1989

A Comment on the Rule of Law Model of Separation of Powers

Robert F. Nagel
University of Colorado Law School

A COMMENT ON THE RULE OF LAW MODEL OF SEPARATION OF POWERS

ROBERT F. NAGEL*

President Verkuil's paper is a careful and realistic effort to consider separation of powers from the lawyers' perspective. By this I mean that his aim is to refine rules and doctrines that can be used to implement constitutional principles in sensible, consistent ways. As quixotic as it may be to resist the attractions of legal thinking when it appears in such a thoughtful and familiar form, I want to comment on some of the negative consequences of treating the Constitution as a legal document. My general view, which I have expressed at some length elsewhere,[1] is that lawyers' intellectual inclinations are dangerous to constitutional values. Because the essay under consideration is such an admirable example of how we lawyers customarily approach constitutional issues, it affords a challenging opportunity to apply my somewhat grumpy perspective to one conception of separation of powers.

I.

Let me begin by sketching what I mean by "lawyers' intellectual inclinations." Although I make no effort here to explain why certain instincts and habits are common to the legal culture, I hope that my brief description will be recognizable and plausible. First, lawyers are not at home with plain or obvious meaning. Our job and our skill are often to find a subtle or surprising interpretation. Second, because so many disputes that are resolved through adjudication involve individuals, we tend to conceive of constitutional issues in terms of rights that belong to individuals, rather than in terms of more abstract matters like public understanding or organizational structure. Consequently, we tend to be more interested

* Moses Lasky Professor of Law, University of Colorado School of Law; Lee Visiting Professor, Spring 1989, Marshall-Wythe School of Law, College of William and Mary.

1. R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (forthcoming 1989).

in operational rules—precise, containable, usable formulations—than in theory. Third, we have an understandable, sometimes touching, inclination to favor judicial processes and judicial power over less familiar alternatives.

These characteristics of lawyers' thought are often appropriate and helpful—which is why lawyers are so influential, especially in giving effective meaning to our Constitution. However, I believe these characteristics and that influence also help to account for the other-worldly quality that pervades so much of modern constitutional law. The legal mind, to use only one of many available examples, has made it somehow credible, even compelling, to find in the Constitution a whole set of rights involving a kind of behavior—sexual behavior—that without doubt is no part of the subject matter of the Constitution's content or design. In the case of Verkuil's argument, the legal mind makes it credible that a law vesting in the judiciary much of the appointment and removal power over important federal prosecutors is consistent with a principle that places the executive power in the office of the President.

Observe the foundation for this surprising conclusion: principles of political theory are dismissed as excessively abstract and open-ended. Separation of powers, therefore, must be understood as a conventional legal concept, sufficiently specific to provide a "doctrinal foothold." How is such a foothold to be found? Naturally by analogizing separation of powers to a series of constitutional provisions, such as the bill of attainder clause and the due process clause, that seem more workable because they involve rights that attach to individuals and protect values that are juridical. A general organizational principle thus becomes a sort of backstop for catching those laws that somehow get through the specific prohibitions against conflicts of interest or, more generally, against threats to "the rule of law." A theory with strong populist antecedents—from the seventeenth century British Levellers through America's Jeffersonian democrats[2]—becomes a justification for expanding unaccountable judicial power. This rule of law model, although more in tune with the aristocratic principle of balance than with separation, is intended to operationalize separation of powers. If successful, the model would reduce the principle to a contains-

2. *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

ble set of doctrines that would allow for consistent invalidation of certain egregious laws while leaving room for legislative experimentation and growth.

Building on this foundation it is possible to conclude that the Ethics in Government Act does not violate separation of powers. The principal objection to this conclusion—what makes it at first glance so startling—is that the principle of separation prohibits the merging of the functions of different departments unless some constitutional provision permits it,[3] and the Act plainly merges the judicial and executive functions in an important way. However, a good legal mind can immediately and justifiably dismiss the primary meaning of separation of powers as a maxim, a simplistic and uncontainable assault on the competing constitutional principle of balance, which often permits and sometimes requires merged functions. Although lawyers' doctrines cannot usually resolve the clash of great organizational principles except through a naive formalism, they can (we are told) resolve the narrower conflict within the executive branch. Indeed, if separation of powers applies mainly to intrabranch conflicts, a powerful and immediate reason exists to approve the Act. After all, the criminal laws that the President is under a duty to faithfully execute are—insofar as the Ethics in Government Act applies—aimed at executive officers themselves. This "conflict" can be resolved by entrusting some executive power to the judiciary. According to the rule of law model, separation of powers is enhanced, not violated, by the merging of functions.

The obvious difficulty with this approach is that it substitutes one kind of concern (conflict of interest within a branch) for another (the merging of functions among competing branches). According to what theory does resolving the former take precedence over preventing the latter? Here we lawyers resort to a pragmatic doctrine, not theory.[4] Verkuil proposes[5] that the general principle

3. For some standard formulations of this view, see Myers v. United States, 272 U.S. 52, 127 (1926); Marshall v. Gordon, 243 U.S. 521, 536 (1917); Mugler v. Kansas, 123 U.S. 623, 662 (1887); Kilbourn v. Thompson 103 U.S. 168, 191 (1880).

4. I do not mean to separate myself from the tradition that I am criticizing. I once proposed a very similar doctrinal solution. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 697-706 (1978).

5. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 327-28 (1989).

against merging functions will not be excessively subordinated if merger is permitted only when the objective is sufficiently important and the means chosen are the least restrictive way of achieving the purpose.[6] With the exceptions to the pure principle of separation cabined by a "test" used in many other areas of constitutional law, a sensible sort of accommodation appears to have been struck.

All this is the kind of proficient constitutional argument that we lawyers aspire to make. Its conventionality is demonstrated by the Court's recent adoption of a very similar position in *Morrison v. Olson*, in which the Court sustained the Ethics in Government Act.[7] My doubt is that, as right as the analysis is step-by-step, it may be wrong overall. As I said at the outset, even thoughtful legal analysis can be dangerous. In the next section, I try to show that Verkuil's approach leaves out or undervalues important considerations in a way that can undermine constitutional values.

II.

Resort to the rule of law model to operationalize separation of powers submerges political theory, but does not avoid it. Consider President Verkuil's treatment of the delegation doctrine. He notes that when the legislature affirmatively grants some of its power to the executive branch, normally no "conflict of interest" exists because both branches have agreed to share power. Having largely dismissed the objection to merging functions, he next considers various other types of "conflicts," concluding that attention should focus on "the potential for . . . biased decision-making [rather than] on legislative abdication."[8] Many violations of separation of powers, however, do not involve "conflicts of interest" in this sense. By enacting the Immigration and Naturalization Act, both the Congress and the President agreed to its one-house veto provision, and this agreement did not remove the relevant conflict.[9]

---

6. In *Morrison v. Olson*, the Court did not employ precisely this test. It did ask, however, whether the means were carefully designed to achieve their purpose, which (like Verkuil's proposal) is a common doctrinal inquiry. *See* 108 S. Ct. 2597, 2613 (1988).

7. *Id.* at 2622.

8. Verkuil, *supra* note 5, at 321.

9. INS v. Chadha, 462 U.S. 919 (1983).

Similarly, the President "agreed" to share with Congress executive power over the Comptroller General, and this agreement did not make that merging of functions permissible.[10] When President Truman seized the nation's steel mills, he claimed he would honor a congressional objection,[11] which was not forthcoming. Even in the *Steel Seizure Case*, then, it is doubtful that an unequivocal conflict of wills was a prerequisite to invalidation.

The reason why a "conflict" in this sense ought not to be a prerequisite for unconstitutionality is that the principle of separation is based on a theory that requires differentiation of function. Consent to inappropriate merging of functions, under that theory, is consent to an unconstitutional arrangement. On its face the theory, wise or not, does not have to do with conflict but with merger.

The rule of law model submerges the theory behind separation of powers when it emphasizes a practical inquiry into bias. Of course, there may be some aspect of the theory of separation that permits merger of functions when both branches consent; and, of course, there may be some constitutional theory that explains why "biased" executive decision making is unconstitutional under either the due process clause or some residual meaning of separation of powers. The rule of law approach to the delegation doctrine, however, is surely incomplete without elaborating such a theory.

The substitution of practical inquiries for political theory is dangerous because judicial review is so influential in defining the relevant constitutional issues for the public. If the Supreme Court accepts as constitutional all legislative delegations except those involving some version of executive "bias," a fundamental understanding on which our system rests is jeopardized. That understanding is best conveyed, perhaps, in the sort of maxim that is so unsatisfactory to the modern legal mind. As Justice Black put it, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[12] I do not claim that maxims always make for good opinions. However, when the judiciary defines basic constitutional principles according to the re-

10. Bowsher v. Synar, 478 U.S. 714 (1986).

11. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 676-77 (1952) (Vinson, C.J., dissenting).

12. *Id.* at 589.

quirements of practical inquiry and polished opinion-writing, those principles can be drained of their simplest and most important meaning. At a minimum, legislators ought not to be taught that the only constitutional considerations relevant to a delegation of rule-making authority are their own consent and the possibility of executive bias. Put more generally, the rule of law model offers no intellectual resistance to the erosion of one thing we know our system depends on: widespread agreement that our legislators themselves are responsible for making the difficult choices that underlie social regulation.

A similar set of difficulties arises when we examine the rule of law approach to the Ethics in Government Act. As I said earlier, that Act is thought to implement separation of powers because it reduces the bias inherent in the President (and his Attorney General) prosecuting other members of the executive branch. Moreover, it is thought that the Act does not diminish executive authority unnecessarily, in part because the Attorney General is permitted to remove the independent counsel for good cause, such as incompetency. The courts are assigned the task of sorting out whether the removal was permissible or was for the purpose of aborting an investigation about to uncover executive wrongdoing.

The rule of law model takes it as axiomatic that something is wrong with the kinds of tensions created when the executive branch investigates itself. Perhaps these tensions are always unhealthy, but treating this kind of "bias" as self-evidently opposed to "the rule of law" only submerges the necessary theoretical explanations. Suppose the worst case. If the President and his Attorney General decide to remove an independent counsel because an investigation is threatening to uncover their own illegal conduct, it is still not obvious that their decision is improper or that separation of powers should permit judicial control over the removal decision. No one believes that every violation of law must or should be prosecuted. If the President's policies generally implement the strong preferences of the electorate, he may have institutionally sound reasons for wanting to protect his appointees from prosecution. Although some problematic theory might be used to defend a rule that prosecution is appropriate, one cannot simply assume that the value of democratic accountability at the most significant

levels of government always is inferior to the value of prosecuting specific criminal laws.[13]

Focusing attention on the doctrinal question of whether the Act is more intrusive into executive authority than necessary substitutes a practical inquiry for important theoretical questions. Again, this model can be dangerous for the maintenance of elementary aspects of the constitutional design. Putting aside notions of institutional bias for a moment, one avenue for correcting abuses under our constitutional system is quite clear. When the people determine that lawlessness in the executive branch is sufficiently serious, they can get redress by voting the President out of office or by removing him in accordance with the impeachment provisions.[14] For these constitutional remedies to work, however, the people must accept their responsibilities and must be ready to use their power. Basic aspects of the constitutional system depend on intangibles—on attitudes, sentiments, understandings, and psychological predispositions—despite the fact that concern for intangible conditions is foreign to the kind of pragmatic operationalism that dominates modern legal thought. The rule of law model has already seriously eroded the public's readiness to oversee the Presidency by short-circuiting a conscientious impeachment investigation of a sitting President.[15] The Ethics in Government Act institutionalizes a similar transfer of power and responsibility from the political branches to the courts. Under the Act neither the President, the Congress, nor the people need to weigh the importance of individual prosecutions against the achievement of preferred public policies or other relevant considerations.[16] This crucial judgment is now to be made by an independent officer subject to judicial oversight. As I said a moment ago with respect to the delegation doctrine, the rule of law model offers no intellectual resistance to the erosion of one thing on which we know our system

13. For an analogous situation in which the Court gave priority to voters' preferences, see Powell v. McCormack, 395 U.S. 486 (1969).

14. *See* Morrison v. Olson, 108 S. Ct. 2597, 2638-39 (1988) (Scalia, J., dissenting).

15. United States v. Nixon, 418 U.S. 683 (1974). *See* Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

16. For enumerations of some of these considerations, see *Morrison*, 108 S. Ct. at 2628-29, 2638-39 (Scalia, J., dissenting).

depends: widespread agreement that it is the responsibility of the public itself (and its elected officials) to decide when executive lawlessness is intolerable.

III.

In his dissent in *Morrison v. Olson*, Justice Scalia characterized the majority opinion as lawless:

> Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. . . . Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. . . . This is . . . ad hoc judgment.[17]

Against the allegedly lawless balancing of the majority, Justice Scalia proposed a straightforward textualism. The issues, he said repeatedly, are "clear" and "plain."[18] The case should be resolved by reference to the simple principle announced in article II: "The executive Power shall be vested in a President of the United States."[19]

There is an innocence about this conception of lawfulness. After all, the *Morrison* opinion is not, despite Scalia's outraged attack, especially unusual. As President Verkuil's paper illustrates, realistic functionalism is usually praised as a sophisticated alternative to simplistic maxims and other crude manifestations of literalism. Although the majority opinion is somewhat opaque in its reliance on matters of degree, its basic approach is surely consistent with modern understandings of both law and adjudication. Indeed, in going beyond the apparent clarity of the text, the Court engaged in the

---

17. *Id.* at 2640-41.

18. *Id.* at 2625 (suggesting that to describe the case is to decide it), 2626 (reducing the issue to whether statute deprives President of exclusive control over executive authority), 2628 (arguing that it is not for the Court to decide how much purely executive power must be kept in the office of the President), 2629 (referring to the "clear" constitutional standard), 2632 (relying on "common usage"), 2633 (relying on dictionary meaning), 2634 (describing historical intent as "clear"), 2635 (claiming "there is no doubt about [the fact that the independent prosecutor is not subordinate to President]"), 2641 (describing the relevant constitutional principle as quite plain).

19. *Id.* at 2641 (quoting U.S. CONST. art. II).

kind of creative analysis taught in every law school. If *Morrison* is lawless, much of modern constitutional law is lawless, for it is entirely normal for the courts to balance, to qualify, to distinguish, and to complicate.

Although Justice Scalia's obstinate insistence on simplicity runs against the current, his approach has its own claim to sophistication. Because constitutionalism involves the preservation of basic institutions, it depends on public understanding and support. I believe that the creative balancing engaged in by the majority opinion is fundamentally antithetical to the kinds of stable assumptions, instincts, and beliefs that undergird the system. Under this view, however, the deficiency in *Morrison* is not its lawlessness. The deficiency is that its lawfulness—its recognizably sophisticated, legalistic quality—is unsuited to the task of preserving constitutional arrangements.

If "lawfulness" can undermine constitutionalism, judicial decisions that are good for the constitutional system may not be admirable under traditional legal norms. Useful opinions, like that of Justice Black in the *Steel Seizure Case*,[20] sometimes have to convey difficult political theories in simplified terms. Moreover, because fidelity to constitutional principles requires not only public understanding but also public support, there are severe limitations on how consistently courts can apply even their useful holdings. Doctrinaire enforcement of the theory of separation of powers might eventually undermine popular acceptance of the principle, much as pre-1937 enforcement of federalism reduced acceptance of that principle. Indeed, from the perspective of support for constitutional values in the wider political community, the strongest aspect of *Morrison* is not its legalistic craft, but its possible political acumen. If separation of powers became linked in the public perception with protecting criminal scheming in the executive branch, another constitutional value (along with separation of church and state, free speech, and the right against self-incrimination) would appear unwise to important segments of the public. Similarly, although the invalidation of the legislative veto may have taught a useful and simple lesson about the mechanics of legislating, the

20. 343 U.S. 579 (1952).

consistent extension of *INS v. Chadha*[21] could be constitutionally harmful if the bureaucratic state were thereby made significantly less accountable. An intellectually rigorous application of Justice Scalia's disapproval of the Ethics in Government Act might (despite his disclaimers) threaten the Court's approval of independent administrative agencies in *Humphrey's Executor v. United States*.[22] If so, even his useful insistence on a basic, simple principle might discredit separation of powers in the long run by preventing necessary administrative adaptations. In this event, Scalia's position could be kept useful to constitutionalism only by abandonment of the legalistic criterion of consistency

My main point, however, is not that opinions of doubtful legal quality can be constitutionally useful. The important point is that good legal thinking can be constitutionally dysfunctional. If we lawyers insist that our habits and standards should constrain how the Constitution is to be understood, we should face up to how our intellectual norms may be destructive to constitutional values. If the development of pragmatic doctrine helps us lose sight of our Constitution's basic design—under which the Congress should be held accountable for making the laws and the President for executing them—sophistication will have helped do us in.

21. 462 U.S. 919 (1983).

22. 295 U.S. 602 (1935). Justice Scalia adhered to the position that "the line of permissible restriction upon removal of principal officers lies at the point at which the powers exercised are no longer purely executive." 108 S. Ct. at 2636 (Scalia, J., dissenting). Yet he also described the category of " 'purely executive' functions" as unclear and irrational. *Id.* Given this concession and Scalia's emphatic view that is not for the courts to determine how much purely executive power must be preserved for the President, one can certainly conclude from his opinion that all "independent" agencies ought to be found unconstitutional.