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# OF BALKANIZED EMPIRES AND COOPERATIVE ALLIES: A BICENTENNIAL ESSAY ON THE SEPARATION OF POWERS\*

*Douglas W. Kmiec\*\**

The delegates to the Constitutional Convention in Philadelphia in 1787 brought two experiences with them: a substantial dislike for the tyrannical behavior of an English King and a profound disappointment with the weaknesses of the Articles of Confederation. They knew well, from their study of Locke and Montesquieu, that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.”<sup>1</sup> Yet, the framers’ most recent experience, under the Articles of Confederation, had replaced the tyranny of the King with an ineffectual central legislature largely subservient to state legislative bodies. Royal supremacy had given way to “the supremacy of faction and the tyranny of shifting majorities.”<sup>2</sup>

Out of the twofold desire to avoid tyranny, in whatever form, and to retain a workable government, arose the dynamic of separated powers in conjunction with clearly stated checks and balances. The first three Articles of the Constitution assign primary, but not unrestrained, authority for the legislative, executive, and judicial functions to the two Houses of Congress,<sup>3</sup> the President,<sup>4</sup> and the Supreme Court,<sup>5</sup> respectively. These functions are not neatly separated or “hermetically sealed.” Congress passes open-textured statutes which invariably invite both the President and the courts to fill in the gaps, and thus, make law. Similarly, members of Congress and the Pres-

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\* Brendan Brown Lecture, The Catholic University of America, Columbus School of Law, September 17, 1987. Professor Kmiec also extends his appreciation to the Board of Foreign Scholarships which permitted him to present earlier versions of these thoughts as a Fulbright Distinguished Scholar in Hong Kong and Malaysia.

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1. THE FEDERALIST NO. 47, at 301 (J. Madison) (Mentor ed. 1961).
2. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375 (1976).
3. U.S. CONST. art. I.
4. *Id.* art. II.
5. *Id.* art. III.

ident are regularly called upon to determine issues of constitutionality, and thus, interpret law.

That the functions of government do indeed overlap suggests the futility of rigid theoretical insistence upon a precise separation of power. It also reveals the justification for the framers' reliance upon procedural checks and balances, rather than substantive and inflexible definitions of authority, to preserve their tripartite structure. These checks and balances are well-known. They include the President's ability to veto legislation<sup>6</sup> and Congress' countervailing authority to override that disapproval with the concurrence of two-thirds of both Houses of Congress.<sup>7</sup> The judiciary is checked by Congress' ability to determine the kind of cases which may be brought to court,<sup>8</sup> and even, with the exception of the Supreme Court, to eliminate the federal courts.<sup>9</sup> Judicial authority is also bounded by the practical willingness of the executive to enforce judicial decisions. In turn, the courts have the final word with respect to the propriety and constitutionality of both executive decisions and legislation.

Over the long term, these procedural checks and balances have been essential safeguards against improvidently passed laws, the obduracy of the executive, and even the inclination of the judiciary, the so-called "least dangerous branch," to go beyond its assigned function of adjudicating cases and controversies. With respect to the judicial branch, it is popular today to level criticism at the courts for the usurpation of the lawmaking function. Some of this criticism is justified, some not. I do not intend to enter the debate, for in my judgment most judges conscientiously aspire to ascertain

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6. The Constitution of the United States provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

*Id.* art. I, § 7, cl. 2.

7. The Constitution of the United States provides: "[I]f after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law." *Id.*

8. The Constitution of the United States provides:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

*Id.* art. III, § 2, cl. 2.

9. The Constitution of the United States provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, § 1.

the will of the legislature and not to impose their own. Significantly, on two occasions within the last five years<sup>10</sup> the Supreme Court has properly rejected claims that the modern day realities of government necessitate departure from what the Court has described as a "single, finely wrought and exhaustively considered, procedure"<sup>11</sup> set out by the framers. Constitutional structure and procedure did not give way to expediency, and this, in itself, is a tribute to the Court's ability to say what the law is.

Yet, as important as the safeguards of divided power and its judicial acknowledgment have been, they are often eclipsed by the day-to-day tension yielded by the less definable essence of the separation of powers among the three branches. As will be discussed, this tension is greatest between the executive and the legislature.<sup>12</sup>

Before getting to actual disputes, however, it is worthwhile to spend a moment on this bicentennial of the Constitution to reflect upon whether the tension borne of the separation of powers serves us well or ill. In my judgment, the consequences of this imprecise concept must be viewed favorably. The tyranny, suffering, and loss of liberty associated with centralized power has not been a feature in the American political landscape. Moreover, the concept has been a necessary operational adjunct to a constitutional scheme premised on express grants of limited national power, and a reservation of authority to the states and the people themselves. To be sure, the interests and activities of the national government have expanded well beyond the conceptions of the framers, and arguably, beyond the express terms of the constitutional document itself. Nevertheless, these expansions into local decisionmaking would surely be greater if national authority were centralized in a single hand. At the very least, with national power divided, the sovereign states have multiple forums in which to seek redress from particular encroachments upon their interests and in which to find an amenable advocate for federalism.

Related to this point is the greater responsiveness of the government to the citizenry which results from separated powers. Ours is a nation of pluralism and, within that pluralism, deeply felt views. No one authority could possibly accommodate them all, and thus, bitter conflict is avoided by the very fact that no one authority can impose a singular resolution. That such conflict can and does result from the assertion of concentrated authority is amply demonstrated by the Supreme Court's decision in *Roe v. Wade*<sup>13</sup> where

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10. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

11. *Chadha*, 462 U.S. at 951.

12. See *infra* notes 30-52 and accompanying text.

13. 410 U.S. 113 (1973).

the court articulated a federal constitutional right to an abortion, contrary to the then-existing laws of most states and contrary to the current views of the President and a significant number of members of Congress. Because the powers of government are separated, however, those in opposition to the Supreme Court's decision in *Roe* have had their interests responded to by a congressional restriction on the use of federal money for abortions<sup>14</sup> and the President's recent announcement of executive rulemaking to carry out Congress' legislative mandate for a separation between preventive family planning programs, which may be federally funded, and abortion-related services, which may not.<sup>15</sup>

Separation of powers also produces greater deliberation and specialization. A deliberative process which is subject to the scrutiny of competing powers is more likely to yield a course based upon consensus. It is also not unfair to say that legislators inhabiting the more heady regions of theory and policy are not usually the best administrators.

These benefits of the separation of powers, of course, do not come without cost. Subjectively, those who want the public sector to do more, not less, or those who are chary of the parochial views of the states are not likely to be pleased by the limitations of divided authority at the national level. So too, prolonged deliberation in search of consensus can mask inefficiency, and specialization may simply spawn labyrinthine bureaucracies.

The greatest cost, or if you will, danger to separated powers, however, lies in the occasionally extreme adversarial attitude it can produce.<sup>16</sup> Certainly, each branch must be wary of encroachment upon its authority, but surely not at the cost of losing sight of the common purposes of the Republic stated eloquently in the Constitution's preamble.<sup>17</sup> Nor should the general populace be misled into believing that every arguable encroachment triggers a constitutional crisis meriting gavel to gavel television coverage or the appointment of an independent counsel. The boundaries of power are far too imprecise to have them litigated like constitutional trespass actions.

An overly adversarial attitude, which insists upon a precise demarcation

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14. 42 U.S.C. § 300a-6 (1982).

15. 52 Fed. Reg. 33,210 (1987) (to be codified at 42 C.F.R. pt. 59) (proposed September 1, 1987).

16. To some degree, this attitude is instinctive in government officials insofar as they naturally seek to expand their territorial authority. Such aggressiveness is further driven by the large number of lawyers in American government, who after all, are taught not to accommodate, but to zealously advocate the interests of their client.

17. The framers' common purposes for forming a republican form of government were "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. preamble.

of powers in matters of every significance, thrives on a level of confrontation which neither is in keeping with the intent of the framers nor is necessarily conducive to good government. As former Attorney General and Professor of Law Edward Levi remarked, “[t]he branches of government were not designed to be at war with one another. The relationship was not to be an adversary one . . . .”<sup>18</sup> Similarly, the late Justice Robert Jackson observed that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>19</sup>

As history and even current events demonstrate, members of any branch of government forget this lesson at their peril. President Truman forgot it when he seized steel plants without legislative authorization or inherent constitutional authority.<sup>20</sup> President Nixon did the same when he impounded or refused to spend funds authorized to be spent by Congress.<sup>21</sup> Congress overstepped its constitutional boundary when it sought to empower a largely legislative commission to enforce election laws through litigation,<sup>22</sup> and when it retained authority over the implementation of previously passed laws by means of the legislative veto.<sup>23</sup> In each case, there was a direct corrective reaction by the branch encroached upon or an indirect correction through the courts. In a sense, these corrections give proof to the genius of the framers’ creation for thwarting even petty tyrannies. However, each occasion for correction does its own damage, just as something repaired never quite equals the vitality it had when new. Furthermore, in these corrections lie the seeds of greater hostility and suspicion. If historian Arthur Schlesinger is correct to suggest that modern Presidents have bordered on the imperial in undertaking military activity without a congressional declaration of war,<sup>24</sup> what is the proper characterization of the congressional response in the War Powers Act<sup>25</sup> or other statutory limitations on the President’s constitutionally assigned role as Commander in Chief?<sup>26</sup>

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18. Levi, *supra* note 2, at 391.

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

20. *See id.* at 582-89.

21. *See Train v. City of New York*, 420 U.S. 35, 45-48 (1975) (Federal Water Pollution Control Act did not provide the President with discretion to withhold funds from allotment and obligation).

22. *See Buckley v. Valeo*, 424 U.S. 1, 137-43 (1976).

23. *See Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919, 951-59 (1983).

24. *See generally* A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973) (discussing military action within the President’s role as Commander in Chief).

25. War Powers Resolution §§ 1-9, 50 U.S.C. §§ 1541-1548 (1982).

26. The Constitution of the United States provides: “The President shall be Commander

Action, reaction, counteraction—the process is inexorable and self-destructive. While undesirable, it is hardly an unnatural response for the executive branch to enshroud its foreign affairs in even greater secrecy—a secrecy that has apparently frustrated even chief executive review of foreign policy and a secrecy that is likely to invite unworkable proposals for a rigid compartmentalization of functions. Thus, failure to understand that the framers envisaged the separated branches of government not as balkanized empires but as cooperative allies designed to “achieve a harmony of purposes differently fulfilled”<sup>27</sup> leads to a divorce, rather than a separation of powers, and, in that, its own undoing.

The actual interplay of the separation of powers is colored by the institutional features of the branches and the personalities of those who inhabit them. I will leave the dissection of personalities to the biographers, but certain patterns are easily discerned. Lincoln’s strong presidency was aided and abetted by the exigencies of the Civil War and the coincidence of single party domination of both the White House and Congress. The post-Civil War era returned power to the legislative branch until Theodore Roosevelt transformed the presidency into his “bully pulpit.”<sup>28</sup> A period of equilibrium followed World War I until the economic emergency of the depression and the demands of World War II led to the domination of events by Franklin Roosevelt. With some exception, the executive maintained its preeminence until the Vietnam War reawakened congressional initiative. Congress enlarged its staff, undertook greater scrutiny of foreign policy, and internally reconstituted the budget process.

Watergate further weakened the presidency, and not just for President Nixon. As former Solicitor General Rex Lee commented, “Watergate had left its legacy, and part of that legacy was a diminution in the ability of the executive branch to withstand intrusions by Congress into an area that should have belonged to the executive: protection of official governmental secrets.”<sup>29</sup> The Carter years saw continued congressional control, although excessive government spending, high unemployment, and a dramatic increase in inflation created public skepticism towards the legislative process as well.

President Reagan benefited from the public’s disaffection with “legislative politics as usual” and also from a confluence of economic policies which

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in Chief of the Army and Navy of the United States, and of the Militia of the several States.” U.S. CONST. art. II, § 2, cl. 1.

27. Levi, *supra* note 2, at 391.

28. J. CONLIN, *THE MORROW BOOK OF QUOTATIONS IN AMERICAN HISTORY* 253 (1984).

29. R. LEE, *A LAWYER LOOKS AT THE CONSTITUTION* 49 (1981).

have led to lower tax rates and inflation, as well as economic expansion and new employment. The President's well-articulated strengthening of defense policies also seemed to bolster public confidence, although legitimate doubts linger in the shadow of an ever-larger national debt and a highly volatile stock market. Seemingly, the Iran-Contra matter disclosed in late 1986 once again recalibrated the executive/legislative balance. However, we may still be too close to these events to tell their actual effect. Somewhat unexpectedly, the inundation of televised committee proceedings, patently designed to crudely divide the good and able men from the evildoers, may have actually resulted in a greater public sophistication about the uneasy separation of powers in our constitutional Republic.

It is interesting to note the sharp differences between the Iranian inquiry and Watergate as it relates to congressional access to executive information. As a general matter, Congress was given virtually everything within the control of the executive branch that it had requested. In terms of a full accounting of the facts, this is surely salutary. Yet, the executive must necessarily have concerns, some of which are anchored in the separation of powers, lest this expedient response, dictated in part by the memories of Watergate, lead to the mishandling of classified information or perhaps damage specific and only tangentially related foreign policy efforts.

Some contemporary examples of conflict between the executive and legislative branches may further elucidate the separation of powers. For example, it is unassailable that Congress may undertake to investigate how well the executive is enforcing the law. Congress' authority is at its strongest when such oversight is directly in aid of its lawmaking function: to determine whether existing law needs revision or whether additional legislation is required. In contrast, as Congress' interest moves away from lawmaking and toward mere supervision of executive personnel, a task committed by the Constitution to the President,<sup>30</sup> the separation of powers would argue for congressional restraint.

This has not always been the case, however, and such disputes often become manifest when the executive refuses to supply information to Congress under a claim of executive privilege. While executive privilege retains its negative connotation from the Watergate episode, it is important to remember that the Court in *United States v. Nixon*,<sup>31</sup> although unanimously requiring President Nixon to give up his tapes, clearly acknowledged that the privilege is "inextricably rooted in the separation of powers under the Con-

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30. The Constitution of the United States provides: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

31. 418 U.S. 683 (1974).

stitution.”<sup>32</sup> Like the nuances of the separation of powers, however, the privilege is qualified, and in *Nixon* it had to yield to a specific need for evidence in a criminal trial.<sup>33</sup> Thus, any claim of privilege balances the executive’s need to protect information against Congress’ or the Court’s need to know that information as those needs are defined in relation to the powers assigned by the Constitution. Just as Congress’ oversight role is most compelling in aid of its direct legislative function, so too, the executive’s claim of privilege is greatest when it is premised upon the specific need to protect military, diplomatic, or sensitive national security information.

Another executive/legislative intersection occurred over the use of the so-called legislative veto. For almost sixty years in a great variety of legislative enactments, Congress had included provisions which authorized the executive to issue implementing regulations, but subject to the approval, or lack of disapproval, by one or both Houses of Congress or a committee. As a practical matter, the legislative veto was a device designed to usurp executive enforcement authority. For example, under the immigration laws, the executive was given the authority to determine matters of deportation.<sup>34</sup> In 1974, when the Attorney General exercised that authority in a manner displeasing to the House of Representatives, the House passed a resolution reversing his decision.<sup>35</sup> Believing this resolution not to be new legislation, but rather merely oversight of existing law, the House did not present the resolution to the President.<sup>36</sup>

These were the facts which led the Supreme Court to find the legislative veto to be unconstitutional in *Immigration & Naturalization Service v. Chadha*.<sup>37</sup> Writing for the Court, former Chief Justice Burger defined legislative action broadly to include all actions with the “purpose and effect of altering the legal rights, duties and relations of persons, including [executive branch officials] . . . outside the legislative branch.”<sup>38</sup> Thus, the legislative veto’s interference with the powers of the executive was twofold in *Chadha*: first, the legislative reversal of the Attorney General’s decision,<sup>39</sup> and, second, the failure of Congress to comply with the presentment clause of the Constitution<sup>40</sup> by presenting the legislation containing that same reversal to

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32. *Id.* at 708.

33. *Id.* at 711-12.

34. Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a) (1982).

35. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 926 (1983).

36. *Id.* at 927-28.

37. *Id.* at 919.

38. *Id.* at 952.

39. *Id.*

40. The Constitution of the United States provides: “[E]very Bill which shall have passed

the President for his consideration.<sup>41</sup> In addition, the legislative veto was not only an encroachment upon executive authority, but also a disregard for legislative procedure insofar as it violated the bicameral requirements of the Constitution<sup>42</sup> by which both houses of Congress must pass a bill before it can become law.<sup>43</sup>

Conflict also results between the executive and legislative branches when the executive declines to enforce what it believes to be an unconstitutional statute. Former Attorney General William French Smith has pressed this point in two contexts: first, where the law at issue encroaches upon executive authority and, second, where clear precedent suggests the invalidity of the law. One may wonder why a President would sign legislation he thought was unconstitutional. The reason becomes apparent once the modern congressional practice of inserting substantive legislation in appropriations measures is understood. In effect, the President is given a choice between approving constitutionally suspect legislation buried in an appropriation or vetoing the measure and shutting the government down. The problem is further aggravated by the legislative practice of passing funding measures in the waning hours of a fiscal year, and sometimes even later. Since 1980, the government has, in fact, been shut down several times for lack of funds. The separation of powers are surely implicated by a practice that effectively negates the President's veto authority.

Because of the increasing impracticality of a veto, presidents have placed renewed emphasis upon presidential signing statements to articulate their constitutional concerns.<sup>44</sup> Such statements have a long history, but they are now more readily employed to direct subordinate executive officers to interpret newly enacted laws in rather specific ways to avoid unconstitutional implementation. In a sense, such statements are analogous to the executive stating directions in rulemaking or adopting a statutory interpretation in litigation. Nevertheless, members of Congress and other commentators, suspicious that the President will deliberately misinterpret the law to suit executive purposes, have objected to such statements as a usurpation of the legislative function. For example, the counsel to the House of Representatives argues that once a bill is on the President's desk "his role is limited to

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the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." U.S. CONST. art. I, § 7, cl. 2.

41. *Chadha*, 462 U.S. at 946.

42. The Constitution of the United States provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. art. I, § 1.

43. *Chadha*, 462 U.S. at 945-46.

44. Kmiec, *Judges Should Pay Attention to Statements By President*, NAT'L L.J., Nov. 10, 1986, at 13.

thumbs up or thumbs down, with no shades of gray [in between]."<sup>45</sup> However, an appreciation of the separation of powers demonstrates the inflexibility of such a broadly stated objection. The President has the executive responsibility to "take care that the [l]aws be faithfully executed."<sup>46</sup> This in itself commands a faithful and reasonable effort to make sure subordinates understand the law and enforce it. By the same token, any attempt by a President to supply additional terms or adopt an interpretation that would do violence to the terms provided by the Legislature would be unwarranted and antagonistic to legislative powers.

The President used a signing statement to highlight the separation of powers difficulty in the Balanced Budget and Emergency Deficit Control Act of 1985,<sup>47</sup> more commonly known as Gramm-Rudman. The Act specified declining deficit targets for each fiscal year through 1991.<sup>48</sup> In any year in which the deficit target was expected to be exceeded, the Comptroller General, a legislative officer removable only by Congress, was authorized to specify spending cuts to be made and to direct the President to make them, unless Congress legislated other reductions which obviated the need for the cuts.<sup>49</sup> In signing the law, the President stated: "I am mindful of the serious constitutional questions raised. . . . The bill assigns a significant role to [a legislative officer]. . . . Under the system of separated powers established by the Constitution, however, executive functions may only be performed by officers in the executive branch."<sup>50</sup>

The President was quite right to raise the objection since a few months later in *Bowsher v. Synar*<sup>51</sup> the Supreme Court invalidated the law on precisely the basis stated by the President. According to the court:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws . . . is constitutionally impermissible.<sup>52</sup>

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45. Greenhouse, *Washington Talk: The White House; Signing Bills, Reagan Tries to Write History*, The N.Y. Times, Dec. 9, 1986, at B14, col. 3 (quoting Steven R. Ross, Counsel to the House of Representatives).

46. U.S. CONST. art. II, § 3.

47. Pub. L. No. 99-177, 99 Stat. 1038 (codified in scattered sections of 2, 31 and 42 U.S.C.) (Supp. III 1985)).

48. *Id.* (codified at 2 U.S.C. § 622 (Supp. III 1985)).

49. *Id.* (codified at 2 U.S.C. § 901 (Supp. III 1985)).

50. President Reagan's Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1491 (Dec. 12, 1985).

51. 106 S. Ct. 3181, 3194 (1986).

52. *Id.* at 3189.

The Court's decision in *Bowsher* invalidating the balanced budget legislation on separation of powers grounds raises the question of what role the judiciary should play constitutionally in settling disputes between the executive and legislative branches. Because of the fluid nature of the concept, such disputes are, as a practical matter, often best left to the political arena. Indeed, the Court's political question doctrine, though never clearly applied in a separation of powers case, seems apropos. That doctrine asks whether the dispute has been committed by the Constitution to a branch other than the court, whether the lack of definable judicial standards precludes judicial action, and whether the controversial nature of the dispute counsels prudential noninvolvement.<sup>53</sup>

These questions are not easily answered, however, because several Supreme Court decisions have shunted the political question doctrine aside in order to reach questions that were previously thought committed elsewhere under the Constitution: namely, legislative apportionment<sup>54</sup> and the seating of a member of Congress whose qualifications were in doubt.<sup>55</sup> Moreover, noted scholar Herbert Wechsler has severely criticized the political question doctrine as antagonistic to the Court's primary function, which is, in the words of John Marshall, "to say what the law is."<sup>56</sup> It should be noted, though, that Wechsler's criticism merely suggests that the Court should take the case in order to determine whether, in fact, the dispute has been constitutionally committed elsewhere.

Chief Justice Rehnquist has spoken strongly in favor of the political question doctrine.<sup>57</sup> Similarly, Professor Choper has urged that the Court should generally abstain where the political branches can fend for themselves.<sup>58</sup> In large part, this idea is also implicit in Justice White's dissent in the *Gramm-Rudman* case, which suggests that where a statute poses "no real danger of aggrandizement of congressional power" the Court should not interfere.<sup>59</sup> According to Justice White, "[t]he role of [the] Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic

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53. See *Baker v. Carr*, 369 U.S. 186, 208-37 (1962).

54. *Id.* at 209.

55. See *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969).

56. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

57. See, e.g., *Uhler v. AFL-CIO*, 468 U.S. 1310, 1312 (1984); *Maryland v. United States*, 460 U.S. 1001, 1005-06 (1983) (Rehnquist, J., dissenting); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 783-84 (1976) (Rehnquist, J., dissenting).

58. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* *passim* (1980).

59. *Bowsher v. Synar*, 106 S. Ct. 3181, 3211-14 (1986) (White, J., dissenting).

division between the lawmaking power and the power to execute the law.”<sup>60</sup>

That cautionary note is appropriate. Nevertheless, it should not be taken to signify a tolerance for the blurring of power in a manner contrary to the structural features of the Constitution. In my judgment, the Court’s decisions in *Chadha* and *Bowsher* were necessary reaffirmations of the principles which maintain the constitutional allocation of authority among coequal branches which we revere today. Having done that, the Court may, and perhaps should, prudentially refrain from resolving day-to-day interbranch disputes. Those entrusted with governmental power forget, at their peril and ours, that the first line of duty in fulfilling the terms of the Constitution rests with them, not with the courts. Each branch must strive to observe its functional limitations. Most importantly, when encroachments of power occur, the affected branch must seek rectification in a manner which does not paralyze the governmental process. To do otherwise would lose sight of the fact that the framers sought not only the preservation of liberty, but liberty’s preservation within the confines of a workable government.

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60. *Id.* at 3214-15 (White, J., dissenting).