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Book Review: The Constitution as Political Structure. by Martin Redish.

Richard W. Murphy

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First Amendment jurisprudence impressive. I plan to keep it handy as a ready reference.

THE CONSTITUTION AS POLITICAL STRUCTURE.

By Martin Redish.[1] New York: Oxford University Press. 1995. Pp. 229. Hardcover, $39.95.

Richard W. Murphy[2]

In *The Constitution as Political Structure*, Professor Martin Redish argues that the Supreme Court has ignored or mangled the Constitution's federalism and separation-of-powers requirements. He suggests that, contrary to the suggestions of some scholars, the Supreme Court has a duty to vigorously and consistently enforce these provisions for at least two reasons. First, the Court should enforce them because they are in the Constitution. If one values rule of law (and Professor Redish obviously does), then one should enforce the *whole* Constitution—it's cheating to pick favorite provisions. Second, he argues that the Constitution's structural provisions are a great bulwark against tyranny. To ignore them is to risk sliding down the slippery slope to loss of liberty.

In light of these reasons, Professor Redish contends the Supreme Court should: put real limits on the reach of Congress's Commerce Clause power (strongly foreshadowing the majority opinion of *United States v. Lopez*[3]) (p. 49-61); demolish the (mythical?) Dormant Commerce Clause (p. 63-98); abandon functionalist approaches to separation-of-powers in favor of a "pragmatic formalist" approach (p. 99-134); and adopt a "political commitment" approach that would put teeth (though, it turns out, not sharp ones) into the doctrine that the legislature cannot delegate legislative power (p. 135-61). Along the way, Professor Redish discusses the normative political theories that underlie the Constitution's structural provisions and offers quick critiques of competing scholarly views concerning their interpretation.

This book's greatest strength is its often devastating critique of the Court's federalism jurisprudence. Professor Redish per-

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1. Louis and Harriet Ancel Professor of Law, Northwestern University.

2. Law Clerk to the Honorable Stephen S. Trott, 9th Circuit; J.D. *suma cum laude* University of Minnesota Law School, 1995; B.A. Carleton College, 1987.

3. 115 S. Ct. 1624 (1995).

suasively argues that the Court should protect residual state sovereignty by enforcing real limits to the Commerce Clause rather than by grafting meaning onto the tautological Tenth Amendment. (pp. 39-49) He describes the Dormant Commerce Clause as "little more than a figment of the Supreme Court's imagination" (p. 98) and argues with great force that it is a perversion of the Constitution's text and structure. (p. 63-98) Professor Redish does a wonderful job of diagnosing the disease of doctrinal inconsistency.

He is less successful in showing that he has found effective cures. With the notable exception of the suggested cure for the Dormant Commerce Clause (i.e., get rid of it), the standards Professor Redish suggests for interpretation and enforcement of the Constitution's structural provisions might well prove little more coherent (or effective for the protection of liberty) than the Court's current approaches.

Still, according to Professor Redish's view of things, reform of the status quo is crucial because vigorous, correct enforcement of these provisions—particularly separation of powers—is vital for the protection of liberty against creeping tyranny. This premise is no doubt true to a certain extent. Perhaps, however, it underestimates the sturdiness of the governmental scheme the framers designed—a system probably strong enough to withstand a judiciary that, through little (if any) fault of its own, has a hard time deciding the hard cases governed by the vague language of the Constitution's structural provisions.

Professor Redish covers a remarkable amount of ground in his short book. To better highlight the strengths and weaknesses of *The Constitution as Political Structure*, however, the remainder of this review narrows the focus to a mere two of Professor Redish's primary suggestions: that the Supreme Court revivify federalism by enforcing real limits to Congress's Commerce Clause power, and that the Court reinvigorate separation of powers by adopting his "pragmatic formalist" approach to constitutional interpretation. Examination of these two suggestions indicates that, to switch metaphors, although Professor Redish has shown where the doctrinal roof leaks, he, like the Supreme Court (or probably anybody else for that matter—it's that kind of problem), does not know how to fix it. Fortunately, maybe a leaky roof is not so bad.

I

The Constitution as Political Structure offers powerful and timely criticisms of the Supreme Court's current approach to federalism problems—particularly as they relate to the Tenth Amendment and the Dormant Commerce Clause. Professor Redish's discussion of the proper reach of federal power, however, also betrays a fundamental (though eminently understandable) weakness in his book. In essence, he argues that the Supreme Court should abandon attempts to use the Tenth Amendment to protect state sovereignty and should instead do so by enforcing real limits to the Commerce Clause power—an approach the majority of the Court has since attempted to adopt in part in *United States v. Lopez*.[4] However, like the majority opinion in *Lopez*, Professor Redish offers little conceptual guidance to frame future Commerce Clause decisions.

Professor Redish's criticisms of Tenth Amendment jurisprudence, however, are incisive. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Supreme Court itself notes on occasion, this amendment is essentially tautological. On its face, it simply means that the federal government enjoys only those powers granted it by the Constitution.

As Professor Redish relates, the tautological nature of this amendment did not stop the Court from using it in *National League of Cities v. Usery*[5] as a backstop to protect the states from a voracious federal government armed with the seemingly absolute power of the Commerce/Necessary and Proper Clause combination. (p. 43-44) The *National League of Cities* Court held that the Tenth Amendment creates an "enclave" of state power that is immune from and affirmatively limits the federal government's exercise of its enumerated powers. (p. 43) Congress therefore cannot use its Commerce Clause power "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ."[6]

In *Garcia v. San Antonio Metropolitan Transit Authority*, a 5-4 Court overruled *National League of Cities* partially on the reasonable grounds that nobody could tell what a traditional governmental function was or why anyone should care.[7] *Garcia*'s

4. 115 S. Ct. 1624 (1995).
5. 426 U.S. 833 (1976).
6. 426 U.S. at 852.
7. *Garcia*, 469 U.S. 528, 538-39, 545-47 (1985).

central theme is that the states primarily protect themselves from an overweening federal government by virtue of their participation in the political process that forms the federal government. (p. 39-42) They do not need (or have) an ill-defined enclave of traditional governmental function protection from Big Federal Brother.[8] According to Professor Redish, *Garcia* "probably amounted to an almost total judicial abdication of any role in enforcing constitutional protections of federalism . . . ." (p. 23)

The Court partially unabdicated in *New York v. United States*, in which it ruled that the Congress cannot use the Commerce Clause to "compel the States to enact or administer a federal regulatory program."[9] The federal government can preempt state laws with federal laws; it can bribe states to pass laws, but it cannot force states to write their laws according to federal dictates. As Professor Redish tells the story, the *New York* opinion, like *National League of Cities*, seems ultimately to rest on the idea that states enjoy an enclave of sovereign power that affirmatively limits the federal government's enumerated powers. (p. 44-45) The *New York* enclave, however, is far smaller than the *National League of Cities* enclave.[10]

Professor Redish rejects both enclave and abdication approaches to federalism. He insists the Tenth Amendment is a sort of "exclamation point" designed to emphasize that the federal government enjoys only those powers that the Constitution gives it. (p. 44) This amendment therefore does not carve out additional enclaves of state sovereign power from areas that would otherwise fall within the scope of federal power. By the same token, however, Professor Redish argues that the Court should not take the overly-deferential *Garcia*esqe approach of trusting the political process to protect federalist values. Instead, the Court should adjudicate the Constitution as written and enforce federalism by refusing to permit Congress to step beyond the limits of its enumerated powers. (p. 48-49)

The root of Professor Redish's abdication critique is the idea that the Supreme Court has allowed the Commerce Clause—with liberal help from the Necessary and Proper Clause—to usurp such gargantuan powers that it has turned into a Congress-can-do-anything Clause, transforming the United States from a

8. Id. at 556-57.

9. 112 S. Ct. 2408, 2435 (1992).

10. But perhaps just as confusing. See *Mack v. United States*, 66 F.3d 1025, 1030-33 (9th Cir. 1995) (Brady Act does not violate Tenth Amendment in post-*New York* world), *petition for cert. filed*, 64 U.S.L.W. 3642 (U.S. Mar. 12, 1996) (No. 95-1478). But see *Koog v. United States*, 79 F.3d 452, 457-61 (5th Cir. 1996) (It does.).

federalist to a consolidated, national government. (p. 49-51) The modern Commerce Clause's reach is, of course, largely a function of the doctrine that Congress may regulate activities which substantially affects interstate commerce.[11] The required level of "substantial affect" is hardly self-evident. Therefore, because everything is connected to something else, one could colorably argue that Congress can regulate anything.

To fend off this absurdity, Professor Redish exhorts that the Commerce Clause must have *some* limits. He offers the following illustration:

> For example, if Congress were to enact the proposed domestic violence legislation rendering family violence a federal crime, and were to purport to ground the act in its commerce power, the Court should hold the legislation unconstitutional. Any connection between the act and commerce of any kind, much less interstate commerce, is simply too remote. If such a law were upheld, it would be difficult to imagine *any* federal legislation that would fall outside the scope of the commerce power. And it is this inquiry that the Court must make when asked to review the constitutionality of statutes grounded in the commerce power that affect interstate commerce in at most speculative or remote ways. Before upholding such laws, the Court must be able to contemplate conceivable statutes that would exceed constitutional limits. While this mode of analysis is admittedly both awkward and difficult, there would seem to exist no viable alternative to a Court that simultaneously wishes to extend Congress's power yet adhere to the limits of the Constitution.

(p. 51) Thus, the thrust of the argument is that unless *some* conceivable statutes exceed Congress's commerce power, the Constitution's federalist structure means nothing. This argument is perfectly sound, so far as it goes; but, left to itself, does little to provide specific guidance on how to corral the commerce power.

Professor Redish does, however, give two more concrete examples of ways to begin this process. First, he suggests that the Court should be less deferential when determining whether an activity "affects" interstate commerce—and thus falls within Congress's regulatory grasp. (p. 53-56) Professor Redish argues that the Court's rational basis approach to this inquiry often merely masks judicial abstention. He suggests that, if the Court is going to use this deferential standard (he implies that more

11. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

searching scrutiny may be appropriate), it must at the very least *really* apply it.

Professor Redish's second suggestion is that the Court limit use of the "class of activities" doctrine of *United States v. Darby*, which allows Congress to regulate "intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."[12] (p. 56-59) He maintains that this doctrine has been improperly extended to allow Congress to regulate intrastate activities even where they are not so commingled with interstate activities as to render impractical regulation of solely the interstate portion.[13]

Supreme Court adoption of these two suggestions would no doubt curb Congress's reach somewhat. However, they do not really hack at the "substantial affect" source of the Commerce Clause's almost plenary power. Thus, Professor Redish does not so much suggest a theory that could coherently limit the Commerce Clause power as he espouses an attitude that it *should* be limited.

In this respect he is in very good company—the majority (albeit a slim one) of the Supreme Court. The Court's opinion in the 1995 case *United States v. Lopez*[14] reads a little as if Chief Justice Rehnquist had just read the federalism chapters in *The Constitution as Political Structure*, and it shares the same (perhaps inevitable[15]) difficulty—it exhorts that the Commerce Clause must not mean that Congress can do everything, but it imposes no framework for determining when Congress has gone too far.

In *Lopez*, the defendant challenged a law that made it a federal crime "knowingly to possess a firearm at a place that [he] knows . . . is a school zone."[16] Five of the Justices joined in an

12. 312 U.S. 100, 121 (1941).

13. Professor Redish cites *Perez v. United States*, 402 U.S. 146 (1971), as an example of this practice. In *Perez*, the defendant was convicted of loan sharking in violation of the Consumer Credit Protection Act. He argued that Congress could not regulate his activities, which he maintained were solely intrastate. The Court, relying on a "class of activities" rationale (i.e., loansharking in general is bad for interstate commerce), disagreed and upheld his conviction. Professor Redish persuasively argues that, because Perez's criminal case required individualized adjudication, it would not have been impractical to create a regime which allowed defendants to prove that their activities were entirely intrastate and thus beyond Congress's reach. Therefore, *Perez* marked an unnecessary and improper extension of federal Commerce Clause power. (p. 57-59)

14. 115 S. Ct. 1624 (1995).

15. Id. at 1634 ("These are not precise formulations [of the limits of the commerce power], and in the nature of things they cannot be.").

16. 18 U.S.C. § 922 (q)(2)(A) (1994).

opinion that struck this provision because the mere activity of possessing a gun in a school zone does not substantially affect interstate commerce. The government made various arguments to the effect that violence harms learning and thus will harm the economy, etc. The five rejected the government's arguments, reasoning that if such indirect effects were sufficient to bring an activity within the reach of Commerce Clause legislation, then Congress could regulate anything and federalism would be meaningless.[17] Four Justices dissented, in part because they accepted the government's (obviously true—to some extent or another) argument that guns in school zones affect interstate commerce.[18]

This 5-4 split indicates that, in hard cases, whether an activity "substantially affects" interstate commerce depends on little more than the length of the Justices' collective feet. What does it take to substantially affect interstate commerce? Well, apparently the Justices know it when they see it.[19] The mushiness of this standard is not a problem for those who don't worry too much about the balance of state and federal power. It is more of a problem for those, such as Professor Redish and perhaps the *Lopez* majority, who genuinely wish to consistently rein in the Commerce Clause. To reach this result, a clearer doctrine than the I-know-it-has-a-substantial-effect-on-interstate-commerce-when-I-see-it test must evolve. Justice Thomas makes a similar point in his concurrence in *Lopez* in which he suggests reconsideration of the "substantial effects" test on the grounds that it offers no principled way to keep the federal government from swallowing the states.[20]

II

Professor Redish admits that, given two hundred years of legal and social developments, it is late in the day to expect con-

17. 115 S. Ct. at 1632 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.").

18. Id. at 1659-62 (Breyer, J., dissenting).

19. Not that this "standard" is necessarily a bad one. See Paul Gewirtz, *On "I Know It When I See It"*, 105 Yale L.J. 1023 (1996).

20. 115 S. Ct. at 1642-43 (Thomas, J., concurring) ("While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. . . . In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.").

stitutional federalism, by itself, to work as intended "as a truly effective check on the concentration of political power." (p. 99) The states may no longer be able to prevent federal tyranny. He therefore reasons that it is all the more vital that the federal branches check one another to forestall tyrannical concentration of power in any one branch. Thus, the Supreme Court should vigorously and consistently enforce separation of powers.

According to Professor Redish, however, the Supreme Court suffers from a "split personality" when it comes to enforcement of separation of powers. (p. 3) Sometimes the Court applies the constitutional text "with a formalistic vengeance." (Id.) Often, however, the Court relies on ad hoc functionalist tests that find no support in the Constitution's text or structure and "appear[ ] to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another."[21] (Id.) Under one such functionalist approach, the Court strikes down interbranch usurpation of power where the usurping branch acquires "too much" power or interferes "too much" with the workings of the usurpee branch. Under another approach, the Court balances the evils of a given interbranch usurpation against the benefits the usurpation creates. (p. 125)

Professor Redish argues that unadorned functionalism is bad in the separation-of-powers context for two reasons. First, it is bad not to enforce the Constitution as written. Second, the separation-of-powers structure required by the Constitution was designed as a "prophylactic" to prevent creeping tyranny. By abandoning this structure, the Court creates the danger that it will, on a case-by-case basis, gradually destroy the balance of power necessary to prevent one of the branches from assuming tyrannical powers. (p. 106-08)

But the answer to functionalism is not a narrow formalism. Rather, to halt our slide down the slippery slope to tyranny, Professor Redish suggests the Court adopt a "pragmatic formalist" approach to separation of powers. (p. 100-02) He describes this method as follows:

> The mode of interpretation I employ throughout my analysis of the Constitution's structural provisions is a type of "pragmatic formalism"—one that rejects the constraints that flow from an all-or-nothing approach to constitutional interpretation. By this I mean that one need not—and should not—be

21. Others have also noted the Court's formalist/functionalist split personality on separation of powers. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1732-38 (1996).

> forced to make a choice between rigid, abstract formalism on the one hand and totally unguided and unlimited judicial pragmatism on the other. One may legitimately accept that the nature of a constitutional system imposes on the judiciary an obligation to engage in principled, consistent analysis and to make decisions that are capable of rational reconciliation with governing textual directives, yet simultaneously recognize that within those confines there exists room for the judiciary to take at least some account of pragmatic concerns.

(p. 9-10)

The formalist part of this approach is "grounded on the deceptively simple principle that no branch may be permitted to exercise *any* authority definitionally found to fall outside its constitutionally delimited powers." (p. 100) Professor Redish is quick to acknowledge that defining the branches' powers is not an easy job. The constitutional text is ambiguous; words' meanings may evolve through time, etc. In this respect, however, he notes that defining branch power is really no harder than defining similarly vague constitutional provisions, i.e., "due process," "speech," etc. (p. 101) He insists that those who wish to interpret the Constitution must use its text.

Pragmatic formalism is pragmatic in three senses. First and foremost, Professor Redish argues that an appropriate dose of formalism is pragmatic because it is instrumentally necessary for separation of powers to serve its vital "prophylactic" function of preventing tyranny:

> "Pragmatic formalism" . . . is a "street-smart" mode of interpretation, growing out of a recognition of the dangers to which a more "functional" or "balancing" analysis in the separation-of-powers context may give rise. It recognizes that once a reviewing court begins down those roads in the enforcement of separation of powers, no meaningful limitations on interbranch usurpation of power remain. More importantly, it recognizes that even if functionalism and balancing could be employed with principled limitation, any such interpretational approach inherently guts the prophylactic nature of the separation-of-powers protections, so essential a part of that system.

(p. 100) Second, pragmatic formalism is pragmatic because it requires the Court to look to *policy* in addition to tradition, precedent, and linguistic analysis when narrowing the definitions of ambiguous constitutional provisions. (p. 101) Third, Professor Redish allows for the possibility that a branch's exercise of 'definitionally proper' power may allow that branch to interfere with the workings of another branch to a degree that threatens tyr-

anny. For such instances, Professor Redish suggests the Court adopt a "supplemental functionalist" model, which would supplement pragmatic formalism by invalidating ("formally" constitutional) exercises of power which would allow a branch to unduly interfere with the other branches' proper operation. (p. 119-20) Such functionalism by itself is "too shaky a foundation to assure protection of separation of powers", but it is a useful pragmatic backstop that "can fill certain gaps left by exclusive use of a definitional formalist approach." (p. 120)

Perhaps the most attractive aspect of Professor Redish's loose-reined approach is that it takes words (and thus the possibility of law) seriously, but, at the same time, does not overestimate our capacity to make and follow rules on how we interpret words. Words matter. For instance, the history of this country is different than it would have been without a written constitution. Under our relatively democratic political system, the judiciary, notwithstanding any epistemological problems, is bound to apply the words of the Constitution as representing the will of the sovereign people. Professor Redish is thus quite right to insist that the application of the Constitution to cases should always rationally—there's the word that does the work: rationally—relate to the words of the Constitution.

By the same token, Professor Redish recognizes that words aren't always easy to use—particularly words like "judicial," "executive," and "legislative." Therefore, definitional inquiry (e.g., What does "executive" mean?) must be flexible. He does not attempt to give a complete account of the pragmatic factors that guide this flexibility, and this is probably how it should be. The decision-making process is too rich (and variable across people) to be completely cabined by lists of rules suitable for self-conscious application.

However, for this same reason, although pragmatic formalism seems a good habit of mind, it is not obvious that, as a practical matter, it would make much difference in many separation-of-powers cases. This approach is sufficiently malleable (and separation-of-powers requirements sufficiently ambiguous) that it would probably allow the Court, in good faith, to reach largely the same results that it does now.

Professor Redish acknowledges this criticism but argues that his pragmatic formalist approach nonetheless would channel Court decisions more than functionalist approaches:

> Though there will no doubt be close cases [using the pragmatic formalist approach], both historical tradition and linguistic

> common sense will impose restrictions on the Court's use of purely pragmatic factors in its separation-of-powers analysis. To be sure, a Court *not* acting in good faith could manipulate the suggested standard into meaninglessness. But that is just as true of any conceivable doctrinal standard, for the interpretation of any constitutional provision. In any event, to do so would impose costs on the Court's institutional capital that open and admitted use of functionalism would not. The Court looks considerably sillier when it stoutly maintains that a fish is a tree than when it explains that, under appropriate constitutional theory, it simply does not matter whether the item in question is a fish or a tree.

(p. 102) Professor Redish's point is no doubt true to a certain extent. It is usually obvious, however, whether a thing is a fish or a tree. As a general matter, it is probably less obvious whether a power is legislative, executive, or judicial—at least in cases that make it to the Court.

The problem of the independent counsel discussed in *Morrison v. Olson*[22] perhaps most dramatically illustrates this point. This case is Professor Redish's prime example of the evils of functionalism. He describes it as a "total failure of the judicial function" and a paradigmatic example of a case in which his pragmatic formalist approach would lead to a different result than functionalism. (p. 115) Just suppose Congress sets up a statutory scheme under which the Attorney General must, under certain limited circumstances, request that a special court appoint and define the jurisdiction of independent counsel with the power to investigate and prosecute members of the executive branch and that the executive may only remove such counsel for good cause. Plus, certain members of Congress can request that the Attorney General seek appointment of independent counsel, and they also enjoy oversight over such counsel's activities.[23] A functionalist might inquire whether this grant of power so interfered with the workings of the executive (or aggrandized the judiciary and legislature) as to be unconstitutional.[24] A pragmatic formalist, by contrast, would inquire whether the power to prosecute is definitionally part of the executive power. As part of this definitional inquiry, the pragmatic formalist would turn to policy, tradition, precedent, and linguistic analysis to shed light on what "executive" means. Our pragmatic formalist might well conclude

22. 487 U.S. 654 (1988).

23. For the rest of the details, see Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591-599 (1994).

24. See, e.g., *Morrison*, 487 U.S. at 691-92.

that prosecution is a "quintessentially executive function."[25] After reaching this conclusion, she would (and this is the "formal" part) necessarily conclude that the independent counsel law was unconstitutional. She would reject mushy tests designed to somehow determine if this grant of admittedly executive power to the judiciary and legislature was nonetheless constitutional because it did not interfere with the executive judiciary and legislature too much or make the other branches too strong. Thus, at first glance, *Morrison v. Olson* is a strong candidate for the pragmatic formalist junkpile. (p. 115, 124)

On the other hand, pragmatically turning to *policy* to define difficult words like "legislative," "executive," and "judicial" naturally infuses the definitional process with the same sort of functionalist mushiness Professor Redish criticizes in other approaches. In fact, once one allows policy to guide the process of defining a truly ambiguous word, pragmatic formalism may, as a practical matter, collapse into pragmatism, i.e., functionalism. For instance, what is the policy behind separation of powers? One answer is that separation of powers serves to protect political liberty by preventing tyrannical concentrations of power—as would exist, for instance, if the legislature had the power to both write and enforce law.

Turning back to *Morrison*, it is by no means obvious whether the independent counsel law advances or retards the anti-tyranny policy of separation of powers. One could cogently argue that, in the late twentieth-century state with its immense administrative apparatus and its (formerly?) imperial presidency, the independent counsel is an excellent means to sap the strength of the mighty executive. It follows that the policy behind separation of powers is best served by allowing independent counsel. To the degree this policy result pragmatically defines "executive," it advances the notion that the independent counsel law is constitutional.

Professor Redish would no doubt respond that policy may be an important factor in fashioning one's pragmatic definitions, but, at a certain point, one simply goes too far. (p. 118) Control of prosecution is, as Justice Scalia would have it, historically a "core" executive function. No amount of policy can change this brute historical and precedential fact. Thus, for an honest and rational legal mind, pragmatic formalism really would compel the result that the independent counsel law is unconstitutional.

25. Cf. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

This response has force. Even in legal culture, there is a limit to how far words can be pushed around before people get upset. For instance, it seems a safe proposition to bet that, within our lifetimes, the word "executive" will not generally mean "bunny rabbit," no matter how useful such a result might be from a policy standpoint. The problem of the independent counsel law does not present so obvious a case. To the degree one allows a functional analysis to enter the definitional argument, one can argue, with a perfectly straight face, that the word "executive," for separation-of-powers purposes, does not encompass the independent counsel's power.[26] The majority in *Morrison* probably would have had little trouble doing so. Thus, it is not obvious that self-conscious adoption of pragmatic formalism would change judicial decisionmaking.[27]

On a conceptual level, another problem bedeviling the pragmatic formalist approach to separation of powers is the tension between policy analysis and Professor Redish's view that separation-of-powers doctrine must serve as a "prophylactic" that prevents all interbranch encroachment, no matter how minor. (p. 114-15) On the prophylactic view, we cannot trust the Court to apply a functional approach and guess when an encroachment gives too much power to a given branch. To effectively serve the policies behind separation of powers—although the Court must use common sense to derive its definitions of "executive," "legislative," and "judicial"—the Court *must* apply these definitions prophylactically to hermetically seal the branches from one another.

However, there is something odd about strictly applying definitions that have been loosely developed. Professor Redish straightforwardly declares that policy (along with tradition, precedent, and linguistic analysis) may inform the process of defining ambiguous constitutional text. Policy analysis is functional analysis. It examines the goals behind a text and fashions an interpretation that best serves those goals. Thus, if the goal of separation of powers is to protect political liberty, the Court, in fashioning its definitions of the powers of the three branches, must consider what definitions best serve political liberty.

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26. For such an argument, see Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994). For a forecful rebuttal, see Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994).

27. Indeed, if quizzed, many Justices and judges might respond that pragmatic formalism is a pretty good description of the approach they take to interpretation already.

The prophylactic argument depends for its power, however, on the proposition that the Court cannot tell what results best serve political liberty. Thus, the pragmatic formalist definitional process seems to require (or at least allow) a form of policy analysis which the Court is not competent to do. It's a vicious circle.

A second, perhaps more interesting, difficulty with the prophylactic approach is that it may rely on a too judicialocentric view of the workings of government that exaggerates the Court's role in the separation-of-powers struggle.[28] Professor Redish's argument rests on the notion that it is vitally important that the Court get its separation-of-powers jurisprudence *right*. The argument runs something like this: Separation of powers is a bulwark of liberty—without it, the individual protections of the Bill of Rights are nothing but paper. The Court defines separation-of-powers law. If it messes up, then so much for liberty. The Court is bound to mess up if it adopts anything other than a prophylactic approach to separation of powers. It is therefore urgent that the Court adopt this approach.

Fortunately, the Framers' design is probably stronger than this argument presupposes. Separation-of-powers gives each branch tools which enable ambition to counteract ambition.[29] The Court gets to decide cases. It justifies its decisions with opinions which the other branches and the citizenry generally follow as authoritative. Thus, although the Court does not have guns or money, it has words. These words are the Court's tools in the separation-of-powers struggle.

Any time the Court writes an opinion on separation of powers, it self-consciously uses its particular power to shove the boundaries of branch power—sometimes to profound effect, as a simple hypothetical illustrates. Suppose Chief Justice Marshall had ended *Marbury v. Madison* with the following paragraph:

> Then again, Congress has just as much right to interpret the Constitution as I do—perhaps even more, because Congress is the branch closest to the people, and it is the people's Constitution. I was just kidding about that judicial review stuff.[30]

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28. For an interesting and extended discussion of how the branches deploy their powers in the separation-of-powers struggle, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L. Rev. 217 (1994).

29. Federalist 51 (Madison) in Garry Wills, ed., *The Federalist Papers* 262 (1982).

30. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

History would be very different, partially because such a result in *Marbury* would have grossly undermined the Court's future ability to compete in the separation-of-powers struggle successfully.

On a more general level, Supreme Court opinions on *any* topic can affect the balance of branch power. For instance, the Supreme Court can undermine its authority by producing poorly reasoned opinions—or, much worse from a realpolitik point of view, *unpopular* opinions. The power, however, of any given decision to damage a Court staffed by relatively sane Justices is probably limited. This is an institution that has survived *Dred Scott*[31] and *Plessy v. Ferguson*.[32]

Of course, the other branches also shove at the boundaries of branch power—FDR's Court-packing plan being one notable example of this practice. Sometimes the law of unintended consequences grabs hold. Perhaps the Court-packing plan concentrated the Justices' minds on finding ways to hold New Deal legislation constitutional, but it also blew up in FDR's face politically.

At least for the last two hundred years, however, no branch has managed to expand its power to the point of delivering an obvious knock-out blow to another branch. Seen from this broader perspective, cases such as *Morrison*,[33] *Bowsher v. Synar*,[34] and *Mistretta v. United States*[35] surely alter the balance of branch power at a given historical moment, but do not change the fundamental and brute fact that the Constitution puts three institutional heavyweights into a ring where they are free to bash each other.

Judicialocentrism tends to obscure this obvious point because it causes people to dwell on the hard cases that reach the Supreme Court. The power of separation of powers, however, largely resides in its ability to keep the easy cases from ever occurring. For instance, Congress, although it tries to weaken the President from time to time, has not tried to reduce the President to a ceremonial figurehead à la the Queen of England. Similarly, Congress does not make a habit of trying cases that have been heard by the courts. This list could be continued indefinitely.

The Supreme Court has had two hundred years to muck about with separation-of-powers doctrine. Over that time, scores

31. 60 U.S. (Howard 19) 393 (1856).
32. 163 U.S. 567 (1896).
33. 487 U.S. 654 (1988).
34. 478 U.S. 714 (1986).
35. 488 U.S. 361 (1989).

of Justices—each with his or her own somewhat idiosyncratic view of the law—have sat on the bench. Scholars have denounced separation-of-powers jurisprudence as a mess. But the Republic endures, at least more or less. These historical facts tend to indicate that the Court need not rush to change its approach to separation of powers to prevent a slide into tyranny.

III

The Constitution as Political Structure is timely and well worth reading, particularly for its wonderful savaging of the Supreme Court's approach to federalism. Its criticisms of current Court and scholarly doctrines on the Tenth Amendment, the extent of Congress's Commerce Clause power (albeit pre-*Lopez*), the Dormant Commerce Clause, and separation of powers (in general and as applied to the problem of delegation of legislative power) are thought-provoking and in several instances compelling.

With the exception of its prescription for the destruction of the Dormant Commerce Clause, however, this book does not provide a sufficient framework for a coherent reworking of the Court's approach to federalism and separation of powers. Also, the book's arguments on the need for reform are not always persuasive. Professor Redish has done an excellent job of diagnosing the doctrinal diseases afflicting the Constitution's structural provisions. He is less successful in showing that we need cures and that his would work.