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The Separation of Powers and the Public Policy Role of the State Court in a Routine Case

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Grand questions like those of tyranny and anarchy rarely present themselves in royal attire, but, instead, appear in humble garb. I wish to address the constitutional issue of the separation and balance of powers in our tripartite structure of government, but I will address it in humble dress.

Although paternity suits have long been an element of the legal landscape,[1] until relatively recently when a court was called upon to determine whether a man was the father of a particular child, the court had to rely on little more than the testimony of the mother.[2] Even with the advent of blood tests, paternity could not be proved with certainty. The process of determining paternity was subject to substantial unreliability in method and inaccuracy in results. Moreover, the law has sometimes had difficulty adapting to a changing scientific

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1. W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 156–57 (1945). Because the maintenance of "bastard" children was putting a strain on the finances of English parishes, the Poor Law Act of 1576 authorized justices of the peace to punish the child's mother and father and to require both to make periodic payments for the maintenance of the child. *Id.*

2. *See, e.g.*, McGuire v. State, 326 P.2d 362 (Ariz. 1958) (holding that there was no error in instructing the jury that it could find the defendant to be father of an unborn child solely on the testimony of the mother, provided that the testimony was credible); Medina v. Gonzales, 347 P.2d 138 (Colo. 1959) (holding that the mother's testimony as to acts of intercourse with the defendant, pregnancy, and subsequent birth within the permissible gestation period established a *prima facie* case); State ex rel. Sarnowski, 119 N.W.2d 451, 452 (Wis. 1963) ("In illegitimacy proceedings the testimony of the complaining witness that she had timely intercourse with the defendant and that she had none with anyone else is sufficient to support a verdict that the defendant is the father of the child, if the jury believed it.").

landscape.[3] The consequences of inaccuracy in paternity matters can be significant to a putative father. Not only may he be required to make child support payments, but his life will be involved with the lives of the child and the child's mother.[4]

The Alabama Legislature recognized that there had been certain advancements in genetic science.[5] With the advent of DNA testing, it became possible to determine with virtual certainty whether a particular man is a particular child's father.[6] The Alabama Legislature therefore enacted a statute that provided that anyone alleged to be a child's father would be permitted to undergo DNA testing and to compel the mother and child to undergo DNA testing to establish evidence of paternity.[7] Because DNA testing is very accurate, it ordinarily would be dispositive of a paternity case.[8] For paternity decisions that had already been made, the Legislature provided a window of opportunity for a man who had already been adjudicated the father of a particular child to reopen the case and to have this DNA evidence presented.[9] What the Alabama Legislature did, then,

3. *See, e.g.*, Ex parte Calloway, 456 So. 2d 308 (Ala. 1984) (holding that an indigent alleged father did not have a due process right to a second, more accurate blood test at state expense); State ex rel. Smith v. Roberson, 562 So.2d 1325 (Ala. Civ. App. 1989) (holding that the evidence supported the jury verdict that the defendant was not the biological father even though the mother had introduced a blood test claiming a 99.29% probability that the defendant was the biological father); Finkenbinder v. Burton, 477 So.2d 459 (Ala. Civ. App. 1985) (holding that evidence showing a 97.1% probability that the putative father was the child's biological father was insufficient to rebut the presumption that a child born during a marriage was the legitimate child of the husband).

4. *See* ALA. CODE § 26-17-15(a) (1975) ("If the existence of the father and child relationship is declared . . . the obligation of the father may be enforced in the same . . . proceedings by the mother, the child, the public authorities that have furnished or may furnish the reasonable expenses of pregnancy, confinement, education, or support . . . .").

5. Ex parte Jenkins, 723 So. 2d 649, 664 (Ala. 1998) ("I believe that the Legislature, in adopting § 26–17A–1, recognized . . . the advent of accurate scientific tests that can show paternity with certainty.").

6. E. Donald Shapro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 29 (1993) (asserting that when DNA tests are combined with other genetic marking tests, such as standard blood grouping tests and HLA tests, the Probability of Paternity can be raised to a Paternity Index of over a hundred million to one, or above 99.999999%).

7. ALA. CODE § 26-17-12(a) (1975) ("Upon application of the defendant in a paternity proceeding or any other party to the action, the court shall order the mother, child and defendant to submit to one or more blood tests to assist the court in determining paternity of the child . . . .").

8. *See* Chew v. State, 394 So. 2d 64 (Ala. Civ. App. 1981). "Paternity proceedings are of a civil nature wherein the trier of facts must be reasonably satisfied from the evidence that the defendant is the father of the child involved." *Id. See also* Shaparo et al., *supra* note 6, at 29. "When the 'Probability of Paternity' can be raised to a 'Paternity Index' of over 99.999999%, that evidence provides the trier of fact with a 'reasonable certainty' of the defendant's paternity." *Id.*

9. ALA. CODE § 26-17A-1(a) (1975) ("Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father . . . .").

was to create a statutory means of altering a court decision.

Before continuing discussion of this paternity statute, it is important to put it in a constitutional context. I recall attending a judicial conference at which a judge on the panel said, "You know, it's wonderful being a judge and knowing that all you have to do all day is what you want to do." I turned to the judge seated next to me in the audience; we agreed that, as judges, we often have do things that we do not want to do. But the difference in perspectives between the judge on the panel and the judge seated beside me says something about two judicial philosophies: the judicial activist philosophy and the judicial textualist (or restraint) philosophy.

When I was a candidate for the Alabama Supreme Court, my opponent and I participated in a debate. We were both asked what are the most difficult cases to decide. My opponent said that the most difficult cases to decide are those where the legislature had made a mistake and he had to correct it. I think this statement is representative of a judicial activist philosophy; it says something about the speaker's view of the role of a judge. The suggestion embodied in the statement is that if the legislature does not do the right thing, a judge should correct it and get the right thing done. This end justifies the judge in performing a function entrusted by the constitution to another—the legislative—branch of government, namely, the amendment of legislation.[10]

It is a struggle to meaningfully define these terms: activist and textualist. In an effort to be fair, I will give each its own positive spin. A judicial activist would say that it is the job of a judge to do what is right. A judicial textualist would say that it is the job of the judge to do what the law requires.[11] One of these philosophies, the one that requires adherence to the text of the constitution or other law, is called for by the Constitution.

Attorneys probably can recall from their law school days an exchange that occurred when the professor was discussing a case and a student said something like, "But, professor, that's not fair." The

10. *See* Orin S. Kerr, *The Strong Arm of the Law: Upholding the Law*, LEGAL AFFAIRS Apr. 2003, at 32 ("[P]erhaps the most powerful form of judicial activism is what you might call separation-of-powers activism: Judicial decision making that takes away the power to create governing rules from the executive or legislative branches and gives that power to the courts.").

11. *See, e.g.*, Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141, 142 (1998) ("[C]ourts are not just another policymaking branch of the government, but are performing the function of assuring the rule of law."). There are parallel legislative and executive philosophies characterized by the willingness of their adherents to "do what is right" or to "do what is required," but we do not often hear these parallel philosophies articulated in terms of activism and textualism.

professor responded, "Fairness has nothing to do with it." That is a good response to a first year law student who has to learn about the law. Of course, we know that fairness has a great deal to do with it.[12] But let me suggest that it is not a narrow concern for fairness. Fairness is not the only thing that matters to us because we are also concerned about popular self-government. And, in the long term, popular self-government is likely to be far more fair than tyranny.

Our state constitutions are patterned after our federal Constitution. What is it that the drafters of the Constitution were trying to accomplish? Remember, they had won their freedom, and they had already adopted the Articles of Confederation, so a system of self-government was in place.[13] Still, they recognized that serious problems remained.[14] The fundamental problem was safety.[15] There were thirteen independent states. They had entered into a loose confederation, but the central government was weak.[16] For example, taxes to the central government were voluntary, so they were rarely paid.[17] Yet, there were British troops to the north in Canada. The French were to the west, and the Spanish to the south. The most powerful nations in the world surrounded these thirteen states, and then there were Indian tribes to contend with. The newly independent Americans were outnumbered, and powerful tribes posed a great threat to those on the periphery, like Georgia and western Pennsylvania. Georgia, for example, was isolated and sparsely populated by the European settlers.[18]

Also, there were commercial problems of quotas, tariffs, and trade barriers that interfered with the welfare of the individual states.[19] The states in the south were agricultural and relied upon their ability to sell their goods.[20] The New England states were shipping states and were dependent upon trade.[21]

12. *See* McGarva v. U.S., 409 U.S. 953 (1972) (stating that the concept of basic fairness underlies all law).

13. PAGE SMITH, *The Shaping of America*, *in* 5 A HISTORY OF AMERICA 1–18 (Easton 1997) (1980).

14. *Id.*

15. *Id.* at 50–51. For example, Benjamin Rush wrote, "[A]n increase of power in Congress is absolutely necessary for our safety and independence." *Id.*

16. *Id.* at 1 ("[T]he respective states were jealous of their sovereignty and reluctant to yield up the most modest degree of authority to Congress.").

17. JAMES TRUSLOW ADAMS, THE MARCH OF DEMOCRACY 220 (1932).

18. *Id.* at 233–35.

19. SMITH, *supra* note 13, at 133.

20. DAVID HAWKE, THE COLONIAL EXPERIENCE 670–71 (1966).

21. ALAN TAYLOR, AMERICAN COLONIES 176–77 (Eric Foner ed., 2001).

How could the framers address these problems of defense and commerce? How could the drafters of the Constitution develop a central government with sufficient power to defend them against the external threats posed by foreign powers and against internal threats like that posed by the revolutionary soldiers who had not been paid for their service?[22] And how could the central government be given enough power to ensure open trade, yet not given so much power that it would soon produce tyranny?

The framers were educated people. They were aware of history, and they understood it. Democracy is a phenomenon fairly common in history and in anthropology.[23] So the framers had a historical basis on which to build. The uniform experience in history had been that when a nation becomes so large that all its citizens cannot gather and make collective decisions, it has to depend upon representative government, and it develops sooner or later into tyranny.[24]

The framers of the new constitution were faced with the challenge of creating a government that could perform these core functions, yet not result in tyranny. I believe the drafters relied upon three principles. The first principle is the rule of law. For that we look to the year 1215 and the field at Runnymede, where a group of nobles compelled King John to sign the Magna Carta, guaranteeing certain rights to the nobles.[25] These nobles had transported King John under force of arms into the countryside; yet, they felt compelled to have the king sign the document. The reason for this behavior lies in the power of ideas and, in particular, the idea of the divine right of kings; that is, the idea that the king receives his right to rule from God, and that citizens—even nobles—receive rights only to the extent that the king is willing to give them those rights. The king was required to sign the Magna Carta so that he would bind himself to the rule of law.[26] This

22. PERCY GREG, HISTORY OF THE UNITED STATES 253 (1892).

23. *See, e.g.*, SMITH, *supra* note 13, at 60 (noting that John Adam's book, *Thoughts on Government*, contained principles of government that dated back to the Greek philosophers and historians); THE FEDERALIST NO. 6, at 57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the history of such ancient republics as Sparta, Athens, Rome, and Carthage); THE FEDERALIST NO. 38, at 232 (James Madison) (Clinton Rossiter ed., 1961) (discussing the birth of the republican form of government in Crete, Athens, Sparta, and Rome).

24. SMITH, *supra* note 13, at 61 (noting that historically, "democracy was notoriously unstable; the people were passionate, volatile and easily mislead by demagogues"). The classical formula was that "democracy tends rapidly and inevitably toward anarchy" and the cure for anarchy was a dictatorship that would inevitably develop into a tyrannical monarch. *Id. See also* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188 (Richard Beeman et al. eds., 1987) (discussing Madison's cautions on the likelihood of elected rulers becoming disjoined from the electorate).

25. A.E. DICK HOWARD, MAGNA CARTA 8 (Univ. Press of Va. 1998) (1965).

26. *Id.* at 23.

was a profound development.

However, something far more profound happened on that field at Runnymede. The nobles also signed the Magna Carta, swearing to compel the king to abide by the law. This was a new concept in government—that the ruler could be forced by his subjects to obey the law.[27] This idea would eventually see its fruition in our nation's defining spiritual document, the Declaration of Independence.[28]

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . .[29]

The Declaration of Independence turned the divine right of kings on its head, saying that the people receive their rights directly from God and that the government derives its power and its rights from the people. The governors, therefore, like the governed are bound by the rule of law.

The second principle the drafters relied on is federalism. The Constitution bestowed awesome powers on the federal government, but they were enumerated powers.[30] The sovereign, constituent States, presented a counterpoise to the federal government's power, a force to keep the federal government in check.[31] Similarly, the federal power has been a significant check on the power of the State

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> The very fact that the King was forced to agree to this declaration of rights and liberties set an example that could never be erased. In a later century when Stuart Kings, to cloak their tyranny, invoked the doctrine of "Divine Right," men could look back to Magna Carta as a reminder that free men are not obliged to allow themselves to be ground into the dust.

Id.

27. *Id.*

28. *Id.* at 28–29 ("The colonists were acutely aware of [the rights granted by Magna Carta] . . . . Specific provisions of the Magna Carta found their way into colonial legislation. . . . When revolutionary fevers rose in the eighteenth century, it was upon the "rights of Englishmen," among other things, that the colonists rested their cause."). *See also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Cambridge Univ. Press 1988) (1698).

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

30. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated to the proposed Constitution to the federal government are few and defined.").

31. *Id.* at 291. Madison stated that the federal government could not exist without state governments because "[w]ithout the intervention of the State legislatures, the President of the United States cannot be elected," and that "[t]he Senate will be elected absolutely and exclusively by the State legislatures." *Id.* "Thus, each of the branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is more likely to beget a disposition too obsequious than too overbearing towards them." *Id.*

governments. Of course, we are all aware that federalism does not look today like it did 200 years ago.

The third principle on which the drafters relied—and the most significant for us in our everyday experiences as state court judges and justices—is the separation and balance of powers that we see reflected in our state constitutions. Montesquieu had suggested that the separation of powers preserves freedom for individuals.[32] His idea was that certain powers would be given to one branch, other powers to the second branch, and still others to the third.[33] Each branch would have its own domain, its own set of powers designed to assure that no single branch would be dominant, and, therefore, this separation of powers would preserve freedom for the citizenry.[34] The Constitution of the United States is an effort to put this theory of separated and balanced powers into practical effect.[35]

If our freedom truly depends on holding a nice balance, then it is critically important to ask how we recognize an encroachment, how we know when powers are not being properly segregated. To answer that question, we must know what the three powers are. What do we mean when we speak of the judicial power, the legislative power, or the executive power?

As noted *supra*, the Alabama Legislature enacted a statute that provided to the putative father of a child the right to have DNA testing performed.[36] This right was made available to those who had already been adjudicated fathers, as well as to those whose paternity had not yet been decided by the court.[37] Such a policy seems only fair. Suppose there is a man who is not the father of a particular child.

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32. CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS 157 (Cohler et al. trans., Cambridge Univ. Press 1989) (1751) ("All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised [the] three [governmental] powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.").

33. *Id.*

34. *Id.* at 151–52.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id.

35. *See* THE FEDERALIST NO. 47, at 300–08 (James Madison) (Clinton Rossiter ed., 1961).

36. ALA. CODE § 26-17-12(a) (1975).

37. ALA. CODE § 26-17A-1(a) (1975).

However, the mother of the child claimed that he is and presented her case to the court. Suppose that the court determined that the man is the father of that child. And, suppose finally that this man is now paying child support for someone else's child. Isn't this an error that needs to be corrected? Isn't it only right and fair to correct the error? Isn't that what the Legislature is doing? But there is also another concern. That concern is for freedom, and for preserving the system of separation of powers that protects our freedom.

The temptation to weaken the separation of powers often comes in very appealing attire. But, under the principle of the separation of powers, each branch of government is entitled to the preservation of its core power. More importantly, each branch is obligated by oath and by interest to protect that core power from encroachment by the other branches.[38]

The core power of the judicial branch is the power to decide individual cases.[39] In the days before the Constitution, it was quite common that when a colonial legislature disliked a decision of a court, the legislature would pass a bill overruling that decision.[40] Isn't that what the Alabama Legislature did with respect to decided paternity cases? It saw paternity cases where the court had adjudicated men to be fathers when many of them might not have been. Therefore, it enacted a statute that allowed those men to go back into court and to compel the court to hear their cases anew.[41] That is an encroachment by the Legislature on the judicial power.[42] We hear a great deal about how judges should not legislate.[43] I suggest that for

38. THE FEDERALIST NO.51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961) ("But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . [a]mbition must be made to counteract ambition.").

39. Marbury v. Madison, 5 U.S. 137 (1803) (holding, *inter alia*, that Article III established a judicial department with the province and duty to say what the law is in particular cases and controversies); Ex parte Jenkins, 723 So. 2d 649, 664 (Ala. 1998) ("[T]he core judicial power is the power to declare finally the rights of the parties, in a particular case or controversy, based on the law at the time the judgment becomes final.").

40. *See* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 33 (Richard Beeman et al. eds., 1987) (discussing the colonial individual's desire for redress of private matters within the court system without the outcome being censured by the legislature).

41. ALA. CODE § 26-17A-1(a) (1975).

42. *See* THE FEDERALIST NO. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.").

43. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 188 (1986). Justice White noted that "[t]he Court . . . comes nearest to illegitimacy when it deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . in doing so the

the same reason that judges should not legislate, legislatures should not adjudicate. And, those of us on the bench should be every bit as assiduous in our efforts to preserve our core powers as we are to ensure that we do not encroach upon the core powers of one of the other two branches.

The Supreme Court of Alabama decided in *Ex parte Jenkins* that the Legislature does not have the power to reopen final judgments in decided cases.[44] That is not to say, of course, that the Court does not hold such a power; the Court can reopen cases under certain circumstances.[45] But the legislature may not reopen final judgments, because that is the core judicial power.[46]

The core legislative power is the power to declare policy, to declare rules. The core executive power is the power to carry out those legislative policies within the limits of a certain executive discretion, meaning that the executive has discretion within certain statutory limits to choose the means by which it will execute the law.[47] Of course, none of these boundaries is neat and clear.[48] We are dealing

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Judiciary necessarily takes to itself further authority to govern the country without express Constitutional authority." *Id.* Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 190–91 (2002).

> Highly expansive or activist judicial power exceeds the scope of the court's authority under Article III of the United States Constitution. . . . The central thrust in judicial restraint is to minimize aggressive, discretionary, judicial lawmaking in areas of public importance and controversy. Some of the more notable exemplars of this view of the judicial role among American judges would include Oliver Wendell Holmes, Learned Hand, Benjamin Cardozo, Felix Frankfurter, John Marshall Harlan III, and Byron White.

Id.

44. Ex parte Jenkins, 723 So. 2d 649, 664 (Ala. 1998) (holding that to the extent § 26-17A-1 is applied retroactively to change the reopening provisions incorporated into paternity judgments that became final before § 26-17A-1 was enacted, it unconstitutionally impinges on the principle of separation of powers; however, to the extent that the statute is applied prospectively to judgments that have become final since April 26, 1994, when that section was enacted, there is no violation of the principle of separation of powers).

45. *See, e.g.*, Ala. R. Civ. P. 60(b)(6). "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).

46. *See* Plaut v. Spendthrift Farms, 115 S.Ct. 1447, 1467 (1995) (holding that Congress had violated the separation-of-powers principle in retroactively commanding the federal courts to reopen final judgments because part of the Article three power is the power to render dispositive judgments).

47. *See* THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The essence of the legislative authority is to enact laws, or in other words, to prescribe rules for the regulation of society; while execution of the laws and the employment of the common strength . . . seem to comprise all the functions of the executive.").

48. *See generally* THE FEDERALIST NO. 75, at 449–54 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the "intermixture of powers" between the divisions of government).

with a continuum that extends from the promulgation of a policy, to the execution of that policy, to the enforcement of that policy by means of a judicial decision. The question is one of line-drawing. That is always difficult, but it is a function that lawyers and judges are expected to perform.

This line drawing is made more difficult because we do not have a simple system of pure separation of powers, but one of checks and balances, in which certain powers that would be thought to belong to one branch are given to another.[49] As judges, we are bound by the distribution of powers that is provided in our constitutions. So, we may find ourselves allowing constitutionally permitted encroachments that were designed to ensure that each branch has the tools it needs to preserve its own power. After all, the drafters of the Constitution of the United States, which is the pattern for our respective state constitutions, were eminently practical politicians who understood that this is a question of power, and of contending powers, and that by providing the mechanisms and the tools for separating and distributing powers, our freedom can best be preserved.

Policy is found in constitutions and in statutes. We do not get it from the morning newspaper. If we judges are going to do our job correctly, we must examine our foundational documents that we may understand the core policies that underlie our constitutional system, and we must remain sensitive to those cases where these policies appear in strange or in ordinary guise. We cannot let the circumstances of an individual case dictate an outcome that infringes upon the mechanisms that are in place to protect freedom. As we go about the ordinary business of judging, when we find unfairness, and we are likely to, we are not always the ones positioned to correct it. In some cases it is the executive branch that should correct the unfairness. In others it is the legislative branch. And in some cases, a response to an unfairness has been left outside the charge of any department of government, and "reserved . . . to the people."[50]

Each branch of government has a dual obligation: the obligation not to exceed the scope of its charge, and the obligation to defend its

49. *See* THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (arguing for the system of checks and balances). Madison argues that unless the legislative, executive, and judicial departments are so far connected and blended as to give to each a constitutional control over the other, the degree of separation required to ensure a free government can never be duly maintained. *Id.*

50. U.S. CONST. amend X.

own competency.[51] That demands our understanding and our attention.

51. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961). "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." *Id.*