) [hereinafter STATE CONVENTION DEBATES] (first emphasis added).

91. U.S. CONST. amend. I.

92. *Compare* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 565, 571 (Max Farrand ed., rev. ed. 1966) (text submitted to the Committee of Style: "[t]he Legislature shall pass no bill of attainder nor any ex post facto laws"), *with id.* at 590, 596 (text returned by the Committee: "[n]o bill of attainder shall be passed, nor any ex post facto law").

93. *See* THE FEDERALIST NO. 44 (James Madison), *supra* note 2, at 282 ("Bills of attainder [and] *ex post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound *legislation*." (second emphasis added)); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 2, at 466 ("By a limited Constitution, I understand one which contains certain specified *exceptions to the legislative authority*; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." (first emphasis added)).

94. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798) ("The Constitution of the United States, article 1, section 9, prohibits the *Legislature* of the United States from passing any *ex post facto* law." (emphasis altered)).

95. Nevertheless, in this most simple case, it is striking that confusion about the *who* question persists. As recently as 2008, the Second Circuit gave the wrong answer, holding that a district court had violated the Ex Post Facto Clause. *See* United States v. Marcus, 538 F.3d 97, 98, 102 (2d Cir. 2008). So, just last Term, the Supreme Court was obliged to reaf-

It might be tempting to assume that all the passive-voice clauses likewise apply only to Congress. Indeed, that assumption has a long pedigree. Writing just a few years after *Barron*, Chief Justice Taney concluded that all of Article I, including Section 9—which is written entirely in the passive voice—"is devoted to the *legislative* department of the United States, and has not the slightest reference to the *executive* department."[96]

Here, too, the *who* question proved "of great importance."[97] Indeed, it was the linchpin of one of the great constitutional questions of Taney's era—and our own. One of the passive-voice clauses in Article I, Section 9, provides: "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."[98] The key question, of course, is: *suspended by whom?* President Lincoln had purported to suspend habeas earlier that year,[99] but Taney concluded (for his circuit court) that *Congress*, not the President, has the emergency power to suspend the writ.[100] And 150 years later, this textual point convinced Justice Scalia of the same thing.[101]

Chief Justice Taney's analysis of Article I, Section 9, is now enshrined in conventional wisdom. Constitutional law treatises consistently describe Article I, Section 9, as limiting *congressional* power.[102] And in its constitutional guide

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firm that "[t]he *Ex Post Facto* Clause is a limitation upon the powers of the *Legislature*." United States v. Marcus, 130 S. Ct. 2159, 2165 (2010) (second emphasis added) (quoting Marks v. United States, 430 U.S. 188, 191 (1977)); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) (Scalia, J., concurring) ("The Takings Clause (unlike, for instance, the Ex Post Facto Clauses) is not addressed to the action of a specific branch or branches." (citations omitted)); GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 11 (2009) ("Article I, Section 9 . . . prohibits the *enactment* of bills of attainder or ex post facto laws . . . ." (emphasis added)); 2 RONALD E. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.9(b)(i), at 867 (4th ed. 2007) ("The clause[] limit[s] *Congress* . . . when enacting penal laws that have a retrospective effect." (emphasis added)).

96. *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (emphasis added).

97. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

98. U.S. CONST. art. I, § 9, cl. 2.

99. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 998-99 (2008) (citing Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861)).

100. *See Ex parte Merryman*, 17 F. Cas. at 148-49.

101. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice *and the Clause's placement in Article I*." (emphasis added)).

102. *See, e.g.*, BERNARD D. REAMS, JR. & STUART D. YOAK, THE CONSTITUTION OF THE UNITED STATES: A GUIDE AND BIBLIOGRAPHY TO CURRENT SCHOLARLY RESEARCH 10 (1987) (titling Article I, Section 9, bibliography, "Powers Denied to Congress"); CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 2 (2001) ("[Article I,] § 9: Restricts powers of Congress"); JOHN R. VILE, A COMPANION TO THE

for congressmen, the Congressional Research Service calls Article I, Section 9, "Powers Denied to *Congress*."[103]

But these generalizations are wrong. Article I, Section 9, is *not* exclusively "devoted to the legislative department of the United States."[104] True, one of its passive-voice clauses does give "Congress" as the answer to the *by whom* question: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited *by the Congress* . . . ."[105] And, as discussed above, Congress is also the object of the Ex Post Facto Clause. But another clause has a different, more general object: "No Title of Nobility shall be granted *by the United States* . . . ."[106] In Great Britain, it was the King and not Parliament who granted titles of nobility,[107] so surely this clause forbids the *President*, as well as Congress, from granting such titles.

And more to the point, at least one clause in Article I, Section 9, *does not bind Congress at all*: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[108] This clause, like the others in the section, is written in the passive voice, raising the question *drawn by whom?* But in this case, the answer *cannot* be Congress. Congress's appropriations power[109] is simply *recognized* by this clause. It is not a restriction on the power of Congress to appropriate; rather, it forbids the *President* from withdrawing money *without* an appropriation. Indeed, the Court eventually realized as much, holding that the Appropriations Clause is "a restriction upon the disbursing authority of the *Executive* department."[110]

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UNITED STATES CONSTITUTION AND ITS AMENDMENTS 53 (2d ed. 1997) ("Article I, Section 9—Limits on Congressional Powers").

103. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 362 (Johnny H. Killian et al. eds., Supp. 2004) (emphasis added).

104. *Ex parte Merryman*, 17 F. Cas. at 148.

105. U.S. CONST. art. I, § 9, cl. 1 (emphasis added).

106. *Id.* art. I, § 9, cl. 8 (emphasis added). Presumably, the Title of Nobility Clause specifies "by the United States" in order to distinguish the possibility, addressed later in the same clause, that a title might be granted, with the consent of Congress, by a "King, Prince, or foreign State." *Id.*

107. *See* THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 2, at 421 ("The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure . . . ."); Noel Cox, *The British Peerage*, 17 N.Z.U.L. REV. 379, 392 (1997) ("While the legal definition of a peer has varied over the centuries, English law on the issue has been reasonably settled for the past 500 years. . . . Peers are created by the Queen on the advice of her British Ministers.").

108. U.S. CONST. art. I, § 9, cl. 7.

109. *See id.* art. I, § 8, cl. 1.

110. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (emphasis added); *see also* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 874 (1994) ("[T]here are two clauses in [Article I,] section 9 that restrict the President's powers rather than those of Congress . . . .").

So Chief Justice Taney was wrong to say that Article I, Section 9, "has not the slightest reference to the executive department."[111] To the contrary, the Appropriations Clause is addressed exclusively to that department. And while the Suspension Clause might indeed be directed at Congress, its passive-voice formulation and its location in Article I cannot suffice to prove the point.[112] The truth is that different clauses of Article I, Section 9, bind different federal actors. It requires sensitive textual and structural analysis to determine which ones apply to whom.

And the same sort of analysis will be required for the Bill of Rights. In *Barron*, Chief Justice Marshall presumed that the passive voice should be interpreted consistently throughout the Constitution. But if different passive-voice clauses bind different federal officials in Article I, Section 9, it follows that different clauses may bind different federal officials in the Bill of Rights too. One cannot simply conclude, as Judge Bybee did, that "the Framers wrote the amendments in passive voice to ensure that they applied to the executive and judicial departments as well [as to the legislature]."[113] In the Bill of Rights, as in Article I, Section 9, the answers to the *by whom* questions may vary from clause to clause. And clause by clause, these answers will properly dictate both the structure and the substance of judicial review.[114]

But there is a deeper theoretical point here, too. If some clauses of the Bill of Rights bind a particular branch or two of the federal government, rather than all three, then the Bill of Rights is, to that extent, about *assigning* and *channeling* federal power. It is, in other words, as much about structure as it is about rights.[115] The Bill of Rights is centrally concerned with allocation and separation of powers—which is to say that it is centrally concerned with answering *who* questions. And it is impossible to understand this structural aspect of the Bill of Rights without identifying its *objects*. Illuminating this aspect of the Bill of Rights will be the object of Part II. And tracing its implications for incorporation will be the object of Part III.

111. *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

112. *See* Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 698 (2002) ("Architextural arguments from blueprint location must be considered alongside, and should ideally cohere with, more general arguments of text, history, and structure. The location of the suspension clause in Article I need not, by itself, mean that the executive power fails to encompass suspension authority on the facts Lincoln faced.").

113. Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 323 (2000).

114. *See* Rosenkranz, *supra* note 3, at 1227-50.

115. *See generally* AMAR, *supra* note 5, at xii ("Individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.").

2. *State subjects*

Just as Chief Justice Taney was too quick to generalize about the federal clauses, Chief Justice Marshall himself was too quick to generalize about the state clauses.

Marshall correctly observed that "the restrictions contained in [Article I, Section 10,] are in direct words . . . applied to the states."[116] This section is written in the active voice, and the emphatic first words of each clause are "No State shall."[117] As Marshall explained: "[I]n every inhibition intended to act on state power, words are employed which directly express that intent . . . ."[118] So, these clauses do not bind the federal government, and the federal government cannot violate them.

Yet here, too, the question remains: do these clauses apply to all branches of state government? Just as the passive-voice formulation of the federal clauses makes it difficult to identify the relevant branch of the federal government, the "No State shall" formulation makes it difficult to identify the relevant branch of state government. It may be tempting to say that all of these clauses apply to all three branches of state government, because they say only "No State shall."[119] But textual analysis does not end there. Structural logic might demonstrate that some such clauses are limited to only one or two branches of state government.

To see the point, begin where Chief Justice Marshall began, with the two Ex Post Facto Clauses. As he recognized, this pair of clauses is special. He used the juxtaposition of the two Ex Post Facto Clauses to conclude that passive-voice clauses do not bind the states. But there is much more to learn from the comparison.

Indeed, the very fact of these twin clauses is striking. The Constitution is remarkably brief, and the exigencies of brevity would have suggested combining these twin clauses. In the active voice, the Constitution might have said: "Neither Congress nor any state legislature shall pass any Bill of Attainder or ex post facto Law." Or, in the passive voice, it might have said: "No bill of attainder or ex post facto law shall be passed by the United States or any of them." But the exigency of brevity was trumped by the imperative of structural clarity—clarity of subject and object. Article I, Section 9, binds the federal government and not the states; Article I, Section 10, binds the states and not the federal government; and no single clause of the original Constitution—other than, of course, the Oath Clause[120]—binds both at once. This structural prin-

116. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833).

117. U.S. CONST. art. I, § 10, cls. 1-3.

118. *Barron*, 32 U.S. (7 Pet.) at 249.

119. U.S. CONST. art. I, § 10, cls. 1-3.

120. *Id.* art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of

ciple, a principle of document structure and of institutional structure,[121] was so important that it justified some repetition—some pairs of clauses that are identical in subject matter, yet different in *subject*.

As discussed, the first Ex Post Facto Clause is a restriction on Congress. Now consider the second Ex Post Facto Clause: "[N]o State shall . . . pass any Bill of Attainder [or] ex post facto Law . . . ."[122] This clause is written in the active voice, and it has a clear subject: "State." But the same crucial questions remain. Does this clause apply to *all branches* of state government? Governors? State legislatures? State courts?

Certainly, the second Ex Post Facto Clause applies to state *legislatures*, just as the first Ex Post Facto Clause applies to Congress. The verb and the direct objects all point in this direction: "*pass* any *Bill* . . . or . . . *Law*." As a general matter, Governors do not pass bills or laws, and state judges do not pass bills or laws. So the Court was (mostly[123]) right to say that "the text of the [second Ex Post Facto] Clause makes clear [that] it is a limitation upon the powers of the Legislature."[124] And, as usual, this answer to the *who* question should dictate the proper structure ("facial") and substance (*lex ipsa loquitur*)[125] of judicial review.[126]

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the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

121. *See generally* Amar, *supra* note 112.

122. U.S. CONST. art. I, § 10, cl. 1.

123. *But see infra* Part III.B.1.

124. Rogers v. Tennessee, 532 U.S. 451, 456 (2001) (quoting Marks v. United States, 430 U.S. 188, 191 (1977)) (internal quotation marks omitted).

125. *See* Rosenkranz, *supra* note 3, at 1235.

126. However, two years later, the Court reverted to muddled euphemism: "[A] law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." Stogner v. California, 539 U.S. 607, 632-33 (2003). Note how obscuring the *who* leads to confusion about the *when*, which in turn leads to erroneous substantive doctrine. A "law" cannot violate the Ex Post Facto Clause or any other clause of the Constitution. The Constitution forbids *actions*, and binds government *actors*. The Court should not say: "A *law* . . . violates the ex post facto clause when . . . ." The holding should begin: "A *state legislature* violates the Ex Post Facto Clause when . . . ."

The difference is substantive as well as semantic. Once one has the subject right, it is clear that the Court's predicate is wrong. Once one answers the *who* question, the answer to the *when* question follows. One cannot say, following the Court: "[A state legislature] violates the Ex Post Facto Clause when [a law that it passed] is *applied* to revive a previously time-barred prosecution." At *that* moment, the moment of *application*, the state legislature may be in recess. Years may have passed since the legislature passed the law. The legislators who voted for it may have retired, or died. It makes no sense to say that *they* violated the Constitution at *that* moment, from their beds or their graves. And it makes no sense to say the *current* legislature violated the Constitution at that moment; after all, the current legislators may have had nothing to do with *either* the enactment of the law (before their time) *or* the application of the law (not their department).

The Ex Post Facto Clause is not violated "when [a law] is *applied* to" a particular set of facts. The Ex Post Facto Clause forbids *passing* certain laws. If a legislature violates this

It might be tempting to conclude that all the "No State shall" clauses likewise target state legislatures. Indeed, Chief Justice Marshall himself thought so. He declared that Article I, Section 10, "enumerate[s] [the limits] which were to operate on the state *legislatures*."[127]

But just as Taney was wrong to generalize about Article I, Section 9, Marshall was wrong to generalize about Article I, Section 10. Consider, for example, the first clause of that section: "No State shall enter into any Treaty . . . ."[128] It is implausible that this clause is only or primarily a restriction on state legislatures. Entering into treaties has always been a paradigmatic executive function—entrusted to the King of England,[129] entrusted to the President of the United States,[130] and apparently entrusted to at least some state executives before 1789.[131] Surely, this clause paradigmatically forbids state *governors* from entering into treaties. Likewise, Article I, Section 10, provides that "[n]o State shall . . . grant any Title of Nobility,"[132] and granting such titles was always an *executive* prerogative.[133] So Chief Justice Marshall's dictum was overbroad at best: Article I, Section 10, does not (merely) "enumerate [the limits] which were to operate on the state legislatures."[134] The answer to the *who* question is more complicated than that, and it varies from clause to clause.

The same is true of the Fourteenth Amendment. Again, Marshall knew that the passive voice of the Bill of Rights did not bind the states, because "[h]ad the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention."[135] But a generation later, John Bingham did indeed "imitate[] the framers of the original constitution," draft-

provision, then it violates the provision by passing such a law, *at the moment of passage*. Thus, a challenge is inherently "facial," and cannot turn on any subsequent facts. The *who* (legislature) dictates the *when* (moment of enactment), which in turn dictates the structure of judicial review (facial) and thus the nature of the doctrinal test (*lex ipsa loquitur*). A state legislature violates the Ex Post Facto Clause when it passes a law that is, in some sense, retroactive, *on its face*. *See* Rosenkranz, *supra* note 3, at 1235-38.

127. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248 (1833) (emphasis added).

128. U.S. CONST. art. I, § 10, cl. 1.

129. *See* 1 BLACKSTONE, *supra* note 89, at *249 (stating that it was "the king's prerogative to make treaties"); *id.* at *243 ("[T]he king . . . may make what treaties . . . he pleases . . . ."); *id.* at *244 ("[T]he king may make a treaty."); THE FEDERALIST NO. 47 (James Madison), *supra* note 2, at 302 ("[In Great Britain, the King] alone has the prerogative of making treaties with foreign sovereigns . . . .").

130. U.S. CONST. art. II, § 2, cls. 1-2 ("The President . . . shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . .").

131. *See, e.g.*, S.C. CONST. of 1776, art. XXVI ("That the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council.").

132. U.S. CONST. art. I, § 10, cl. 1.

133. *See supra* note 107.

134. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248 (1833).

135. *Id.* at 250.

ing the Fourteenth Amendment with Marshall's interpretive canon firmly in mind. When Bingham wanted to restrict both the federal government and the states in a single clause, he knew that he had to do so actively and expressly: "*[N]either the United States nor any State* shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave . . . ."[136] And when Bingham wanted to bind only the states, he carefully repeated the explicit, active-voice formulation of Article I, Section 10: "No State shall."[137]

Thus, in many of the most important clauses—including the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment[138]—states are the subjects of the Constitution.[139] The crucial inquiry here will be: *which branch or branches of state government are bound by these clauses?* And, as in Article I, Section 10, the answer may prove to vary from clause to clause—or, in this case, from privilege to immunity. As Akhil Amar has shown, the Bill of Rights underwent "refinement" when it was incorporated against the states.[140] But Amar did not focus upon the most important refinement of all—refinement of the *who*, refinement of the *subjects*. This refinement will be a central theme of Part III.

In short, *Barron v. Baltimore* left many fundamental questions unsettled, but its basic approach was brilliant. As Marshall realized, different constitutional clauses bind different governmental actors. These differences inhere in constitutional text and structure; they are not accidental; and they are "of great importance."[141] If one can tell who is bound by the clause at issue, then one can know who may violate it. And the answer, in turn, dictates both the structure and the substance of judicial review.

The pages that follow will apply Chief Justice Marshall's interpretive approach to the questions he left unanswered. As Marshall demonstrated, the *who* of judicial review may be found in the subjects and objects of the Constitution.

136. U.S. CONST. amend. XIV, § 4 (emphasis added).

137. *Id.* amend. XIV, § 1; *see* CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871); AMAR, *supra* note 5, at 163-65.

138. *See* U.S. CONST. amend. XIV, § 1 ("*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)).

139. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) ("We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the *states* from maintaining racially segregated public schools. The legal problem *in the District of Columbia* is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment *which applies only to the states*." (emphasis added) (footnote omitted)).

140. *See generally* AMAR, *supra* note 5.

141. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

## II. THE OBJECTS OF THE BILL OF RIGHTS

### A. *The Subject of the First Amendment*

*The Subjects of the Constitution* demonstrated that many jurisdictional and substantive riddles of First Amendment doctrine may be solved simply by asking the right first question: *who?* Since Congress is the subject of the First Amendment, Congress must be the answer to the *who* question.[142] The answer to the *when* question must be *when Congress makes a law*.[143] Thus, First Amendment challenges must be "facial," and First Amendment doctrines must be *lex ipsa loquitur*.[144]

These simple points explain anomalous jurisdictional doctrines like overbreadth under the Speech Clause[145] and taxpayer standing under the Establishment Clause.[146] They also explain controversial substantive doctrines like the rule of *Employment Division v. Smith*.[147] The analysis also harmonizes the six clauses of the First Amendment and identifies the doctrinal parallels that should derive from the amendment's hub, its shared subject.[148]

All this analysis will not be repeated here. But there is one crucial point to bear in mind as one considers the rest of the Bill of Rights. *The First Amendment is exceptional.* It is written in the active voice, with a single, identifiable subject. By contrast, the rest of the Bill of Rights is written in the passive voice. The First Amendment announces the answer to the *who* question with its first word: "Congress." By contrast, every other clause in the Bill of Rights invites the question *by whom?*

This Part will answer that question for several representative clauses of the Bill of Rights. It will show that here, too, the answer to the *who* question dictates both the structure and the substance of judicial review. And, in the process, it will also reveal an overlooked structural theme of the Bill of Rights.

### B. *The Object of the Third Amendment*

To determine whether the Bill of Rights applies to the states, Chief Justice Marshall found a Rosetta stone in an unlikely place: at the other end of the document, in Article I. As discussed above,[149] his Rosetta stone demonstrated

142. Rosenkranz, *supra* note 3, at 1253.
143. *Id.* at 1255.
144. *Id.*
145. *See id.* at 1250-57.
146. *See id.* at 1257-63.
147. 494 U.S. 872 (1990); *see* Rosenkranz, *supra* note 3, at 1263-68.
148. *See* Rosenkranz, *supra* note 3, at 1268-73.
149. *See supra* Part I.A.

that clauses written in the passive voice, like most of the Bill of Rights, apply to the federal government, not the states.

But Marshall did not successfully determine which *branches* of the federal government are subject to those clauses. To determine that, a different Rosetta stone will be necessary, one located in an equally unlikely place. The Rosetta stone of the Bill of Rights is its most obscure provision: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[150]

There has been precious little judicial scrutiny of Third Amendment claims, even in lower courts.[151] The Supreme Court has never reviewed such a case. To the extent that the Third Amendment has a doctrinal claim to fame, its most prominent citation was in the ethereal "penumbras and emanations" passage of *Griswold v. Connecticut*.[152] Likewise, scholars have generally found little use for the Third Amendment, other than as a synecdoche of privacy.[153]

It is doubtful that the Third Amendment illuminates penumbras and emanations of the Bill of Rights. But the Third Amendment can reveal the *structure*

150. U.S. CONST. amend. III.

151. *See* Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1043 (10th Cir. 2001) ("Judicial interpretation of the Third Amendment is nearly nonexistent."). Apparently, only two circuit court cases have analyzed the Third Amendment in depth. *See id.* at 1042-44 (rejecting claim of property owners that military flights over their property would constitute an unconsented military occupation in violation of the Third Amendment, on the ground that property owners do not have a sufficient property interest in airspace to prevent aircraft flights); Engblom v. Carey, 677 F.2d 957, 961-64 (2d Cir. 1982) (sustaining, against summary judgment motion, a Third Amendment claim of striking prison workers displaced from their prison-provided residences by National Guardsmen, on the ground that an issue of material fact existed regarding the prison workers' tenancy interests in the residences).

152. *See* 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy." (citation omitted)).

153. *See, e.g.*, AMAR, *supra* note 5, at 62 ("In today's world, lawyers, scholars, and judges are wont to link the Third Amendment to the Fourth rather than to the Second, despite the fact that no state constitution or convention paired antiquartering and antisearch clauses. A computer check of Supreme Court citations to the Third Amendment since *Youngstown* reveals seven attempts to associate the amendment with privacy and only one (dissenting) invocation of the amendment in a context involving alleged military overreaching."); Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 209 (1991) ("[N]o one cares about the Third Amendment; no one even has any interest in perpetuating its memory. For the record, many of my colleagues, after learning that I was to speak on the Third Amendment, sheepishly asked me what the Third Amendment is."); Josh Dugan, Note, *When Is a Search Not a Search? When It's a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555, 557 (2009) (surveying scholarly works on the Third Amendment and finding the arguments "can be divided roughly into two categories: those that accept the basic assumption that quartering was conceived of as a very narrow, substantive protection but that seek to broaden its applications by examining the surrounding clauses in the Third Amendment, and those that present the Amendment as having only symbolic value" (footnote omitted)).

of the Bill of Rights, and its *objects*. The answers follow from asking the right first question: *who can violate the Third Amendment?*

The Third Amendment is written in the passive voice ("be quartered"), and so it invites the question *quartered by whom?* The beginning of the answer may be found in the holding of *Barron v. Baltimore*. The answer must be federal actors, rather than state actors. But the question remains: *which branch or branches of the federal government?*

*Barron* itself does not answer this question, but the lessons of *Barron* point the way. When confronted with a passive-voice clause in the Bill of Rights, Chief Justice Marshall looked to analogous passive-voice clauses in Article I, Section 9. Since that section applies to the federal government, the Bill of Rights must do the same. Now, to answer the more precise question—*which branch of the federal government?*—the key may again be found in Article I, Section 9.

The Third Amendment is the Rosetta stone of the Bill of Rights because it has a particularly revealing analogue in Article I, Section 9. The Third Amendment forbids peacetime quartering without consent and wartime quartering "but in a manner to be prescribed by law."[154] As a matter of grammar and structure, the unmistakable echo is the Appropriations Clause: "No Money shall be drawn from the Treasury, *but in Consequence of Appropriations made by Law . . . .*"[155]

As discussed above, this is the clause that proves Chief Justice Taney wrong about Article I, Section 9. Taney declared that Article I, Section 9, concerns only Congress and not the President, but the Court has held, to the contrary, that the Appropriations Clause does not restrict *Congress* in the *making* of laws; rather, it restricts what the *President* may do in the *absence* of a law.[156] And the Third Amendment is a restriction of exactly the same sort. The Third Amendment, like the Appropriations Clause, cannot be violated by making a law; the Third Amendment can only be violated by *quartering a soldier*. Congress makes laws; the President quarters soldiers. Thus, *the Third Amendment is a restriction on the President*. He is the answer to the *who* question, and only he can violate the Third Amendment.

To put the analogy in structural terms, the Appropriations Clause cannot be a restriction on Congress, because it expressly contemplates congressional appropriations. Likewise, the Third Amendment cannot be a restriction on Congress, because it expressly contemplates that Congress may authorize quartering.

154. U.S. CONST. amend. III.

155. *Id.* art. I, § 9, cl. 7 (emphasis added).

156. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) ("[The Appropriations Clause] was intended as a restriction upon the disbursing authority of the Executive department . . . .").

The nature of the predicate confirms the point. Part I.B.1.a demonstrated that when Congress is the subject, the predicates are generally "legislative" predicates—"make law," synonyms for "make law," or jurisdictional actions that can be fully accomplished by the making of a law. This is true of provisions that empower Congress, like Article I, Section 8 ("Congress shall have Power . . . [t]o *make* all *Laws* which shall be necessary and proper"[157]), and it is true of provisions that restrict Congress, like the First Amendment ("Congress shall *make* no *law*"[158]). Part I.B.1.b confirms that the same principle applies in the passive voice. The Ex Post Facto Clause, for example, is written in the passive voice, with no explicit answer to the *who* question. But the legislative nature of the subjects and verb answers the question: "No *Bill* of Attainder or ex post facto *Law* shall be *passed*."[159] This provision, like the First Amendment, is a restriction on Congress.

The Third Amendment reads quite differently. It does not follow the active-voice model of the First Amendment; it does not read: "*Congress shall make no law* quartering soldiers in any house in time of peace." And it does not follow the passive-voice, legislative-predicate model of the Ex Post Facto Clause; it does not read: "*No law* quartering soldiers in any house in time of peace *shall be passed*." The First Amendment is violated by making a law. The Ex Post Facto Clause is violated by passing a law. By contrast, the Third Amendment does not forbid making a law; it forbids *quartering a soldier*. The nature of the predicate strongly suggests the identity of the implied object. It is the President who quarters soldiers, and so he is the object of the Third Amendment.

Another way to see the point is to identify the constitutional *power* to which the Third Amendment corresponds. Per *Barron v. Baltimore*, the Bill of Rights restricts federal power—power that is, by definition, vested and defined elsewhere in the document.[160] So, to determine who is restricted by any given provision of the Bill of Rights, start by asking *who has been granted the corresponding power in the first place*. Here, the answer is clear. Article II specifies: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."[161] The power to move troops from place to place is the core prerogative of a commander in chief.[162] Thus the Third

157. U.S. CONST. art. I, § 8, cls. 1, 18 (emphasis added).

158. *Id.* amend. I (emphasis added).

159. *Id.* art. I, § 9, cl. 3 (emphasis added).

160. Barron v. Baltimore, 224 U.S. (7 Pet.) 243, 247 (1833) (the passive-voice limitations on power "are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes").

161. U.S. CONST. art. II, § 2, cl. 1.

162. *See, e.g.*, Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces

Amendment restriction corresponds to the Commander in Chief power. Absent the Third Amendment, the power to quarter soldiers might have been implicit in this power. But the Third Amendment cuts across the Commander in Chief Clause, limiting what the President may do. The President is the subject of the Commander in Chief Clause, and thus the object of the Third Amendment. The Third Amendment is a restriction on federal *executive* action.

Moreover, it is not an *absolute* restriction on executive action; it is a *conditional* restriction. The Third Amendment establishes a complex, two-pronged legislative check on executive quartering. The President *can* quarter soldiers in American houses without consent, but only if Congress (1) declares war, and (2) provides, by law, for the manner of quartering.

This careful division of military authority maps onto the original grants of military authority earlier in the Constitution. The President is the Commander in Chief,[163] but Congress has power "[t]o declare War"[164] and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[165] Separation of these military powers was a central feature of the original Constitution and a conscious departure from the British system.[166] The Third Amendment is a specific instantiation of this general structural principle.

So, focusing on the *who* question does not merely identify the object of the Third Amendment (the President) and thus illuminate the proper structure of judicial review ("as-applied"). It also brings out a crucial substantive aspect of the provision. The Third Amendment is hardly an absolute individual right against the world. It does not restrict individuals; it does not restrict state governors; it does not restrict state legislatures; it does not restrict state courts; it does not restrict federal courts; and, most importantly, it does not bind Congress. The Third Amendment only binds the President, and only in a condition-

placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.").

163. U.S. CONST. art. II, § 2, cl. 1.

164. *Id.* art. I, § 8, cl. 11.

165. *Id.* art. I, § 8, cl. 14.

166. *See* THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 2 at 417-18 ("The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature."); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495-96 (1987) ("In England, the King theoretically had the power both to declare war and to command troops. . . . By contrast, the Constitution split these powers between legislature and executive. The former could declare war, but the latter would serve as commander-in-chief. Similarly, Congress could lay down 'rules for the government and regulation' of military forces, but the President would execute these rules . . . .").

al way. In short, *the Third Amendment is primarily a separation of powers provision, a contingent legislative check on executive power*.[167]

Now, these conclusions might seem to be of only academic interest; after all, the Third Amendment is scarcely ever litigated. But, thanks to Chief Justice Marshall's canon of grammatical consistency, the Third Amendment analysis has profound implications for the rest of the Bill of Rights. The contrast between the First Amendment and the Third Amendment illustrates the organizing dichotomy of judicial review—the basic difference between review of legislative action, on the one hand, and review of executive action, on the other.

And within this dichotomy, *most of the provisions of the Bill of Rights are like the Third Amendment, not like the First Amendment*. Most of its provisions (other than those concerning judicial procedure[168]) are *conditional* restrictions on *executive* action (like the Third Amendment), not *absolute* restrictions on *legislative* action (like the First Amendment). This grammatical and structural fact explains the Court's general preference for "as-applied challenges," its punctiliousness about ripeness and standing, and its predilection for fact-intensive doctrinal tests. And it also explains why all those doctrinal intuitions run the other way in the First Amendment context—with unique receptivity to overbreadth, taxpayer standing, and preenforcement challenges, as well as substantive doctrinal tests that turn on the general scope of the statutory text rather than the enforcement facts in any particular case.[169]

In short, the First Amendment is, grammatically and structurally, unique. By contrast, the Third Amendment is, grammatically and structurally, a model for the rest of the Bill of Rights.

### C. *The Objects of the Fourth Amendment*

Scholars have noted the textual and thematic links between the Third Amendment and the Fourth.[170] Both are concerned with certain sorts of governmental intrusion or invasions, and both single out "houses" for special pro-

167. *See* AMAR, *supra* note 5, at 267 ("The Third . . . stood as a separation-of-powers provision, requiring legislative authorization of troop quartering in wartime.").

168. *See infra* Part II.E.

169. *See* Rosenkranz, *supra* note 3, at 1250-73.

170. *E.g.*, Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 360 (2010) ("The Fourth Amendment's protection against unreasonable searches and seizures, as well as the Third Amendment's bar against the quartering of soldiers in private houses, reflect a foundational commitment to the 'fierce protection of the inner sanctum of the home' . . . ." (citation omitted)); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1304 (2009) (comparing the Third and Fourth Amendment's protection of the home); Dugan, *supra* note 153 (arguing that the Third and Fourth Amendments operate in parallel, regulating intrusions by military and civil agents, respectively). *See generally* AMAR, *supra* note 5, at 62 ("In today's world, lawyers, scholars, and judges are wont to link the Third Amendment to the Fourth . . . .").

tection.[171] But these two Amendments also share important grammatical and structural features—features that are only revealed by asking the *who* question: *who can violate the Fourth Amendment?*

The Fourth Amendment, like the Third Amendment, actually comprises two distinct prohibitions: first, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"; and second, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[172]

### 1. *The object of searches and seizures*

The first prohibition, like most of the Bill of Rights, is written in the passive voice, eliding the question *violated by whom?* But the nature of the prohibition furnishes the answer: this provision, like the Third Amendment, is a prohibition on *executive* action.

As Part I established, actions associated with Congress are, by their nature, legislative. But the first clause of the Fourth Amendment does not sound like a legislative prohibition. It does not follow the active-voice, First Amendment model; it does not say "Congress shall make no law authorizing unreasonable searches and seizures." And it does not follow the passive-voice, Ex Post Facto Clause model; it does not say "No law authorizing unreasonable searches and seizures shall be passed." The First Amendment is violated by making a law. The Ex Post Facto Clause is violated by passing a law. By contrast, the Fourth Amendment is not violated by making a law; it is violated by *executing an unreasonable search or seizure*.

Searches and seizures are paradigmatic executive actions.[173] The President searches and seizes; Congress does not. As usual, the best way to identify the object of a provision of the Bill of Rights is to identify the corresponding constitutional *power* that is limited by the provision. The Fourth Amendment is not a gloss on Article I; it is, rather, a gloss on the Take Care Clause of Article II: "[The President] shall take Care that the Laws be faithfully executed . . . ."[174] If Congress passes a statute forbidding the possession of drugs,[175] a President might have believed that faithful execution of such a statute requires constant, suspicionless searches, no matter how intrusive. But the Fourth Amendment

171. AMAR, *supra* note 5, at 62 ("To be sure, there *is* an important connection between the Third and Fourth Amendments. Both explicitly protect 'houses'—above and beyond all other buildings—from needless and dangerous intrusions by governmental officials.").

172. U.S. CONST. amend. IV.

173. *See* United States v. Grubbs, 547 U.S. 90, 98 (2006) (referring to searches as "exercise[s] of executive power").

174. U.S. CONST. art. II, § 3.

175. *E.g.*, Controlled Substances Act § 404, 21 U.S.C. § 844 (2006) ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . .").

glosses the adverb "faithfully," forbidding the President from taking this approach.

If the first clause of the Fourth Amendment were to be read figuratively, to bind Congress, it would have to be interpreted to mean something like: "No unreasonable searches or seizures shall be *authorized*." But this figurative interpretation runs headlong into the second half of the Fourth Amendment, which *is* expressly about authorizing searches, via warrant. Reading the two clauses together, it is clear that the first concerns the actual executive acts of *searching* and *seizing*, while the second concerns the *authorizing* of searches and seizures. For the first clause of the Fourth Amendment, the answer to the *by whom* question is the President. An action—or act—of Congress cannot violate this clause, because Congress is not the object of the clause. Only the President can violate the Searches and Seizures Clause.

The usual doctrinal implications follow. If the President is the answer to the *who* question, then the answer to the *when* question must be *when the President searches or seizes*. Such a challenge generally will not become ripe until after the search or seizure, and only the victim of the search or seizure is likely to have standing to complain.[176] A "facial challenge to a statute" is untenable under this clause, for the simple reason that the clause has nothing to do with actions, or "Acts," of Congress. Calling such a challenge an "as-applied challenge to a statute," is closer to the mark, but it still hedges on the all-important *who* question, and misleadingly implies that the statute, rather than the action of a government actor, is to blame. The first clause of the Fourth Amendment forbids executive action *per se*; challenges do not properly concern the underlying statute, and so any such challenge should simply be called an "execution challenge."

As usual, the Court's intuitions generally comport with this analysis, but its persistent imprecision about the *who* question has occasionally led it astray. So, the Court was quite right to hold that "the Fourth Amendment[] protect[s] against unreasonable searches and seizures *by federal agents*."[177] This is the correct answer to the *who* question. And it was quite right to hold that "[t]he wrong condemned by the [first clause of the Fourth] Amendment is 'fully ac-

176. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) ("Absent a sufficient likelihood that he will again be [seized] in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional."); United States v. Salvucci, 448 U.S. 83, 85 (1980) ("Today we hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if *their own Fourth Amendment rights have in fact been violated*." (emphasis added)); Rakas v. Illinois, 439 U.S. 128, 134 (1978) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.").

177. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391 (1971) (emphasis added).

complished' by the unlawful search or seizure itself."[178] This is the correct answer to the *when* question. Thus, the Court usually quite rightly insists on a fact-specific, "as-applied" approach to the merits, focusing on the execution of the search itself, rather than an abstract, "facial" approach, focused on an authorizing statute:

> The parties . . . have urged that the principal issue before us is the constitutionality of [an authorizing statute] "on its face." We decline . . . to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [the statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case.[179]

But the Court has not always been so careful about the *who* and the *when* of the Fourth Amendment. And so, a decade later, it was quite wrong to hold that an "Act [of *Congress*] is unconstitutional insofar as it purports to *authorize* inspections without [a] warrant or its equivalent."[180] This holding is wrong about *who*, wrong about *when*, and thus, inevitably, wrong about *how*. *Congress* cannot violate this clause by *authorizing* a search; only the *President* can violate it, and only by *executing* a search.[181] Happily, this exceptional holding proves the rule; never before or since has the Court held that an act of Congress violated the Fourth Amendment.[182] An action—or "Act"—of Congress cannot violate this clause; only an act of the President can.

### 2. *The object of warrants*

The second clause of the Fourth Amendment provides: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and par-

178. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 415 U.S. 338, 354 (1974)); *cf.* Byars v. United States, 273 U.S. 28, 33 (1927) (holding the character of a search is determined at the moment of execution, rather than at the moment resulting evidence is introduced).

179. Sibron v. New York, 392 U.S. 40, 59 (1968).

180. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (emphasis added).

181. *Cf.* Illinois v. Krull, 480 U.S. 340, 351 (1987) ("There is no evidence suggesting that Congress . . . [has] enacted a significant number of statutes *permitting* warrantless administrative *searches violative* of the Fourth Amendment." (emphasis added)). A statute might purport to *permit* an unconstitutional search, but it is the search itself, not the statute, that is "violative of the Fourth Amendment."

182. CONG. RESEARCH SERV., *supra* note 103, at 59; CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 2121-22, 2146 (Johnny H. Killian et al. eds., 2004). The only other possible example appears to be *Boyd v. United States*, 116 U.S. 616 (1886), but that case—no model of clarity—expressly conflates the Fourth and Fifth Amendments, and it does not clearly state which one forbade the making of the law at issue. *See id.* at 630 ("[T]he Fourth and Fifth Amendments run almost into each other.").

ticularly describing the place to be searched, and the persons or things to be seized."[183] The Court has perversely concluded that this clause expresses a *preference* for warrants.[184] As Akhil Amar has explained, the opposite is true; on its face, this provision is a *restriction* on the issue of warrants.[185] But who is its object?[186] May executive officials issue warrants?

Amar rightly recognizes that it is essential to "[c]onsider the person who issues the warrant."[187] But his answer to this *who* question is uncharacteristically cryptic. He notes that "[i]n England, certain Crown *executive* officials regularly exercised this warrant power."[188] And, "[i]n colonial America, Crown executive officials, including royal Governors, also claimed authority to issue warrants."[189] Amar invokes this history to explain why the Framers distrusted warrants, and rightly so. But in light of this historical distrust, Amar takes a surprisingly permissive position on the *who* question. He says that "a lawful warrant can issue only from one duly authorized,"[190] and, of course, "an *unrea-*

183. U.S. CONST. amend. IV.

184. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chimel v. California, 395 U.S. 752, 762 (1969) ("[W]e emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . .'" (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968))); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

185. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 771-72 (1994) [hereinafter Amar, *Fourth Amendment*] ("The Amendment's Warrant Clause does not require, presuppose, or even encourage warrants—it *limits* them. Unless warrants meet certain strict standards, they are per se unreasonable. The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit the aggrieved target might try to bring before a local jury after the search or seizure occurred."); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991) [hereinafter Amar, *Bill of Rights*] ("Because juries could be trusted far more than judges to protect against government overreaching . . . , warrants were generally *dis*favored. Judges and warrants are the heavies, not the heroes, of our story.").

186. Most of the Bill of Rights is written in the passive voice, thus eliding the *by whom* question. The Warrant Clause is actually an even more cryptic grammatical formulation. (It is not, strictly speaking, written in the passive voice; the passive voice formulation would be "no warrants shall *be issued* . . . .") *See* GARNER, *supra* note 17, at 612 ("The unfailing test for passive voice is this: you must have a *be*-verb (or *get*) plus a past participle (usually a verb ending in *-ed*)."). "Issue" is an *ergative* verb, "a verb that can be used (1) in the active voice with a normal subject (actor) and object (the thing acted on) . . . [e.g., 'the judge issued the warrant']; (2) in the *passive voice*, with the recipient of the verb's action as the subject of the sentence . . . [e.g., 'the warrant was issued by the judge']; or (3) in what one textbook called 'the third way,' active in form but passive in sense . . . [e.g., 'the warrant issued']." *Id.* at 314. In the Fourth Amendment, the verb "to issue" is used in this mysterious third way. *Cf. id.* at 315 ("[T]he ergative verb eliminates the actor altogether . . . . It may be a device to hide the actor . . . or even to create mystery . . . ."). The question posed by this formulation is *issue from whom?*

187. Amar, *Fourth Amendment*, *supra* note 185, at 772.

188. *Id.*

189. *Id.*

190. *Id.* at 779.

*sonable* executive warrant . . . is no warrant at all."[191] Amar thus implies, without quite affirming, that a *reasonable* executive warrant would be permissible.

But this cannot be right. Despite British and colonial history, it cannot be the case that federal executive officials can issue search warrants. The reason is structural, and it derives from the distinctive separation of powers of the Constitution. A warrant historically functioned as a sort of declaratory judgment, immunizing executive officers from tort suits for trespass.[192] For warrants to fulfill this (or any other) function, it must be that *the person issuing the warrant is not the person executing the search*. If an FBI agent could immunize himself by issuing himself a warrant, the Fourth Amendment would be a dead letter.

And this problem would not dissipate if the warrant issued from a different FBI agent, or even from an executive official in an entirely different department. The reason is that the Constitution vests all executive power in a single person: "The executive Power shall be vested in *a President* . . . ."[193] Every executive official is merely exercising the President's power, and it is ultimately the President's personal responsibility to "take Care that the Laws be faithfully executed."[194] Bicameralism is a sort of *intra-legislative* check on legislative power;[195] but the Constitution never provides for *intra-executive* checks and balances, for the simple reason that the executive power is vested in a single person.[196]

The Opinions Clause underscores the point. "The President . . . may require the *Opinion*, in writing, of the [Attorney General]"[197] about the constitutional reasonableness of a contemplated search, but such a written opinion does not

191. *Id.* at 780 (emphasis added).

192. *See* Amar, *Bill of Rights*, *supra* note 185, at 1178-79 ("[A] warrant, if strictly complied with, would act as a sort of declaratory judgment whose preclusive effect could be subsequently pled in any later damage action. A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages.").

193. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

194. *Id.* art. II, § 3.

195. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 322 ("[I]t is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.").

196. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 424 ("Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive . . . . That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

197. U.S. CONST. art II, § 2, cl. 1 (emphasis added) ("[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .").

and cannot constitute a *warrant* immunizing the search from judicial review. One executive official issuing a warrant to another is constitutionally indistinguishable from the President issuing a warrant to himself.

According to the Supreme Court, the federal judicial power includes the implicit power to issue warrants.[198] If so, then the Warrant Clause corresponds to, and cuts across, that Article III grant of power.[199] Thus, *federal warrants must be issued by judicial officers, not executive officers*.[200] The federal judiciary is the answer to the *issue from whom* question.

### 3. *The Fourth Amendment as a whole*

The Fourth Amendment is not an *absolute* prohibition on *legislative* action, like the First Amendment. It is, instead, a *conditional* check on *executive* action, like the Third Amendment. The Third Amendment is a *legislative* check on executive action. The Fourth Amendment is a *judicial* check on executive

198. *See* Morrison v. Olson, 487 U.S. 654, 681-82 n.20 (1988) ("[F]ederal courts and judges have long performed a variety of functions that . . . do not necessarily or directly involve adversarial proceedings within a trial or appellate court. For example, . . . [f]ederal courts . . . participate in the issuance of search warrants, . . . which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an *ex parte* proceeding.").

199. The answer to the *when* question follows. A judicial officer violates the second clause of the Fourth Amendment at the moment he issues an impermissible warrant. A challenge under this clause may well be ripe immediately thereafter, and the target of the warrant might well have standing, even before the search. Confusion on all these points was recently on full display in Washington, D.C. *See* Ord v. District of Columbia, 573 F. Supp. 2d 88 (D.D.C. 2008), *rev'd*, 587 F.3d 1136 (D.C. Cir. 2009). The district court in *Ord* held that only actual searches and seizures can violate the Fourth Amendment—the mere issuance of a warrant does not. The D.C. Circuit disagreed; it correctly held that the mere issuance of a warrant might violate the Fourth Amendment's separate Warrant Clause. Similarly, the district court held that Ord lacked standing to contest the issuance of a warrant, and that the case would not ripen until an actual seizure occurred. Again, the D.C. Circuit disagreed; it correctly held that mere issuance of a warrant might give rise to a cognizable injury, justiciable immediately. Yet it was Ord himself who sowed the seeds of this confusion. In his complaint, he identified the *wrong constitutional subject*: "[C]laiming injury from the arrest warrant, Ord . . . [sought] damages for a Fourth Amendment violation under 42 U.S.C. § 1983. . . . Ord alleged that *[Metropolitan Police Department] officers* filed the affidavit in support of the warrant in bad faith and without probable cause." 587 F.3d at 1139 (emphasis added). But the Warrant Clause does not prohibit *law enforcement agents* from *seeking* illegitimate warrants; it prohibits *judges* from *issuing* them.

200. *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 316-17 (1972) ("Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."); *see also* THE FEDERALIST NO. 47 (James Madison), *supra* note 2, at 303 ("Were [the power of judging] joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." (quoting MONTESQUIEU, SPIRIT OF THE LAWS 181 (1748))).

action. And it comprises two different prohibitions, with two different objects.[201]

In this sense, *the Fourth Amendment, like the Third Amendment, is a separation of powers provision*. The Fourth Amendment is a calibration of executive and judicial power. As Akhil Amar explains, the check on executive power may come after the search, in the form of a civil trespass suit before a jury.[202] Or it may, in some circumstances, come before the search, in an ex parte motion for a carefully circumscribed warrant.[203] But either way, the crucial point is that the check on executive power is vested in the judicial branch. And, thus, the separation of powers contemplated by the Fourth Amendment maps onto the separation of powers of the original Constitution.

So, beyond the usual jurisdictional and substantive implications, the *who* question reveals a crucial facet of separation of powers, a point that may be generalized. Indeed, this is a little-noticed implication of "unitary executive theory" that should be of great comfort to its critics. Yes, the executive power is vested in a single person,[204] and, yes, his personal duty to "take Care that the Laws be faithfully executed"[205] implies substantial control over the entire executive branch.[206] But precisely because all "executive power shall be vested in

201. At one point, Akhil Amar appears to conflate them. He writes: "Even if all the minimum prerequisites spelled out in the Warrant Clause are met, a warrant is still unlawful, and may not issue, if the underlying search or seizure it would authorize would be unreasonable." Amar, *Fourth Amendment*, *supra* note 185, at 774. This is not quite right. A judge may *issue* such a warrant, consistent with the second clause of the Fourth Amendment. But if the President *executes* such a warrant *with an unreasonable search*, then he thereby violates the first clause of the Fourth Amendment.

202. *See id.* ("[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and the citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and the official would be obliged to pay (often heavy) damages." (footnote omitted)); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (inferring a cause of action against federal officials for violations of the Fourth Amendment).

203. *See* Amar, *Fourth Amendment*, *supra* note 185, at 781 (suggesting that the issuance of a judicial warrant should shift liability from the searcher to the issuer of the warrant).

204. U.S. CONST. art. II, § 1, cl. 1.

205. *Id.* art. II, § 3.

206. *See* Statute Limiting the President's Auth. to Supervise the Dir. of the Ctrs. for Disease Control in the Distrib. of an AIDS Pamphlet, 12 Op. O.L.C. 47, 48 (1988) ("As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States 'The executive Power,' which means the *whole* executive power."); *id.* ("[The President] is solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions. Any attempt by Congress to constrain the President's authority to supervise and direct his subordinates in this respect, violates the Constitution."); *see also* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 607 (2005) ("[T]hree devices [are] generally viewed as necessary to any theory of the unitary executive: the president's power to remove subordi-

a President," all *checks* on executive power, like the power to issue warrants, *must be vested elsewhere*.

This separation of powers dimension of the Fourth Amendment has deep implications for its incorporation against the states. These implications will be a central theme of Part III.

### D. *The Objects of the Fifth Amendment*

#### 1. *The objects of due process*

The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[207] Like the Third Amendment and the Fourth Amendment, this clause is written in the passive voice. It invites the question *deprived by whom?* As usual, the answer dictates both the structure and the substance of judicial review. In this case, though, the Court's answer did a great deal more.

*Dred Scott v. Sandford*[208] is surely the Court's most infamous case. Yet scholars rarely note that the heart of Chief Justice Taney's opinion is his answer to precisely this *who* question. Four years later, he would give the wrong answer to the *who* question for Article I, Section 9, as discussed above.[209] But *Dred Scott* found him answering the *who* question for the Due Process Clause, in perhaps the most momentous sentence in the *United States Reports*:

> [A]n act of *Congress* which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[210]

With this single sentence, Chief Justice Taney answered the *who* question, established the doctrine of substantive due process,[211] extended the domain of slavery throughout the territories, and provoked the Civil War.

A comprehensive analysis of substantive due process is beyond the scope of this Article. But text and structure suggest that the Due Process Clause is

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nate policy-making officials at will, the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power.").

207. U.S. CONST. amend. V.

208. 60 U.S. (19 How.) 393 (1857).

209. *See supra* text accompanying notes 97-115.

210. 60 U.S. (19 How.) at 450 (emphasis added).

211. *See* Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 700 (2009) ("*Dred Scott* was nothing less than the Supreme Court's first venture in the enterprise known today as substantive due process."); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1559 (2004) ("*Dred Scott* proved to be a pretty good paradigm for the future development of what we call substantive due process.").

more like the Third and Fourth Amendments than like the First Amendment. The Due Process Clause does not follow the active-voice model of the First Amendment. It does not say: "Congress shall make no law depriving any person of life, liberty, or property without due process of law." And it does not follow the passive-voice, legislative-language model of the Ex Post Facto Clause. It does not say: "No law depriving any person of life, liberty, or property without due process of law shall be passed." (Indeed, it is difficult to understand what such formulations could possibly mean.[212]) As a matter of grammatical structure, the Due Process Clause tracks, not the First Amendment, but rather the Appropriations Clause and the Third Amendment. All of these provisions end with a prepositional phrase, and all of these prepositions have the same *object*: "law." Recall the Appropriations Clause: "No Money shall be drawn from the Treasury, *but in Consequence of Appropriations made by Law . . . .*"[213] And the Third Amendment: "No Soldier shall . . . be quartered in any house . . . in time of war, *but in a manner to be prescribed by law*."[214] And, again, the Due Process Clause: "No person shall . . . be deprived of life, liberty, or property, *without due process of law . . . .*"[215] Each of these provisions is essentially a restriction on what the *executive* branch may do *in the absence of a law*.

As usual, the point is confirmed by identifying the *grant* of power to which the restriction on power corresponds. For the Due Process Clause, the corresponding grant of power is not in Article I but in Article II. Indeed, Justice Jackson identified this correspondence in his most celebrated concurrence:

> [T]he Solicitor General finds seizure powers [in Article II:] '[The President] shall take Care that the Laws be faithfully executed . . . .' That authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther.[216]

In short, setting *Dred Scott* and substantive due process to one side, the object of the Due Process Clause is not Congress but the President.[217] As a matter of grammar and structure, the Due Process Clause is not an *absolute* restriction

212. *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) ("Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").

213. U.S. CONST. art. I, § 9, cl. 7 (emphasis added).

214. *Id.* amend. III (emphasis added).

215. *Id.* amend. V (emphasis added); *see also id.* amend. XIV, § 1.

216. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (omissions in original) (footnote omitted).

217. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 (1985) ("On its face the term 'due process' seemed to speak of procedural regularity . . . ."); *id.* ("[C]onsiderable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against *unlicensed executive action*, forbidding only deprivations not authorized by legislation or common law." (emphasis added)).

on *legislative* power, like the First Amendment; it is, at least at its core, a *conditional* check on *executive* power, like the Third Amendment and the Fourth Amendment.

Indeed, far from forbidding executive deprivations of life, liberty, and property, the clause expressly contemplates that the executive *will* deprive persons of life, liberty, and property. The central function of the clause is to create a *check* on such deprivations. Recall, again, the Third Amendment, with its legislative check on executive quartering,[218] and the Fourth Amendment, with its judicial check on executive searching.[219] The Due Process Clause, likewise, creates a check on executive actions depriving persons of life, liberty, or property.

Here the check is generally judicial. Due process generally cannot be purely intra-executive, for the same reason that executive officials cannot issue warrants.[220] All executive power is vested in a single person, and so an intra-executive check on executive power is not really any check at all.[221]

Thus, the *who* question reveals that the Due Process Clause, like the Third Amendment and the Fourth Amendment, is essentially a separation of powers provision.[222] Individual rights are indeed the beginning and the end of the clause. But separation of powers is the means and the meaning. The clause protects individual rights by assigning and channeling federal power.

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218. *See supra* Part II.B.

219. *See supra* Part II.C.

220. The Court has approved some deprivations by executive adjudication. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 45-49 (1932). But even in these cases, the Court generally emphasizes the availability of (at least some) Article III judicial review. *See id.* at 45-46 ("Rulings of the deputy commissioner upon questions of law are without finality. So far as [they] are concerned, full opportunity is afforded for their determination by the Federal courts."); *id.* at 48 ("An award not supported by evidence in the record is not in accordance with law."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."); Rasul v. Bush, 542 U.S. 466, 474 (2004) ("Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting))). *See generally* FALLON ET AL., *supra* note 8, at 348 ("A final position, resting on the approach in Crowell v. Benson, would treat sufficiently searching appellate review by an Article III court as both necessary and sufficient to legitimate initial adjudication by a federal legislative court or administrative agency."); *id.* at 362 ("The legality of an adjudicative scheme may depend . . . on the scope of judicial review in an Article III court . . . .").

221. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 2, at 303 ("Were [the power of judging] joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." (quoting MONTESQUIEU, THE SPIRIT OF LAWS 181 (1748))).

222. *See supra* note 217.

2. *The objects of takings*

When Chief Justice Marshall first turned his attention to the *who* question, the clause at issue was this one: "[N]or shall private property be taken for public use, without just compensation."[223] As discussed in Part I, Marshall's approach to this question hinged on subtle intratextual analysis. He looked to Article I to derive a principle for interpreting the passive voice. Then, he developed and applied a presumption of grammatical consistency, presuming that the passive voice has the same object in the amendments that it does in Article I. Thus, he held that the Takings Clause (and the rest of the Bill of Rights) binds only the federal government.

But the question remains: *which branch or branches of the federal government?* Almost two centuries after *Barron v. Baltimore*, the answer to this question remains uncertain. Just last term, it appeared that the Supreme Court would at last answer the fundamental question of whether a court can violate the Takings Clause. But only a plurality ventured an answer, and the question remains open to this day.[224]

Occasionally, the Court appears to realize that the answer to the *who* question should dictate both the structure and the substance of judicial review under the Takings Clause. It has, for example, rightly "recognized an important distinction between a claim that the *mere enactment* of a statute constitutes a taking and a claim that the *particular impact* of government action on a specific piece of property requires the payment of just compensation."[225] But its substantive doctrine collapses this distinction, requiring a showing of economic harm "as applied," even when challenging a legislative act "on its face."[226] Lower courts continue to struggle with this paradoxical strain of takings doctrine.[227]

223. U.S. CONST. amend. V.

224. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601-10 (2010).

225. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494 (1987) (emphasis added).

226. *Id.* at 495-96 ("Petitioners thus face an uphill battle in making a *facial* attack on the Act as a taking. The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable *for them* to continue mining their bituminous coal interests in western Pennsylvania." (emphasis added)). *But see* Rosenkranz, *supra* note 3, at 1230-35.

227. *See, e.g.*, Guggenheim v. City of Goleta, 582 F.3d 996, 1014 (9th Cir. 2009) (Bybee, J.) ("The fact that the Park Owners have characterized their facial challenge under *Penn Central* creates further complications. In a typical *Penn Central* claim, the court must consider factors that will usually not be found in the text of the statute, such as the economic impact on the claimant and the claimant's investment-backed expectations. Nevertheless, when adjudicating a facial challenge, the court must be careful not to simply look at 'the effect of the application of the regulation in specific circumstances.' The Park Owner's facial *Penn Central* claim requires us to address this apparent paradox: we must confront the question of whether a facial challenge under *Penn Central* is actually a viable legal claim; and if

For present purposes, it suffices to note that the basic structure of the Takings Clause is like the Third Amendment, like the Fourth Amendment, and like the Due Process Clause. The Takings Clause is not an *absolute* prohibition but a *conditional* prohibition. It does not *forbid* the taking of private property; it expressly *contemplates* the taking of private property.

The clause creates a *check* on the taking of private property. And, most importantly, the Takings Clause check is an *interbranch* check. As usual, one can identify the object of the right by identifying the subject of the corresponding power. St. George Tucker did precisely this analysis in 1803, concluding that the primary purpose of the Takings Clause was as a military restraint—cutting across the *President's* Article II Commander in Chief power—"to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever."[228] In short, the paradigmatic taking is a *physical*[229] taking by an *executive* officer.

But the requirement of just compensation is inherently a *legislative* check on this executive action. As usual, it is useful to find the clause in the original Constitution to which an amendment corresponds. Here, the Just Compensation Clause corresponds to the Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." This clause appears in Article I, Section 9, so Chief Justice Taney concluded that it restricts Congress, but, as discussed above,[230] this is not so. The Appropriations Clause restricts the President, and, in conjunction with the Takings Clause, it ensures that the President cannot take private property without a *congressional* appropriation. This aspect of the Takings Clause has escaped general attention, but Justice Douglas saw the point in his concurrence in *Youngstown*:

> The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. *The President might seize* and the Congress by subsequent action might ratify the seizure. *But until and unless Congress acted, no condemnation would be lawful.* The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected.

we determine that it is, we must then consider what evidence the Park Owners may present to prove their claim." (citation omitted)).

228. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 305-06 (Philadelphia, William Young Birch & Abraham Small 1803).

229. *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 115, 121-22 (1951) (participating Justices agreeing, in separate opinions, that a temporary physical seizure of coal plants pursuant to executive order, but without legislative authorization, constituted a taking); *cf.* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1101 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792-803 (1995).

230. *See supra* Part I.B.

> That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment.[231]

In short, the Takings Clause, like the other clauses discussed in this Part, is essentially a separation of powers provision. It does not *forbid* a particular federal government action, but rather *requires interbranch coordination* to effect that action. It is not an absolute prohibition, but a conditional check.

### E. *The Objects of Procedure*

Several provisions of the Bill of Rights concern judicial procedure. Many clauses of the Fifth, Sixth, Seventh, and Eighth Amendments fit this description. For present purposes, one clause of the Sixth Amendment will suffice to make the point: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."[232] This provision is clearly about the conduct of trials. But, as usual, one must ask: *Whom does this provision bind? Who can violate it?*

The answer cannot be Congress. The Sixth Amendment does not follow the First Amendment, active-voice model; it does not say, "Congress shall make no law authorizing bench trials." And it does not follow the Ex Post Facto, passive-voice model; it does not say, "No law authorizing bench trials shall be passed." There is no language pointing toward the halls of Congress as the locus of any violation; rather, the locus of this clause is "[i]n a[] criminal prosecution[]," after someone has been "accused," in the context of a "trial."

Another telltale sign is the District Clause: "which district shall have been previously ascertained by law." This clause is reminiscent of the Third Amendment ("but in a manner to be prescribed by law"); the Fifth Amendment Due Process Clause ("without due process of law"); and the ancestor of them all, the clause Chief Justice Taney overlooked, the Appropriations Clause ("but in Consequence of Appropriations made by Law"). These provisions are not restrictions on acts of Congress; to the contrary, they expressly contemplate and invite acts of Congress. These provisions are restrictions on what *other* branches may do *absent* an act of Congress.

To confirm the point, it is essential to locate the power to which the right corresponds; as usual, the subject of the power is the object of the right. And in this case, the answer is to be found, not in Article I, but in Article III: "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . .

231. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring) (emphasis added) (footnotes omitted).

232. U.S. CONST. amend. VI.

the Laws of the United States,"[233] including federal criminal laws. And Article III goes on to specify how this power shall be exercised:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[234]

Text and history make clear that the Jury Trial Clause of the Sixth Amendment is a gloss on this provision[235]—which is, in turn, a restriction on the *judicial* power. A federal judge violates the Jury Trial Clause of the Sixth Amendment when he presides over a trial that is inconsistent with it.[236]

Thus, the Jury Trial Clause is, in this sense, a separation of powers provision. It is a legislative check on judicial power, requiring that Congress ascertain districts by law (and, of course, define federal crimes over which the judicial power shall extend[237]) before the judiciary may preside over federal criminal trials.

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233. *Id.* art. III, § 2, cl. 1.

234. *Id.* art. III, § 2, cl. 3.

235. *See* AMAR, *supra* note 5, at 105 ("But why, then, was the jury trial language of the amendment necessary? . . . The historical answer is unequivocal: to guarantee, among other things, a right to a trial by a jury from the 'district' of the crime. Article III had not specified jury trial of 'the vicinage,' as did the prevailing common law, and many Anti-Federalists wanted an explicit guarantee that juries would be organized around local rather than statewide communities." (citing 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 545, 568-69, 678-79 (Jonathan Elliot ed., Ayer Co. reprt. ed. 1987) (1836) (remarks of Patrick Henry and William Grayson in Virginia ratification debates); 4 *id.* at 150, 154 (remarks of Joseph McDowall and Samuel Spencer in North Carolina ratifying convention); 2 *id.* at 400 (remarks of Thomas Tredwell in New York ratifying convention); *id.* at 109-10 (remarks of Mr. Holmes in Massachusetts ratifying convention); EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 183, 190, 200 (1957) (declarations of rights of Virginia, New York, and North Carolina ratifying conventions); CECELIA M. KENYON, THE ANTIFEDERALISTS 36, 51 (1985) (report of Pennsylvania convention minority); *Letters from the Federal Farmer* (II-IV), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 230, 230-31, 244, 245, 249 (Herbert J. Storing ed., 1981); *Letters of Agrippa* (V), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra*, at 77, 78-79)); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* The Law of Other States, 59 STAN. L. REV. 1281, 1298-99 (2007) ("[Article III] guarantees a jury, and a local trial—but, by its terms, it does not guarantee a *local jury*. This oversight was evidently considered so serious that it was immediately corrected by the Sixth Amendment, which guarantees a 'trial[] by an impartial jury *of the State and district wherein the crime shall have been committed*.'" (second alteration in original) (citation omitted)).

236. Perhaps Congress could violate the Jury Trial Clause by purporting to preside over a nonjury trial itself (rather than merely authorizing such a trial). *Cf.* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, *except in Cases of Impeachment*, shall be by Jury . . . ." (emphasis added)). But the key point is that such a congressional trial would be unconstitutional *anyway*, regardless of the Sixth Amendment, *because Congress is nowhere granted such a power*. By contrast, the Jury Trial Clause cuts across and restrains a power *that is otherwise vested in the judiciary*.

237. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts do not have jurisdiction to create federal common law crimes).

And, as usual, confusion about the *who* and the *when* begets confusion about both the structure and the substance of judicial review. Consider the most important Jury Trial Clause case in recent years, *United States v. Booker*.[238] Congress had created a Sentencing Commission, which in turn promulgated Sentencing Guidelines, which purportedly authorized judges to find certain facts without juries and to enhance criminal sentences based upon those facts. Booker was sentenced under this regime, and the Court held that the Sixth Amendment was violated. But who violated the clause and when?

Justice Breyer, for the Court, seemed to assume that Congress, or perhaps the Sentencing Commission, had violated the Sixth Amendment by establishing the regime. He repeatedly phrased the issue as one of *congressional* power and insisted that the *statute*, or at least the guidelines, are unconstitutional.[239] Having framed the issue this way, the Court then had no choice but to embark upon an adventure in lawmaking by severance, purporting to determine what Congress would have wanted if it had anticipated the constitutional problem.[240] The Court reached the dubious conclusion that Congress would have wanted the regime to remain intact—but optional—and so it "severed" the provisions that made the guidelines mandatory.[241]

The dissent sensed the Court's analytical confusion, but did not quite identify its source. The problem is the *who* and the *when*. The Court implicitly believed that Congress, or perhaps the Sentencing Commission, was the answer to the *who* question. Thus, the Court's implicit answer to the *when* question was *when they promulgated the regime*. But at that moment, the moment of enactment, no "criminal prosecution" had yet commenced against Booker. He had not yet been "accused," and was not yet in a position to "enjoy" or not "enjoy" the jury trial right. At that moment, Congress had perhaps *purported to authorize* a violation of Booker's Sixth Amendment rights, but it had not and could not have actually *committed* a violation of the Sixth Amendment. The Jury Trial Clause does not bind Congress, and it does not bind the Sentencing Commission. *It binds federal courts.* Booker's rights were violated, not by Congress when it created the Sentencing Commission, and not by the Sentencing Commission when it promulgated the guidelines, but by the court when it sentenced him pursuant to this regime. And so, there should have been no question of

238. 543 U.S. 220 (2005).

239. *See, e.g.*, *id.* at 250 ("[T]his provision of the statute, along with those inextricably connected to it, are constitutionally invalid, and fall outside of Congress' power to enact.").

240. *See id.* at 265 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given today's constitutional holding, that is not a choice that remains open. Hence we have examined the statute in depth to determine Congress' likely intent *in light of today's holding.*" (citation omitted)).

241. *See id.* ("In our view, it is more consistent with Congress' likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions than (2) to maintain all provisions of the Act and engraft today's constitutional requirement onto that statutory scheme." (citation omitted)).

"severing" the "unconstitutional" guidelines, or imagining what Congress "would have wanted" the regime to be. A challenge under the Jury Trial Clause is inherently a challenge to *judicial* action, and thus it is inherently an "as-applied" challenge. The majority missed all this by skipping over the *who* question. But Justice Stevens[242] and Justice Thomas,[243] who agree on so little, seemed to share the correct intuition. The Jury Trial Clause binds *judges*, and if it was violated, then it was violated *at Booker's trial*.

Clauses like the Jury Trial Clause must constitute a special category in any model of judicial review, as Chief Justice Marshall himself explained. At some points, "the language of the constitution is addressed especially to the courts,"[244] and, as Marshall emphasized, this textual fact itself constitutes a powerful argument for judicial review. Clauses that apply directly to the judiciary demonstrate "that the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature."[245] (To be perfectly precise, enforcement of such clauses does not entail "judicial *review*" at all; it entails, rather, direct judicial *application* of the Constitution.[246] The term "judicial review" is best reserved for constitutional review of the actions of the other branches, legislative and executive, as careful definitions make clear.[247]) For present purposes, the important point is that the

242. *See id.* at 283 (Stevens, J., dissenting) ("When a provision of a statute is unconstitutional, that provision is void, and the Judiciary is therefore not bound by it in a particular case. Here, however, the provisions the majority has excised from the statute are perfectly valid: *Congress could pass the identical statute tomorrow and it would be binding on this Court so long as it were administered in compliance with the Sixth Amendment*. Because the statute itself is not repugnant to the Constitution and can by its terms comport with the Sixth Amendment, the Court does not have the constitutional authority to invalidate it." (emphasis added) (citation omitted)); *id.* at 272-73 ("[I]t is appropriate to explain how *the violation of the Sixth Amendment that occurred in Booker's case* could readily have been avoided without making any change in the Guidelines. . . . [I]f the two facts, which in this case actually established two separate crimes, had both been found by the jury, *the judicial factfinding that produced the actual sentence would not have violated the Constitution*." (emphasis added)).

243. *See id.* at 314 (Thomas, J., dissenting in part) ("In effect, [Booker] contends that the Guidelines supporting the enhancements, and the Sentencing Reform Act of 1984 (SRA) that makes the Guidelines enhancements mandatory, were *unconstitutionally applied* to him." (emphasis added)).

244. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

245. *Id.* at 179-80; *see also* James Madison, *Report on the Virginia Resolutions* (1800), *reprinted in* 4 STATE CONVENTION DEBATES, at 546, 549 ("[T]he judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution . . . .").

246. *See, e.g.*, U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."); *Marbury*, 5 U.S. (1 Cranch) at 179-80 ("Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from.").

247. *See* BLACK'S LAW DICTIONARY 864 (8th ed. 2004) (defining "judicial review" as "[a] court's power to review the actions of *other* branches or levels of government; esp. the courts' power to invalidate legislative and executive actions as being unconstitutional" (emphasis added)); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1 (1962)

Jury Trial Clause is not like the First Amendment. It is not an *absolute* prohibition on *legislative* action. It is, rather, a *procedural* check on *judicial* action.

### F. *The Bill of Rights as a Whole*

For reasons of space, this Part has analyzed only a handful of clauses of the Bill of Rights. More comprehensive analysis will have to wait for the book that will follow.[248] But these few clauses may suffice to confirm the analytical primacy of the *who* question.

First, the answer to the *who* question dictates both the structure and substance of judicial review. To demonstrate how, *The Subjects of the Constitution* began with the First Amendment.[249] Because Congress is the subject of the First Amendment, only Congress can violate it—and only by making a law, at the moment of making a law.[250] So First Amendment challenges must be "facial," in the sense that any constitutional violation must be visible on the face of the statute.[251] The doctrinal tests under the First Amendment must be ones whose inputs are available to a conscientious congressman as he votes on a bill.[252] The substantive test, in other words, must be *lex ipsa loquitur*—the law must speak for itself.[253] This analysis explains and justifies anomalous jurisdictional doctrines, including taxpayer standing and overbreadth, and it confirms controversial substantive doctrines like the rule of *Employment Division v. Smith*.[254]

This Part has shown that, in all these ways, the First Amendment is unique, and not typical of the Bill of Rights. The First Amendment is written in the active voice, and its subject is Congress. The rest of the Bill of Rights is written in the passive voice. And in many of the most important clauses, Congress is not the implied object. The rest of these provisions are not *absolute* prohibitions on *legislative* action, like the First Amendment. Rather, they are *conditional* checks on *executive* action, like the Appropriations Clause, or *procedural* checks on *judicial* action, like the Sixth Amendment's Jury Trial Clause.

("The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the *other* branches of government, federal and state." (emphasis added)).

248. NICHOLAS QUINN ROSENKRANZ, THE SUBJECTS OF THE CONSTITUTION (forthcoming 2012).

249. Rosenkranz, *supra* note 3, at 1250.

250. *Id*. at 1255.

251. *Id.*

252. *Id*. at 1267.

253. *Id*. at 1268.

254. 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment))); *see* Rosenkranz, *supra* note 3, at 1263-68.

Challenges under these other clauses are not "facial" challenges to legislative action, but rather "as-applied" challenges to executive action. Most of the Bill of Rights restricts executive or judicial action, which is precisely why most constitutional challenges are what the Court calls "as-applied" challenges. This explains the Court's intuitive preference for "as-applied" challenges,[255] and it explains why the Court does not allow overbreadth or taxpayer standing, except in the First Amendment context.[256]

But there is a deeper, theoretical point here as well. Modern scholarship on the Bill of Rights has focused on its countermajoritarian, individualistic character. From this perspective, the most important questions have concerned the *scope* of the rights. Akhil Amar's groundbreaking work has challenged this modern account, demonstrating that the Bill of Rights is actually as much about structure as it is about individual rights. In particular, Amar has shown the extent to which the Bill of Rights embodies and reflects the principles of federalism that animate the original, unamended Constitution.

This is a profound insight, but it is incomplete. Asking the *who* question, clause by clause, adds an important dimension to this account of the Bill of Rights. The inquiry underscores that these are scarcely rights against the world. Per *Barron v. Baltimore*, the Bill of Rights binds only the federal government, not the states. But that is not all. Many of these provisions do not even bind the *entire* federal government. Much of the Bill of Rights targets only one branch of the federal government, and not Congress. Much of the Bill of Rights binds only the *executive* or the *judicial* branch.

And even vis-à-vis the executive branch, many of these provisions are not absolute rights. The *who* inquiry reveals that many of the provisions of the Bill of Rights are *conditional* checks on *executive* action. There can be no intra-executive checks on executive action, because all the executive power is vested in a single person. And so these checks are *interbranch* checks on executive action. Some are legislative checks; some are judicial checks; some are, perhaps, both. But the important point is that these provisions are interbranch checks—which is to say that these provisions are, fundamentally, *separation of powers* provisions.

255. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (explaining that the Court "disfavor[s]" facial challenges because they "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring))); United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully . . . .").

256. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 609 (2007) (plurality opinion) ("We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause."); *Salerno*, 481 U.S. at 745 ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); Rosenkranz, *supra* note 3, at 1251, 1257-58.

And to the extent that they are separation of powers provisions—carefully calibrated to the distinct structure of the federal government—they may not map precisely onto states—with their many and varied governmental structures—when incorporated via the Fourteenth Amendment. This implication is the subject of Part III.

## III. THE OBJECTS OF THE FOURTEENTH AMENDMENT

The second sentence of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[257]

Current doctrine holds that the Due Process Clause incorporates almost all of the Bill of Rights against the states.[258] The academic consensus is that the Court has reached the right result, more or less, but for the wrong reason. Most scholars believe that the Fourteenth Amendment does indeed incorporate the Bill of Rights against the states, but that it is the Privileges or Immunities Clause, not the Due Process Clause, which (primarily) effects the incorporation.[259] To be precise, most scholars believe that (some or all of) the rights enshrined in the Bill of Rights are, by definition, (some or all of) the "privileges or immunities of citizens of the United States." Assuming that they are correct, then the textual mechanism of incorporation is as follows: "No State shall make or enforce any law which shall abridge [certain] privileges or immunities [enshrined in the Bill of Rights]."

257. U.S. CONST. amend. XIV, § 1.

258. McDonald v. City of Chicago, 130 S. Ct. 3020, 3034-35 (2010) ("The Court [in the modern era] also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated." (footnote omitted)).

259. *See, e.g.*, AMAR, *supra* note 5, at 163-74; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 195-203 (2004); ELY, *supra* note 212, at 22-30; 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-6 (3d ed. 2000); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that [the *Slaughter-House Cases* interpretation] is a plausible reading of the Amendment."); Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1310 (2009); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313-15, 317-18 (2007); Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 1, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) ("*Amici* submit this brief to bring to the foreground of this case a remarkable scholarly consensus and well-documented history that shows that the Privileges or Immunities Clause of the Fourteenth Amendment was intended to protect substantive, fundamental rights . . . .").

A. *Objective Incorporation*

As always, the first question should be the *who* question: *who is bound by the Privileges or Immunities Clause?*

The subject, of course, is "State." And recall that the phrase "No State shall" is the result of a particular intergenerational constitutional colloquy. In *Barron v. Baltimore*, Chief Justice Marshall concluded that the passive-voice clauses of Article I, Section 9, apply only to the federal government, whereas, by contrast, "the restrictions contained in [Article I, Section 10,] are *in direct words . . . applied to the states*."[260] Each clause of Article I, Section 10, begins "No State shall." And Marshall presumed that the same grammatical pattern would obtain in the Amendments, even though they were ratified later.

John Bingham wrote the Fourteenth Amendment with Marshall's presumption firmly in mind, "imitat[ing] the framers,"[261] just as Marshall suggested.[262] And so Marshall's canon of constitutional interpretation became a canon of constitutional *drafting*. "No State shall" in the Fourteenth Amendment is a deliberate echo of Article I, Section 10.

But the next phrase, "make or enforce any law," is unique. Never before in the Constitution had these two verbs been paired together. Article I, Section 10, provides: "*No State shall pass* any *bill* of attainder or ex post facto *law*." The First Amendment begins: "Congress shall *make* no *law*." Both of these provisions have *legislative* predicates, and forbid *legislative* actions, as discussed in Part I. But "[n]o State shall make or enforce any law" adds something new. This formulation seems expressly designed to capture *both* legislative action ("[n]o State shall *make* . . . any law") *and* executive/judicial action ("[n]o State shall . . . *enforce* any law").

History and logic bear out this conclusion. Countless antebellum state laws abridging the privileges and immunities of citizens were, of course, already on the books in 1868, when the Fourteenth Amendment was ratified. Merely forbidding the "making" of such laws would not eradicate the ones that had already been made. It was necessary to forbid the enforcement of preexisting laws as well.[263] Thus, the Fourteenth Amendment forbids both legislative action and executive action. Its subject comprises state legislatures and state ex-

260. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) (emphasis added).

261. *Id.* at 250.

262. *See* AMAR, *supra* note 5, at 182-83 (describing the way the text of the Fourteenth Amendment tracks the language in *Barron* and noting that "[i]n a speech in January 1867, while the amendment was pending in the states, Bingham again reminded his audience that his amendment would overrule *Barron*").

263. By contrast, the states ratified the First Amendment promptly after the ratification of the Constitution. Indeed, proposing the Bill of Rights was at the top of the first Congress's agenda. So there was no need to prohibit the enforcement of speech-infringing laws already on the books, because there were no speech-infringing laws already on the books. Thus: "Congress shall *make* no law . . . ."

ecutives (as well as state courts).[264] All state officials are bound by the Privileges or Immunities Clause of the Fourteenth Amendment.

It does not follow, however, that all of the Bill of Rights "incorporates" against all state officials. To see why, it is necessary to begin with the two pillars of conventional incorporation wisdom, and to recall how they have been upended by Akhil Amar.

First, modern scholarship has conceptualized the Bill of Rights as entirely individualistic and countermajoritarian.[265] And, second, modern constitutional doctrine has incorporated (almost all of) the Bill of Rights against the states—insisting that the incorporated version applies against the states in exactly the same way that the unincorporated version applies against the federal government. Once a right incorporates, it incorporates mechanically, jot for jot.[266]

Akhil Amar has challenged both of these pillars of the conventional wisdom. First, he has shown that the Bill of Rights is not strictly, or even primarily, individualistic and countermajoritarian. In many respects, it is as much about structure as it is about rights, and as much about channeling governmental power as about restricting it.[267] In particular, he has emphasized the *federalism* dimension of the Bill of Rights—the extent to which the Bill preserved a zone of state power, as much as a zone of individual rights.[268]

Second, Amar has explained how the first point casts doubt on the conventional wisdom of incorporation. To the extent that particular provisions of the Bill of Rights are, at least in part, federalism provisions, it cannot make sense to incorporate them against the states jot for jot. To the extent that a particular

264. *See* United States v. Raines, 362 U.S. 17, 25 (1960) ("It is . . . established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments.").

265. *See, e.g.*, William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 12 (1991) ("[The] salient purpose [of a bill of rights] is . . . to protect minorities . . . from the passions or fears of political majorities.").

266. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034-35 (2010) ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964))).

267. *See supra* note 115.

268. *See, e.g.*, *id.* at 46 ("As with our First Amendment, the text of the Second is broad enough to protect rights of private individuals and discrete minorities; but, as with the First, the Second's core concerns are populism and *federalism*. At heart, the amendment reflects a deep anxiety about a potentially abusive *federal* military, an anxiety also reflected in the Third Amendment." (emphasis added)); *id.* at 88 ("The jury [in the Fifth, Sixth, and Seventh Amendments] was not simply a popular body but a local one as well. . . . [G]rand and petit jurors could interpose themselves against *central* tyranny . . . ." (emphasis added)). *See generally id.* at xii ("A close look at the Bill reveals structural ideas tightly interconnected with language of rights; *states' rights* and majority rights alongside individual and minority rights . . . ." (emphasis added)).

provision of the Bill of Rights functions to *preserve* states' rights, it cannot make sense to incorporate such a provision *against* the states.[269]

It is necessary, therefore, to separate out the individual-rights aspects of the Bill of Rights. Only these aspects are sensibly characterized as "privileges or immunities of citizens of the United States" circa 1868, and so only these aspects properly incorporate against the states through the Fourteenth Amendment. On this view, the provisions of the Bill of Rights do not incorporate jot for jot against the states. Rather, they are *refined* as they are incorporated. And only the aspects that are properly characterized as "privileges or immunities" apply against the states.

### B. *Changing the Subject*

This Article and its predecessor add an important dimension to this account of refined incorporation. These Articles contend that the first step in any constitutional inquiry is to answer the *who* questions: *Who is bound by the clause at issue? Who has allegedly violated it?*

The answers to these questions establish the organizing dichotomy of constitutional law, the distinction between judicial review of legislative actions and judicial review of executive actions. As has been explained, this dichotomy dictates both the structure and the substance of judicial review, with profound doctrinal implications, both for jurisdiction and for the scope of constitutional rights and powers.

But the *who* question is equally central to the incorporation question, and it adds a missing dimension to Akhil Amar's account. Amar has focused on the refined *content* of substantive rights. His central insight is that the 1791 Bill of Rights does not incorporate against the states jot for jot; what incorporates are the individual-rights components of the Bill of Rights, as those were understood in 1868. Thus, the shape and scope of the rights may be substantially, substantively refined in the process of incorporation.

This account of refined incorporation is powerful, as far as it goes. But the focus on *substantive* refinement overlooks perhaps the most important refinement of all—*refinement of the subjects and the objects of the Bill of Rights*.[270]

269. *See id.* at xiv ("But not all of the provisions of the original Bill of Rights were indeed rights of citizens. Some instead were at least in part rights of states, and as such, awkward to fully incorporate *against* states.").

270. Amar briefly adverts to the possibility of refined subjects, but only in his analysis of the First Amendment. *See id.* at 43 ("Though the language of the Fourteenth Amendment at first seems to track that of the First Amendment . . . the Fourteenth focuses not just on making laws but on enforcing them, which may suggest that we should look [for violations] not just at the time of enactment but at the moment of application, too.").

1. *Protoincorporation, ex post facto*

To see the point, begin again where Chief Justice Marshall began, before incorporation, juxtaposing the two Ex Post Facto Clauses in Article I. There is much to learn from the parallel between the two Ex Post Facto Clauses, but there is also much to learn from the semantic and structural difference between them. They are identical in subject matter but different in *subject*. Recall that the first one is written in the passive voice: "No Bill of Attainder or ex post facto Law shall be passed."[271] In *Barron v. Baltimore*, Chief Justice Marshall held that this clause applies to the federal government, not the states.[272] And in Part I, intratextual analysis identified the object of the clause more precisely. "All *legislative* Powers . . . granted [by the Constitution are] vested in a *Congress* . . . ."[273] It is Congress that has power "[t]o *make* all *Laws* which shall be necessary and proper."[274] And "[e]very *bill* . . . *pass[es]* the House of Representatives and the Senate . . . before it become[s] a *Law*."[275] These intratextual echoes make clear that the first Ex Post Facto Clause is a restriction on Congress. To put the textual point in structural terms, the federal Ex Post Facto Clause need not extend any further than Congress, because "[a]ll legislative Powers . . . [are] vested in . . . Congress,"[276] and the Constitution "permits no delegation of [federal legislative] powers."[277]

But this same textual and structural analysis does not apply to the second, active-voice Ex Post Facto Clause. There are no parallel provisions vesting *state* legislative power or specifying its mechanics. The Constitution does not require that all state legislative power be vested in state legislatures in the first instance, and it does not forbid delegation of state legislative power. To the contrary, states may choose any "Republican Form of Government"[278] that they like, and they may delegate legislative power as they see fit—to, for example, governors or city councils. Indeed, the people themselves may retain some state legislative power, to exercise through popular referenda.[279]

So while state legislatures are the paradigmatic culprits under this clause,[280] in some circumstances a state instrumentality *other than a legislature*

271. U.S. CONST. art. I, § 9, cl. 3.

272. 32 U.S. (7 Pet.) 243, 249 (1833).

273. U.S. CONST. art. I, § 1 (emphasis added).

274. *Id.* art. I, § 8, cl. 18 (emphasis added).

275. *Id.* art. I, § 7 (emphasis added).

276. *Id.* art. I, § 1.

277. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

278. *See* U.S. CONST. art. IV, § 4.

279. *Cf.* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568 (1916) ("[S]o far as the state had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power . . . .").

280. *See* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1986 (2006) ("For any particular constitutional provision, some Application Understandings may have played a special, central, definitive role at the time of enactment. Many of our constitutional

might "pass [an] ex post facto law." In other words, this Ex Post Facto Clause may be identical to its federal counterpart in subject matter, but it might be broader in *subject*.

Indeed, the Court has recognized this possibility:

> [W]hilst thus uniformly holding that the [second Ex Post Facto Clause] is directed against legislative . . . acts, this court with like uniformity has regarded it as reaching every form in which the legislative power of a State is exerted, . . . [including a] regulation or order of some other instrumentality of the State exercising delegated legislative authority.[281]

In other words, for *this* Ex Post Facto Clause, the *who* must be a *state* actor exercising *legislative power*, but it *need not be a state legislature*.

This analysis teaches a deep constitutional lesson. *The Constitution is generally more specific about who at the federal level than at the state level.* The federal clauses written in the active voice often specify a particular branch of the federal government. "Congress shall make no law . . . ."[282] Even in passive-voice clauses, like the first Ex Post Facto Clause, it is often possible to deduce a precise answer to the *who* question, a single branch of the federal government. But the state clauses, in the active voice, generally say only "No State shall." There is a grammatical irony here, as the much-maligned passive voice turns out to be more determinate than its active-voice counterpart. But this grammatical irony reflects a profound constitutional logic. Because the Constitution created the federal government, it could be precisely calibrated to empower and restrain each of the three branches that it created. But the Constitution did not create the state governments, and it permits a wide variety of state governmental structures—requiring only that those structures be "Republican."[283] So the Framers could not be certain precisely *who*, at the state level, would pose each sort of threat to liberty. Therefore, the Constitution never expressly singles out branches of state government when limiting state power;[284] instead, it says either "No State shall" or "by any State."[285]

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rights were enacted with core original purposes. These foundational Application Understandings are the ones I have been referring to so far. And they not only are intact in contemporary constitutional law. They have, more significantly, served as paradigm cases, shaping the doctrine as exemplary holdings around which the rest of the case law is organized.").

281. Ross v. Oregon, 227 U.S. 150, 162-63 (1913).

282. U.S. CONST. amend. I.

283. *Id.* art. IV, § 4; *see also* Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("[I]n ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law . . . ."); Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902).

284. The Constitution singles out branches of state government only when granting specific powers or imposing specific duties, generally only by way of specifying who will represent the state in intergovernmental matters. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, *the Executive Authority thereof* shall issue Writs of Election to fill such Vacancies." (emphasis added)); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as *the Legislature thereof* may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which

To put the point another way, Article I, Section 9, and the Bill of Rights are (to the extent that they are not merely declaratory[286]) restrictions on powers granted elsewhere in the document. They are, as Chief Justice Marshall says, "limitations of power *granted in the instrument itself*."[287] The limitations are, thus, carefully calibrated to the power grants. (And just as Constitutional Law I is largely the study of *who is granted which power*, Constitutional Law II should largely be the study of *who is restrained by each right*.) By contrast, Article I, Section 10, and Section 5 of the Fourteenth Amendment are restrictions on state governmental powers *that are not to be found in the Constitution itself*.

the State may be entitled in the Congress . . . ." (emphasis added)); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of *the Legislature, or of the Executive (when the Legislature cannot be convened)*, against domestic Violence." (emphasis added)).

285. *See* U.S. CONST. art. I, § 10, cl. 1 ("*No State shall* enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." (emphasis added)); *id.* art. I, § 10, cl. 2 ("*No State shall*, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." (emphasis added)); *id.* art. I, § 10, cl. 3 ("*No State shall*, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (emphasis added)); *id.* amend. XIV, § 1 ("*No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)); *id.* amend. XIV, § 4 ("[N]either the United States *nor any State shall* assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave . . . ." (emphasis added)); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or *by any State* on account of race, color, or previous condition of servitude." (emphasis added)); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or *by any State* on account of sex." (emphasis added)); *id.* amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States *or any State* by reason of failure to pay poll tax or other tax." (emphasis added)); *id.* amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States *or by any State* on account of age." (emphasis added)).

286. *See* AMAR, *supra* note 5, at 148 ("To a nineteenth-century believer in natural rights, the Bill [of Rights] was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but rather a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed.").

287. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (emphasis added).

These provisions cut across state powers that may or may not be found in various state constitutions and may or may not vary from state to state. Here, the restrictions do not map onto grants of power to particular state officials, and so the restrictions are phrased generally: "No State shall."

For this reason, the doctrine of the federal Ex Post Facto Clause[288] may not map exactly onto the state Ex Post Facto Clause.[289] And even if the federal Ex Post Facto Clause applies only to Congress, it may not follow that the state Ex Post Facto Clause applies only to state legislatures.

The second Ex Post Facto Clause, the second Bill of Attainder Clause, and the second Title of Nobility Clause, mark the first constitutional effort to bind the state governments and the federal government in parallel ways. These state clauses are, in this sense, a precursor to Section 1 of the Fourteenth Amendment, "incorporating" restrictions that run against the federal government against the states as well. But here, in this 1789 protoincorporation, *even when the predicate of the constitutional prohibition is ostensibly identical, the object of the provision may be subtly different at the state level.*

There is an important lesson here for refined incorporation under the Fourteenth Amendment. In Part II, the *who* question revealed that the Bill of Rights—like the first Ex Post Facto Clause—is calibrated to grants of federal power found elsewhere in the document. But Section 1 of the Fourteenth Amendment—like the second Ex Post Facto Clause—is not; it cuts across powers that are located, not in the U.S. Constitution, but in the many and varied state constitutions. States are permitted to have—and do have—a wide variety of governmental structures, subject only to the requirement that those structures be "Republican."[290] To the extent that the Bill of Rights reflects and reinforces the federal government's unique mechanism of separation of powers, it cannot be mechanically grafted upon the states. In incorporating such provisions against the states, a crucial refinement may obtain, beyond the substantive refinements contemplated by Akhil Amar. In incorporating such provisions against the states, the Fourteenth Amendment may *refine their subjects and objects*.

### 2. *Incorporating the First Amendment*

Refinement of the subjects and objects of the Bill of Rights as incorporated might result in *broader* government restrictions at the state level or it might result in *narrower* government restrictions at the state level. In the First Amendment context, it might do both.

288. U.S. CONST. art. I, § 9, cl. 3.

289. *Id.* art. I, § 10, cl. 1.

290. *Id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

Begin with the Establishment Clause: "Congress shall make no law respecting an establishment of religion . . . ."[291] This clause is arguably a pure federalism provision. It seems to signify that Congress will *neither establish nor disestablish* state churches, thus leaving the issue of establishment entirely to the states.[292] It restricts federal legislative power, in favor of state legislative power. Accordingly, it may not make sense to incorporate the Establishment Clause *against* the states. To put the point in textual terms, perhaps the Establishment Clause never created, protected, or preserved a "privilege[] or immunit[y] of *citizens* of the United States";[293] if anything, it preserved a privilege of *states themselves*. Thus, far from incorporating "jot for jot," the Establishment Clause may not sensibly incorporate at all.[294] In that sense, refined incorporation of the First Amendment might mean that not all of the First Amendment incorporates.

But refined incorporation also might mean a broader incorporation, a refinement of the subject. Compare the First Amendment with the Fourteenth Amendment. The First Amendment begins: "Congress shall make no law . . . ."[295] The Privileges or Immunities Clause begins: "No State shall make or enforce any law . . . ."[296] There are obvious textual echoes here: "shall," "make," "no," "law." But there are important differences too. And of course, the most important difference is the difference in subject. The subject of the First Amendment is "Congress." But the subject of the Privileges or Immunities Clause is not the state analogue; it is not "state legislature." The subject is the broader "State"—a deliberate echo of Article I, Section 10, as discussed above.

291. U.S. CONST. amend. I.

292. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."); AMAR, *supra* note 5, at 32 ("Its mandate that Congress shall make no law '*respecting* an establishment of religion' also prohibited the national legislature from interfering with, or trying to *dis*establish, churches established by state and local governments.").

293. U.S. CONST. amend. XIV, § 1 (emphasis added).

294. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 49 (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause."); AMAR, *supra* note 5, at 33-34 ("[T]he nature of the states' establishment clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment. Incorporation of the free-speech clause against states does not negate state legislators' own First Amendment rights to freedom of speech in the legislative assembly. But incorporation of the establishment clause has precisely this kind of paradoxical effect; to apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself. . . . [H]ow can such a local option clause be mechanically incorporated *against* localities, requiring them to pass no laws (either way) on the issue of—'respecting'—establishment?").

295. U.S. CONST. amend. I.

296. *Id.* amend. XIV.

And just as the Fourteenth Amendment subject is broader, the Fourteenth Amendment predicate is also broader. Both the First and Fourteenth Amendment forbid "mak[ing]" certain "law[s]." But the Fourteenth Amendment also forbids "enforc[ing]" certain "law[s]."

Arguably, then, if "the freedom of speech"[297] is a "privilege[] or immunit[y] of citizens of the United States,"[298] then it is protected more comprehensively at the state level than at the federal level.[299] One could think of the Fourteenth Amendment freedom of speech as two distinct prohibitions on state action. (1) "No State [*legislature*] shall *make* . . . any law which shall abridge [the freedom of speech]"[300] (just as "Congress shall make no law . . . abridging the freedom of speech"[301]). But, *in addition, at the state level*, (2) "No State [*executive or judicial official*] shall . . . *enforce* any law which shall abridge [the freedom of speech]."[302]

The second rule might simply have been intended to forbid the enforcement of objectionable state laws that predated the Fourteenth Amendment.[303] But it also reflects the same deep structural truth revealed by the Ex Post Facto Clauses. The framers of the First Amendment could know that Congress posed a certain sort of threat to speech and religion, because the Constitution itself vested Congress with its power. But the framers of the Fourteenth Amendment could not know which branch of state government would pose the equivalent threat.

So, First Amendment challenges are always challenges to actions of Congress, and thus they are always and inherently "facial."[304] But Fourteenth Amendment challenges—challenges to state action abridging the freedom of speech or the free exercise of religion—might be challenges to state *executive* (or judicial) action, and thus "as-applied" rather than "facial." As always, the answer to the *who* question dictates the structure of the constitutional inquiry, and so refinement of the subject likewise refines the structure of judicial review.[305]

297. *Id.* amend. I.

298. *Id.* amend. XIV.

299. *Cf.* AMAR, *supra* note 5, at 43 ("[P]erhaps a sensitive reading of the text, history, and structure of the Reconstruction Amendment calls for a broader protection [than the First Amendment's] of some forms of religious worship, even against neutral, secular laws.").

300. U.S. CONST. amend. XIV.

301. *Id.* amend. I.

302. *Id.* amend. XIV.

303. *See supra* Part III.A.

304. Rosenkranz, *supra* note 3, at 1255.

305. A harder question is whether this refinement, in turn, refines the substance of the free speech or free exercise right. On the one hand, if the Fourteenth Amendment binds state executive officials, then one might be tempted to say, for example, that a state policeman cannot enforce a religion-neutral law in a manner that abridges the free exercise of religion. *See* AMAR, *supra* note 5, at 43 ("[T]he Fourteenth focuses not just on making laws but on enforcing them, which may suggest that we should look at the clash between church and

3. *Incorporating quartering*

The Court has not held that the Fourteenth Amendment incorporates the Third Amendment against the states,[306] and the object of the Third Amendment helps explain why. As discussed in Part II.B, the Third Amendment is largely a separation of powers provision—a legislative check on executive power. It is carefully calibrated to the division of military authority in the original Constitution—a conditional restriction on the President's Commander in Chief power, and an implicit gloss on Congress's power "[t]o raise and support Armies" and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[307] It would be odd to describe this structural division of federal military authority as a "privilege or immunity of citizens of the United States."

And it would be doubly odd to impose this structure on states. After all, states may structure and divide military authority in a wide variety of ways. And the Constitution generally does not concern itself with state separation of powers, so long as the state structure is "Republican." Even more to the point: "No State shall, without the consent of Congress, . . . keep Troops . . . in time of Peace . . . ."[308] It would be odd to read the Fourteenth Amendment as a restriction on state quartering of soldiers in time of peace, when, as a general matter, states will have no peacetime troops to quarter.

Here, too, the *who* question reveals that a provision of the Bill of Rights is more a separation of powers provision than a "privilege or immunity of citizens of the United States." As a textual matter, it is doubtful that the Fourteenth Amendment incorporates these sorts of provisions against the states. And as a matter of structural logic, it would be strange indeed to think that the Fourteenth Amendment imposed federal separation of powers on the various republican governments of the states. In short, the object of the Third Amendment is not reflected in the subject of the Fourteenth.[309]

state not just at the time of enactment but at the moment of application, too. And perhaps some religious practices that affect only the religious community itself (with no externalities imposed on religious nonbelievers) might be deemed 'privileges' and 'immunities'—islands of institutional privacy and communal autonomy against general laws."); McConnell, *supra* note 8, at 268. On the other hand, though, even under the "enforce[ment]" prong of the Privileges or Immunities Clause, it is the "law," not the enforcement of the law, which must not abridge the freedom of religion: "No State shall . . . enforce *any law which shall abridge* [the free exercise of religion] . . . ." It is difficult to see how a religion-neutral law could fit that description. After all, if any such law did, then every law would. *See* Rosenkranz, *supra* note 3, at 1266-67.

306. *See* AMAR, *supra* note 5, at 220 ("For the Third Amendment, a plausible explanation for failure to incorporate is that a proper case never materialized: the right rarely arises in modern litigation.").

307. U.S. CONST. art. I, § 8, cls. 12, 14.

308. *Id.* art. I, § 10, cl. 3.

309. *See* AMAR, *supra* note 5, at 267 ("The Third . . . stood as a separation-of-powers provision, requiring legislative authorization of troop quartering in wartime. Th[is] basic feature[] make[s] the Third a poor candidate for unrefined, mechanical incorporation: . . . surely

4. *Incorporating warrants*

Part II.C demonstrated that the Fourth Amendment is, fundamentally, a *judicial* check on *executive* power. Again, it provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[310]

The President is the answer to the *who* question for the first clause, because the power to search and seize is a core executive power. And separation of powers analysis demonstrates that the judiciary must be the answer to the *who* question for the second clause. If the Constitution disfavors warrants, because they immunize executive officials against ex post trespass suits, then it cannot be that executive officials can immunize themselves by issuing themselves warrants. History may be equivocal about executive warrants,[311] but the logic of separation of powers is dispositive. Since all executive power is vested in a President, one executive officer issuing a warrant to another is constitutionally indistinguishable from the President issuing a warrant to himself.

As Amar explains, the check on executive power may come after the search, in the form of a civil trespass suit before a jury.[312] Or it may come before the search, in an ex parte motion for a carefully circumscribed warrant.[313] But either way, the crucial point is that the check on *executive* power is vested in the *judicial* branch. And the separation of powers contemplated by the Fourth Amendment maps onto the separation of powers of the original Constitution. Precisely because all the executive power is vested in one person, any *check* on executive power must be vested elsewhere.

But none of this analysis can apply mechanically when the Fourth Amendment is incorporated against the states. Consider just two fundamental

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Reconstructors did not mean to impose every aspect of federal separation of powers onto states.").

310. U.S. CONST. amend. IV.

311. *See* Amar, *Fourth Amendment*, *supra* note 185, at 772-73 ("In England, certain Crown *executive* officials regularly exercised this warrant power. We need only recall the facts of the 1763 English case, *Wilkes v. Wood*, whose plot and cast of characters were familiar to every schoolboy in America, and whose lessons the Fourth Amendment was undeniably designed to embody. . . . In *Wilkes*, a sweeping warrant had been issued by a Crown officer, Secretary of State Lord Halifax. In colonial America, Crown executive officials, including royal Governors, also claimed authority to issue warrants. Well into the twentieth century, states vested warrant-issuing authority in justices of the peace—even when such justices also served as prosecutors . . . ." (footnotes omitted)); *see also* 4 BLACKSTONE, *supra* note 89, at *287 ("A warrant may be granted in extraordinary cases by the privy council, or secretaries of state; but ordinarily by justices of the peace." (footnote omitted)).

312. *See supra* note 202.

313. *See id.* at 781 (suggesting that the issuance of a judicial warrant should shift liability from the searcher to the issuer of the warrant).

differences between state separation of powers and federal separation of powers. First, the central structural feature of Article II is that it vests the executive power in a single person: "The executive Power shall be vested in a President . . . ."[314] Many states, by contrast, never had a strictly unitary executive.[315] In many states, for example, attorneys general are elected rather than appointed; they are elected separately from their governors; governors cannot fire them at will; and they often have distinct, freestanding constitutional powers and responsibilities.[316] Second, the central structural feature of Article III is its endeavor to insulate federal judges from political pressures, with salary and tenure protections.[317] By contrast, many state judges are elected, just as they were in 1868.[318] In fact, the Fourteenth Amendment expressly contemplates such elections.[319]

314. U.S. CONST. art. II, § 1, cl. 1.

315. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (contrasting the unity of the federal executive with the executive unity "destroyed" by eleven of the thirteen state constitutions); *see also* OHIO CONST. art. III, § 1 ("The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general . . . ."); PA. CONST. art. IV, § 1 ("The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe."); TEX. CONST. art. IV, § 1 ("The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General.").

316. *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) ("Most states directly elect state attorneys general—as well as numerous other executive officers . . . ."); *see, e.g.*, CAL. CONST. art. V, § 11 ("The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor."); MD. CONST. art. V, § 1 ("There shall be an Attorney-General elected by the qualified voters of the State, on general ticket . . . who shall hold his office for four years from the time of his election and qualification, and until his successor is elected and qualified, and shall be re-eligible thereto, and shall be subject to removal for incompetency, willful neglect of duty or misdemeanor in office, on conviction in a Court of Law."); *id.* art. V, § 3(d) ("The Governor may not employ any additional counsel, in any case whatever, unless authorized by the General Assembly."); N.Y. CONST. art. V, § 1 ("The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term . . . ."); VA. CONST. art. V, § 15 ("An Attorney General shall be elected by the qualified voters of the Commonwealth at the same time and for the same term as the Governor; and the fact of his election shall be ascertained in the same manner. . . . He shall perform such duties and receive such compensation as may be prescribed by law, which compensation shall neither be increased nor diminished during the period for which he shall have been elected. There shall be no limit on the terms of the Attorney General.").

317. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.").

318. *See* Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002) ("Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy. By the time of the Civil War, the great majority of States

Thus, the separation of powers logic of the Fourth Amendment cannot apply jot for jot against the states. If warrants are to issue at the federal level, it must be that they are to issue from a politically insulated *judicial* official, rather than from an *executive* official who answers to the same boss that is responsible for "tak[ing] Care"[320] of the search. At the state level, though, the opposite might be true. Unlike a federal judge, an elected state judge might feel a great deal of political pressure to issue a warrant in a high-profile case.[321] And, on the other hand, an executive official in the state attorney general's office might be sufficiently insulated from an executive official in the governor's office that there would be a real protection in having the one issue a warrant to the other.

The process of refinement, here, is to identify the "privilege or immunity" embodied in the separation of powers provision, and to incorporate *that* against the states. In this case, according to the Court, the "privilege or immunity" is the assurance that warrants must issue from a "neutral and detached magistrate."[322] But who? As the Court has observed, "States differ significantly as to whom they entrust the authority to grant a warrant."[323] Can an executive official ever be a "neutral and detached magistrate"? Because the Court has insisted that the Bill of Rights incorporates mechanically, it has been forced to

elected their judges."); Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 465 (1993) ("Mississippi became the first state to adopt a completely elective judiciary in 1832. New York followed suit in 1846. In the following ten years, fifteen of the existing twenty-nine states amended their constitutions to provide for a popularly elected judiciary. The trend towards an elected judiciary has thus far proven irreversible; every state which entered the union after 1846 has provided for popular election of at least a portion of its judiciary." (footnotes omitted)). In 1868, many state court judges enjoyed only fixed terms and lacked tenure protection. *See, e.g.*, MISS. CONST. of 1832, art. IV, §§ 2, 3 (providing limited terms for elected judges); N.Y. CONST. of 1846, art. VI, § 2 (same); *id.* art. VI, § 11 (permitting removal of justices of the supreme court and judges of the court of appeals by concurrent resolution of the legislature).

319. *See* U.S. CONST. amend. XIV, § 2 (reducing state representation "when the right to vote at *any election for the choice of . . . Judicial officers of a State* . . . is denied" (emphasis added)); *see also White*, 536 U.S. at 783 ("[T]he Due Process Clause of the Fourteenth Amendment . . . has coexisted with the election of judges ever since it was adopted . . . .").

320. U.S. CONST. art. II, § 3.

321. *Cf.* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 251-58 (2004) (comparing discretionary sentencing in Pennsylvania's elected judges over nine years, and finding that "all judges, even the most punitive, increase their sentences as reelection nears").

322. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)); *see also Johnson*, 333 U.S. at 13-14 ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

323. *Shadwick*, 407 U.S. at 353 n.12.

equivocate on this fundamental *who* question.[324] But if incorporation works a refinement of subjects and objects, then the answer is simple: a federal executive official can never be a "neutral and detached magistrate,"[325] but a state executive official might be.[326] In other words, *the object of the Warrant Clause might undergo refinement upon incorporation*.

5. *Incorporating takings*

It is fitting that the final example should be the incorporation of the Takings Clause. This was the clause that first gave Chief Justice Marshall occasion to opine on the subjects and objects of the Constitution. His masterful opinion in *Barron v. Baltimore* is the primogenitor of the analysis here. And it is also the primogenitor of the Privileges or Immunities Clause itself, as Bingham carefully heeded Chief Justice Marshall's admonition to "imitate[] the framers of the original constitution,"[327] and echoed the words "no State shall." Thus this final example closes a constitutional circle. The object of the Takings Clause was the subject of *Barron v. Baltimore*; *Barron*, in turn, helped Bingham select the subject of the Privileges or Immunities Clause; and the subject of the Privileges or Immunities Clause, in turn, incorporated—and refined—the object of the Takings Clause.

As discussed in Part II.D.2, the Takings Clause is, at least at its core, a restriction on executive action. Though historical evidence is sparse, the Framers were apparently concerned, paradigmatically, with physical takings[328]—and particularly military takings effected by the President as Commander in Chief.[329] The just compensation requirement guaranteed a legislative check on such executive action, since only Congress could appropriate the money to pay

324. *See id.* at 352 ("Nor need we determine whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch.").

325. *See, e.g.*, United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 316-17 (1972) (invalidating certain warrantless wiretaps, and remarking that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch" and that "[t]he Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates").

326. *See* Amar, *Fourth Amendment*, *supra* note 185, at 772-73 ("In colonial America, Crown executive officials, including royal Governors, also claimed authority to issue warrants. Well into the twentieth century, states vested warrant-issuing authority in justices of the peace—even when such justices also served as prosecutors . . . ." (footnote omitted)).

327. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833); *see supra* text accompanying notes 135-37.

328. *See* Treanor, *supra* note 229, at 782 ("The original understanding of the Takings Clause of the Fifth Amendment . . . required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.").

329. *See* 1 TUCKER, *supra* note 228, app. at 305-06.

compensation.[330] And there is a judicial check too, since the judiciary would determine how much compensation was "just."[331] Thus, the clause as a whole works as a separation of powers provision, an interbranch check on executive action.

But even if the President is the primary object of the Takings Clause, it does not follow that the "privilege[] or immunit[y]" against takings runs only against state executives. Again, the Privileges or Immunities Clause begins "No State shall." So the privilege against *state* takings may run against state *legislatures*, as well as state executives, and it may forbid *regulatory* takings as well as physical takings. Indeed, the only article to address this precise question found powerful historical evidence to this effect.[332] Here, again, a refinement of the object may broaden the scope of the right.

## CONCLUSION

This Article's predecessor, *The Subjects of the Constitution*, established the primacy of the *who* question in matters of constitutional law, demarcating the two basic forms of judicial review. The fundamental dichotomy, which the *who* question reveals, is the basic distinction between judicial review of *legislative* action and judicial review of *executive* action. The differences between them dictate both the structure and the substance of judicial review.

Unfortunately, the *who* question, though fundamental, is often difficult to answer. Many of the most important clauses are written in the passive voice. And several others begin "No State shall." In both of these formulations, it is not immediately apparent whether the provision is a prohibition on legislative action, executive action, judicial action, or some combination of the three. Both Chief Justice Marshall and Chief Justice Taney attempted this set of questions—but both ventured answers that are demonstrably incorrect.

This Article analyzes many of the most important of these clauses—some in Article I, some in the Bill of Rights, and some in the Fourteenth Amend-

330. *See* U.S. CONST. art. I, § 9, cl. 7; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring); *see also supra* Part II.D.2.

331. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) ("By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.").

332. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 750-57 (2008).

ment. In all these cases, the *who* question confirms its analytical power, shedding new light on both the structure and the substance of judicial review.

But, here, the *who* question also reveals a central structural feature of the Bill of Rights, and thus a crucial nuance of incorporation. Chief Justice Marshall established that the object of the Bill of Rights is the federal government, not the states. But pressing harder on the *who* question reveals that the Bill of Rights does not indiscriminately restrict the *entire* federal government. To the contrary, it restricts different branches of the federal government in different ways, establishing checks and balances among them, which reflect the checks and balances of the original Constitution. In this sense, the provisions of the Bill of Rights are separation of powers provisions, carefully calibrated to the separation of powers established by the original Constitution.

And this structural point leads to a crucial refinement to the theory of refined incorporation. The Fourteenth Amendment binds all branches of state government; any state official could be the answer to the *who* question. But it does not follow that the provisions of the Bill of Rights incorporate against all state actors in the same way that they apply against their federal counterparts. Again, the Bill of Rights is carefully calibrated to federal separation of powers, and federal separation of powers principles do not apply to state governments. To put the point in textual terms, separation of powers is a structural feature of the federal government; it is not a "privilege[] or immunit[y] of citizens of the United States."[333] And so, to the extent that provisions of the Bill of Rights reflect the distinctive structure of the federal government, they cannot be grafted onto the states jot for jot.

As Akhil Amar has argued, the substance of the Bill of Rights might be refined as it is incorporated against the states. But perhaps the most important refinement worked by the Fourteenth Amendment is actually the refinement revealed by the *who* question. Perhaps the most important refinement is a refinement of the objects of the Constitution.

This Article and its predecessor have endeavored to reorient constitutional law around the *who* questions: *Who is bound by the clause at issue? Who has allegedly violated it?* Answering these questions requires identifying the subjects and objects of the Constitution. But this is hardly some sort of hypertextualism or grammatical sophistry. The subjects and objects of the Constitution are not merely features of constitutional *text*; they are the very pillars of constitutional *structure*. The words "federalism" and "separation of powers" are simply shorthand for the deep truth that the Constitution empowers and restricts different governmental actors in different ways. Constitutional Law I, the "structure" course, is essentially a course about *who* questions—about who has been allocated each constitutional power. But Constitutional Law II, the "rights" course, generally forgets the lessons of Constitutional Law I. It is so fixated upon the *scope* of rights that it often forgets to ask *rights against*

333. U.S. CONST. amend. XIV, § 1.

*whom?* But each right is a restriction on a corresponding power, and each power is carefully allocated to a constitutional actor. So Constitutional Law II, no less than Constitutional Law I, should begin by asking: *who?* To elide the *who* question is to overlook the central feature of our constitutional structure. And this structure itself is the object of the Constitution.