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BALANCING AS ART: JUSTICE WHITE AND THE SEPARATION OF POWERS

William J. Wagner[†]

In more than one key opinion, Justice Byron White cited Justice Robert H. Jackson's concept of the "art of governing" as the cornerstone of his own approach to separation-of-powers problems.¹ In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson had written:

The actual *art of governing* under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.²

This concept of governance as "art," in fact, aptly describes White's vision of the proper functioning of *each* branch of the federal government, including the judicial. The concept usefully describes White's vision of the proper functioning of the political branches, as well as that of the Court in resolving separation-of-powers disputes. The art in question is, in both respects, a quest for the mean in a process of balancing, and not an observance of formal definitions.³

An adequate understanding of White's separation-of-powers jurisprudence requires that one understand its terms, on their face, as well

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1. See *Bowsher v. Synar*, 478 U.S. 714, 760 (1986) (White, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 978 (1983) (White, J., dissenting); *Nixon v. Fitzgerald*, 457 U.S. 731, 779 (1982) (White, J., dissenting).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

3. See, e.g., *Bowsher*, 478 U.S. at 759 (White, J., dissenting) (expressing disapproval of the majority's "willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution"); See Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 984-85 (1995) (describing Justice White's functional approach to the separation of powers doctrine). Because "[f]unctionalists reject the ideal of pure separation . . . seeking instead a balanced government . . . facilitated by a creative blending of the powers of government," they focus on interaction among the branches "rather than their independence." Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2683 (1996).

as the nature of his objection to his opponents' formalism.⁴ These points are considered in Parts I and II of this essay. But it calls, as well, for acknowledging a tacit reference in White's position to the judiciary's accountability for the rule of law. A discussion of this more implicit dimension of White's reasoning is found in Part III.

Both the credibility of the well-known priority that White's separation-of-powers jurisprudence accords the legislative branch, and of his claim that the judiciary can remain a meaningful check on the other branches of government, ultimately depend upon this final concept of judicial responsibility to the rule of law. The judiciary, like the other branches, exercises its check in an exercise of the art of balancing. At the same time, accountability to the rule of law provides a fundamental constraint on judicial balancing. This constraint assures White's approach of its ultimate integrity. A consideration of this implicit reference to the rule of law is essential to a fair comparison between White's approach and the formalist alternative.

I. JUSTICE WHITE'S SEPARATION OF POWERS

Justice White's vision of government takes the common good as the end to be achieved. The mechanisms of government serve to advance that end. In each case, government action aligns and chooses among available means to this end. The "correct" answer to the problems facing government is one of finding the mean, of providing enough, but not too much, of a solution to advance the end, optimally.⁵

In the constitutional order, one means toward the end of the common good—a means procedurally prior to others—is the separation of powers. Governance is pursued through three power centers, oriented to legislative, judicial, and executive functions.⁶ The answer to separation-of-powers issues is only exceptionally a matter of right and wrong. Ordinarily, the answer is a matter of finding the mean, i.e., a balance, of providing enough, but not too much, power to each branch, with due respect to its function and its relation to the other branches. The judiciary considers claims to power

4. See Tanielian, *supra* note 3, at 985 (noting how Justice White "found the standards-based inquiry to be the proper approach to the separation of powers" and expressed his view through a series of dissents).

5. "It is [the] distinction between fact and concept, between underlying transaction and doctrine, that provides critical insight into the jurisprudence of Justice Byron White. White's philosophy cannot be pinned to a single point on any jurisprudential spectrum . . ." Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 419 (1993).

6. Despite the delineation of power into three branches, which is "described with neat precision in basic civics books," an obvious blending and overlapping occurs, for "as soon as one looks at this system in action, the formal structure begins to dissolve." Ides, *supra* note 5, at 421.

by the other branches, with the aim of achieving the most effective balance of power among them. The assessment tends not to focus on right and wrong, but on greater or lesser effectiveness in bringing about the good. When the Court has to intervene under the doctrine of judicial review, it is not because a deontological principle requires it, but because the balance has tipped.⁷

In this essentially teleological vision, the legislature necessarily plays a leading role.⁸ The legislature discovers and pursues the good and puts it in programmatic form through generalized rules. When its work is evaluated, its assessments are found to be more or less apt, as they are more or less good exercises of legislative art. More or less effective, they can rarely be considered entirely wrong.⁹ They are at most unwise, and the remedy for unwise rules is, ordinarily, trial and error by the same body.

The executive is not essentially different. Unlike the legislative branch, the executive is act-oriented, working on programs assigned to it by another, rather than promulgating general programs. But even here, the issue is: does the executive have enough, but not too much, power to optimize the good? Again, executive actions are generally more or less wise, rather than right or wrong, and the solution to less wise executive action is trial and error. Voting serves as the mechanism to validate the relative quality of results of executive action.

In this vision there is no essential difference between the separation of powers and any other means suited to advancing the good. Additionally, there is no reason that the separation of powers need exist exclusively at the level of constitutional principle. The legislature can continue to elaborate

7. Justice White describes the role of the judicial branch: "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982). Where the Court does strike down a claim of another branch, it will be, according to White, in the form of moderating the demand of the other branch, rather than invalidity per se. Similarly, even though White voted against absolute immunity, he recognized qualified immunity in other cases. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 790 (1982) (White, J., dissenting); *Harlow v. Fitzgerald*, 457 U.S. 800, 821-22 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985).

8. *See* Charles Fried, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 24 (1993) (describing Justice White's views on separation of powers as "distinctly parliamentary," as the "legislative veto, Gramm-Rudman hammer, and legislative representation in the Federal Election Commission, which the Court struck down in *Buckley*, White thought valid because congressional action in canonical form instituted them").

9. "It is long settled that Congress may exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government, and avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *INS v. Chadha*, 462 U.S. 919, 984 (White, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-16, 420 (1819)) (internal quotation marks omitted).

on the separation-of-powers principle as a transient means of pursuing the good as it assigns statutorily enacted roles to the respective branches, under changing circumstances. Thus, the judiciary encounters the separation-of-powers implications of a legislative act twice: first on the level of constitutional requirement, and second on the level of legislative accommodation. Although the requirements of the Constitution are privileged, when the judiciary encounters legislative separation-of-powers issues, it considers how far the legislature may go beyond—or even in apparent contravention of—the literal constitutional text in choosing its means. Once again, the issue is one of enough but not too much, rather than per se right or wrong.

The judiciary's analysis of the actions of Congress and its development of separation-of-powers principles has a foundation in the constitutional text, which assigns roles to the branches. Here the privileged position of the text is not because it contains an invariant principle, but because it enshrines a prudential judgment of the Founders. The constitutional text reflects a presumption in favor of the efficiency of certain means. For example, because the Founders incorporated judgments about the most efficacious allocation of the appointment power into the Constitution,¹⁰ Justice White struck down actions of Congress deviating from that prudential judgment.¹¹ The distribution of power in the constitutional text does not point to a philosophical principle, but rather indicates the Framers' judgment that in the dynamic of balanced competition among branches, the executive needed a lock on aspects of the appointments prerogative.¹² Here, the scope of each branch's function is set with an *a priori* prudential judgment about the optimal interaction among the three.

Where such textual assignment of detail is not present, however, the legislature itself can enact structural arrangements as a means to advance

10. U.S. CONST. art. II, § 2, cl. 2.

11. See *Buckley v. Valeo*, 424 U.S. 1, 267-82 (1976) (White, J., concurring in part and dissenting in part). “[N]o case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.” *Id.* at 275.

12. See *Buckley v. Valeo* for an elaboration on the debate surrounding the Appointments Clause:

The language of the Appointments Clause was not mere inadvertence. The Framers repeatedly debated the matter of the appointment of officers of the new Federal Government. They reached the final formulation of the Clause only after the most careful debate and consideration of its place in the overall design of government

The separation-of-powers principle was implemented by a series of provisions, among which was the knowing decision that Congress was to have no power whatsoever to appoint federal officers, except for the power of each House to appoint its own officers serving in the strictly legislative processes and for the confirming power of the Senate alone.

Id. at 271-72.

the most effective balance among the powers.¹³ This legislative judgment can serve both to assign and check powers. Congress's control over certain means is not specifically acknowledged in the constitutional text, but was later approved by the Court with its affirmation of the activist state amidst the Great Depression. But the Court did not accord Congress unrestricted control over these means, it still checks Congress by scrutinizing whether in acting in any particular case, Congress is aggrandizing itself at the expense of another branch. Justice White gave Congress the benefit of the doubt in his examination of legislative measures for evidence of aggrandizement.

Several examples illustrate White's willingness, in the absence of constitutional assignment, to let Congress make judgments about separation-of-powers issues. For example, White, in his *Chadha* dissent, found that Congress may give the deportation of aliens—a traditionally legislative function—to the executive branch, and simultaneously check the executive in this role by means of a one-house veto.¹⁴ White found no principled objection to the plan, and no disqualifying motive on the part of Congress to aggrandize itself.¹⁵ In parallel fashion, White's *Northern Pipeline* dissent concluded that Congress may create extensive Article I courts such as bankruptcy courts, subject only to legislative assessments of appropriate procedure and unencumbered by the requirements binding on Article III courts such as the jury.¹⁶ In *Bowshar v. Synar*, White argued, Congress may empower the executive branch to enforce budgetary

13. See *Chadha*, 462 U.S. at 967-74 (White, J., dissenting) (describing the virtues of the legislative veto).

14. See generally *id.* at 967-1003. In the face of constitutional silence on the legislative veto at issue in *Chadha*, White wrote, the Court's task was to "determine whether the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution." *Id.* at 977-78. To infer disapproval from silence would negate the flexibility given to the federal government by the Founders. See *id.* at 978.

15. "The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches—the concerns of Madison and Hamilton." *Id.* at 974.

16. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, White dissented from the majority's holding that certain kinds of claims could only be adjudicated by judges with Article III independence. See generally 458 U.S. 50, 92-118 (1982) (White, J., dissenting). Because the Court had historically approved of legislative activity, White concluded that "[t]here is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts." *Id.* at 113. In *Granfinanciera, S.A. v. Nordberg*, concerning a claimed right to a jury, White wrote that "the determination whether the Seventh Amendment guarantees a jury trial on petitioners' claims must turn on two questions: first, in what forum will those claims be heard; and second, what is the nature of those claims." 492 U.S. 33, 78-79 (1989) (White, J., dissenting). White wrote that the majority ignored the first requirement, and therefore ignored Congress' ability to create fora with limited procedural rights. *Id.* at 84.

discipline and simultaneously check the executive's exercise of that power by retaining power to remove that officer.¹⁷

In a parallel vein, White endorsed allowing Congress to resolve division of powers issues arising between federal and state or local authorities. For instance, he found that Congress may delegate oversight over airports serving the District of Columbia to local political authorities, while continuing to appoint members of Congress to serve in the oversight process and to stipulate how the local authorities are to do their work.¹⁸ He likewise supported the validity of congressional balancing in the areas of interstate compacts¹⁹ and federal preemption.²⁰

Where he encountered silence in the constitutional text, Justice White consistently deferred to congressional judgments on the best structure and functioning of government. The judiciary's role in these cases was simply to unmask any congressional attempts to deprive another branch of its constitutional power, not to apply formulaic rules. White's rejection of such rules is examined in the next section.

II. JUSTICE WHITE'S CRITIQUE OF FORMALISM

In contrast to his functionalism, Justice White's opponents followed a formalistic approach to separation-of-powers concerns.²¹ Formalist approaches create a broader role for the judiciary to strike down actions of the legislature and the executive, where the legislature or executive deviate

17. "I cannot accept . . . that the exercise of authority by an officer removable for cause by a joint resolution of Congress is analogous to the impermissible execution of the law by Congress itself . . ." *Bowsher v. Synar*, 478 U.S. 714, 765 (1986) (White, J., dissenting); see also *id.* at 776 (asserting that the majority's decision "strike[s] down a statute posing no real danger of aggrandizement of congressional power").

18. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 286-92 (1991) (White, J., dissenting); see also *id.* at 286 ("It is absurd to suggest that the Board's power represents the type of legislative usurpatio[n] . . . that concerned the Framers.") (internal quotation marks omitted).

19. See *New York v. United States*, 505 U.S. 144, 189 (1992) (White, J., concurring in part and dissenting in part) ("To read the Court's version of events . . . one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem. Not so. The [statutes at issue] resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem."); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 490 (1978) (White, J., dissenting) (arguing that the Court's approval of a state compact formed without congressional approval "fails to provide the ongoing congressional oversight that is part of the Compact Clause's protections").

20. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 202-23 (1983) (finding that California regulations on nuclear power plants were not preempted by congressional action).

21. See *Bowsher*, 478 U.S. at 759 (White, J., dissenting) ("I will, however, address the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives . . .").

from the nature of their respective roles.²² Formalism tends to strike down legislative additions to constitutionally-based separation of power structures, whether those additions take the form of congressional grants or checks on power.

In each case, the formalist rationale for the holding is that the congressional addition violates a principle or form found in the text, or that the action contradicts the Founders' intent; the consequences of the addition, or of a judicial invalidation of the addition, are irrelevant.²³ White repeatedly observed that formalists intervened to strike down laws where consequences in the form of the usurpation of power or loss of freedom did not require it.

A triumphant instance of formalism was *Chadha*, which universalized the procedures of bicameralism and presentment as requirements of all legislative action.²⁴ Once that universalization had taken place, the retention of a one-house veto was per se invalid.²⁵ Against this finding, Justice White noted that the one-house veto worked, and that it had been embedded in "nearly 200 statutes."²⁶ While formalists claim to find justification in the text, White argued that they do not, and cannot, find the definitive scope of a provision in the text alone.²⁷ The adequacy of the text is illusory.²⁸ The majority arbitrarily ignored both a supplemental normative judgment appropriately made by Congress at the time of the Depression, and the cumulative evidence on the function performed by the one-house veto.²⁹

22. For example, see Chief Justice Burger's majority opinion in *Chadha*: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

23. On Justice White's concern for consequences, see his *Chadha* dissent:

Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.

Id. at 968 (White, J., dissenting).

24. *Id.* at 951 (opinion of the Court).

25. *Id.* at 956-57.

26. *Id.* at 967-68 (White, J., dissenting).

27. See *id.* at 977 ("The Constitution does not directly authorize or prohibit the legislative veto.").

28. *Id.*

29. White explained that the legislative veto came about in order to assist reorganization of government after the Depression, as a "means by which Congress could confer additional authority [on the executive] while preserving its own constitutional role." *Id.* at 969.

*United States v. Brown*³⁰ can be read in a parallel fashion. In *Brown*, the majority interpreted the Bill of Attainder Clause³¹ as implementing the separation of powers.³² It held that the Labor-Management Reporting and Disclosure Act of 1959, barring anyone who had been a member of the Communist Party during the preceding five years from serving on the executive board of a labor organization, was an unconstitutional bill of attainder.³³ The Court interpreted the bill of attainder prohibition as preventing legislative rules applicable to “easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.”³⁴ In other words, the Court concluded that the Act was a departure from the legislative function of making general rules, even if the Act was not retributive.³⁵ According to White, the majority found the Act unconstitutional because of its over- and under-inclusiveness.³⁶

Justice White objected to this reasoning, finding—through close textual arguments—insufficient reason to suppose that the bill of attainder prohibition implicated a general separation-of-powers principle.³⁷ The fact that the Bill of Attainder Clause generally contributed to separation of powers did not support the broad inference made by the majority.³⁸ White found that inference inconsistent with the Court’s decisions in other cases.³⁹

He believed that appropriate deference to step-by-step problem solving on the part of Congress made it impossible for the Court to find any punitive purpose to the Act.⁴⁰ White argued that the majority ignored a tradition of reading the bill of attainder prohibition as a discrete problem, rather than as a basis for generic separation-of-powers distinctions.⁴¹

30. 381 U.S. 437 (1965).

31. U.S. CONST. art. I, § 9, cl. 3.

32. See *Brown*, 381 U.S. at 442 (“[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function . . .”).

33. *Id.* at 440.

34. *Id.* at 448-49 (quoting *United States v. Lovett*, 328 U.S. 303, 315-16 (1946)).

35. *Id.* at 450 (“The statute does not set forth a generally applicable rule . . .”); see also *id.* at 458 (“Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution.”).

36. *Id.* at 464 (White, J., dissenting).

37. *Id.* at 472-73.

38. *Id.* (conceding that “the prohibition on bills of attainder is a judicially enforceable restraint on legislative power and therefore constitutes one among the many mechanisms implementing the separation of powers,” but asserting that “that conclusion is the most that can be gleaned from the authorities cited by the Court”).

39. *Id.* at 464-72.

40. *Id.* at 475-78.

41. See *id.* at 463 (“In this case, however, the Court discards this meticulous multifold analysis that has been deemed necessary in the past.”).

White's dissent in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.* rested on similar reasoning.⁴² There, Congress transferred operating control over National Airport and Dulles International Airport from the federal government to the Metropolitan Washington Airports Authority, a compact between Virginia and the District of Columbia. The transfer was conditioned on a provision that a board of review made up of congressmen retain veto power over the Authority's decisions.⁴³ The Court found that the arrangement violated separation-of-powers principles.⁴⁴ The majority held that *Chadha's* procedural requirements applied to protect against legislative incursion upon the executive, in this case, a *state-created* executive organ.⁴⁵

White's critique established that the majority strained to create an unprecedented separation-of-powers issue by invoking the doctrine as a basis for ruling on the delegation of power to a state.⁴⁶ The Court easily could have avoided the issue under *South Dakota v. Dole*,⁴⁷ as the states constitutionally could have created the arrangement themselves.⁴⁸ Having arbitrarily created the separation-of-powers issue, White argued, the majority asserted, but did not establish, that the board of review was exercising a legislative function required to meet *Chadha's* procedural requirements.⁴⁹ The majority again asserted, but did not establish, that the board was impermissibly exercising an executive function while simultaneously falling under Congress's control.⁵⁰ Nor, White argued, did the Court's ruling create logical consistency with the preceding series of formalist majority opinions.⁵¹

In *Bowsher v. Synar*, the majority struck down the Gramm-Rudman-Hollings Act, which charged the Comptroller General with the executive task of independently evaluating budget reductions recommended by the Congressional Budget Office and the Office of Management and Budget: Congress retained the power of removal for cause.⁵² In contrast to *Buckley*

42. 501 U.S. 252 (1991).

43. *Id.* at 255.

44. *See id.*

45. *Id.* at 275-77.

46. "For the first time in its history, the Court employs separation-of-powers doctrine to invalidate a body created under state law." *Id.* at 278 (White, J., dissenting).

47. 483 U.S. 203 (1987).

48. 501 U.S. at 285 (White, J., dissenting) ("There is no question that *Dole*, when faithfully read, places the Board outside the scope of separation-of-powers scrutiny.").

49. *Id.* at 290 (criticizing the majority on the basis that "if the Board is exercising federal power, its power is not legislative").

50. *Id.* at 286-90.

51. *See id.* at 290.

52. 478 U.S. 714, 726 (1986).

v. Valeo,⁵³ the retention by Congress of a check under Gramm-Rudman-Hollings did not violate a textual restriction.⁵⁴ The Court in other cases had said that the Congress could restrict the President's removal power.⁵⁵ The majority concluded that, even though the removal provision satisfied the bicameralism and presentment requirements of *Chadha*, it violated another formalistic principle derived from the text.⁵⁶ White labelled the Court's ruling "distressingly formalistic"⁵⁷ and "rigid dogma,"⁵⁸ in response to a legislative threat that was "wholly chimerical."⁵⁹ White saw no threat of legislative aggrandizement;⁶⁰ not only was there no positive evidence of aggrandizement, but the officer in question remained "one of the most independent officers in the entire federal establishment."⁶¹

Justice White consistently took his formalist opponents to task for invalidating legislation that complied with all relevant constitutional requirements. He repeatedly asserted that formalistic principles could not be supported by reference to the text of the Constitution. Not only did he disagree with the particular principles put forward by the majority in these cases, he disagreed with the very idea that the judicial task was to check the other branches by deriving such principles. His vision of the judicial check is the subject of the next section.

III. WHITE'S ALTERNATIVE VERSION OF THE JUDICIAL CHECK

White's critique of formalism reinforces his own alternative vision of the legislative art. It affirms his preference for assessing the validity of legislative judgments in prudential terms, as discussed above, but it also suggests a generally principled limit on the legislative and executive branches of government that stands as an alternative to the formal structures of his opponents. This alternative is respect for the rule of law.

53. 424 U.S. 1 (1976).

54. See *Bowsher*, 478 U.S. at 765 (White, J., dissenting) ("*Buckley*, however, was grounded on a textually based separation-of-powers argument . . .").

55. See *id.* at 724-26 (opinion of the Court) (discussing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958)).

56. "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726.

57. *Id.* at 759 (White, J., dissenting).

58. *Id.* at 776.

59. *Id.* at 774.

60. "It is evident . . . that the powers exercised by the Comptroller General under the Gramm-Rudman-Hollings Act are not such that vesting them in an officer not subject to removal at will by the President would in itself improperly interfere with Presidential powers." *Id.* at 763.

61. *Id.* at 773.

A. Procedure: The Court's Assertion of the Power of Judicial Review Serves to Establish the Rule of Law

In championing an expansive conception of judicial review, White affirms a principled basis, of a procedural kind, for a judicial check on the other branches of the federal government. He does so in at least two ways. He limits the scope of the political question doctrine and he rejects claims to various forms of immunity from judicial review.⁶²

1. Justiciability

White's narrow reading of the political question doctrine can be seen in his concurrence in *Nixon v. United States*.⁶³ The majority in the case formalistically asserted that the Senate's right to try an impeachment is not reviewable.⁶⁴ It held that the constitutional text gives the Senate "sole" authority in trying impeachments,⁶⁵ and that no judicially manageable standards existed that would have permitted the Court to review the Senate's interpretation of the word "try."⁶⁶ Though he ultimately concluded that the Senate's procedures complied with the Constitution, Justice White asserted that the Senate's action was reviewable.⁶⁷

In regard to the executive branch, White asserted the same breadth of justiciability in the context of the "act of state doctrine" under international law. Due attention to executive branch concerns was, for Justice White, compatible with continuing justiciability.⁶⁸ Or, in *Department of the Navy v. Egan*, the grant or denial of a security clearance—in the absence of an

62. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 187 (5th ed. 1897) ("We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution . . . are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts . . .").

63. 506 U.S. 224 (1993).

64. *See id.* at 238.

65. *Id.* at 229 ("[T]he word 'sole' indicates that this authority is reposed in the Senate and nowhere else.") (quoting U.S. CONST. art. I, § 3, cl. 6).

66. *See id.* at 229-30.

67. "I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to 'try' impeachment cases." *Id.* at 239 (White, J., concurring in the judgment).

68. Justice White wrote:

Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 461 (1964) (White, J., dissenting); *see also* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 690-95 (1976) (finding that the burden of establishing an "act of state" defense had not been met).

expression of congressional intent to the contrary—remained reviewable.⁶⁹ White interpreted the power of review broadly, so that when the Court heard a case, he rejected the idea that implying remedies raised separation-of-powers concerns. Thus, in *Franklin v. Gwinnett County Public Schools*, Justice White, writing for the majority, refused to restrict the judiciary's prerogative to imply a damages remedy.⁷⁰

2. *Restriction of Executive and Legislative Immunity*

A correlated theme can be seen in White's inclination to narrow the doctrine of executive immunity from civil suits. White dissented in *Nixon v. Fitzgerald*, holding that the President has absolute immunity from civil suit for any act undertaken within the "outer perimeter" of his duties of office,⁷¹ and he concurred in *Harlow v. Fitzgerald*, denying such absolute immunity to executive aides.⁷² He wrote the majority opinion in *Mitchell v. Forsyth*, justifying a holding that Cabinet officers or other high executive officers, such as the Attorney General of the United States, did not have absolute immunity from civil actions.⁷³

In *Gravel v. United States*, Justice White, writing for the majority, addressed the issue of legislative immunity.⁷⁴ *Gravel* held, in connection with the Pentagon Papers case, that Speech or Debate Clause immunity for legislative aides did not extend to required appearances before grand juries regarding the source of documents in possession of a member of Congress, as long as the aides were not questioned about the legislative process itself.⁷⁵

For Justice White, a principled basis for the judiciary's check on Congress and the President is that both are to remain subject to the scrutiny of judicial review, even though he envisions such scrutiny as generally occurring by means of prudential balancing in the place of formalist definitions. He stresses this principled importance of judicial review in cases such as *Bowsher v. Synar*, even as he rejects the asserted bright lines of formalism.⁷⁶ White rejects limits on the judiciary which would interfere

69. See 484 U.S. 518, 538 (1988) (White, J., dissenting).

70. 503 U.S. 60, 73-74 (1992) ("Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power.").

71. See generally 457 U.S. 731 (1982).

72. 457 U.S. 800, 821-22 (1982).

73. "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." 472 U.S. 511, 524 (1985).

74. 408 U.S. 606 (1972).

75. *Id.* at 627-29.

76. *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) ("Reliance on such an unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and *insensitive to our constitutional role.*") (emphasis added).

with the rule of law by arbitrarily restricting the scope of justiciable disputes, but he accepts limits on the judiciary aimed at the integrity of its functioning. An example of the latter is seen in Justice White's broad reading of the jury requirement in *Bloom v. Illinois*.⁷⁷ Legislatures can require judges to use juries in certain cases as a legislative check on the judiciary.⁷⁸

B. Substance: The Court's Review of the Rationality of the Judgments of the Other Branches Has Teeth

Though White wanted to allow Congress to experiment with a free range of reasonable options, he also viewed Congress as subject to the judicial check, if its experiments crossed into irrationality. This limit is encountered not when one branch of government encroaches on the turf of another, but when a governmental entity, in either political branch, oversteps the rights of a private litigant. Separation-of-powers concerns arise as the Court adjudicates private claims.

Several examples are illustrative. In his majority opinion in *City of Cleburne v. Cleburne Living Center, Inc.*, White pointed out that an ordinance requiring a special permit for a home for the "feble-minded" rested on an "irrational prejudice against the mentally retarded."⁷⁹ And, concurring in *Furman v. Georgia*, White argued that the random application of the death penalty as delegated to juries could not rationally satisfy the Eighth Amendment.⁸⁰

Dissenting in *San Antonio Independent School District v. Rodriguez*, White asserted that the Texas school financing system, which left some districts without sufficient means to support the education of their children, had no rational basis.⁸¹ A parallel exists in the Pentagon Papers case, where White was skeptical of, and ultimately rejected, the claim that the executive

77. 391 U.S. 194 (1968) (White, J.) (upholding the right to a jury in criminal contempt cases with severe penalties). "[D]ispensing with the jury in the trial of contempt subjected to severe punishment represents an unacceptable construction of the Constitution, 'an unconstitutional assumption of powers by the [courts] which no lapse of time of respectable array of opinion should make us hesitate to correct.'" *Id.* at 198 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

78. *See id.* at 207.

79. 473 U.S. 432, 432, 450 (1985).

80. *See generally* 408 U.S. 238, 310-14 (1972) (White, J., concurring) (arguing that the infrequency with which juries apply the death penalty makes its rare application one without a rational basis).

81. 411 U.S. 1, 68 (1973) (White, J., dissenting) (criticizing the majority for not requiring the state to show "that the means chosen to effectuate [the state's educational] goal are rationally related to its achievement," thus making equal protection analysis "no more than an empty gesture").

needed the remedy of prior restraint of expression for the sake of national security.⁸²

C. The Judicial Art of Assessing Legislative Rationality Must Satisfy the Rule of Law

Justice White acknowledged that judicial departures from a stance of deference to the legislature created separation-of-powers conflicts. In this context, he believed that the Court could avoid violating the proper balance of powers by applying judicial art. The necessary safeguard was not to be found in a formalist view of the judicial role, but in judicial art itself. The Court was to peg its judgment of whether the other branch had overstepped its bounds on some demonstrable criteria of rationality.

Thus, White was prepared to apply heightened due process review only where there is a clear tradition of doing so, as in *Griswold v. Connecticut*.⁸³ In *Griswold* he wrote, “[s]urely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”⁸⁴ In the absence of such a tradition, he did not apply heightened scrutiny in either *City of Cleburne v. Cleburne Living Center, Inc.*⁸⁵ or *Bowers v. Hardwick*.⁸⁶

Similarly, White was unwilling to permit the judiciary to intervene to strike down a state statute unless he found clear congressional intent requiring the judiciary to do so. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, he found that a California statute was not pre-empted by the Atomic Energy Act partially because he concluded that it was Congress’ job to promulgate and protect federal policies, and Congress had not spoken.⁸⁷

82. “What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 733 (1971) (White, J., concurring).

83. 381 U.S. 479 (1965).

84. *Id.* at 502-03 (White, J., concurring in the judgment) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

85. *See* 473 U.S. 432, 442 (1985).

86. *See* 478 U.S. 186, 190-91 (1986).

87. “[I]t is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.” 461 U.S. 190, 223 (1983).

In a parallel manner, White required a showing of intentional discrimination before finding a violation of equal protection, as he explained in both *Washington v. Davis*⁸⁸ and *Rogers v. Lodge*.⁸⁹ In addition to a showing of intent, he required a demonstration of concrete disadvantage before striking down political gerrymandering in *Davis v. Bandemer*.⁹⁰ He was aware that, without limitation, the Court's scrutiny of the work of other branches would distort the constitutional system of separation of powers. But, he believed that the limits on that scrutiny were not to be found formally within the text of Article III. Rather, he held that they arose as intrinsic criteria of its sound exercise within the rule of law.

IV. CONCLUDING OBSERVATIONS

It has often been said that White excelled in setting forth a skeptical critique of the positions of others, but exhibited a certain modesty when making the terms of his own approach explicit. This diffidence can perhaps be traced biographically to his desire to move beyond his early celebrity as an NFL football star. A review of his separation-of-powers jurisprudence, however, exposes a judicial philosophy that is, at the least, remarkably coherent, and that merits being considered in its own light.

It is true that White propounds an expansive role for the legislature within the constitutional order of the activist state, and that the role he accords the judiciary is one that will not often lead it to overturn the actions of another branch. But, the commitment to the rule of law that undergirds White's approach ensures that, in the end, it is not only flexible but principled. In the patchwork represented by separation-of-powers precedents, with its vacillating rationales and compromises, he offers a coherent view and challenges his formalist adversaries to do the same.

88. 426 U.S. 229, 242 (1976).

89. 458 U.S. 613, 618 (1982).

90. "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. 109, 132 (1986) (White, J., plurality opinion).

