BRANCHES BEHAVING BADLY: THE PREDICTABLE AND OFTEN DESIRABLE CONSEQUENCES OF THE SEPARATION OF POWERS

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INTRODUCTION

At the intersection of law and politics, Republicans have continually run red lights, committed hit-and-runs, and otherwise flouted constitutional norms. At least that is what Professor Peter Shane would have us believe. In his provocative paper, Professor Shane argues that over the past two decades Republicans (especially those in Congress) have repeatedly violated separation of powers norms in a manner that evinces contempt for pluralism and the Constitution's separation of powers.[1]

Professor Shane essentially makes three points. First, separation of powers norms are increasingly fragile and have been violated as they never have been before, and that their wobbly state is bad for the nation.[2] Second, Republicans are the norm-breakers.[3] Third, they are norm-breakers for reasons congenital to the modern Republican Party, a narrow party that is homogeneous, white, dominated by the right-wing, and thus hostile to the Constitution's separation of powers.[4]

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† Professor of Law, University of San Diego. Thanks to the *Cornell Journal of Law and Public Policy* and Professor Cynthia Farina for their kind invitation to attend the conference. Special thanks to Professor Peter Shane for suggesting my name to the conference organizers as a commentator. Though I disagree quite vigorously with Professor Shane's claims, I salute his desire for commentators who might disagree with him. Thanks also to Michael Rappaport for comments on an earlier draft.

1 Peter M. Shane, *When Interbranch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503 (2003).

2 *Id.* at 510.

3 *Id.* at 514–33.

4 *Id.* at 534, 537.

I disagree with each of these claims. To begin with, we ought not to lament changing interbranch norms. Given the predictable interbranch friction in a system of separated powers, interbranch norms inevitably will change over time. The inescapable creation and destruction of interbranch norms is not a process to be feared or despised. What matters is not merely whether some institution has broken a norm, but whether the norm supposedly violated is one worth preserving. For instance, if there were a norm of rubberstamping treaties, few ought to shed tears if the Senate began to examine treaties more carefully. Hence, the mere fact that interbranch norms might have changed recently is not reason for anyone to fret or panic.

Assuming that interbranch norms have been changing lately, it is not obvious that the Republicans deserve all the credit (or blame). In the past, congressional Democrats have taken many of the actions that Professor Shane protests (such as stalling judicial nominees or presenting presidents with all-or-nothing appropriation bills).[5] Nonetheless, they escape his censure because they took these actions while opposing supposedly unpopular presidents. Yet a norm's application cannot depend upon something as mercurial and uncertain as popularity. We will be able to say very little that is sensible and consequential about norms and their violation if we also have to check the Gallup polls of the era. Indeed, it seems unlikely that an interbranch norm exists at all if it does not apply when one or more branches are unpopular and therefore weak. Rather, it would seem that meaningful norms exist only if they apply generally, regardless of whether the application of the norm would cater to public opinion. If Professor Shane truly cherishes these norms, he should direct at least some of his indignation at Democrats in Congress.

Finally, contrary to what Professor Shane seems to argue, the Grand Old Party, for all its faults, has no beef with "deliberative legitimacy." Nor is it opposed to democracy, accountability, or checks and balances. To be sure, it is opposed to the Democratic Party, and it may have had a hand in undermining some of the interbranch norms Professor Shane prizes. However, these facts do not mean that the Republicans are to be feared and loathed anymore than the Democratic Party should be feared and loathed for its opposition to the Republicans and its active participation in undermining the norms at issue. This is not to say that one cannot fault the Republicans for their politics and their policies. But to go further and claim that they are systematically hostile to the Constitution's checks and balances, or are somehow antidemocratic, as Professor Shane repeatedly claims, requires much more by way of evidence. Professor Shane simply has not made the case that the Republican Party is the

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[5] *See id.* at 519.

party of angry, white, anti-separation of powers, antidemocratic, anti-deliberative, males.

I. THE CONTINUAL CREATION AND DESTRUCTION OF INTERBRANCH NORMS

As is well-known, the Constitution establishes certain separation of powers rules. What those rules dictate is a subject of great dispute. Some commentators claim that Congress has the preeminent role in foreign affairs;[6] others believe that the Constitution assigns this role to the President.[7] Some assert that the President controls the law-enforcement bureaucracy;[8] others assert that Congress can structure the executive machinery as it sees fit.[9] Some contend that the Court has been too eager to strike down federal statutes.[10] Others believe that the Court has been too deferential in the past and has resumed its historical role as a judicial safeguard for federalism.[11] In the interstices of these contested rules,

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[6] *See* John Hart Ely, On Constitutional Ground 149 (1996); Harold Hongju Koh, The National Security Constitution 79 (1990); Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War 177 (1986).

[7] *See* Saikrishna B. Prakash & Michael Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001); H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999).

[8] *See generally* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701; Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws* 104 YALE L.J. 541 (1994); Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[9] *See* Peter Shane, *Returning Separation-of-Powers Analysis to its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11,081 (2000); Cynthia Farina, *The 'Chief Executive' and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179 (1997). *See also* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1729 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787 (1987).

[10] *See generally* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (criticizing the Rehnquist Court's federalism decisions as reflecting a growing disrespect for Congress); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) (claiming that the Constitution was not originally understood to authorize judicial review); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (criticizing the expansion of state sovereign immunity); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (criticizing as institutionally wrongheaded the Court's imposition of decisionmaking process requirements on Congress in federalism cases); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimmel, 110 YALE L. J. 441 (2000) (criticizing the Court's decisions on Section 5 of the Fourteenth Amendment).

[11] To be sure, some scholars have defended the Court's jurisprudence. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE

there are uncertain, contested, and ever-changing interbranch norms. The Constitution grants the President a veto and does not limit how often the President may veto bills.[12] Likewise, the Constitution grants Congress the power to appropriate funds,[13] but, with few exceptions,[14] it does not require the Congress to fund anything. Finally, the Constitution grants to the Senate the responsibility of confirming all non-inferior officers of the United States,[15] without dictating how the Senate must exercise its check.

As one might expect, the interaction of certain settled rules with changeable norms in an environment where politicians are ever grasping for power necessarily results in hydraulic pressure for changes in established norms. Certain presidents will wield the veto more aggressively; others will decide that they should take a backseat to Congress in legislative matters. Similarly, the Senate sometimes will defer to the President's treaty proposals; at other moments in time, the Senate will be more wary of foreign entanglements.

Changes in these norms are often appropriate and desirable. Much of the legal academy favors the relatively recent norm of expansive readings of the Bill of Rights, even when these interpretations limit the federal government. Likewise, many people welcome the President's relatively recent and much larger role in tax and spending policy because they believe that the President is the only elected federal official who considers the welfare of the entire country in making tax and spending decisions. Perhaps Professor Shane would agree that the outdated norm of judicial nominees not testifying before the Senate, a norm in place for more than a century,[16] was discarded for good reason. Obviously, not all norms are good ones and, therefore, not all norm-breaking is bad.

L.J. 75 (2001) (arguing that the Court should enforce the federalism provisions of the Constitution); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (defending the Court's enforcement of federalism guarantees); Saikrishna Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (arguing that the Constitution, as originally understood, authorizes judicial review of federal statutes); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (arguing that judicial review is a valid safeguard for federalism).

12 U.S. CONST. art. I, § 7, cl. 2.

13 U.S. CONST. art. I, § 8, cl. 1.

14 *See* U.S. CONST. art. II, § 1, cl. 6 (President's salary cannot be diminished or increased during the period in which he was elected); U.S. CONST. art. III, § 1 (judicial salaries cannot be diminished).

15 U.S. CONST. art. II, § 2, cl. 2.

16 *See* Ronald Rotunda, *The Senate's Role in the Nomination and Confirmation Process: Whose Burden?*, submitted to the Subcommittee on an Administrative Oversight and the Courts of the Committee on the Judiciary of the United States Senate, *at* http://www.senate.gov/~judiciary/oldsite/te090401so-rotunda.htm (Sept. 4, 2001).

Indeed, Professor Shane admits that many of his preferred norms began during the New Deal or post-World War II.[17] Should we fret over the demise of the pre-existing norms that Professor Shane's preferred norms replaced? We should not be upset merely because these old norms are no more. We should only long for those discarded norms that were better than their successors.

Given the inevitable fluidity of norms, the question has to be whether an existing norm is better than the one that might replace it. Professor Shane's preferred norms (Congress may statutorily constrain the President's direction of foreign policy; Congress should not present the President an all-or-nothing appropriation bill; Congress should wield the impeachment power in a more restrained manner; and the Senate should play a more deferential confirmation role) are hardly indisputably better than the norms that may have replaced them, or that may replace them in the future. Nor, for that matter, are these norms obviously better than the norms that they replaced. Merely establishing that some branch or political party is upsetting norms hardly indicates that something rotten is afoot.

That norms are often important for the smooth functioning of government is beyond dispute. Deciding what those norms should be, however, requires an argument as to each norm. Professor Shane, rather than arguing for his preferred norms, assumes the utility of each one. Though he may be right as to each one, he has yet to make the case for them.

II. AWARDING CREDIT (OR APPORTIONING BLAME) FOR NORM-BREAKING

There is the separate question of who should get the credit (or the blame) for violating established norms. Even assuming that the norms Professor Shane discusses actually existed at some point in our nation's history, one can make credible and powerful arguments that Democrats, rather than Republicans, originally violated at least some of these norms. In particular, one could argue that Democratic Congresses first gave the President all-or-nothing appropriation bills and that Senate Democrats first stalled judicial nominations during the last year of the first Bush administration. If one accepted these claims, one might have to question whether some of the norms identified by Professor Shane even existed at the time the Republicans supposedly violated them. Indeed, one might conclude that rather than violating norms, the Republicans were actually following other, more recent norms that had replaced the outdated norms that Professor Shane prizes.

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[17] *See* Shane, *supra* note 1, at 511.

Professor Shane colorfully describes the Republican Senate's "attempts to hijack" the power of judicial appointments.[18] In this case, Republican "obstructionism" supposedly violated a norm of deferential review of judicial nominations. Professor Shane recites numerous statistics meant to show that the Republicans engaged in "unprecedented" tactics to delay confirmations.[19] Yet Professor Shane apparently is unaware of other statistics that cast a decidedly different light on the actions of the Republican Senate and its Democratic predecessors. Professor Shane praises the 1992 Democratic Senate for confirming 66 of President Bush's judicial nominees in 1992 and criticizes the 2000 Republican Senate for not taking action on some 40 nominees.[20] What he fails to mention are the 54 judicial nominations of President Bush in which the Senate took no action in 1992.[21] It would seem that the Republican Senates of 1996 and 2000 could cite the 1992 Senate as the model for their supposedly "unprecedented" acts.

Professor Shane also neglects to examine how President Clinton's nominations to the bench fared compared to President Reagan's. Though both Presidents served for eight years and though both had almost 400 judges confirmed, they faced rather different institutional constraints. President Reagan had his judges confirmed by a Republican Senate for six of eight years. President Clinton had about the same number of judges confirmed, despite the fact that "obstructionist" Republicans controlled the Senate for six of President Clinton's eight years. One must wonder how successful the Republicans' efforts to obstruct were if President Clinton's nominations fared so well in the face of a Republican Senate.[22] Truly obstructionist Republicans have cause for complaint, especially in light of more recent and more successful Democratic obstruction.

The simple fact is that, though both parties have generally approved presidential nominees to the judiciary, both also have applied "the brakes" at the end of presidential terms in the hope that their parties would be able to capture the presidency and fill the judicial offices left vacant. For some reason, Professor Shane has chosen to single out recent Republican senators as if they were particularly obstructionist. A more comprehensive examination leads to the conclusion that no party has had

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18 *See id.* at 526.

19 *See id.* at 527.

20 *See id.*

21 *See* Press Release, Senator Jeff Sessions, Ghosts Of Nominations Past: Setting The Record Straight, *at* http://www.aclj.org/news/judicialconf/020510_sessions.asp.

22 *See* Opening Statement of Senator Orrin G. Hatch, Ranking Republican Member Before the United States Senate Committee on the Judiciary Hearing on "Ghosts of Nominations Past: Setting the Record Straight," *available at* http://www.aclj.org/news/judicialconf/020509_hatch.asp (last visited June 23, 2003).

a monopoly on obstructing judicial nominations, and that there is a tradition of obstructionism in the last two years of a presidential term.[23] If anything is new, it is the recent Democratic tactic of obstruction throughout an entire presidential term. Only time will tell whether Democrats will receive credit for creation of a new norm.

If the stalling of judicial nominations at the end of presidential term has gone on for more than a decade, it is hard to say that the Republicans in 2000 (or 1996) somehow violated an accepted and meaningful interbranch norm of deference to presidential nominations to the bench. Perhaps Professor Shane's evident displeasure is better directed at the Senate's Democrats circa 1992 (or 1988). Or perhaps the Republicans of 1980 are at fault, if they also tried to run out the clock on President Carter's nominees. Indeed, one might say that the 1996 and 2000 Republican senators were *following* an interbranch norm of stalling at the end of a presidential term.[24]

Another tactic that upsets Professor Shane is the supposed decision by Congressional Republicans to "shut down" the government in 1995.[25] But as Professor Shane must know, the congressional Republicans did no such thing. Republicans in Congress passed appropriation bills to their liking and President Clinton vetoed them because they were not to his. The resulting lack of appropriations caused the government shutdown. When two branches disagree in a situation where their concurrence is necessary, it is possible to blame one, rather than the other, for a failure to come to a consensus. But that requires a rather complicated and highly contestable argument about which side was "right" and which side negotiated in good faith. Professor Shane never makes such an argument.

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[23] Eugene Volokh has claimed that Democratic senators began applying the brakes in 1988 at the end of Ronald Reagan's second term. He has noted that there was "a period of time when there was a general understanding that presidents would get more of their nominations confirmed during their first two years in office than at the end of a term." Eugene Volokh, *Confirmation History*, *at* http://volokh.blogspot.com (Apr. 30, 2003). In a recent study, Sheldon Goldman has come to the same conclusion. *See* Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 Judicature 251, 257 (2003) (noting that obstruction increases during "presidential years").

[24] To his credit, Professor Shane notes in a footnote that Republicans might have been following a new norm in delaying consideration of President Clinton's appointments. *See* Shane, *supra* note 1, at 533 n.151. He also seems to admit that both sides have engaged in obstruction in the last two years of a presidential term. *See id.* Still, he claims that the Republicans are responsible for "'ratcheting up'" the obstruction, creating a new, "less salutary equilibrium." *See id.* If this is true of the Republicans, it is also true for Democrats. Sheldon Goldman's "index of obstruction" indicates that obstruction of appeals court nominees hit an all-time high in the 107th Congress, when the Senate was controlled by the Democrats. *See* Goldman, *supra* note 23, at 257 (table 6). Senate Democrats were also responsible for setting previous all-time highs in the 100th and 102nd Congresses. *See id.* Objectively speaking, both sides have ratcheted up the delaying tactics at the end of a presidential term.

[25] *See* Shane, *supra* note 1, at 516, 517.

Even if the 1994 Congressional Republicans were to blame because of their refusal to compromise with President Clinton (rather than the other way around), they were hardly the first Congress to present the President with a "take it or leave it" appropriations offer. To his credit, Professor Shane cites Senate Majority Leader Mike Mansfield as having issued a similar ultimatum to President Nixon in 1973.[26] One could also cite Congress's use of omnibus appropriations during the Reagan Administration. In the mid-1980s, Congress played hardball by rolling up all appropriations bills into one omnibus bill and then dared President Reagan to veto these bills. Both Nixon and Reagan caved and signed these bills rather than shutting down the government for extended periods of time.

Why aren't these episodes of "nuclear blackmail" lamentable collapses in a separation of powers norm? Because, according to Professor Shane, the Democrats "could plausibly assert the necessity of that strategy to effect the democratic aims that underlie checks and balances."[27] With all due respect, Professor Shane has eviscerated his norm. He begins with the proposition that one branch should not defund the other.[28] But in order to avoid tarring the Democratic Congresses that preceded the Republicans in 1995, he has to amend his norm to allow nuclear blackmail where the incumbent president has approval ratings at 44% or is "largely discredited."[29] There really is nothing left of the budget cooperation norm if it can be circumvented whenever a president is considered unpopular. A norm that does not apply when a president has an approval rating of 44% is not really a norm. Nor is a norm of much consequence when it does not serve to protect the weak branch. Meaningful norms exist only if they are strong enough to withstand temptations to dog-pile on a politically unpopular branch. In any event, Professor Shane does not show that President Reagan was similarly unpopular in the mid-1980s, nor does he acknowledge that appropriations blackmail might have been permissible during the Clinton administration, when President Clinton's approval ratings hovered in the low-40s .

Much of this suggests that in 1995, there was no norm against appropriations blackmail. In making the President "an offer he couldn't refuse," Republicans were following in the footsteps of their Democratic predecessors. In vetoing their ultimatum, President Clinton decided not to cave in and ultimately won the day. But his triumph merely means that the Republican gambit failed. It does not mean that Republicans were guilty of "antidemocratic assaults on checks and balances," or that

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26 *See id.* at 519.

27 *See id.* at 520.

28 *See id.* at 516.

29 *See id.* at 520.

they somehow lacked "democratic legitimacy." Sometimes losing a political fight means nothing more than losing the fight. It does not necessarily signal a deep-seated hostility to the regime and its Constitution.[30]

III. A POX ON BOTH YOUR PARTIES

The point in strolling down memory lane is not to suggest that Democrats are engaged in a massive conspiracy against constitutional norms. Indeed, in many cases the norms discussed by Professor Shane probably did not even exist at the time they supposedly were violated. Moreover, as noted earlier, there is nothing necessarily wrong with violating or replacing a nonbinding constitutional norm. It all depends upon the particular norm that one replaces.

Instead, the point of all this is that, even if one embraces the norms identified by Professor Shane, neither party has an unblemished record. Both have succumbed to the ever-present temptation to power-grab, with more success in some cases than others. The story that Professor Shane tells, of one party hell-bent against the Constitution's separation of powers and the other party ever-virtuous and ever-victimized, is simply unbelievable, even for those who are unfamiliar with the last three decades. No political party has yet cornered the market on constitutional fidelity, much less fidelity to unconstitutionalized (and therefore non-obligatory) interbranch norms.[31]

Hence, the most that can be said is that both parties have violated certain separations of power norms. Not content with this limited claim, however, Professor Shane goes much further than his evidence will allow. He concludes that Republicans have been "notably hostile to checks and balances," are wed to presidentialism, and are engaged in "antidemocratic initiatives."[32] As to the first charge, one could equally, and perhaps more plausibly, argue that, in pressing for a greater role in appropriations and appointments, congressional Republicans (and Democrats) have merely more robustly exercised their "checks" to achieve a new and different "balance." Contests for power are part of the separation of powers; they are not signs of a malignant system. As Democrats will tell you today, the President is not entitled to every appropriation or

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[30] I have chosen not to comment on Professor Shane's other examples of Republican norm-breaking, not because I agree with his characterizations and claims, but because my point is made even if one agrees with his remaining claims. As discussed in the text, my point is not that Democrats deserve to be censured for their obstructionism and all-or-nothing omnibus appropriation bills. Rather, my point is that both parties have helped create and destroy interbranch norms.

[31] Some might conclude that, in addition to the Democrat's participation in the norm-breaking identified above, they also deserve credit (or blame) for the first "Borking" of a judicial nominee and for the politicization of investigations of executive branch officials.

[32] *See* Shane, *supra* note 1, at 533–34.

tax cut he wishes, nor is he entitled to every appointment he desires. Opposition to existing norms does not necessarily constitute antagonism to the Constitution's separation of powers for the simple reason that the norms are not part of the Constitution's separation of powers.

Professor Shane's presidentialism charge is odd for two reasons. To begin with, those who profess a desire for a strong president do so in part because they believe that the Constitution's separation of powers demands it. Professor Shane undoubtedly disagrees with this claim, but his disagreement does not entitle him to condemn those with whom he has a scholarly disagreement. The most that he can say is that "presidentialists" just misunderstand the Constitution,[33] which is something very different from saying that they are hostile to its checks and balances because they favor a strong president. This more limited claim would suggest that presidentialists are mistaken, not that they are opposed to the separation of powers.

The presidentialism claim is strange for a second reason: most of the episodes Professor Shane recounts involve a Republican Congress thwarting a Democratic president. One is hard pressed to understand why these examples prove that Republicans are "presidentialists." Indeed, these examples suggest the opposite–a party bent on strengthening congressional prerogatives. I think a more complete picture of the past two decades reveals that the Republicans have not been committed to presidentialism any more than Democrats have been committed to congressionalism. When President Clinton came into power, Democrats no longer seemed as enamored with independent counsels, or as interested in vigorously pressing the view that Congress must authorize all uses of military force. The role reversals that took place over the past two decades suggest less a commitment to abstract principals than a commitment to power. Both parties quickly and opportunistically change their rhetoric and tactics when new circumstances arise.

Finally, there is no evidence to support Professor Shane's remarkable claim that Republicans have been engaged in antidemocratic initiatives, other than violations of supposed norms, which were also violated by members of the Democratic Party. If the Republicans are hostile to democratic pluralism because of their violations of interbranch norms, the same must be true of the Democrats. Of course, the problem here is that Professor Shane links two unrelated things. The violation of separation of powers norms hardly suffices to prove a hostility towards democracy. At most it indicates a hostility to existing separation norms. Thus, even if I agreed that Republicans or Democrats have been upending separation of power norms right and left, it would not follow that they are

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[33] *See id.* at 534.

somehow opposed to democracy. One can be for or against existing interbranch norms regardless of one's position about democracy. Because Professor Shane provides no other reason for supposing that Republicans are hostile to democracy, he has not made his case.

CONCLUSION

Is the sky falling? At times, Professor Shane seems to suggest as much. But one is never quite sure exactly why. His article ends with a lament that the congressional Republicans are patsies for the White House. According to Professor Shane, they do not seem interested in checking the President and, instead, seem intent on fighting the Democratic opposition. It seems that sometimes congressional Republicans are insufficiently deferential (when it comes to Democratic presidents) and others times too obsequious (when it comes to Republican presidents). They just cannot find the equilibrium, the happy medium, occupied by pluralistic, heterogeneous, democratic, checks and balances-loving Democrats.

If there is a problem here, it is an ordinary problem of partisan politics, not one of constitutional dimension. No one should be surprised that Democratic members of Congress gave a pass to President Clinton on many of the issues for which they now hound President Bush (access to governmental documents and war powers, for instance). And no one should be astonished that Republicans are more deferential to a Republican President than to a Democratic one. It is the same as it ever was. Branches will behave "badly" from time to time—it is part of our system.