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Keeping It Complex With Philip Hunton, John Locke, and the United States Federal Judiciary: On the Merit of Murkiness in Separation of Powers Jurisprudence

Michelle M. Kundmueller*

ABSTRACT

This article draws on the resources of a little-known political theorist, Philip Hunton, to explain the function of "murky" jurisprudence in the maintenance of separation of powers over time. In the era immediately before the drafting of the United States Constitution, separation of powers was a touted remedy to tyranny. But if government is thus moderated, a critical question arises: who will judge the precise contours of each institution's powers? This article addresses this longstanding question by comparing the solutions offered by Philip Hunton, John Locke, and the United States judiciary. I conclude that the judiciary's decried inability to clarify the limits of its own power is justified by Hunton's obscure explanation that separation of powers can only function so long as murkiness shrouds questions of ultimate institutional authority.

KEYWORDS

Separation of powers, tryanny, John Locke, case or controversy, political question doctrine

CONTENTS

* Assistant Professor of Political Science, Old Dominion University; Ph.D. 2014 (Political Science), University of Notre Dame; J.D. 2004, University of Notre Dame; B.A. 2000, Flagler College. I owe a debt of gratitude to Michael Zuckert: not only did he introduce me to Philip Hunton, but his teaching and scholarship on political thought and the United States judiciary continuously inspire me as a scholar and writer. Three research assistants, David Livermon, Nicole Palmieri, and Brian Anderson, enriched this project with hard work, thoughtful research, and attention to detail. As ever, I am grateful to Aimee Anderson: her eagle eye and erudite comments have improved this article.

Introduction

This article contributes to our understanding of separation-of-powers theory by analyzing the role of the United States judiciary in maintaining that separation under the United States Constitution. The United States Supreme Court's role in defining the limits of its own constitutional authority has been a source of perennial debate and critique. The Supreme Court's articulation and implementation of the limits of judicial authority have elicited critique both for their substance and their doctrinal ambiguity. This article juxtaposes the doctrinal ambiguity of the United States judiciary's role in the national government with the mixed-government theory of the seventeenth-century political theorist Phillip Hunton. Hunton's little-known analysis provides the logic necessary to explain the function of the decried murkiness in the United States Supreme Court's jurisprudence.

As Locke warned and the drafters of the Constitution attempted to prevent, separated governments—often called complex—have a tendency towards consolidation of power into one part of the government. The great danger for a separated government is thus "simplification," which effectively ends its existence as a separated government. Hunton's argument suggests that a kind of "murkiness" is necessary for a separated government to avoid this evil and retain the necessary dynamism within its structure. If Hunton is right, imprecision in articulating and enforcing limits of judicial authority may be the key ingredient in whatever success separation of powers can boast within the American system.

All concede that no branch of the United States government is without some authority, and thus no branch has total authority. Accordingly, most scholarship focuses on determining the limit of each branch's authority in relation to the others and to other salient features of United States politics that might shift the relative power limits. Hunton's insight draws attention to an overlooked possibility: *where* precisely the boundaries of branch power lies may be less important than *how* and *how predictably* these boundaries are found. Counterintuitively, Hunton argues that unpredictability of branch boundaries is essential to the stability and quality of government over time. He argues that the inability to identify the supreme power within a complex government supports the continuation of the dynamic struggle necessary for such a government to remain complex and thus to serve its own end—the prevention of tyranny.

Hunton's theory was expounded in the context of a mixed government with hereditary elements and not to address the needs of government in the wholly republican United States. Nonetheless, his argument suggests a benefit of the Supreme Court's inability to articulate a consistent, clear doctrine explaining its own "case or controversy" limitations under Article III. Mapping Hunton's understanding of the power relations within a mixed government onto the respective branches created by the Constitution reveals that clarity and predictability are not ends to be sought. To the contrary, murkiness is the mechanism that prevents separation of powers from becoming a mere parchment barrier against tyranny.

Murkiness is not a known or even—to my knowledge—previously used term in jurisprudence or legal scholarship. The term is employed here to denote the particularly problematic quality of the precise boundaries of institutional authority among the United States legislature, executive, and judiciary and particularly to describe the federal common law delineating which branch shall determine the precise limitations of each branch's authority under the Constitution. The term "murkiness" is employed to underscore a feature of this portion of the United

States jurisprudence that is distinct *in function* from the baseline unpredictability, ambiguity, inconsistency, or downright irrationality that can (at times) be observed in the common law more generally. In addition to all these qualities (which are normal and inherent, if regrettable, in common law), in this particular instance the common law produces a murkiness that—according to the dynamic observed by Hunton—actually strengthens rather than weakens the government as a whole.

Given prevailing rule-of-law norms such as the desirability of predictability, stability, and clarity,[1] the finding that a certain type of judicially-created murkiness enhances the government's aggregate structural integrity is particularly surprising, unconventional, and—I believe—unprecedented. Admittedly, if the murkiness were too thick (so to speak), the government could not function at all. Moreover, as mentioned below, the murkiness may produce unjust outcomes in some cases. So, while Hunton's theory would lead one to believe that murkiness renders important or even critical benefits, there are countervailing interests indicating that the benefits come at a high price and that therefore the desirable degree of murkiness is itself murky.

To be clear, this article attempts to demonstrate neither Hunton's historical influence nor his success in foretelling a potential role for courts. Rather, my argument is that—in grappling with the dynamics inherent in mixed government, the dynamics of limiting the potential tyranny of a king or of Parliament—Hunton proposed a solution that the Supreme Court has reproduced, albeit unwittingly and contrary to its best efforts at predictability, stability, and clarity. Hunton's insight did not cause or predict the development of the United States judiciary or the function that it performs in maintaining separations of powers within the United States government; rather, Hunton's insight about the uncertainty necessary to maintain the power dynamics of a mixed regime—when applied to the power dynamics of the separation of powers established within the United States—reframes what has been seen as a deficiency in the constitutional structure of the United States. The Supreme Court's unintended lack of clarity in expounding just when it has the authority to resolve a conflict and when it must defer to the coordinate branches is a saving grace—not a stumbling block.

I. The Case or Controversy Limitations of Article III

The federal judiciary's role in resolving conflicts among the branches of the national government has been the subject of extensive study by political scientists,

[1] However it may be best formulated or to whomever it may be most accurately attributed, the rule of law—which requires at a minimum that the law be knowable—exists in tension with murkiness in the law. The idea of the rule of law is notoriously difficult to pin down within the Anglo-American legal tradition, but whether it is best attributed to ancient Greek Aristotle or British attorney A.V. Dicey, the practice, idea, or ideal of the rule of law requires that law be known in advance and then applied in some rational, predictable, and pre-announced fashion. *See* Richard H. Fallon, Jr., *"The Rule of Law" As A Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 1–7 (1997); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 Geo. Wash. L. Rev. 991, 991–95 (1994); Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 Baylor L. Rev. 48, 67 (2015).

legal scholars, and judges. Political scientists have posited a variety of models that account for case selection and outcome when the branches are pitted against one another in a legal battle.[2] Offering a complex set of partial explanations for the Supreme Court's resolution of these conflicts, this research suggests various factors—perhaps most recently and notably the degree of judicial control over ruling implementation[3] and the degree of policy preference divergence among the Court,[4] the branches, and public opinion.[5] A large body of work is devoted to predicting which branch is likely to prevail once a legal confrontation has started among the branches. Yet the discipline is still at odds with itself, and no conclusive set of factors predicting judicial outcomes is in sight. For example, while Moe and Howell conclude that the Court is largely deferential to the executive, they call the Court's potential to resist executive action a "wild card."[6] More recently Owens, in challenging the separation of powers model favored by many, concluded that the studied factors in judicial decision making may simply be "so limited or difficult to measure that existing methodologies are blind" to them.[7]

As this overview is intended to establish, the brunt of the focus of political science has fallen on how federal courts generally and the Supreme Court in particular resolve conflicts that all observers concede are properly conflicts for the judiciary to resolve. The judiciary's role in determining which branch shall resolve which issue has, by contrast, attracted relatively little attention from political

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2 For an overview of the competing theories of the two dominant approaches, the attitudinal and the separation of powers models, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am. Pol. Sci. Rev. 28 (1997).

3 Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 Am. J. Pol. Sci. 352 (2014).

4 Employing the convention of United States judges and attorneys, I refer to the United States Supreme Court as the "Court" and any other court (including a lower federal court) as a "court."

5 Bethany Blackstone & Greg Goelzhauser, *Congressional Responses to the Supreme Court's Constitutional and Statutory Decisions*, 40 Just. Sys. J. 91 (2019); Alyx Mark & Michael A. Zilis, *The Conditional Effectiveness of Legislative Threats: How Court Curbing Alters the Behavior of (Some) Supreme Court Justices*, 72 Pol. Rsch. Q. 570 (2019); Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 Am. J. Pol. Sci. 89 (2011); Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*, 72 J. Pol. 812 (2010); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 Am. J. Pol. Sci. 971 (2009).

6 Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 Presidential Studs. Q. 850, 866 (1999).

7 Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 Am. J. Pol. Sci. 412, 425 (2010). *See also* Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. Rev. 1323 (2005). Likewise, political scientists are divided over the desirability of separation of powers and the principles that justify its continuation. For new and classic examples, see, e.g., Tara Ginnane, *Separation of Powers: Legitimacy, Not Liberty*, 53 Polity 132 (2021); Gleason Judd & Lawrence S. Rothenberg, *Flexibility or Stability? Analyzing Proposals to Reform the Separation of Powers*, 64 Am. J. Pol. Sci. 309 (2020); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

scientists. Because this issue is central to understanding the operation of separation of powers under the United States Constitution, it is to this preliminary and often overlooked question—the question of whether a conflict may be resolved by a federal court—that I wish to direct attention.

To be clear, all branches—and even individual citizens—play a role in this traffic direction of conflict to and through the branches of government. Thus, presidents decide whether to attempt to work under existing laws or to solicit new statutes from Congress.[8] Congress determines when to create judicial remedies, when to empower executive action, and when to employ both judicial and executive solutions.[9] And citizens—whether consciously or not—decide too: sometimes they sue, sometimes they campaign to change public opinion and hence—eventually—the relevant politicians and the law, and sometimes they attempt to elicit a change from the relevant federal, state, or local executive official (be it president, mayor, or cop on the beat).

But the judiciary plays what is most often the most definitive role—which is not to say a universally final role[10]—in determining how the social conflict traffic

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8 *See* Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 712 (2000).

9 In some cases, Congress even elects to bring suit, effectively harnessing the judicial branch to meet its own goals. Ben Miller-Gootnick, *How the House Sues*, 2021 U. Ill. L. Rev. 607 (2021). Congress may write laws that either expand or contract the federal judiciary's jurisdiction. The extent of this power is unclear and the topic of much debate. Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. Rev. 1778 (2020); Reid Coleman, *Separation of Powers Faux Pas: The McGahn Litigation and Congress's Efforts to Utilize the Courts to Resolve Interbranch Information Disputes*, 87 U. Chi. L. Rev. Online 1 (2020); *see also* David R. Dow & Sanat Mehta, *Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?*, 16 Duke J. Const. L. & Pub. Pol'y 89 (2021) (arguing that Congress may be able eliminate life tenure for federal judges without recourse to constitutional amendment).

10 Various constitutional provisions and power dynamics permit resistance to final resolution of an issue by the federal judiciary. The most obvious is constitutional amendment, provided for in Article V. Together, constitutional amendment and the Civil War reversed the Court's finding that it held the authority to resolve the constitutional status of slavery. *Scott v. Sandford,* probably not coincidentally, is also the Court's most infamous case of ruling without jurisdiction under Article III. 60 U.S. 393, 427–431 (1856). Section II of Article III empowers Congress to remove issues from federal jurisdiction, giving Congress direct control over the federal judiciary's jurisdiction. Creative legislation can also substantially alter the dynamic between branches. For example, the federal Religious Freedom Restoration Act effectively raised the floor for federal deference to religious freedom, thereby curtailing the relevance of the judiciary's role in determining the contours of religious freedom protection under the First Amendment. Ben Ojerkis, Comment, *Protecting Religion or Privileging Religion: An Analysis of the Genesis and Unintended Consequences of the Indiana Religion Freedom Restoration Act*, 21 Rutgers J.L. & Religion 260, 261–71 (2020) (providing an overview of why and how the Religious Freedom Restoration Act changed the protection of religious practice from federal law); *see Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014), 693–696. Finally, overwhelming popular pressure and longstanding executive resistance can dampen, delay, or foreclose enforcement of judicial rulings. The prolonged end of school segregation, although a state example, is probably the most overt and famous example of this dynamic. *See* Jim Hilbert, *Restoring the Promise of Brown: Using State*

will be directed among the three branches of the federal government. Every time a federal court rules on a point of First or Fourteenth Amendment law (for example), the judiciary first determines that it is the branch that will make this determination. More to the point, sometimes a judicial ruling never comes because the court determines as a preliminary matter—in a very real sense before the legal controversy has even started—that the case before it is not a case at all. This limitation of judicial authority is grounded in Article III of the Constitution, which vests the "judicial power" of the United States to resolve "cases" and "controversies." As recently articulated by the Court, "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[11]

As interpreted by the Court over the years, the case-or-controversy limitation means that the federal judiciary is limited to resolving legal conflicts—and only those legal conflicts that do not require resolving a question committed by the Constitution's text to either the executive or the legislature.[12] The doctrines that have grown from this limitation prevent the courts from "usurp[ing] the powers of the political branches."[13] When a conflict lies outside these parameters, it is not—to put the issue in Article III terms—a "case" or "controversy." Therefore, the issue lies outside the judicial power, or—to put the matter in the terms most often employed by the courts—it is "nonjusticiable," and accordingly the court has no jurisdiction and may not rule.[14] As Justice Warren explained, the case-or-controversy formulation limits the "federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and ensures "that the federal courts will not intrude into areas committed to the other branches of government."[15]

Through the common law process, the Court has developed a number of doctrines that articulate how the case-or-controversy limitation circumscribes the federal judiciary's authority in different scenarios.[16] Perhaps best known is

Constitutional Law to Challenge School Segregation, 46 J.L. & Educ. 1, 4–8 (2017); Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 Geo. L.J. 1135, 1140–51 (2019).

11 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). *Spokeo*, like all the cases relied on to illustrate the Article III limitations of the federal judiciary's jurisdiction, adjudicated a separation of powers question. In each of these opinions the Court ruled on the scope of its own authority, thereby delineating the scope of judiciary's authority within the United States separation of powers scheme. Both diminishment and expansion of the judiciary's authority will normally have at least an indirect and corresponding impact on the power of one or both of the coordinate branches (because the coordinate branches will thereby have either more or less capacity to act without judicial oversight).

12 *Id.* at 336–37; *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019); *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 101–04 (1998).

13 *Spokeo*, 578 U.S. at 338. In *Spokeo*, the Court was specifically referring to the doctrine of standing, but the same logic applies to all the doctrines based on the case-or-controversy limitation.

14 Fundamental to the federal court's limitations under Article III is their inability to rule without jurisdiction. *See Steel Co*., 523 U.S. at 89–104 (for further elaboration on this issue).

15 *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

16 Andrew Hessick, *Standing and Contracts*, 89 Geo. Wash. L. Rev. 298, 304–05 (2021). The *Spokeo* court described this aspect of standing in terms that apply to all the case-or-

the doctrine of standing, which requires that the plaintiff have suffered an injury that is "both concrete and particularized."[17] The legal issue at the heart of the case must also be "ripe—not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all."[18] On the flip side, the issue may be "moot" if—at some point before judgment—circumstances change so that the court can no longer provide effectual relief.[19] Once a case becomes moot, it is no longer a "case" within the meaning of Article III, and accordingly it is outside the jurisdiction of the federal judiciary.[20] Taken together, these case-or-controversy–derived doctrines ensure that "the dispute must be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[21] In other words, these doctrines ensure that the judiciary does not exercise "general authority to conduct oversight of decisions of the elected branches of government."[22] Hence the case-or-controversy doctrines guide the courts as they translate this constitutional imperative into reality.

Exploration of the concept of advisory opinion is particularly helpful to the process of understanding the common foundation of these doctrines, all of which limit courts to ruling on legal questions in the context of legal battles.[23] Viewed in the broadest of perspectives, standing, mootness, and ripeness are all analytical tools that ensure that—even when the conflict looks a bit "lawlike"—a court will not render what would effectively be an advisory opinion. Since the Court refused to give George Washington advisory opinions "under circumstances which do not give cognizance to them to the tribunals of the country," it has been axiomatic

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controversy doctrines: it "is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo*, 587 U.S. at 338.

17 *Spokeo*, 578 U.S. at 334. To demonstrate standing, the plaintiff must also show that the injury is fairly traceable to the defendant and that it is likely to be redressed by a favorable judicial decision. *Id.* at 338.

18 *Trump v. New York*, 141 S. Ct. 530, 535 (2020).

19 *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

20 *United States v. Sanchez-Gomez,* 138 S. Ct. 1532, 1537 (2018).

21 *California v. Texas,* 141 S. Ct. 2104, 2115–16 (2020).

22 *Id.* at 2117.

23 A related yet distinct doctrine of judicial self-limitation is the "party presentation rule." Under this rule, which is derived from the fundamentally passive nature of judicial power, the judiciary generally limits itself to resolving issues properly raised by the parties. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). As the Court has explained, "In our adversarial system of adjudication, we follow the principle of party presentation. . . . in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (internal citations omitted). Because this doctrine is "supple, not ironclad" (*id.)* it adds another layer of complexity to a federal court's analysis of which issues will be resolved when by federal courts. Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 449–55 (2009). The party presentation rule is distinct from the doctrines discussed in the body of this paper, however, because it is not generally understood as a jurisdictional issue and because it is triggered by the party's determination of how to plead a case: pleaded differently, there would be no bar to adjudication of whatever issue the party presentation rule precludes.

that federal courts will not provide advisory opinions.[24] Taken together, standing, mootness, and ripeness help the courts apply this limitation to the varied and real-world scenarios that come before them—many of which are less obvious than Washington's request for advice because they often have more in common with an actual case or controversy. Unless an issue can meet these requirements, it is not a case or controversy, and the courts will leave the issue to be dealt with by the other branches (if at all). The conflict cannot proceed within the judicial system because any judicial pronouncement would be essentially indistinguishable from an advisory opinion—the court pronouncing on an issue even though that issue has not come before it as a case or controversy.

A closely related doctrine—the political-question doctrine—dictates the same result but follows a slightly different logic. Under the political-question doctrine, a court will make a similar finding of nonjusticiability and dismiss the conflict for lack of jurisdiction if it decides that resolving the conflict would require the court to determine an issue exclusively allocated to a coordinate branch or an issue for which there is no legal resolution.[25] In such cases, the "claim is said to present a political question and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction."[26] The contours of the political-question doctrine were first suggested by the Supreme Court in *Marbury v. Madison*, when the Court declared that "questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made by this court."[27] Like the other case-or-controversy limitations, the political-question doctrine reflects both the explicit limits on the power granted the judiciary under Article III and the separation of powers inherent in the structure of the Constitution. But where the other case-or-controversy limitations are most clearly indicated by the "case" and "controversy" wording of Article III, the foundation of the political-question doctrine is found equally in the judiciary's duty to respect the power grants of Article I and Article II.[28]

Thus, for example, the text of the United States Constitution provides that military decisions are within the discretion of the executive and legislative branches. In addition to the power to declare war, Article I vests Congress with the power to "provide and maintain a Navy" and to "make the Rules and Regulations of the land and naval Forces."[29] Article II states that, among the president's duties, the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia."[30] By contrast, Article III is silent about the role of the judiciary in relation to military matters. Based on this textually demonstrable commitment of the military to the political branches (the branches that are most accountable to the people through the political process), the Supreme Court has repeatedly held that many military issues are beyond the scope of judicial determination. In

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24 *Vieth v. Jubelirer*, 541 U.S. 267, 302–03 (2004) (quoting correspondence between then Supreme Court Chief Justice John Jay and then Secretary of State Thomas Jefferson, writing on behalf of George Washington in 1793).

25 *See Rucho v. Common Cause,* 139 S. Ct. 2484, 2493–94 (2019).

26 *Id.* at 2494.

27 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803).

28 *See Rucho,* 139 S. Ct. at 2493–94; *Vieth,* 541 U.S. at 276–78.

29 U.S. Const. art. I, § 8, cl. 11–14.

30 U.S. Const. art. II, § 2, cl. 1.

Gilligan v. Morgan, the Court discussed the constitutional allocation of military powers to Congress and the president, concluding that it "would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."[31]

Over the course of the second half of the twentieth century, the most-cited delineation of the political-question doctrine was found in *Baker v. Carr*. *Baker* consolidated the narrative of the history of the political-question doctrine and clarified—if one may use that word—the factors that the Court would look to when determining the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[32]

Although the amorphous *Baker* factors remain the best-known judicial test for a political question, in recent years the Court has apparently collapsed or streamlined this into a two-factor test: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it."[33] If one considers that the "judicial power" is granted in Article III to the judiciary and that—by the logic of the terms used—this means that the institution created by Article III is intended to act as a legal court resolving legal cases and controversies, then these two factors really collapse into one. Under the political-question doctrine, the Court refuses to exercise jurisdiction over conflicts that do not fall within the meaning of "judicial power"—which may be discovered by considering whether there are traditional judicial means for resolving the conflict or by searching the Constitution to see whether the issue was allocated to either of the other branches.

Under all the doctrines discussed above, the question of the appropriateness of an issue for judicial resolution is a preliminary or threshold issue whenever issues come before a federal court.[34] However, it is not only a threshold question: it

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31 *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973).

32 *Baker v. Carr*, 369 U.S. 186, 217 (1962) (brackets in original).

33 *Zivotofsky v. Clinton,* 566 U.S. 189, 195 (2012) (brackets in original).

34 Of course, there are reasons unrelated to the Article III origin of the federal judiciary's power that may lead a federal court to determine that it ought not or cannot rule. Those related to the relationship between state governments and the federal judiciary are beyond the scope of this article because they relate to neither separation of powers nor the limits of Article III. The Eleventh Amendment, which prohibits federal jurisdiction over suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State" is an obvious example. In such instances, federal

remains a live question until a final judgment. If at any point the conflict changes so that it is no longer a case or controversy, a court will—without a motion from the parties—note its new lack of jurisdiction, vacate any rulings, and dismiss the case. This necessity has been at the heart of American jurisprudence since *Marbury v. Madison*, when Justice Marshall determined that the Court would not provide relief if jurisdiction could not be claimed consistently with the Article III charter of the judiciary's authority.

Counter-examples that come to mind often relate to one of two potential routes of confusion—either the conflation of the political question doctrine with an issue of political importance or conflation of judicial supremacy (to whatever extent it may exist) with an end to the requirement of jurisdiction. Turning first to the confusion over the meaning of the political question doctrine, the Court's resolution of high-profile political issues might seem at first blush a counter-example to the doctrines of judicially-enforced judicial limitation that have been sketched. This is due to an unfortunate ambiguity in the name of the "political question doctrine." The doctrine's name is derived from the fact that a political question exists when an issue has been constitutionally allocated to one of the two "political branches" of the United States government. The political branches are those branches held accountable to the people via the political process—the executive and the legislature. The doctrine has nothing to do with whether a case relates to a "political" issue in the sense of a substantive issue with a bearing on electoral or policy-oriented politics. The high-profile political impact of the outcome of cases like *Bush v. Gore*, *Clinton v. Jones*, and even *Scott v. Sandford* has no relationship to the question of whether or not the political question doctrine (which relates to the question of whether determination of an issue has been allocated exclusively to a political branch) barred a judicial ruling.[35] Accordingly, the political question doctrine by no means bars federal courts from resolving issues of decisive political importance; it does bar courts from resolving issues allocated to the political branches of the federal government. The verbal ambiguity introduced by the word "political" is

courts have no jurisdiction, but it is neither because the case falls outside the meaning of "judicial power" nor because it is not a case or controversy. Similarly, federal courts sometimes employ abstention (one variety of which arises when there are independent state grounds to resolve the issue before the court) to defer resolving a constitutional question when a state proceeding is ongoing. Robert J. Pushaw, Jr., *Dual Enforcement of Constitutional Norms: Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 Wm. & Mary L. Rev. 1289, 1300–05 (2005). Abstention—which is a federalism rather than a separation of powers issue—should not be confused with justiciability: indeed, courts reach an abstention analysis only after a case has been found justiciable (although this distinction is so definitional that it is commonly left implicit). Joseph A. Carroll, Howard C. Schwab Memorial Essays*, Family Law is Not 'Civil': The Faulty Foundation of the Domestic Relations Exception to Federal Jurisdiction*, 52 Fam. L.Q. 125, 140–41 (2018). A precise number of case or controversy doctrines cannot be named without courting controversy. Not only has the total set of doctrines altered over time and been the subject of various scholarly framings, but some of the doctrines are arguably a subset of the others (see the discussion of advisory opinions above) and sometimes courts simply state that there is no case or controversy, leaving scholars to debate which specific doctrine applies.

[35] *Bush v. Gore*, 531 U.S. 98 (2000); *Clinton v. Jones*, 520 U.S. 681 (1997); *Scott v. Sandford,* 60 U.S. 393 (1856).

increased by the fact that sometimes a political question may bar ruling in high-profile political cases: in other words, although most high-impact political issues that come to the courts do not require a resolution of a political question, some do.[36]

A second set of potential counter-examples arises from the Court's most emphatic statements of its own prerogative to determine the contours of constitutional law—those statements that have come to be known as claims of "judicial supremacy." Take this example from *Cooper v. Aaron*, one of the cases in which the Court insisted on the federal judiciary's capacity to direct and control enforcement of *Brown v. Board of Education*[37] over state resistance:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. [38]

Granted, this language—like the language of *Marbury* before it—is emphatic. But this is a case in which the Court is asserting supremacy over state action and state law.[39] Moreover, in *Cooper*, there was no question of whether or not a case or controversy, within the bounds of Article III, existed. Even in *Cooper*, perhaps the most famous assertion of judicial supremacy, the Court relies on an example—*Marbury*—that underscores the limits of judicial power. Lest we forget, in *Marbury*, the Court refused to rule on the substantive issue before it (after making perfectly clear what such a ruling should be) because it found that it lacked jurisdiction.[40] At the end of the day, *Cooper's* claim to power carries within it a reminder that—however supreme the judiciary may be in its declarations of the meaning of the Constitution—its supremacy is always contingent upon its jurisdiction under Article III.

And yet, this fundamental limitation of the judiciary is consistently ignored by scholars who blithely conclude that "the fact is that the Supreme Court has the right

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36 *See Clinton*, 520 U.S. at 698–705.

37 *Brown v. Board of Education*, 347 U.S. 43 (1954).

38 *Cooper v. Aaron*, 358 U.S. 1 (1958), 18 (internal citations omitted).

39 *Cooper* is known as one of the strongest statements of the doctrine of judicial supremacy, the doctrine that once the federal judiciary has addressed an issue it is resolved—not only for the parties before the court—but for all individuals, all political actors (state and federal), and all time. The pedigree of this doctrine and its acceptance among judges and legal scholars is questionable at best. The doctrine's most famous detractor is Abraham Lincoln, who explicitly rejected it in his response to *Scott v. Sandford*. President Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857). For an overview of the doctrine of judicial supremacy and the closely related doctrine of judicial universality and an analysis of their legitimacy, see Blackmun, *supra* note 10, at 1135–1204, 1154–1159, 1192–1202.

40 *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173–180 (1803).

to say what the Constitution means—and thus to resolve any and all ambiguities. . . . It can issue rulings that spell out in explicit, all-encompassing terms what the boundaries of presidential power are, and it can set these boundaries as narrowly as it likes."[41] Indeed, no. As the Supreme Court has explained repeatedly and continues to explain today, the Court may not, consistently with its own basis of power (Article III), do any such thing.

> No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison* . . . . In this rare circumstance, that means that our duty is to say "this [issue brought before the court] is not law."[42]

Perhaps this limitation is yet more clearly explained when the Court makes explicit the connection between this doctrinal limitation and the function of the judiciary.

> The judicial Power created by Article III . . . is not whatever judges choose to do . . . or even whatever Congress chooses to assign to them . . . . It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.[43]

Thus, Supreme Court history shows that—as theory and Constitution have translated into political reality—the judiciary's power is great but also curtailed in relation to policing the precise limits of the other branches of government.

As political scientists have paid little heed to these limitations on the federal judiciary's authority, it is not surprising that they have failed to note the difficulty of applying these doctrines to the various scenarios that emerge over time. Whether the cause is the inherent intellectual challenge posed by the doctrines themselves, the wide range of factual circumstances to which they must be applied, or the differences among the justices crafting and applying the definitive version of these concepts, it is remarkable how little consistency has emerged. While there is much agreement about the general contours of case-or-controversy limitations on the judiciary, there is also widespread agreement that separation-of-powers law is hard to pin down precisely, unpredictable, and always morphing.[44] The further one

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41 Moe & Howell, *supra* note 6, at 865–866.

42 *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (internal citation omitted).

43 *Vieth v. Jubelirer*, 541 U.S. 267, 276–78 (2004).

44 Aziz Z. Huq, *Separation of Powers Metatheory*, 118 Colum. L. Rev. 1517, 1517–19 (2018); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 Yale L.J. 346, 352 (2016); Edward Hirsch Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 386–88 (1976).

gets from theoretical explanations (like the one above) and the closer one gets to workaday judicial application of the doctrines, the more this is true.

For example, because of ongoing adjustments in the doctrine of standing, potential plaintiffs may come to the courts only to find that—regardless of a clear statute providing for liability—their claims cannot be redressed by the courts.[45] In *Spokeo, Inc. v. Robins*, the Court adjusted—or at least newly articulated—the "injury" prong of the standing test. Under the challenged law, the Fair Credit Reporting Act, Congress had created a cause of action and damages for individuals whose credit information had been mishandled—even where the individual involved could otherwise show no damages as the result of the handing of their credit information.[46] Robins filed suit, and indeed conventional wisdom before the Supreme Court's ruling would have predicted that he had standing because he individually had had his information mishandled and because Congress's law stated that the mishandler of the information could be held liable.[47] The Court commenced by restating its own limitations under Article III, and then explained—much as Justice Marshall had done with regard to original jurisdiction in *Marbury*—that Congress could not create standing where Article III does not provide for it. In particular, the Court emphasized that because Congress cannot extend the judiciary's fundamental boundaries there could be no standing without a concrete injury.

> This case primarily concerns injury in fact, the "[f]irst and foremost" of standing's three elements. . . . Injury in fact is a constitutional requirement, and "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[48]

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.[49]

Based on this reasoning, the Court indicated that unless an alternate basis for jurisdiction could be found by the lower courts, Robins had no standing and ultimately the judiciary had no jurisdiction.

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45 Hessick, *supra* note 16, at 300–303.

46 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334–37 (2016).

47 *Id*. As the Court paraphrased the statute, it "provided that '[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]' for, among other things, either 'actual damages' or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages." *Id*. (internal citations omitted).

48 *Id.* at 338–39 (internal citations omitted).

49 *Id.* at 341 (internal citations omitted).

The point of this example is not to hail *Spokeo* as a radical change in the Court's articulation of standing, to dramatize the travails of the would-be plaintiff, or to detail the work of federal district and circuit courts as they reconsider various statutory and contract-based claims and commence rejecting them for lack of standing.[50] The point of this example is to illustrate how this one decision and the changes that ripple outward from it are simultaneously profound—when considered in their own right—and yet relatively common in proportion to baseline level of instability, ambiguity, and opaqueness within the common law as it defines the judiciary's authority.

The effect of *Spokeo* is profound (if subtle) in its own right. It affects the enforcement of yet-unidentified laws and alters Congress's toolkit for addressing social ills moving forward. And yet this one change is small or at least normal: it is one small component in an ever-changing landscape of murkiness. Indeed, *Spokeo* is only one of several reasons why some scholars believe that standing is so confusing that even the federal courts are having trouble keeping it straight. Birney and Edmonson accuse the federal courts of consistently confusing statutory standing (which Congress may change) with constitutional standing (which Congress obviously cannot alter).[51] Similarly, Coon accuses the courts of conflating standing and ripeness,[52] and similar allegations and debates surround the other Article III limitations on judicial authority.

Legal scholars have engaged in a rigorous debate over whether the political-question doctrine (the subject of analysis in many a federal and Supreme Court opinion) remains viable.[53] A vast body of literature, fueled in part by recent case law, debates the nature and precise limits of the political-question doctrine: one scholar quips, "[T]he doctrine (if it can even be called that) is little more than an amalgam of tangentially related concepts and cases—a repository of loose odds and ends."[54] Others have critiqued the vague doctrine for excessive "malleability,"[55] and indeed scholarship has repeatedly demonstrated that this is true—whether considering alterations in the doctrine over time or across the judiciary at one moment in time.[56] As some have noted, this type and amount of confusion is not necessarily the fault of either doctrinal inconsistency by the courts or a lack of perception on the part of scholars.[57] The task of identifying the genuine cases and controversies among the

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50 Hessick, *supra* note 16, at 301; Jason R. Smith, Comment, *Statutes and Spokeo*, 87 U. Chi. L. Rev. 1695, 1697 (2020).

51 Patrick M. Birney & Jamie L. Edmonson, *Understanding Standing: Statutory Authority Made Simple*, 39 Am. Bankr. Inst. J. 18 (2020).

52 Nora Coon, Chapter*, Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law*, 45 Env'tl. L. 811, 812–13 (2015).

53 Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & Pol. 427 (2014).

54 G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 Ind. L.J. 1295, 1297 (2020).

55 Michael Gentithes, *Gobbledygook: Political Questions, Manageability, and Partisan Gerrymandering*, 105 Iowa L. Rev. 1081, 1083–84 (2020).

56 John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 509–12 (2017).

57 Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA* and *City of Los Angeles v. Lyons*, 23 Wm. & Mary Bill Rts. J. 127, 127–28 (2014).

indescribably wide range of issues brought into the federal courts ought not to be underestimated.[58]

However important the judiciary's interpretation of the law and the Constitution's substance may be, the traffic director role entailed in the Court's interpretation of its own legitimate authority is arguably the most important and interesting function that the Court fulfills. As its own authority expands and contracts through the application of this doctrine, the power of the other branches adjusts accordingly. Not only is the United States judiciary the first judiciary to serve as an independent and coequal branch of government, but in this role it orchestrates the whole institutional framework in an entirely novel fashion.

Delving into the opinions and practices of the Supreme Court itself, one finds an ambiguous set of opinions that explain the Court's policing of the roles of the respective branches in relationship to one another. The overview provided here of this case law and related scholarship is not intended to demonstrate that the judiciary dominates or fails to dominate—or should or should not dominate—the other branches. Rather, this overview is intended, first, to illustrate the most fundamental doctrine under which the Court directs traffic among the three branches and, second, to reveal how this case-or-controversy limitation puts the federal courts at the pivot point within the separation of powers. Determining which issues the courts will resolve and which issues will be left without their otherwise ostensibly final resolution, the Court effectively shifts power among all three branches in the very act of limiting its own. This is the elusive—the "murky"—mechanism at the heart of separation of powers. Despite its pivotal role in conflict resolution, the mechanism

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[58] This uncertainty is closely related to concerns about the justice of leaving potential litigants outside the protection of the courts. Litigants, judges, and scholars have legitimate concerns about claims for justice that the courts cannot—in some cases ever—resolve because of the judiciary's lack of authority. The federal judiciary's refusal to claim jurisdiction leaves certain questions about the lawfulness—and sometimes the constitutionality—of executive and legislative action effectively irresolvable through recourse to the judiciary. In the last decade alone, pleas to resolve international, national-security, corporate responsibility, and environmental claims have been found to be nonjusticiable by federal courts. Nino Guruli, *Pro-constitutional Engagement: Judicial Review, Legislative Avoidance, and Institutional Interdependence in National Security*, 12 Harv. Nat'l Sec. J. 1 (2021); Albert C. Lin, *Dodging Public Nuisance*, 11 UC Irvine L. Rev. 489 (2020); Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 Envtl. L. 557 (2020); Philip G. Cohen, *The Political Question Doctrine—An Inappropriate Roadblock to the Limitations on Benefits Safety Valve*, 21 Hous. Bus. & Tax L.J. 48 (2020). Moreover, under these doctrines, branch inaction is often unchallengeable by recourse to the courts, and this can make righting presidential wrongs particularly difficult. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195, 1227–28 (2014). In these instances, it is not merely individual litigants who happen to be turned away by the courts; rather, systemic injustices—or so the potential litigants argue—cannot be addressed by the courts because there is no set of facts where the alleged wrong is justiciable. Environmental and corporate responsibility wrongs, for example, may fail to produce an individual plaintiff with standing. Executive decisions impacting military contractors, international affairs, and military decisions may cross constitutional, tort, or contract lines yet remain outside the scope of adjudication because of the political questions—in other words, executive military or international affairs decisions—that the courts would have to rule on in order to address the claims of litigants.

ensures ongoing unpredictability through shifts in dominant doctrine, doctrinal complexity, and the contingency inherent in the application of this doctrine to the variety of circumstances that may or may not materialize before a federal court.

II. How Separation of Powers Fails and Why It Matters

Although Alexander Hamilton admitted that the judiciary is "incontestably" the "weakest of the three departments of power," he likewise made it clear that the judiciary was incontestably one of the three departments of power and not a mere subsidiary of the legislative or executive powers.[59] Madison, famously paraphrasing Locke, wrote that separation of powers was imperative because "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[60] Taking together these two axiomatic claims about the role of the judiciary, it seems that the judiciary is the weakest of three branches integral for tyranny prevention under the Constitution. Moreover, in practice the judiciary—this weakest branch—plays the most decisive role in allocating issues to the respective branches. This is particularly extraordinary when one takes into account how crucial the separation among the branches was thought to be to the moderation of the tendency toward tyranny.

Even as the tyrant, by classical definition, lacks the capacity to rule himself as an individual and is in need of moderation, so too any government—which is but comprised of individuals—needs a moderating mechanism to check its tyrannous tendencies. As Madison famously paraphrased, "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."[61] A dependence on the will of the people is the first tool to this end, but—because of the potential for a tyrannous majority to emerge—separation of powers must also be employed to prevent all power from consolidating into one set of hands.[62]

The United States Constitution does not duplicate any earlier institutional structure or replicate the designs of any single theorist.[63] Nonetheless, there are

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59 The Federalist No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

60 The Federalist No. 47, *supra* note 59, at 249 (James Madison).

61 The Federalist No. 51, *supra* note 59, at 269 (James Madison).

62 This truth about the institutional structure of the United States has been recognized in many formulations. Ackerman, *supra* note 8, at 689 (noting that if the power to make laws is not separated from the power to implement them, "the result will be tyranny"); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. L. Rev. 592, 611 (1986) ("Indeed there are times when it seems that there is nothing between the political tyranny of the political branches and the liberty of the people but a vigilant judicial branch").

63 Alan Gibson, *Madisonian "Paths of Innovation": Michael Zuckert on the Political Science of James Madison*, 8 Am. Pol. Thought 243, 243–45 (2019); Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 Oxford J. Legal Stud. 419, 440 (2005); Michael Zuckert, *Natural Rights and Modern Constitutionalism*, 2 Nw. J. Hum. Rts. 1, 51, 54 (2004); Kurland, *supra* note 62, at 595.

several dynamics touted by eighteenth-century political theorists that provide the logic behind the creation of separated government institutions. Perhaps most importantly, Locke and Montesquieu both taught that liberty was best protected by the moderation that could be introduced via the separation of powers.[64] Locke recommended dividing government power between two institutions, the legislative and executive, but he never suggested elevating the judiciary to the position it takes under the United States Constitution.[65] Montesquieu, on the other hand, suggested the judiciary's institutional potential as a distinct branch of government, but his institutional framework was dependent on the continued use of hereditary social institutions unpalatable to the fully republican Madison and the lion's share of his peers.[66]

Indeed, we can learn much about separation of powers and the political goods that it may provide via reference to Locke and Montesquieu.[67] Taken together, they clearly affirm at least two aspects of the separation of powers that are pertinent here. First, government institutions are to be separated in order to prevent the usurpation of power by any one institution within government, and accordingly their ultimate end is the protection of the citizen's liberty from encroachment by government.[68] Second, in order to achieve this end, each of the institutions must maintain some capacity and will to check the other institutions: without this capacity and will, the separation may continue formally but it is no longer a working reality contributing to the protection of liberty.[69]

As admired and emulated as this institutional arrangement may have been, advocates of the separation of powers were aware of at least one potentially fatal flaw—the difficulty of keeping each of the institutions within its own proper sphere of action.[70] This proper sphere includes checking the other branches when they step beyond their just authority, but it can never include dominating the system as a whole. How is such a complex system to be maintained when one branch overreaches, and who shall hold the power to declare when a branch is beyond its authority? These difficult questions reveal the weakest point in a separated system. Locke's explanation of just how fundamental this problem is underscores

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64 Levi, *supra* note 44, at 373–374.

65 The discussion in the following pages supports this paragraph's claims about Locke with references to *Two Treatises of Government*.

66 Gibson, *supra* note 63, at 252; Claus, *supra* note 63, at 421; Zuckert, *supra* note 63, at para. 29–31, 34; Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 Rev. Pol. 231, 259–60 (2000). For a discussion of the extent to which Montesquieu's suggestion of the judiciary may have been premised on a civil law (rather than common law) understanding of the function of courts, see Claus, *supra* note 63, at 426, 431.

67 Arguably, taken together they were the most influential on the Constitution's drafters. Kurland, *supra* note 62, at 595.

68 Giacomo Gambino, *Our End Was in Our Beginning: Judith Shklar and the American Founding*, 8 Am. Pol. Thought 202, 207 (2019); Krause, *supra* note 66, at 231, 238–239.

69 Zuckert, *supra* note 63, at para. 27, 35–37; Claus, *supra* note 63, at 419.

70 *The Federalist* grapples with this difficulty: Number 51 provides the famous solution that ambition shall be made to check ambition, but Number 37 concedes that even clearly delineating the roles of the respective branches poses a fundamental challenge such that a "faultless plan was not to be expected." The Federalist No. 51, *supra* note 59, at 269 (James Madison); The Federalist No. 37, *supra* note 59, at 180 (James Madison).

the difficulty of the problem and thereby brings the gravity of the Supreme Court's position at the pivot point of the separation of powers more fully into focus.

Locke's awareness of this difficulty is forecast in his description of the state of nature: the challenge, indeed, is found in the natural human condition. He lists the need for "a known and indifferent Judge, with Authority to determine all differences" as fundamental to the human need to join into political societies to preserve their property.[71] The lack of an impartial judge draws humanity into political association because without it humans are but a short path from war with one another. As he explains in his chapter on the state of nature, "[T]he *Execution* of the Law of Nature is in that State, put into every Mans hand, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation."[72] The universal authority to execute the law of nature leads to a serious problem because "it is unreasonable for Men to be Judges in their own Cases."[73] As he illustrates, "'[T]is easily to be imagined, that he was so unjust as to do to his Brother an Injury, will scarce be so just as to condemn himself for it."[74] Men cannot be judges in their own cases because "Self-love will make men partial to themselves and their Friends."[75]

Without any judge who is not a party to a dispute, the state of nature results in "Confusion and Disorder."[76] To this problem Locke "easily grant[s] that *Civil Government* is the proper remedy."[77] But the introduction of government only introduces a judge between one citizen and another.[78] It leaves the citizen judgeless in relation to government itself. In other words, one of the fundamental problems that motivated the departure from the state of nature is only partially solved by the introduction of government.[79] To solve the problem introduced by government, Locke calls for dividing the authority of government, delineating the legislative and the executive as the two primary government powers and suggesting that they may be allocated in various arrangements.[80]

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71 John Locke, Two Treatises of Government Bk II, §§124–125 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

72 *Id.* at Bk II, §7.4–7.

73 *Id.* at Bk II, §13.3–4.

74 *Id.* at Bk II, §13.12–14.

75 *Id.* at Bk II, §13.4–5.

76 *Id.* at Bk II, §13.7–8.

77 *Id.* at Bk II, §13.9–10.

78 *Id.* at Bk II, §19.

79 This poses a particularly onerous threat in the case of absolute monarchs: because the monarch "has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure. . . . Much better it is in the State of Nature wherein Men are not bound to submit to the unjust will of another." *Id.* at Bk II, §13.16–29. Indeed, Locke concludes that an absolute monarchy "can be no Form of Civil Government at all." *Id.* at Bk II, §90.3–4.

80 Locke also briefly discusses the "federative" power, the power "of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth." *Id.* at Bk II, §146.1–3. But this power, he explains, is "always almost united" with the executive power, and need not complicate this discussion further. *Id.* at Bk II, §147.6. Locke dismisses all other political powers in a single sentence: "Of other *Ministerial* and *subordinate Powers* in a Commonwealth, we need not speak." *Id.* at Bk

Locke introduces the potential to mix the traditional estates, noting the potential for democracy, oligarchy, monarchy, and "compounded" (also called "mixed") forms of government.[81] Observations about the potential for the legislature to be in being intermittently and the executive's need for constant vigilance lead Locke to conclude that the powers can and should be held separately: "Legislative and Executive Power are in distinct hands . . . in all moderated Monarchies, and well-framed Governments."[82] Although there are two main government powers for Locke, there can be only one supreme power—the legislative.[83] But Locke returns to another possible configuration—a configuration of particular importance for a nation in which the executive has a role to play in lawmaking and the courts have a role in effectively erasing law. According to Locke, if the executive has a "share in the Legislative" then—despite the supremacy of the legislative power vis-à-vis the executive power—that person who has a role in both "in a very tolerable sense may also be called *Suprem*."[84]

Locke explains the danger in this separation between executive and legislative function by discussing potential strife over the executive's use of the prerogative. The prerogative is a power to take action unsupported by—sometimes even contrary to—legislation for the good of society.[85] When the executive's use of the prerogative is challenged, ultimately the question of breach of executive authority must be decided with reference to the good of the people.[86] But the practical question still remains: *who* determines when this limit has been breached? The answer, Locke explains, is simple: "Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth*."[87] An appeal to heaven, he proposes, is the only

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II, §152.10–11. Such powers are inferior because "they have no manner of Authority any of them, beyond what is, by positive Grant, and Commission, delegated to them and are all of them accountable to some other Power in the Commonwealth." *Id.* at Bk II, §152.16–19.

81 *Id.* at Bk II, §107.13–20, §132.13–14. Having once established the legislature as the supreme authority (*id.* at Bk II, §132.19–23, §134.4–14), Locke explores the relationship of the lawmaking function to the function of executing the law. The legislative function rules by "*promulgated standing Laws*" to be applied by "*known Authoriz'd Judges*." *Id.* at Bk II, §136.4. The legislature "need not always be in being, not having always business to do." *Id.* at Bk II, §143.6–7. In contrast, the laws enacted by the legislature "are constantly to be Executed" and their "force is always to continue." *Id.* at Bk II, §143.4–6. Locke thus concludes that the executive, unlike the legislature, is "*always in being*." *Id.* at Bk II, §144.4.

82 *Id.* at Bk II, §159.1–3; *see also id.* at Bk II, §143.7–23, §144.6.

83 *Id.* at Bk II, §149.3–4.

84 *Id.* at Bk II, §151.3–4. On the other hand, where executive power rests with a person who has no share in the legislative power, then the executive "is visibly subordinate and accountable to it." *Id.* at Bk II, §152.2–3.

85 *Id.* at Bk II, §159.5–17.

86 *Id.* at Bk II, §161.7–10 ("But if there comes to be a *question* between the Executive Power and the People, *about* a thing claimed as a *Prerogative*; the tendency of the exercise of such *Prerogative* to the good or hurt of the People, will easily decide the Question").

87 *Id.* at Bk II, §168.3–5.

recourse when a direct conflict arises between executive and legislature or, as he goes on to elaborate, between the legislature and the people.[88]

Locke does not place the right to resolve conflict over the limits of the executive and legislative power vis-a-vis one another in *any* part of the government. If a conflict between the legislature and executive is resolved by either of them, then the victorious power—by the act of deciding who defines their respective roles—has ended the separation of powers and thus simplified the government so that no division of power remains. If the people (or a majority of the people) assert themselves to reform the powers of government back into their proper spheres, then the function of government as impartial arbiter of disputes has also broken down. In either case, the political structures have failed to perform their function. If one government power (or institution) has emerged supreme in the sense of exceeding its proper boundaries, it has become a tyrant holding all power. Or, in the more apparent scenario of total breakdown, political authority reverts to the people as supreme.[89]

Of course, a dissolution reduces the government—or whatever one should call this society of the people to which the legislature has reverted—once again to a simple, undivided form in which majority rule controls without any moderating forces. The benefits of dividing political power are lost. This reversion of authority to the community is clearly good in the sense that it avoids the abuse of power in the hands of government, but it is also in itself a loss of the moderating role of separation of power that a properly structured government provided. Thus, for Locke, disagreement among the repositories of political power has the potential to end the division of their power.[90] The separations of power collapse to the victor, who then emerges as an unmoderated ruler—be it the executive, legislature, or an unmitigated democracy.

III. Hunton's Insight

From this perspective, the advantages of the United States' institutional structure are evident. Instead of appealing to heaven, at least initially one appeals to the courts. As the first section of this essay illustrates, this leads to a complex and unpredictable resolution process in which a court—arguably the weakest of three power contenders—limits the power of not only the other branches but also of itself. Juxtaposition of this process to Locke's description of the breakdown of

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88 *Id.* at Bk II, §168.16. Locke asserts that when the matter is of sufficient weight action may be taken. *Id.* at Bk II, §168.32–34. What exactly this appeal entails is a matter of debate: is it limited to the appeal to heaven or does it include the right to change one's government, as would seem implied by Locke's claim that "God and Nature never [allow] a Man to so abandon himself, as to neglect his own preservation." *Id.* at Bk II, §168.28–29. It is enough for present purposes to note that conflict may ensue.

89 Political authority may be "forfeited" by "the Miscarriages of those in Authority." *Id.* at Bk II, §243.14–15. Authority then "*reverts to the Society*, and the People have a Right to act as Supreme, and continue the Legislative in the themselves, or erect a new Form, or under the old form place it in new hands, as they think good." *Id.* at Bk II, §243.17–20.

90 John T. Scott, *The Sovereignless State and Locke's Language of Obligation*, 94 Am. Pol. Sci. Rev. 547, 554 (2000) ("The state of nature endures as a necessary possibility, and the state of war looms as a constant threat for the Lockean commonwealth.").

the separation of powers between an executive and a legislature reveals how the American process delays and obscures the results when the legitimacy of a branch's use of its power is challenged, and this alone may provide some moderation—if only time for heads to cool and negotiations to play out—with explanatory power. But, on the logic of Locke's analysis alone, we cannot quite explain how this nation has—more often than not—avoided the appeal to heaven of which he warned. Why, by and large, has the Court (and the system as a whole) been able to avoid the emergence of either an all-dominant branch, civil war, or both? Hunton's theory provides a novel answer to this question.

Countryman and contemporary of Thomas Hobbes and John Locke, Hunton is most frequently mentioned in scholarship on the English Civil War and the theories of mixed government then being debated.[91] Despite his current obscurity, Hunton's works enjoyed a renown of their own in the seventeenth century.[92] Writing and publishing *A Treatise of Monarchy*[93] during the English Civil War, Hunton was a moderate Parliamentarian who theorized about the rights and functioning of England's mixed regime and its monarchic, aristocratic, and popular elements.[94]

Despite his having been relegated primarily to historical debate, incidental scholarly references to Hunton indicate that his work sheds light on Locke and more generally on the republican government theorists who would inherit Locke at the time of the American founding.[95] Hunton, like Montesquieu, thought, wrote,

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91 Glenn Burgess, *Was the English Civil War a War of Religion? The Evidence of Political Propaganda*, 61 Huntington Libr. Q. 173, 180 (1998); Eunice Ostrensky, *The Levellers' Conception of Legitimate Authority*, 20 Araucaria 157, 164 (2018); Corinne Comstock Weston, *English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy under Charles I and After*, 75 Eng. Hist. Rev. 426, 435 (1960). While political theorists and historians have paid Hunton little attention, legal scholars have rarely even mentioned his work. The LexisNexis "law reviews and journals" database contains only nine articles mentioning Philip Hunton. None of these articles devotes more than a paragraph and a handful of footnotes to Hunton, and most relegate him entirely to the footnotes to provide context, further support, or contrast to other, better known mixed-government theorists of his century. Kinch Hoekstra, *Constitutionalism, Ancient and Modern: Early Modern Absolutism and Constitutionalism*, 34 Cardozo L. Rev. 1079, 1092–93 (2013) (containing the most substantive discussion of Hunton's theory of mixed government in a law review or journal article).

92 As Peter Laslett notes in his introduction to Locke's *Two Treatises of Government*, Hunton's works were among those burned at the University of Oxford in 1683 (alongside the better-known *Leviathan*). Peter Laslett, *Introduction* to Locke, *supra* note 71.

93 Phillip Hunton, A Treatise of Monarchy: Containing Two Parts. I. Concerning Monarchy in General. II. Concerning this Particular Monarchy, Also a Vindication (London, 1643). To my knowledge, there is no modern edition of *A Treatise of Monarchy* in standardized or modern spelling. The 1643 text is difficult to read, containing archaic spelling and punctuation. In quotations I have replaced the *f*, which appeared to stand for the modern *s*, as this is critical for comprehension. Otherwise, I have left cited text unchanged.

94 Michael P. Zuckert, Natural Rights and the New Republicanism 67 (1994); John Sanderson, *Philip Hunton's Appeasement: Moderation and Extremism in the English Civil War*, 3 Hist. Pol. Thought 447, 449 (1982).

95 Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1197, 1216, 1232, 1235, 1240 (2019); Scott, *supra* note 90, at 552. Robert Filmer—certainly contrary to his own wishes—best predicted the

and argued from within a mixed-government framework.[96] Like Locke, he was concerned with the potential for abuse of government power, particularly the abuses likely when a ruler judges between himself and his people.[97] Like Locke, Hunton outlined methods of moderating the potential for such abuses by dividing political power. Like Locke, he preferred complex or compound institutional arrangements over simple or consolidated government power.

Hunton describes the problem inherent in an institution judging the limits of its own power in the context of both absolute and limited monarchies. In so doing, he illustrates why—although the people may sometimes have the ultimate right to resist their monarch—this breakdown of government undermines the benefits for which governments are instituted. In his discussion of the right to resist an absolute monarch, Hunton observes that an ultimate judge is required between the governed and those governing. Thus, he claims that, while a monarchy may be unlimited as to means, it must still be understood as aiming at the "conservation of the whole Publike."[98] Even under an absolute monarch, therefore, when the conservation of the public is "invaded; the intent of the constitution is overthrowne; and an act is done which can be supposed to be within the compasse of no politicall power."[99] And while Hunton concludes that this justifies some forms of resistance to an absolute monarch, this does not solve the problem. One of the defining features of absolute rule is that when a "plea of reason and equity" is made by the people, the will of the monarch judges the plea.[100] This cannot be escaped because "some power must judge" and the "constitution of absolute Monarchy resolves all judgments into the will of the Monarch."[101]

When Hunton turns from his discussion of absolute monarchy to limited monarchy, the location of the authority to judge between the subjects and the government again comes to the fore. Hunton asks, "Who shall be the Judge of the Excesses of the Soveraigne Lord in Monarchies of this composure?"[102] This question, he claims, exposes the one defect from which absolute monarchy is free that limited monarchy suffers from: "the impossibility of constituting a Judge to determine this last controversie, *vis*. the Soveraigne's transgressing his fundamentall

eventual relevance of Hunton's advocacy for mixed government to government of the then colonies. Ridiculing Hunton, Filmer concluded: "I am somewhat confident that his doctrine of limited and mixed monarchy is an opinion but of yesterday, and of no antiquity, a mere innovation in policy, not so old as New England, though calculated properly for that meridian." Robert Filmer, Patriarcha and Other Writings 134 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

96 Many scholars have connected mixed-government theory to the fully republican separation-of-powers structure of the United States Constitution and recognized the potential utility of applying insights about the earlier government structure to our own. Gibson, *supra* note 63, at 252; Huq, *supra* note 44; Krause, *supra* note 66, at 264.

97 Sanderson notes that there was no impartial, ultimate judge to mediate dispute between Charles I and Parliament. Without such an arbitrator, violence erupted. Sanderson, *supra* note 94, at 450.

98 Hunton, *supra* note 93, at 10.

99 *Id.*

100 *Id.* at 11.

101 *Id.*

102 *Id.* at 16.

limits."[103] Placing the power to judge the monarch in the government destroys the limited nature of the government, and therefore Hunton concludes, "I conceive in a limited legall Monarchy there can be no stated internall Judge of the Monachs actions, if there grow a fundamentall Variance betwixt him and the Community."[104]

Thus, Hunton continues, "it is a transcendent case beyond the provision of the Government, and must have an extraordinary Judge and way of decision."[105] While counseling subjects to peacefully bear with a government which has transcended its limitations in small matters, Hunton concludes that when the matter is "mortall and such as suffered, [it] dissolves the frame and life of the Government and publique liberty."[106] In such a case, if petition does not result in a better resolution, citizens are to judge for themselves according to their own conscience.[107] Such judgments are not legal, but moral: for once the government acts beyond its own limitations it is as if the people had no government.

> People are unbound, and in state as if they had no Government; and the superior Law of Reason and Conscience must be Judge: wherein every one must proceed with the utmost advice and impartiality: For if hee erre in judgement hee either resists Gods Ordinance, or puts his hand to the subversion of the State and Policy he lives in.[108]

Thus, in the case of limited monarchy, when the government must ultimately be judged by the people, it is as though there were no government and citizens are called upon to use their own discretion. But this, as Hunton makes clear, is not a legal or a political judgment: it is a moral power of each individual—the use of one's own reason—and not a provision of the government for such extreme moments. Ultimately, in Hunton's eyes, there is no political or legal means to resolve grave questions of constitutional compliance between governed and governor.

Hunton focuses on how the lack of a judge between a government and its people may drive the people outside of political bounds, and ultimately he concludes that the people have a right to resist under some circumstances. But he seeks to contrive political structures likely to avoid such a breakdown of government. Where Locke delineates the separation of executive and legislative function to solve this problem, Hunton proposes a mixture of the various types of government (monarchy, aristocracy, and democracy). This structure, he argues, will avoid insofar as possible all their weaknesses while capturing insofar as possible their respective strengths.[109] The key feature of the mixed government

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103 *Id.* at 17.
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 17-18.
108 *Id.* at 18.
109 In Hunton's lexicon, in contrast to a "mixture" or a "mixed government," a "simple" government, whether limited or absolute, places authority in "one Person," or "one associate body, chosen either from the Nobility, . . . or out of the Community, without respect of birth or state." *Id.* at 24. According to Hunton, each simple form has a particular weakness and a particular strength. Monarchy is prone to tyranny. *Id.* Aristocracy tends to factions. *Id.* Democracy suffers from "Confusion and Tumult." *Id.* But each of these simple forms of government likewise has "some good which the

is that one estate "must not hold his power from the other, but all equally from the fundamentall Constitution."[110] A mixed government is framed so that estates "might confine each other from exorbitance, which cannot be done by a derivate power."[111] Thus, in a genuinely mixed government each estate holds its power from the fundamental law, and the government is thus limited by its own foundational structure.[112]

In the latter half of his treatise, Hunton illustrates both the moderating effect of mixing government and the necessity that each estate's power be independent of the others in his discussion of the then-current monarchy. He praises the "never enough to be admired wisedome of the Architects and Contrivers of the frame of Government in this Realme" for establishing a system which makes "an excellent provision for the Peoples freedome, by constituting two Estates of men, who are for their condition Subjects, and yet have that interest in the Government, that they can both moderate and redresse the excesses and illegalities of the Royall power."[113] Such a structure, with all its benefits, cannot be achieved without "putting into the hands" of the estates "a power to meddle in the acts of the highest function of Government; a power not depending on his will, but radically their owne, and so suficient to moderate the Soveraignes power."[114]

Hunton warned that this measure brings with it a problem that would look all too familiar to Locke or even—one suspects—to a modern federal judge. As soon as political power is divided, it will become necessary to judge whose judgment controls when the different parts of the government are at odds with one another. As he concedes, Hunton cannot prescribe a fully satisfactory solution to this problem, but he does set forth a solution that looks surprisingly similar to that of the working United States solution. After outlining various methods for minimizing the potential for conflict,[115] Hunton comes to the heart of the matter, admitting the "one inconvenience" that "must necessarily be in all mixed Governments."[116] This "inconvenience" is that "there can be no Constituted, Legall, Authoritative Judge of the fundamentall Controversies arising betwixt the three Estates."[117] The problem, as he most aptly explains, is that insofar as a final judge were to be determined,

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others want": "Unity and Strength in Monarchy; Counsell and Wisdome in Aristocracy; Liberty and respect of Common good in a Democracy." *Id.* Thus, Hunton recommends a mixture of all three "so the good of all might be enjoyed, and the evill of them avoided." *Id.* at 25. Sanderson notes this feature, explaining that Hunton "expects the Estates to act in a mutually restraining way, taking it as their function to preserve the integrity of the regime." Sanderson, *supra* note 94, p. 453.

110 Hunton, *supra* note 93, at 25.

111 *Id.*

112 *Id.* at 27; *see also id.* at 41.

113 *Id.* at 41.

114 *Id.* In the mixed government described in most detail by Hunton, the two powers which are allocated amongst the three estates are the "Legislative" and the "Gubernative." *Id.* The legislative is the superior of these two and has the power "of making new Lawes, if any new be needfull to be added to the foundation: and the Authentick power of interpreting the old." *Id.* Hence, the legislative power must be held jointly by the three estates—people, aristocrats, and monarch.

115 *See id.* at 27–28.

116 *Id.* at 28.

117 *Id.*

the government would cease to be mixed and the final judge would become the absolute ruler.[118]

Despite the seriousness of this problem, Hunton does not shy away from his conclusion that the problem is inevitable: "[O]f this question there is no legall Judge, it is a case beyond the possible provision of such a Government."[119] The only solution—such as it is—is not a governmental one. Rather, Hunton recommends an appeal to the people's consciences and ultimately to the force of arms for the sake of preserving the government understood according to its original frame.[120]

> The Accusing side must make it evident to every mans Conscience. In this case, which is beyond the Government, the Appeal must be the Community, as if there were no Government; and as by Evidence mens Consciences are convinced, they are bound to give their utmost assistance. For the intention of the Frame in such States, justifies the exercise of any power, conducing to the safety of the Universality and Government established.[121]

Hunton further illustrates this point by explaining its application to the government of his own country. He explains that each estate in "case the Fundamental Rights of either of the three Estates bee invaded by one or both the rest, the wronged may lawfully assume force for its own defense."[122] Each estate may thus employ force because "else it were not free but dependent upon the pleasure of the other."[123] Moreover, the "suppression" or "diminishing" of the rights of any estate "carries with it the dissolution of government" and thereby triggers the right and duty to use force in defense of the government.[124] In order to truly exist as a mixed government, each estate must wield the right and carry the potentially burdensome duty of defending its own rights and thereby the very form of the government.

But—and here we return to the question of final authority to decide the contours of the rights of each estate—the unanswerable question remains: who will judge whether the rights of an estate have been violated and whether the right to use force has been triggered? Sometimes the violation of an estate's rights may be blatant—clear for all to see and possibly even without a claim to legality and thus also clearly calling the other estates to moderate the estate that has moved beyond its proper sphere. But, as Hunton frames the question, when a "plea of subversion is more obscure and questionable, which of three Estates hath the power of ultime and

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118 *Id.* at 28–29. *See also* Ostrensky, *supra* note 91, at 163. ("Hunton even denies that any of the three estates can prevail over the others, lest the excess of power of one estate should unbalance the government").

119 Hunton, *supra* note 93, at 29.

120 *See* Ostrensky, *supra* note 91, at 164. ("In that extreme situation, the appeal to the community outside the frame of government seems to Hunton the only solution to the deadlock; only the individual, after a careful examination of his conscience, can decide whom he shall obey and assist").

121 Hunton, *supra* note 93, at 29.

122 *Id.* at 67.

123 *Id.*

124 *Id.*

supreme judicature by Vote or sentence to determine it against the other?"[125] Who, as Hunton further elaborates, has the power to declare "so that the People are bound to rest in that determination, and accordingly to give their assistance, . . . because it is by such a Power so noted and declared?"[126]

This is the question that Hunton will not answer. He believes that even answering this question destroys the mixed—and therefore moderated—government and renders it simple in favor of whichever estate has the right to declare the extents of the rights of each. As he argues, "To demand which Estate may challenge this power of finall determination of Fundamentall controversies arising between them is to demand which of them shall be absolute."[127] If a king resolves the question, the government is a monarchy. And the same follows for the aristocratic and democratic estates, their authority to resolve inter-estate disputes, and the resulting simple—and therefore unmoderated—form of government. Thus the placement of this "finall Judgment" must be withheld if a government is to remain mixed.[128]

Without writing a word on courts or judiciaries in his analysis, Hunton thus explains the great benefit of "murkiness" in separation of powers. Withholding an answer to the question of who shall decide power struggles among the branches is essential to the maintenance of a complex government.

Conclusion

Three observations common to Hunton and Locke bring into focus the function that the judiciary plays in the separation of powers under the United States Constitution. First, Hunton and Locke both insist on the importance of a judge or umpire between individuals in politics. Second, they both praise the division of political power as a means for moderating its possible abuses. Third (and flowing from the first and second similarities), they demonstrate that the inherent problem with dividing political power is that eventually the divided parts will come into conflict with one another and this conflict will not be resolved peaceably or in favor of the moderate use of political power without an authority established to umpire the question. Locke concludes that the people are the ultimate umpire, and he shows how this could result in the collapse of the division of authority. Hunton concludes that no such umpire can be established and declares this to be the great defect of the separated political power for which he advocates.

Taken together, Hunton and Locke thus implicitly explain why political institutions based on a division of power needed an innovation—or, as history would reveal, an institution—such as the judiciary as established in the United States Constitution. Although neither of them identifies any form of judiciary as a solution, both men frame the problem. Of the two, Hunton gives the closer hint to the innovation needed. Somehow, power needs to be divided, and yet the division needs to be both clear enough for workaday implementation and vague enough to prevent a clear or sustained answer to the question of the location of the ultimate arbiter of disputes within the government. In the end, the United States

[125] *Id.* at 68.
[126] *Id.*
[127] *Id.* at 69.
[128] *Id.*

Constitution supplies a potential answer by elevating the judiciary to the role of a coequal power of government, an institution capable of resisting the other two and thus of moderating the government. And the Supreme Court has completed the answer (however unintentionally) through case law that gives life to the perpetual non-answer that Hunton thought necessary. And, lest we forget, Locke's answer—appeal to the people and to heaven—remains a living possibility either through the overriding and longstanding preferences of the people or through civil war.

Hunton and Locke teach us why the use of the separation of powers as a moderating force in government has created the need for judges like those established by the Constitution. They explain why separated powers need a body that can judge among them, and hence they explain the forces keeping the modern judiciary at the center of our polity. But through their caution against placing the powers wielded by the Supreme Court into any government hands, Hunton and Locke warn of the dangers inherent in this structure. Apprehension—if not complete comprehension—of the danger lurking in the placement of this power into any hands can be discerned in the doctrines developed by the Court; powerful as it is, under the case-or-controversy and political-question doctrines, the Court refuses to unambiguously claim a clearly defined role as final arbiter of all constitutional questions. If Hunton is correct, this is one case where the murkiness of the law—however unappealing to those who love to find coherence in the common law—ultimately serves to maintain institutional arrangements necessary to subvert humanity's tyrannical tendencies.