Volume 33
Number 1 *Fall 1998*

*pp.*1-21

Fall 1998

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Akhil Reed Amar

VALPARAISO UNIVERSITY LAW REVIEW

VOLUME 33 FALL 1998 NUMBER 1

Seegers Lecture

CONSTITUTIONAL REDUNDANCIES AND CLARIFYING CLAUSES

Akhil Reed Amar*

I. INTRODUCTION

My topic today is redundancy of a certain sort—constitutional redundancy. You will perhaps have noticed that my topic sentence itself arguably involved a kind of redundancy—the word "redundancy" appeared twice. Does this make it a bad topic sentence? I hope not. Rather, I hope the end of my topic sentence helped clarify the beginning of the sentence by making express what might otherwise only have been implied. Since I am not a linguist but a constitutional scholar, when I said my topic today is redundancy of a certain sort, most of you probably inferred that I meant to address *constitutional* redundancy. Rather than leaving this to inference, however, I thought it best to be explicit. But suppose I had said instead that "my topic today is constitutional redundancy, which is my topic today." Would *that* have been a bad topic sentence? I think so. But what, exactly, is the difference between these two kinds of redundancy—the good kind and the bad kind—and how is that difference relevant to constitutional interpretation? These questions are also part of my topic today.

Before we explore this topic together this afternoon, let us pause to consider why we should make the journey at all. Why is this an important topic? And is there anything interesting to be said about it? To answer the first question, we need only remember that the Constitution is, to borrow a phrase, the supreme law of the land. And so the stakes in constitutional interpretation are high. The Constitution is

* Southmayd Professor of Law, Yale Law School. This article derives from the 1998 Seegers Lecture in Jurisprudence, delivered on October 26 at the Valparaiso University School of Law.

also a written text, and a short one at that, so we must weigh each word and each clause with care. Of course, there is more to constitutional law than the text itself; original intent, tradition, institutional practice, precedent, and practicality, among other things, must all get their due in proper constitutional interpretation. But constitutional interpretation should also have something to do with the text of the Constitution itself. In principle, virtually all lawyers, judges, and scholars accept this point; we are all textualists. But some of us are more textualist than others, lingering on the text longer, laboring to squeeze more meaning from it before turning to other sources of constitutional guidance. Rules of construction can be especially important, because these rules shape the lens through which we read the words themselves. One of the most commonly voiced rules of construction is that we should try to read the document to avoid redundancy. But—and here is where I think that there is indeed something interesting to be said on the topic—most lawyers and law students seem to misunderstand the true meaning and proper scope of this rule of construction.

II. A MISUNDERSTOOD MAXIM

My thinking on this issue began, as so many of my thoughts on constitutional law have begun, in my classroom. On countless occasions, I have made a set of arguments about some constitutional clause or other, giving what I consider to be strong reasons to believe that the clause means x, only to have one of my brightest students say something like the following: "Surely, Professor, the clause must mean more than that. If it meant x and only x, it would be redundant! Even if the clause did not exist at all, we would sensibly read other parts of the document to mean x." At these moments, most of the other students solemnly nod their heads or murmur in approval, as if this objection were unassailable, the constitutional equivalent of the Pythagorean Theorem. Their reaction is, I think, quite typical of the legal profession more generally. Speaking from personal experience, I can report literally dozens of similar reactions from law review editors and law professors over the years. Usually, the redundancy objection is presented as if it were a knock-down, slam-dunk, irrefutable objection to a given reading.

But it is not. Indeed, it is often a rather obtuse objection, ignorant of the way our Constitution is, in fact, written. A considerable number of constitutional clauses are redundant in a certain sense; they illuminate and clarify what was otherwise merely implicit. Call these clauses *declaratory* or *clarifying* provisions. I shall spend the bulk of this lecture identifying some of these clauses to persuade you that they are, indeed, a

ubiquitous feature of our written Constitution. To the extent that the usual form of the redundancy objection misses this deep fact about our Constitution, the usual form of the objection proves far too much—and therefore nothing at all.

What, then, are we to make of the redundancy objection? Let us begin with one of the most canonical formulations of the rule of construction, from Chief Justice John Marshall in *Marbury v. Madison*: "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it."[1]

First, note that Marshall's rule of a construction is a rebuttable interpretive *presumption*, a default rule in the absence of clear evidence to the contrary. Marshall here is not identifying some universal and unbending jurisprudential property that all legal, or even all constitutional, provisions must exhibit. By way of contrast, consider the jurisprudential property of, say, noncontradiction. This property might well be a universal requirement; law, to be law, cannot require both x and not x simultaneously.[2]

Second, although Marshall says that his presumption can be rebutted only if "the words require it," this may be too strong a formulation. For example, perhaps the words themselves merely *suggest* that the presumption be rebutted, and historical data reflecting the original intent of the ratifiers, or general arguments from constitutional structure, provide additional presumption-rebutting reasons. (As I have already suggested, sensible textualists should not ignore nontextual sources of constitutional wisdom).

Third, and most important, note that Marshall is *not* confronting the argument that a given provision merely clarifies a rule that is otherwise implicit. He claims that if the clause at hand does not mean y, it would literally mean nothing at all. In Marshall's language, the clause would otherwise be "entirely without meaning," "form without substance," "inoperative," and with "no operation at all."[3] Thus, when he says that we may not presume that a given clause is "without effect" or "mere surplussage,"[4] he is *not* challenging the notion that a given clause might merely add emphasis or clarification. Rather, his presumption applies

[1] 5 U.S. (1 Cranch) 137, 174 (1803).
[2] *See generally* LON L. FULLER, THE MORALITY OF LAW (1964).
[3] 5 U.S. (1 Cranch) at 174-75.
[4] *Id.* at 174.

only if a given reading suggests that the clause means zero. When we argue that a clause instead means x (where x is not zero), we are arguing that it *does* have "effect"(namely x). And this is true even if the rest of the document can also be read to mean x. Even if we insist that the clause must have some *incremental* effect, Marshall's formal maxim is formally satisfied if we say that the incremental effect of the clause is to add *emphasis* or *clarity*. So Marshall's maxim, strictly speaking, is not anti-redundancy, but anti-nullity.

Further confirmation of this key point comes from the rest of Marshall's opinion in *Marbury*, as well as his classic opinion in *McCulloch v. Maryland*. On the subject of judicial review, Marshall in *Marbury* emphasizes that the basic structure and essence of the Constitution render it supreme, and superior to any inconsistent statute.[5] At the end of the opinion he points to the text of the Supremacy Clause, whose particular phrasing, he says, "confirms and strengthens the principle, supposed to be essential to all written constitutions."[6] In other words, on Marshall's view, certain parts of the Supremacy Clause simply add emphasis and clarity to what the Constitution is best read as meaning even without that clause! Nor is this result unique to the supremacy clause, or some inadvertent slip on Marshall's part. In *McCulloch*, in a passage we shall consider in more detail later, Marshall confronts another clause of the Constitution that, he concedes, may well simply confirm what would otherwise be the best reading of the document: "If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts. . . ."[7]

What's more, Marshall's application of his maxim in *Marbury* itself should be a strong cautionary tale to those tempted to take the maxim and run with it. The constitutional clause whose interpretation prompts Marshall's maxim reads as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as

[5] *Id.* at 176-77.
[6] *Id.* at 180.
[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819).

> to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[8]

Marshall contends that if Congress were to have power to add to the quantum of Supreme Court original jurisdiction set forth in this clause, the clause would be utterly meaningless, a complete nullity. It is, he says, a maximum or nothing at all. Since it cannot lightly be presumed to be nothing, it must be a maximum. QED. But modern scholars have ridiculed Marshall's logic here, labeling his argument "clearly overstated" and "surely wrong."[9] As a matter of logic, perhaps the clause could be read as setting forth a constitutional minimum rather than maximum quantum of original jurisdiction. Or perhaps the clause could be read as setting forth neither a minimum nor a maximum, but a simple default rule, operative unless and until Congress specifies otherwise. Both of these alternative readings give the clause some meaning and thus avoid the force of Marshall's objection that the words must mean something. At the end of the day, and for reasons I have set forth elsewhere,[10] I believe that Marshall is ultimately right in reading the clause as a maximum, but wrong in the reasons he gives. His application of his anti-surplussage maxim is one of the least impressive and most vulnerable parts of his opinion, because he simply fails to identify and confront other initially plausible readings. All this should be a sobering lesson to modern-day wielders of the redundancy objection. Is it possible that they, too, often use an extreme and overstated variant of Marshall's maxim to blind themselves to highly plausible readings?

Having cut Marshall's maxim down to size, we might wonder if there is any sensible application of some version of an anti-redundancy rule of construction. I think there is, and that we need look no further than Marshall himself to find it. Consider the great Chief's landmark 1833 opinion in *Barron v. Baltimore*, holding that the Bill of Rights constrains federal officers, but not state officials. Marshall justifies his holding in a variety of ways, one of which involves close inspection of Article I, Section 9 of the original Constitution. Marshall's first step is to show that the general language of Section 9—proclaiming that "x shall

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[8] U.S. CONST., art. III, § 2, para. 2.

[9] *See, e.g.*, William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 31 ("clearly overstated"); MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 11 (1980) ("surely wrong"). *See also* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT 68 (1985) ("far from obvious").

[10] *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 463-78 (1987).

not be done" without specifying *who* may not do x—applies only against the federal government and not against states. His second step is to argue that what is true for Section 9 is also true for the Bill of Rights. Today, let us focus on his first step. Why does Marshall believe that the generally worded prohibitions of Section 9 do not apply against states? Because if they did, the Constitution would read in a horrendously unstylish, repetitive way.[11] Section 9 contains the following words: "[n]o bill of attainder or ex post facto law shall be passed." Shortly thereafter, Section 10 provides as follows: "[n]o state shall pass any bill of attainder or ex post facto law." If Section 9 applies only to federal officials, Section 10's purpose is obvious—to impose the same limit on states. But if Section 9 itself is read to apply to states, then what exactly are the words of Section 10 doing? It is hard to think that they seek merely to clarify, because they do so in such a stylistically clumsy and artlessly repetitive way—as if I had opened this lecture by saying that "my topic today is constitutional redundancy, which is my topic today." This extreme kind of stylistic clumsiness belongs in Yogi Berra's "department of redundancy department."

There are indeed reasons to read the Constitution so as to absolve it of such stylistic ugliness. But these reasons are presumptive and flexible. It is simply unlikely, in the absence of specific evidence to the contrary, that the Constitution's drafters were truly terrible writers. And so the anti-redundancy maxim, sensibly understood, is merely one aspect of a general preference in favor of grace over awkwardness, both as a matter of interpretive charity and as a clue toward likely intended meaning. In my experience, however, the redundancy objection has usually been raised precisely to put forth a more awkward and clumsy reading, insisting that a certain clause must mean far more (or far less) than what it says. So, for example, some very bright professors have contended in conversations with me that the Double Jeopardy Clause cannot merely prevent retrial after a suitably error-free trial has resulted in an acquittal or conviction for a given offense; if that is all it means, they have argued, it would not add anything more than what was already implicit in due process. Inspired by a certain vision of anti-redundancy, these bright folks end up arguing that the Double Jeopardy Clause must mean something much more than what its words, its history, and common sense suggest. But this use of anti-redundancy derives absolutely no support from *Marbury* (which, as noted, proclaims an anti-nullity rather than an anti-redundancy presumption) or from *Barron*. Indeed, in *Barron*, Marshall points out that above and beyond concerns about

[11] Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248 (1833).

certain unstylish redundancies, there are sound structural and historical reasons for reading Section 9 and the Bill of Rights as inapplicable to states. And his reading of Section 9 also highlights and does justice to a rather elegant organization of constitutional clauses, in which all the clauses of Section 9 apply to the feds, while all the clauses of Section 10 apply to the states.

Of course, the deepest problem with an overly exuberant deployment of the anti-redundancy maxim is not that such deployment goes beyond *Marbury* and *Barron*, or even that it makes a hash of these cases. The deepest problem is that such deployment makes no sense, and fails to do justice to the Constitution it purports to interpret. Rightly understood, the Constitution contains a good many provisions that are best read as declaratory and clarifying. Let us catalogue just a few.

III. THE NECESSARY AND PROPER CLAUSE

Consider first the opening half of the last clause of Article I, Section 8, giving Congress power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." (The careful listener will have noticed that I am setting aside the words of the second half of this clause, which need not concern us today. When I shall refer to the clause today, I thus mean to refer only to the familiar words that I have just quoted).[12] Nowadays, it is widely thought that these words stand as a free-standing font of plenary or virtually plenary legislative power, and that this reading of these words draws support from Marshall's landmark opinion in *McCulloch v. Maryland*. But nothing could be further from the truth.

The words of the clause of course do not purport to be an independent, stand-alone grant of power. Rather, they are explicitly tied to "the foregoing Powers" enumerated earlier in Article I, Section 8. Nor is it so clear that the words of the clause add anything at all to the scope of the earlier enumerations. If we think of each of the earlier enumerations as an island of explicit textual power ringed by some suitably-defined territorial sea of implicit ancillary power, we need not read the words of the Necessary and Proper Clause as widening the width of the appropriate territorial sea.

[12] For a thoughtful analysis of the rest of the clause, focusing on its implications for separation of powers more than federalism, see William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (1976).

If the Necessary and Proper Clause need not be read as widening the implicit territorial sea surrounding each island of enumerated power and cannot be read as conferring power wholly independent of the enumerations—over some faraway ocean or over the entire globe, to continue our metaphor—then what exactly is its purpose and meaning? One logical possibility is that the clause actually *restricts* congressional power, calling for a thinner territorial sea than would otherwise seem sensible, or perhaps none at all. On this account, the clause could logically function like Article II of the Articles of Confederation, insisting that Congress has only power explicitly conferred, and frowning on all efforts to use explicit grants of power to justify implicit territorial seas.[13] According to Marshall in *McCulloch*, this was Maryland's argument, in effect.[14] But as Marshall demonstrates, this argument is highly implausible.[15] The clause is not grammatically worded as a restriction--syntactically, it does not say that "Congress shall *not* have power *unless* a law is necessary and proper." The clause is not included in the section of Article I dealing with restrictions on Congress, Section 9. Rather, it wraps up a section that confers broad powers on Congress, Section 8. Its phrasing complements the phrasing of another clause of the Constitution that has been construed in a nonrestrictive way, the Territories Clause of Article IV. Historically, if the Necessary and Proper Clause had truly been designed to shrink the natural breadth of the previous enumerations, its Federalist friends would have drafted and explained it as an obvious shrinkage clause (because in order to win ratification of the Constitution, they needed to ease fears of states' rightists). But they neither drafted it nor defended it as a shrinkage clause.

Marshall makes all of these arguments, and several more, to support his emphatic conclusion that the Necessary and Proper Clause does not shrink the territorial seas of implied power surrounding the earlier textual enumerations of express power. But—contrary to what many today seem to believe—Marshall does not say that the clause expands power in any way. He professes agnosticism on that point. The basic thrust of his opinion, as Charles Black reminded us long ago,[16] is that in the absence of the Necessary and Proper Clause, Congress would surely

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[13] *See* ARTICLES OF CONFEDERATION, Article II (1783) ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled") (emphasis added).

[14] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412 (1819).

[15] *See id.* at 413-23.

[16] *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13-14 (1969).

have power, under various enumerated powers and their implicit territorial seas, to charter a national bank. Only after he has already established this point does he turn to the Necessary and Proper Clause—not to prove that it *adds* power but to rebut Maryland's argument that it *subtracts* power. Once he has rebutted Maryland's argument, he does not try to prove conclusively that the clause adds any power whatsoever.

All this might at first seem to leave us with a puzzle. If the clause clearly does not shrink, and does not necessarily expand, then what does it do, on Marshall's account? Here is Marshall's answer: "If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble."[17] Simply put, the clause might well be a declaratory or clarifying provision designed to *remove all doubts*. A constitutional clause need not add or subtract a new constitutional rule; it is enough if it adds clarity or subtracts confusion.

Is this declaratory, doubt-removing reading of the clause a historically plausible one? Absolutely. Here is what Alexander Hamilton, as Publius, says about the clause in *The Federalist* Number 33, with my emphasis addded:

> [The Necessary and Proper and Supremacy Clauses] are *only declaratory* of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers.
>
> . . .
>
> The *declaration* [in the Necessary and Proper Clause] itself, *though it may be chargeable with tautology or redundancy,* is at least perfectly harmless.
>
> But SUSPICION may ask why then was it introduced? The answer is that it could only have been done *for greater caution,* and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union . . . [so as] *to leave nothing to construction.*[18]

[17] 17 U.S. (4 Wheat.) at 420-21.
[18] THE FEDERALIST No. 33, at 202-03 (Clinton Rossiter, ed. 1961).

And James Madison, writing as Publius, says much the same thing about the clause in *The Federalist* Number 44, deeming it an explicit declaration of a constitutional truth that would otherwise have been left to "unavoidable implication."[19]

In light of all this, we might well wonder why so many otherwise well-trained lawyers today misread *McCulloch* so badly, invoking it for the proposition that the Necessary and Proper Clause grants Congress sweeping powers above and beyond the various enumerations, when Marshall says no such thing. My suspicion is that many moderns may believe that Marshall simply cannot mean it when he says that the clause may well be in some sense redundant. For these moderns have somehow gotten it in their heads that clauses cannot be redundant in any sense. But that is not what Marshall or Hamilton or Madison thought, and it is also not the theory underlying our written Constitution. A good lecture may contain sentences that clarify and summarize what has gone before—elegantly one hopes—and indeed the very sentence that I am uttering may be one of them. What is true of a good lecture is also true of a good constitution, which may well feature a certain kind of good redundancy represented by various clauses that are clarity-enhancing and doubt-removing. The Necessary and Proper Clause (at least its first half) may well be one of these. And there are others.

IV. THE OPINIONS CLAUSE

Consider the following clause in Article II: "The President . . . 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."[20] Like the Necessary and Proper Clause, this clause is best read as declaratory and clarifying.

Begin at the beginning--of Article II, that is: "The executive Power shall be vested in a President of the United States of America." Here we have a breathtaking grant of power, it seems. The executive power of the nation is by this clause apparently vested in a single person, the President. Unlike the opening words of Article I, which vest in Congress only those legislative powers "herein granted"[21]—granted, that is, in the subsequent clauses of Article I—the opening words of Article II seem themselves to grant the entirety of federal executive power.

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[19] THE FEDERALIST No. 44, at 285 (Clinton Rossiter, ed. 1961).
[20] U.S. CONST., art. II, § 2, para. 1, cl. 2.
[21] "All legislative Powers *herein granted* shall be vested in a Congress. . ." (emphasis added). *Id.* at art. I, § 1.

And the prominent placement of this clause, as the opening gateway into one of the first three articles of the Constitution, establishing three great and coordinate branches, is calculated to draw our attention. A considerable number of textual, historical, and structural data points, together with institutional practice and the teachings of various landmark cases, confirm that the opening clause of Article II means what it says, creating a unitary executive vested with broad power over executive underlings.

To be sure, this grant of power is modified by, and must be read in the light of, other constitutional clauses. For example, though this clause vests only *executive* power, and the opening words of Article I vest all *legislative* powers in *Congress*, specific language of Article I modifies these general rules by giving the President a kind of legislative power, via the veto.[22] Conversely, though we might think that the power to make appointments is generally executive in nature, specific language in Article II modifies the general rule of its opening clause by involving the Senate and courts of law in the appointments process.[23]

All this is quite familiar, and traditional. But now consider a modern argument that has recently surfaced repeatedly. (I say "modern" because none of its recent proponents cites to any Founding-era statement of this argument, and I have not come across any myself). According to this argument, the highly prominent Vesting Clause of Article II cannot really mean what it says, because if it did, the less prominent Opinions Clause would be redundant. In various forms and with various degrees of emphasis, this is an argument that has been put forth by, among others, Michael Froomkin, Stephanie Dangel, Larry Lessig, and Cass Sunstein.[24] Let me say at once that I consider all four to be lawyers and scholars of genuine distinction and extraordinary intelligence. In addition, they are all my friends, and three of the four were once my students. But their argument from redundancy is a bad argument—an argument that they do not defend methodologically, and that turns out to be very hard to defend.[25]

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[22] U.S. CONST., art. I, § 7, para. 2.

[23] *Id.* art. II, § 2, para. 2.

[24] *See* A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 800-01, n. 72 (1987); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1082 n.83 (1990); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 n.21, 13, 32-38, 48, 72, 119 (1994).

[25] Lessig and Sunstein, who deploy the argument repeatedly and at length in their article, and highlight it in their conclusion, do in a couple of footnotes acknowledge that they are

As we have seen, there is one version of the anti-redundancy argument that does make sense. We must ask what a clause adds (understanding that the answer might be "clarity" or "doubt-removal") and should not lightly indulge the assumption of artless and misleading draftmanship. As an example, a good argument against reading the Necessary and Proper Clause as itself a font of free-standing and plenary federal power would be that such a reading would seem to render pointless the preceding seventeen clauses, carefully enumerating specific powers. Why go through such painstaking specification if you intend simply to confer plenary power in the last clause?[26] And if a single clause is slyly designed to repeal the basic and highly visible structure of enumerated powers, surely we should insist on a very clear statement to that effect, so that would-be ratifiers are not misled. (Note, however, that we do not necessarily avoid all redundancy here. By reading the Necessary and Proper Clause more narrowly, we avoid making the previous seventeen enumerations redundant, but we may well render the Necessary and Proper Clause itself redundant in a certain way, *i.e.*, declaratory).

A similar issue arises in the context of the Article II Vesting Clause. If it really was--as it seems on its face—designed to confer plenary executive power, why did the framers go on to provide a menu of specific presidential powers elsewhere in Article II? The obvious and traditional answer appears in *United States Reports*, in the landmark *Myers* opinion,[27] building on earlier statements of Madison and Hamilton (both of whom read the Vesting Clause at face value, as itself an important font of executive power).[28] According to this traditional answer, some of the clauses in the menu, like the above-mentioned Appointments Clause, modify the general rule laid down in the Vesting Clause. And other provisions in the menu clarify the precise contours of executive power, laying down specific rules consistent with the general Vesting Clause but not clearly dictated by that clause. Thus, the power of presidential pardon is recognized but also importantly qualified by

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"of course" assuming that "redundancy is to be avoided in reading the Constitution" and that this interpretive assumption is "perhaps incorrect[.]". Lessig & Sunstein, *supra* note 24, at 38 n.172, 48 n.199. But they never defend this assumption, and the footnotes seem a bit of a throwaway—a sop, perhaps, to a friend who read their article in draft and railed against their underlying set of anti-redundancy assumptions?

[26] For a similar argument in the context of the "general Welfare" language of the taxing clause, see THE FEDERALIST No. 41, at 262-63 (Clinton Rossiter, ed. 1961) (James Madison).

[27] Myers v. United States, 272 U.S. 52, 118, 138-39 (1926).

[28] *See* Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 995-96, 1001 (1993).

making clear that it does not extend to impeachments;[29] the power to command state militias is recognized but also importantly qualified by making clear that such militia must first be properly federalized;[30] and so on. Thus, the general existence of a menu of specific presidential powers in Article II is wholly consistent with reading the Vesting Clause at face value.

But Froomkin and company argue that such a face-value reading would render the Opinions Clause redundant. To which I say, so what? If "redundant" simply means "declaratory," what is wrong with redundancy? Just as Hamilton in *The Federalist* admits that the Necessary and Proper Clause "may be chargeable with tautology or redundancy,"[31] so he also admits in *The Federalist* that the Opinions Clause may be a "mere redundancy in the plan [*i.e.*, the Constitution], as the right for which it provides would result of itself from the office."[32] But Hamilton hardly thought that this meant that we cannot or should not read the Article II Vesting Clause to mean what it says. And none of the other members of the founding generation, so far as I have been able to determine after doing considerable research on the Opinions Clause,[33] *ever* invoked it against the idea of a unitary executive. On the contrary, the bulk of early commentary on the clause read it to *support* and *clarify* the notion of a unitary executive. None of these founders and early commentators thought that declaratory and clarifying provisions were out of place in the Constitution. Thus Froomkin and company end up using an undefended methodological assumption in an unhistorical way to undo the Framers' design. If we follow their rules of construction, the Framers turn out to be lousy and misleading drafters indeed, repealing the plain meaning of one of the earliest, most important, most debated (in and out of Philadelphia), and most visible clauses in the Constitution with a less visible and more technical clause that, by some weird rule of interpretation, repeals the Vesting Clause precisely because it reinforces it.

But in my view, weren't the Framers also bad drafters, clumsily saying twice what they should have elegantly said once? Shouldn't we expect that if they consciously added the Opinions Clause, they added it for a reason? What does it add on my view? My answer, you will not be

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[29] U.S. CONST. art. II, § 2, para. 1.
[30] *Id.*
[31] *See* THE FEDERALIST NO. 33 *supra* note 18, at 203.
[32] THE FEDERALIST No. 74, at 447 (Clinton Rossiter, ed. 1961).
[33] For a much more general summary of my research and discussion of my findings, see Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647 (1996).

surprised to hear, is that the Opinions Clause does add something of sorts. It adds clarity. Consider all of the ways in which it helps clarify and sharpen a proper view of the presidency and the executive branch, a view that would otherwise have been a bit fuzzier with more left to implication. By stating expressly that principal officers answer directly to the *President*, the clause helps make clear that he is their direct and personal supervisor, not Congress (as too many congressional barons seem to think these days), and not a collective executive cabinet or committee. By stating expressly that the President may require the opinions of *principal officers*, the clause reminds us of the existence of a pyramidic executive structure in which we should not tax the President personally with the responsibility of overseeing all members of the branch; instead, his job is to monitor the inner circle near the apex of the pyramid. By stating expressly that the President may require an opinion *on any subject*, the clause makes it clear that the President has sweeping oversight of his cabinet members—but by limiting this to any subject *relating to their official duties*, the clause further clarifies that the President cannot burden them with personal chores, like filling out his personal income tax forms. (In England, the King's men could be required to attend to his personal affairs). By stating expressly that the President can require opinions of officers of the *executive* departments, the clause helps remind us by negative implication that judges are members of their own branch, and do not report to the President (unlike an English model in which judges were part of the King's privy council). By stating expressly that the President may require opinions concerning officers' *respective* offices, the clause clarifies that each officer is personally responsible for his own department and that the President is in charge of all departments; strictly speaking, the Attorney General plays no role in setting interest rates, and the Treasury Secretary does not weigh in on the death penalty. In short, this little clause helps clarify and exemplify a variety of ways in which the American President—in whom all executive power has been vested by Article II's opening and prominent words—is more than the first minister of a collective council or cabinet but less than a King. Surely that is quite a lot of clarification for a single clause. The Constitution is better with the clause than without it. It clarifies.

Of course, the biggest thing that the clause clarifies is the personal responsibility of a unitary President. Without this clause, it might have been easier for a President formally vested with all executive power to informally hand over his power to a collective cabinet, with individual department heads reporting to the cabinet as a whole, and the President hiding behind the collective decisions of his collective council. Over and

over, founding-era discussions of the Opinions Clause emphasized that it would strengthen the political accountability and personal responsibility of a single, unitary President.[34]

Historically, it seems easy enough to understand why the Framers felt it useful to add the two clarifying clauses we have seen so far. In light of an explicit rule in the Articles of Confederation forbidding the old Congress to exercise implied powers,[35] the Constitution explicitly clarified that no such rule should apply to the powers of the new Congress. In light of the King's experience with privy councils and state governors' experience with executive councils, the Constitution explicitly clarified that no such collective council should blur the personal responsibility of the new President. But an extreme and silly brand of anti-redundancy would turn all of this upside down. Instead of reading the Necessary and Proper Clause to confirm broad power, we might be tempted to read the clause to shrink it—at least then it adds something! Instead of reading the Opinions Clause to confirm a unitary executive, some today are tempted to read the clause to undo it—at least then it adds something! We are right to ask what a clause adds. But we are wrong if we overlook the obvious answer that sometimes a sensible clause will merely add clarification.

V. THE FIRST AMENDMENT

Having considered a couple of clarifying clauses from the original Constitution, let us conclude by considering three examples from the Bill of Rights from the beginning, middle, and end of the Bill, respectively. When the First Congress proposed the Bill of Rights to the states, it described the Bill as encompassing "further declaratory and restrictive clauses" added "in order to prevent misconstruction or abuse of [the Constitution's] powers."[36] The idea of "restrictive" clauses preventing "abuse" of constitutional powers is clear enough today. But many today seem not to understand the role of "declaratory" clauses designed to prevent "misconstruction"–designed, that is, to clarify.[37]

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[34] For detailed elaboration and documentation of the claims made in the foregoing paragraphs, see *id.*

[35] *See supra* note 13 and accompanying text.

[36] 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321 (1894).

[37] For other aspects and implications of declaratory clauses, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 28, 147-56, 161n, 208, 210, 322 n.44 (1998).

With this language in mind, let us examine the opening words of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ." Is it possible that these opening words were "declaratory" in some sense, designed in some way simply to prevent "misconstruction" of the powers created by the Constitution? Is it possible, in other words, that this part of the First Amendment is in some sense redundant?

As we begin to ponder these questions, I ask you to forget about rights for a moment, and think about federalism. Where does Congress have any power to regulate religion, or the press, in the several states? Not from the Necessary and Proper Clause standing alone, which confers no freestanding power, and may not even widen the territorial seas of implied powers surrounding the various enumerated powers. And it is hard to see which enumerated power gives Congress authority to regulate religion *as such*, or the press, *as such*, in the several states. I say "as such" to put aside here laws that incidentally bear on religion or the press—say, a nonpretextual tax law that imposes duties on imported wine used by churches (among others), or imported ink used by newspapers (among others). Rather, I am asking where Congress might have enumerated power, say, to tell churches in the several states what they may and may not preach, or to tell the press in the several states what they may and may not print. And my answer is that—in the several states, at least—Congress has no enumerated power over religion or the press. And so said virtually every leading Federalist, when pressed on these issues, during the debates over the Constitution's ratification.[38]

But Anti-Federalist skeptics pointed a suspicious finger at the Necessary and Proper Clause. Suppose a grasping Congress tried to use that clause to usurp power over religion and the press, they asked? The First Amendment was drafted in large part to make clear, to clarify, to declare that such an action would be a *misconstruction* of the Necessary and Proper Clause. Note the obvious textual link here, with the same words in the same order: "Congress," "shall," "make," and "law." The Necessary and Proper Clause says that "Congress shall have power. . . to make all laws" of a certain sort, and the First Amendment clarifies this by emphasizing that "Congress shall make no law" regulating religion or censoring the press in the states. Of course, to the extent that the First Amendment also constrains Congress in the territories, over which

[38] *See id.* at 36.

plenary congressional power did exist under the Constitution, it adds even more than clarity; it adds a new rule.

Now let us move past federalism to rights. Even if the First Amendment speech clause did not exist, wouldn't the basic structure of democratic self government implicit in the original Constitution impose severe constraints on the ability of Congress to punish opposition speakers? To that extent, isn't the speech clause redundant in a way? In other words, isn't it added largely out of an abundance of caution, to make textually explicit a basic structural requirement of our constitutional order?[39]

In this regard it is useful to consider the Constitution's *other* free speech clause, which may also be redundant. Under Article I, Section 6, no libel suit may lie against a member of Congress for anything he says as part of his "speech or debate" inside the legislature: "For any Speech or Debate in either House, they [i.e., the Senators and Representatives] shall not be questioned in any other place." Even if this clause did not exist, its rule might have been a sensible inference from the rest of the document. A legislature, to be a legislature, must have free debate, and so such freedom might have been deemed "inherent" in the creation of Congress itself (as other congressional freedoms and powers have been deemed inherent, like the freedom to investigate and the power of contempt).[40] As a matter of federalism, could state libel law and state libel courts interfere with the performance of a federal function by federal officials in a federal city?[41] As a matter of separation of powers, could other branches interfere with the core function of the legislative branch? Thus, in the absence of the Article I, Section 6 speech clause, Congress would have had a very strong constitutional claim to immunity from outside interference, but the issue might not have been free from doubt. The Article I clause removes this doubt. It clarifies.

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[39] *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 101-24 (1960); BLACK, *supra* note 16, at 35-50.

[40] Similarly, judges have been held to have inherent powers of contempt and immunity from libel suits for things they say in open court and in judicial opinions; the Vice President must obviously be immune from a libel suit for things he says in the Senate, even though he is not, strictly speaking, a Senator covered by the words of the Article I speech clause; and the same must also be true when the President delivers the State of the Union message. For more general discussion of this issue, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 702-08 (1995).

[41] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)(invalidating state interference with performance of federal bank).

What is true of the Article I speech clause may also be true of the First Amendment speech clause. As members of the ultimate sovereign legislature—We the people of the United States—self-governing citizens can rightfully claim inherent powers of free political discussion among ourselves. Under proper agency theory, our servants in government cannot stop us, their sovereign principals, from debating and criticizing their conduct.[42] This would be true even without the First Amendment, but it is even clearer with it.

One final First Amendment thought experiment. Imagine that the First Amendment existed without the press clause. Would our First Amendment doctrine differ measurably? Would we, for example, say that "oral" speech is protected, but "printed" speech is not? I tend to think that we would not. I suspect that we would pretty much use the First Amendment in the same way, using the speech clause to pick up whatever slack was created by the absence of a press clause. If you share my suspicion, then take note of the implication, the press clause is in some sense redundant or declaratory, making clear what might otherwise be left to implication, namely, the need to protect written as well as oral communication.

VI. THE FIFTH AND SIXTH AMENDMENTS

Moving now to the middle of the Bill of Rights, let us consider the Fifth and Sixth Amendments. These amendments contain a variety of rather specific rules about criminal procedure, concerning grand juries, self-incrimination, double jeopardy, speedy trial, public trial, jury trial, district trial, fair notice of charges, confrontation, compulsory process, and counsel. Nestled in the middle of all these specific rules is a general command, calling for due process of law. Taken at face value, this general command requires fair procedures in criminal adjudication, procedures designed to protect the innocent man from erroneous conviction.

Here's the rub: many of the specific clauses are in some sense redundant. Read at face value, they specify procedures that would have sensibly been deemed components of general due process if the specific clauses did not exist. By now, you will not be surprised to hear that this troubles me not at all. What the specific clauses add is clarity and precision. If they did not exist, then the general due process inquiry

[42] *See* 3 ANNALS OF CONG. 934 (1794) (remarks of Rep. James Madison) ("If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."). *See supra* note 39.

might have been more doubtful: and these specific clauses nicely remove all doubt. Indeed, they exemplify due process in particular contexts, much as the Opinions Clause exemplifies the general idea of the unitary executive as applied to the specific issues raised by the executive bureaucracy and a possible executive council. The specific examples in the Fifth and Sixth Amendments help anchor the more general concept of due process, giving us fixed data points that the rational continuum of due process should connect together. Without a general clause, it would be unclear that a rational continuum of fair procedure was required; but without specific anchors, it would be much harder to plot the curve of this rational continuum. There is no need to strain to read the Due Process Clause for less than it is worth, or the specific clauses for more than they are worth, in some senseless effort to avoid a sensible redundancy.

To elaborate on this last point, surely it would be a mistake to read the Due Process Clause to mean less than it says. (If it meant nothing at all, the redundancy problem would disappear but so would the Due Process Clause, in effect). The clause is a grand and general guarantee of fair procedures, and it makes no sense to undo it because other clauses also aim at fair procedures, clarifying and specifying what general fairness might mean in a given context.[43] Historically, it is true that the words "due process" had a special link to a suspect's right to be indicted by a grand jury,[44] but the words mean more than that, and speak at a higher level of generality. (Note, for example, that by covering all deprivations of "property" above and beyond "life" and "liberty," the Due Process Clause applies to civil cases, too, where grand jury indictments have no place). Indeed, if the Framers meant only "grand juries" by this phrase, they were truly dreadful drafters. Why not simply say "grand juries"? And why put the Due Process Clause just a few words away from, but not adjoining, a clause that does say "grand juries"? Such a clumsy repetition and inexplicable sequencing of clauses would not add clarity, but confusion. In an effort to avoid a completely benign redundancy—specific clauses complementing a general one—we would end up construing the Fifth Amendment as creating a truly weird two-headed hydra.

[43] Note that this is in effect the move of Froomkin and company, undoing the general unitary executive clause simply because a more specific clause helps clarify the unitary executive vision.

[44] *See* A. AMAR, *supra* note 37, at 97, 200-02.

An equally unattractive way of avoiding redundancy would be to insist that each of the other specific clauses of the Fifth and Sixth Amendments must be read to go beyond sensible rules of fundamental fairness, even when such a reading does violence to their text and history, and to common sense. This does avoid redundancy, but only by saddling all Americans with rigid constitutional rules that by hypothesis go beyond fairness, and that cannot otherwise be justified by proper modes of constitutional argument.[45] The real "redundancy problem" I suggest, is not redundancy, but the "redundancy problem" itself, or at least its thoughtless deployment.

VII. THE TENTH AMENDMENT

Finally, let us take a quick look at the Tenth Amendment, which reads as follows: "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." What do these words add to the Constitution? The best answer, I think, is *emphasis*. These words are a kind of exclamation point, an italicization, of the Constitution's basic themes of federalism and popular sovereignty. As a matter of federalism, the clause makes emphatic and explicit what was perhaps only implicit, though strongly so: the central government enjoys only those powers that are expressly or impliedly enumerated. (Note that unlike the Articles of Confederation, the Amendment does not rule out implied federal powers--territorial seas are permitted.) And as a matter of popular sovereignty, the amendment's last three words echo the Preamble's first three, reminding us that here, the People rule.

I am of course hardly alone in viewing the Tenth Amendment as redundant. The Supreme Court has famously labeled the amendment a "truism;"[46] Justice Story declared that "this amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution;"[47] and James Madison, upon introducing the amendment in the First Congress, said that: "Perhaps words which may define this more precisely than the whole of the instrument now

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[45] Elsewhere, I have suggested that this is a rather ubiquitous problem with modern constitutional criminal procedure scholarship and doctrine. *See generally* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

[46] United States v. Darby, 312 U.S. 100, 124 (1941).

[47] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752, § 1900 (1833).

does, may be considered as superfluous. I admit they may [be] deemed unnecessary."[48]

If these words are in some obvious sense redundant, why did Anti-Federalists clamor so loudly for their inclusion? (Recall that among the Bill of Rights, the Tenth Amendment was the only amendment put forth by each and every state ratifying convention that proposed amendments, and typically it was listed first.)[49] The answer, I think, returns us to our starting point. Constitutional text matters and a clear textual affirmation of a principle that might otherwise be left to inference is something to be desired. Our constitutional tradition includes many kinds of argument--from history, from structure, from precedent, and so on--but perhaps the most solid form of argument, at least to some of those who helped frame our written Constitution, was a clear argument from the text itself.

The problem, of course, is that texts are often less than clear—to read them correctly we need sound rules of construction. I hope that my Lecture today will, in some small way, help contribute to the maintenance of such sound rules, and I thank you all for your kind attention this afternoon.

[48] 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1033 (Bernard Schwartz ed., 1971)(June 8, 1789).
[49] AMAR *supra* note 37, at 14, 123.