RESTRAINED AMBITION IN CONSTITUTIONAL INTERPRETATION

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The question of who may interpret the Constitution is a question of separation of powers. That question should be answered with reference to classic separation-of-powers principles. Prime among those principles is the concept of checks and balances.

Checks and balances may seem to suggest what I will call an "unrestrained ambition" model, in which each branch seeks to seize as much interpretive power as possible. Yet this model does not explain the behavior of any branch of government over any extended period of time. Even the judicial branch, which has a special prerogative in constitutional interpretation, does not conform to this model.

To the contrary, the Supreme Court has adhered to what I will call a "restrained ambition" model, under which it imposes restrictions on its own interpretive powers. Such restrictions include the so-called justiciability doctrines—standing, ripeness, mootness, the case-or-controversy requirement, *certiorari* practice, and the political question doctrine.

In this paper, I sketch a preliminary case for the restrained ambition model. In making that argument, I focus on the Court's political question doctrine. I contend that this doctrine provides a guide for the self-discipline the judiciary needs to secure its legitimacy and authority.

I then apply the restrained ambition model to executive interpretations of the Constitution. I discuss a cognate of the political question doctrine that has been proposed for the executive branch. I finally turn to recent decisions by the executive branch that have flouted this restrained ambition model. The consequences of those decisions may support the model's descriptive accuracy and normative appeal.

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I. AMBITION IN SEPARATION OF POWERS

It is sometimes said that "separation of powers" is a misnomer for the division of power among the branches. The theory of the Framers, inherited from Montesquieu, was not one in which the powers were "separated," at least in the sense of being hermetically sealed from each other. To the contrary, each branch, in pursuing its self-interest, was meant to cabin the self-interest of the others, making "checks and balances" a more appropriate term. The passage from Madison's Federalist No. 51 is familiar:

> [T]he 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. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.[1]

Madison's answer to the age-old question of who ought to guard the guardians is that the guardians ought to guard each other. Appropriate checks on human governance can be achieved not by denying the human propensity to pursue self-interest, but by channeling that self-interest toward legitimate ends.

The Madisonian view of checks and balances is at once too cynical and too naïve. The theory is cynical in assuming that individuals will generally not transcend their own self-interest. It is naïve in presuming that self-interest can be made to serve the collective good in a straightforward manner.

In this paper, I suspend these criticisms to make a different point. I argue that an embrace of the Madisonian theory does not commit any branch to an unremitting pursuit of power. I distinguish between two models here—unrestrained ambition and restrained ambition. In the unrestrained ambition model, each branch pursues every advantage it can possibly achieve. In the restrained ambition model,

1. THE FEDERALIST NO. 51, at 288 (James Madison) (Robert Ferguson ed., 2006).

institutions impose restraints on themselves not in spite of, but because of, that self-interest. I maintain that the restrained ambition model is both a more accurate description of how constitutional interpretation occurs and a more normatively desirable way of engaging in such interpretation.

II. RESTRAINED AMBITION IN THE JUDICIARY

To make the descriptive and normative case for restrained ambition, I begin with the judiciary. I do so because the judiciary has long been recognized as having a special role in constitutional interpretation. At least since *Marbury v. Madison*[2] established the power of judicial review, the judiciary has been deemed the default ultimate interpreter of the Constitution.

The familiar account of *Marbury* rightly casts it as a "masterwork of indirection,"[3] insofar as it seizes power for the judiciary even as it appears to relinquish it. Chief Justice Marshall sacrifices the pawn of Marbury's commission to seize the power of judicial review. And that is not his only sacrifice. Before he reaches the question of whether the Judiciary Act of 1789 conflicts with the Constitution, Marshall considers the possibility that the question might be political in nature. Although Marshall ultimately rejects this possibility, he acknowledges a category of decisions made by the political branches that the Court cannot review.

The political question doctrine is a doctrine of justiciability. Other such doctrines include standing, ripeness, mootness, the bar on advisory opinions, and (for the Supreme Court) *certiorari* practice. The justiciability doctrines underscore the idea that the there can be rights without judicially enforceable remedies.[4]

All these doctrines are self-imposed restrictions that suggest that the judiciary is operating under the restrained ambition model. When it follows these doctrines, the judiciary is not being checked externally by another branch. It is constraining itself.

Of the justiciability doctrines, the political question doctrine most fully elaborates why the Court adheres to the restrained ambition model. The ostensibly definitive elaboration of the political question

2. 5 U.S. (1 Cranch) 177 (1803).

3. ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960).

4. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

doctrine lies in *Baker v. Carr*.[5] In that case, the Court stated that "[p]rominent on the surface of any case held to involve a political question is found" either:

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

These six circumstances can be reduced to three principles—*commitment*, *competence*, and *comity*. Framed more expansively, the principles are: (1) textual commitment by the Constitution of decision-making to another branch of government (circumstance (a)); (2) a lack of institutional competence (circumstances (b) and (c)); and (3) a special need for inter-institutional comity (circumstances (d) through (f)).

These self-imposed restrictions are fully consistent with the pursuit of institutional ambition. Like other parts of the case in which it was first elaborated, the political question doctrine reflects a paradoxical stance with regard to judicial power. The judiciary is insisting on its own prerogative to interpret the Constitution at the level of determining what constitutes a political question even as it ostensibly surrenders that prerogative at the level of relinquishing the power to answer that question. It is no fortuity that *Marbury* is the fountainhead of judicial restraint as well as of judicial review.

The doctrine can also be seen as an enabling constraint. The doctrine internalizes the predicted "checking" effects of the other two branches, imposing them imaginatively *ex ante* to preempt their actual imposition *ex post*. While the doctrine represents a constitutional interpretation that occurs within one branch, it nonetheless reflects the ambitions of all three.

5. 369 U.S. 186, 217 (1962).

6. *Id.*

III. RESTRAINED AMBITION IN THE EXECUTIVE

Current events have reanimated the question of whether and when the executive can interpret the Constitution. A general if not uniform consensus exists that the executive can and should engage in independent constitutional interpretation in some circumstances. The devil is in ascertaining when those circumstances obtain.

The political question doctrine can be helpful here both directly and analogically. The direct implication of the doctrine is that the political branches should engage in independent constitutional interpretation when the judiciary is incompetent to enforce a particular constitutional provision.[7] That is, if we assume (1) that the Constitution is generally enforceable and (2) there are only three branches that can enforce it, the abdication of part of the field by the judiciary would leave that portion to be digested by the other two. The direct implication of the political question doctrine can be seen as aggrandizing the power of the other two branches to interpret the Constitution.

Yet the political question doctrine also has an analogical implication, which counsels restraint. If the judiciary finds the political question doctrine to be an enabling constraint, the other two branches may find cognate restraints to enlarge rather than to limit their own ambitions.

In fact, principles elaborated by the Office of Legal Counsel stand as analogues of the political question doctrine for the executive branch. The so-called Dellinger Memorandum[8] articulates the principles of textual commitment, institutional competence, and inter-branch comity set forth in *Baker*.

With respect to textual commitment, the Memorandum states that one of the Supreme Court's fundamental axioms is that "where '[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised,' the constitutional procedures must be followed with precision."[9] That statement merely states what the Court believes the Constitution requires. But in the next paragraph, the opinion adopts this understanding—and Supreme Court precedent in general—as its own

7. Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1224 (2006).

8. The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996), at 1996 WL 876050 (O.L.C.).

9. *Id.* at *3 (quoting INS v. Chadha, 462 U.S. 919, 945 (1983)).

guide: "Our analyses are guided and, where there is a decision of the court on point, governed by the Supreme Court's decisions on separation of powers."[10]

With respect to institutional competence, the Dellinger Memorandum maintains: "While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution."[11] The Memorandum then produces the chestnut from *Marbury* that, "'It is emphatically the province and duty of the judicial department to say what the law is.'"[12]

With respect to comity, the Memorandum, quoting Justice Jackson's *Youngstown* concurrence (through *Mistretta v. United States*), emphasizes the importance of "separateness but interdependence, autonomy but reciprocity."[13] On the side of autonomy, the Memorandum discusses how Congress (the classical villain in a separation of powers analysis) is expected to show coordinate branches respect, stating that Congress's attempts to aggrandize its own power or otherwise to prevent other branches from carrying out their constitutionally prescribed duties will be checked as unconstitutional.[14] On the side of reciprocity, however, the Memorandum is careful to underscore the importance of "a degree of deference to legislative judgments."[15] Legislation that affects only general separation of powers principles, rather than implicating the anti-aggrandizement principle "is subject to less searching scrutiny."[16]

The Dellinger Memorandum's show of self-restraint suggests that political question doctrine is not simply a Bickelian "passive virtue."[17] Under Bickel's account, the judiciary must check itself because of its insulation from the external check of electoral

10. *Id.*

11. *Id.*

12. *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

13. *Id.* at *2 (quoting Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

14. *Id.* at **5–6.

15. *Id.* at *3.

16. *Id.* at *6.

17. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (1962).

politics.[18] On this account, the justiciability doctrine cabins overreaching specific to the judicial branch.

The adoption of the restrained ambition model by the Office of Legal Counsel, however, suggests that the utility of such restraint is not specific to the judiciary. Read against the Dellinger Memorandum, the political question doctrine looks less like a specific response to the counter-majoritarian difficulty and more like an instantiation of inter-branch comity that each branch will be rewarded for embracing

A critic might object that executive self-restraint is still distinguishable from judicial self-restraint. Every branch has the incentive to mouth the words of commitment, competence, and comity. It may be that the judiciary—and only the judiciary—has the incentive to *act* on these grounds because of the additional need to dissolve the counter-majoritarian difficulty. This objection can be met by looking at what the executive actually does, rather than what it says.

Recent executive practice is equivocal on this issue. On the one hand, the Bush White House and Office of Legal Counsel repeatedly flouted the principles outlined in the Dellinger Memorandum. As Jack Goldsmith, who headed Office of Legal Counsel for a period during the Bush administration, recounts in his book *The Terror Presidency*,[19] the 9/11 attacks presented less the cause than the occasion for the administration to shore up the executive branch.[20] Goldsmith describes how attempts to preserve inter-branch comity—by encouraging collaboration with Congress or by bringing executive action within the ambit of established Supreme Court precedent—were repeatedly rebuffed.[21]

On the other hand, Goldsmith concludes that this executive unilateralism was self-defeating. Goldsmith argues that presidential prerogatives would have been more secure if the executive branch had not taken such an extreme "go-it-alone" attitude.[22] Recent decisions

18. *Id.* at 16–23.

19. JACK GOLDSMITH, THE TERROR PRESIDENCY (2007).

20. *Id.* at 89 (observing that "Cheney and the President told top aides at the outset of the first term that past presidents had 'eroded' presidential power, and that they wanted 'to restore' it so that they could 'hand off a much more powerful presidency' to their successors").

21. *Id.* at 124.

22. *Id.* at 140.

by the Court, he posits, represent the condign punishment for this executive overreaching.[23]

If Goldsmith's account is correct, it stands as a cautionary tale for future executive departments. A rational successor to the Bush administration would engage in self-restraint before restraint was thrust upon it. This would be the case even if its sole goal was to increase departmental power.

Much more, of course, would need to be said before this could stand as an argument. But the analysis raises an intriguing possibility regarding the Madisonian vision of separation of powers. The genius of the Madisonian scheme may not lie solely in how it makes the guardians guard each other. It may also lie in how it makes them guard themselves.

23. *Id.* at 207.