OUR STRUCTURAL CONSTITUTION

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Americans properly revere our Constitution for its protection of individual rights. We tend to overlook, however, that the Constitution also provides a blueprint for our governmental structure. This Essay urges a renewed emphasis upon structure in all aspects of constitutional interpretation.

The most compelling lessons of the Structural Constitution pertain to the place of the federal courts in relation to Congress, the executive branch, and the various states. Each of these topics is addressed in turn. In each case, this Essay explores the different consequences of viewing the Constitution primarily as a charter of rights or a blueprint of structure.

The final section addresses the value of structuralism as a tool of constitutional interpretation. Structuralism teaches that the Constitution protects all of us as well as each of us. By returning the focus to the critical role of the political branches and the states in our constitutional scheme, the Structural Constitution restores a proper respect for the workings and products of American democracy.

INTRODUCTION

What does it mean to look at the American Constitution structurally? Our founding document assumes different appearances, much as a mountaintop may seem to change under shadows and sun. In the view of some, the Constitution is primarily a declaration of rights, a priceless charter of our most basic freedoms. In the view of others, the Constitution is the blueprint of our government, a document that literally allows us to function. In point of fact, the Constitution is both things, and the supposed dichotomy between rights and structure is never so stark as some would have it. There is nonetheless a difference: Viewing the Constitution structurally provides insights that simply are not possible if the Constitution is seen as a list of liberties and little more.

In the halls of the Fourth Circuit Court of Appeals is a bronze plaque listing the provisions of the Bill of Rights. It is a magnificent plaque, one which ought to hang in public buildings all across the country. But beside it should be a plaque highlighting the significant structural provi-

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* Circuit Judge, United States Court of Appeals for the Fourth Circuit. This Essay was presented as the Maurice Rosenberg Lecture at Columbia Law School on March 25, 2004. I wish to thank Dean David Leebron and the Law School community for their warmth and hospitality during my visit. The questions of the Columbia faculty on the subject of this Essay were most appreciated, especially the careful comments on this piece by Professor Henry Paul Monaghan. For the contents of this Essay, I of course bear sole responsibility.

An earlier, abridged version of Part III appeared in the October/November 2003 issue of *JD Jungle* as part of a national symposium on the Bill of Rights. I am hardly the first to use the phrase "Structural Constitution." See, e.g., Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1155–56 (1992).

sions of Article I (the Necessary and Proper Clause); Article II (the Faithful Execution Clause); and Article III (the Case and Controversy Clause). How boring, you say. To the contrary. The structural provisions of our founding document are in some ways its most fascinating.

I term "structural" those provisions that appear to direct responsibility for a decision to a particular branch of the federal government or to the states. I would contrast, for instance, those constitutional provisions that assign responsibility and authority with those that prescribe various personal rights. The structural provisions, in other words, appear to confer authority upon one or another agency or level of government. The rights provisions appear to confer rights against the government.

But one should not pursue this dichotomy too far, for our Madisonian tradition teaches that structural provisions not only confer collective rights upon popular majorities, but safeguard individual liberty by diffusing power. The Founders early on faced the dilemma of protecting minority rights in a country of majority rule. "For Jefferson," writes the historian Bernard Bailyn,

> the solution was clear: a bill of rights, which he advocated from the moment he first saw the Constitution. . . . But Madison—who in the end would write the national Bill of Rights—pointed out to Jefferson that a limited enumeration of human rights would never prevent anyone from misusing power. Only structural balances within a government, Madison thought, pitting one force against another, could keep the misuse of power in check and so protect minority rights.[1]

Thus, the dichotomy between rights and structure has been with the Republic almost from the start. But the distinction has also been subsumed into the larger purpose of holding government in check for the benefit of all citizens.

For a long time, the Structural Constitution has been neglected. Perhaps this is because cases conferring rights, such as *Brown*[2] and *Miranda*,[3] have penetrated the world of popular culture in a manner that structural pronouncements never have. The understandable enthusiasm for individual rights caused us to overlook the structural features of the document. The term "individual rights" came to seem almost one word. It did not intuitively occur to us that the Constitution conferred collective rights as well. Liberty was seen as something that individuals exercised and that collective entities threatened to restrict.

This emphasis on constitutional rights over constitutional structure was a product of many things. Throughout American history, state governments have used high-minded structural arguments to protect some very low practices. In the process, they gave constitutional structure a bad

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1. Bernard Bailyn, To Begin the World Anew: The Genius and Ambiguities of the American Founders 48 (2003).

2. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

3. Miranda v. Arizona, 384 U.S. 436 (1966).

name. The debate between Justices Hugo Black and John Harlan over whether the Fourteenth Amendment incorporated the Bill of Rights against the states seemed to end in a decisive triumph for the rights-based Constitution and in a resounding defeat for those asserting the primacy of the federal structure. The magnitude of the defeat was apparent from the fact that much of the Bill of Rights was deemed so fundamental that the states were obliged to respect it even though the Constitution did not demand such respect in so many words. The Warren Court also reflected the rights-based viewpoint of the 1960s in two respects. The civil rights movement underscored the need for individuals to be protected from state governments with a stubborn commitment to at least the vestiges of segregation. Second, the criminal procedure revolution recognized rights that our system of justice had too long denied defendants, especially black defendants in Southern states. The high moral urgency that accompanied these overlapping developments created the impression that the structural dictates of our Constitution, far from protecting liberty, operated as little more than impediments to the realization of basic rights.

I both approve and applaud the role that the courts played in the mid-twentieth century in applying the Bill of Rights to the states and in vindicating rights that had been too long denied. The price of this emphasis, however, was that constitutional structure was overshadowed to such an extent that it hardly seemed to matter much at all. To the extent that structural questions crossed anybody's mind, it was said that the national political process would take care of them.[4] The notion that the judiciary should enforce an independent constitutional structural mandate was infrequently considered. Yet the Constitution has profound things to say about governmental structure, and our appreciation of those lessons may help to bring our perspective on it back into balance.

There are many structural mandates in the Constitution, and whole treatises could probably be written, for example, on each of the Article I, Section 8 enumerated powers. The structural questions inherent in our Constitution are so varied and complex that I cannot begin in this brief space to catalog them. I shall concentrate in this Essay, however, on a subject of great importance to our Structural Constitution: the place in our system of the federal judiciary.

The most compelling teachings of the Structural Constitution pertain to the place of the federal courts in relation to the Congress, the executive branch, and the various states. I shall address each of these topics in turn. In each case, I explore the different consequences of viewing the Constitution primarily as a charter of rights or a blueprint of structure.

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4. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550–51 & n.11 (1985) (citing work of Professors Jesse Choper and Herbert Wechsler).

I. The Judiciary and Congress

The threshold question in this area is whether the federal judiciary has any role at all in policing the structural boundaries between Congress and the states. This controversy has come front and center with the federalism revolution of the Rehnquist Court. Older forms of judicial activism primarily invalidated state legislation that trespassed on individual rights. The Rehnquist Court's interventions, by contrast, have invalidated congressional enactments violating basic principles of structure, namely the sovereign rights of states. Opponents of the federalism revolution argue that this latter course is illegitimate because structural questions are essentially political questions and of a lesser order of magnitude than questions of personal rights and liberty. Thus, issues of structure should be left to the *political* interplay between Congress and the states, while the states must be *judicially* prevented from trampling the rights of often powerless individuals.[5]

This dichotomy between powerful states and powerless individuals is misguided. One could quarrel interminably over which entities, groups, or persons are better represented in the United States Congress. Some argue the states are already more than adequately represented by their representatives in Congress, especially their senators. Others contend Congress in fact acts at the expense of the states in order to claim political credit for itself. Surely, however, the case for judicial intervention on questions of structure cannot be resolved by resort to the slippery and subjective notion of which individuals or interests judges may happen to feel are relatively better positioned in the political process. Which interests are best represented varies from moment to moment, and from issue to issue. It is, in the end, anybody's guess. As a matter of practice, conservative judges might tend to see their liberal opponents as politically well represented and hence not in need of judicial assistance, while more liberal judges would see precisely the opposite. The entire argument would soon enough assume an ideological cast.

As a matter of law, though, the rebuttal to the recent indictment of the Rehnquist Court was provided long ago in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[6] *Marbury* did not limit the judiciary to enforcing the Constitution's declaration of rights. Rather, it vested in the courts the power to review the lawfulness of governmental action in all its forms. As to the scope of judicial review, the proponents of rights and structure should thus be able to find common ground. The same competencies that the courts would bring to bear in defining rights would serve equally well in safeguarding structure. If the courts are to function as interpreters of

5. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (crafting a rights-oriented standard of judicial review).

6. 5 U.S. (1 Cranch) 137, 177 (1803).

constitutional rights, they must necessarily function as arbiters of constitutional structure.

Both rights and structure are, after all, different parts of the same document.[7] There is no wall of separation in the document itself between structure and rights. To the contrary, guarantees of rights and principles of structure are sprinkled throughout. The Bill of Rights contains an important structural premise (the Tenth Amendment), and Article I not only sets forth the powers of Congress, but prohibits suspension of the Writ of Habeas Corpus,[8] as well as the passage of bills of attainder or ex post facto laws.[9] It is thus difficult to contend that *Marbury* applies no more than a selective principle of judicial review. Either the courts' powers of review extend to both rights and structure, or they extend to neither. To say that courts have an emphatic role in protecting enumerated rights but not in interpreting enumerated powers is to indulge an inconsistency that argument cannot sustain.

The fact that the states themselves are structurally represented in the Congress thus cannot mean that the structural provisions of Article I, Section 8 are politically, and not judicially, enforceable.[10] For the notions of politically enforceable constitutional guarantees and judicially enforceable constitutional guarantees are not mutually inconsistent.[11] We can and should have both. The fact that states may have failed to prevail on their representatives in Congress to prevent an encroachment on their rights does not nullify the independent judicial obligation to determine whether Congress exceeded its lawful powers.

Our Structural Constitution thus presupposes both a political and a judicial check on the exercise of enumerated powers, in the same sense that the protection of individual rights requires both political and judicial vigilance. We would never contend that because Congress had failed to embrace arguments on behalf of civil liberty, the judicial role in that regard was thereby rendered at an end. Both the rights of individuals and the rights of states enjoy dual political and judicial protections. In this way, the liberties served by the diffusion of governmental power and by the protection of our personal freedoms are enhanced.

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7. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1132 (1991) ("A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with language of rights . . . . The main thrust of the Bill was not to downplay organizational structure, but to deploy it . . . .").

8. U.S. Const. art. I, § 9, cl. 2.

9. Id. art. I, § 9, cl. 3.

10. See Oregon v. Mitchell, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) ("Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary . . . this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers." (citations omitted)).

11. See generally John C. Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311 (1997) (discussing interplay between judicial and political safeguards of federalism).

If one takes a purely rights-based view of the constitutional order, then to defend against a structural challenge it would be sufficient that Congress was acting to expand individual rights through, for example, the creation of a new private cause of action. However, the notion that congressional legislation on behalf of rights nullifies the judicial obligation on behalf of structure was set aside by the Supreme Court in *United States v. Morrison*.[12] At issue in *Morrison* was the constitutionality of the Violence Against Women Act (VAWA), which Congress had passed with the entirely laudable aim of preventing gender-motivated violence. The Supreme Court held that VAWA was not a legitimate exercise of Congress's power to regulate interstate commerce under the Commerce Clause, nor of its power to remedy discrimination under the Fourteenth Amendment.[13] *Morrison* is significant precisely because it invokes the structural principle of judicial review of congressional powers to limit a political declaration of rights. The implications of this decision for the vindication of the Structural Constitution thus cannot be overestimated. Again, the invocation of structure is not ultimately antithetical to the promotion of rights. The Framers, most famously in *The Federalist No. 10*, understood that the "proper structure of the Union" helps safeguard the rights of minorities from the dangers of faction.[14]

But what if the judiciary abuses its role as a structural referee between Congress and the states? What if the judicial branch acts politically to nullify acts of Congress of which the judiciary simply disapproves? It is unclear, first, why we should expect more abuse when the courts patrol matters of structure rather than rights. In any event, the response to this concern about abuse can be understood by envisioning a hard-fought basketball game. The officials may be too quick on the whistle and call too many fouls, and they may have, in some cases, an effect upon the actual outcome of the game itself. But the fact that referees might unfortunately abuse their authority does not lead to the conclusion that they should have no authority. Someone must enforce the rules of the game. In our system, the Constitution sets the rules, and *Marbury* says the judiciary is the ultimate interpreter of them. In law, as in basketball, we have long ago rejected the notion that it is best for a contest to have no referees at all.

Thus the first structural principle requires the judicial branch to play a role in assessing whether Congress has exceeded its enumerated powers. To the extent that critics of the Rehnquist Court have argued that such a role is illegitimate, they are wrong. The critics, however, do have a valid larger point. The same structure that affords the courts the role of policing the boundaries between Congress and the states also operates to limit that role significantly. The opening phrase of our founding charter

12. 529 U.S. 598 (2000).

13. Id. at 617, 627.

14. See The Federalist No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

is "We the People,"[15] a dramatic announcement of a democratic document. The Articles describing the powers of the political branches come before the one describing the function of the judicial branch, a sequence designed to underscore the primacy of democratic process. Articles I and II are not just at the head of the constitutional line; they substantially exceed in length the discussion of the powers of the judiciary. The Constitution, in fact, defined the judicial power in such sparse terms that immediate statutory amplification in the form of the Judiciary Act of 1789[16] was necessary. As a simple matter of priority and heft then, one who reads the Constitution from beginning to end would be left in no doubt that the usurpation of the powers of popular governance by an unelected third branch was decidedly not what the Framers had in mind.[17]

Moreover, the Congress is endowed with broad prescriptive powers. One is struck by the choice of verbs in Article I, Section 8. The verbs are active; they convey energy. The Congress "shall have Power," among other things, "To regulate," "To establish," "To provide," "To promote," "To constitute," "To define," "To declare," "To make Rules," "To exercise exclusive Legislation," and, finally and majestically, "To 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."[18] The Congress, in other words, possesses the power of prescription. There is simply nothing in Article III that compares with Article I's formidable arsenal of verbs. In fact, even the word "decide" is totally absent from Article III.

When one congressional power is found wanting, Congress can often send in a substitute; such is the breadth and versatility of its authority. When the Supreme Court held that the Religious Freedom Restoration Act exceeded Congress's power under Section 5 of the Fourteenth Amendment,[19] Congress responded with the Religious Land Use and Institutionalized Persons Act of 2000,[20] which achieved much the same result under the Commerce and Spending Clause powers.[21] No other branch of government possesses such a deep bench.

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15. U.S. Const. pmbl.

16. 1 Stat. 73.

17. See *The Federalist No. 78*, which makes the point that,

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

The Federalist No. 78, supra note 14, at 465 (Alexander Hamilton).

18. U.S. Const. art. I, § 8, cls. 1, 3, 4, 6, 8, 9, 10, 11, 14, 17, 18.

19. See City of Boerne v. Flores, 521 U.S. 507, 534–36 (1997).

20. See 42 U.S.C. § 2000cc-1 (2000).

21. See Mayweathers v. Newland, 314 F.3d 1062, 1066–70 (9th Cir. 2002), cert. denied, 124 S. Ct. 66 (2003) (upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 as applied to state prisoners).

Of course, Article III provides that judges shall hold their offices during good behavior, thus establishing the indispensable condition for an independent judiciary. Judicial autonomy, however, is not absolute. Article III speaks explicitly of the powers of Congress over the inferior courts and the Supreme Court when it vests the judicial power "in such inferior Courts as the Congress may from time to time ordain and establish"[22] and grants the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[23] By contrast, Article I contains no corresponding reference to powers the judiciary shall exercise over the organization and jurisdiction of the Congress.

Legislative and judicial powers are thus described in our Constitution in dramatically different ways. The legislative power is basically one of prescription. The judicial power is basically one of interpretation. The judicial assumption of prescriptive power would thus seem fundamentally at odds with the Constitution's grand design. *Erie Railroad Co. v. Tompkins* makes this clear.[24] *Erie* is not just a case about state and federal courts; it is also a separation of powers decision. The famous maxim that "[t]here is no federal general common law"[25] means that federal courts should stick to their basic task of interpreting the Constitution and statutes and not go about creating new rules on their own.

That structural division of labor between Congress and the courts is what makes *Sosa v. Alvarez-Machain* such a problematic case.[26] *Sosa* involved the Alien Tort Statute, which gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[27] In discussing what by its plain terms is a jurisdictional statute, the Supreme Court conferred upon federal courts a discretionary authority not only to create private causes of action, but to define violations of the law of nations as well.[28] To be sure, the Court admonished the federal judiciary to exercise this power in a manner that would not trespass unduly upon the powers of the political branches in foreign affairs.[29] But in breaching the line between prescriptive and interpretive power, the Court risked a retreat to the era of *Swift v. Tyson*, which assigned to the judiciary, under the guise of federal common law, an impermissible prescriptive task.[30] The presence of powerful prescriptive verbs in Article I, Section 8 and the absence of such verbs from Article III both justifies the abandonment of the *Swift* regime, and makes its resurrection in *Sosa* a structurally objectionable step.

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22. U.S. Const. art. III, § 1.
23. Id. art. III, § 2, cl. 2.
24. 304 U.S. 64 (1938).
25. Id. at 78.
26. 124 S. Ct. 2739 (2004).
27. 28 U.S.C. § 1350 (2000).
28. See *Sosa*, 124 S. Ct. at 2761–62.
29. See id.
30. See 41 U.S. (16 Pet.) 1, 18–19 (1842).

This discussion is not intended to diminish the vital role of the federal courts, but to emphasize the proportionate place of the federal bench in relation to the democratic branches. As we have just noted, that place requires that federal courts not assume lawmaking powers. Just as critically, judicial invalidations of congressional enactments should be few and far between. The Constitution suggests a sense of judicial modesty and restraint, and abjures acts of aggrandizement on the part of the judiciary. It is worth remembering that the judicial review that is so much a part of our constitutional order is not explicitly commanded by the Constitution's text. The adages designed to ensure the primacy of political prerogatives, such as the presumption of constitutionality that attaches to legislative acts,[31] faithfully reflect the structural assignment of authority in Articles I through III. Thus our first structural principle—that the courts do indeed possess authority to police the Article I, Section 8 powers—is tempered by a more pervasive structural principle that prohibits the exercise of that authority from ever becoming the judicial equivalent of an Article I, Section 7 executive veto.[32]

Indeed, the reasons against allowing anything approaching a de facto judicial veto power under the guise of judicial review are self-evident. The basis of the executive veto is manifestly political. It can vary from bill to bill, depending upon the political exigencies involved. The basis of judicial invalidation, however, is inevitably doctrinal, and as such, judicial invalidations should ideally assume a consistency over time. But the doctrinal tools formulated to achieve this consistency are nebulous to say the least. Judicial review under the commerce power inquires, for example, whether the regulated subject matter is "economic," and, if so, whether that economic activity taken in the aggregate substantially affects interstate commerce.[33] Judicial review under Section 5 of the Fourteenth Amendment inquires whether a congressional enactment seeks to enforce the provisions of the Amendment or to redefine them.[34] The open-endedness of terms such as "substantially affects,"[35] "congruence,"[36] "pro-

31. See, e.g., United States v. Harris, 106 U.S. 629, 635 (1883) (explaining presumption of constitutionality for legislative acts).

32. U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . .").

33. See United States v. Lopez, 514 U.S. 549, 558–59 (1995) (presenting this standard).

34. See City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (requiring that congressional enactments under the Fourteenth Amendment be congruent and proportional to the underlying substantive right).

35. See *Lopez*, 514 U.S. at 559 ("We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

36. See *Boerne*, 521 U.S. at 530 ("[T]here must be a congruence between the means used and the ends to be achieved.").

portionality,"[37] "remedial,"[38] and "definitional,"[39] just to name a few, makes subjectivity in application a special danger. The inevitable perception of judicial partiality operating under such vagaries of nomenclature requires restraint and caution on the part of the third branch.

Congress cannot trample the states in the name of promoting rights. The courts cannot stonewall Congress in the name of enforcing structure. Rather, our Structural Constitution authorizes judicially imposed limits on congressional powers while suggesting the most stringent limitations on that very role. Supporters of the New Federalism practiced by the Rehnquist Court are apt to emphasize the first principle while opponents stress the second. The fact is that neither structural principle can operate to the derogation of its counterpart.

II. The Judiciary and the Executive

The debate between proponents of rights and adherents to structure is every bit as lively in the judicial/executive arena as it is in the field of judicial/congressional relations. The champions of a rights-based Constitution have argued strenuously for executive accountability on two different levels. Their first argument is that courts should be quick to intervene in many of the myriad disputes between individual citizens and the executive branch of government, whether those controversies be civil or criminal in character. Their second argument is that courts should not hesitate to uphold congressional attempts to enforce executive accountability, whether those attempts be in the form of an independent counsel statute, a war powers act, or some other interbranch dispute involving no legislation at all. Here, as in Part I, our Structural Constitution provides a way of looking at such problems that the purely rights-based perspective of recent decades has neglected.

To begin with, much of Article II describes the manner of choosing the President and the qualifications for that office. But that is not all it does. The concept of enumerated powers is often erroneously supposed to apply exclusively to Congress. Article II, however, not only vests the executive power in a "President of the United States of America," but enumerates the specific powers of the executive branch as well. For example, the President shall be "Commander in Chief of the Army and Navy," may "grant Reprieves and Pardons," may make treaties and nominate officers with the proper "Advice and Consent of the Senate," and, above all, "shall take Care that the Laws be faithfully executed."[40]

The Framers devised a set of shared powers between the political branches as part of their system of checks and balances. For example, the

37. See id. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

38. See id. at 519 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

39. See id. at 525.

40. U.S. Const. art. II, §§ 2–3.

Congress passes legislation, which the President can veto, which the Congress by a two-thirds vote of each house can then override.[41] The warmaking power is allocated, somewhat ambiguously, to both the executive and legislative branches.[42] The President can make treaties, but the Senate must approve them.[43] The President nominates judges and executive officers, but the Senate must confirm them.[44] The judiciary was not made a partner in this power-sharing arrangement and indeed the need for courts to remain independent suggests that it should not have been.

The structural tensions between the judiciary and the Executive are even greater than the tensions between the judiciary and the Congress. To be sure, many of the Executives's enumerated powers fall in the realm of foreign policy, where judicial deference to executive discretion is greatest.[45] Then, too, the Executive is obviously incapable of infringing the rights of the citizenry through legislation. However, the sheer number of executive officers in federal and state government, and the even more numerous acts that they are charged with performing, brings before the courts challenges to executive action with numbing frequency. The arrest, detention, prosecution, and subsequent confinement of a single individual are likely to spawn so many claims of abuse of executive authority as to make tensions with the third branch the normal state of affairs. And where administrative agencies have a substantial policymaking role and become a standard point of contact between citizens and their government, it is inevitable that the level of conflict between the Executive and the judiciary will increase.

How to navigate this tension is among the Constitution's most perplexing problems. The guarantees of our rights simultaneously provide guideposts for the exercise of executive authority. For instance, the provision that "no Warrants shall issue, but upon probable cause"[46] is at once a protection of individual privacy and a standard for executive conduct, but the spare and elliptical nature of this and other phrases in the Bill of Rights has guaranteed many volumes of court interpretations. This is all to the good. A stream of judicial rulings resolving challenges to alleged suppressions of speech, unlawful searches and seizures, coercive interrogations, inflictions of cruel and unusual punishments, and the like is probably the vehicle best suited to vindicate the rule of law.

The most contentious problems in the judicial/executive relationship come in those cases where the Executive asserts what is best de-

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41. Id. art. I, § 7, cl. 2.

42. Id. art. I, § 8, cls. 11–16; id. art. II, § 2, cl. 1.

43. Id. art. II, § 2, cl. 2.

44. Id.

45. See, e.g., United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (offering great judicial leeway to executive branch in its conduct of foreign affairs).

46. U.S. Const. amend. IV.

scribed as a claim of inherent authority.[47] The Executive couches these inherent prerogatives most frequently as matters of "national security" or "executive privilege." The executive branch views itself as having the intrinsic right to take actions pursuant to such phrases, while the judiciary just as instinctively views these general and sweeping invocations of such authority with a skeptical eye.

Implied executive power runs into the same resistance from the rights-based perspective that implied rights may encounter from the structural point of view. A purely rights-based perspective on the Constitution would lead the courts to reject claims of national security and executive privilege almost out of hand. It is fair enough for the judiciary to insist that executive action be grounded in positive law more specific than general invocations of national security and executive privilege. The Structural Constitution, however, forms a part of the positive law that justifies executive action on behalf of what, after all, are the claims of the majority to enforce its duly promulgated Constitution and duly enacted laws. The question for the courts then is how strictly tied are claims of national security and executive privilege to the structural dictates of the Constitution and specifically to the enumerated executive powers in Article II.

Some years ago, the Nixon Administration claimed a broad power to conduct what it termed national security surveillances without warrants or any other form of prior judicial approval. The Court rejected the Executive's authority to conduct warrantless wiretaps in domestic security cases such as the one before it.[48] The government's asserted national security wiretap authority seemed plainly to contravene not only the Fourth Amendment's safeguard of personal privacy, but the First Amendment's guarantee of free expression as well. The Court, however, was careful to note that the case before it involved "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country . . . . There is no evidence of any involvement, directly or indirectly, of a foreign power."[49] This distinction between domestic and foreign surveillance, imprecise though it may be, bears a solid connection to the Structural Constitution.[50] The Executive's most explicit mandate in Article II is in the realm of foreign af-

47. See generally Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1 (1993) (addressing need for adequate theory of presidential authority and arguing for executive protective power).

48. See United States v. United States Dist. Court, 407 U.S. 297, 321 (1972).

49. Id. at 308–09.

50. I should note that the distinction has come under pressure in a smaller world with larger terrorism threats. It has become increasingly difficult to draw legal distinctions between ordinary criminal law and law governing acts of terrorism. Similarly, the increasingly global reach of terrorist organizations makes the characterization of surveillance as foreign or domestic a more elusive one.

fairs,[51] to which the asserted authority to conduct unfettered domestic wiretaps bore only tenuous connection.

The structural principles of Article II bore some immediate relevance, however, to the American response to the events of September 11. Many of the executive detentions conducted in the aftermath of that tragedy aroused great controversy, particularly the designation of suspected Taliban fighters as enemy combatants[52] and the holding of alleged terrorists and al Qaeda operatives at Guantanamo Bay.[53] The cases in this area are difficult and require the judiciary to be sensitive to the shifting and delicate balance between structure and rights. The critics protested the executive actions from a rights-based perspective, lamenting the absence of hearings, counsel, and other elements of criminal process. Their concerns are understandable, but they might be tempered by attention to basic principles of constitutional structure. Operations in both Iraq and Afghanistan were authorized by congressional resolution, and the execution of those campaigns fell ultimately to the President as Commander-in-Chief. Attention to the constitutional structure is important not because of some generalized notion of national security, but because of the explicit assignment of military and diplomatic authority under Articles I and II.

The executive branch is thus on firmest ground when its claims of national security or executive privilege are anchored in the explicit structural mandates of Article II. A more difficult case arises when the Executive's claims are tied not to any particular constitutional power, but instead to Article II's general charge that the Executive faithfully execute the laws.[54] The fact that this charge is general rather than specific does not mean that courts are free to ignore it altogether. For example, in *Clinton v. Jones* the President faced a civil suit for conduct that was unrelated to his constitutional mandate and that had occurred before he took office.[55] Although the President was not immune from suit for unofficial acts, he argued that the case against him should be stayed during his term of office, for fear that it might result in a generalized impairment of the executive function. The Court, however, rejected the President's argument. It found that Jones "[had] a right to an orderly disposition of her claims," and that the President was unable to invoke any immunity that would prevent the courts from exercising their jurisdiction.[56]

Such a purely rights-based view of the matter is not without its merit. No one is above the law. And it is tempting to think that President Clinton was pleading nothing more exalted than his personal self-interest. But the President's argument that Jones's suit should be held in abeyance

51. See U.S. Const. art. II, § 2, cls. 1–2.
52. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2637 (2004).
53. Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004).
54. U.S. Const. art. II, § 3.
55. 520 U.S. 681, 684–86 (1997).
56. Id. at 710.

was rooted in structural values that underpin the constitutional order. The Constitution confers collective rights as well as individual ones, and one of those collective rights is that a majority is entitled to have its duly elected President exercise the powers it granted him.

Suppose, for example, that something akin to the *Jones* litigation had arisen in the aftermath of the September 11 tragedy. The American people would expect the executive branch to be capable of devoting its undivided attention to preventing another terrorist attack. The Court in *Clinton v. Jones* did not perceive much potential for distraction, as it deemed Jones's suit "highly unlikely to occupy any substantial amount of [the President's] time."[57] This assessment, though, underestimates the challenges faced by a coordinate branch in the midst of media-hyped litigation and overestimates the ability of courts to prevent scandalgate suits from impairing the Executive's effective performance in office.[58]

The point here is that the Structural Constitution provides for political accountability while the President is in office and defers legal accountability, or at least civil legal accountability,[59] until the President has left office. Indeed, the Structural Constitution presupposes political accountability for the President while in office through periodic elections[60]—if not the President's own reelection, then the elections of his successor or the members of his party in Congress and in statehouses throughout the country. And, of course, the extreme remedy of impeachment is also available.[61] More informal political mechanisms also hold the Executive to account. A President beset by cries of scandal will soon enough find his political capital drawn down. A purely rights-based view risks overlooking these structural political checks by focusing on strictly legal ones.

The same thread of political versus legal accountability also runs through cases in which the structural allocation of authority, rather than the vindication of individual rights, is at stake. In *Morrison v. Olson* the Court upheld Congress's transfer of the power to prosecute executive officers from the Department of Justice to an independent counsel largely free from the President's control.[62] Whatever the statute's efficacy in policing misconduct in the executive branch, it transferred some of the power to investigate and prosecute crimes—quintessentially executive

57. Id. at 702.

58. See Adrian Vermeule, The Judicial Power in the State (and Federal) Courts, 2000 Sup. Ct. Rev. 357, 368 n.45 (discussing tendency of courts to overweigh "concrete needs of the case at hand" and underweigh "systemic value[s]" important to the executive branch).

59. The Supreme Court has properly recognized that federal criminal prosecution is a much more serious matter. See United States v. Nixon, 418 U.S. 683, 713 (1974) (concluding that "when the ground for asserting privilege . . . is based only on the generalized interest in confidentiality, it cannot prevail over . . . the fair administration of criminal justice").

60. U.S. Const. art. II, § 1, cl. 1.

61. Id. art. II, § 4.

62. 487 U.S. 654 (1988).

functions—away from the President.[63] And in so doing, the statute left "no one accountable to the public to whom the blame could be assigned."[64] The Framers certainly understood the dangers of corruption and vice in the executive branch, but they understood no less the dangers of an enervated Executive. Civil suits and special prosecutors risk supplanting the Structural Constitution's political checks and balances with a system of legal accountability that the judiciary may instinctively approve, but that the Framers did not intend.

Morrison v. Olson is intriguing in yet another sense. Should the judiciary be more willing to intervene in structural disputes between Congress and the states than in structural controversies involving two coordinate branches of the federal government? *Morrison v. Olson*, of course, represents the latter kind of conflict. One answer might be that because states are weaker in relation to Congress, the legislative and executive branches being more equal adversaries, the courts should be more willing to intervene on the states' behalf. Even if one were to accept the premise that states are relatively feeble vis-à-vis the federal government, that does not place controversies between Congress and the Executive beyond judicial purview. The same interpretive obligations that require courts to review congressional incursions on dual sovereignty do not disappear when controversy involves the Congress and the Executive.[65] Witness, for example, the Supreme Court's willingness to redress a structural imbalance between the Executive and the Congress by invalidating the line item veto—a power that had actually been granted to the Executive by Act of Congress.[66]

Thus for the reasons expressed in Part I, the judiciary would have some obligation to rule upon purely federal disputes between the executive and legislative branches. However, for many of the same reasons expressed in Part I, the courts should tread cautiously in exercising their power. In *Morrison v. Olson*, the structural principle of electoral accountability was at stake and the Court's failure to vindicate that structural principle was unfortunate. This failure hardly means, though, that the structural underpinnings of the Constitution suggest an aggressive role for the courts in every contest between the President and Congress. Consider, for example, the recent suit by the congressionally controlled General Accounting Office to compel a presidential energy task force to turn over

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63. But see the thoughtful article by Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 612–15 (2001) (criticizing view that powers can be denominated executive, judicial, or legislative and assigned to branches accordingly).

64. *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting) (emphasis omitted).

65. See, e.g., Steven G. Calabresi, The Structural Constitution and the Countermajoritarian Difficulty, 22 Harv. J.L. & Pub. Pol'y 3, 6 (1998) ("The Court's role in separation of powers disputes is . . . democracy enhancing. The Court polices the democratic processes to decide which national majority—the presidential one or the congressional one—gets to decide which questions.").

66. See Clinton v. City of New York, 524 U.S. 417, 420–21 (1998).

records that related to the Administration's development of its energy policy.[67] Although the district court dismissed the case on standing grounds, it noted that this hardly left Congress without a remedy.[68] Not only could Congress decline to act on the President's energy proposal until it had the information, but it could refuse to act on other proposed legislation, to confirm judicial or executive nominees, or to appropriate funds requested by the Executive.

Conflicts between the legislative and executive branches over the conduct of foreign hostilities present the classic case in which courts should not casually intervene. Both Congress and the Executive are ultimately accountable to the people for the conduct of foreign wars. And each of the coequal political branches has formidable tools at its disposal. The Executive is best equipped to commit troops to foreign lands in an emergency and to speak for the nation as a whole at a time of grave international tension. Congress, through the powers of appropriation, oversight, and legislative enactment,[69] can assert its views in a powerful, if somewhat belated, fashion. Then, too, the very text and structure of the Constitution allocate significant warmaking powers to each of the elected branches of the federal government. Thus, titanic struggles over foreign affairs present a far less auspicious context for judicial intervention than in *Morrison v. Olson*, where preserving political accountability for prosecutorial decisions and executive misconduct was a more straightforward matter.

In sum, the same Structural Constitution that preserves a judicial role in disputes between the Congress and the Executive also suggests profound limitations on that role. It is difficult to believe that the Framers envisioned no part for the judicial branch when the structural equilibrium between the other two branches gets out of whack. It is also clear, however, that the Structural Constitution imposes profound limits on that role, for the dangers of having an unelected branch interfere in the fierce partisan disputes of the political branches should be apparent.

III. The Judiciary and the States

The relationship between the judiciary and the states themselves is the focus of as much, if not more, controversy than the two previous subjects. Here again the ostensible differences between a perspective based on rights and one grounded in structure are stark. The rights-based view places a premium on the values of individual privacy and autonomy, and it has further preserved those values as matters for special constitutional

67. See Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002). The D.C. Circuit has allowed discovery to proceed in a separate but similar suit against Vice President Cheney by Judicial Watch, a nonprofit organization. See In re Cheney, 334 F.3d 1096, 1107 (D.C. Cir. 2003).

68. See *Walker*, 230 F. Supp. 2d at 68 & n.12.

69. See, e.g., War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (1994)).

solicitude. There is, however, a significant structural dimension to the rights-based argument in this area, namely that the Fourteenth Amendment so reordered the constitutional structure between the national government and the states that it placed even unenumerated rights within the national purview. The structural rejoinder to that proposition is that the basic federal structure survived the enactments of the post-Civil War era, albeit in a modified form. In this view, the restructuring attached preeminently to matters of racial equality and left the states with many of their earlier sovereign attributes.

The Structural Constitution contains both strong affirmations of national power and significant support for the role of the states. In fact, the Constitution's creation of two sovereigns within a single territory was one of its great contributions to the art of government.[70] Many provisions underscore the importance of state government to the constitutional scheme. Article I bases representation in Congress on the states; Article II, Section 1 directs that each state shall appoint electors in presidential elections; Article IV, Section 4 provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government"; Article V incorporates the states as well as Congress into the constitutional amendment process; and Article VII directs that the Constitution take effect upon "the Ratification of the Conventions of nine States." But the most significant, or at least the most tantalizing, recognition of state authority is found in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Unlike other provisions of the Bill of Rights, the Tenth Amendment does not prescribe a right but establishes a structural principle of reserved powers. The Constitution establishes a system of dual and concurrent sovereignties. However, these sovereign entities operate very differently from each other. The federal government is at once powerful and finite. "The United States is entirely a creation of the Constitution. Its power and authority have no other source."[71] The federal government exercises enumerated powers, most notably those granted by Article I, Section 8. The states, by contrast, exercise residual and unenumerated powers, fundamentally the basic police power to protect the health, welfare, safety, and morals of the people.[72] And it is the people of each state, as the beneficiaries of the Tenth Amendment's final phrase, who decide

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70. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

71. Reid v. Covert, 354 U.S. 1, 5–6 (1957) (citation omitted).

72. See, e.g., The Federalist No. 39, supra note 14, at 245 (James Madison) (explaining that the federal government's powers extend "to certain enumerated objects only," thus leaving "to the several States a residuary and inviolable sovereignty over all other objects").

in what measure and manner the reserved powers of their state shall be exercised.

The Supreme Court's treatment of the Tenth Amendment is a good barometer of its regard for the states. The strength of the Amendment appears to ebb and flow with the political tides. It probably reached a low point in 1941 when Chief Justice Harlan Fiske Stone declared that it expressed nothing more than "a truism."[73] When states have failed to exercise such basic responsibilities as ending racial segregation, federal authority has filled the void, and the appeal of the Tenth Amendment has declined accordingly. The willingness of the Court to breathe life into its words may depend on the public esteem in which state government is held.

During the Rehnquist Court years, the Tenth Amendment has experienced something of a revival. In *Gregory v. Ashcroft*, the Court declined to apply a mandatory retirement provision of the Age Discrimination in Employment Act to state judges because Congress had not clearly intended to intrude on an important governmental function reserved to the states.[74] And in *Printz v. United States*, the Court invoked the Tenth Amendment to prohibit Congress from commandeering state personnel in the execution of a federal gun control program.[75] The statute at issue in *Printz* went so far as to require state and local law enforcement officers to conduct background checks on prospective purchasers of handguns.[76]

But in *Reno v. Condon*, the Court brushed aside a Tenth Amendment challenge and allowed Congress to impose compliance costs upon the states in furtherance of a federal law aimed at protecting personal information possessed by state motor vehicle departments.[77] Thus, Congress appears to have broad latitude in imposing costs incidental to the implementation of federal directives, so long as it does not cross the line and actually direct state officials' actions.

In fact, the much ballyhooed revival of the Tenth Amendment has been something of a marginal development. The Court has actually moved more aggressively under the Eleventh Amendment to limit Congress's ability to subject the states to private suits for monetary damages.[78] And despite predictions to the contrary by then-Justice Rehnquist in dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,[79] Congress re-

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73. United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth A]mendment states but a truism that all is retained which has not been surrendered.").

74. 501 U.S. 452, 460–63 (1991).

75. See 521 U.S. 898, 933 (1997); see also New York v. United States, 505 U.S. 144, 149 (1992) (refusing to allow federal government to compel states to enact federal regulatory program).

76. See *Printz*, 521 U.S. at 902–04.

77. See 528 U.S. 141, 150–51 (2000).

78. See, e.g., Alden v. Maine, 527 U.S. 706, 712 (1999).

79. 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

mains free to impose broad-based regulations on the state and local workforce, such as those decreed in the Fair Labor Standards Act and Family Medical Leave Act.[80] Thus, whatever attributes of sovereignty state governments hold, they do not enjoy final and unfettered authority to set rules for their own employees.

The Supreme Court itself has moved to restrict the foremost concern of the Tenth Amendment—the preservation of the state police power. Even in a core area of state concern like domestic relations, the Court struck down as violative of a parent's constitutional rights a Washington state statute granting grandparents the right to petition the Court for visitation privileges.[81] And in *Lawrence v. Texas* the Court cabined the ability of states to regulate private morality by voiding a Texas statute that criminalized intimate sexual conduct between consenting adults of the same sex.[82] In neither case did the strictures of the Tenth Amendment, or the federal system it embodies, operate to inhibit the Court's assessment of its own constitutional obligations.

No betting person, then, would believe that the Tenth Amendment was poised for a major revival. This is so for several reasons. Congress's enumerated powers are broad and varied; the spending power, for example, will always give the national legislature a strong hand, because while in theory the states can reject federal funding, in practice they are beholden to federal dollars. Then too, the twin revolutions in transportation and communications, and the interconnectivity of the global economy, have made many problems appear more national and international than local and regional in scope. Twenty-first century America is also a nation conscious of rights and entitlements, and once conferred, such rights are not easily withdrawn. The Tenth Amendment coexists in our Constitution with such provisions as the Supremacy Clause in Article VI, the Necessary and Proper Clause, and the other guarantees of the Bill of Rights. These provisions remind us that the Framers set out to do many things—among them, to protect dual sovereignty, establish effective centralized power, and safeguard individual liberty. The last two purposes have served to moderate the structural force of the Tenth Amendment to the point where a major doctrinal revival is unlikely.

The Tenth Amendment requires a high tolerance for disparateness. A rights-based perspective on our Constitution has uniformity at its heart. Advocates of a rights-based approach properly point out the unfairness that results when the power of the state differently affects similarly situated individuals. For example, in the Fourth Circuit, Virginia allows capital punishment; West Virginia does not. Why would we allow this life-or-death difference for the sake of a jurisdictional line?

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80. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201–219 (2000)); Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (current version at 29 U.S.C. §§ 2601–2654 (2000)).

81. See Troxel v. Granville, 530 U.S. 57, 67 (2000).

82. 123 S. Ct. 2472, 2484 (2003).

The answer can only be that our Structural Constitution confers the priceless values of self-governance upon many different entities. The Tenth Amendment protects, above all, against the hubristic notion that there is invariably one and only one version of the truth. The Amendment is populist in character. It allows many solutions to bubble up from below, rather than requiring one solution to be prescribed from above. It safeguards the possibilities of diverse state approaches to the nation's most volatile social problems. And in so doing, it respects regional differences as well. The Amendment also holds open the possibilities of political experiment and compromise. It allows change in America to assume a gradual, evolutionary, and democratic course—one quite different from the change achieved through the convulsive stroke of the constitutional pen. What is often forgotten is that localities too can protect our cherished liberties.[83]

The Tenth Amendment thus exists in some tension with other constitutional values. Because its focus is perceived to preserve governmental structure and not to protect individual rights, it will not meet with universal favor. The Tenth Amendment was not intended by the Framers to dominate our constitutional landscape. But neither was it placed in our founding document to be forgotten. Precisely because it is an antidote to national uniformity and a stimulant to local self-determination, the Amendment will always be subject to much criticism. But without it, our nation would be less vital and less free.

IV. Our Structural Future

The problem is not that too much attention has been paid to constitutional rights. It is that too little attention has been paid to constitutional structure. Why, one asks, should it matter? Why is it so critical to appreciate the Constitution as a structural document? Why is it so important for both lawyers and laypersons to think in structural terms? The answer is that freedom and authority are forever in conflict, and it is mainly through the interlocking roles and parts of government that the tension is worked out. The failure to understand public structures, then, is a failure to understand the essence of either liberty or order. The fundamental structural notion of checks and balances was the Framers' attempt to establish authority and preserve liberty under one constitutional roof.

If the structure of the American Constitution represents that document's attempt to balance liberty and order, then the judiciary must perforce play some role in working that structure out. Major structural principles will doubtlessly be established by the tug and pull of political forces. Others, however, must be defined in the course of the judiciary's

83. See Amar, supra note 7, at 1136 ("What has been lost in this twentieth-century debate is the crucial Madisonian insight that localism and liberty can sometimes work together . . . .").

interpretive function. We are rightfully fond of saying that an independent judiciary exists to protect our rights. But in our Constitution, rights and structure are so linked that to ensure one the courts must explore the other as well.

If the Constitution is all about rights and nothing about structure, then the instinctive perception will be that constitutional law is a vehicle for the vindication of individual liberty and little else. But the Framers' vision was so much more. The document they produced sought to ensure the primacy of democratic process, the significance of political accountability, the effective uses of centralized power, the sovereignty of states, the protection of individual rights and liberty, the separation and division of governmental power, and the integrity and independence of the rule of law. Government itself was conceived by our Constitution not only as a potentially overreaching entity, but as an entity of productive value.[84] It is only through an understanding of structure that these colliding and often contradictory aims can be appreciated. To forsake structure for a purely rights-based view of the Constitution is to forsake the genius and subtlety of the Framers' vision as well.

Then too, structuralism affords us a tool of constitutional interpretation we would otherwise lack. The constitutional text, although vitally important, is often too ambiguous or abbreviated to yield definitive insights into the document's meaning. The debates on ratification have long been mired in controversy over whether, and at what level of generality, to consult the Framers' intent. In short, we need something else. It is here that structural interpretation performs a unique and indispensable function, namely that of asking insistently exactly which governmental entity should properly resolve the question presented by a particular case. It is the structural preference for a judicial or democratic solution, or for federal or state sovereignty, that brings us most into concord with the constitutional universe.

The threshold question for a judge under the Structural Constitution is not, "How should I resolve this case?" It is rather, "To whom does the Constitution entrust the resolution of this issue?" It is these allocative choices of the Structural Constitution that deserve special notice and respect. Of course, the mere fact that the federal or state government is acting pursuant to a lawful power gives government no license to trample on our rights. Congress cannot say that because criminal suspects may have moved in interstate commerce, it can remove from them the protection of the Bill of Rights. A state cannot say that because criminal suspects threaten the health, welfare, and safety of the populace, the state has the power to deprive them of their Fourth, Fifth, or Sixth Amendment liberties. The glory of the Bill of Rights and the Fourteenth Amendment is that they act as brakes upon the exercise of both enumerated and residual powers.

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84. See, e.g., U.S. Const. art. I, § 8, cls. 4, 5, 7, 8.

But that, of course, is not the end of the matter. The Structural Constitution makes specific allocative choices. In difficult cases where public interests and personal liberties must be balanced, our Constitution's grant of authority to particular public entities means the public, not just the personal, interest must command respect. It is only through an appreciation of structure that the collective rights accorded the American people in the Constitution will receive their due. If one neglects the beginning of the American Constitution and concentrates just on the end, one might well conclude that the majoritarian choices of the American people were not entitled to all that much respect. Structure teaches that the Constitution protects all of us as well as each of us. Collective rights and individual rights both were included in its grand design.

Yet public interests and personal liberties need not always be at odds. The aftermath of September 11 underscored yet another structural lesson. Powers tend to be assigned exclusively to one branch of government, while rights are more the shared responsibility of all three. One would not expect, for example, the courts to undertake some part of the Commander-in-Chief's foreign affairs prerogative or exercise the congressional spending power. On the other hand, there is nothing in our Constitution that allocates protection of the Bill of Rights to courts alone. It is entirely fitting and proper for the executive and legislative branches to act to safeguard our basic liberties. There is no reason that a body elected by the people would automatically be predisposed to trample the rights of the people. Elected officials, no less than judges, are sworn to uphold the Constitution, and they likely came of age in the same culture that nourished their counterparts on the bench. The ongoing debate over the USA Patriot Act suggests that Congress retains a keen interest in questions of personal liberty.[85] Similarly, three United States senators recently visited the military's detention center at Guantanamo Bay.[86] Their calls on the military to release or try the detainees were not out of order. It is natural that the legislative branch, which bears significant constitutional responsibilities for the conduct of war, would weigh in on the civil liberties dimensions of armed conflict as well.

Whether the judiciary should involve itself, however, is another question. The structure of the Constitution does not assign it warmaking powers, and a court may not seize upon the vehicle of litigation to assume those powers it does not possess. The Structural Constitution counsels judicial restraint. We have passed through a period when both conservatives and liberals have become disillusioned with the excesses of judicial activism. Conservative displeasure with the interventions of the Warren

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85. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); see also H.R. 2799, 108th Cong. (2003) (denying funding for section 213 of Patriot Act, which permits "sneak and peek" searches).

86. Neil A. Lewis, Try Detainees or Free Them, 3 Senators Urge, N.Y. Times, Dec. 13, 2003, at A11; R. Jeffrey Smith, Military Urged to Try or Free 660 Detainees, Wash. Post, Dec. 13, 2003, at A8.

Court gave way to liberal displeasure with the interventions of the Rehnquist Court, which itself by the end of the 2002–2003 Term had again raised conservative distemper. The Structural Constitution does not by any means call a halt to judicial review or even to judicial intervention, but it does suggest restraint in its exercise. By broadening the focus from rights alone, the Structural Constitution teaches that the federal judiciary is not the only game in town. And by returning the focus to the critical role of the political branches and the states in the constitutional scheme, the Structural Constitution necessarily requires judicial respect for the workings and products of democracy. That five justices can preempt the will and voices of millions should make it neither a casual nor a regular occurrence. The past half century has seen a shift of power from the people to the courts. Our Structural Constitution alone will restore the delicacy of the political/judicial balance and return respect to where the whole of our Constitution says it rightfully belongs.