

Interbranch Tangling: Separating Our Constitutional Powers
The Charles Evans Hughes Lecture
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I begin by expressing enormous gratitude to the New York County Lawyers' Association for adding me to the dazzling roster of lawyers across the profession who have delivered the annual Charles Evans Hughes Lecture, starting with Harvard Dean Roscoe Pound, including several Chief Judge predecessors and deans of my alma mater, and my first ever mentor when I joined the litigation department of Sullivan & Cromwell back in the year 1962, a full half-century ago.

And on the subject of significant anniversaries, could there be a more serendipitous moment for a lecture named for Charles Evans Hughes? I think not. I'll start with some confluences and anniversaries that make this lecture so especially well timed.

Just one hundred and fifty years ago – April 11, 1862 to be exact – Charles Evans Hughes was born in Glens Falls, New York to parents of modest means and high ideals. I feel especially fortunate to be giving this prestigious lecture on the 150th anniversary of the birth of one of the towering figures of 20th century America -- brilliant lawyer and law teacher, dedicated public servant, Governor of the State of New York, Secretary of State, narrowly defeated presidential candidate, Justice and later Chief Justice of the Supreme Court of the United States. How on earth, I wonder, did he miss service in the Legislature – he covered everything else! And as he moved from post to post, in the

interstices he filled his spare time with presidency of the New York County Lawyers' Association, the New York State Bar Association and the American Bar Association, as well as founding the distinguished Hughes, Hubbard law firm.

About Hughes, Learned Hand wrote "Sure-footed time will tread-out the lesser figures of our day; but, if our heritage does not perish, the work of this man and his example will remain a visible memorial of one who helped to keep alive and pass on that ordered freedom without which mankind must lapse into savagery."¹

A Coincidence of History

Staying with anniversaries for the moment, it was 75 years ago that Chief Justice Hughes led the Supreme Court of the United States through the most serious challenge ever mounted to its exercise of constitutional power. By that, of course, I have in mind President Franklin Roosevelt's court-packing plan, proposed in response to the Court's nullification of significant portions of the President's New Deal legislation. President Roosevelt, by the way – like Chief Justice Hughes – was also a former New York State Governor. They greeted one another as "Governor." But 75 years ago our nation's "ordered freedom" (to use Judge Hand's words) was at risk, as the President, Congress and Judiciary all sought to define and maintain their power and our democracy in the wake of the Great Depression.

How could one not be struck by the coincidence of this 75th anniversary with today's banner headline constitutional confrontation? As we all know, the Supreme Court

in March heard an unprecedented three days of oral argument in the matters collectively known as the “Obamacare cases,” challenging President Obama's signature healthcare reform. Pundits and scholars alike characterize these cases as a supreme constitutional moment, supreme in every sense, including the quantity and quality of discourse. I am for the first time thankful that arguments are not televised. Outside the Supreme Court last month were nonstop protests for and against, a small brass band, a presidential candidate, activists signing autographs and mugging cameras, nonstop press, nonstop hyperbole ever since. Even a new Supreme Court-picking, if not a Supreme Court-packing, plan has been floated.

Indeed, NPR's Nina Totenberg called the Obamacare cases a “constitutional Woodstock.” Commentators such as Robert Barnes of the Washington Post, Adam Liptak of the New York Times and Erwin Chemerinsky of the University of California Irvine School of Law were not alone in noting that the Obamacare cases presented the first time since the New Deal that a monumental domestic program proposed by the President and passed by Congress faced review by the Supreme Court of the United States.

They refer back, of course, to 1936, when the Hughes Court struck down legislative requirements for the coal industry's wages and hours, ultimately laying the groundwork for FDR's court-packing plan, announced February 5, 1937. As Dean Chemerinsky commented concerning the Supreme Court's pending review of the Patient Protection and Affordable Care Act: “The potential consequences socially, legally and

politically are enormous. The outcome could very well shape how health care is provided in this country for decades to come. If the court invalidates this law—and one of the issues is whether the entire act should be struck down—it will be the first time since the New Deal that a major federal regulatory statute has been declared unconstitutional. And there is little doubt that whatever the court decides could have an impact on the outcome of the November presidential election.”²

Speaking in the Washington Post, Jeff Shesol, author of Supreme Power: Franklin Roosevelt vs. the Supreme Court³, also noted how the Obamacare litigation parallels the Supreme Court’s consideration of the progressive New Deal legislation 75 years ago. Both addressed the scope of federal authority and how our national government is empowered to deal with national problems. In Shesol's view, however, the stakes were considerably higher in Roosevelt’s time, and public opinion shifted overwhelmingly to endorse the necessity of the New Deal programs. He observed that the string of Roosevelt’s programs reviewed by the Justices actually gave that Court a way to adjust to that new reality gradually over time.⁴

I felt a particular twinge of concentricity a month ago, on March 29 to be precise, as I was working on these remarks. That was the very day, 75 years ago, that the Supreme Court announced 17 decisions, the last of them West Coast Hotel Company v Parrish, shifting course and upholding, against Fourteenth Amendment due process challenge, the constitutionality of Washington State's minimum wage law for female workers. It was in fact Chief Justice Hughes, a dissenter in the Court's earlier five-four

cases striking down minimum wage laws, who announced the decision. In Parrish, Justice Owen J. Roberts (who had previously joined the "Four Horsemen" in striking down the laws) this time voted to uphold the law and tipped the balance the other way, thus furnishing the proverbial "switch in time that saved nine" and defusing a court-packing showdown.

Reportedly, just before Chief Justice Hughes announced the Parrish decision, dissenting Justice James C. McReynolds picked up his papers and simply walked off the bench. As I reflected on that scenario, my heart went out to New York State's own great former Chief Judge Benjamin Nathan Cardozo, who in 1932 left the warm collegiality of the New York Court of Appeals for this raging firestorm at the Supreme Court. Those years until his death in 1938 could not have been his happiest.

While there have of course been countless other inter-branch clashes in the Supreme Court, the scope and timing of the Obamacare cases provide a unique snapshot of constitutional power battles. Next month will come the end of the Supreme Court's current term, and likely the announcement of its resolution of these cases. We will know then how each of the branches fared, although it may be a while before we see the full impact of the decision.

The Turf in General

The subject of constitutional clashes of power encompasses at least three areas – first, the legitimacy or inherent power of each co-equal branch of government; second,

the separation, or distribution, of powers among the branches; and third, the division of power between the national government and the states, known as federalism.

I do not intend to elaborate on the third category – federalism – which could extend these remarks beyond your patience. Just think of cases like Baker v Carr, Bush v Gore – indeed the Court's historic opinion in Brown v Board of Education – principally involving issues of the balance between state and federal governments, each with separate court systems and constitutions.

Indeed, I didn't intend to linger on the first area either. As we all know, Marbury v Madison definitively established the legitimacy, or inherent power, of the Supreme Court to review actions of the executive and legislative branches of the federal government. Even the most notorious and unpopular Supreme Court decisions – like Dred Scott – have not altered this basic acceptance of the idea of judicial review.⁵ Inherent power of course includes as well the judicial branch's authority to govern aspects of its administration necessary to assure its proper functioning, most notably the determination of funds adequate to support the courts. You surely appreciate my decision to pass quickly by the court-funding issue. Accepted though judicial independence and the inherent power of review may be, our efforts to obtain reasonable judicial compensation and adequate funding for the New York State courts, whether by negotiation or litigation, were the most miserable times of my entire tenure.

As mentioned, I didn't intend to linger at all on this first area of inherent power, but then came the ruckus kicked up by President Obama's recent comment during a highly publicized news conference that it "would be an unprecedented, extraordinary step [for the Supreme Court to overturn] a law that was passed by a strong majority of a democratically elected Congress." Among other things, that provoked a demand from the Fifth Circuit in an unrelated case for a three-page single-spaced memorandum addressing the executive branch's view of the judiciary's power to review legislative acts, which the Attorney General dutifully furnished. In his letter Attorney General Holder reaffirmed that "Where a plaintiff properly invokes the jurisdiction of a court and presents a justiciable challenge, there is no dispute that courts properly review the constitutionality of acts of Congress" – adding, notably, that "acts of Congress are presumptively constitutional." End of story.

So that brings me squarely to the second area, which will be my focus – the exercise of the Judiciary's unquestioned authority to review acts of the other branches for constitutional validity. While our popularly elected partners in government have broad authority to set social policy, address national problems and serve the public will, it remains for the Judiciary – with deference and independence (a potent mixture!) – to assure the maintenance of our constitutional ideals and values. Not an easy task, as I can tell you from firsthand experience.

Focus on New York State

Back to the subject of anniversaries, I add that I have now passed the three-year mark since the end of my glorious term as a Judge, and then Chief Judge, of the Court of Appeals of the State of New York. Three years is not 150 years, or even 75, but still it's sufficient distance to permit me to reflect a bit on the delicate subject of interbranch tangling at the state level, where the courts are from time to time drawn into constitutional controversies involving our partners in government.

Of course, in addition to federal constitutional issues every state has its own constitution. Ours is a hefty 46-page, tightly printed document with some provisions duplicating the federal charter, many worded a bit differently but similar in substance, and many unique to New York, with our own state constitutional history. Every New York public officer, every New York attorney, swears to uphold both the Constitution of the United States and the Constitution of the State of New York.

Decisions of the New York State high court are generally the last word on the New York State Constitution. Even on equivalent state and federal constitutional provisions, the New York State court cannot go below the federal floor of rights, but it can raise the ceiling of rights under its state charter. It will, for example, be interesting to see how the Supreme Court's recent decision upholding strip searches fares under the New York constitutional protection against unreasonable searches and seizures, should defendants assert a separate, higher state constitutional standard.

I can tell you that after 25 years, three months, 19 days and 12 precious hours, I left the Court of Appeals with a much finer appreciation of the tremendously difficult separation of powers issues arising under our constitutions than I had previously imagined. It goes without saying that, if there were precise constitutional language and authoritative precedents that resolved the hot-button issues, a case would never reach the high court. Just as at the federal level, always there are judgments to be made – by judges, independently and deferentially. That's what courts are there for.

So, how have issues of constitutional power played out in New York State? Thankfully not the national drama of Obamacare, but still sometimes pretty dicey. With that in mind, and even with the distance of three years from the end of my court service, I intend to stay on solid ground – meaning that I will offer only a few examples, all cases decided during my tenure, and I will limit myself to the competing views as expressed in the court's writings themselves. My point is simply to underscore the delicate balancing these cases require, the public issues at stake, the various positions that can be taken in such matters, and the fact that the system has served our state and nation well.

My first examples – Silver v Pataki and Pataki v New State Assembly – were disputes between the executive and legislative branches, each accusing the other of overstepping constitutional limitations regarding authority to allocate the state budget, with the Court in the role of umpire between the branches. These were not the first such disputes and surely are not the last. The cases divided the Court of Appeals three ways: a

three-judge plurality adopting the position of the Governor, a more limited concurrence joined in by two members of the majority, and a two-judge dissent.

The plurality began by expressing doubt that any meaningful line between broad and narrow budgetary changes could ever be drawn. And it drew none, concluding that to permit the Legislature to rewrite the details of the Governor's budget, as embodied in his appropriation bills, would be inconsistent with the aims of the executive budget system. In their view it was the Governor, not the Legislature, who was expected by the constitutional framers to produce an economical and systematic plan for the annual State budget.

The two concurring Court of Appeals judges took issue with the proposition that no meaningful line could be drawn between gubernatorial and legislative budgeting powers, observing that it's what courts do! The concurrence then went on to set out a test, consisting of a number of factors to determine when an appropriation becomes unconstitutionally legislative, including its effect on substantive law, the durational impact of the provision and the history and custom of the budgetary process, noting that its test was necessarily imperfect, but better than no test at all.

The dissenters saw the constitutional budgeting scheme differently – as a careful system of checks and balances in which the Governor has initial authority over state finances, and in which the Legislature, while it can always make the determination to spend less, is forbidden from spending more than in the Governor's appropriation bills.

The dissent concluded that the Governor had taken on the legislative function in this regard and intruded upon the Legislature's untrammelled authority with respect to those bills. While agreeing that the precise line may be difficult to fix, the dissent posited that the better question may well be not what the Governor can do in an appropriation bill, but what the Legislature can do in response, cautioning that the Court's unbounded executive authority set a brand new template for the future. Always that is a concern for courts of last resort.

Turning next to the Court of Appeals' constitutional review of legislation enacted by our partners in government, three subjects spring to mind: the death penalty, marriage equality and the school funding cases. Again, the clashes I will be describing are hardly unique for our high court, or courts generally. Each of them I recall with crystal clarity.

Of the school funding cases, I will say only this. In its very own Education Article the New York State Constitution uniquely directs that the "legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." A guaranteed system of free education for all the State's children was important enough to garner its own article in our Constitution. But what exactly does this mandate require? Again, the Constitution is hardly precise in directing the Legislature on what it must do. The trio of school funding appeals known as the "Campaign for Fiscal Equity," or CFE, drew our trial and appellate courts to an unprecedented degree into determining issues of educational financing, content and resources, hence raising and determining a host of separation of powers issues.

In the course of re-reading those cases, I realized it would be impossible for me adequately to portray the underlying clash among the branches without similarly engulfing you in the complexities of the State's constitutional promise to ensure the availability of a sound basic education to all its children. Suffice it to say that, in a court long known for the goals of clarity and unanimity, the 1995 CFE appeal generated five extensive writings, replete with authorities – among six judges. The subsequent 2003 and 2006 appeals each produced three significant opinions.

Always we were unanimous in our concern for the welfare of New York's schoolchildren but, as individual judges, we assessed the Court's responsibility and power relative to its partners in government very differently. Today, I am sure that each of my Colleagues who participated in the CFE appeals – whatever their views and their votes – remain hopeful with me that state and local policymakers will continue to strive to give modern-day reality to the mandate of our State Constitution, and that watchful advocates will continue to press those issues in the courts as appropriate. That is a foundation of our prized system of government.

Our marriage equality cases, Hernandez v Robles, centered on the more generalized guarantees of due process as well as our state constitutional equal protection clause. Like the guarantee of due process, our equal protection clause is hardly formulaic. It reads "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." Whether New York's Domestic Relations Law is

consistent with the constitutional guarantee of equal protection as it has developed through the centuries requires study, thought, judgment. Again, Hernandez divided the six judges who constituted the Court of Appeals into three substantial opinions.

At the root of the many differences that separated the judges, including the requisite level of scrutiny, was the question of whose role it was to decide this fundamental societal issue. The majority saw it exclusively for the Legislature. For the dissenters, it was uniquely the function of the judicial branch to safeguard individual liberties guaranteed by the New York State Constitution and to order redress for their violation, concluding that the Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.

My final example centers on the death penalty which, as you no doubt recall became a major campaign issue in the 1994 race for Governor. Indeed, the very first legislation signed by Governor Pataki reinstated capital punishment in New York.

My own education in the art of judging actually began with People v Lemuel Smith, argued April 23, 1984, seven months after I arrived on the Court of Appeals from private commercial practice, and it persisted for the next 23 years, through People v Taylor, decided October 23, 2007. In each of our death penalty cases, the Court of Appeals concluded that provisions of the statutes denied the defendant due process of law, and that those offending provisions could, or could not, be severed without misshaping the law.

In each case, the court was heatedly divided, with at least two extensive opinions. In the last of the cases – Taylor – the critical fourth vote to overturn the death penalty, putting an end to New York's death penalty – was actually furnished by one of the dissenters in the earlier cases, on the ground that the Court's prior decision in La Valle rendered the death penalty invalid, and while the Legislature could have repaired the statute it chose not to do so. After Taylor, and the tens if not hundreds of millions of dollars New York had spent on the death penalty, I believe the Governor, the Legislature, the people, had had enough of the death penalty.

The death penalty saga – from 1983 to 2007 – reminds me, by the way, not only of the evolution of the law and the impact of the three branches on one another, but also of the inevitable effect over a period of years of a court of five, or seven or nine dedicated individuals on one another. Let's reserve that meaty subject for a next lecture, perhaps a Charles Evans Hughes Junior Lecture.

All of which seems a reasonable point to bring my remarks to an end.

A Modern Postscript

Charles Evans Hughes wisely revealed little of his personal thoughts and emotions during the constitutional crisis that entangled his Court with the Executive and Legislative branches. He did, however, express the view in his later autobiography that "the controversy had the good effect of revealing the strength of public sentiment in

support of the independence of the Court. That independence is not a vague, collective attribute; it means the actual independence of the Justices. They are supposed to have shown at the bar or on the bench the learning, integrity and stability which will assure the expert, independent, and conscientious discharge of the supreme duty of maintaining the provisions of the organic law against either executive or legislative departures.”⁶

In other words, whatever their personal views and experiences, and no matter how they came to their position, judges must be sensitive to, and protective of, separation of powers principles in all their ramifications and complexities. Imagine: in just a few sentences Chief Justice Hughes used some form of the word "independent" four times. Having no power over the sword or the purse, clearly the strength of the Judiciary lies in its independence and integrity. May this ever be so.

Preparing this lecture, reflecting on my former treasured life on the bench, I affirm Chief Justice Hughes' sentiments in full. As in the past, it is essential to our "ordered freedom" that our banner headline conflicts be approached by all sides with dignity, respect, cool heads, and a profound admiration for the constitutional distribution of powers at the foundation of our democracy. Hopefully, the current controversy will in retrospect also have the good effect of "revealing the strength of public sentiment in support of the independence of the Court."

I take this moment of anxious respite – as the ashes of public frenzy still smolder after the Obamacare arguments, and we prepare for the inevitable conflagration that will

erupt with the Court's decision, whatever it may be – to reassert those time-honored principles.

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¹ Learned Hand, Tribute to Charles Evans Hughes (Reprinted in 1949 Harvard Law School Yearbook, p. 9).

² Chemerinsky: SCOTUS Tackles Law and Politics of the Health Care Act
(http://www.abajournal.com/news/article/chemerinsky_scotus_tackles_lawand_politics_of_the_health_care_act/).

³ I commend as well the just published FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle Over the New Deal, by New York Law School Professor James F. Simon.

⁴ Washington Post: A Supreme Court Justices Review Health-Care Law, Stakes Will be Hard to Ignore
(http://www.washingtonpost.com/politics/as-supreme-court-justices-review-health-care-law-stakes-will-be-hard-to-ignore/2012/03/20gIQAO5XYS_story_1.html).

⁵ See William Lasser, "The Political Process," *The Oxford Companion to the Supreme Court of the United States* 644, 645 (1992).

⁶ Hughes, *The Autobiographical Notes of Charles Evans Hughes* p. 307 (1973).