Because Men Are Not Angels: Separation of Powers in the United States

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Because Men Are Not Angels: Separation of Powers in the United States

Hon. D. Brooks Smith*

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I begin with expressions of both thanks and regret. First, my gratitude to Professor Barker for including me once again in this seminar, which has become a biannual event. The international focus of these seminars has set them apart from any other symposia I am aware of in Western Pennsylvania, and the quality of the presenters—with the exception of the immediate incumbent of the podium—has assured thoughtful and expert presentations. Bob Barker deserves our hearty congratulations.

As for the expression of regrets, I was very sorry to miss last evening’s event. By coincidence, a biannual convocation of United States Appeals Court judges is taking place in Washington—the only occasion that my colleagues throughout the country have to meet collegially every two years. In an effort to keep commitments to both Bob Barker and the federal judiciary, I attended yesterday’s sessions in Washington, but I will miss them today so that I may participate in this unique international exchange between judges and legal academics.

* Circuit Judge, United States Court of Appeals for the Third Circuit. This text was delivered as part of the symposium Separation of Powers in the Americas... and Beyond: An International Seminar for United States Lawyers at the Duquesne University School of Law in November 2008. The author expresses his gratitude to Kimberly L. Herb and Judith C. Gallagher for their invaluable contributions to the preparation of these remarks.
Dean Guter has observed in his written welcome to all participants and attendees, "[t]he separation of powers is a topic that is particularly ripe for discussion in this era of global terrorism." I do not disagree. What I would say is that the topic is always ripe, whatever the season, and no matter what party or faction happens to be regnant at the time. A discussion of "separation," however we define it, will always be animated by the views that citizens in a democracy have concerning the most pressing policy issues of the day. And the manifestations of "separation"—the countervailing impulses toward political hegemony and institutional deference—play out in every age. I begin, in a very traditional way, with the early stirrings in our own budding democracy.

I. HISTORICAL UNDERPINNINGS

The Federalist Papers first appeared as a series of essays published in New York newspapers between October 1787 and August 1788. The purpose of those essays was to explain to would-be voters in the new American Republic their proposed Constitution, its structure, and its motivating principles. The immediate goal, of course, was to influence the ratification of the Constitution. The Founders also understood their role at a pivotal moment in history, and we have a sound basis to believe that they intended The Federalist Papers to provide us with guidance for our continuing interpretation of constitutional issues.

In the first paper of this series, Alexander Hamilton proposed to discuss such topics as the "utility of the union to your political prosperity"; the "conformity of the proposed constitution to the true principles of a republican government"; and the "additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property." Our discussion today implicates all of those concerns, as separation of powers—namely, distinct legislative, executive, and judicial branches of government—was thought to be the "essential precaution in favor of liberty."

Separation of powers principles derive from a profound distrust of government power. In Federalist No. 51, James Madison wrote:

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If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.4

These “auxiliary precautions” are woven throughout the Constitution in the form of specific, enumerated powers for each branch and yet, at the same time, a symbiotic relationship between all three.

In fact, separation of powers is a bit of a misnomer. While, as I mentioned, there are distinct roles for each branch of government, James Madison argued that the experience of the colonies proved that “parchment barriers”—the specific powers granted to each branch in the Constitution—were “greatly overrated” as a check on encroachments of power.5 Thus, the concept of separation of powers actually embodies two distinct notions: (1) enumerated powers and (2) a sufficient “connect[ion] and blend[ing] as to give to each a constitutional control over the others.”6 It is as much about balance and interdependence as about separation.

II. APPROACHES TO SEPARATION OF POWERS ISSUES

Before discussing the American experience in more detail, let me say a few words about how courts approach and consider separation of powers issues. One of the first complexities encountered in a discussion of separation of powers is that there are varying approaches to questions about whether the doctrine has been violated, namely, whether a particular branch of government is acting within its range of powers or is intruding into another branch’s sphere.7 One approach has been called the “functional”

6. Id.
7. See Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 CORNELL L. REV. 488, 489 (1987) (“The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government . . . and a functional approach that stresses core function and relationship, and permits a good deal of flexibility[].”).
approach. This method is not concerned with whether one branch is performing an act committed to its sphere of power, but it is instead primarily concerned with whether the action taken is so disruptive to the constitutional scheme that the action impairs the other branches from exercising their constitutionally delegated power. It is a more deferential, case-by-case approach that essentially looks to whether the particular action poses a serious disruption to the separation of powers. As such, the "functional" approach has been criticized as antithetical to the "prophylactic structure adopted by the Framers."

A second approach is known as the "formal" approach. This approach takes a strict view of separation of powers; it is, technically, a definitional approach. One characterizes the action in question as judicial, legislative, or executive and then looks at which branch is performing the action. A reviewing court must then determine whether it is constitutional for that actor to perform that action. One of our current Supreme Court justices, Justice Scalia, is a well-known proponent of this approach. In contrast to the pragmatic approach, the formal approach rejects case-by-case analysis of whether some actions intrude "too much" "for the simple reason that there is no effective method of making that inquiry—at least until it is too late to avoid the danger."

Having established that our legal scholars disagree on how to approach the principle of separation of powers—shocking as that may be to you—the balance of my discussion focuses on the jockey-
ing for position and the friction that it inevitably produces within our system.

III. THEORY INTO PRACTICE—THE CONSTITUTION AND INTRAGOVERNMENTAL TENSION

While the notion of "separation of powers" was a driving force behind the Constitution, it is notable that the words themselves are not found in the text of our Constitution. That is because our federal government is structured around the concept; our Constitution as a whole manifests this principle by giving shape to that government. Article I vests in Congress specific powers, such as the ability to write and enact laws, raise taxes, and declare war; yet it also requires that Congress engage in the affairs of the other branches—Congress creates lower federal courts and has the power to impeach the president and offers a check on Congress in the form of presidential presentment before a bill can become law.15 Likewise, Article II gives the president the power to conduct war, make treaties, and pardon.16 Once again, the Constitution gives the executive a role in the other departments by giving the president the power to appoint judges17 and the authority to execute enacted laws18 while, concurrently, Article II also makes the executive accountable to the other branches by requiring confirmation of the president's candidates for officers, judges, and ambassadors of the United States19 and establishing the impeachment process for judges and the president.20 Finally, Article III maintains a similar structure: it confers all the judicial power in the Supreme Court,21 but it gives Congress the authority to create lower courts22 and make exceptions to the jurisdiction of the federal courts.23 Each branch, therefore, has a defined role, and yet each branch must coexist, often interdependently, with the others and find balance.

Such a form of government certainly comes with a cost: ongoing tension. No branch of government is institutionally inclined to cede authority—or even influence—to another. Supreme Court

Justice Louis Brandeis once said that the purpose of the doctrine of separation of powers "was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Just as the routine workings of democracy can be unattractive to observe, so too can the institutionalized friction of separation at work give evidence not only to tension but to occasional hostility. Let me give you some examples of the cases in which these tensions are manifest.

A. Checks on the Legislative Branch

First, a number of cases arise out of the actions of the legislative branch. For instance, the Constitution prohibits Congress from passing what are called Bills of Attainder. Bills of Attainder are legislative acts prescribing punishment, without a trial, for a specific person or group. In *United States v. Brown*, the Supreme Court struck down a federal law that prevented members of the Communist Party from serving as officers in labor unions. The Court boldly noted that the Framers were more concerned about the legislature exceeding its authority than the executive. The Court then stated that the "Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness[] of, and levying appropriate punishment upon, specific persons."

There are also a number of examples of legislative encroachment on the role of the executive. For example, Article I of the Constitution requires that all legislation, before it can become law, is subject to bicameralism and presentment. Bicameralism requires that all legislation be approved by both the House and the

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25. U.S. CONST. art. I, § 9, cl. 3.
26. *See United States v. Brown*, 381 U.S. 437, 442 (1965) (stating that the Bill of Attainder Clause was an outgrowth of separation of powers and a "general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature").
27. 381 U.S. 437 (1965).
29. *See id*. at 444 (stating that, in a republican form of government, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments").
30. *Id*. at 445.
31. U.S. CONST. art. I, § 7, cl. 2. Both requirements derive from the same provision: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law be presented to the President of the United States." *Id*. 
Senate. Presentment requires the president to approve the legislation (subject to an override by Congress) before the bill can become law. These provisions were implicated in the context of immigration when Congress gave the Attorney General, an officer of the executive branch, the authority to suspend the deportation of certain aliens in cases of extreme hardship. The law, however, not only gave power but also took it away—it provided that either the House or Senate alone could override the decision of the Attorney General in a particular case. Applying separation of powers principles (although not deciding the case on separation of powers grounds), the Court declared the provision unconstitutional as a congressional usurpation of executive power. The Court reasoned that the "legislative veto" in the case essentially allowed Congress to control an executive agency's discretion in carrying out the laws. A veto by either chamber of Congress allowed Congress to override the Attorney General's discretion. This construct was an impermissible encroachment by the legislative branch on the executive's power.

Another case arose out of the passage of the Brady Handgun Violence Protection Act, and again, the Supreme Court invoked the doctrine of separation of powers. The Act required state and local law enforcement officers to perform background checks on individuals seeking to purchase a handgun. The Court struck down the law, noting first that the Founders "rejected the concept of a central government that would act upon and through the States." Equally problematic, however, the Court declared that the law impermissibly interfered with the separation between the branches. It stated, "The Constitution does not leave to speculation who is to administer the laws enacted by Congress," and

32. Id.
33. Id.
35. See Chadha, 462 U.S. at 923-24 (discussing the operation of the statute).
36. Id. at 959.
37. Id. at 955 ("Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.").
38. Id.
39. Id. at 956 ("[T]he veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.").
41. Printz, 521 U.S. 898.
42. See id. at 902-03 (discussing the Brady Act).
43. Id. at 919.
found that the Brady Act circumvented this commitment of power to the executive branch by seeking to transfer it to the states.\textsuperscript{44}

Although these cases demonstrate the first part of the separation of powers doctrine—namely, the idea of distinct, enumerated powers, and the efforts made to preserve those powers—the fact that these issues arise in court cases, duly referred to and decided by the judiciary, speaks volumes about the second aspect of the doctrine and the necessary coexistence between the branches. The judiciary has played an important role—from \textit{Marbury v. Madison},\textsuperscript{45} when the Court declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”\textsuperscript{46} up to today—in the legislature’s exercise of its authority. A good example of this law-defining role is the nondelegation doctrine. Under this doctrine, Congress cannot wholly delegate its legislative power to the executive branch.\textsuperscript{47} If a delegation is so wide in scope that it enables the executive to exercise unfettered discretion regarding legal obligations and standards, it is invalid.\textsuperscript{48} The judicial branch, rather than the legislature, is called upon to monitor and police questions of delegation.

For instance, Congress passed a law in 1934 that enabled the president to establish “a code of fair competition,” which was predominately aimed at setting wage and hour requirements for the live poultry industry.\textsuperscript{49} The code would be administered through an industry advisory committee selected by trade associations and members of the industry, and the president was authorized to approve the code if he believed that it effectuated congressional intent.\textsuperscript{50} The Supreme Court struck down Congress’s law because it gave the executive branch limitless authority to define fair competition.\textsuperscript{51} While the courts have not frequently struck down laws under this doctrine, cases have come before the Court on a fair

\textsuperscript{44} Id. at 922.
\textsuperscript{45} 5 U.S. (1 Cranch) 137, 177 (1803).
\textsuperscript{46} \textit{Marbury}, 5 U.S. (1 Cranch) at 177.
\textsuperscript{47} \textit{See} Touby \textit{v. United States}, 500 U.S. 160, 165 (1991) (“Congress may not constitutionally delegate its legislative power to another branch of Government.”).
\textsuperscript{48} \textit{See} Mistretta \textit{v. United States}, 488 U.S. 361, 374 n.7 (1989) (stating that the Court had struck down laws where Congress “failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power”).
\textsuperscript{50} \textit{A.L.A. Schechter}, 295 U.S. at 521-23.
\textsuperscript{51} Id. at 541-42.
number of occasions, demonstrating the interplay between the branches necessary to ensure the proper functioning of each.

B. Checks on the Executive Branch

While there are many cases regarding legislative encroachment on executive power, the reverse has also been an issue. One famous case is Youngstown Sheet & Tube Co. v. Sawyer.\textsuperscript{52} During the Korean War, President Truman issued an executive order directing the Secretary of Commerce to seize and operate most of this country’s steel mills to avert a strike by steelworkers.\textsuperscript{53} The Court considered whether the President had the authority to do this. Justice Black, writing for the majority, concluded that he did not. The president is limited to acting under the direction of either a constitutional provision or a law; because President Truman had neither, the order was invalid.\textsuperscript{54} Interestingly, and further illuminating the tensions that the separation of powers doctrine presents, the majority decision in the Youngstown case was qualified by separate concurring opinions of five other members of the Court, making it difficult to determine the precise limits of the president’s power to seize private property in emergencies. For example, Justice Frankfurter would have held that congressional silence is not determinative.\textsuperscript{55} Justice Jackson took what is now referred to as a legislative-accountability approach. His view would allow the president to take any action not prohibited by the Constitution or by federal statute.\textsuperscript{56}

Another compelling issue implicating separation of powers principles, which has caused tension throughout history, is the concept of executive privileges and immunities. Executive privilege is based on the constitutional doctrine of separation of powers, and it exempts the executive branch of the federal government from certain disclosure requirements.\textsuperscript{57} Basically, it refers to the ability of the president to keep conversations with, or memoranda to or from, advisors a secret. The Constitution does not explicitly create such a privilege, but it has been invoked throughout history—

\textsuperscript{52} Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
\textsuperscript{53} Youngstown, 343 U.S. at 582.
\textsuperscript{54} Id. at 585-89.
\textsuperscript{55} Id. at 602 (Frankfurter, J., concurring).
\textsuperscript{56} Id. at 637 (Jackson, J., concurring) ("[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."). Id.
\textsuperscript{57} BLACK'S LAW DICTIONARY 1005 (8th ed. 2005).
most frequently in the context of the need for candor between the president and his advisors on issues of national security.

Executive privilege is most famously associated (and, unfortunately, notoriously so) with the Watergate scandal of the Nixon Administration and was met head-on by the Supreme Court in the case of *United States v. Nixon*. A special prosecutor was appointed to investigate an indictment charging seven individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. The prosecutor sought audiotapes of conversations recorded by then-President Nixon in the Oval Office. Nixon refused to turn over the tapes, claiming executive privilege. In fact, he declared: "Under the doctrine of separation of powers, the manner in which the president personally exercises his assigned executive powers is not subject to questioning by another branch of government." The Supreme Court took up the issue to decide whether the president's ability to claim executive privilege really was immune from judicial review. The Court answered in the negative and made three points. First, it concluded that it is the role of the Court to decide whether the president may properly invoke executive privilege, and if so, what the scope of that privilege is. The Court cited to *Marbury v. Madison* for the Court's authority to decide what the law is. Second, the Court recognized the existence of executive privilege as an inherent presidential power in spite of the fact that Article II does not expressly grant this power to the president. Finally, the Court concluded that executive privilege is not absolute, but rather it must yield when there are important countervailing interests. Ultimately, the Court concluded that "the fundamental demands of due process of law in the fair administration of justice" demanded that President Nixon obey the subpoena and produce the tapes and documents. Nixon, of course, resigned shortly after the release of the tapes. Once again, though, this case demonstrates that separation of powers is not just about maintaining the dis-

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60. Id. at 703.
61. Id.
62. Id. at 705-06 ("Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.").
63. Id. at 707 ("[W]e conclude that the legitimate needs of the judicial process may outweigh Presidential privilege[].")
64. *Nixon*, 418 U.S. at 713.
distinct powers of each branch. Separation of powers presumes the occasional involvement of each branch in the affairs of the others to bring balance and accountability.

C. Checks on the Judiciary

Much of my discussion has focused on Supreme Court cases. As a member of the judiciary, I admit to a certain bias that almost deterministically informs my focus. Certainly, the courts play a significant role in defining the nature and scope of the separation of powers doctrine. Yet, I do not wish for you to think that my view—the view of a federal appeals judge—of our constitutional structure is a myopic one. There are substantial limits on the courts as well, to prevent encroachment on the purview of the other branches. Admittedly, though, those limits are not as explicit, arguably because of the Founders' belief—expressed by Alexander Hamilton—that "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." 65 Nonetheless, those limits do exist. For instance, the Constitution limits the judicial function as extending only to "cases" and "controversies." 66 In a self-limiting jurisprudential exercise, courts have maintained two doctrines related to the "cases" and "controversies" requirement in the name of separation of powers, namely the political question doctrine and advisory opinions.

Under the political question doctrine, the Supreme Court has held that certain claims should not be ruled on by the federal courts, despite the existence of jurisdiction and justiciability requirements. 67 Courts, in considering whether a case presents a political question, usually will examine several considerations, including whether (1) the Constitution has committed decision-making on the subject to a coordinate branch of the federal government; (2) there are adequate standards for the court to apply in considering the matter; and (3) it would be prudent for the court to interfere. 68 If one or all of those considerations are present, the court may decline to consider the matter. Justifications cited in support of this doctrine are (a) that it is sometimes better for the

courts to avoid deciding certain cases so as to preserve the judiciary's political legitimacy; (b) it allocates decisions to the branches of government that have superior expertise in particular areas, for example, foreign policy; (c) there are some instances where the federal courts' self-interest disqualifies them from ruling on certain matters, for example, the process of ratifying constitutional amendments because that is the process by which Supreme Court rulings are overturned; and (d) it minimizes judicial intrusion into the operations of the other branches of government.69

As an example of some issues that arise under the political question doctrine, let me discuss another Nixon—not President Nixon, but a federal district court judge by that name. The House impeached Judge Nixon after he was convicted of perjury.70 The matter was then referred to the Senate, which appointed a committee to hear the evidence against Nixon and report to the chamber as a whole.71 Judge Nixon challenged this rule, arguing that the Constitution guaranteed him an evidentiary hearing and trial before the full Senate, not just a committee.72 The Supreme Court declined to take this route, ruling that the issue presented a political question.73 It concluded that opening the door to consider the Senate's impeachment procedures and proceedings would "expose the political life of the country to months, perhaps years of chaos."74 Moreover, the Court stated that judicial review of impeachments would be inconsistent with the Framers' views of impeachment in the scheme of separation of powers. The Framers saw impeachment as a legislative check on the judiciary; judicial involvement would undercut this independent check on judges.75

Another self-imposed limit on the authority of courts relates to advisory opinions. These are opinions issued by the courts on the legality of an executive or legislative action, but they do not involve an actual case or concrete set of facts.76 The Supreme Court

69. *But cf. Baker*, 369 U.S. at 706-10 (reviewing cases involving the political question doctrine and the various rationales offered to support its application).
72. *Id.* at 228.
73. *Id.* at 228-38.
74. *Id.* at 236 (internal quotation marks omitted).
75. *Id.* at 234-35 ("[J]udicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature.").
76. See, e.g., *Hall v. Beals*, 396 U.S. 45, 48 (1969) ("The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.").
has repeatedly prohibited such opinions. The reason is quite clear: the judicial role is limited to deciding actual disputes; it does not include giving advice to the Congress or to the president on what is legal and what is not.

Returning to the idea of the interplay and entanglement of the branches, the judiciary also cannot act alone. The coordinate branches, and particularly Congress, have a substantial role in checking the judiciary. For instance, Article I gives Congress the power to create all lower federal courts, as well as to determine the jurisdiction of those courts. In fact, the lower federal courts did not have jurisdiction to hear cases involving federal questions until 1875. Furthermore, the Constitution appears to give Congress the power to regulate the jurisdiction of the Supreme Court. Article III states that “[t]he Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” It is the “with such Exceptions” language that seems to allow for the legislative branch to defeat the Court’s substantive rulings by prohibiting the Court from hearing and deciding certain cases. This practice is known as “jurisdiction stripping.”

Proponents of jurisdiction stripping argue that the language means just that. They claim that the language is unambiguous in its authorization of Congress to make “such Exceptions”; they claim that the Framers intended this authority as a check on the power of the federal judiciary. Others, however, argue that the “Exceptions” refer to “facts,” and thus, Congress is limited to restricting the fact-finding ability of the Supreme Court. Still others argue that if Congress were to withdraw the Supreme Court’s ability to hear certain cases, such an action would be unconstitu-

77. See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 302 (2004) (“[T]he giving of advisory opinions—not just advisory opinions on particular questions but all advisory opinions, presumably even those concerning legislation affecting the Judiciary—was beyond [the Supreme Court’s] power.”).
78. U.S. CONST. art. I, § 8, cl. 9.
82. See Ex parte McCordile, 74 U.S. 506, 514 (1868) (“[T]he power to make exceptions to the appellate jurisdiction of this court is given by express words.”).
tional under other provisions. In 1868, in the case of *Ex parte McCordle*, the Supreme Court acknowledged that the constitutional provision may allow for a political restraint on its jurisdiction, when the Court refused to hear a case on the ground that a federal statute enacted by Congress took the Court's jurisdiction away from the issue. Since that time, some limits have been placed on *McCordle* and Congress's jurisdiction-stripping power. But, the underlying tension remains alive and well today.

Additionally, although the judicial power is vested in the courts, Congress can still play a role in interpreting the law through the constitutional amendment process. A constitutional amendment requires a two-thirds vote of Congress followed by the approval of three-quarters of the states (or two-thirds of the states by constitutional convention). Every year, members of Congress propose a number of constitutional amendments on issues that have arisen in the course of judicial review, including some recently that relate to school prayer, the definition of marriage, and the death penalty.

**IV. THE EFFECTIVENESS OF SEPARATION OF POWERS IN THE UNITED STATES**

Having discussed the tensions that arise between the coordinate branches of government, I want to return to the Founders. Separation of powers was not an end, but a means to achieving peace, stability, and a government free of tyranny. After more than two centuries of experimentation, the question becomes whether the structure and purpose of government works as the Founders intended. Our discussion today will certainly shed some light on that. By discussing the experience of countries throughout the

84. See Oestereich v. Selective Serv. Sys., 393 U.S. 233, 243-44 (1968) (Harlan, J., concurring) (stating that a law that would deprive courts of judicial review of some Selective Service Board decisions "would raise serious constitutional problems").
86. *McCordle*, 74 U.S. at 514.
87. See Webster v. Doe, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.").
88. U.S. Const. art. V.
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world, I hope we can better understand what we do well and
where we can improve. I want to bring a few of my own personal
reflections to bear on this topic.

I am a great believer in the notion of public virtue—a form of
self-sacrifice and dedication to duty that, when apparent to a citi-
zenry, can bolster its faith in a nation's institutions and its confi-
dence in the propriety of the actions of its government. This prin-
ciple guided the Founders. They repeatedly stressed the impor-
tance of virtue, not only in our leaders, but in all citizens, as a
necessary precondition for self-governance. The Founders also
recognized, however, that there must exist "auxiliary" precautions
to check against the exercise of self-interest by a few, which could
result in the oppression of many.

In recent years, I have traveled abroad and worked with judges,
predominately in Eastern Europe, on rule-of-law issues. I am
driven by the notion that a sense of public virtue must animate
the work of judges everywhere, but I have also recognized that it
is a fragile commodity. In the absence of checks and balances, the
natural expression of public virtue can be thwarted by the self-
interested. I have met judges who lack life tenure and who de-
pend on the executive or legislature for both their tenure and sal-
ary. These seemingly modest differences in governmental struc-
ture can permeate every aspect of a system. Not only can it affect
the adjudication and vindication of individual rights and liberties
as the law is applied arbitrarily, but also the legislative and ex-
ecutive branches can act more hastily and opportunistically with-
out fear of accountability. While I do not labor under the illusion
that the American system is perfect or that we should export
wholesale to other countries our system of judicial review, I am
thankful that I have the ability to rule based on the law as I know
it, to review government conduct, and to provide a remedy where
that conduct is wrongful—powers that might well be denied with-
out life tenure and salary protection.

Second, I have begun to reflect on this issue in light of the times
in which we live. As our hosts noted in the printed announcement
of this seminar, times of war can test the separation of powers
doctrine. Most frequently, tension arises between the executive,
who has the power to conduct war, and the legislature, which has
the power to declare war. We have witnessed this tension over the
past few years, as former President George W. Bush broadly in-
terpreted his war powers and members of Congress fought back
and sought to manage the deployment and withdrawal of U.S.
troops from Iraq. Again, these tensions are not new. Congress
made similar efforts to influence the conduct of war during the War of 1812, the war with Mexico, and the Civil War. While there is often friction between the political branches in times of war, we need to look no further than our recent experience to see that tensions arise with the judiciary as well; with the Detainee Treatment Act of 2005, Congress sought to prevent courts from hearing the cases of individuals detained in the wars in Iraq and Afghanistan.

First, we must distinguish between the means to effectuate more balance and the will to do so. Although it has not done so, for reasons that could range from acquiescence to agreement, there is little doubt that Congress could constitutionally use its power of the purse to necessitate a troop withdrawal. This inaction complicates the inquiry into the effectiveness of our system of checks and balances during times of war: How do you redistribute power when the imbalance is due, in part, to the reluctance of one branch to assert its power? We could, of course, alter the structure and require the president to obtain congressional approval prior to military action. But this comes with a number of costs, not least of which is the speed with which our nation is able to respond to emergencies.

It could be that Congress has not invoked its appropriation power because it views a troop withdrawal as too drastic, by which I mean politically unpalatable. This brings me to my second point, which is that Congress may wish to consider other options if it does not want to acquiesce completely. As I mentioned previously, members of Congress have introduced a number of proposals related to the Iraq war, ranging from the elimination of funding, to a phased withdrawal of troops, to the imposition of specific training and equipment standards for deployments. There have also been a number of hearings, including some specifically on balance-of-power issues. Once again, there may be reason to question the likelihood that such seemingly innocuous actions by Congress will prompt the executive to change course, but I think it is arguable

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90. Jeffrey Rosen, Op-Ed., In Wartime, Who Has the Power?, N.Y. TIMES, Mar. 4, 2007, at § 4, at 1 (stating that during the War of 1812, congressional critics of President Madison forced the resignation of his Secretary of War; that the House censured President Polk for "unconstitutionally beginning a war with Mexico;" and that, during the Civil War, members of Congress sought to fire General McClellan in order to prosecute the war more aggressively).


92. Id. § 1005.
that the dialogue alone forces the president to be more accountable than he would be otherwise.

Finally, it should be evident that the courts continue to exercise their role in vindicating the rights of individuals, even when issues of war powers are at stake. In *Hamdan v. Rumsfeld*, the Supreme Court considered the Detainee Treatment Act ("DTA") and concluded that, under ordinary rules of statutory interpretation, the Act did not strip the jurisdiction of the Court to hear cases pending before Congress passed the Act. Congress responded by passing the Military Commission Act, which amended the DTA to deny federal courts jurisdiction to hear habeas corpus actions that were pending at the time of its enactment. In a second case following on the heels of this law, the Court construed the constitutionality of this Act. In the case of *Boumediene v. Bush*, the Court acknowledged that the Military Commissions Act did, in fact, deprive federal courts of the opportunity to hear requests for writs of habeas corpus filed by detainees. Nonetheless, the Court struck down the law as an unconstitutional suspension of the writ. In so doing, the Court discussed the very topic that brings us here today. It stated:

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.

These cases demonstrate that the Supreme Court has not abdicated its role in our constitutional structure to determine "what the law is." Nor do they suggest, in my view, a judicial branch that is complicit in a migration of power to the executive. But later generations will have a much better perspective from which to decide whether the courts have effectively exercised their con-

94. *Hamdan*, 548 U.S. at 575-76.
98. Id. at 2274.
99. Id. at 2277.
institutional authority in a manner that both maintains separation and prevents an undue consolidation of presidential power.

V. SEPARATION OF POWER IN THE STATES

In closing, while it might seem beyond the scope of today's discussion, I would be remiss if I did not note the existence of separation-of-powers issues at the level of our fifty states. The vitality of our federalism compels me to advert at least briefly to the experience of those states.

The Constitution places only one real limit on the form state governments may take or the distribution of powers within state governments: the Guarantee Clause. This Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."\(^{100}\) The Supreme Court, however, has held that this Clause and the question of how states organize themselves is a political question and is not justiciable.\(^{101}\) Of course, this holding does not mean that states are entirely unregulated. The federal government must guarantee that a state's form of government is republican, and, with federal courts out of the picture, it is Congress's job to interpret what that means.\(^{102}\) Congress has not yet chosen to do so.\(^{103}\)

Ultimately, then, state constitutions define how state governments are to be formed and how various governmental powers should be exercised. Often, their powers are not separated in the same way as power is constitutionally dispersed at the federal level. For example, state constitutions often give the judicial branch a much broader role in government than that possessed by the federal judicial branch.\(^{104}\) Yet, 40 state constitutions contain

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100. U.S. CONST. art. IV, § 4, cl. 1.
101. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (stating that questions related to the authority and "republican character" of state governments are ones to be decided by Congress and "not in the courts"). But see Baker v. Carr, 369 U.S. 186, 208-32 (1962) (narrowing the nonjusticiability of Guarantee-Clause cases).
103. Id.
104. Id. at 1195.
clauses that explicitly call for separation of powers. This stands in contrast to the fact that words of separation are not found in our federal Constitution. Should we take this to mean that—at the state level—the doctrine really is about separateness rather than a balance and interplay between the branches? I think not. James Madison discussed this very thing in The Federalist Papers: "[N]otwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [of separation of powers] has been laid down [in the constitutions of the several States], there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."\[106\]

VI. CONCLUSION

I conclude with the realization that I have done little more than describe what seems to be a dynamic process. Is it possible, in the absence of explicit constitutional text, to define the limits of separation? And if we fail to do so, do we invite incursions by one branch into the proper sphere of another? To what extent can the constitutional roles of the three branches be impacted by majoritarian influences, if at all? I sincerely hope that I do not seem glib when I observe that, far removed from what we do in the courts, both public opinion and national elections which give voice to a sovereign people have their own unique way of balancing things out. I thank Professor Barker and our hosts at Duquesne for their invitation and for permitting me the opportunity for this kind of reflection.

