The Constitution and the Art of Practical Government

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I would like to look at the current culture of our constitutional law, at what might be called our constitutional style in dealing with questions of separation of powers. A major problem of constitutionalism is: how can a society have a stable and lasting constitutional structure—one that is not constantly being tinkered with by amendment—and, at the same time, be capable of institutional innovation, adaptability, creativeness? A good constitution must, in part, be architectural: it must define the major political institutions of the society and allocate powers and duties among them. But changing circumstances will lead a politically healthy society—one that is creative and ingenious—to invent new institutions and adapt old ones to meet unanticipated needs. A constitution that is architecturally too severe or too rigid either denies the society the possibility of institutional renewal or soon becomes a constitution that needs constant tinkering.

It is of course a commonplace that the United States Constitution seeks to answer this problem through structural provisions that are brief, general, and unspecific, laying down general rules and aspirations rather than detailed code-like regulations. Somewhat less generally remarked is the fact that our dominant tradition has been to interpret these provisions—the basic separation of powers and checks and balances machinery of our Constitution—in a manner that is fundamentally pragmatic, undogmatic, and adaptive. We have mostly assumed that the Framers were practical adaptability and flexibility and ingenuity are as much needed for the survival of the political as of the biological species. If we look at our Olympus of great jurists—Holmes and Brandeis, Hughes and Learned Hand, Marshall and Jackson and Frankfurter—there is an intensely pragmatic strain that unites them. And, of course, European jurists never tire of pointing out how illogical, even incoherent, are our constitutional theories of separation of powers and checks and balances.

This saving sense of the practical has, I believe, been a critical component of our ability to interpret our constitutional provisions in a manner that permits institutional innovation and experimentation. Time and again in the history of our Constitution we have developed needs that seem to have been unperceived or only dimly perceived by the Framers; yet we have succeeded, in an improvisational and somewhat untidy way, to adapt their document to these needs, while at the same time adapting our own expediencies to their fundamental ideals and aspirations. There has been a huge and brilliantly successful ingredient of lawyers' practical wisdom in the history of our constitutional theories about governmental structures and separation of powers.

Let me give three brief examples. The first lies in a branch of my own subject of federal jurisdiction. The text of Article III of the Constitution appears to contemplate that if what it
calls the "federal judicial power" is to be exercised at all, it must be exercised by courts constituted in accordance with the prescriptions of Article III—that is, by courts that perform only a judicial function, and that are staffed by judges whose tenure and salary is protected for life by the Constitution itself. But this apparently simple and majestic contemplation soon proved unable to withstand the test of practical needs. Since the beginning of our constitutional history circumstances have demanded the creation of special and/or temporary and/or specialized tribunals for which the use of life-tenured judges performing an exclusively judicial task through the apparatus of conventional adjudication would have been awkward and ill-adapted. The territories needed temporary tribunals; the military needed a specialized institutional jurisprudence adapted to its needs; the advent of the modern industrial state produced a need for high-volume, low-visibility tribunals—workmen's compensation is the most obvious example—using informal and expeditious procedures to assure quick and inexpensive justice; the rise of the modern administrative state has led to experimentation with administrative adjudication by agencies that are at the same time involved in policy-making, rule promulgation, and enforcement. How can we justify this huge array of institutions that are not Article III courts but are nevertheless busily engaging in what, from a functional viewpoint, can only be described as the exercise of the federal judicial power—that is, are busily deciding cases and controversies arising under federal law? Over some two hundred years the United States Supreme Court has struggled with this question and has made it into one of the most arcane and unruly branches of constitutional
law that you can imagine. But the important bottom line is that the power of Congress to create such institutions has, until recently, been unanimously and massively confirmed. The theory has been extremely unsatisfying and murky; much of it satisfies George Kaufman's crack about a learned book, that it fills a well-deserved gap in the literature. But the practical subtext has been triumphantly successful. A hundred experiments with special and temporary adjudicative institutions of all kinds have been undertaken, while at the same time the central political function of Article III has been amply safeguarded through the technique of a powerful doctrine of judicial review that assures that the legality of the power exercised by these tribunals will be controlled by the regular courts staffed by independent life-tenured judges.

"Creative administration requires vast rule-making discretion . . . to generate the specialized expertise that successful government in a modern industrial setting demands."
servative constitutional purists, the calls for separation-of-powers rigidity have begun to have an effect on the courts.

Here are some straws in the wind. Three years ago, for the first time in our two hundred years of constitutional history, the Supreme Court, in the Marathon Pipe Line decision, invalidated an Act of Congress that gave special tribunals—in this case, special bankruptcy courts—the power, subject to judicial review in the Article III courts, initially to adjudicate a special category of cases arising under federal law. The partial invalidation of the bankruptcy courts was a historic event. It is characteristic of this field that no opinion commanded the votes of a majority of the court, and the case may be a fluke, a narrow and special invalidation that will prove to be without generative power. But I regard the case as an ominous portent. If its reasoning becomes pervasive, our ability to experiment with new sorts of specialized tribunals and our flexibility to invent new forms of administrative adjudication will be sorely crippled. The constitutional power of the federal government to participate in the “alternative forms of dispute resolution” movement will be hobbled. For two hundred years we have managed to accommodate the spirit of Article III without trapping ourselves in doctrinal prisons that destroy our freedom to innovate and prevent us from creating new adjudicative institutions. It would be a grave mistake to close ourselves into such a prison today.

Straw in the wind number two is the celebrated Chadha decision, which invalidated the legislative veto. The tual case against the validity of the legislative veto was, I must avow, quite powerful. Nevertheless, the case seems to me to be devoid of practical wisdom. The legislative veto is an ingenious political device designed to maintain some semblance of legislative control and supervision in an environment where huge delegations of discretionary legislative power to the executive are routine. Once these delegations are themselves upheld as valid—as they have been—it seems to me oddly pedantic—a search for an innocence long lost—to invalidate this modest countervailing checks-and-balances device. In any event, it seems to me an extremely happy accident that for some fifty years we were allowed to experiment with various forms of legislative veto, and that invalidation came after we had learned a great deal about the uses and abuses, benefits and disadvantages of this device.

Straw in the wind number three is the litigation, not yet decided, challenging the validity of the Federal Trade Commission on the ground that the Commission’s “independence” from presidential control violates the Constitution. Let us assume for the moment that the theory of Humphrey’s Executor may be flawed and that the notion of the nonpolitical expert agency as an independent source of public policy may be unreal. And it is true that we have not created new independent agencies for a long time and are spinning some of the old ones back into the regular departments. Nevertheless, it seems to me that it would have been a serious mistake if the country had been told at the beginning of the historical experiment with the independent agency—in 1890 or 1915—that it could not proceed with the experiment; if the Constitution had been interpreted from the beginning to prevent the country from experimenting with an ICC, an FTC, an FCC. Ex post, some of these agencies may seem flawed; but there are some (SEC, Federal Reserve) that count as quite remarkable successes. In any event, should we not have the opportunity to try things out? If the country wants to experiment with the notion of scientific, non-political administration, should it be told that the Constitution simply prohibits the experiment from being set on foot? Progress depends to some extent on learning from failures, or, more accurately, from the mix of successes and failures that innovation tends to generate. In my view, the twentieth-century experiment with the independent agencies has been a fruitful and enriching experience, one that our Constitution should not be read as disabling us from undertaking.

“Gramm-Rudman is an important and innovative political experiment.”

I come, finally, to the current controversy about Gramm-Rudman, the budget-balancing law adopted by the last Congress. You all know that this has been challenged in the courts. It is said that the Constitution is violated by Gramm-Rudman because under the statute the Comptroller—an official appointed but not removable by the President—plays a big role in making the findings relating to national income and expenditure that in turn will trigger the automatic spending cuts required by the Act. The statute is also under attack because specific spending cuts and levels dictated by the statute are not voted by the then-sitting Congress but are mandated by pre-existing formulas. Interesting theoretical arguments can be formulated on both sides of this constitutional debate. But the point I want to make is that the issue is not one merely of constitutional theory. Gramm-Rudman is an important and innovative political experi-
ment designed to dissolve a problem on which the political system has managed to achieve gridlock. It is sniffed at by some on the ground that it is cowardly and evasive—that it uses the escape hatch of automatic formulas to force action that the political system does not have the courage to take. This criticism seems to me overly severe, even sanctimonious. It asserts that it is wicked to sugarcoat a pill, that strategic maneuvers designed to counterbalance and mitigate our own lack of courage are ignoble and despicable. My opinion is to the contrary. In personal life as well as in political life, it is wise and important that we can sometimes borrow courage by resorting to stratagems and formulas and tricks that will make it easier to do what is right. Who does not sometimes say, “I don’t have the courage and the will to do this now on my own, but I will enter into a sort of scheme or bargain that will in effect force me to do it later”? Why should countries disable themselves from likewise fortifying their courage? It seems to me that Gramm-Rudman is an ingenious tactical experiment, a creative institutional gamble to make it possible to swallow the bitter but necessary pill.

What strikes me as absolutely unacceptable and crazy is that the country should be told, at the very inception of this experiment, that it is not permissible, because the Constitution must be interpreted rigidly to require that every official who participates in the making of findings that will trigger automatic budget cuts must not only be appointed by the President but must also be removable at his pleasure. Why, suddenly, are we engaging in this riot of pedantic separation-of-powers purity? Why are we being nagged to interpret the Constitution in this masochistic fashion? Benjamin Franklin and Madison and Hamilton would be astonished and offended by this pettifogging. They understood quite clearly that separation of powers must be understood “as the expression of a general attitude rather than an inexorable table of organization.” If some exact form of separation is taken as a literal prescription, the processes of government will be strangled.

Our genius and style as a constitutional democracy have always included a deep notion that the necessities of the time constitute an important element in public policymaking. Our interpretation of the constitutional provisions defining separation of powers—provisions that, after all, do not define individual rights, but are the elements of an organic architectural design—has always been informed by this notion. During Watergate, we invented the device of the independent prosecutor to investigate the President, rejecting the unwelcome and constraining assertion that it is flatly unconstitutional to give a federal prosecutor independence from presidential control. It would have been a great historical disaster if we had been told we could not do that. My plea, in sum, is for us to maintain a measure of the American tradition that the art of government must be seasoned with a solid dose of what might be called practical ethics.

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I realize, of course, that what I am advocating may take me into dangerous waters. I do not think generally that mere expediency is a touchstone for constitutional adjudication. I am not one of those who believe that the intentions of the Framers do not count; I do not think that we are free to read into the Constitution whatever our current desires dictate. How, then, can I justify the proposition that a practical sensitivity to the necessities of the time should be an important ingredient in interpreting the constitutional provisions respecting separation of powers?

The matter is, I must admit, highly problematical, and I do not have a complete answer. My submission is that a rigid reading of the separation-of-powers provisions is wrong as a matter of interpretation; that it was, precisely, the intention of the Framers that these provisions be understood as setting out very general guidelines rather than as defining a rigid table of organization. Indeed, if we look at the Constitution as a whole, we see that its fundamental genius, its most pervasive institutional tactic, is not separation of powers at all; rather, it is checks and balances—a mixing of functions rather than a rigid separation among them. The President participates in many important ways in the process of legislation; the legislature has important on-going supervisory powers over executive appointments and policies; the courts can trump the executive and legislative branches, but their jurisdiction and personnel are subject to regulation. I could go on giving a hundred examples to show how untidy and un­doctrinaire our Constitution is in this respect. In such a setting, it seems to me bad interpretation to make a rigid separatist dogma out of the few sparse words, vesting the legislative and executive and judicial powers in the three branches, that constitute the basic allocation.

Finally, one slightly different point. Until about twenty years ago, institutional experimentation was greatly facilitated by the fact that various justiciability doctrines guaranteed judicial restraint by making it difficult to challenge the validity of the experiment. Doctrines of standing, ripeness, and political question were available to avoid or postpone constitutional adjudication. The experiment thus proceeded even though the courts had not upheld its validity. It seems to me regrettable that the weakening of these justiciability doctrines has made inevitable immediate judicial intervention at the start of every institutional innovation. Indeed, nonjusticiability doctrines themselves can be characterized as reflecting the virtues of practical and prudent wisdom that have historically imbued our public law over the years.

In any event, my principal aim has not been to debate constitutional doctrine. It is a plea about constitutional style. We have learned a great deal from the influx of theoretical rigor that has infused our academic study of law in the past fifteen years. But, as a society, I hope we do not swallow wholehog the love affair the professors are having with issues of theory and methodology. The American style of pragmatic common sense has been a saving solvent in the history of our constitutional development. I hope we do not abandon it.