

11-2003

## War and American Constitutional Order

Mark E. Brandon

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Constitutional Law Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

Mark E. Brandon, War and American Constitutional Order, 56 *Vanderbilt Law Review* 1815 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol56/iss6/4>

This Essay is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# War and American Constitutional Order

Mark E. Brandon\*

I.	INTRODUCTION .....	1815
II.	HISTORY OF AMERICAN MILITARY CONFLICT .....	1817
III.	CONSTITUTIONAL IMPLICATIONS .....	1821
	A. <i>National Ethos</i> .....	1824
	B. <i>Rights</i> .....	1829
	C. <i>Operation of Republican Government</i> .....	1839
	D. <i>Allocation of Institutional Authority</i> .....	1842
	E. <i>Sovereignty</i> .....	1856
IV.	CONCLUSION.....	1862

## I. INTRODUCTION

In their introduction to a fine new edition of Alexis de Tocqueville's *Democracy in America*, Harvey C. Mansfield and Delba Winthrop claim that "[i]f the twentieth century has been an American century, it is because the work of America . . . has been to keep democracy strong where it is alive and to promote it where it is weak or nonexistent."<sup>1</sup> By "democracy" they doubtless intend something akin to "constitutional democracy,"<sup>2</sup> "liberal democracy,"<sup>3</sup> or

---

\* Professor of Law, Vanderbilt University Law School. Thanks to Alison Brown for research, to the participants in the Georgetown/PEGS Discussion Group on Constitutional Law and my colleagues at Vanderbilt University Law School, for forums to talk about the essay; and to Rebecca Brown, Robert Covington, Allison Danner, Paul Edelman, James Ely, John Goldberg, Chris Guthrie, Walter Murphy, Richard Nagareda, Suzanna Sherry, Robert Thompson, and Christopher Yoo for helpful comments and conversations.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* xvii (Harvey C. Mansfield & Delba Winthrop eds., 2000).

2. See, e.g., WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 41-53 (2d ed. 1995).

3. See WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 85, 162 (1993).

"republican government."<sup>4</sup> I take each of these to be a rough proxy for a *constitutionalist* system that includes (1) institutions authorized by and accountable to the people (both in the making of the order and in the regular operation of government); (2) some notion of limited government (whether by the designation of purposes for governmental action, the specification of rights, or the allocation of authority among institutions); and (3) rule of law (which connotes the regularization of processes by which public norms are made and applied). Whatever the precise contours of the concept, the claim that the success and strength of the United States derive from a commitment to democracy (or, as I shall use it here, constitutionalism), has an almost intuitive appeal. It is my sense, however, that even a cursory look at the United States' record of diplomatic, military, and covert initiatives—the regimes it has supported, opposed, or toppled, and how and why it has done so—would raise doubts about that commitment.

In this essay, I give voice to those doubts.<sup>5</sup> I first observe that much of the history of American prominence—even pre-eminence—in the world is a story as much of military conflict as of constitutionalism. Second, I argue that the nation's persistent engagement in military conflict is constitutionally significant. By "significant" I have in mind two measures, although I do not attempt to specify them precisely in this essay. One is that the persistent use of force has altered consequentially the norms and institutions that constitute the United States. The other is that, whatever their cause, certain trends of American constitutional development have the potential to do mischief and that this potential is exacerbated by conditions of warfare, especially when those conditions are continual. I identify five general areas of concern—five areas in which these trends or consequences might be worrisome—from the standpoint of constitutionalism: national ethos, rights, the operation of republican government, the allocation of institutional authority, and the concept of sovereignty.<sup>6</sup> I argue that the trends or consequences within these domains are no less worrisome because the Supreme Court of the United States has sometimes given anti-constitutionalist policies the cover of law. Even if we assume that the nation has been consistently

---

4. See THE FEDERALIST NO. 39, at 111 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

5. For the most part, I confine myself here to overt military initiatives and do not take up diplomacy or covert operations.

6. One area I do not discuss is the relationship between armed conflict and federalism. This omission is not because the impact of warfare on the vertical distribution of power is unimportant or inconsequential; it is instead because, in a nation-state that assumes comprehensive authority to maintain and regulate a standing army, incursions on federalism are unavoidable.

justified and effective in its uses of force, an irony follows: In successfully maintaining a constitutional order, the nation may well be weakening its constitutionalist roots.<sup>7</sup>

## II. HISTORY OF AMERICAN MILITARY CONFLICT

The United States is a regime founded on military conflict. This is to say more than that the United States relied on a war of secession to gain independence from Britain. It is to say that the United States has resorted to military force frequently in its history. In research conducted under the auspices of the Congressional Research Service of the Library of Congress, Ellen C. Collier has catalogued "instances in which the United States has used its armed forces abroad in situations of conflict or potential conflict or for other than normal peacetime purposes" between 1798 and 1993.<sup>8</sup> She reports that the United States used its military on 234 occasions.<sup>9</sup> Employing more expansive criteria than Collier, Robert D. Kaplan has recently brought her analysis up to date.<sup>10</sup> He enumerates 86 "U.S. military operations" from 1993 to the present.<sup>11</sup> Controlling for overlapping citations, Collier and Kaplan cite a total of 318 actions involving military forces of the United States from the founding of the nation to the present.<sup>12</sup>

For understanding the relation between military actions and constitutional authority, Collier's list is underinclusive, and Collier's and Kaplan's lists together are overinclusive. Collier's is underinclusive for three reasons. First, it commences at 1798, which excludes the American Revolution.<sup>13</sup> My sense is that we should include the war for independence. It was fought by a working political system that had recently declared itself independent; and the period of the Revolution was a critical juncture in the emergence of constitutionalist norms and institutions.<sup>14</sup> Second, Collier confines

---

7. In this essay, I draw periodically on present events. I do so not to denigrate contemporary actors, but to show how events or actors are consistent with larger or more enduring patterns.

8. Ellen C. Collier, *Instances of Use of United States Forces Abroad, 1798-1993*, Congressional Research Service (Oct. 7, 1993), <http://www.history.navy.mil/wars/foabroad.htm>.

9. *Id.* An extended war, military action, or campaign counts as a single "instance" in Collier's usage. *Id.*

10. Robert D. Kaplan, *Supremacy by Stealth: Ten Rules for Managing the World*, ATLANTIC MONTHLY, July-Aug. 2003, at 65, 75, 77, 79, 81.

11. *Id.*

12. See Collier, *supra* note 8; Kaplan, *supra* note 10, at 75, 77, 79, 81.

13. Collier, *supra* note 8.

14. Some might argue that "nationhood" did not commence until the last decade of the eighteenth century, when the Constitution was ratified. There is a sense in which even this date

her list to military actions conducted abroad.<sup>15</sup> This criterion, too, excludes the Revolution. It excludes also the Civil War and most of the military campaigns against the native tribes (carried out from the earliest years of the colonial period through the end of the nineteenth century). I suspect that Collier omits these last two because she supposes they were prosecuted "within" the United States. There are good reasons for challenging this supposition,<sup>16</sup> but I shall not press them here. Instead, I claim only that—inside or outside—they were significant military actions and have a bearing on the problem of maintaining constitutionalist government. My own list, therefore, includes the Revolution, the Civil War, and several campaigns against native tribes. There is a third way in which Collier's list is underinclusive: It excludes covert military, quasi-military, and proxy involvement in fighting civil wars or overthrowing rulers in other countries.<sup>17</sup> Because these activities are difficult to identify, classify, and track, I too omit them.

Collier's and Kaplan's lists are overinclusive because they include all uses of military personnel on foreign soil in situations of potential conflict. Kaplan's list, in fact, includes situations in which the risk of conflict is remote.<sup>18</sup> These criteria are too broad, for they comprehend a number of engagements that were, for my purposes, insignificant or inchoate.

I propose instead a list that includes only three types of military action: declared wars; actions that, though undeclared, are reasonably classifiable as wars; and significant military actions short of war.<sup>19</sup> With respect to the third group, "significance" is a function of

---

is too early, as the establishment of the American nation was a process that spanned more than a century. I conclude, nonetheless, that we may mark the beginning of the United States with the creation of rudimentary institutions of interstate cooperation and governance in the period of the Revolution.

15. Collier, *supra* note 8.

16. For example, from the standpoint of the secessionists, the Civil War was fought almost exclusively outside the United States. From the standpoint of the tribes, too, their conflicts with the United States were predominately outside the U.S., both because the tribes frequently claimed the locus of conflict as their own (though some may have been ceded by ostensible treaties) and because, in any event, the lands were usually not yet incorporated formally into the United States. Collier includes in her list only one campaign against native tribes—the First Seminole War—perhaps because that conflict also involved campaigns against the Spanish in Florida. *Id.*

17. *Id.*

18. See Kaplan, *supra* note 11, at 75, 77, 79, 81. Note, for example, the following operations carried out during the first two years covered by Kaplan's survey: Provide Hope III (1993), Balikpapan (1993), Iris Gold (1993-present), Provide Hope IV (1994), Distant Runner (1994), Sea Signal (1994-1996), Quiet Resolve/Support Hope (1994), Safe Haven/Safe Passage (1994-1995). *Id.*

19. My list of military conflicts is attached as an appendix.

one or more of the following factors: duration of engagement; level of commitment of troops and/or other resources; form of engagement; and strategic or historical importance of the conflict or location. In the first group—declared wars—I include the Revolution, the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II.<sup>20</sup> In the second group—undeclared wars—I include the Naval War with France, the First Barbary War, the Second Barbary War, the Civil War, the Korean War, the Vietnam War, the Persian Gulf War, the Balkan intervention, the war in Afghanistan (and beyond), and the war in Iraq.<sup>21</sup> All the rest—including campaigns against native tribes and various invasions of Latin America—fall into the third group.

Although my list of conflicts includes the Revolution, the Civil War, and a few campaigns against native tribes, it is a more conservative estimate than either Collier's or Kaplan's. As indicated above, I exclude military actions that are insufficiently significant for coverage here. For example, I have omitted dozens of limited actions that aimed to protect American consulates, trade, insubstantial interests, or small numbers of American citizens abroad.<sup>22</sup> Similarly, I have excluded scores of actions that were essentially isolated retaliations—by bombardment, looting, burning, killing, or simply “show of force”—against foreigners abroad for insulting, assaulting, or killing Americans.<sup>23</sup>

I observe that from the Revolution to the present, armed forces of the United States have participated in 84 distinct, significant engagements.<sup>24</sup> Of these, 6 were declared wars, 10 were undeclared wars, and the rest were significant actions (including campaigns against Indians). In aggregate, these wars and actions have occurred

20. This description follows Collier in all respects, except that mine includes the Revolution. Collier, *supra* note 8.

21. This group follows Collier's lead, except that it includes the Civil War and extends beyond 1993 (and thus includes the invasion of Afghanistan and Iraq). *Id.*

22. Note the following operations, just to cite a few examples: destruction of Nicholls Fort in Spanish Florida (1816), invasion of Amelia Island (1817), operations in the Falkland Islands (1831-1832), incursion in Argentina (1833), incursions in Peru (1835-36), incursion in China (1843), demonstration and landing in Africa (1843), naval operation in Smyrna (1849), incursions in Argentina (1852-1853), incursions in Nicaragua (1853), landings in China (1854), Operation Distant Runner (Rwanda, 1994). *Id.*; Kaplan, *supra* note 10, at 75, 77, 79, 81.

23. A few examples, from the nineteenth century, would include actions in the following locations: Sumatra (1832), Sumatra (1838-1839), Fiji Islands (1840), Drummond Island (1841), Samoa (1841), Turkey (1851), Johannis Island (1851). Collier, *supra* note 8. One exception to these exclusions is the American bombardment and burning of Greytown, Nicaragua, to punish local officials for having offended an American diplomat in 1854. I include that event because it became a model for this sort of military action in later years.

24. Despite my adding the Revolution, the Civil War, and 13 military engagements with Indians, my list is but 26% of Collier's and Kaplan's combined 318 instances.

in 182 of the 228 years covered by my analysis (80 percent of the life of the nation). In the last quarter of the 18<sup>th</sup> century, there were 12 years in which the United States *did not* use its military according to my classification (or 48 percent of that period); in the 19<sup>th</sup> century, there were 28 such years (28 percent); in the 20<sup>th</sup> century, there were but 6 such years (6 percent); and so far in the 21<sup>st</sup> century, there have been no such years. In connection with these figures, the 20<sup>th</sup> century is notable for two reasons. First, despite the frequency of military conflict in that century, only two conflicts were formally declared as wars: the two “world wars.”<sup>25</sup> Second is the unbroken sequence of significant military engagements since the end of World War II.<sup>26</sup>

What follows, as an empirical matter, is this: The United States has been at war or engaged in significant military action for most of its corporate life. The rate of engagement has increased dramatically from the eighteenth through the twenty-first centuries. In fact, the country’s military has been actively engaged every year since 1941. This engagement has continued despite the demise of Soviet Communism. The persistence of engagement shows no sign of abating.<sup>27</sup> Simply, military action has been such a substantial part of the history of the nation that it is not unfair to characterize the United States as a warrior state.

I should be clear about my meaning here. The warrior state is not necessarily a martial state. Hence, it need not connote a regime that glorifies war or the military, nor one in which the military controls the administration of state, nor one that comprehensively organizes and regulates society for predominantly militarist purposes, akin to Sparta in ancient Peloponnesus. In fact, it is one of the distinctive aspects of the American experience that the nation’s military actions have tended neither to arise from nor to provoke a crisis; that is, the nation has typically used military force under conditions in which (1) the survival of the order is not at risk and (2) the order can simultaneously fight and maintain a domestic life that appears to be “normal.”<sup>28</sup> In using the term, therefore, I have in mind

---

25. It is tempting to note, in connection with this observation, that both declared wars were waged in Europe. The fact, however, that in World War II the United States declared war first against Japan and later against the European members of the Axis, complicates this observation.

26. A third twentieth-century tendency may follow from the first two: the steady accumulation of military prerogative in the office of the President. I shall address this tendency below.

27. As George W. Bush has noted, the present war against terrorism is not susceptible to geographic or temporal limitation. George W. Bush, Remarks to Nation During a Press Conference (Oct. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011011-7.html>.

28. Possible exceptions to one or both of these observations are the Revolutionary War, the Civil War, World War I, World War II, and the Vietnam War.

merely a regime for which the use of military force is a regular aspect of the nation's life.

In labeling the United States as a warrior state, we need not question in each instance the validity of the nation's motives or reasons for action. Thus, we need not judge whether each of its military actions has been defensive or offensive, justified or unjust. Perhaps the world is more dangerous today (for the most powerful nation in the history of the planet) than it was two-and-a-quarter centuries ago (for a fledgling nation barely able to defend its borders). Perhaps, more simply, the assumption of political realists is right: Military might remains the path to influence in the world or, more charitably, to maintaining conditions of relative freedom at home and abroad.<sup>29</sup> Perhaps, for a significant number of actions, imperialist ambition has been the primary motive for resorting to armed force.<sup>30</sup> Perhaps individual presidents and their administrations have perceived an institutional advantage in prosecuting actions, and the accumulation of policies of many administrations has gradually become the policy of the regime. There might be other explanations. My aim, however, is not to explain causes of this sort. It is instead to reflect on the possible constitutional implications of a warrior state, no matter how well intended it might be.

### III. CONSTITUTIONAL IMPLICATIONS

Neither war nor the military that wages it is inherently anti-constitutionalist. Alexander Hamilton, for example, offered a military justification for ratifying the proposed Constitution of the United States. He bemoaned "[t]he imbecility of our government" under the Articles of Confederation.<sup>31</sup> "We may indeed . . . have reached almost the last stage of national humiliation."<sup>32</sup> Among the insufficiencies of

---

29. With respect to the latter motive see George W. Bush, State of the Union Address (Jan. 28, 2003), (saying "Once again, we are called to defend the safety of our people, and the hopes of all mankind."), <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>. With respect to the former, Thucydides put it this way: "the strong do what they can and the weak suffer what they must." THUCYDIDES, *THE COMPLETE WRITINGS OF THUCYDIDES* 331 (Richard Crawley trans., 1951).

30. See generally WALTER LAFEVER, *THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898* (1963); ERNEST R. MAY, *IMPERIAL DEMOCRACY: THE EMERGENCE OF AMERICA AS A GREAT POWER* (1961); JAMES C. THOMSON, JR. ET AL., *SENTIMENTAL IMPERIALISTS: THE AMERICAN EXPERIENCE IN EAST ASIA* (1981). For useful comparisons, focusing on the avowedly imperialist ambition of Britain, see generally BYRONE FARWELL, *QUEEN VICTORIA'S LITTLE WARS* (1972); NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002).

31. THE FEDERALIST NO. 15, at 30 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

32. *Id.* at 29.



the Confederacy, he said, was its inability to perform "engagements," to enforce agreements transferring territory to the United States, to "repel aggression," to secure navigation of the Mississippi River, to sustain "respectability in the eyes of foreign powers," or to "safeguard against foreign encroachments."<sup>33</sup> Hamilton obsessed that the country was facing "impending anarchy."<sup>34</sup> He offered three reasons for this state of affairs: (1) a "want of concert" in commerce, war, and foreign affairs, (2) the absence of "vigorous," "economical," and equitable means to raise armies, and (3) the lack of a national judicial power, focused in "one SUPREME TRIBUNAL" with the power to enforce the nation's treaties as "the law of the land."<sup>35</sup> The solution, he argued, was simple. The national government must be provided the power to promote "the common defence of the members; the preservation of the public peace . . . ; the regulation of commerce with other nations . . . ; [and] the superintendence of intercourse, political and commercial, with foreign countries."<sup>36</sup> Defense was the lynchpin of all of these functions. In fact, he insisted, the power of defense was illimitable: "[N]o constitutional shackles can wisely be imposed on the power to which the care of it is committed."<sup>37</sup> Hence war, or the power to wage it, was a comprehensive, "unconfined authority" on which the success and survival of the extended commercial republic depended.<sup>38</sup>

But, as even Hamilton sometimes conceded, strength alone was an insufficient justification for the Constitution. Put differently, if war (or the military) can create or conserve conditions for making or maintaining constitutional politics, it cannot establish constitutional authority.<sup>39</sup> The reason rests in the distinction between power and authority. Hamilton comprehended something of this distinction when he posited that the proposed Constitution was an "experiment" in whether it was possible to "establish[ ] good government from reflection and choice," instead of relying on "accident

---

33. *Id.* at 29-30.

34. *Id.* at 29.

35. THE FEDERALIST NO. 22, at 51, 55-56 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

36. THE FEDERALIST NO. 23, at 58-59 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

37. *Id.*

38. *Id.* at 60-61. The physical safety of the order to one side, wars and military engagements might have beneficial consequences, some of which are constitutionally significant: social solidarity, incentives to expand civil rights or the fruits of membership in the order, technological development, and economic energy. Chris Guthrie has pointed out in conversation that war might also invigorate the political process—by inciting public discussion of issues of state and of values—that can be healthy (when not suppressed).

39. MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 206-07 (1998).

and force.”<sup>40</sup> In a constitutionalist order, then, the exercise of power must be authorized and justified. Power alone cannot justify itself.<sup>41</sup> Power must also be constrained, for it is not the tendency of power to limit itself.

Clinton Rossiter pushed the point further. “[T]he complex system of government of the democratic, constitutional state,” he wrote, “is essentially designed to function under normal, peaceful conditions. . . . ‘Democracy is a child of peace and cannot live apart from its mother[.]’ . . . ‘War is a contradiction of all that democracy implies. War is not and cannot be democratic.’”<sup>42</sup> Rossiter had in mind wars of crisis, like World War II or the Civil War. Such wars are certainly relevant to the concerns of this essay. But it is part of my thesis that lesser, garden-variety wars or military actions, too, can generate strains, sometimes imperceptible, within a constitutionalist government.

There is, therefore, an ineluctable and dangerous tension between military force and constitutional government. This tension makes for a vexing dilemma. How does one configure institutions so as to render them simultaneously safe and effective as repositories of power? In the case of the military, the difficulty is intensified because the implements of force it employs can be titanic. Moreover, because one of the military’s reasons for being is the physical survival of the order, the stakes of military action (or inaction) can sometimes be high. Thus, although raising and deploying armed forces may be indispensable for sustaining a secure environment for constitutionalist politics, creating a safe place and constructing safe roles for military institutions are among the most troublesome challenges of a constitutionalist order.

---

40. THE FEDERALIST No. 1, at 1 (Alexander Hamilton) (Roy P. Fairfield, ed., 2d ed. 1981); see also BRANDON, *supra* note 39, at 206-07.

41. In this respect, among others, I deviate from both Thomas Hobbes and Carl Schmitt. See THOMAS HOBBS, LEVIATHAN 183-88, 231, 233-34, 246, 266, 272 (C.B. Macpherson ed., Penguin Books 1968) (n.d.) (positing that authority—whether legal, moral, or political—derives from power and that he is sovereign who possesses that power); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5-6, 13 (George Schwab trans., MIT Press 1985) (1922) (positing a self-justifying state). Both Hobbes’s and Schmitt’s positions derive from an assumption—implicit in Hobbes, explicit in Schmitt—that sovereignty resides in the state. For reasons I shall return to below, this assumption is erroneous from the standpoint of constitutionalism. See *infra* Section III.E.

42. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (1948) (quoting WILLIAM E. RAPPARD, THE CRISIS OF DEMOCRACY (1938) and Wiley Rutledge, *Foreword: A Symposium on Constitutional Rights in Wartime*, 29 IOWA L. REV. 379 (1944)). I shall consider below Rossiter’s solution to the problem of converting constitutional government into a government of war.

Abraham Lincoln framed the tension profoundly: "Is there, in all republics, this inherent, and fatal weakness? Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"<sup>43</sup> The context that incited Lincoln's questions was a crisis—in his view a singular, hopefully temporary juncture in the history of the United States. For a regime that is more or less permanently at war, however, the constitutional difficulties may be more subtle and pernicious than Lincoln imagined. In short, continual military engagement can pose additional dangers for a constitutional order because it can generate conditions that are uncongenial to constitutionalism. In this essay, I consider five areas in which such conditions might hold—national ethos, rights, republican government, the allocation of institutional authority, and sovereignty—and I suggest why a constitutionalist might worry that the conditions are present in the American order.

### A. National Ethos

Doubtless, the warrior state is inconsistent with the self-image of most Americans and with the standard proclamations of most of their public officials. Even in time of war, most politicians insist that the history, purpose, and ethos of the nation are peaceful.<sup>44</sup> It is not mysterious that Americans would want to see themselves as peaceful. For one thing, the normative precepts of constitutionalism presuppose a degree of peace—sufficient to sustain reflection and choice—in the regular affairs of the order. If Americans aim to be constitutionalist, therefore, it makes sense that they would see their motives as peaceful. Still, how might one reconcile their aspiration with the nation's discrepant behavior?

---

43. Abraham Lincoln, *Message to Congress in Special Session July 4, 1861*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 426 (Roy P. Basler ed., 1953).

44. Mr. Bush's statements after the attack of September 11 are exemplary: "This nation is peaceful, but fierce when stirred to anger." George W. Bush, President's Remarks at National Day of Prayer and Remembrance (Sept. 14, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html> [hereinafter Bush, National Day]. To similar effect are his comments anticipating a possible invasion of Iraq: "This nation fights reluctantly, because we know the cost and we dread the days of mourning that always come. We seek peace. We strive for peace. . . . [But] if war is forced upon us, we will fight with the full force and might of the United States military—and we will prevail." Bush, *supra* note 29; see also George W. Bush, Remarks at Naval Station Mayport, Jacksonville, Florida (Feb. 13, 2003) (stating that the administration's aim in invading Iraq would be "to keep the peace"), <http://www.whitehouse.gov/news/releases/2003/02/20030213-3.html>.

One way to do so is to construct the world in terms of “us” and “them” or, somewhat differently, in terms of “friend” and “enemy.”<sup>45</sup> In practice, there are many ways of dividing the world on these terms—national, ideological, economic, religious, racial, and others. Often the conflict is viewed as implicating competing ways of life. But whatever the content of a particular classification, it can be useful, not simply as a description of the world or of competing aspirations, but also because it protects against the disabling or disorienting effects of psychic dissonance. If we have acted in warlike ways, “others” have been responsible. Those others have been—are—dangerous. They have provoked us. They have threatened us. Or worst, they have physically attacked us. If we respond militarily, our behavior is not inconsistent with, but actually attempts to preserve the ethos of peace that genuinely defines us.<sup>46</sup>

The psychic incentives for this logic have contributed also to a kind of moralism in American foreign policy. This disposition is not confined to the kind of morality represented by the internationalist diplomatic agendas of Presidents Wilson and Carter. Hence, it is not coextensive with what Robert Osgood characterizes as a pure form of “idealism” (whose psychological antonym is “egoism”).<sup>47</sup> The moralist disposition I have in mind extends to a more primal (and conflictual)

---

45. Carl Schmitt posited that the friend-enemy distinction was the central, essential characteristic of politics (and therefore of the state), arising from an inherent psychological need. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 25-37, 45-53 (George Schwab trans., 1976). My claim is weaker: Even if the friend-enemy distinction is not inherent in politics, statehood, or the psychology of individuals, it is nonetheless pervasive and potent. Against one American trend, Schmitt refrains from moralizing the distinction: “The political enemy need not be morally evil or aesthetically ugly . . . . But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.” *Id.* at 27.

46. Hence, Mr. Bush announced the invasion of Afghanistan from the Treaty Room, a place from which “American Presidents have worked for peace. We’re a peaceful nation. . . . Yet, . . . [i]n the face of today’s new threat, the only way to pursue peace is to pursue those who threaten it.” George W. Bush, Address to the Nation (Oct. 7, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>. Again, preparing to invade Iraq, Mr. Bush remarked, “[s]ometimes peace must be defended. A future lived at the mercy of terrible threats is no peace at all. If war is forced upon us, we will fight in a just cause and by just means—sparing, in every way we can, the innocent.” Bush, *supra* note 29.

47. “An ideal is a standard of conduct of a state of affairs worthy of achievement by virtue of its universal moral value. The motive of national idealism is the disposition to concern oneself with moral values that transcend the nation’s selfish interests; it springs from selflessness and love.” ROBERT ENDICOTT OSGOOD, *IDEALS AND SELF-INTEREST IN AMERICA’S FOREIGN RELATIONS: THE GREAT TRANSFORMATION OF THE TWENTIETH CENTURY* 4 (1953). “National egoism,” on the other hand, understands “national self-interest” in terms of “a state of affairs valued solely for its benefit to the nation. The motive of national egoism . . . is marked by the disposition to concern oneself solely with the welfare of one’s own nation; it is self-love transferred to the national group.” *Id.*

moralism whose constituent elements are good and evil.<sup>48</sup> In the American context, this form of moralism surely has cultural roots in Puritanism, which posited the existence of a covenantal relationship between political community and God.<sup>49</sup> For American Puritans, evil was in them—in all of us—as fallen creatures.<sup>50</sup> Their struggle, simultaneously humble and arrogant, was to make themselves worthy of the beneficence that the Maker of the Universe had generously bestowed on them, if not on others.<sup>51</sup>

By the second half of the twentieth century, of course, Americans were not saddled with such doubt about their worthiness. We can see the lightened load in Jimmy Carter's repeated invocations of the goodness and decency of the American people. It is not that the concept of evil was unimportant to Mr. Carter, certainly not for the individual who might be tempted to sin; but most of President Carter's public moralism focused on the aspiration to goodness, without attempting to balance with references to evil.<sup>52</sup> In the context of foreign policy, then, Mr. Carter could unashamedly pronounce: "It is a new world that calls for a new American foreign policy—a policy based on constant decency in its values and on optimism in our historical vision."<sup>53</sup> Part of President Reagan's rhetorical talent was his ability to restore allusions to evil without calling into question the basic goodness of America. Hence, he could insist that the United States had realized the Puritan aspiration to "a shining city on a hill" and could depict the Soviet Union as an "evil empire."<sup>54</sup>

---

48. This form of moralism is "conflictual" in at least two senses, both of which I shall discuss briefly below. First, it plays a role in the resolution of a psychic conflict that adopts one strategy for friends, another for enemies. Second, it tends to justify conflict with enemies.

49. See, e.g., EDMUND S. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP* 69-70 (1958).

50. See *id.* at 18-19.

51. See *id.* at 69-83. This habit of mind is not confined to Christianity. Some such orientation is one reason the conflict between Israelis and Palestinians—each side claiming an exclusive divine entitlement to the same territory—has been so explosive and enduring. Consider also the conflict between some Hindus and Muslims in the multi-faith secular state of India.

52. For an early example of Mr. Carter's general moral orientation, see JIMMY CARTER, *WHY NOT THE BEST?* 9-11, 154 (1975). For his approach to foreign affairs while in office, see JIMMY CARTER, *KEEPING FAITH: MEMOIRS OF A PRESIDENT* 141-51 (1982) [hereinafter CARTER, MEMOIRS].

53. CARTER, MEMOIRS, *supra* note 52, at 141 (quoting Jimmy Carter, Address on Foreign Affairs (May 22, 1977)).

54. The first occasion for invoking the phrase "evil empire" was a speech to the National Association of Evangelicals on March 8, 1983. RONALD REAGAN, *AN AMERICAN LIFE* 568-71 (1990); see also ANDREW E. BUSCH, *RONALD REAGAN AND THE POLITICS OF FREEDOM* 196-97 (2001). President Reagan's depiction of the enemy as evil revived a trope that had been conspicuous earlier in the twentieth century. Recall, for example, references to the Kaiser and to the Japanese as evil, diabolical, or unstable. On the Japanese, see PAUL L. MURPHY, *THE*

George W. Bush has retained the simple structure of Mr. Reagan's moral rhetoric but adapted it to contemporary events. Gone are references to evil empire. (The Soviet Union is no more, and "empire" no longer carries quite the negative connotation it once did.) Now the goodness of America can go without saying; Mr. Bush need only invoke "our way of life."<sup>55</sup> The notion of evil, however, persists and now serves several rhetorical functions. Mr. Bush speaks of "evil acts," perpetrated by "evil-doers" or "evil folks," who "lurk out there."<sup>56</sup> They are abetted, moreover, by nation states that, by design or happenstance, form an "axis of evil."<sup>57</sup> The American burden, therefore, is to "defend freedom and all that is good and just in our world"<sup>58</sup> by "rid[ding] the world of evil."<sup>59</sup> This is an ambitious undertaking; but in pursuing it, the nation can ensure the blessing of God and preserve the American covenant.<sup>60</sup> Even the Lord, after all, wields a "terrible swift sword."<sup>61</sup>

The restoration of allusions to evil is politically potent because it reflects a particular psychological form: the patriotic personality. Osgood describes the form in this way:

A citizen's dependence upon his nation assumes a distinct intimacy because he confers upon the object of his allegiance the attributes of a person so closely identified with his own personality that he virtually acquires a second self, in whose behalf he can feel

---

CONSTITUTION IN CRISIS TIMES, 1918-1969, at 233 (Harper & Row, 1972); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT Formed the Movement 63, 67-68 (1995). For an example of popular depictions of the Kaiser, see JOHN A. GARRATY, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES* 778 (2d ed. 1970). See also OSGOOD, *supra* note 47, at 83, 169. In significant respects, this trope was dormant in Carter's administration. For a comparison of Mr. Reagan's rhetorical imagery with Puritan jeremiads, see PAUL D. ERICKSON, *REAGAN SPEAKS: THE MAKING OF AN AMERICAN MYTH* 72-93 (1985).

55. See George W. Bush, Address to the Nation (Sept. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> [hereinafter Bush, Nation]; George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> [hereinafter Bush, Joint Session].

56. Bush, Nation, *supra* note 55; George W. Bush, Remarks by the President (Sept. 16, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html>.

57. George W. Bush, State of the Union Address (Jan. 29, 2002), <http://www.whitehouse.gov/new/releases/2002/01/20020129-11.html>.

58. Bush, Nation, *supra* note 55.

59. Bush, National Day, *supra* note 44.

60. "Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. . . . In all that lies before us, may God grant us wisdom, and may He watch over the United States of America." Bush, Joint Session, *supra* note 55. "Beyond all differences of race or creed, we are one country, mourning together and facing danger together. . . . And many have discovered again that even in tragedy—especially in tragedy—God is near." Bush, *supra* note 57. Note also the numerous and various invocations of the phrase "God bless America." See, e.g., Bush, Nation, *supra* note 55; Bush, National Day, *supra* note 44.

61. *Battle Hymn of the Republic*, <http://www.law.ou.edu/hist/bathymn.html> (last visited Aug. 30, 2003).

friendly, hostile, generous, selfish, confident, afraid, proud, or humiliated almost as poignantly as he would feel these emotions for himself in his relations with other individuals. However, the conscience of this vicarious personality, unlike the private conscience, is relieved by the sanction of patriotism, so that a citizen can manage with a sense of complete moral consistency to combine lofty altruism toward his own nation with extreme egoism toward other nations and thereby actively support a standard of ethics in foreign relations which he would not dream of tolerating in his private dealings.<sup>62</sup>

In short, the patriotic personality conjoins the two elements of Osgood's antinomy—idealism and egoism—without fully integrating them. The friend-enemy distinction reinforces and stabilizes the segregated elements of this personality.

The bifurcation of political personality is useful. It promotes the cohesion and attachment necessary for sustaining a voluntary political order committed to resolving conflict through reflection and choice. At the same time, it can both justify an aggressive posture toward others and diffuse the psychic dissonance of this posture (as against the image of peacefulness) by rationalizing aggression as self-defense. What, then, makes the personality and the ethos that reflects it problematic from a constitutionalist standpoint? We need not pause over the concern that the rationalization is hypocritical. If the friend-enemy distinction is not universal, hypocrisy is. Nor is there danger that the patriotic personality is irrational. On the contrary, it is almost perfectly rational, even as it is segregated.

In fact, it is the very perfection of this segregated rationality that poses danger, for it may create a too perfect enclosure,<sup>63</sup> converting attachment to *patria* into an article of faith and rendering the peaceful self-image essentially non-falsifiable. This combination can effectively incapacitate the citizenry from judging possible deviations from the image of peacefulness. Those citizens who presume to judge will risk being labeled "the enemy," or at least complicit with the enemy.<sup>64</sup> What follows is that, even if the peaceful

---

62. OSGOOD, *supra* note 47, at 11.

63. For a potent description of a similar enclosure, see MARTIN HEIDEGGER, *PARMENIDES* 88-91 (André Schuwer & Richard Rojcewicz trans., 1992) (conceding "the frightfulness, the horribleness, the atrociousness" of the people gathered as a polis—"neither city nor state but . . . the abode of the essence of this humanity").

64. In the present administration, the Attorney General of the United States has sometimes flirted with such characterizations. In testimony before a congressional committee, for example, he asserted that critics of certain of the administration's policies in the war on terror "give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil." *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (2001) (testimony of Attorney General John Ashcroft); see also John Ashcroft, Remarks to the International Association of Chiefs of Police Conference (Oct. 7, 2002) ("Our critics want to roll back the enhancements we deployed during the last year. . . . But history instructs us that

self-image be a desirable aspiration and even if it be an accurate description of some (or most) events, the image will cease to be useful for constitutionalist purposes, because it will lose the capacity to constrain or direct action. In short, it will justify almost any behavior, and no one will be the wiser.<sup>65</sup> Ironically, therefore, although a form of nationalism can be useful for creating and maintaining constitutionalist institutions, a comprehensively nationalist ethos can weaken the constitutionalist character of those institutions.

### B. Rights

Conventional wisdom posits that, in time of war, rights tend to give way to power. Rossiter, for example, argues that any state, even a constitutional state, will resist its own physical destruction and will do so by any means at its disposal, even anti-constitutionalist means.<sup>66</sup> Hence, in time of war, “[c]ivil liberties, free enterprise, constitutionalism, [and] government by debate and compromise” give way to needs of state.<sup>67</sup> So framed, this is an empirical claim. I shall argue that it is overstated. Still, there is enough evidence supporting it that the status of rights—whether civil liberties, personal liberties, or rights to property or of enterprise—in a nation at war might be worrisome from the standpoint of constitutionalism. This worry aside for now, one question is this: To the extent that the empirical claim is accurate, what might justify it?

---

reticence and complacency are not defenses of freedom; they are a capitulation before freedom's enemies.”), <http://www.usdoj.gov/ag/speeches/2002/100702chiefsofpolicemn1.htm>. The Secretary and Defense and the Chairman of the Joint Chiefs of Staff have also weighed in. See *Top Ranked Officer Denounces Internal Dissent on Iraq*, N.Y. TIMES, April 2, 2003, at A1 (“Defense Secretary Donald H. Rumsfeld and Gen. Richard B. Myers, the nation’s highest-ranking military officer, denounced critics of the campaign in Iraq today, declaring that complaints about the handling of the war were misinformed, inaccurate and harmful to American forces in combat. . . . General Myers also reprimanded members of the news media for analyzing, criticizing and reporting anonymous dissent on a secret war plan they had never seen . . .”), <http://www.nytimes.com/2003/04/02/international/worldspecial/02CAPI.html>.

65. For a fictional account of the phenomenology of the patriotic personality in a state of continual war, see GEORGE ORWELL, 1984, at 33-34 (1977) (“Winston could not definitely remember a time when his country had not been at war, but it was evident that there had been a fairly long interval of peace during his childhood. . . . Since about that time, war had been literally continuous, though strictly speaking it had not always been the same war.”).

66. ROSSITER, *supra* note 42, at 5, 11-12.

67. *Id.* at 5. See generally RALPH BROWN, *LOYALTY AND SECURITY* (1958); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Margaret A. Garvin, *Civil Liberties During War*, 16 CONST. COMMENT. 691 (1999); James W. Ely, Jr., *Property Rights and the Supreme Court in World War II*, 1 J. SUP. CT. HIST. 19 (1996); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968); Carl Brent Swisher, *Civil Liberties in War Time*, 55 POL. SCI. Q. 321 (1940).



From within American constitutional discourse, there are two prominent ways of approaching the question. The first is to invoke the ancient precept—*Inter arma silent leges*<sup>68</sup>—as principle's pragmatic concession to necessity. This is certainly the approach of Thomas Jefferson's letter to J.B. Colvin: "A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."<sup>69</sup> Some version of the precept seems to lie behind Abraham Lincoln's suspension of provisions of the Constitution during the Civil War.<sup>70</sup> The precept also underwrites the Supreme Court's ratification of Lincoln's seizure of commercial ships despite the absence of a declaration of war<sup>71</sup> and the Court's strained strategy of institutional self-preservation in *Texas v. White*.<sup>72</sup> And *silent leges* lurks beneath Justice Jackson's dissent in *Korematsu v. United States*: "I would not lead people to rely on this Court for a review that seems to me wholly delusive. . . . If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint."<sup>73</sup>

At first glance, the precept of *silent leges* seems an extreme solution to a constitutional problem, especially when we consider how

---

68. "In time of war the laws are silent." BLACK'S LAW DICTIONARY 811 (6th ed. 1990).

69. Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in xii THE WRITINGS OF THOMAS JEFFERSON, at 418 (Andrew A. Lipscomb ed., 1903).

70. See Abraham Lincoln, *supra* note 43, at 426-37. Lincoln famously posed the question in this way: "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" *Id.* at 360.

71. The Prize Cases, 67 U.S. (2 Black) 635 (1863).

72. 74 U.S. (7 Wall.) 700 (1869). *White* was an original action brought by the provisional Reconstruction government of Texas to recover certain U.S. bonds (face value of \$5 million) that the Confederate State of Texas had conveyed to two entrepreneurs who had undertaken to deliver supplies to Confederate troops in the waning days of the Civil War. *Id.* at 717-18. At the time of the action, Texas was under military occupation, had an unelected government that was under the direction of the military and Congressional Radicals, and enjoyed no representation in Congress. *Id.* at 719. Was Texas a "state," for the purpose of establishing original jurisdiction? The Supreme Court had two options. One was to hold that Texas was *not* a state, which would mean that Texas could not establish a basis for original jurisdiction, which in turn would mean the Court was without authority to order the return of the bonds. For the Court, this option was safe in one respect, for it rested on the principle on which the Radicals justified Reconstruction, but it was dangerous because the Radicals wanted their Governor in Texas to get the bonds. The other option was to hold that Texas *was* a state, which would mean that the Court possessed authority to order the return of the bonds. This option was safe in that it would award the Radicals' government the bonds, but it was dangerous because it had to rest on a principle that challenged the foundation for Radical Reconstruction. As a matter of logic, the Court could not pursue both options, but institutional self-preservation suggested another course. The Court affirmed the policy of Radical Reconstruction and awarded the bonds to Texas. *Id.* at 729-32, 736.

73. 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

frequently the United States finds itself at war. Perhaps, for example, it presumes too quickly that war generically threatens the survival of the order. Some wars might—the Revolution, Civil War, and World War II, maybe—but most seem not to do so. Perhaps, too, the precept underestimates the capacity of judges to distinguish and stand against unnecessary restrictions on liberty in times of military mobilization. Does not the precept, moreover, make judges complicitous in extra-constitutional actions, requiring them to look the other way (or give legal cover) when political or military actors claim necessity?

If these be vices, the precept might nonetheless have its virtues. For one, it concedes without dissembling the brutish hold that survival has on even a constitutionalist order. For another, it sensibly acknowledges that judges are not competent to domesticate all problems, that even law properly has its limits. And it might keep off the books a principle of decision that “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>74</sup> These virtues aside, there might be ways to tame the precept while conceding its dangerousness. Following Rossiter’s lead,<sup>75</sup> perhaps we could construct conditions for the safe use of the precept. For example: (1) The suspension of ordinary norms and processes would be permissible only in conditions of genuine crisis, threatening the survival of the order; (2) the suspension may be invoked only in an express and formal manner, by an authoritative body other than the agent wielding extra-constitutional power;<sup>76</sup> (3) the suspension should be confined to those means that are strictly necessary to addressing the present crisis; and (4) the suspension must be expressly temporary, limited to the duration of the crisis, revocable at any time by the authorizing body, and revocable only by the authorizing body but never by the delegate of extra-constitutional power.

It is possible, however, that even these conditions will not effectively confine the danger the precept poses. Who judges, for example, whether the crisis be genuine or sufficiently severe; whether the requisite formalities of authorization were complied with; what

---

74. *Id.* at 246.

75. ROSSITER, *supra* note 42, at 297-306. John Finn has a more radical approach. He concedes the inevitability of states’ exceeding ordinary constitutional powers in times of crisis. JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 40-43 (1991). One of his solutions is to require of nations that do so to “reconstitute” themselves after the crisis has passed—in short, to ratify a new constitution to govern future normal times. *Id.*

76. The quaintly formalist assumption here is that the authorizing body will be one representing, as fully as possible, the range of persons and interests embodied in the citizenry; that is, the authorizing body will be the Congress. The agent, on the other hand, will typically be the Executive, or some subdivision of the executive branch.

means are strictly necessary; when the crisis has passed; or what to do if a delegate refuses to yield to a revocation of or restriction on authority? Certainly courts are not required for all such determinations at all times; but they are well suited to make some such determinations in many circumstances. Which ones, if any? Why (not)? And, if judges have their roles here, can they (or law) avoid complicity in the retreat of constitutional norms or processes, even if we assume that judges are up to the tasks assigned? Does not a robust version of rule of law, moreover, *require* that judges adjudicate, on the merits, under the Constitution, in good times and in bad, as long as "the courts are open, and in the proper and unobstructed exercise of their jurisdiction"?<sup>77</sup> Finally, what follows if Congress proves unwilling or unable to perform its roles?

Perhaps some or all of these considerations, especially an increasingly muscular conception of rule of law (and therefore of the scope of judicial business), have led the Court to opt for an alternative approach to the status and operation of rights in time of military conflict.<sup>78</sup> This second approach might derive from a certain conception of rights. Specifically, we might invoke a more modern precept, instantiated repeatedly in twentieth-century decisions of courts in the United States, that the scope or content of a right depends on the weight of the governmental interest asserted for a policy that potentially restricts or diminishes the right. In short, interests of state are balanced against those of individuals, groups, or (sometimes) the collective body of citizens.<sup>79</sup> This balancing approach is distinguishable from *silent leges* in its willingness to adjudicate explicitly the "legality" of governmental policy.<sup>80</sup> Outside the context of war, Justice Black decried the "accordion-like qualities" of the

---

77. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

78. Ronald Dworkin may be the most prominent and unapologetic apologist for an imperialist view of law. See, e.g., DWORKIN, *LAW'S EMPIRE* (1986). The Court, too, seems enamored of such a view, but it has resisted Dworkin's libertarian conception of rights as trumps. For recent examples of judicial supremacy, see *Bush v. Gore*, 531 U.S. 98 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

79. In a book that, *inter alia*, defends the legality of the internment of Japanese aliens in World War II, Chief Justice Rehnquist conflates the doctrine of *silent leges* with that of balancing. See REHNQUIST, *supra* note 67, at 218-24. For reasons suggested here, I think this conflation is problematic.

80. It is possible, of course, that balancing is simply a disguise for the *silent leges*. I suspect, however, this conclusion is too quick. For one thing, as I noted above, it discounts the repeated analytic practices of courts across much of the twentieth century. For another, it dismisses too quickly the possibility that what courts do is, at least in part, a function of what they say.

balancing approach to rights.<sup>81</sup> Black's position, however, has plainly lost the day in practice. Hence, military conflict or war, the analysis goes, implicates weighty interests that might well justify the truncation of rights. In *Korematsu v. United States*, even Justice Black held that war was a special context for civil liberty:

[H]ardships are part of war, and war is an aggregation of hardships. . . . Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.<sup>82</sup>

One of the virtues of this approach is that it comports with how the Court treats rights in ordinary times. Because the analytic methods are common, the Court projects an image of judicial competence, dissipates the sense that the Court is "copping out," and secures the apparent reach of rule of law. This virtue in turn has the ancillary (or purposeful) benefits of promoting the authority of the Court and, in relevant cases, supplying a legitimating stamp on governmental action. It is also the case that the standards the Court employs—rationality, intermediate scrutiny, strict scrutiny, clear and present danger, and others—can provide a degree of flexibility and subtlety in adjudicating competing interests. These permit the Court to make fine judgments about the nature of the military conflict, the severity of the danger to interests of state, and the character of the claimed right.

It is precisely these virtues, however, that might make balancing dangerous. We may put aside suspicion that the Court's motives for using this approach are institutional aggrandizement and self-preservation. Such motives are persistently present when an institution acts. More important than motives are the potential effects of balancing. As Justice Black indicated in *Korematsu*, military action on behalf of the nation will frequently look substantial and exigent, as weighed against the parochial claims of mere individuals.<sup>83</sup> This appearance would seem to be all the more powerful when the action involves war, especially a serious war resting on a plausible claim of self-defense. It is conceivable, therefore, that balancing could be subtly corrosive of rights precisely because it is so familiar. Gone is the sense of judicial humility in the face of issues of defense and

---

81. *Rochin v. California*, 342 U.S. 165, 177 (1952) (Black, J., concurring); see also *Barenblatt v. U.S.* 360 U.S. 109, 134 (1959) (Black, J., dissenting) (criticizing the Court's willingness to subject First Amendment rights to a "judicial balancing process").

82. 323 U.S. 214, 219-20 (1944).

83. In a different context, Justice Black offered a version of this criticism. See *Barenblatt v. United States*, 360 U.S. 109, 141-45 (Black, J., dissenting).

foreign policy. Gone is the extraordinary character of *silent leges*, particularly when invocation of the doctrine suggests an eventual return to normalcy. When judges, through balancing, uphold a governmental policy, they make it look ordinary. Ironically, this might be more subversive of rights than outright suspension (as long as suspension is followed by renormalization).

It would be a mistake, however, to make too much of these worries, for American constitutional history presents another irony: Apart from the abolition of slavery and the enfranchisement of black men and eventually all women, the greatest expansion of civil and political liberty in the United States occurred in the most recent half century, a period that is an unbroken chain of wars and significant military actions. This circumstance commends restraint in presuming a general or unavoidable antagonism between war and liberty.

A recent study by Epstein, Segal, and King goes further. In a quantitative analysis of decisions of the Supreme Court from the 1941 Term through the 1999 Term, the study asks whether the law is truly silent in the time of war.<sup>84</sup> It concludes, provocatively, "that the Court behaves no differently in times of crisis than it does in periods of tranquility."<sup>85</sup> I believe that this conclusion, like the conventional wisdom it assails, is overstated. There are three principal reasons for my criticism. First, the authors' database, standing alone, is inadequate, for the analytic dichotomy (liberal result=1; conservative=0) on which it relies is too crude for the question being considered.<sup>86</sup> Second, in aggregating cases involving rights, liberty, and justice, the study implicitly treats every decision as relevant to the status of liberty and power in time of war.<sup>87</sup> Third, the study defines crisis too restrictively.<sup>88</sup> That is, it does not account for the fact that during the period under investigation, there was no time that

---

84. Lee Epstein et al., *During War Is Law "Silent"? An Investigation of Supreme Court Decision Making in Times of Crises* (2002) (unpublished manuscript, on file with author). To be precise, the study investigates the impact of certain international "crises" on the Supreme Court's decision. The authors specify three indicators of crisis: wars (World War II, the Korean War, the Vietnam War, and the Gulf War); major international conflicts (the blockade of Berlin, the Cuban Missile Crises, and the Iran Hostage Crisis); and "rally effects" (defined as an international event that is followed by a surge of at least 10 points in the President's popularity). *Id.* at 8.

85. *Id.* at 2.

86. *Id.* at 8.

87. For a similar criticism, see Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 276-78 (2003). Epstein, Segal, and King's study partially addresses this criticism by analyzing two specific sets of cases—one involving aliens and one involving conscientious objectors. Epstein et al., *supra* note 84, at 12-13. This is a useful specification, but it does not save even this part of the analysis from the other criticism.

88. Epstein et al., *supra* note 84, at 1, 8-9.

the United States was not either at war or engaged in a significant military action.<sup>89</sup> In short, it was a time of ceaseless warfare. Consequently, the period lacks the variation required to establish confidently the effect of the study's independent variables.

None of these criticisms aims to suggest that the study's conclusions are baseless. The Court has not turned a blind eye toward claimants of rights in time of war.<sup>90</sup> That fact is significant. It may be that the rate and manner in which it has done so are partly a function of "docket control." One way in which the Court can control its docket is to render decisions—especially libertarian decisions—after hostilities have subsided.<sup>91</sup> It may also be that the Court has rarely enforced rights in cases that have required an expenditure of substantial institutional capital.<sup>92</sup> Certainly, some of the Court's failures to enforce rights have been spectacular.<sup>93</sup> But the aggregate record is decidedly mixed, and the Court, for reasons both obvious and subtle, has sometimes made more of rights than one might expect in light of the conventional wisdom.<sup>94</sup>

Nonetheless, it is worth asking questions about what the Court has and has not done with respect to rights.<sup>95</sup> For example, even in cases in which the Court has overturned a governmental policy, to what extent has government already gotten what it wanted by the time the Court has decided? Which intrusions into liberty are never litigated, and what legal presumptions lie behind public or institutional acquiescence in such policies? Which particular groups—not simply aliens or conscientious objectors generically—are disfavored in litigation? More specifically, which rights, and whose, are (not) protected, under what circumstances, and why? In a variety of contexts and times, property and enterprise have been subject to heightened regulation during (and after) armed conflict.<sup>96</sup> Throughout

---

89. See *infra* Appendix.

90. Epstein's data support this weaker claim, even if they do not support the stronger claim of "no difference." See generally Epstein et al., *supra* note 84.

91. For a general discussion of strategies for controlling the docket, see H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

92. Compare *Korematsu v. United States*, 323 U.S. 214 (1944) (decided during World War II), with *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (decided after cessation of hostilities).

93. See, e.g., *Korematsu*, 323 U.S. at 214; *Hirabayashi v. United States*, 320 U.S. 81 (1943).

94. See generally Epstein et al., *supra* note 84.

95. It is beyond the aim of this essay to address comprehensively or systematically these (or other) questions about rights. Epstein, Segal, and King are to be commended for having commenced such an effort.

96. See generally Ely, *supra* note 67. For one example of a policy that was justified under the "war powers" but continued after the cessation of hostilities in World War II, see *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). For other examples related to policies enacted during that war, see LOUIS FISHER, PRESIDENTIAL WAR POWER 68-69 (1995).

the twentieth century, socialists, anarchists, and communists often suffered fines and imprisonment for exercising political rights of expression or association.<sup>97</sup> During World War II, persons of Japanese ancestry suffered deprivations of liberty and property, not for doing or saying anything, but for being "members" of a feared group.<sup>98</sup> Throughout American history, aliens of various stripes have been subject to procedural efficiencies and substantive limitations that most citizens have not.<sup>99</sup> In time of war, these efficiencies or limitations have extended to Quakers and other pacifists.<sup>100</sup> To return to the earlier discussion of national ethos, each of these examples (except for the regulation of property or enterprise) has appeared at the nexus of two notions: a concern for national security and a conception of who "we" includes (or more weakly, who is perceived to pose a threat and who is presumed to be trustworthy).

Even stories of success, from the standpoint of rights, are not fully exempt from the gravitational force of national security. W.E.B. DuBois argued, for example, that *Brown v. Board of Education*<sup>101</sup> "would have been [im]possible without the world pressure of communism. . . . It was simply impossible for the United States to

97. See, e.g., *Communist Party v. SACB*, 367 U.S. 1 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Masses Pub. Co. v. Patten*, 246 F. 24 (2nd Cir. 1917). But see *United States v. Robel*, 389 U.S. 258 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Noto v. United States*, 367 U.S. 290 (1961). Some of these prosecutions were not directly related to military conflicts. All of the prosecutions after World War II, however, were connected to the Cold War.

98. See generally *Korematsu*, 323 U.S. 214; *Hirabayashi*, 320 U.S. 81.

99. Constraints on and exclusions of aliens commenced early in the nation's history. See Amendments to the Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Act, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798). The Japanese internment, of course, included both citizens and aliens. For a critique of recent policy toward certain aliens, see Cole, *supra* note 67.

100. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 33, 58 (1997); A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 40 (1985); Perry Miller, *Puritan State and Puritan Society*, in *CHURCH AND STATE IN AMERICAN HISTORY* 25, 27-28, (John F. Wilson ed., 1965); see also *Gillette v. United States*, 401 U.S. 437, 452, 463 (1971) (refusing to extend status of conscientious objector to persons opposing only "unjust war[s]"). For decisions denying citizenship to aliens who were conscientious objectors, see generally *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929). But see *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (striking down a state's policy barring unemployment compensation to an employee who conscientiously refused to manufacture weapons); *Girouard v. United States*, 328 U.S. 61 (1946) (reversing exclusion from citizenship on the basis of conscientious objection).

101. 347 U.S. 483 (1954).

continue to lead a 'Free World' with race segregation kept legal over a third of its territory."<sup>102</sup> Lucas Powe notes that the United States' brief *amicus curiae* in *Brown* explicitly invoked the relation between civil rights for blacks at home and the struggle against communism abroad.<sup>103</sup> If this invocation were not decisive, Powe writes, it "could not fail to impress Cold Warrior patriots sitting on the Court."<sup>104</sup>

*Brown* aside, however, it does seem that concern for national security has contributed to the diminution of rights, not simply for identifiable groups but for everyone. Certainly, it has inured Americans to certain intrusions on person or liberty—for example, searches or surveillance in courthouses, airports, places of commerce, or other public areas—that would have been unthinkable a generation ago. Many of these intrusions are never litigated; or, if they are, they do not make it onto the Supreme Court's docket. These circumstances, I suspect, are partly attributable to the low-tension force of law or of perceptions of law.

The present war against terrorism and the invasion of Iraq have intensified the trend toward the truncation of liberty generally or of certain rights. Examples include the detention of persons in military prisons without access to the judiciary,<sup>105</sup> the indefinite detention of American citizens,<sup>106</sup> the denial of procedural safeguards to certain citizens,<sup>107</sup> the closure of immigration hearings from public

---

102. W.E.B. DUBOIS, *THE AUTOBIOGRAPHY OF W.E.B. DUBOIS* 333 (1968). Derrick Bell has adopted this position and converted it into a predictive theory, arguing that civil rights for blacks tend to be enforced only when consistent with the interests of whites. See generally DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 41-42 (1987); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). More recently, Mary L. Dudziak has pressed a claim similar to DuBois's. See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Mary L. Dudziak, *The Supreme Court and Racial Equality During World War II*, 1 J. SUP. CT. HIST. 35 (1996); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

103. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 35 (2002).

104. *Id.* at 34-36.

105. See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002); *Concerns over Detainees*, N.Y. TIMES ABSTRACTS, Jan. 31, 2003, at A1 (noting that "[t]he European Parliament called on the United States to immediately clarify the status of detainees at the American naval base at Guantanamo Bay, Cuba"), 2003 WL 10856259.

106. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (holding that the court lacked jurisdiction to hear a judicial challenge to confinement by aliens in military custody in Guantanamo Bay); Timothy Egan, *Terrorism Task Force Detains an American Without Charges*, N.Y. TIMES, Apr. 4, 2003, at A1, 2003 WL 18100758; *Citizen "Enemy Combatant" Gets Only Limited Habeas Review of His Detention*, 71 U.S. L. WK. 1422 (2003), WL 71 USLW 1422.

107. Neil A. Lewis, *Detention Upheld in Combatant Case*, N.Y. TIMES, Jan. 8, 2003, at A1, 2003 WL 8364932.



scrutiny,<sup>108</sup> and the secret inquisition, detention, or deportation of hundreds of people who lacked discernible ties to terrorism.<sup>109</sup> One recent, rapid response to the attack on the World Trade Center and the Pentagon was the USA PATRIOT Act.<sup>110</sup> Although many of the Act's implications are uncertain, provisions delegating to the Executive broad powers to carry out surveillance against both citizens and aliens have triggered suspicion among some commentators.<sup>111</sup> The Attorney General of the United States has recently proposed amendments to the Act that would expand executive powers,<sup>112</sup> and members of the majority party in Congress have proposed making the Act permanent.<sup>113</sup> Another, less rapid response was the Homeland Security Act, which has centralized a large number of functions related to security within a single national agency.<sup>114</sup> A concern for national security has also incited a movement toward the militarization of domestic policing, including the use of military personnel to patrol airports and a proposal to repeal the Posse Comitatus Act. The latter proposal, if adopted, would permit the armed forces to serve as a domestic police force, a power that has been prohibited since the latter half of the 19<sup>th</sup> century.<sup>115</sup> Again, it is not

---

108. Adam Liptak, *A Court Backs Open Hearings on Deportation*, N.Y. TIMES, Aug. 27, 2002, at A1, 2002 WL 26112506.

109. See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (denying release of information on persons detained after the September 11, 2001, terrorist attacks); Eric Lichtblau, *Ashcroft Defends Detentions as Immigrants Recount Toll*, N.Y. TIMES, June 5, 2003, at A23, 2003 WL 56605292; Christopher Newton, *Judge: Gov't Can Withhold 9/11 Names*, N.Y. TIMES, Aug. 15, 2002, 2002 WL 25139850; Adam Liptak, *After Sept. 11, a Legal Battle on the Limits of Civil Liberty*, N.Y. TIMES, Aug. 4, 2002, at A1, 2002 WL 25399104. For a comprehensive critical assessment of the detention and treatment of aliens, see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (Apr. 2003), <http://www.usdoj.gov/oig/special/03-06/full.pdf>.

110. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

111. See, e.g., Cole, *supra* note 67, at 966-74. Recently, in response to questions from the House Committee on the Judiciary, the Department of Justice reported hundreds of new operations involving bugging and surveillance of targets, including libraries and mosques, using "tools" provided by the USA PATRIOT Act. U.S. Dep't of Just., Report to the House Committee on the Judiciary, May 13, 2003, at 38-40.

112. The proposal has been dubbed by some commentators "Patriot Act II." See *Now with Bill Moyers* (PBS television broadcast, Feb. 7, 2003), [http://www.pbs.org/now/transcript/transcript206\\_full.html](http://www.pbs.org/now/transcript/transcript206_full.html); *Patriot Act Redux* (ABC television broadcast, Feb. 21, 2003), <http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice.html>.

113. Eric Lichtblau, *Republicans Want Terror Law Made Permanent*, N.Y. TIMES, Apr. 9, 2003, at B1, 2003 WL 18102654.

114. Homeland Security Act of 2002, Pub. L. No. 107-56, 116 Stat. 2135 (2002).

115. Posse Comitatus Act, 18 U.S.C. § 1385 (1878). Ironically, one motive for the Act, at the time of enactment, was to prevent the United States Army from enforcing civil rights. See

my purpose here to question whether any of these developments is justified as a matter of policy. In fact, it is all the more poignant if they are so justified, for they illustrate the tension between maintaining the physical safety (if not the survival) of the order, on the one hand, and concerns of constitutionalism, on the other.<sup>116</sup>

### C. Operation of Republican Government

The third front on which the constitutional inquiry is important relates to the daily operation of republican government.<sup>117</sup> James Madison claimed famously that the basic logic of the incipient American order was republican. That is, its aim was self-government, its structure one in which government “derives all its powers directly or indirectly from the great body of the people.”<sup>118</sup> Part of the purpose for such a system is not only that the people are entitled to rule themselves (according to notions of ancient liberty), but also that they exert a low-tension force that directs and constrains the personnel who populate formal institutions of government (promoting a kind of

---

DONALD J. CURRIER, STRATEGIC STUDIES INSTITUTE, THE POSSE COMITATUS ACT: A HARMLESS RELIC FOR THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION? 3-6 (2003) (noting the use of troops to prevent violations of civil rights during Reconstruction), <http://carlisle-www.army.mil/ssi/pubs/2003/posse/posse.pdf>; see also Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 960-61 (1997) (observing that the military was used to reinforce Reconstruction governments in the states of the former Confederacy and was used to police the polls during the election of 1876). For the Bush administration's proposal to repeal the Act, a proposal that is not motivated by a concern to protect civil liberties, see Eric Schmitt, *Military Role in U.S. Gains Favor*, N.Y. TIMES, July 21, 2002, at A16; Margaret Graham Tebo, *Posse Comitatus Under Review*, A.B.A J. EREPORT (Aug. 9, 2002), WL 1 No. 30 ABAJEREP4.

116. If Clinton Rossiter's assessment and prediction are correct, there is even more reason for concern:

There can no longer be any question that the constitutional democracies . . . are caught up in a pronounced, if lamentable trend toward more arbitrary, more powerful and more 'efficient' government. The instruments of government depicted here as temporary 'crisis' arrangements have in some countries, and may eventually in all countries, become lasting peacetime institutions. . . . Each twentieth century crisis leaves the governments of the United States, England, and France, and the valiant small democracies as well, a little less democratic than before, at least by traditional standards.

ROSSITER, *supra* note 42, at 313. For a similar claim, focusing on the role of crisis in expanding both the size of the United States' government and its power over the economy, see ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 17-18, 61 (1987).

117. I take republican government to be the American version of self-government, which Mansfield and Winthrop invoke as democracy. See generally DE TOCQUEVILLE, *supra* note 1, at iii (foreword by Mansfield & Winthrop). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); cf. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 240 n.78 (2001).

118. THE FEDERALIST NO. 39, at 233 (James Madison) (Henry Cabot Lodge ed., 1888).

modern liberty).<sup>119</sup> There are many ways of contriving a system of self-government; but however contrived, military conflict can strain it. I do not refer here to the strain that a shortage of material goods can impose, especially in the context of "total" war, though there is no denying such a shortage can have important political consequences. What I have in mind are a few related matters that may impede the proper operation of republican government.

First is the level of secrecy required for both tactics and strategy in the prosecution of military actions.<sup>120</sup> Plainly, some sorts of secrecy are justified in this context. At the same time, secrecy poses several problems for republican government. One is that it restricts the flow of information—certainly to the public, but sometimes even to governmental officials—that might be useful for framing public policy (including the desirability of pursuing particular military actions).<sup>121</sup> Another is that secrecy bleeds. That is, it expands beyond the realm that is necessary for sustaining successful military operations.<sup>122</sup> Still another is that, in a regime in which military secrecy proliferates, civilian control of the military succeeds only to the extent that civilian personnel are conscientious and trustworthy. James Madison

119. For one iteration of the distinction between ancient and modern liberty, see generally CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (rev. ed. 1947).

120. Secrecy can be promoted by silence, by management of information, or by deliberate obfuscation. The aim of each is the same: concealing information. An artful example of obfuscation is this excerpt from a recent press conference of the Secretary of Defense Donald Rumsfeld:

The message is that there are no "knowns." There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know. So when we do the best we can and we pull all this information together, and we then say well, that's basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns. . . . There's another way to phrase that and that is that the absence of evidence is not evidence of absence.

Lewis H. Lapham, *Power Point*, *HARPER'S MAG.*, Aug. 2002, at 305.

121. In the American context, problems of this sort were present in the War in Vietnam. See, e.g., JOHN DEAN, *BLIND AMBITION: THE WHITE HOUSE YEARS* (1976) (on the connection between the scandal over the Watergate burglary and the War in Vietnam); DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 280-82 (1976) (noting the role of the suppression of evidence in order to maintain the War in Vietnam); MERLE MILLER, *LYNDON: AN ORAL BIOGRAPHY* 386 (1980) (noting that President Johnson extracted the resolution committing troops to Vietnam by suppressing evidence that the alleged military engagement in the Gulf of Tonkin did not happen); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 329-30, 341-42 (1973, 1974) (noting the pervasiveness of secrecy during the years of the War in Vietnam); BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* (1976) (on the connection between the scandal over the Watergate burglary and the War in Vietnam). But see LESLIE H. GELB & RICHARD K. BETTS, *THE IRONY OF VIETNAM: THE SYSTEM WORKED 2* (1979) (arguing that, with respect to Vietnam, "the domestic decisionmaking system . . . worked as it usually does, in the way that most constitutionalists and democratic pluralists believe it should work").

122. Here again, the War in Vietnam is an example.

criticized the first condition: "Enlightened statesmen will not always be at the helm."<sup>123</sup> Thomas Jefferson criticized the second: "[F]ree government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions, to bind down those whom we are obliged to trust with power . . . ."<sup>124</sup>

Jefferson assumed that the people could be relied upon to check unscrupulous politicians. In practice, of course, there are many reasons this assumption might not hold. One, as I have already suggested, is that the people often lack sufficient information to serve as a rational check, especially in time of war.<sup>125</sup> Another is that, even if they know enough, people can sometimes be sufficiently inflamed against an external enemy that they create internal enemies as well, essentially devouring not only potential friends but even themselves.<sup>126</sup>

The final problem for republican government in time of military conflict is that civilian government sometimes effectively delegates responsibility over plainly domestic matters to military authorities. This was undoubtedly the case with the exclusion and internment of persons of Japanese descent in World War II,<sup>127</sup> and with the executive proclamation of martial law in Hawaii after the bombing of Pearl Harbor, a status that was maintained long after the emergency precipitating the imposition had passed.<sup>128</sup> The Supreme Court did not address the constitutionality of aspects of martial law in

123. THE FEDERALIST No. 10, at 55 (James Madison) (Henry Cabot Lodge ed., 1888).

124. Thomas Jefferson, *Kentucky Resolutions*, in 1 DOCUMENTS OF AMERICAN HISTORY 178, 181 (Henry Steele Commager & Milton Cantor eds., 1988). Jefferson of course imagined that states were proper instruments of popular control of national policy. Even so, his position in the Kentucky resolutions seems to cut against much of his justification for the Louisiana Purchase. See generally Letter from Thomas Jefferson to J.B. Colvin, *supra* note 69.

125. Note, for example, the unavailability of information that might have been relevant to evaluating the justification for invading Iraq. James Risen, *Iraq Arms Report Now the Subject of a C.I.A. Review*, N.Y. TIMES, June 4, 2003, at A1, 2003 WL 56604980; James Risen, *Prewar Views of Iraq Threat Are Under Review by C.I.A.*, N. Y. TIMES, May 22, 2003, at A1, 2003 WL 55755072.

126. The populist and governmental excesses (democratic, legal, and bureaucratic) of the Nazi regime are merely one extreme example of this latter tendency. For an account of the role of courts in reinforcing that regime, see generally INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider ed., 1991).

127. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). For discussion of the Court's deliberation in *Hirabayashi*, see MURPHY ET AL., *supra* note 2, at 89-101. Compare Justice Black's Opinion for the Court in *Korematsu*, 323 U.S. 214 (upholding military authority to exclude and detain) and MURPHY ET AL., *supra* note 2, at 89-92 (noting Justice Black's similar position in deliberation in *Hirabayashi*), with *Trop v. Dulles*, 356 U.S. 86, 104-05 (1958) (Black, J., concurring) (stating that "the power to denationalize" cannot be delegated to the military).

128. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 284-85 (1957); ROSSITER, *supra* note 42, at 284-85.

Hawaii until after the war was over.<sup>129</sup> Even if government does not formally delegate authority to the military, however, civilian institutions can be susceptible to the influence of a militarist orientation in the formulation or administration of public policy,<sup>130</sup> and it is conceivable that civilian institutions might sometimes act, for purposes of both policy and administration, as extensions of the military.

In his farewell address, President Eisenhower warned that the danger was not simply from the military, but from “the conjunction of an immense military establishment and a large arms industry.”<sup>131</sup> The rise of this conjunction, he said, was a rational response to “a hostile ideology, global in scope, atheistic in character, ruthless in purpose, and insidious in method.”<sup>132</sup> Hence, “we can no longer risk emergency improvisation of national defense; we have been compelled to create a permanent armaments industry of vast proportions.”<sup>133</sup> Eisenhower insisted, however, that this very instrument for the country’s defense was itself a threat. “We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”<sup>134</sup>

#### *D. Allocation of Institutional Authority*

The fourth way in which the military experience of the United States bears upon the capacity to sustain a constitutionalist order is that militarism can gradually alter working notions of institutional authority in the American order. That is, military engagement can alter the allocation of power or responsibility among institutions of government. I am speaking specifically of accretion of power in the Executive.

---

129. See generally *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (holding unconstitutional the trials of Hawaiian civilians by military tribunals under martial law).

130. One comical illustration of the latter tendency was the televised image of George W. Bush, bedecked in military aviator’s gear, landing by fighter jet on an aircraft carrier just off the coast of California. Editorial, *A Long Way from Victory*, N.Y. TIMES, May 2, 2003, at A32, 2003 WL 55190147. A more serious version of the general phenomenon has been the gradual militarization of American foreign policy. See, e.g., DANA PRIEST, *THE MISSION: WAGING WAR AND KEEPING PEACE WITH AMERICA’S MILITARY* (2003).

131. GEOFFREY PERRET, *EISENHOWER* 599 (1999).

132. TOM WICKER, *DWIGHT D. EISENHOWER* 132 (2002).

133. *Id.*

134. *Id.* Perret reports that President Eisenhower had planned to call it the “military-industrial-congressional” complex, but at the last minute deleted the reference to Congress. PERRET, *supra* note 131, at 599.

The problem of institutional relations—the location and limitation of powers to direct foreign affairs, regulate the military, and wage war—is a murky area of constitutional law. Part of the murkiness is traceable to the text of the Constitution, which divides particular powers between Congress and the Executive.<sup>135</sup> Technically, the powers expressly delegated to one branch are distinct from those expressly delegated to the other. Hence, the source of the difficulty is not that the specific powers of the two branches overlap. The problem is that the branches share, in a general sense, authority over the military. And the sharing of authority can lead to conflicts between the branches in circumstances that implicate the powers of each.

To flirt with tedium, we can tick off Congress's powers in these areas. Article I vests "all legislative Powers" in the Congress.<sup>136</sup> More particularly, it delegates to Congress authority to: (1) "provide for the common Defence and general Welfare of the United States"; (2) "regulate Commerce with foreign Nations"; (3) "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"; (4) "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; (5) "raise and support Armies;" (6) "provide and maintain a Navy"; (7) "make Rules for the Government and Regulation of the land and naval Forces"; (8) "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; (9) "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"; and, of course, (10) "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers."<sup>137</sup>

Article I prohibits suspension of the writ of habeas corpus, "unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>138</sup> Chief Justice Taney, sitting as Circuit Judge, was correct that the location of this provision implied that the power to suspend was vested in Congress;<sup>139</sup> Abraham Lincoln disagreed,

135. U.S. CONST. arts. I, II.

136. U.S. CONST. art. I, § 1.

137. U.S. CONST. art. I, § 8.

138. U.S. CONST. art. I, § 9, cl. 2.

139. *Ex parte Merryman*, 17 Fed. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487) (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time, the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.") Taney noted further:

however,<sup>140</sup> and his position prevailed, at least until the end of the Civil War.<sup>141</sup> Article II confers authority on the Senate to consent to (and give advice on) treaties made by the Executive and to advise on and consent to the Executive's appointment of "Ambassadors, other public Ministers and Consuls."<sup>142</sup>

Powers of the President are less numerous. Article II vests "the executive Power . . . in a President of the United States of America."<sup>143</sup> It designates the President "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."<sup>144</sup> As mentioned above, the President has authority to make treaties and to appoint "Ambassadors, other public Ministers and Consuls" (both, again, subject to the "Advice and Consent of the Senate").<sup>145</sup> And the President is directed to "take Care that the Laws be faithfully executed."<sup>146</sup>

The constitutionally prescribed oaths of office for members of Congress and for the President are similar but not identical. Article VI obliges the former to affirm that they "support this Constitution."<sup>147</sup> Article II obliges the Executive to affirm that "I . . . will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>148</sup>

---

But the documents before me show, that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. . . . These great and fundamental laws [guaranteeing due process of law, prohibiting unreasonable searches and seizures, and providing for a speedy trial in a court of law], which congress itself could not suspend, have been disregarded and suspended . . . by a military order, supported by force of arms. . . . In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.

*Id.* at 152-53.

140. LINCOLN, *supra* note 43.

141. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Congress responded to the decision by limiting the Court's jurisdiction in cases involving military trials or martial law. Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 433 (1867). For a definitive treatment of Lincoln and civil liberty during the Civil War, see J. G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1963).

142. U.S. CONST. art. II, § 2, cl. 2.

143. U.S. CONST. art. II, § 1, cl. 1.

144. U.S. CONST. art. II, § 2, cl. 1.

145. U.S. CONST. art. II, § 2, cl. 2.

146. U.S. CONST. art. II, § 3.

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

148. U.S. CONST. art. II, § 1, cl. 8.

Finally, without specifying an institution of the national government, Article IV provides that "the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."<sup>149</sup> Outside the context of war, the Supreme Court has repeatedly held that contests implicating the Guarantee Clause were nonjusticiable political questions.<sup>150</sup> With respect to reapportionment, later decisions have not challenged the notion that the Guarantee Clause is not subject to judicial enforcement. Litigants (and eventually the Court) in the later cases simply abandoned the Guarantee Clause for a different doctrinal peg: equal protection.<sup>151</sup> Where enforcing the Guarantee Clause is concerned, however, the bottom line persists: The Court concedes the field of play to other "political" institutions.<sup>152</sup>

Although the record of the debates of the Constitutional Convention is sketchy, there is reason to believe that this set of delegations and obligations was motivated in part by a desire among some framers to reject the British monarchical model of war and foreign affairs in favor of a republican model.<sup>153</sup> Under the latter model, primary responsibility for the commitment and regulation of troops in combat was to belong to Congress.<sup>154</sup> The reason rested not merely on antipathy for this aspect of the British constitution, but also on the assumption that Congress represented a wider range of people and interests and possessed a greater capacity for deliberative decision than the President.<sup>155</sup>

---

149. U.S. CONST. art. IV, § 4.

150. *Luther v. Borden*, involving which of two governments of the State of Rhode Island was legitimate, was an early commitment to the position of nonjusticiability. 48 U.S. (7 How.) 1 (1849). See also *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (deferring to the authority of the President with respect to his decision "to call forth the militia"). Later decisions extended the position to legislative reapportionment. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946):

Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

151. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

152. For a general analysis of the guarantee clause, see generally WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972).

153. FISHER, *supra* note 96, at 1-6.

154. See JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 45-46, 448, 476 (W.W. Norton & Company 1987) (1966) (advocating a more limited role of the executive in favor of vesting war powers in bodies less likely to be corrupted).

155. See FISHER, *supra* note 96, at 1-11.



Practice and experience, however, soon rendered archaic this vision of the centrality of a deliberative Congress.<sup>156</sup> Instead, they vindicated at least one founder's alternative model: the way to maintain and constrain a republican system is to "contriv[e] the interior structure of the government, [so] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."<sup>157</sup> The difficulty with this general prescription for institutional conflict is that it begs for resolution in particular cases. For one thing, it might be constitutionally desirable, when possible, to resolve conflicts in a principled manner. For another, it might be desirable, as a matter of pragmatic self-interest, to have a device for circumscribing Madison's model of institutional warfare in times of military conflict.<sup>158</sup> Enter the Supreme Court.

Chief Justice Marshall insisted that "[t]he province of the court is, solely, to decide on the rights of individuals," and not to inquire into "[q]uestions in their nature political."<sup>159</sup> Despite this limitation, the Court has sometimes found ways to insert itself into disputes over the scope of institutional authority in time of military conflict.

As suggested above, the types of military conflict over which legal or political disputes might arise tend to be threefold: (1) declared wars; (2) undeclared wars; and (3) significant military actions. Each of these types may include actual or threatened conflict.<sup>160</sup> Similarly, there are three general contexts in which parties might petition for judicial intervention in cases involving military conflict: (1) the direction and control of military actions (in the context of embargo, invasion, or other intercession); (2) the direction and management of foreign affairs; and (3) governmental action seizing property, restricting enterprise, or restricting personal liberty (by exclusion or confinement).

The institutional contexts in which cases might arise tend also to be threefold (here I cannot improve upon Justice Jackson's formulation in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>161</sup>): (1) the Executive might act pursuant to an express or

---

156. As a matter of constitutional drafting and interpretation, this development may exemplify the power of parsimony and abstraction over detail and specificity.

157. THE FEDERALIST NO. 51 (James Madison).

158. The reasoning here is simply that it might be more difficult to prosecute a military campaign while institutions of government are at war with one another.

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

160. As noted above, however, the Appendix includes only actual conflicts.

161. 343 U.S. 579 (1952).

implied delegation of authority by Congress;<sup>162</sup> (2) the Executive might act in the face of congressional silence (whether a general silence or an interstice of an express delegation);<sup>163</sup> and (3) the Executive might act in the face of an express or implied congressional prohibition.<sup>164</sup> The first of these contexts raises two questions: Was Congress's delegation proper? If so, was the Executive's action within the scope of the delegation? The second context raises an interpretive question: How do we construe congressional silence? The third raises important questions of prudence and principle: Should the Court intercede, and, if so, by what standard should it adjudicate the dispute?

To put the point simply, the story of American constitutional politics with respect to institutional relations in the context of military conflict has been one of steady erosion of Congress's power to prevent, confine, or even direct military action and of steady accretion of executive discretion and control. The reasons for these trends are complex. They include the President's direct authority to command the military, the President's dominant role in foreign affairs, and the increasing importance of the United States—politically, economically, culturally, and militarily—throughout the world. They include also Congress's general inability or unwillingness to check executive prerogatives, whether by express prohibition or through control of the purse. The sources of Congress's weakness range from the desire not to look unpatriotic when the President commands the political stage, to the fear of appearing less than supportive of American troops who stand in harm's way, to the obvious disabilities that afflict institutions that must coordinate collectively.

We may add to these considerations the fact that Congress's primary power with respect to particular conflicts is merely to declare war, not to wage it. Congress may terminate appropriations necessary for waging war, but doing so is almost always politically untenable. Moreover, although Congress has power to make rules for regulating the armed forces, the more direct "street-level" control that flows from the Executive's authority as commander-in-chief often supercedes

---

162. According to Jackson, this circumstance supports "the strongest of presumptions" in favor of executive power. *Id.* at 635, 637.

163. According to Jackson, this circumstance is best described as a "zone of twilight in which [President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. The "test of power," he wrote, "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.*

164. Here, wrote Jackson, the President's authority is "at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* In this circumstance, courts should "scrutinize [the presidential claim] with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637-38.

general rules of regulation.<sup>165</sup> Another reason for executive superiority is the difficulty Congress faces in enforcing rules against a President who sees the world differently from Congress. Considerations of policy, too, have historically reinforced executive prerogative free from congressional control: "self defense" (entailing executive authority to deploy troops to defend against aggression); "neutrality" (authority to deploy troops in foreign venues to protect American citizens and property, so long as the troops remain neutral among factions competing in the venue); and "collective security" (authority to intervene pursuant to international agreements or treaties to promote the joint security of signatory nations).<sup>166</sup>

Beyond these considerations is the historical deference paid to the President in foreign affairs, which bear such a close kinship to military action.<sup>167</sup> I shall say more about this below. It suffices for now to observe that, although Congress's powers over war and foreign affairs are numerous, the logic of the Constitution's allocation of power and the historical deference the Executive has enjoyed in foreign affairs tend to favor the President. They do so, that is, unless Congress can rely on another institution to shore up its position.

At one time, it appeared the Court might be willing to support Congress and hence to uphold the sometimes populist positions of Madison and Jefferson against the centralist position of Alexander Hamilton.<sup>168</sup> In *Little v. Barreme*, for example, Congress authorized the Navy, during the Quasi-Naval War with France, to seize American vessels bound to a French port.<sup>169</sup> The Secretary of the Navy went further, ordering the seizure of such vessels bound to or from a French port.<sup>170</sup> The Navy's frigate *Boston* seized *The Flying Fish*, bound from a French port, and filed a libel action against the vessel.<sup>171</sup> The owner of *The Flying Fish* challenged the seizure as illegal.<sup>172</sup>

Writing for the Court, Chief Justice Marshall oddly tucked two contradictory opinions into one. The first, and more extensively reasoned, supported the Captain of the *Boston*. For one thing, Marshall wrote, the President's constitutional powers are capacious.<sup>173</sup>

---

165. *But see* RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 9-10 (1980) (claiming that presidential power is the power to persuade and that successful persuasion is not guaranteed).

166. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 353-55 (6th ed. 2000).

167. *Id.* at 229-30.

168. *Id.* at 252-55.

169. 6 U.S. (2 Cranch) 170 (1804).

170. *Id.* at 171-72, 178.

171. *Id.* at 176.

172. *Id.* at 176-78.

173. *Id.* at 177-78.

For another, the President's "construction" of Congress's delegation was actually "much better calculated to give it effect" than were the plain words of the delegation. Hence, Marshall noted that

I confess the first bias of my mind was very strong in favor of the opinion . . . that a distinction ought to be taken between acts of civil and those of military officers; and between proceeding within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors . . . appeared . . . to imply the principle that those orders . . . ought to justify the person whose general duty it is to obey them.<sup>174</sup>

But Marshall did not stop there. In an abrupt shift, he tersely wrote, "I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren . . . that the instructions [of the Secretary] cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."<sup>175</sup> In short, the Executive lacked independent authority to act beyond Congress's express delegation.

Despite this beginning, the Court has shied from insinuating itself into inter-institutional disputes over control of military action. As noted above, the operating logic of institutional power, in contrast with the textual allocation of authority, has tended to favor the Executive as against Congress. Even when the Court has stepped in—because avoidance was difficult or because there were political incentives or legal reasons to intercede—it has supported Executive authority more often than not. This has frequently been true even when interests of property or personal liberty—Marshall's "rights of individuals"—were at stake.

Hence, in *The Prize Cases*, the Court affirmed the condemnation of merchant vessels seized pursuant to President Lincoln's order to blockade Confederate ports in 1861, although Congress had not declared war.<sup>176</sup> One doctrinal strategy might have been to distinguish the case from *The Flying Fish* by claiming that in the prior case Congress had directed a precise manner for employing military force. Complete congressional silence, on this view, might ironically imply greater executive discretion than would congressional delegation. But the Court did not pursue this distinction, opting instead to search for an express delegation.<sup>177</sup> It invoked two, both of which were enacted to address specific circumstances long passed:

[B]y the Acts of Congress of February 28<sup>th</sup>, 1795, and 3d of March, 1807, [the President] is authorized to call out the militia and use the military and naval forces of the United

---

174. *Id.* at 179.

175. *Id.*

176. 67 U.S. (2 Black) 635 (1863).

177. *Id.* at 668.

States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.<sup>178</sup>

The Court buttressed this invocation with three additional moves. One was to assert that the President always had authority to resist "invasion of a foreign nation."<sup>179</sup> There were some problems with this move. It was not clear, on Lincoln's logic, that the Confederate States were a foreign nation. Lincoln prosecuted the Civil War under the theory that the South's secession was a nullity and therefore that the Union was unbroken.<sup>180</sup> The Court patched this problem with the *ipse dixit* that "States organized in rebellion" nonetheless fell within the principle.<sup>181</sup> Moreover, the Confederacy might have pointed out that it had not (yet) invaded territory outside the seceded states.<sup>182</sup> The Court did not address this point. The second move was to invoke Congress's attempt *ex post facto* to ratify "all the acts, proclamations, and orders of the President, & c., as if they had been issued and done under the previous express authority and direction of the Congress."<sup>183</sup> The Court concluded that the prohibition against *ex post facto* laws applied only in the realm of criminal law, and in any event that retroactive ratification in this context cured any defects in the President's order.<sup>184</sup> This reasoning was compatible with dicta in *Calder v. Bull*,<sup>185</sup> but it contradicted the holding in *Fletcher v. Peck*,<sup>186</sup> where Chief Justice Marshall for the Court overturned a legislative enactment that amounted to an *ex post facto* taking of property.<sup>187</sup>

The final move was to assert that the President had authority *jure belli* (by right of war) to order a blockade of ports of seceding

---

178. *Id.*

179. *Id.*

180. See BRANDON, *supra* note 39, at 177-79.

181. *Id.*

182. Presumably, firing on supply ships and the federal garrison at Fort Sumter did not violate this logic, because, after secession, the island became part of the sovereign soil of South Carolina.

183. *The Prize Cases*, 67 U.S. at 670.

184. *Id.* at 671.

185. 3 U.S. (3 Dall.) 386, 390 (1798).

186. 10 U.S. (6 Cranch) 87 (1810).

187. The bulk of Marshall's opinion rested on the enforcement of contracts for the sale of land, which were relied upon by innocent purchasers who gave value but had no notice of a possible defect in title, *id.* at 129-35, but part of his reasoning invoked principles prohibiting *ex post facto* legislation:

"This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

*Id.* at 138-39.

states, "which neutrals are bound to regard."<sup>188</sup> The difficulty with this move was not merely that it threatened the notions of delegated and reserved powers that were central parts of the logic of the Constitution, but that it obliterated institutional devices for checking the President's power. For the Court held that the question of whether the President was acting within the proper scope of his authority

is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.<sup>189</sup>

Eight decades later, similar, though not identical, reasoning would lead the Court to ratify the exclusion and internment of ethnic Japanese in *Hirabayashi*<sup>190</sup> and *Korematsu*.<sup>191</sup>

In the *Steel Seizure Case*,<sup>192</sup> however, the Court pulled back. The United Steel Workers had called a strike that would shut down much of the country's production of steel.<sup>193</sup> In a pre-emptive move to preserve production generally and, more importantly, to continue production of munitions for the war in Korea, President Truman ordered the seizure of targeted mills and the continuation of production under the Secretary of Commerce, who appointed the presidents of affected firms to continue day-to-day management.<sup>194</sup> The President notified Congress and said he would comply with congressional will in the matter.<sup>195</sup> Congress offered no formal reply.<sup>196</sup>

Although the Court struck down the President's order, its members could not agree on why. Justice Black, writing for the Court, held that the text of the Constitution committed this sort of regulation to the legislature and that congressional silence in the Taft-Hartley Act implicitly denied the President the power he now asserted.<sup>197</sup> Retreating from his prior decision in *Korematsu*, he held that the Constitution's allocation of institutional authority did not change in

---

188. *The Prize Cases*, 67 U.S. at 671.

189. *Id.* at 670.

190. *See* 320 U.S. 81, 99 (1943).

191. *See* 320 U.S. 214, 218-20 (1944).

192. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

193. *Id.* at 582-83.

194. *Id.* at 583.

195. *Id.*

196. *Id.*

197. *Id.* at 585-89.

time of war. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."<sup>198</sup>

Concurring, Justice Frankfurter insisted that "experience," not text, was the proper source for constitutional value and that the threshold issue was the scope of judicial power.<sup>199</sup> He was bolder even than Black, however, in reading the Taft-Hartley Act. Frankfurter examined the history of Congress's regulation of disputes between labor and management, and inferred that Taft-Hartley barred the President's action "in so many words."<sup>200</sup> It did not, but Frankfurter rarely resisted the chance to tweak Black. Justice Clark concurred, relying in part on a problematically expansive reading of *Little v. Barreme*.<sup>201</sup> Justices Douglas<sup>202</sup> and Burton,<sup>203</sup> too, each concurred separately.

Justice Jackson's concurrence revealed the subtlest understanding of the implications of the case and of the sources of constitutional principle for resolving it. Neither text nor framers' intent nor experience nor judicial precedent was adequate to the task, he argued.<sup>204</sup> What the case called for instead was a conceptual framework capable of explaining and justifying the contextually contingent allocation of institutional power.<sup>205</sup> The relevant context in *Youngstown*, as Jackson expressly understood, was military conflict.<sup>206</sup> I have already alluded to his tripartite scheme for resolving disputes between Executive and Congress.<sup>207</sup> Agreeing with Black that Truman's order was "incompatible with the . . . implied will of Congress," Jackson urged not that the order was *ipso facto* unconstitutional, but that the Court should "scrutinize [it] with caution" to determine whether it was unconstitutional.<sup>208</sup> Jackson rejected all of the President's claims, whether from (1) Article I's general delegation of "the executive Power," (2) its requirement that the President "faithfully [execute]" the law, and (3) its designation of the President as Commander in Chief, or from (4) "inherent powers" derived from "the customs and claims of preceding administrations."<sup>209</sup>

---

198. *Id.* at 589 (citations omitted).

199. *Id.* at 593-96.

200. *Id.* at 597-604.

201. *Id.* at 660-67.

202. *Id.* at 629-34.

203. *Id.* at 655-60.

204. *Id.* at 634-35.

205. *Id.* at 635-39.

206. *Id.* at 642.

207. See *supra* text accompanying notes 161-164.

208. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-40 (1952).

209. *Id.* at 640-53.

I shall not pause over the first and second claims.<sup>210</sup> The third and fourth claims, however, are directly relevant to the concerns of this essay. Against the third claim, that the President possesses implied "war powers" to do "anything, anywhere, that can be done with an army or navy," Jackson responded in four ways.<sup>211</sup> First, the Constitution delegated the power to declare war "only to Congress."<sup>212</sup> Second, although a state of war can exist (and presumably might justify executive action) without formal declaration, an expansive understanding of war powers did not follow from that fact.<sup>213</sup> The reason was that such an understanding implied a basic alteration of the Constitution's allocation of institutional authority.

[N]o doctrine . . . would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and is often unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.<sup>214</sup>

Third, "the title Commander-in-Chief of *the Army and Navy* [does not] constitute him also Commander-in-Chief of the country."<sup>215</sup> Fourth, whatever the President's authority to employ armed forces "against the outside world for the security of our society," authority is absent "when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."<sup>216</sup>

Against the fourth claim—*inherent powers*—Jackson dismissed what he called its "unarticulated assumption": "that necessity knows no law."<sup>217</sup> We might doubt the wisdom of vesting emergency powers anywhere, he said, but "emergency powers are consistent with free government only when their control is lodged elsewhere than in the

---

210. Against the first claim, Jackson argued that the text and purpose of Article I made the President's interpretation—that it was "a grant of all the executive powers of which the Government is capable"—unacceptable. *Id.* at 640-41. Against the second claim, Jackson insisted that the President's duty to faithfully execute the laws must be read in light of the Fifth Amendment's guarantee of due process of law. *Id.* at 646. The combination of the two, he said, ensures rule of law: "leave to live by no man's leave, underneath law." *Id.* at 646, 654. The proper way to guarantee this principle is to respect the Constitution's delegation of authority, under which the Executive "has no legislative power." *Id.* at 655. President Truman's order, said Jackson, was "an exercise of authority without law." *Id.*

211. *Id.* at 642.

212. *Id.*

213. *Id.* at 642-46.

214. *Id.* at 642.

215. *Id.* at 643-44.

216. *Id.* at 645-46.

217. *Id.* at 646.



Executive who exercises them.”<sup>218</sup> In our experience, the safest repository is the legislature. Does such a location make national government vulnerable to incompetence in dealing with emergencies? Implicitly confining *The Prize Cases* to its narrowest ground, Jackson said no: “Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.”<sup>219</sup>

Jackson’s concurrence is the most substantial, forthright, unapologetic, and well-reasoned commitment by a member of the Court, much less the Court as a collective body, to side with Congress against the accretion of executive power in the military context in the twentieth century. Hence, it stands against a powerful array of countervailing forces across a century or more. It is open to question, however, how influential it has been in affecting the behavior of national institutions. One reason for my skepticism grows out of a point that Jackson himself observed: “We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”<sup>220</sup>

Congress has been a less than vigorous defender of its own authority. The War Powers Resolution<sup>221</sup> is not an exception to this observation, for it reveals more about Congress’s weakness than its power. This joint resolution issues detailed commands to the President: (1) consult with Congress before the introduction of troops into conditions of actual or potential hostility, (2) report to Congress within 48 hours after an introduction of troops in the absence of a declaration of war, (3) report regularly to Congress about the status of troops introduced into actual or potential hostility, and (4) withdraw troops within 60 days after any report is due, if certain conditions of the Resolution are not met: formal action by Congress (a) declaring war or (b) authorizing the President to use the armed forces.<sup>222</sup> (5) Against the *Prize Cases*, the Resolution provides that authority to introduce armed forces into conditions of hostility or potential hostility “shall not be inferred . . . from any provision of law” unless the provision “specifically authorizes the introduction . . . and states that it is intended to constitute specific statutory authorization within the

---

218. *Id.* at 652.

219. *Id.* at 652.

220. *Id.* at 654.

221. 50 U.S.C. §§ 1541-1548 (2000) (passed November 7, 1973, over presidential veto).

222. *Id.* §§ 1542, 1543(a), 1543(c), 1544(b). The President may extend the 60-day period to 90 days by certifying to Congress in writing that “unavoidable military necessity” requires continued use of armed forces. *Id.* § 1544(b).

meaning of this joint chapter.”<sup>223</sup> (6) The President must remove forces from “hostilities outside . . . the United States” whenever the Congress “directs by concurrent resolution.”<sup>224</sup>

Whatever the motivations of various members of Congress for adopting the Resolution, its effect has been minimal. Certainly, it has been ignored or flouted far more frequently than followed. Even when Presidents have adhered to its technical requirements, they have sometimes done so without conceding the existence of a constitutional obligation.<sup>225</sup> In fact, some in the White House, including Presidents, have posited that the Resolution is an unconstitutional intrusion on the Executive’s authority over the military and foreign affairs.<sup>226</sup> There are several reasons executive resistance has been possible. First, the Resolution’s very existence is an implicit concession to the toothlessness of Congress’s constitutional authority to declare war.<sup>227</sup> Second, Congress has consistently lacked the will to use its institutional clout to enforce the Resolution.<sup>228</sup> Third, the Resolution’s language and logic virtually invite niggling legalism by the Executive. Hence, Presidents have interpreted the Resolution as implicit permission to engage in covert operations or to conduct military operations that can be completed within the Resolution’s 60-day limitation.<sup>229</sup> At least one President conducted covert foreign operations, despite specific express prohibitions by Congress.<sup>230</sup> The principal effect of the Resolution has been simply to shift the political risk that comes from the possible failure of an undeclared war from

223. *Id.* § 1547(a)(1).

224. *Id.* § 1544(c).

225. See MURPHY ET AL., *supra* note 2, at 460 (providing a synopsis of the first two decades of the Resolution); see also Alfred P. Rubin, *War Powers and the Constitution*, FOREIGN SERVICE J., Feb. 1991, at 20, 20-21 (observing the infrequency with which the War Powers Resolution has been followed by the President or Congress).

226. See FISHER, *supra* note 96, at 131-61 (providing a detailed discussion of the impact of the Resolution).

227. Prior to the invasion of Iraq, George W. Bush initially indicated that he would consult with Congress, but refused to commit to seeking Congress’s authorization for the invasion. Eric Schmitt, *Iraq is Defiant as G.O.P. Leader Opposes Attack*, N.Y. TIMES, Aug. 9, 2002, at A6. Mr. Bush later obtained authorization from Congress. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (to be codified at 50 U.S.C. § 1541).

228. The record of relations between President and Congress under the War Powers Resolution bespeaks a lack of congressional will. See MURPHY ET AL., *supra* note 2; FISHER, *supra* note 96, at 131-61.

229. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 39-40 (1990).

230. The President was Reagan. *Id.* at 45-49. The prohibitions were contained in the Boland Amendments, which were riders to annual appropriations from 1982 to 1986. *Id.* at 52.

Congress to the President.<sup>231</sup> Perhaps such a shift was the predominant motivation of many members from the beginning. If so, it merely underscores the chronic weakness of Congress in this area.

To summarize, there have been two lines of decision from the Supreme Court. One, exemplified by *The Flying Fish* and *Youngstown*, posits a role for the Court to enforce limits on executive discretion. The other, proceeding from *The Prize Cases* through *Hirabayashi* and *Korematsu* and beyond, sharply curtails that role and perhaps abrogates it entirely. With respect to the latter line, it is tempting to read *The Prize Cases* as *sui generis*, confined to the extraordinary circumstance that produced it. Commentary, moreover, insists that the exclusion and internment cases are no longer good law.<sup>232</sup> I am dubious of attempts to pronounce the demise of the second line, not least because there is reason to believe that the present administration adheres to it as a matter of both policy and constitutional principle.<sup>233</sup>

### *E. Sovereignty*

The fifth area in which we might point to troubling trends in the American order concerns not institutional relations directly (although it implicates them) but the authority of the order itself. Let me frame this as a proposition: The persistent American reliance on war and military action has affected the regime's view of its own authority. Specifically, it has weakened a constitutionalist conception of authority and strengthened a statist conception that is ultimately antagonistic to constitutionalism.

The sovereignty of the people is at the heart of American constitutionalism. Some scholars contest this claim,<sup>234</sup> but it is

---

231. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 54 (1993). The joint resolution that was taken as authorization to invade Iraq is exemplary. Despite language tying congressional authorization to resolutions of the Security Council of the United Nations, the joint resolution authorized Mr. Bush to "defend the national security of the United States against the continuing threat posed by Iraq." Authorization for the Use of Military Force Against Iraq Resolution of 2002 § 3(a)(1). This sort of language acts to give cover to members of Congress who supported the joint resolution: Mr Bush was authorized to act to defend militarily the national security against Iraq. This authorized action that a plurality of Americans came to support and that Mr. Bush was probably inclined to pursue in any event. On the other hand, if it later were to turn out that the nation's security was not truly at risk and the electorate became exercised over the issue, members could insist that they were duped.

232. See NOWAK & ROTUNDA, *supra* note 166, at 255 n.5.

233. See discussion *supra* Section III.B.

234. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). See also MURPHY ET AL., *supra* note 2, at 45-47 (arguing that the authority of the Constitution is grounded in "political morality"). For an Hegelian account of American constitutional development that is skeptical of the possibility of self-government on current models in American theory, see

sufficiently well established that I offer it here as a fact. The reason for the place of popular sovereignty is partly an accident of history and partly a function of the logic of constitutionalism.<sup>235</sup> The historical accident famously grew out of the fact that the English conception of authority was grounded in sovereignty. When part of British North America separated from Britain, declared itself the United States, and eventually constructed new political institutions, it retained the concept of sovereignty but jettisoned the English conception. In crafting a replacement, the Americans drew on their extensive and long-standing experience with self-government—even self-constitution.

This accident of history is relevant to the logic of constitutionalism. I have argued elsewhere that all political regimes—even constitutionalist regimes—“arise to some degree from illegality.”<sup>236</sup> Illegality is one way we recognize a regime as distinct from its predecessors or its successors. The Constitution of the United States, for example, was illegal from the standpoint of both the Articles of Confederation and the specific instructions that Congress gave the Constitutional Convention.<sup>237</sup> This sort of illegality invites a basic question: When a new constitution appears on the scene, and a new regime lays claim to it, why should anyone pay it any mind, much less obey? This question of authority is important, because if the regime aims to be constitutionalist, the founding cannot be simply a brute fact. It must be justified. Here is how. The new order will try to explain itself (because this, among other things, is what a constitutionalist order must do). Typically, it will do so by reference to the manner in which it came to exist. Hence the constitutionalist preoccupation with origins. The story of the founding becomes the device for self-justification, and it becomes part of the logic of the new regime.<sup>238</sup>

---

generally PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* (1992).

235. See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (Rita Kimber & Robert Kimber trans., 2001); HARRIS, *supra* note 3, at 201-04; WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

236. BRANDON, *supra* note 39, at 188.

237. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 49-53 (1998); BRANDON, *supra* note 39, at 188-89, 204-05.

238. BRANDON, *supra* note 39, at 186-89. On the illegality of the American founding, see ACKERMAN, *supra* note 237, at 49-53.

In the United States, the self-told story has typically been one of popular creation. In truth, there have been many versions of this story, but two general approaches have been notable. One is antifederalist. Prominent early proponents were Madison (at times), Jefferson, and later John C. Calhoun. Framed simply, the antifederalist approach posits that the Constitution, and hence the order that traces its authority to the Constitution, was authorized by the people of antecedent states. The position suggests certain ways of reading the Constitution—especially ways of understanding the allocation (and reservation) of institutional authority. Typically, this understanding has entailed a more pluralist and/or localist conception of norms and institutional authority.<sup>239</sup> Chief Justice Taney bifurcated his antifederalism; his default position was localist, but he adopted a nationalist position with respect to slavery (to permit the Court to protect it).<sup>240</sup>

The other approach is federalist. An early exemplar was Chief Justice Marshall, followed by Abraham Lincoln. Federalism, in this context, presumes that the Constitution's (and the order's) authority derives from the people not of states but of the nation as a whole. Typically, this position has entailed a more liberal and/or centralist conception of norms and institutional relations—one in which the nation is superior to states in certain domains of action.<sup>241</sup> Against Taney, Marshall bifurcated his federalism; he was nationalist on most matters of political economy, but localist with respect to slavery (permitting states to protect it).<sup>242</sup>

The differences between the two approaches can range from profound to subtle. But it is not my purpose here to explore the analytic details or implications of the approaches. My aim instead is simply to note that, whichever approach one employs, each invokes the people as the source for constitutional authority. This is a useful notion. It comports with widely held conceptions of the ultimate rule of recognition. It promotes the idea that the people are the proper beneficiary of governmental action. And it serves as a background check against governmental excess or folly.

---

239. On antifederalist constitutionalism in the United States, see BRANDON, *supra* note 39, at 42-50, 101-09, 123-27, 192-98.

240. See BRANDON, *supra* note 39, at 88-100, 111-15.

241. On federalist constitutionalism in the United States, see BRANDON, *supra* note 39, at 38-42, 93-94, 189-92.

242. See BRANDON, *supra* note 39, at 50-55, 93-95.

The Court, however, has in some contexts called into question the relevance of sovereignty of the people to war and foreign affairs.<sup>243</sup> A forthright and influential articulation of this position is Justice Sutherland's opinion of the Court in *United States v. Curtiss-Wright Export Corp.*<sup>244</sup> The Court held that constitutional constraints on executive authority were qualitatively different as between "foreign or external affairs" and "domestic or internal affairs."<sup>245</sup> Thus, Congress would have been constitutionally prohibited from delegating power to the President to make criminal law had the context been domestic; but constitutional limitations do not apply in the same way in the context of foreign affairs. Why might this be so? Sutherland offered two foundational rationales.

One was a variation on the story of the creation of American constitutional order, a variation that combined antifederalist and federalist tropes, but essentially read the people out of one aspect of constitutional politics:

[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the Federal government. . . . That this doctrine applies only to powers that

---

243. I should emphasize the phrase "in some contexts." In the context of international agreements, one question is whether Congress may use them to expand its powers with respect to matters or in ways that Article I, standing alone, would not authorize. The Court has spoken with two voices on this question. One decision answers affirmatively. *Missouri v. Holland*, 252 U.S. 416, 432-34 (1920) (upholding congressional regulation of hunting migratory birds, enacted pursuant to a treaty with Britain, despite earlier judicial holdings that the Tenth Amendment barred such legislation). Another answers negatively. *Reid v. Covert*, 354 U.S. 1, 15-19 (1957) (holding, *inter alia*, that an executive agreement could not support an extension of military jurisdiction over dependents of American military personnel stationed outside the United States). One way of distinguishing these two decisions is to point to the difference between a treaty and an executive agreement, the former being more authoritative than the latter. Paul J. Heald and Suzanna Sherry note two alternative bases for distinction. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1182 (2000). One basis is that "*Holland* might be construed as holding only that the treaty power can supplement Congress's other powers when they run out, whereas *Reid* governs when there is a[n express] constitutional limit on otherwise valid congressional authority." *Id.* The question here is why the Tenth Amendment is not an express limit. The other basis, which answers this question, is that considerations of federalism "do not constrain the treaty power," but "other types of limits on congressional authority," like the Bill of Rights, do. *Id.*

244. 299 U.S. 304 (1936). For an adoring account of the content and influence of Sutherland's approach to executive power in the areas of war and foreign affairs, locating that approach in a theory of natural right, see HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 196-241 (1994). For a less reverential account of Sutherland's jurisprudence, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 46-53, 70-83 (2000).

245. *Curtiss-Wright*, 299 U.S. at 315. Sutherland would later extend the logic of his opinion in *Curtiss-Wright* to a decision holding that mere executive agreements—embodied in diplomatic correspondence and not subject to ratification by the Senate—were constitutionally binding. *United States v. Belmont*, 301 U.S. 324, 330-32 (1937).

the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.<sup>246</sup>

What source? "The Union," wrote Sutherland, echoing Lincoln, "existed before the Constitution."<sup>247</sup> Before ratification, "it is clear that the Union . . . was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution. . . qualified its exercise."<sup>248</sup>

The second rationale for distinguishing external from internal affairs, and buttressing the first, was "the law of nations."<sup>249</sup> "As a member of the family of nations, the right and power of the United States [in the fields of war and foreign affairs] are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."<sup>250</sup> Consequently, "the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."<sup>251</sup> If these powers "had never been mentioned in the Constitution, [they] would have vested in the Federal government as necessary concomitants of nationality."<sup>252</sup>

The problems that Sutherland's statist conception of sovereignty posed for rights, for the operation of republican government, or for a constitutionalist allocation of institutional authority need not have been insurmountable. They were heightened, however, by four additional aspects of his analysis, each of which pertains to considerations we have previously considered: executive exclusivity, secrecy, the blending of military action with foreign affairs, and the blending of both to matters of domestic concern.

Against Madison, Sutherland anthropomorphized the national government in the person of the President. The primary effect of this

---

246. *Curtiss-Wright*, 299 U.S. at 316. Framed in this way, Sutherland's position is distinguishable from that of Chief Justice Taney, who had argued that all national powers, foreign and domestic, derived from the states:

The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home . . . and to accomplish this purpose, . . . it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.

*Ableman v. Booth*, 62 U.S. (21 How.) 506, 517 (1859).

247. *Curtiss-Wright*, 299 U.S. at 317.

248. *Id.*

249. *Id.* at 318.

250. *Id.*

251. *Id.*

252. *Id.*

impersonation was not to rank the authority of competing institutions, but to focus authority exclusively in the Executive. "The President alone has the power to speak or listen as a representative of the nation."<sup>253</sup> Hence, "we are here dealing [with] . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . ." <sup>254</sup> Let's put aside the fact that this formulation is inconsistent with a fair reading of the constitutional text, even in the context of war or foreign affairs.<sup>255</sup> Under Sutherland's theory, not only has the state become the President, but the President has become sovereign.

The danger of such a concentration is exacerbated by Sutherland's willingness to tolerate a high level of secrecy in the conduct of foreign affairs.

[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.<sup>256</sup>

The difficulty here is not that secrecy of some sorts is categorically impermissible, especially in foreign affairs. But, for reasons discussed above,<sup>257</sup> because secrecy is problematic, its management requires sensitivity and special institutional checks against abuse. When authority is vested exclusively in the Executive, most useful institutional checks are unavailing.

Still, a constitutionalist might not worry deeply about these tendencies as long as they are confined to limited aspects of the conduct of diplomacy with other nations. Sutherland did not so limit his theory. For one thing, he held that the need for executive control and secrecy is "especially" acute "in time of war."<sup>258</sup> Again, I do not claim that secrecy per se is illicit. Some secrecy is necessary for the successful prosecution of military actions. Sutherland's theory,

253. *Id.* at 319.

254. *Id.* at 319-20. Sutherland's position on this point is distinguishable from the position of Justice Frankfurter in his dissent in *Trop v. Dulles*. 356 U.S. 86 (1958) (Frankfurter, J., dissenting). Although Frankfurter agreed with Sutherland that "there is no limitation" on "the several powers . . . compendiously described as the 'war power,'" he parted company with Sutherland on two critical points. *Id.* at 120. First, with Taney, Frankfurter argued that the power was delegated by "the States." *Id.* Second, Frankfurter insisted that the power belonged to Congress. *Id.* at 120-21.

255. See *supra* notes 136-137 and accompanying text.

256. *Curtiss-Wright*, 299 U.S. at 320.

257. See *supra* text accompanying notes 120-124.

258. *Id.*



however, makes the Executive the exclusive repository of information "especially . . . in time of war" and perhaps also during any sort of military action that can plausibly be linked to national security or the national interest.<sup>259</sup> Because these events occur so frequently for the United States, this position undermines institutional checks that not only are desirable for a healthy constitutional system (if we believe Madison), but also are established by the Constitution itself.

This is not the only way in which Sutherland's theory of Presidential power reaches beyond foreign affairs, strictly understood. For it also extends to domestic matters. Sutherland himself left open this possibility, notwithstanding his opening embrace of the internal-external distinction. The President, he held, requires "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>260</sup> Thus, only when matters are strictly domestic should executive discretion be constrained by the Constitution or statute. When domestic affairs touch matters of international or military concern, however, they cease to subject presidential power to conventional limits. When might such a connection be present? Perhaps often, especially given the incessancy of militarism in American experience and ethos. *Hirabayashi* and *Korematsu*, on one side of the ledger, and *Brown v. Board*, on the other, are indications of the ways in which national security can determine or influence domestic policy. If we search, we can find other examples.

#### IV. CONCLUSION

Because my aim here has been to sketch a framework for understanding the relation between armed conflict and constitutionalism in the United States, I have focused on general tendencies, not on fine details. To close, I might offer three sets of observations that point toward further, perhaps deeper, analysis of the relationship.

The first concerns the constitutional implications the essay identifies. It is important to note that these areas of concern are partially independent of one another. Neither a single armed conflict nor an aggregation of conflicts will produce uniform effects across areas. Hence, some conflicts—like those that are either isolated and discrete or continuous but small—might implicate secrecy, the allocation of institutional authority, or sovereignty, but have little

---

259. *Id.*

260. *Id.*

effect on civil liberties. Other conflicts—especially perhaps those that are large and visible—might fully engage the attention of all relevant institutions and therefore might have only limited impact on institutional relations; but some such conflicts could trigger incursions on civil liberties. Some conflicts—large or small—might awaken aspects of national ethos that precipitate a decisive demarcation of interest or identity between “us” and “them.” In doing so, such conflicts can threaten to convert a conflict into a crusade, witch-hunt, or inquisition. Even within an area of concern—like civil liberties during and after World War II—a single conflict can generate conflicting consequences, some of which strengthen or expand the scope of liberties, some of which do the opposite.

The second set of observations, related to the first, originates in a question: What, with respect to armed conflict, is driving these consequences? In this essay, I have for the most part distinguished among armed conflicts in a fairly formal way—sorting them by declared and undeclared wars and significant military actions. One can push these distinctions further than I have here; but even so, their utility has limits. More useful, perhaps, for drawing out a subtler, more complex sense of consequences might be a functional classification of armed conflict within and across two dimensions. One concerns the *scale* of conflict, ranging from massive (like the Revolution, Civil War, and World War II), to moderate (like the Quasi-War with France, the War of 1812, the Korean War, and the Vietnam War), to minor (like the two Barbary Wars, the various intercessions in Latin America, and an array of conflicts spanning the latter half of the twentieth century).<sup>261</sup>

The other dimension concerns the *character* of particular conflicts. Within this dimension, we might categorize roughly as follows: (1) conflicts involving perceived danger to the physical safety of the nation, including but not limited to the sort of critical danger that might justify the invocation of emergency powers (like the Civil War, World War II, the Cold War, the Cuban missile crisis, and the current war against terrorism); (2) conflicts in which the nation aims to promote a general interest in international order (perhaps like World War I, the intervention in Somalia, and the various actions in the Balkans); (3) opportunistic conflicts of imperialism (including campaigns against the Indians, the Mexican War, the Latin-American campaigns, and the Spanish-American War); (4) conflicts to protect trade or other parochial interests (like the Barbary Wars, various

---

261. One would want to specify criteria for inclusion. I have not attempted such a specification here.

anti-piracy patrols, slave-trade patrols, and the policing of shipping lanes in the Persian Gulf); and (5) conflicts arising from failures of diplomacy or to promote the status of the nation (including several forays into Latin America and Asia).<sup>262</sup> The relations among these categories are not ordinal; that is, they are not arranged hierarchically. Nor are the categories mutually exclusive. Thus, a particular conflict might arguably fall into more than one category. But my sense is that a nuanced investigation, that accounts for considerations of both scale and character, can shed useful light on the relation between armed conflict and the various constitutional implications identified in this essay.

Finally, lurking in the essay is a latent story of a larger tension—not merely between armed conflict and constitutionalism, but between constitutionalism and the nation-state. As an historical matter, it is easy enough to appreciate how and why the emergence of a working theory of constitutionalism was linked to the rise of the nation-state. More difficult is comprehending how and why the two might be at odds. The issue of tension, if not incompatibility, is larger than the location (or even the relevance) of sovereignty. It also has to do with the fact that constitutionalism presupposes certain norms or values logically antecedent to the state. These norms need not be universalist or naturalist. Nor do they necessarily entail internationalism. They are simply norms that pertain to a political order if it is to be constitutionalist.

We may well be entering a time, however, in which this sort of constitutionalism—linked as it is to individual nation-states—is a quaint relic of a simpler time. If so, many of the factors driving this condition are certainly external to any individual state.<sup>263</sup> But, as this essay has suggested, some are internal as well. In previous work, I offered a four-fold typology of constitutional failure: failures of constitutional discourse, of constitutional order, of a constitution, and of constitutionalism.<sup>264</sup> Of these, the fourth—the “failure to employ basic principles of constitutionalism within a regime or in moving into or out of such a regime”—is the most easily tolerated, because it is the most difficult to detect and the easiest to rationalize away in the interest of (perceived) necessity.<sup>265</sup> But once it occurs, a failure of constitutionalism can be the most difficult type of failure to overcome, because its implications are so subtle and far-reaching and because

---

262. I am grateful to Robert Covington for helping me clarify these categories.

263. For an ambitious analysis of these external circumstances, see generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002).

264. BRANDON, *supra* note 39, at 18-22.

265. *Id.* at 18.

correction frequently requires such a fundamental alteration of norms, institutions, and practices.

The antifederalist John DeWitt claimed that the proposed Constitution of the United States was "nothing less than a hasty stride to Universal Empire in this Western World."<sup>266</sup> He was wrong, of course. The Constitution was not a hasty step. Nor need it (nor the government it authorized) have been imperial in the sense DeWitt intended.<sup>267</sup> But as Felix Frankfurter noted in the *Steel Seizure Case*, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."<sup>268</sup>

I am suspicious of apocalyptic visions and prophetic predictions of doom. Still, I sense reasons for disquiet over the health of constitutionalism in the United States. My focus here has been only on one aspect of the American order: the history and practice of militarism. The ethos that has ignored it, the institutional spinelessness that has permitted it, and the judicial doctrines that have justified it threaten to enfeeble constitutionalism in America. *Pace* Mansfield and Winthrop,<sup>269</sup> this is the dominant theme of the American century.

---

266. John DeWitt, *Essay III*, in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 313, 313 (Ralph Ketcham ed., 1986).

267. *But see* *THE FEDERALIST* NOS. 1, 6, 13, 22, 23, 28 (Alexander Hamilton) (invoking "empire" as both a description of and an aspiration for American constitutional order). *See also* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (where Chief Justice Marshall describes "the American union" as "a large empire").

268. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

269. *See supra* note 1.

**Appendix:****Significant Military Conflicts of the United States<sup>270</sup>**

1775-1783: Revolutionary War

1775-1783: campaigns against the British (d)

1775-1783: dispersal of pro-British Iroquois (ic)

1791: Miami (under Little Turtle) defeat Gen. Arthur St. Clair (ic)

1794: U.S. defeats Miami, Shawnee, et al., in Battle of Fallen Timbers (ic)

1794: Militias suppress Whiskey Rebellion in western Pennsylvania

1798-1801: Quasi-War with France (u)

1801-1805: First Barbary War (u)

1806-1810: anti-piracy patrols in Gulf of Mexico

1810-1814: seizure of Spanish territories in West Florida

1811: Gen. William Henry Harrison defeats northwestern tribes at Tippecanoe (ic)

1812-1815: War of 1812 (d)

1814: Gen. Andrew Jackson defeats Creeks at Horseshoe Bend (ic)

1814-1830s: anti-piracy patrols and raids in the Caribbean

1815: Second Barbary War (u)

1816-1818: First Seminole War (ic)

1818: USS Ontario seizes control of Oregon Territory

1820-1861: African slave-trade patrols

1832: Black Hawk War to expel the Sauk and Fox from Illinois (ic)

1835-1842: campaigns (including Second Seminole War) against southeastern tribes (ic)

1846-1848: Mexican War (d)

1847: Pueblo revolt suppressed (ic)

---

270. See generally MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002); *DICTIONARY OF AMERICAN HISTORY* (James Truslow Adams ed., rev. ed. 1976); *DICTIONARY OF AMERICAN HISTORY SUPPLEMENT* (Robert H. Ferrell & Joan Hoff eds., 1996); *ENCYCLOPEDIA OF CONFLICTS SINCE WORLD WAR II* (James Ciment ed., 1999); *ENCYCLOPEDIA OF THE INTERWAR YEARS: FROM 1919 TO 1939* (Mark Grossman ed., 2000); *FAMILY ENCYCLOPEDIA OF AMERICAN HISTORY* (1975); FISHER, *supra* note 96; *INTERNATIONAL CONFLICT: A CHRONOLOGICAL ENCYCLOPEDIA OF CONFLICTS AND THEIR MANAGEMENT, 1945-1995* (Jacob Bercovitch ed., 1997); *READER'S GUIDE TO AMERICAN HISTORY* (Peter J. Parish ed., 1997); *READER'S GUIDE TO MILITARY HISTORY* (Charles Messenger ed., 2001); *A STUDY OF CRISIS* (Michael Brecher and Jonathan Wilkenfel eds., 1997); Kaplan, *supra* note 11; Eric Schmitt, *U.S. Combat Force of 1,700 Is Headed to the Philippines*, N.Y. TIMES, Feb. 21, 2003, at A1, 2003 WL 13612976; Collier, *supra* note 8; Naval Historical Ctr., *Wars and Conflicts of the United States Navy*, <http://www.history.navy.mil/wars/index.html> (last modified Aug. 22, 2003).

- 1853-1854: Commodore Perry's Demonstrations and Invasions to "open" Japan
- 1854: bombardment and burning of Greytown, Nicaragua
- 1861-1865: Civil War (u)
- 1861-1865: 'Pacification' of the Navajo (ic)
- 1863-1864: retaliation, demonstration, and compulsion against Japan
- 1872: defeat of the Modoc in Oregon (ic)
- 1876: Sitting Bull and Crazy Horse defeat Custer at Little Big Horn (ic)
- 1877: Nez Perce (under Chief Joseph) defeated (ic)
- 1890: end of armed Indian hostilities at Wounded Knee (ic)
- 1898: Spanish-American War (d)
- 1899-1902: Philippine Insurrection Campaign
- 1900-1901: China Relief Expedition, after outbreak of Boxer Rebellion
- 1902-1934: Latin-American Campaigns
  - 1902: U.S. forces prevent Colombia from putting down an insurrection (instigated by U.S.) in Isthmus of Panama
  - 1903-1914: occupation of Isthmus of Panama after Colombia refuses to ratify treaty granting U.S. a right of way in Panama
  - 1906-1909: Cuban Pacification
  - 1909: USMC deployed to destabilize presidency of Jose Santos Zelaya
  - 1912-1925: 1<sup>st</sup> Nicaraguan Campaign
  - 1914: seizure and bombardment of Veracruz
  - 1914-1917: Mexican Border Campaign after *Dolphin* affair and Pancho Villa's raids
  - 1915-1934: Haitian Campaign
  - 1916-1924: USMC occupation of Dominican Republic
  - 1917-1922: occupation of Cuba
  - 1918-1919: Series of skirmishes with Mexican bandits and troops
  - 1918-1920: U.S. troops police Panama
  - 1926-1933: 2<sup>nd</sup> Nicaraguan Campaign
- 1912-1941: demonstrations, patrols, and landing parties in China, after Japanese invasion (including intensified landings and bombardments, in response to factional hostilities, 1922-1927)
- 1917-1918: World War I (d)
- 1918-1922: occupation of Vladivostok, Soviet Russia, after Bolshevik Revolution
  - 1918-1920: Allied occupation
  - 1920-1922: USMC occupation to protect US property
- 1941-1945: World War II (d)
- 1945-1949: troops occupy parts of China to support Nationalists against Japanese, then against Communists

- 1948-1949: Berlin airlift
- 1950-present: Korean Conflict
  - 1950-1953: Korean War (u)
  - 1953-present: U.S. forces police DMZ
- 1950-1955: U.S. Seventh Fleet protects Formosa from attack by Communists
- 1958: USMC deployed to Lebanon
- 1961: invasion of Cuba at Bay of Pigs
- 1962: Cuban Missile Crisis
- 1962-1975: Vietnam War and aftermath
  - 1962-1973: military operations in Vietnam (u)
  - 1962-1975: support for government of Laos
  - 1970: incursion into Cambodia
  - 1975: evacuation from Vietnam and Cambodia
  - 1975: U.S. forces retake USS *Mayaguez*
- 1965: intervention in Dominican Republic's civil war
- 1967: intervention to support government of Congo against a revolt
- 1982: participation in Multinational Force and Observers in the Sinai
- 1982: participation in Multinational Force in Lebanon
- 1983: invasion of Grenada
- 1983-1989: exercises to support Honduras against Nicaragua
- 1986: air strikes against Libya
- 1987-1988: Naval forces protect shipping lanes in Persian Gulf after Iran-Iraq War
- 1988-1989: invasion of Panama and seizure of General Noriega (Operation Just Cause)
- 1989-present: military personnel support "war on drugs" in Andean nations
- 1990-present: Persian Gulf War against Iraq
  - 1990-1991: military operations (Operations Desert Shield / Desert Storm) (u)
  - 1992-present: post-War policing of Iraq
- 1992-1993: intervention in Somalia (Operation Restore Hope)
- 1992-1995: multinational interventions in the Balkans (Operations Sharp Guard / Deny Flight / Deliberate Force) (u)
- 1993: missile attack on Baghdad, Iraq
- 1993-1994: intervention in Haiti (Operation Uphold Democracy)
- 1999: bombing of Kosovo and Federal Republic of Yugoslavia (Operation Allied Force)
- 2001-present: war against terrorism
  - 2001-present: invasion of Afghanistan (Operation Infinite Justice) (u)
  - 2003-present: USMC deployment to Philippines

2002-present: mobilization for and invasion of Iraq (Operation Iraqi Freedom) (u)

---

(d) = declared war

(ic) = Indian campaign

(u) = undeclared war



\*\*\*