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.

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 regatuesti18c'l ambition.cdi for power-5.f-i(cia) forircum dm

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 when t.

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*

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