EXECUTIVE POWER IN *YOUNGSTOWN*'S SHADOWS

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INTRODUCTION

"We can hardly expect that the lasting outgrowth of the steel controversy will be the *Youngstown* case."[1] This projection captures the sentiment of much of the early academic commentary[2] on the Supreme Court's decision invalidating President Truman's seizure of the nation's steel industry in the spring of 1952.[3] For Professor Edward S. Corwin, the decision was "a judi-

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1. Jerre Williams, *The Steel Seizure: A Legal Analysis of a Political Controversy*, 2 J. Pub. L. 29, 34 (1953).

2. It was, however, perhaps at odds with the reaction of the general public. See, e.g., *Steel: Theory and Practice*, N.Y. Times 28 (June 3, 1952) ("We have, in the opinion delivered by Justice Black yesterday and sustained by five other justices, a redefinition of the powers of the President.").

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see, e.g., Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Colum. L. Rev. 53, 64-65 (1953) ("*Youngstown* will probably go down in history as an outstanding example of the *sic volo, sic jubeo* frame of mind into which the Court is occasionally maneuvered by the public context of the case before it."); Paul A. Freund, *The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case*, 66 Harv. L. Rev. 89, 95 (1952) (characterizing the majority opinion as offering a "rigid conception of the separation of powers," and predicting that the Court in the future would be forced to disavow that conception); Glendon A. Schubert, Jr., *The Steel Case: Presidential Responsibility and Judicial Irresponsibility*, G.W. Pol. Q. 61, 64-65 (1953) ("The decision in the Steel case is so much out of step with the way in which the American system of government functions that it cannot long stand as a guidepost in the development of United States constitutional law."). But see L.B. Lea, *The Steel Case: Presidential Seizure of Private Industry*, 47 Nw. U. L. Rev. 289, 289 (1952) ("The Supreme Court's decision on June 2, 1952, invalidating the President's seizure of the steel industry, is certain to become a landmark case in our constitutional jurisprudence.") (footnote omitted); Paul G. Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 Mich. L. Rev. 141, 143 (1952) (arguing that *Youngstown* assumes "a significance of large dimensions" with respect to broader questions of judicial review).

cial brick without straw"—the opinion of the Court resting on a "purely arbitrary construct,"[4] Justice Jackson's "rather desultory" concurring opinion containing "little that is of direct pertinence to the constitutional issue,"[5] and the other concurring opinions contributing nothing "to the decision's claim to be regarded seriously as a doctrine of constitutional law."[6] Scholars who observed the crisis and pronounced the Court's decision "destined to be ignored"[7] might have been surprised at the thought that, fifty years later, a law review would devote all of its pages to a commemoration of the *Youngstown* case.

The claims of *Youngstown*'s detractors likewise would surprise modern first-year law students, who find the case prominently featured in the separation of powers section of their constitutional law case books,[8] who highlight Justice Jackson's discussion of three categories of executive action,[9] and who extract from the majority and concurrences evidence of "formal" versus "functional" analysis in separation of powers disputes.[10]

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4. Corwin, 53 Colum. L. Rev. at 53, 64 (cited in note 3).

5. Id. at 63.

6. Id. at 65.

7. Schubert, G.W. Pol. Q. at 65 (cited in note 3).

8. See, e.g., Erwin Chemerinsky, *Constitutional Law* 232 (Aspen Publishers, 2001); Jesse H. Choper, et al., *The American Constitution* 114 (Aspen Publishers, 2001); Daniel A. Farber, et al., *Cases and Materials on Constitutional Law* 917 (West, 2d ed. 1997); Geoffrey R. Stone, et al., *Constitutional Law* 392 (Little Brown and Co., 3d ed. 1996); Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 333 (Foundation Press, 14th ed. 2001).

9. See 343 U.S. at 635-38.

10. For commentary on the formal and functional strands in the *Youngstown* opinions, see, e.g., Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1522-31 & nn.55, 59 (1991) (describing formal and functional approaches and using Justice Black's and Justice Jackson's opinions, respectively, as examples); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 Harv. J.L. & Pub. Pol. 21, 23-24 (1988) (highlighting the formalist reasoning of Justice Black's opinion and the functionalist strains in the concurrences; arguing that *Youngstown* indicates that formalism and functionalism "are frequently and maybe typically interconnected"); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L.J. 679, 691 & n.125 (1997) (characterizing the reasoning in Justice Black's *Youngstown* opinion as "exaggerated formalism" and noting the Supreme Court's description of Justice Jackson's opinion as reflecting "'the pragmatic, flexible view of differentiated governmental power'" (quoting *Mistretta v. United States*, 488 U.S. 361, 381 (1989))); Martin H. Redish and Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Realism in Separation of Powers Theory*, 41 Duke L.J. 449, 486 (1991) (advocating a "pragmatic formalist" approach to resolving separation of powers disputes, and arguing that Justice Jackson's approach in *Youngstown* is inconsistent with that model); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 Cornell L. Rev. 430, 439 (1987) (suggesting that Justice Jackson's concurrence in *Youngstown* rejects "single-minded devotion to the analytics of separation" as "inflexible and unrealistic"); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 S. Ct. Rev. 357, 362-63 (distinguishing for-

The weight of scholarship, too, has shifted. Many who study the balance of congressional and presidential power, especially in the area of foreign affairs, view Justice Jackson's concurrence in *Youngstown* as providing a sensible framework for resolving the conflicting claims of the two branches[11] and decry this framework's alleged erosion in subsequent case law.[12] One constitutional scholar even found Justice Jackson's opinion to be—as of 1996, at least—"the most truly intellectually satisfying . . . opinion in our two-hundred-year constitutional history."[13] And some

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malist and functionalist approaches and characterizing Justice Black's opinion as an example of the former). For an illuminating discussion of the relationship between formal and functional approaches to separation of powers questions, see generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127 (2000).

11. See, e.g., Louis Henkin, *Foreign Affairs and the United States Constitution* 94-96 (Oxford U. Press, 2d ed. 1996) (stating that Justice Jackson's concurring opinion in *Youngstown* "has become a starting point for constitutional discussion of concurrent powers"); Harold Hongju Koh, *The National Security Constitution* 105 (Yale U. Press, 1990) (arguing that Justice Jackson's concurrence articulates "with unusual clarity . . . the concept of balanced institutional participation" in the foreign policy process); Gordon Silverstein, *Imbalance of Powers* 105-07 (Oxford U. Press, 1997) (analyzing separation of powers questions under Justice Jackson's framework); see also Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* 382 n.18 (Bellinger Publishing Company, 1976) (describing Justice Jackson's opinion as "deservedly famous"); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 Va. L. Rev. 1, 10-12 (1982) (calling *Youngstown* the "principal modern authority on the relationship between the President and Congress" and observing that "[i]t is Justice Jackson's famous [concurrence] that has most influenced subsequent analysis"); Joel L. Fleishman and Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 L. & Contemp. Probs. 1, 19 (1976) (suggesting that Justice Jackson's framework in *Youngstown* "remains the most definitive account" of how to analyze questions of executive authority); Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 Wm. & Mary L. Rev. 343, 352 (1989) ("[T]oday it is almost universally believed that the more narrowly framed concurring opinions in [*Youngstown*] capture what it really 'stands for.'"); Thomas A. O'Donnell, Comment, *Illumination or Elimination of the Zone of Twilight? Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. Cin. L. Rev. 95, 99 & n.35 (1982) (noting influence of Justice Jackson's concurrence).

12. See, e.g., Koh, *The National Security Constitution* at 142 (cited in note 11) (discussing cases, including *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *INS v. Chadha*, 462 U.S. 919 (1983), that "dramatically alter the application of Justice Jackson's tripartite *Youngstown* analysis in cases on foreign affairs"); Silverstein, *Imbalance of Powers* at 11-12 (cited in note 11) (arguing that courts "began to soften the barriers" between Justice Jackson's categories in the decades following the *Youngstown* decision, thus lending "legitimacy to the emerging executive claim to prerogative powers in foreign policy"); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391, 2421 (1994) (challenging Supreme Court's upholding of government policy to return possible refugees to Haiti; arguing that Court failed to recognize that Congress had disabled the President from granting Attorney General unreviewable discretion to return refugees, and that case thus fell within Justice Jackson's third category).

13. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* 187, 202 (Yale U. Press, 1996); see also Sanford Levinson, *Introduction: Why Select a Favorite Case?*, 74 Tex. L. Rev. 1195, 1196-97 (1996) ("[Justice Jackson's opinion] is one of the few opinions

regard *Youngstown* not only as a significant case in the Supreme Court's separation of powers jurisprudence, but also as a turning point in the Court's handling of politically charged constitutional questions.[14]

In light of the importance the legal academy attaches to the *Youngstown* case, it is perhaps hazardous to submit that Professor Corwin had the better of the argument. I will not go so far as to say that. The *Youngstown* decision well deserves its status as a landmark case in our constitutional jurisprudence. But *Youngstown*, I will argue, is a landmark case for what it symbolizes, not for what it says. And it is dangerous for us to confuse the two.

What *Youngstown* symbolizes is the notion that actions do not achieve the status of law merely because they are the actions of the government. The case no doubt deters some executive conduct of questionable legality. And the case will always add weight to the proposition that the judiciary has the power, and in some cases the obligation, to review and invalidate the actions of a coordinate branch of government on separation of powers grounds. Courts invoke *Youngstown* in the most delicate of cases involving abuses of power, even when the case is quite far off point.[15]

But courts and scholars put *Youngstown* to more work than this. The case has special significance for disputes involving the relative powers of Congress and the President in foreign affairs matters—where the Constitution says little, controversies are frequent, judicial resolutions are few, and the stakes are high.[16]

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that make me truly proud to be a constitutional lawyer or to believe in the notion of what Ronald Dworkin calls legal 'integrity.'"). I should be clear that Professor Levinson favors Justice Jackson's opinion for "the interplay of persona and analysis" that its rhetoric reveals, not for its conclusions on the questions of presidential power, to which Levinson ascribes "almost no importance." Id. at 1198.

14. Constitutional historian Maeva Marcus, for example, invites us to see the *Youngstown* decision as dealing "a telling blow to the . . . doctrine . . . that each branch of government was the arbiter of its own powers and responsibilities," thus influencing the Court's decisions to address important constitutional questions in the context of other controversial cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954), *Baker v. Carr*, 369 U.S. 186 (1962), and *United States v. Nixon*, 418 U.S. 683 (1974). Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* 248 (Columbia U. Press, 1977); see id. at 228-48. For a discussion of this aspect of Marcus's project, see William H. Harbaugh, *The Steel Seizure Reconsidered*, 87 Yale L.J. 1272, 1281-83 (1978).

15. See text accompanying notes 116-122.

16. Not surprisingly, questions about the proper balance of power between the President and Congress surfaced in connection with the U.S. response to the September 11 attacks, particularly with respect to the President's order providing for the trial of suspected terrorists before military tribunals. Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 Weekly Comp. Pres. Doc. 1665 (Nov. 13, 2001); see, e.g., Laurence H. Tribe, *Trial by Fury*, New Republic,

Although not itself a paradigmatic foreign affairs case, *Youngstown* is thought to bear on separation of powers questions touching on foreign affairs in a number of ways. First, for those who would argue that the President lacks any independent, "implied" powers to formulate and carry out foreign policy, the Court's opinion in *Youngstown* stands as the high water mark.[17] Second, Justice Jackson's concurrence offers something of a blueprint for resolving disputes between the President and Congress, bringing together, as the Court put it in 1981, "as much combination of analysis and common sense as there is in this area."[18] Scholars who argue that the Constitution lodges most foreign affairs powers in Congress find in Justice Jackson's concurrence a recognition of congressional primacy—that presidential powers fluctuate, "depending upon their disjunction or conjunction with those of Congress."[19]

I will argue that the lessons that the case—and in particular, Justice Jackson's concurrence—offers in the foreign affairs area are less clear and less helpful than is often believed. It is a mistake to assume that *Youngstown* carries a doctrinal weight equal to its rhetorical or symbolic power. First, to the extent that the *Youngstown* decision is thought to foreclose claims of implied presidential power in foreign affairs, the better reading of the case suggests otherwise. Second, Justice Jackson's tripartite framework for evaluating executive action is not a framework at all, nor did he necessarily intend it to be.[20]

More important, Justice Jackson's opinion sends mixed signals about who is best able to police executive conduct—Congress or the courts. Justice Jackson clearly envisioned a role

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Dec. 10, 2001, at 18-19 (arguing that Congress should intervene to cut back on President's order).

17. I use the phrase "implied powers" to describe powers that flow from the Constitution, but that are based on inferences from specific textual grants or from the structure the Constitution creates. I distinguish the concept of implied powers flowing from the Constitution from claims that the Executive possesses "inherent" foreign affairs authority, not created or constrained by the Constitution. Of course, those who believe that the text and structure of the Constitution vest few foreign affairs powers in the President argue that so-called implied powers are extraconstitutional. See notes 128-139, 149-151, and accompanying text. I do not use the phrase "implied powers" to encompass powers Congress impliedly delegates to the President. Cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 14 (1993) (distinguishing implied legislative authorization from implied constitutional powers).

18. *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

19. 343 U.S. at 635 (Jackson, J., concurring).

20. See id. (describing grouping of presidential actions in relation to powers of Congress as "somewhat oversimplified" and as providing a means to "distinguish[ ] roughly" the legal consequences of presidential conduct).

for the courts in policing the boundaries between different categories of executive action, to determine which actions Congress has expressly or impliedly authorized or forbidden. Many scholars take this to mean that courts should narrowly construe statutes conferring foreign affairs authority on the Executive Branch; to do otherwise is to entrench a shift in power from Congress to the President.[21] Justice Jackson seemed to envision a smaller role for courts, however, when Congress is silent. In that situation, he suggested, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[22] Even some scholars who believe that Congress has primary foreign affairs power acknowledge a diminished role for courts in this category of cases; they assume that the President possesses some "initiating"[23] or "concurrent"[24] powers and can exercise those powers until Congress acts.[25] As a result, Congress bears the primary responsibility for policing the Executive Branch. Those who believe that the President has more substantial foreign affairs authorities, of course, are likely to share this view that a court's

21. See, e.g., David Gray Adler, *Court, Constitution, and Foreign Affairs*, in David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* 19, 32-35 (U. Press of Kansas, 1996) (criticizing the Supreme Court's treatment of congressional delegation to Secretary of State of power to issue passports); Koh, *The National Security Constitution* at 146 (cited in note 11) ("[T]he Supreme Court's reading of these statutes has enhanced presidential power by encouraging lawyers throughout the executive branch to construe their agency's authorizing statutes to permit executive initiatives extending far beyond the intended scope of those statutes.").

22. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

23. Michael J. Glennon, *Constitutional Diplomacy* 15 (Princeton U. Press, 1990).

24. Henkin, *Foreign Affairs and the U.S. Constitution* at 92, 94 (cited in note 11) (recognizing "some undefined zone of concurrent authority in which [the President and Congress] might act, at least when the other has not acted"; noting that concept of concurrent authority "is now accepted"); Koh, *The National Security Constitution* at 109 (cited in note 11) (discussing zone of concurrent authority).

25. See, e.g., Glennon, *Constitutional Diplomacy* at 15-16 (cited in note 23) ("The Constitution sometimes appears silent with respect to issues of decision-making authority. In such circumstances, concurrent power is said to exist in both political branches. . . . The President's initiatives here are contingently constitutional; their validity depends upon congressional *inaction*."); Henkin, *Foreign Affairs and the U.S. Constitution* at 36 (cited in note 11) ("Except where the Constitution expressly allocates power to Congress and implies that it is exclusive of the President, there is increasingly less disposition to deny the President power to act where Congress had not acted."); Phillip R. Trimble, *The President's Foreign Affairs Power*, 83 Am. J. Int'l L. 750, 757 (1989) ("The foreign affairs prerogative protects the ability of the Executive, subject to ex post facto review by Congress, to determine . . . what action to take or not to take in communicating and negotiating with foreign governments and other international actors to settle pressing international problems."); see also Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863, 874-76 (1983) (noting cases in which "the Court has implicitly adopted a framework whereby the President may take any action not expressly prohibited by the Constitution or statute").

role in reviewing executive action in the face of congressional silence is limited.[26]

The guidance scholars draw from Justice Jackson's concurrence, I will argue, is precisely backwards. Courts faced with the question whether a statute authorizes challenged executive conduct should do no more than apply ordinary delegation principles, leaving Congress to legislate against the backdrop of those principles. To require courts to construe foreign affairs delegations narrowly solely to preserve supposed congressional foreign affairs prerogatives is to force courts to make policy judgments better left to Congress. When the question is how to evaluate presidential conduct not traceable under ordinary delegation principles to a statutory authorization, however, the calculus is different. Any such conduct must rest on the President's constitutional powers—whether Congress is silent or opposed. In other words, the notion that presidential powers "fluctuate"[27] is misleading. The Constitution either grants the President a particular power or it does not. Congressional silence cannot create power where none exists; at most, silence might indicate something about what Congress believes the President's *constitutional* authority to be.

To the extent that Justice Jackson's approach suggests that law has little role to play when Congress is silent, that approach contains the seeds of a misplaced political question doctrine, allowing courts to skirt questions of executive power even when other justiciability requirements are met. Once this route of judicial deference is open, it is all too tempting for courts to follow it—not only when Congress is silent, but when the President's conduct conflicts with congressional policy. In short, courts tend to avoid exploring the President's constitutional foreign affairs powers—express or implied—instead finding congressional authorization in questionable circumstances or simply assuming that presidential action should stand as long as Congress is silent. This failure to develop a coherent theory of presidential power, I argue, has an impact far beyond the specific questions about the distribution of powers in the few separation of powers cases that

26. See, e.g., H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash. L. Rev. 527, 537 (1999). Powell makes a somewhat broader argument, that judicial decisions on foreign affairs matters are "peculiarly unlikely to generate broad doctrinal frameworks," and that, since the Constitution confers authority over foreign affairs and national security on the political branches, there is a "risk that judicial intervention will itself be a serious violation of separation of powers." Id.

27. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

courts actually face. Executive Branch lawyers regularly encounter complicated questions about the President's foreign affairs power. To the extent that courts' consideration of executive power questions would limit the acceptable and persuasive forms of argument available to the Executive Branch, courts' silence compromises one of the most effective restraints on executive conduct. And to the extent that courts' consideration of executive power questions would affirm the Executive Branch's mode of analysis, courts' silence unnecessarily prompts others to doubt the legitimacy of Executive Branch views.

The Article has three parts. Part I introduces the circumstances of the steel crisis and outlines the Supreme Court's response to President Truman's seizure of the steel mills. As is well known, much of the reasoning in the concurring opinions of Justices who joined the majority is in tension with the rationale underlying the opinion of the Court. This tension fueled the critical commentary of the day. Among the questions observers expected the Court to resolve was whether the President can lay claim to powers not expressly enumerated in the Constitution. The Court appeared to answer that question in the negative, but the concurring opinions deprived that answer of its force. Indeed, for all of the rhetoric in the opinion to the contrary, the logic of Justice Jackson's concurrence depends on acceptance of at least some implied presidential powers.

In Part II, I discuss the significance of the *Youngstown* opinions in separation of powers controversies, particularly before the Supreme Court. I postpone treatment of cases touching on the proper allocation of power between the President and Congress in foreign affairs and national security matters. In the balance of cases, courts most often invoke the *Youngstown* opinions—particularly the concurrences of Justice Frankfurter and Justice Jackson—to justify a flexible, pragmatic approach to separation of powers questions. But this fact alone cannot account for *Youngstown*'s prominence in our constitutional jurisprudence, because the language in the concurrences is sufficiently open-ended to support a number of different outcomes in any given case. What gives *Youngstown* its power is that it stands as an example of a court invalidating the actions of a coordinate branch of government on separation of powers grounds where the court perceives an abuse of office. When a court wields this weapon, it can take some cover in *Youngstown*'s shadows. And the possibility of a court exercising this power disciplines the Executive Branch.

In Part III, I turn to *Youngstown*'s role in questions involving the balance of presidential and legislative power in foreign affairs and national security. The *Youngstown* case is of special importance to scholars who believe that the Constitution is best read to lodge most foreign affairs powers with Congress. They criticize courts' treatment of disputes between the Executive and Congress on two grounds: that courts too broadly interpret congressional delegations; and that courts ignore opposition to executive conduct, painting executive action in a light favorable to the Executive Branch. As I will argue, what courts often treat as questions about congressional delegation and congressional intent are really questions about the President's constitutional powers. The approach of Justice Jackson's concurrence places too much reliance on courts to police executive action by locating ill-defined boundaries between categories that turn on Congress's implied will; and too little reliance on courts to identify and limit presidential powers based on inferences from the text and structure of the Constitution.

I. THE *YOUNGSTOWN* DECISION AND THE SCOPE OF PRESIDENTIAL POWER

For modern students of constitutional law, the *Youngstown* decision often provides the first exposure to the Supreme Court's treatment of disputes concerning the appropriate distribution of powers among branches of the federal government.[28] It is convenient, then, for teachers to use the opinion of the Court by Justice Black and the concurring opinions, particularly those of Justice Jackson and Justice Frankfurter, to illustrate the divergent approaches to resolving separation of powers controversies that resurface in the Court's later decisions. Something is lost, however, in the effort to simplify the case to extract warring strands of formal and functional reasoning. What frustrated Corwin and his contemporaries was that the opinion of the Court and the concurring opinions of several Justices who joined it differed not only in the methodology they applied, but also in the answer they provided to what seemed to be the crucial question in the case—whether the President might possess authority, either as part of the "executive Power" the Constitution vests in him[29] or otherwise implied from the text and structure of the Constitution, to take certain action in a national emergency in

28. See note 8.
29. U.S. Const., Art. II, § 1.

the absence of specific congressional authorization.[30] Far from concluding that the President lacked such power in all circumstances, a majority of Justices on the *Youngstown* Court left the question open or embraced the concept of implied power. As I will argue in Parts II and III, this aspect of the case's treatment of presidential power is often ignored, or its significance misunderstood.

A. THE STEEL SEIZURE

The circumstances surrounding President Truman's executive order directing his Secretary of Commerce to take control of the steel industry in April of 1952 have been recounted extensively elsewhere.[31] In brief, the order responded to a dispute between the nation's steel companies and their employees over the terms of new collective bargaining agreements to replace those set to expire on December 31, 1951. When negotiations failed, the employees' representative, the United Steelworkers of America, C.I.O., gave notice of its intention to call a strike upon the expiration of the existing agreements.[32] On December 22, 1951, after other federal mediation efforts were unsuccessful, President Truman referred the dispute to the federal Wage Stabilization Board to recommend a settlement.[33] The steel companies rejected the settlement, and after further negotiations stalled, the union renewed its notice of a nationwide strike to begin on April 9.[34]

A day before the strike was to begin, the President issued Executive Order 10340.[35] The order's preamble stated that "steel is an indispensable component of substantially all . . . weapons and materials" needed by U.S. armed forces then engaged in the Korean conflict.[36] As a result, "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would

30. See, e.g., Freund, 66 Harv. L. Rev. at 95 (cited in note 3) (arguing that "[a]s a guide for the future, the opinions [in *Youngstown*] will surely point in various directions").

31. In addition to the opinion of the Court in *Youngstown*, 343 U.S. at 582-84, see especially Marcus, *Truman and the Steel Seizure Case* at 58-82 (cited in note 14); Lea, 47 Nw. U. L. Rev. at 290-92 (cited in note 3).

32. *Youngstown*, 343 U.S. at 582.

33. Statement by the President on the Labor Dispute in the Steel Industry, 1951 Pub. Papers 651 (Dec. 22, 1951).

34. 343 U.S. at 583.

35. 17 Fed. Reg. 3139 (Apr. 10, 1952).

36. Id.

add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field."[37] The order directed the Secretary of Commerce "to take possession of all or such of the plants, facilities, and other property" of the steel companies "as he may deem necessary in the interests of national defense"[38] and authorized the Secretary to prescribe terms and conditions of employment.[39] In turn, the Secretary issued orders taking possession of most of the steel mills and directing the presidents of the companies to maintain their operations.[40] On April 9, 1952, the President reported these steps to Congress, which took no action.[41]

The steel companies immediately filed suit in federal district court in the District of Columbia, claiming that the President and Secretary of Commerce lacked authority to issue the orders in question and seeking preliminary and permanent injunctions against their enforcement. On April 29, the district court granted a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants . . . and from acting under the purported authority of Executive Order No. 10340."[42] The court of appeals immediately stayed the injunction,[43] and both the steel companies and the Government petitioned the Supreme Court for immediate review. Meanwhile, the White House had encouraged the industry and the union to reach an agreement and indicated that in the absence of such an agreement, the government would grant a wage increase. When the Supreme Court granted review, it continued but modified the court of appeals' stay of the district court's injunction: the Court directed the Secretary of Commerce not to alter the terms and conditions of employment.[44] At that point, the ongoing talks between the companies and the leaders of the union collapsed, and both sides awaited the Supreme Court's decision on the validity of the seizure.[45]

37. Id. at 3141.
38. Id.
39. Id.
40. 17 Fed. Reg. 3242 (Apr. 12, 1952).
41. H.R. Doc. No. 82-422 (1952), reprinted in 1952 U.S.C.C.A.N. 883.
42. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952).
43. *Sawyer v. United States Steel Co.*, 197 F.2d 582 (D.C. Cir. 1952).
44. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937-38 (1952).
45. Marcus, *Truman and the Steel Seizure Case* at 147-48 (cited in note 14).

B. THE COURT'S DECISION

On June 2, 1952, less than three weeks after hearing oral argument in the case, the Court affirmed the district court's judgment by a 6 to 3 vote. Writing for the majority, Justice Black devoted a mere three-and-a-half pages to resolving the constitutional question.[46] The Court reasoned that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[47] Because it found no statute that expressly or impliedly authorized the President to take possession of the steel mills, nor any express constitutional language granting the power, the Court turned to the claim that "presidential power should be implied from the aggregate of . . . powers under the Constitution."[48] The Court focused on three provisions of Article II: section 2, designating the President as Commander in Chief of the armed forces; section 1, stating that "The Executive Power shall be vested in a President"; and section 3, providing that the President "shall take Care that the Laws be faithfully executed." The Court declined to sustain the order under any of these provisions. The Court viewed the power to dictate the terms under which the government could take possession of private property as a "lawmaking" power—as resting within Congress's "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" in the federal government.[49] Because the seizure of property was "a job for the Nation's lawmakers, not for its military authorities," the designation of the President as Commander in Chief could not justify the action.[50] And the provisions granting the President the executive power and requiring that he take care that the laws be faithfully executed "refute[] the idea that he is to be a lawmaker."[51] The Court acknowledged the Government's argument that "other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes"; even if this were true, "Congress has not thereby lost its exclusive constitutional authority" to make laws.[52]

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46. 343 U.S. at 585-89.
47. Id. at 585.
48. Id. at 587.
49. Id. at 588-89.
50. Id. at 587.
51. Id.
52. Id. at 588.

Taken at face value, the opinion for the Court suggests that the President possesses only those powers specifically enumerated in the constitutional text, and that some of those constitutional powers (including the "executive Power" and the Commander in Chief authority) should be construed narrowly. No other powers can be inferred from the constitutional text or from the structure the Constitution creates. But all four of the Justices who joined Justice Black's majority opinion—Justices Frankfurter, Douglas, Jackson, and Burton—wrote separately, highlighting varying degrees of disagreement with Justice Black's rationale.[53] Indeed, in an unusual separate statement appended to the Court's opinion, Justice Frankfurter noted the importance of "[i]ndividual expression of views in reaching a common result," because "differences in attitude toward [the] principle [of separation of powers] . . . can hardly be reflected by a single opinion for the Court."[54] Only Justice Douglas's opinion explicitly embraced Justice Black's characterization of the President's action as "legislative" in nature.[55] He reasoned that the Court "could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some," a step that would "most assuredly alter the pattern of the Constitution."[56] In light of the commitment of the lawmaking power to Congress, the President could not claim an implied power to seize the steel mills. Even if the President could take certain action as a matter of "expediency or extremity,"[57] that action would not be lawful until ratified by Congress.

For the other three Justices who joined Black's opinion—Justices Frankfurter, Jackson, and Burton—and for Justice Clark, who concurred only in the judgment,[58] the case turned not on the characterization of the seizure as a legislative act or on a rejection of broad presidential powers, but on the perception that the President's action in seizing the steel mills conflicted with the authorities Congress had provided the President to deal with potential industrial disruptions. In a now famous passage of his opinion, Justice Jackson suggested that presidential powers "are not fixed but fluctuate, depending upon their disjunction or

53. See id. at 593 (Frankfurter, J., concurring); id. at 629 (Douglas, J., concurring); id. at 634 (Jackson, J., concurring); id. at 655 (Burton, J., concurring).
54. Id. at 589 (separate statement of Frankfurter, J.).
55. Id. at 630 (Douglas, J., concurring).
56. Id. at 633.
57. Id. at 631 n.1.
58. Id. at 660 (Clark, J., concurring in judgment).

conjunction with those of Congress."[59] He offered the following grouping of presidential actions and their legal consequences:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[60]

Justice Jackson viewed President Truman's action as falling within the third category, as a measure "incompatible with the expressed or implied will of Congress."[61] Justices Frankfurter and Burton agreed, as did Justice Clark.

Three statutes were relevant to the analysis. First, with the Taft-Hartley Act, Congress had authorized the President to respond to a threatened work stoppage that would "imperil the national health or safety" by appointing a board of inquiry to gather facts on the dispute[62] and, upon receiving that board's report, seeking injunctive relief for an eighty-day period.[63] Second, the Selective Service Act of 1948 permitted the President to take

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59. Id. at 635 (Jackson, J., concurring).
60. Id. at 635-38 (footnotes omitted).
61. Id. at 637.
62. Labor Management Relations Act of 1947, ch. 120, § 206, 61 Stat. 136, 155.
63. Id. §§ 209(b), 210, 61 Stat. at 156 (establishing sixty-day cooling off period plus twenty days for voting on employer's offer of settlement, after which time court must dissolve injunction).

possession of facilities that failed to fill orders placed by the Government for goods required for national defense purposes.[64] Third, the Defense Production Act of 1950 authorized the President to stabilize prices and wages in industries for various purposes, including to prevent disruption of resources necessary for the national defense,[65] and to mediate labor disputes affecting the national defense.[66] As amended in 1951, the statute authorized the President to institute condemnation proceedings to requisition property when needed for the national defense.[67]

Justices Frankfurter, Jackson, and Burton, as well as Justice Clark, emphasized that the President's seizure of the steel mills did not comport with the requirements of these statutes. President Truman had vetoed the Taft-Hartley Act[68] and elected not to invoke its provisions during the steel crisis.[69] In any event, the statute did not specifically authorize seizure; in fact, the House had considered and rejected an amendment that would have authorized the President to seize an industry to preserve the public health and security.[70] One of the Senate sponsors of the legislation specifically noted that the Senate Labor committee had considered and rejected including a seizure provision.[71] The President could not invoke the Selective Service Act, because the Government had not placed any orders directly with the steel

64. Selective Service Act of 1948, ch. 625, § 18(d), 62 Stat. 604, 626.

65. Defense Production Act of 1950, ch. 932, § 402(b), 64 Stat. 798, 803.

66. Id. § 502, 64 Stat. at 812.

67. See id. § 201(a), 64 Stat. at 799-800 (authorizing President to requisition property); Amendments to Defense Production Act of 1950, ch. 275, § 102, 65 Stat. 131, 132 (requiring President to institute condemnation proceedings to obtain real property).

68. 343 U.S. at 599 n.1 (Frankfurter, J., concurring); see 61 Stat. at 162 (noting Taft-Hartley Act's passage over President's veto).

69. 343 U.S. at 639 (Jackson, J., concurring) (noting that President did not invoke Taft-Hartley Act); id. at 656, 658 (Burton, J., concurring) ("The accuracy with which Congress [in the Taft-Hartley Act] describes the present emergency demonstrates [the Act's] applicability. . . . The President, however, chose not to use the Taft-Hartley procedure."); id. at 663 (Clark, J., concurring in judgment) (noting that President did not invoke the Taft-Hartley Act).

70. 343 U.S. at 599-600 (Frankfurter, J., concurring) ("Authorization for seizure as an available remedy for potential dangers was unequivocally put aside."); id. at 639 n.8 (Jackson, J., concurring) (concurring in Justice Frankfurter's and Justice Burton's discussions of the history of the Taft-Hartley Act); id. at 657 (Burton, J., concurring) ("For the purposes of this case the most significant feature of the Act is its omission of authority to seize an affected industry. The debate preceding its passage demonstrated the significance of that omission."); id. at 663-64 (Clark, J., concurring in judgment) ("At the time [the Taft-Hartley Act] was passed, Congress specifically rejected a proposal to empower the President to seize . . . . The legislative history of the Act demonstrates Congress' belief that the 80-day period would afford it adequate opportunity to determine whether special legislation should be enacted to meet the emergency at hand.").

71. Id. at 600 (Frankfurter, J., concurring).

plants.[72] And although the President had relied on the Defense Production Act and his Executive Order implementing it to refer the steel dispute to the Wage Stabilization Board,[73] he had not instituted condemnation proceedings under the Act's provisions.[74]

Having established that the President's action was inconsistent with the mechanisms Congress provided the President for responding to threatened industrial disruptions, each of the Justices went on to discuss whether the President's action could nevertheless be sustained as an incident of the President's constitutional authority. Here again, the concurring opinions are in tension with Justice Black's majority opinion. Focusing on the Take Care Clause of Article II, section 3, and the Vesting Clause of Article II, section 1, Justice Frankfurter rejected Justice Black's suggestion that past executive practice is irrelevant to an assessment of the President's constitutional authority:

> The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. . . . In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[75]

Justice Frankfurter concluded, however, that the instances of past seizures the Government identified did not amount "in number, scope, duration or contemporaneous legal justification"

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72. Id. at 658 n.6 (Burton, J., concurring); id. at 608 n.16 (Frankfurter, J., concurring) (noting that President had not used his authority to seize plants under the Selective Service Act); id. at 665-66 (Clark, J., concurring in judgment) ("[T]he Government made no effort to comply with the procedures established by the Selective Service Act of 1948 . . . ."). According to Marcus, the Government considered placing such orders and using the Selective Service Act as a basis for seizure. Because the armed forces did not buy steel directly but rather purchased end products containing steel, it would have been difficult for the Government to decide what orders to place. Marcus, *Truman and the Steel Seizure Case* at 77 (cited in note 14).

73. Exec. Order No. 10233, 16 Fed. Reg. 3503 (1951).

74. *Youngstown*, 343 U.S. at 658 & nn.5, 6 (Burton, J., concurring) (noting that President referred controversy to the Wage Stabilization Board under the Defense Production Act, but had not invoked the separate provisions of the Defense Production Act allowing condemnation); id. at 663 (Clark, J., concurring in judgment) ("The Defense Production Act . . . grants the President no power to seize real property except through ordinary condemnation proceedings, which were not used here . . . .").

75. Id. at 610-11 (Frankfurter, J., concurring).

to the kind of unquestioned executive practice that could be viewed as a gloss on executive power.[76] Similarly, Justice Jackson argued that it was important to give "to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism."[77] But he too rejected the notion that the historical precedents the Government cited provided "color of legality" for President Truman's actions.[78]

As this discussion indicates, a majority of the Justices, even those who joined Justice Black's opinion, declined to embrace Justice Black's assertions that the President lacks any implied powers, and that courts should narrowly construe the President's enumerated powers.[79] For Justices Frankfurter, Jackson, Burton, and Clark, the fact that Congress had provided procedures for dealing with industrial strife that were at odds with President Truman's actions in the case was decisive. On their reading, the dispute was not so much about implied presidential power as it was about implied and "plenary" presidential power.[80] In other words, the question was not whether the President had the power to initiate a course of conduct when Congress had not acted, but whether that course of conduct could be sustained when Congress had prescribed a far different course. Justice Frankfurter thought it unnecessary to pass on the scope of the President's powers:

> The issue before us can be met, and therefore should be met, without attempting to define the President's powers comprehensively.... We must... put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure....[81]

Justice Burton likewise viewed President Truman's action as distinct from steps taken when "Congress takes no action and outlines no governmental policy."[82] Justices Burton and Clark even

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76. Id. at 613.
77. Id. at 640 (Jackson, J., concurring).
78. Id. at 648.
79. See Marcus, *Truman and the Steel Seizure Case* at 216 (cited in note 14); Harbaugh, 87 Yale L.J. at 1275 (cited in note 14); O'Donnell, 51 U. Cin. L. Rev at 98-99 (cited in note 11).
80. See Michael Glennon, *May the President Violate Customary International Law?: Can the President Do No Wrong?*, 80 Am. J. Int'l L. 923, 924 (1986) ("Plenary power refers to the power of the President to act even if Congress prohibits that act.").
81. *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring).
82. Id. at 659 (Burton, J., concurring).

observed that there might be situations where an exercise of a presidential power not specifically enumerated could survive in the face of congressional opposition. Justice Burton acknowledged the possibility that implied powers exist, but found them "unavailable" to the President in the current situation, which was "not comparable to that of an imminent invasion or threatened attack,"[83] while Justice Clark explicitly embraced the concept of implied powers: "In my view . . . the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself."[84] And the three dissenting Justices were of course prepared to recognized an implied,[85] and arguably plenary,[86] power in *Youngstown* itself.

Justice Jackson's position on the subject was perhaps the most ambiguous, but even his opinion can be read as accepting that the President possesses at least some implied powers. He rejected the notion that the Court could declare the existence of "inherent" presidential powers as broad as necessary to meet any emergency. But in disclaiming the existence of inherent powers, Justice Jackson appeared to be responding to two specific claims about presidential power. The first claim, most forcefully pressed in *United States v. Curtiss-Wright Export Corp.*,[87] was that the President's foreign affairs powers are not delegated by the Constitution, but are implicit in the nature of sovereignty and inherent in the office itself.[88] The second claim was that powers "never expressly granted" can "accru[e] to the office [of the President] from the customs and claims of preceding administrations."[89] To accept these particular claims about presidential power, one must acknowledge that presidential power can derive

83. Id.

84. Id. at 662 (Clark, J., concurring in judgment).

85. Id. at 667 (Vinson, C.J., dissenting) (criticizing conclusion of "[s]ome members of the Court" that "the President is without power to act in time of crisis in the absence of express statutory authorization").

86. The dissenting Justices argued that the relevant statutes did not prohibit the seizure. Id. at 704-07. But they also emphasized that the President should be able to take action in an emergency to preserve Congress's legislative prerogatives. See id. at 701.

87. 299 U.S. 304 (1936).

88. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring) ("I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers."); cf. id. at 635-36 n.2 (characterizing *Curtiss-Wright* as among the cases reflecting "the broadest recent statements of presidential power").

89. Id. at 646.

from sources other than the Constitution.[90] Justice Jackson was not prepared to do so. But to reject these inherent power claims, one need not also reject the argument that the *constitutional text and structure* themselves imply the existence of powers not expressly enumerated. Indeed, Justice Jackson's recognition of a "zone of twilight" in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain," presupposes that the President can act in the absence of specific authority—and, in Justice Jackson's view, the evaluation of the legality of such action will likely depend "on the imperatives of events" rather than "abstract theories of law."[91] In addition, Justice Jackson declared himself unwilling "to circumscribe, much less to contract, the lawful role of the President as Commander in Chief,"[92] a position that carries with it the suggestion that the President should have wide latitude to respond to foreign threats to the nation's security.

In sum, although Justices Frankfurter, Jackson, and Burton joined Justice Black's opinion for the Court purporting to reject the existence of any presidential powers not delegated by Congress or explicit in the Constitution's text, the question whether the President could claim certain "implied" powers survived the case. That is not to say that the concurring Justices thought the President possessed extraconstitutional powers—that is, inherent powers flowing from notions of sovereignty and not from the Constitution itself. They simply did not rule out the possibility that courts should construe the President's enumerated powers more broadly than Justice Black did, or that the President could claim powers based on the structure that the words of the Constitution ordain rather than the words themselves. For the concurring Justices, the focus was not on whether the President could claim a power absent from the text, but on whether the

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90. As Justice Sutherland put it in a much-criticized passage of his opinion in *Curtiss-Wright*:

> The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution is categorically true only in respect of our domestic affairs . . . . It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of the legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . .

299 U.S. at 315-16, 319-20. For one of many critiques of Justice Sutherland's approach, see Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 Yale L.J. 1 (1973).

91. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

92. Id. at 645.

President could claim that a nontextual power prevailed over Congress's opposition.

II. THE SYMBOLIC AND RHETORICAL *YOUNGSTOWN*

In light of the tension between Justice Black's majority opinion and the accompanying concurrences, the reaction of commentators of the day is unsurprising: One scholar, recalling the words of Justice Roberts in *Smith v. Allwright*, placed the decision "'in the same class as a restricted railroad ticket, good for this day and train only.'"[93] If the *Youngstown* case stands for so little, then why is it viewed as a landmark case? And should it be? The treatment of the *Youngstown* case over the last fifty years by the courts, and particularly by the Supreme Court, provides a useful starting point for answering these questions—but only a starting point. Separation of powers controversies arrive relatively infrequently in court, and the facts of the disputes tend to be highly individual.[94] Writing two years after the Court rendered its decision in *Youngstown*, Professor Willard Hurst put it this way: "How far may the recent Steel Seizure decision have important limiting effects in the future, and how far may its very importance in its day limit its practical compulsion on events of another day? How significant for the future was the Dred Scott case except with regard to slavery?"[95] That said, we can expect to glean something about the *Youngstown* case's influence on the development of constitutional law by examining the propositions for which the courts have relied on it.

The Supreme Court has used *Youngstown* in three different (but overlapping) ways. First, the Court often invokes the opinions of Justice Jackson and Justice Frankfurter to defend a flexible, pragmatic approach to separation of powers disputes. Second, the Court relies on the case, and particularly on the

93. Williams, 2 J. Pub. L. at 34 (cited in note 1) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944)).

94. See Louis Fisher, *Separation of Powers: Interpretation Outside of the Courts*, 18 Pepperdine L. Rev. 57, 57-58 (1990) (suggesting that the Supreme Court offers "limited help in resolving the basic disputes of separation of power," because there are "simply too many conflicts over issues that are not easily addressed in court"). The Supreme Court has, however, demonstrated renewed interest in separation of powers controversies over the last twenty-five years. See Magill, 86 Va. L. Rev. at 1133-36 (cited in note 10) (describing "doctrinal revival" in the separation of powers field).

95. Willard Hurst, *Review and the Distribution of National Powers*, in Edmond Cahn, ed., *Supreme Court and Supreme Law* 140, 147 (Simon & Schuster, 1954) (footnote omitted).

framework of Justice Jackson's concurrence, when it is called upon to police the boundaries between executive and legislative authority. Because many cases in this category touch on foreign affairs, I defer discussion of most of them until Part III. Third, the Court relies on *Youngstown* to establish the power of the judiciary to mark the boundaries of the other branches' powers, particularly in sensitive cases involving perceived abuses of power.

I argue that it is *Youngstown*'s appearance in this last category of cases that accounts for its importance in our constitutional system. As an example in which the judiciary reviewed and invalidated the action of a coordinate branch of government on separation of powers grounds in a sensitive factual context, the case will always lend weight to courts' invalidation of other branches' action and will stand as a deterrent to some forms of executive conduct. As I will suggest in Part III, however, there is a danger when we confuse the case's symbolic or rhetorical significance with its doctrinal significance—with its blueprint for resolving disputes between the President and Congress, particularly in foreign affairs.

A. FUNCTIONAL METHODOLOGY IN SEPARATION OF POWERS CASES

The Court has most frequently relied on *Youngstown* to defend a particular methodology in separation of powers cases—that of examining whether a disputed exercise of power disrupts the essential functions of another branch, rather than attempting to identify the precise boundaries of each branch's power. Justice Jackson's concurring opinion, echoing the views of James Madison,[96] provided an eloquent defense of this approach: "While 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."[97] The Court first invoked this language in 1974 in

96. See, e.g., Federalist 47 (Madison) in Jacob Cooke, ed., *The Federalist* 312, 314 (Random House, 1937) (principle of separation of powers does not mean that branches of the government "ought to have no *partial agency* in, or no *control* over the acts of each other"); id. No. 48, at 321 ("[U]nless [the] departments be so far connected and blended as to give to each a constitutional controul over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

97. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

United States v. Nixon to unanimously reject former President Nixon's claim that the Executive possessed an absolute privilege against enforcement of a subpoena seeking presidential communications in a criminal case.[98] To accept the claimed privilege, the Court reasoned, would disrupt the functioning of the judicial branch; a presumptive privilege, to be overcome if a court finds that the interest in the administration of criminal justice outweighs the interest in preserving confidentiality of communications, would be sufficient to "preserve[] the essential functions of each branch."[99] Since its decision in *United States v. Nixon*, the Court or individual Justices have invoked Justice Jackson's language, or language of similar import in Justice Frankfurter's opinion,[100] to defend a functional methodology in nearly a dozen cases.[101]

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98. 418 U.S. 683, 707 (1974).

99. Id.

100. 343 U.S. at 597 ("'The great ordinances of the Constitution do not establish and divide fields of black and white.'" (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))).

101. See *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (rejecting claim that law governing the disposition of executive materials violates separation of powers principles, suggesting that the Court in *United States v. Nixon*, relying on Justice Jackson's opinion in *Youngstown*, recognized that the proper inquiry is whether law "prevents the Executive Branch from accomplishing its constitutionally assigned functions"); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (analyzing executive power in connection with the resolution of the Iranian hostage crisis, quoting Justice Frankfurter, in turn quoting Justice Holmes, to the effect that "'[t]he great ordinances of the Constitution do not establish and divide fields of black and white'") (alteration in *Dames & Moore*); *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (rejecting claim that the Ethics in Government Act's independent counsel provisions violate separation of powers; holding that the Act does not unduly interfere with Executive Branch's functions); *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (acknowledging overlapping responsibilities among the branches and adopting a "flexible understanding of separation of powers"); id. at 408 (rejecting separation of powers challenge to Sentencing Reform Act's creation of the United States Sentencing Commission as an independent body in the judicial branch); *Loving v. United States*, 517 U.S. 748, 751 (1996) (holding that separation of powers principles do not preclude Congress from delegating authority to the President to prescribe aggravating factors that permit courts-martial to impose the death penalty); *INS v. Chadha*, 462 U.S. 919, 978 (1983) (White, J., dissenting) (arguing that Court's invalidation of legislative veto neglects the principle that "our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles"); *Bowsher v. Synar*, 478 U.S. 714, 760 (1986) (White, J., dissenting) (arguing that Court's invalidation of Gramm-Rudman-Hollings Act neglects "a fundamental principle governing consideration of disputes over separation of powers"—that the relevant question is whether one branch is unduly interfering with the functions of another); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 267 (Stevens, J., dissenting) (arguing that § 27A(b) of the Securities Exchange Act of 1934, which requires federal courts to reopen final judgments in private civil actions, does not violate separation of powers when viewed with "[a]n appropriate regard for the interdependence of Congress and the judiciary"); *Clinton v. New York*, 524 U.S. 417, 471 (Breyer, J. dissenting) (arguing that Supreme Court wrongly invalidated Line Item Veto Act, relying on Justice Jackson's concurrence, among other opinions, for the proposition

Although this category identifies the Court's most frequent use of the *Youngstown* case,[102] the case's importance cannot be attributed solely to this use. The Court's reliance on *Youngstown* in such cases is always more rhetorical than substantive. The language in Justice Jackson's and Justice Frankfurter's opinions provides no specific guidance as to how courts should decide any concrete dispute. Moreover, those invoking this language generally do so to suggest that the "flexible" approach warrants upholding the challenged action.[103] Given the Court's invalidation of executive action in *Youngstown*, it would be ironic to conclude that the case's primary influence on our constitutional system is to provide courts a means to avoid finding separation of powers violations. And the language in question is sufficiently manipulable that other Justices have at times deployed it alongside or in support of seemingly formal approaches.[104]

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that the Court has interpreted the Constitution's structural provisions "generously in terms of the institutional arrangements that they permit"); see also *Clinton v. Jones*, 520 U.S. 681, 701 & n.35 (1997) (relying on *Youngstown*, among other cases, for the proposition that "the lines between the powers of the three branches are not always neatly defined"); *Nixon v. Fitzgerald*, 457 U.S. 731, 779 (1982) (White, J., dissenting) (citing Justice Jackson's concurrence in *Youngstown* as basis for functional interpretation in separation of powers cases); cf. *Buckley v. Valeo*, 424 U.S. 1, 118-22 (1976) (per curiam) (citing Justice Jackson's argument that the Constitution contemplates integration of "dispersed powers into a workable government," but holding that Congress's conveyance of "wide-ranging rulemaking and enforcement powers" to the Federal Election Commission precludes Congress, under separation of powers principles, "from vesting in itself the authority to appoint those who will exercise such authority").

102. This category also reflects the most frequent use of *Youngstown* by lower courts. In opinions available electronically, lower courts have used the language accompanying note 97 in at least forty cases. In addition, the formal legal opinions of the Executive Branch issued by the Office of Legal Counsel frequently use *Youngstown* in this manner. See, e.g., Walter Dellinger, Assistant Att'y Gen., Office of Legal Counsel, Memorandum for the General Counsels of the Federal Government, The Constitutional Separation of Powers Between the President and Congress, 1996 WL 876050 (May 7, 1996); Walter Dellinger, Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. Off. Legal Counsel 232, 233-34 (1994); Ralph W. Terr, Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch, 9 Op. Off. Legal Counsel 60, 62 (1985); Theodore B. Olson, Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481, 487 (1982); Statement of Theodore B. Olson, Before the Subcommittee on Rules of the Committee on Rules, United States House of Representatives, The Legislative Veto and Congressional Review of Agency Rules, 5 Op. Off. Legal Counsel 294, 301 (1981).

103. But see *Buckley*, 424 U.S. at 118-22.

104. See, e.g., *Bowsher*, 478 U.S. at 721 (holding that vesting power in Congress to remove officer charged with execution of the laws would effectively place control of executive function in Congress, relying on Justice Jackson's observation that the purpose of dividing the powers of government was "to secure liberty"); *Chadha*, 462 U.S. at 962, 965-66 (Powell, J., concurring) (relying on Justice Jackson's language in recognizing that Constitution does not "establish three branches with precisely defined boundaries," but arguing that legislative veto as used in *Chadha* amounted to legislative usurpation of judicial function); *Metro. Washington Airports Auth. v. Citizens for the Abatement of Air-*

B. *YOUNGSTOWN* AND ABUSE OF POWER

Courts have also drawn on *Youngstown* for guidance in resolving specific disputes over claimed executive encroachment on congressional prerogatives. As I will argue in connection with the discussion of foreign affairs, the case has proven for the courts a weak tool for restraining executive action. More typically, however, courts rely on *Youngstown* to affirm their power to reject another branch's interpretation of its authority in the separation of powers context. Some of the cases involve specific questions about the balance of power between the Executive and Congress; others do not. Since not all of these cases involve executive power, *Youngstown*'s use here, like the use of the concurring opinions to defend a functional methodology, has a largely symbolic or rhetorical quality to it. The use of the case in this context, however, is far more significant: the Court does not invoke *Youngstown* to justify upholding challenged action under a generous and flexible approach to separation of powers questions, but rather as a signal that it has detected an abuse of power that it cannot let stand.

Several Nixon-era cases illustrate the point. Maeva Marcus's chapter on the constitutional significance of the steel seizure, published twenty-five years after the Court decided the *Youngstown* case, chronicles courts' reliance on *Youngstown* to combat perceived abuses of power in this time period.[105] In particular, *Youngstown* provided the courts with an important precedent for rejecting President Nixon's claims that certain actions of the Executive Branch were not subject to review by the judiciary.[106] The Supreme Court's decision in *United States v. Nixon* is illustrative. As noted above, former President Nixon sought to resist enforcement of a subpoena seeking presidential communications

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craft Noise, Inc., 501 U.S. 252, 276 n.22 (1991) (relying on Justice Jackson's language in holding that Congress could not retain supervisory power over board to oversee control of District of Columbia airports).

105. Marcus's argument is slightly broader than the one offered in the text. She argues not only that *Youngstown* checked abuses of power in cases involving separation of powers disputes, but also that *Youngstown* signaled the beginning of a trend of judicial intervention in politically charged cases, including controversies over school desegregation and reapportionment. See Marcus, *Truman and the Steel Seizure Case* at 229 (cited in note 14) (calling the desegregation cases "the most spectacular example of the Court's new willingness to face basic constitutional questions"); id. at 229-30 (arguing that *Youngstown* helped the Court to explain in *Baker v. Carr*, 369 U.S. 186 (1962), why the Court could intervene in reapportionment disputes). For an argument that Marcus overstates *Youngstown*'s influence in such cases, see Harbaugh, 87 Yale L.J. at 1281-83 (cited in note 14).

106. See Marcus, *Truman and the Steel Seizure Case* at 240-48 (cited in note 14).

by claiming that the Executive possessed an absolute privilege in those communications, subject to no judicial review.[107] In rejecting that claim, the Court observed that "[n]o holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications."[108] But the Court cited two instances in which the judiciary had invalidated another branch's exercise of power[109]—in *Youngstown* with respect to executive authority, and in *Powell v. McCormack*[110] with respect to legislative authority. *Powell*, in turn, staked the Court's authority in part on *Youngstown*.[111] The lower courts made similar use of *Youngstown* in rejecting President Nixon's assertions of privilege as well as his claim that the courts would lack authority to enforce any adverse ruling on the privilege issue.[112] And although *Youngstown* has generally proven an inconsistent restraint on executive conduct specifically in relation to the powers of Congress, the denial of the Executive's request to enjoin publication of the Pentagon Papers in 1971 shows *Youngstown*'s influence.[113] Three Justices rested their rejection of the Executive's request on the ground that Congress, in enacting statutes to protect national security information, had declined to authorize the President to seek injunctive relief.[114] Even when the Supreme Court has

107. *United States v. Nixon*, 418 U.S. 683, 707 (1974).

108. Id. at 703.

109. Id.

110. 395 U.S. 486 (1969).

111. Id. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

112. See Marcus, *Truman and the Steel Seizure Case* at 240-45 (cited in note 14).

113. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

114. Id. at 740 (White, J., joined by Stewart, J., concurring) ("Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. It has not, however, authorized the injunctive remedy against threatened publication.") (internal citations omitted); id. at 743 (Marshall, J., concurring) ("Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States.").

Some scholars who focus on the distribution of congressional and presidential power in foreign affairs view the *Pentagon Papers* case as one in which members of the Court used overbroad language tending to support executive power. See Silverstein, *Imbalance of Powers* at 11 (cited in note 11) (noting that in the *Pentagon Papers* case, "even some of the Court's staunchest civil libertarians went out of their way to note that absent a clear and explicit statement from Congress denying these powers to the executive, the Court might well have been sympathetic to the prerogative claims advanced by the Nixon administration"); Koh, *The National Security Constitution* at 137 (cited in note 11) (arguing that the separate opinions in the *Pentagon Papers* case "unveiled a strong undercurrent favoring the *Curtiss-Wright* vision of executive supremacy in foreign affairs"). As dis-

failed to cite *Youngstown* in invalidating executive conduct, it is possible to detect how *Youngstown* framed the issues in the courts below.[115]

A more recent Clinton-era decision illustrates a similar use of *Youngstown* to establish a court's authority to act in the face of perceived abuses of power. In *Clinton v. Jones*,[116] the Court rejected President Clinton's claim that separation of powers principles required a district court to postpone, until the end of his presidency, civil proceedings in a dispute arising out of unofficial conduct that occurred prior to his time in office. The President argued that permitting the proceedings to go forward would cause undue judicial interference with the "effective performance of his office," because of the potential for burdens on his time and energy.[117] In rejecting this argument, the Court observed that not all "interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."[118] The fact that a court's exercise of jurisdiction may burden the time and attention of the President "is not sufficient to establish a violation of the Constitution."[119] The Court cited *Youngstown* as "the most dramatic" example of a case in which the judiciary had, in effect, imposed a burden on the President

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cussed in, notes 243-248 and accompanying text, however, the *Pentagon Papers* case was closely patterned on *Youngstown*, and the three Justices' approach was consistent with the approach of the concurring Justices in *Youngstown*.

115. For example, in *United States v. U.S. District Court for the Eastern District of Michigan* (*Keith*), 407 U.S. 297 (1972), the Court considered whether the Executive Branch could intercept communications without judicial authorization when facing an alleged domestic threat to national security. The Court concluded that the Fourth Amendment required the Government to seek judicial authorization for the surveillance. Id. at 317. The case was similar to *Youngstown* in that the Government essentially claimed an implied power to protect national security in the absence of an authorizing statute, and indeed in the face of a federal statute that did not specifically authorize the Executive Branch to carry out the surveillance. Id. at 299-308 (concluding that federal wiretap statute neither authorized Executive to conduct surveillance in domestic security matters without prior judicial approval nor recognized an existing constitutional authority to conduct such surveillance). The Court did not directly confront the separation of powers issue, essentially assuming that the President had constitutional authority to protect the United States "against those who would subvert or overthrow it by unlawful means." Id. at 310. But that issue, as framed by the court below, see *United States v. U.S. District Court for the Eastern District of Michigan* (*Keith*), 444 F.2d 651, 660-61 (6th Cir. 1971), may have influenced the Court's decision. See *Keith*, 407 U.S. at 310-11 (discussing past executive practice of engaging in surveillance in domestic security cases).

116. 520 U.S. 681 (1997).

117. Id. at 702.

118. Id.

119. Id. at 703.

by virtue of its authority to determine "whether [the President] has acted within the law."[120] The Court's use of *Youngstown* here, as elsewhere in the opinion,[121] is surprising, because the case seems far off point. Any time or burden that the President's involvement in the *Youngstown* case created arose out of his official duties, and it is therefore difficult to view a requirement that he respond to legal process as a judicial interference with those duties.[122] In invoking *Youngstown* throughout its opinion, and in emphasizing *Youngstown* as a precedent for courts' authority to determine whether the President has acted within the law, the Court seemed to rely on the decision more as an illustration that the President is not above the law than for the case's doctrinal relevance to the dispute at hand.

These cases suggest, as Marcus has put it, that the real significance of the *Youngstown* decision "lies in the fact that it was made."[123] When the courts police the domain of a coordinate branch of government or seek to combat perceived abuse of power, even on questions unrelated to those the Court considered in connection with the steel seizure, it is *Youngstown* that lends the legal if not moral weight. This lesson is not lost on the Executive Branch, and *Youngstown* no doubt deters some questionable executive conduct.[124] As I argue in the next Part, however, the fact that this last contribution to our separation of powers jurisprudence is so significant, but that the case at the same time provides relatively little guidance on the specific contours of executive power, creates a difficulty. In particular, we tend to assume that *Youngstown*'s doctrinal significance for specific disputes about executive versus legislative power equals its rhetorical or symbolic significance in separation of powers cases more generally. This tendency emerges in the difficult debates

120. Id. ("Perhaps the most dramatic example of such a case is our holding that President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avert a national catastrophe.").

121. See id. at 696 (quoting Justice Jackson's observation that historical and scholarly materials concerning the Framers' intent with respect to separation of powers point in different directions); id. at 699 (quoting Justice Jackson's description of the power in the Presidency); id. at 701 & n.35 (relying on *Youngstown*, among other cases, for the proposition that "the lines between the powers of the three branches are not always neatly defined").

122. Cf. id. at 718 (Breyer, J., concurring in judgment) (stating that the *Youngstown* precedent "does not seem relevant in this case").

123. Marcus, *Truman and the Steel Seizure Case* at 228 (cited in note 14).

124. See note 302 and accompanying text.

over how the Constitution allocates the power to formulate foreign policy and protect national security.

III. *YOUNGSTOWN* IN THE FOREIGN AFFAIRS DEBATE

As scholars have frequently noted, the Constitution's limited provisions on the distribution of powers in foreign affairs provide the political branches with an "invitation to struggle" over power in the area.[125] Although judicial decisions are few,[126] the scholarly literature is vast.[127] The weight of modern scholarship takes the view that the Constitution lodges most foreign affairs powers, including the power to formulate foreign policy, with Congress.[128] Scholars who embrace this "congressional primacy"[129] position often argue that the Executive Branch may be responsible for communicating the nation's policy to foreign governments, but it lacks any independent authority to make that policy.[130] They reject the view that the "executive Power" the Constitution confers on the President includes any powers to act independently of Congress.[131] Many such scholars argue that

125. See, e.g., Edward S. Corwin, *The President 1787-1984*, at 201 (Randall Bland, et al., eds., 5th ed. 1984); see also Henkin, *Foreign Affairs and the U.S. Constitution* at 84 (cited in note 11) ("[T]he Constitution is especially inarticulate in allocating foreign affairs powers."); Koh, *The National Security Constitution* at 67 (cited in note 11) ("One cannot read the Constitution without being struck by its astonishing brevity regarding allocation of foreign affairs authority among branches.").

126. See *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) ("[T]he decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases."); Henkin, *Foreign Affairs and the U.S. Constitution* at 135 (cited in note 11) (noting that courts have made only "modest contributions to resolving uncertainties" about the distribution of powers in foreign affairs).

127. See notes 128-145.

128. See John Hart Ely, *On Constitutional Ground* 149 (Princeton U. Press, 1996) ("The Constitution gives the President no general right to make foreign policy. Quite the contrary.... [V]irtually every substantive constitutional power touching on foreign affairs is vested in Congress."); David Gray Adler and Larry N. George, *Introduction*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 1, 3 (cited in note 21) (describing "[t]he Framers' studied decision to vest the bulk of foreign policy powers in Congress"); Trimble, 83 Am. J. Int'l L. at 751 (cited in note 25) (arguing that, because "Congress has virtually plenary authority over all aspects of foreign policy," disputes over separation of powers in this context are "mostly about influence, not law").

129. Powell, 67 Geo. Wash. L. Rev. at 527 (cited in note 26).

130. See Henkin, *Foreign Affairs and the U.S. Constitution* at 43 (cited in note 11) (noting that although President's status as "sole organ of official communication" with foreign governments has not been questioned, "issues begin to burgeon" when the President claims authority to determine the content of the communication).

131. Raoul Berger, *Executive Privilege: A Constitutional Myth* 135-39 (Harvard U. Press, 1974) (rejecting broad construction of executive power); Koh, *The National Security Constitution* at 76 (cited in note 11) (arguing that the grant of "executive Power" in-

those foreign affairs powers that the Constitution vests exclusively in the President—to serve as Commander in Chief of the armed forces[132] and to receive foreign ambassadors[133]—should be narrowly interpreted.[134] Beyond that, the President possesses only shared powers: to negotiate treaties and appoint ambassadors, both subject to the Senate's advice and consent.[135] Because the President's powers are limited, Congress can constrain the President's activities with respect to foreign affairs. Congressional primacy scholars decry what they perceive to be a shift in power in the foreign affairs realm from Congress to the President over at least the last half century.[136] Such scholars often focus their criticisms on executive initiation of acts of military hostility without congressional authorization, claiming that Congress possesses the authority not only to declare war but also to decide on lesser uses of military force.[137] Some also see an in-

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corporates "neither an exclusive power in foreign affairs nor a general war-making power"); Henkin, *Foreign Affairs and the U.S. Constitution* at 39-40 (cited in note 11) (expressing doubts about broad interpretations of the executive power).

132. U.S. Const., Art. II, § 2.

133. Id. § 3.

134. Adler and George, *Introduction*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 3 (cited in note 21) ("The Constitution exclusively assigns only two foreign affairs powers to the president. He is designated commander-in-chief of the nation's armed forces, although, as we shall see, he acts in this capacity by and under the authority of Congress. The president also has the power to receive ambassadors, but the Framers viewed this as a routine, administrative function, devoid of discretionary authority."); Charles A. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 Valp. U. L. Rev. 53, 57 (1986) (arguing that ratifiers of the Constitution had a narrow conception of the President's power as Commander in Chief).

135. U.S. Const., Art. II, § 2.

136. See, e.g., Adler, *Court, Constitution, and Foreign Affairs*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 19 (cited in note 21) ("The unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution."); Silverstein, *Imbalance of Powers* at 9 (cited in note 11) (describing emergence of "executive prerogative" interpretation in foreign affairs after World War II).

137. See, e.g., Ely, *On Constitutional Ground* at 143 (cited in note 128) (arguing that Congress has "authority not simply to declare war but to decide on lesser acts of military hostility"); John Hart Ely, *War and Responsibility* 3 (Princeton U. Press, 1993) ("The debates, and early practice, establish that . . . all wars, big or small, 'declared' in so many words or not . . . had to be legislatively authorized") (footnotes omitted); Louis Fisher, *Presidential War Power* 185 (U. Press of Kansas, 1995) ("The drift of the war power from Congress to the President after World War II is unmistakable. The framers' design, deliberately placing in Congress the decision to expend the nation's blood and treasure, has been radically transformed."); David Gray Adler, *The Constitution and Presidential Warmaking*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 183, 184 (cited in note 21) ("[T]he authority to initiate hostilities, short of and including war, is vested solely and exclusively in Congress."); see also Glennon, *Constitutional Diplomacy* at 84-86 (cited in note 23) (arguing that President's power to introduce armed forces into hostility in the face of congressional disapproval is "extraordinarily narrow," but acknowledging independent presidential power to act in certain

appropriate expansion of executive authority in, among other things, presidential reliance on executive agreements rather than treaties to carry out international objectives,[138] claims to a unilateral power to terminate treaties,[139] and claims that the President has the sole discretion to grant and withdraw recognition of foreign governments.[140]

On the other side of the debate are those who, in varying degrees, believe that the President has substantial authority in the conduct of foreign affairs and the protection of national security, including a power to formulate foreign policy.[141] Some such scholars locate this authority in the Constitution's grant of the "executive Power" to the President.[142] Others focus on the

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circumstances where Congress has not imposed limitations on his conduct); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L.J. 672 (1972) (arguing that under original understanding of Constitution, Congress had dominant role in initiating hostilities, declared or not).

138. See, e.g., Glennon, *Constitutional Diplomacy* at 189-90 (cited in note 23) (suggesting that President cannot enter into executive agreements on matters of national importance unless they deal with a subject falling within the President's independent powers under the Constitution); Adler, *Court, Constitution, and Foreign Affairs*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 29 (cited in note 21) (arguing that increasing use of executive agreements "constitutes a fundamental and extraordinary shift of power from Congress to the President") Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 Mich. L. Rev. 1, 33-48 (1972) (criticizing "flood" of executive agreements since 1930).

139. See, e.g., David Gray Adler, *The Constitution and the Termination of Treaties* 111-13 (Garland Publishing, 1986) (arguing that the President does not possess plenary power to terminate treaty, free of congressional or senatorial restraint); Glennon, *Constitutional Diplomacy* at 156 (cited in note 23) (same); Raoul Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 Nw. U. L. Rev. 577 (1980) (same).

140. See David Gray Adler, *The President's Recognition Power*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 133, 149 (cited in note 21) (characterizing recognition "power" as "clearly delimited by the Framers to the capacity of a narrow ministerial function").

141. See Powell, 67 Geo. Wash. L. Rev. at 529 (cited in note 26) (arguing that the President possesses independent powers to formulate and pursue foreign policy); H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 Wm. & Mary L. Rev. 1471, 1474-75 (1999) (challenging the claim of congressional primacy proponents that "the constitutional thought and practice of the Founding era are devoid of support" for the executive primacy view); Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 252 (2001) (arguing that "the President's executive power included a general power over foreign affairs"); see also Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath, 92 Mich. L. Rev. 1364, 1392 (1994) (arguing that President can commit U.S. forces to hostilities without specific congressional authorization); Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, in Louis Henkin, et al., eds., *Foreign Affairs and the U.S. Constitution* 29, 30 (Transnational Publishers, 1990) (arguing that, since the mid-1970's, "an unusually vigorous and sustained congressional bid for supremacy over the Executive, stimulated by the Vietnam War and the Watergate scandal, has threatened to convert the American President into a prime minister or even a benign constitutional monarch").

142. See generally Prakash and Ramsey, 111 Yale L.J. at 231 (cited in note 141).

President's role as "constitutional representative" of the United States in dealings with foreign governments, and argue that this role includes a hand in the development of foreign policy, not merely its execution.[143] Moreover, from the President's authority as Commander in Chief, his duty to "take Care" that the laws are faithfully executed,[144] and the overall structure of the Constitution, such scholars infer a presidential power to make decisions about the use of military force, not only in the case of imminent armed attack on the United States but also when the President determines that national security requires it.[145]

My purpose here is not to take sides in this debate, but rather to ask what the *Youngstown* case contributes to it. As is often observed, *Youngstown* was not a paradigmatic foreign affairs case, because it concerned the President's power to order the seizure of domestic property.[146] The arguments in *Youngstown*, however, implicated the power of the President to protect the country during a time of large-scale hostilities. The relevance of the case for congressional primacy scholars in the foreign affairs area is therefore clear: the Court was reluctant to accept the Executive's claim that a national emergency affecting our foreign military commitments permitted—and indeed compelled—action not specifically authorized by Congress. I will argue that even if we grant that *Youngstown* bears on the distribution of powers in matters involving foreign affairs and national security, the case offers fewer lessons for analyzing problems of presidential power than some scholars suggest.

A. CONGRESSIONAL PRIMACY CHALLENGES TO "EXECUTIVE PREROGATIVE"

Before discussing *Youngstown*'s bearing on disputes over the distribution of powers in foreign affairs, it is useful to distinguish between two forms of congressional primacy claims. Con-

143. Powell, 67 Geo. Wash. L. Rev. at 545-59 (cited in note 26) (arguing that "the presidency is the institution on which the Constitution places the duty to look to the Republic's interests in the international arena").

144. U.S. Const., Art. II, § 3.

145. Powell, 67 Geo. Wash. L. Rev. at 551 (cited in note 26) ("The executive branch and the courts have long recognized that the President's responsibilities as constitutional representative of the United States in foreign affairs entail significant independent authority to advance foreign policy goals and safeguard the security of the United States through the threat or use of military force."); id. at 564-76 (describing scope of President's power to protect national security).

146. See Henkin, *Foreign Affairs and the U.S. Constitution* at 95 (cited in note 11); Arthur M. Schlesinger, Jr., *The Imperial Presidency* 143-44 (Houghton Mifflin, 2d ed. 1989); Kauper, 51 Mich. L. Rev. at 175 n.99, 182 (cited in note 3).

gressional primacy scholars are united in their rejection of an "executive prerogative" or "prerogative power" in foreign affairs, but they seem to differ in their assessments of precisely what that means and therefore approach separation of powers questions differently.[147] The distinctions are important, because they bear on the residuum of presidential power, if any, that such scholars are willing to recognize.

Virtually all congressional primacy scholars reject claims that the Executive possesses significant "plenary" powers in foreign affairs—that is, powers that cannot be regulated or limited by Congress.[148] We can identify two different strands of the congressional primacy position on plenary power. First is an argument that the Executive lacks the power in question, let alone a plenary one. When an assertion of presidential power is based on the constitutional text—for example, when the President claims authority to initiate military hostilities by virtue of his power as Commander in Chief, or when the President claims that the power to receive foreign ambassadors entails a power to determine the conditions under which the United States recognizes a foreign government—many congressional primacy scholars argue that the Executive Branch has too broadly construed the text.[149] Similarly, if the Executive claims that a particular power can be inferred from a single constitutional provision, a collection of constitutional provisions, or the structure of the Constitution, some congressional primacy scholars argue that the power in question does not exist.[150] In arguing that the President lacks a particular power, congressional primacy scholars who take this approach need not necessarily identify a specific power delegated to Congress that displaces the presidential power, or

147. John Locke included the "prerogative" power in his taxonomy of executive power. See John Locke, *Second Treatise of Government* § 159-68, at 83-88 (Barnes & Noble, C.B. Mcpherson, ed., 1980) (1690). Even in Locke's formulation, the term could mean one of two things: the power to act in the public interest without statutory authority, or the power to act in the public interest in disregard of the law. Id. § 160, at 84 ("This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* that which is called *prerogative* . . . .).

148. See, e.g., Koh, *The National Security Constitution* at 72, 108 (cited in note 11) (arguing that the Constitution's structure and text call for "balanced institutional participation" in the national security process, and that outside of a narrow pocket of exclusive executive authority, "Congress must have an opportunity to participate in the setting of broad foreign policy objectives").

149. See, e.g., Adler and George, *Introduction*, in *The Constitution and the Conduct of American Foreign Policy* at 3 (cited in note 21) (arguing for narrow construction of Commander in Chief power and power to receive ambassadors).

150. See id. at 1-2 (describing and criticizing executive primacy claims that certain executive powers flow from President's place in constitutional structure).

Congress's exercise of such a power. Rather, congressional primacy scholars who take this approach reject the notion that it is possible to identify significant presidential foreign affairs powers, either embraced within the President's enumerated powers or inferred from the constitutional text and structure. Scholars who take this view would presumably treat claims to nontextual presidential powers as claims of "executive prerogative" and reject them, even when those claims were not accompanied by a further argument that Congress cannot regulate the nontextual presidential power.[151]

The second congressional primacy argument is narrower. The argument is not that the Constitution withholds any significant foreign affairs powers from the President, but that, with few exceptions, the President's powers are not "plenary." Under this approach, it is not necessary to argue that the Executive lacks any implied powers in foreign affairs. Rather, this position depends on establishing that the Constitution affords Congress a greater role, and that in most circumstances Congress's will should prevail. In other words, the target of some congressional primacy scholars is not so much the general claim that certain presidential powers can be inferred from the constitutional text and structure, but the further claim that Congress cannot regulate or limit the President's exercise of these powers. Under this theory, Congress has a pivotal role to play in foreign affairs matters should it choose to assert it.[152] The Executive generally cannot act contrary to Congress's will or claim to withhold information from Congress that might influence Congress in its decision to act.[153] Some scholars who take this approach in fact explicitly

151. Adler and George, *Introduction*, in *The Constitution and the Conduct of American Foreign Policy* at 5 (cited in note 21) (criticizing the "mushrooming cloud of unilateral presidential actions in contravention of the Constitution" that overshadows the Framers' blueprint for foreign affairs); Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in Adler and George, *The Constitution and the Conduct of American Foreign Policy* 114, 114 (cited in note 21) (characterizing "prerogative" as the "president's authority to act on behalf of the United States *in the absence of law*, or in defiance of it") (emphasis added).

152. Koh, *The National Security Constitution* at 108 (cited in note 11) (arguing that Congress must have an "opportunity to participate" in the foreign policy process); Silverstein, *Imbalance of Powers* at 8 (cited in note 11) (describing the traditional understanding of foreign policy as one in which "Congress had a legitimate role to play should it choose to assert that role").

153. See, e.g., Koh, *The National Security Constitution* at 113 (cited in note 11) (arguing that balanced institutional participation in the foreign policy making process requires that President and Congress share information); Louis Fisher, *The Role of Congress in Foreign Policy*, 11 Geo. Mason U. L. Rev. 153, 160-61 (criticizing presidential withholding of documents relevant to Congress's exercise of its constitutional powers, such as the power to regulate commerce); cf. Raoul Berger, *Executive Privilege: A Presidential Pillar*

recognize that the Executive has certain unenumerated "concurrent"[154] or "initiating"[155] powers to act, and that the Executive's conduct will stand so long as Congress is silent.[156]

The links between the *Youngstown* case and the approaches of these two groups of congressional primacy scholars[157] are

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Without Constitutional Support, 26 Vill. L. Rev. 405, 405 (1980-81) (arguing that "Congress and the President are partners in government," and "[i]t offends common sense to maintain that one partner may conceal information from the other in the alleged interest of the partnership"); Raoul Berger, *War, Foreign Affairs, and Executive Secrecy*, 72 Nw. L. Rev. 309, 334-43 (1977) (arguing that President lacks power to withhold information from Congress).

154. Henkin, *Foreign Affairs and the U.S. Constitution* at 92 (cited in note 11), Koh, *The National Security Constitution* at 109 (cited in note 11).

155. Glennon, *Constitutional Diplomacy* at 15 (cited in note 23).

156. Id. at 15-16 ("The Constitution sometimes appears silent with respect to issues of decision-making authority. In such circumstances, concurrent power is said to exist in both political branches.... The President's initiatives here are contingently constitutional; their validity depends upon congressional *inaction*."); Henkin, *Foreign Affairs and the U.S. Constitution* at 36 (cited in note 11) ("Except where the Constitution expressly allocates power to Congress and implies that it is exclusive of the President, there is increasingly less disposition to deny the President power to act where Congress has not yet acted."); Trimble, 83 Am. J. Int'l L. at 757 (cited in note 25) ("Presidential exercise of power is always subject to ex post facto review by Congress to weigh both the genuineness of the urgency and the wisdom of the action. If Congress disagrees, it can repudiate the President formally. Congressional action in response to assertions of presidential prerogative in these contexts should in turn trump the presidential power...."); see also Chemerinsky, 56 S. Cal. L. Rev. at 874-76 (cited in note 25) (noting cases in which "the Court has implicitly adopted a framework whereby the President may take any action not expressly prohibited by the Constitution or statute").

157. In focusing on these two types of congressional primacy argument, I leave to one side two other claims that often appear in commentary on the balance of powers between Congress and the President in foreign affairs. The first relates to perceived arguments that the President possesses powers inherent in sovereignty and not stemming from the Constitution or constrained by it. Shades of this claim appear in dictum in Justice Sutherland's opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, which suggested that the conduct of foreign relations was by its nature executive and existed prior to and independently of the Constitution. 299 U.S. 304, 319-20 (1936); see notes 87-90 and accompanying text. Congressional primacy scholars often treat claims of "implied" presidential power as claims of inherent, extraconstitutional presidential power. See, e.g., Adler and George, *Introduction*, in *The Constitution and the Conduct of American Foreign Policy* at 2 (cited in note 21) (characterizing argument for presidential dominance in foreign affairs as depending on claims that President's authority in foreign relations is "unfettered," that he "is vested with certain 'inherent powers' and all of the executive power of the nation," and that he "possesses authority to violate the law"); Adler, *Court, Constitution, and Foreign Affairs*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 25 (cited in note 21) (arguing that *Curtiss-Wright* "has provided a common thread in a pattern of cases that has exalted presidential power above constitutional norms"). For those who believe that the President possesses no implied powers, of course, actions not tied to an explicit textual grant are by definition extraconstitutional. Moreover, such scholars no doubt view at least some invocations of the implied power nomenclature as attempts to cloak otherwise unconstitutional activity with constitutional legitimacy. The point for our purposes is that a theory rejecting inherent, extraconstitutional powers is not of its own force sufficient to dismiss serious claims about implied presidential power in foreign affairs and national

readily apparent. Those who reject the existence of any implied executive powers in foreign affairs, except possibly the power to respond to an armed attack on the United States, treat the Court's ruling against President Truman as a rejection of any broad interpretation of "executive Power" and of the concept of implied powers. For those who reject claims that certain presidential powers, if they exist, are "plenary"—in the sense of being incapable of congressional limitation—the result of the case is less important than Justice Jackson's framework for evaluating presidential action. As I will argue, however, *Youngstown* provides less support for either of these congressional primacy positions than their advocates believe.

B. *YOUNGSTOWN* AND EXECUTIVE POWER CLAIMS

As the earlier discussion of the *Youngstown* decision suggests, the case provides less support for the proposition that the President lacks any significant constitutional foreign affairs powers than its proponents claim.[158] Although Justice Black's opinion for the Court narrowly interpreted the President's enumerated powers and purported to reject implied powers, his reasoning differed substantially from the reasoning of Justices who joined his opinion. For the concurring Justices, the case was not an implied power case at all; it was a plenary power case. Most of the concurring Justices declined to pass on the scope of presidential powers, thus leaving the implied powers question open; some even suggested that the President does possess some plenary powers—a conclusion that, in context, necessarily depended on recognition of at least some implied powers.[159] And Justice Jackson's categorization of executive action, including a range in which congressional inaction might "invite" independent presidential action, necessarily presupposed that the Execu-

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security matters.

Second, some scholars argue not only that the Executive Branch claims constitutional powers that do not exist, but also that Congress has by statute delegated too much of its own constitutional authority to the President. See Silverstein, *Imbalance of Powers* at 185-86 (cited in note 11) (considering whether separation of powers principles limit what foreign affairs powers Congress may constitutionally delegate to the President). Because the Supreme Court has not used the nondelegation doctrine to invalidate a statute since 1935, this argument is largely prudential rather than constitutional under current doctrine. I therefore consider only whether it provides a normative basis for narrowly construing statutory foreign affairs delegations. See note 218 and accompanying text.

158. See notes 79-90 and accompanying text.

159. See notes 83-84 and accompanying text.

tive could act without express constitutional or congressional delegation.[160]

In other words, *Youngstown* tells us very little about the scope of presidential power. At most, the case forecloses the claim that it is possible to identify presidential foreign affairs powers that are inherent in sovereignty, not created or constrained by the Constitution. And without *Youngstown*, congressional primacy scholars who urge a narrow construction of the President's enumerated powers and who reject the existence of implied powers can draw on little judicial support, for the courts' pronouncements on the distribution of power between Congress and the President in foreign affairs tend to favor the President.[161] Congressional primacy scholars explain such pronouncements away, as the product of judicial inattention or judicial susceptibility to executive claims that intervention will upset carefully balanced international policies.[162] The point here is not that a congressional primacy position that rests on *Youngstown* collapses, but that its defense must proceed from nonjudicial sources (and, indeed, in the face of most judicial pronouncements).[163]

Proponents of the view do offer several alternative sources of support for the argument that the President lacks significant powers to formulate and carry out foreign policy. First, they point to the textual commitment of several important foreign affairs powers to Congress[164]—most notably, the power to declare

160. 343 U.S. at 640-41 (Jackson, J., concurring).

161. Apart from the Court's controversial statements in *Curtiss-Wright*, consider *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976); *United States v. Louisiana*, 363 U.S. 1, 35 (1960); *Johnson v. Eisenstrager*, 339 U.S. 763, 789 (1950); *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948); *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion); *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

162. See, e.g., Adler, *Court, Constitution, and Foreign Affairs*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 44 (cited in note 21) (discussing Court's "reflexive use of law to legitimate the international politics of the President"); see also Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L. 805, 806 (1989) (suggesting that "[p]ragmatic concerns about the effective execution of U.S. foreign policy . . . have led courts to accord great respect to the executive branch's positions.").

163. See Powell, 40 Wm. & Mary L. Rev. at 1473 (cited in note 141) (noting "sheer weight of inconvenient judicial comment" that congressional primacy scholars must dismiss).

164. See Adler and George, *Introduction*, in *The Constitution and the Conduct of American Foreign Policy* at 3 (cited in note 21) ("Article I vests in Congress broad, ex-

war,[165] the power to regulate foreign commerce,[166] and the Senate's powers to give its advice and consent to treaties and appointments.[167] Second, they highlight incidents from the time of the Constitution's founding revealing, they argue, that the Framers did not believe that the President possessed an independent power to make foreign policy.[168]

I do not intend to suggest that these sources are unpersuasive or that a congressional primacy view is incorrect. But the matter is considerably more complex than those who would reject significant presidential foreign affairs powers out of hand suggest. The text alone cannot resolve the issue, because presidential and congressional powers could be interpreted broadly or narrowly. For example, the text alone does not indicate whether the "executive Power" includes a general foreign affairs authority,[169] or whether the Commander in Chief power entails a power to decide when to introduce U.S. forces into hostility. The allocation to Congress of the power to "declare War" does not necessarily resolve the matter, because it does not indicate where the Constitution places the power to initiate hostilities short of war.[170] As I will discuss below, others have argued that the congressional primacy view depends as much on inferences from the constitutional text and structure as the executive primacy view.[171] And, as in many other contexts, the accounts of

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plicit, and exclusive powers . . . .")

165. U.S. Const., Art. I, § 8, cl. 11.

166. Id. cl. 3.

167. Id. Art. II, § 2, cl. 2.

168. See, e.g., Koh, *The National Security Constitution* at 90 (cited in note 11) ("None of these [early] Presidents ever claimed that he possessed inherent constitutional powers as chief executive or commander in chief that lay beyond legislative control"); Arthur M. Schlesinger, Jr., *Introduction,* in Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* at xvii-xx (cited in note 11). For discussion of the historical precedents, see generally Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (cited in note 11).

169. For an argument that "executive Power" does include a general foreign affairs authority, see generally Prakash and Ramsey, 111 Yale L.J. at 252-53 (cited in note 142).

170. See Bobbitt, 92 Mich. L. Rev. at 1365 (cited in note141) (noting that "the power to make war is not an enumerated power"). Some congressional primary scholars rely on Congress's power to "grant Letters of Marque and Reprisal," U.S. Const., Art. I, § 8, cl. 11, to argue that the Constitution vested all powers to initiate hostilities in Congress. See, e.g., Ely, *War and Responsibility* at 3 (cited in note 137); Fisher, *Presidential War Power* at 2-3 (cited in note 137); Lofgren, *War-Making Under the Constitution*, 81 Yale L.J. at 695 (cited in note 137).

171. See Prakash and Ramsey, 111 Yale L.J. at 236-37 (cited in note 142) ("A common tenet of scholars who agree on little else is that once one moves beyond the war and treaty-making powers, the Constitution itself has little to say about the relative roles of the President and Congress, but rather contains substantial gaps that compel resort to other considerations."); id. at 241 (noting that congressional primacy scholars rely on

original understanding and early constitutional practice are disputed.[172] More important, such accounts are deployed not only by congressional primacy scholars who reject virtually all significant presidential powers in foreign affairs, but also by congressional primacy scholars who embrace some implied powers—in the form of initiating or concurrent authority—but decline to treat them as plenary. The point for now is that the questions about the scope of presidential foreign affairs powers are not easily resolved, and *Youngstown* contributes little to the analysis. *Youngstown* offers no general theory of the scope of the President's constitutional powers.

C. JUSTICE JACKSON'S CONCURRENCE AND THE ROLE OF CONGRESS IN FOREIGN AFFAIRS

For scholars who object to assertions of "plenary" powers in foreign affairs, without necessarily rejecting the theory that significant presidential powers can be inferred from the Constitution's text and structure, the majority opinion in *Youngstown* is less important than the reinforcement of the congressional primacy position found in Justice Jackson's concurrence. Such scholars interpret Justice Jackson's framework to suggest that Congress can displace most executive action that it disagrees with—that there are few truly plenary presidential powers.[173] If this congressional supremacy model is the appropriate one, then it follows that the courts' main task is to assess Congress's intent. Careful adherence to the lines between Justice Jackson's categories, these scholars argue, will help preserve the balance of power between Congress and the President; failure to police the boundaries will allow congressional objection to be taken for congressional silence or congressional silence to be taken for congressional approval, watering down the appropriate level of scrutiny for the Executive's conduct. Commentators charge that courts have failed to adhere to the boundaries between Justice

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sources other than the constitutional text to explain Congress's foreign affairs powers).

172. Compare, e.g., Raoul Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 36-69 (1972); Ely, *War and Responsibility* at 3-9 (cited in note 137); Fisher, *Presidential War Power* at 1-12 (cited in note 137); and Lofgren, *War-Making Under the Constitution*, 81 Yale L.J. at 677-99 (cited in note 137) with Bobbitt, 92 Mich. L. Rev. at 1370-88 (cited in note 141); Powell, 40 Wm. & Mary L. Rev. at 1476-1533 (cited in note 141); and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 170-75 (1996).

173. See Glennon, *Constitutional Diplomacy* at 13 (cited in note 23) (arguing that "the record is a sobering one for anyone arguing that a subject falls within the President's exclusive constitutional domain").

Jackson's categories.[174] As I will argue, however, Justice Jackson's concurring opinion does not contain many of the limiting principles that scholars ascribe to it.

In analyzing judicial approaches to questions about foreign affairs, it is useful to distinguish two types of cases: cases in which courts construe a specific delegation of authority from Congress to determine whether the delegation encompasses the challenged executive conduct, and cases in which such a delegation is absent. In the first category of cases, scholars implicitly assume that Justice Jackson's concurrence requires courts to construe congressional delegations in the foreign affairs context narrowly, and they criticize courts for failing to do so.[175] This critique is often made without comparing courts' construction of foreign affairs delegations with their construction of domestic delegations. Although there are important differences in approach, the suggestion that courts should construe foreign affairs delegations more narrowly than domestic delegations depends on normative judgments to which the *Youngstown* framework does not speak. In the second category of cases, scholars implicitly assume that Justice Jackson's approach forecloses any finding of congressional "approval" of executive conduct when the President cannot point to a statute delegating specific authority. The concurring opinions in *Youngstown*, including Justice Jackson's, in fact rely heavily on inferences from the legislative landscape, and it is not readily apparent why such inferences cannot give rise to a finding of congressional approval.

If we step back from Justice Jackson's framework, it becomes clear that ordinary delegation principles should govern judicial assessment of Congress's authorization of executive conduct. Beyond that, the relevant questions are ones about the scope of the President's constitutional powers. Courts tend to avoid these questions by resolving cases on dubious statutory grounds or by deeming disputes over the scope of presidential power to be political questions. The narrow role courts take in these cases is in some ways consistent with the role Justice Jackson expected courts to play in cases where Congress is silent with respect to a particular executive initiative. As I will suggest, however, this approach has significant costs.

174. See note 12 and accompanying text.
175. See note 21 and accompanying text.

1. Construing Congressional Delegations

Under Justice Jackson's framework for evaluating executive conduct, a court's task is to determine whether the President is acting in "disjunction or conjunction" with the will of Congress.[176] Where the Executive rests its action on a specific statute, the court must construe the statute to determine if it authorizes the conduct in question. Debates over foreign affairs powers are often debates over whether courts should broadly or narrowly construe statutory delegations. The Supreme Court has dealt with the same statutes in a variety of ways, and the differences cannot be explained solely by shifts over time in the Court's approach to delegation questions.[177] Rather than illustrating the courts' failure to be faithful to Justice Jackson's framework, however, the cases illustrate the inherent ambiguities in that framework. Viewed through the lens of Justice Jackson's concurrence, the variations in the Court's approach highlight the impossibility of identifying Congress's "implied" will.

a. The Passport Cases

Three cases addressing the authority of the Executive Branch to withhold or revoke passports illustrate the difficulty. In *Kent v. Dulles*,[178] the Court considered a challenge by two U.S. citizens to the Secretary of State's denial of passports necessary for foreign travel. Both citizens had declined to execute affidavits, required under regulations promulgated by the Secretary of State, stating whether they were or ever had been members of the Communist Party.[179] They argued that the Secretary of State lacked the authority to require such an affidavit as a condition of granting a passport. Congress had first specifically required passports for foreign travel in 1952.[180] The issuance of passports, however, remained controlled by a 1926 statute authorizing the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe

176. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

177. For a general discussion of deference to the Executive in foreign affairs matters, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 663 (2000) (observing that courts' approach in foreign affairs cases "seems more deferential to the Executive, on average, than the approach in cases conventionally labeled as 'domestic' in nature").

178. 357 U.S. 116 (1958).

179. Id. at 118, 119.

180. Act of June 27, 1952, ch. 477, 66 Stat. 190 (codified as amended at 8 U.S.C. § 1185 (1994)).

for and on behalf of the United States."[181] The President had in turn delegated his authority to prescribe certain rules to the Secretary of State.[182] Writing for the Court, Justice Douglas concluded that, in leaving the issuance of passports in the hands of the Secretary of State, Congress did not intend for the Secretary to have unfettered discretion "to grant or withhold a passport from a citizen for any substantive reason he may choose."[183] In defending the regulation, the Executive urged the Court to hold that Congress had impliedly adopted the Executive's longstanding interpretation that it had broad, if not unlimited, discretion to withhold passports.[184] Analyzing the executive practice in question, however, the Court found that the Secretary of State had withheld passports in the past only in two types of cases—those involving questions about an applicant's citizenship or allegiance to the United States and those involving questions about an applicant's illegal conduct. Because there was no substantial, consistent practice of denying passports on grounds related to political association, the Court would not infer that Congress had adopted the Executive's interpretation of the statute.[185] In light of the fact that the Secretary's action implicated a liberty interest—the right to travel freely—the Court would not construe the statute to grant the Executive unbridled discretion to limit that right absent a clear statement to that effect.[186] Citing *Youngstown*, the Court concluded that if a citizen's right to travel is to be regulated, "it must be pursuant to the lawmaking functions of Congress."[187] The Court thus relied on *Youngstown* to adopt a narrow construction of a statutory delegation impli-

181. Act of July 3, 1926, ch. 772, 44 Stat. 887 (codified as amended at 22 U.S.C. § 211a (1994)).

182. See Exec. Order No. 7856, par. 126, 3 Fed. Reg. 681, 687 (1938) (authorizing Secretary of State "to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to these rules and not inconsistent therewith"); see 5 U.S.C. § 156 (1958) (redesignated as 22 U.S.C. § 2656 (1994)) (requiring Secretary of State to perform foreign affairs related duties assigned by the President).

183. *Kent*, 357 U.S. at 128.

184. Id. at 125.

185. Id. at 128 ("We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.").

186. Id. at 129 ("Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.") (citations omitted).

187. Id. at 129.

cating a fundamental right, and also to foreclose the existence of an implied executive power to control the issuance of passports.[188]

Seven years later, in *Zemel v. Rusk*, the Court construed the same 1926 statute to authorize the Secretary of State to refuse to validate passports for travel to Cuba.[189] The Court found in the statute's legislative history no affirmative intention to authorize area restrictions, but also no intent to exclude such restrictions—factors that took on "added significance" in light of the Secretary of State's imposition of area restrictions both before and after passage of the 1926 and 1952 Acts.[190] In other words, the Court found it appropriate to attribute to Congress the Executive's own construction of the statute. The Court distinguished *Kent* by suggesting that the Executive's practice with respect to area restrictions was more substantial than its practice with respect to questions about political affiliations.[191] But there was a key difference in the Court's approach in the two cases. In *Kent*, the Court had focused on the fact that the Secretary of State's action might infringe upon a protected right to travel. As a result, the Court narrowly construed the delegated power. In *Zemel*, the Court analyzed whether Congress had acquiesced in the Executive's practice before turning to the nature of the right implicated.[192] The result was a standard that favored the Executive. Once the Court found congressional acquiescence, the citizen's right to travel *was* regulated pursuant to an act of Congress—precisely what *Kent* would have required. In other words, while purporting to follow *Kent*, the *Zemel* Court did not narrowly construe the delegation or require a clear statement from Congress.

The Court's 1981 decision in *Haig v. Agee*,[193] again construing the delegation in the 1926 Passport Act, went one step beyond *Zemel*. The case concerned whether the Secretary of State could revoke a passport for security reasons. Although the Executive Branch could not identify a substantial practice of revok-

188. See id.
189. 381 U.S. 1, 7 (1965).
190. Id. at 8; see id. at 8-13 (describing area restrictions).
191. Id. at 12-13.
192. See id. at 13 ("Having concluded that the Secretary of State's refusal to validate appellant's passport for travel to Cuba is supported by the authority granted by Congress in the Passport Act of 1926, we must next consider whether that refusal abridges any constitutional right of appellant.").
193. 453 U.S. 280 (1981).

ing passports,[194] the Executive Branch had issued a regulation setting forth circumstances in which it would do so.[195] The Court imputed knowledge of the executive policy to Congress, even in the absence of any strong evidence that Congress was aware of it. Based on Congress's failure to disturb the policy when it considered statutes in related areas, the Court concluded that Congress had implicitly approved the policy.[196] In other words, the finding of congressional acquiescence in the Executive's construction of the delegation no longer depended on the existence of any substantial and consistent past practice.[197] The result was a standard even more deferential to the Executive Branch than the one applied in *Zemel*.

b. Foreign versus Domestic Delegations

The passport cases illustrate two undercurrents in the court's treatment of delegation in the foreign affairs context. First, questions about the scope of a congressional delegation and the scope of the President's constitutional powers in foreign affairs are closely intertwined. In *Kent*, the Court rejected the Executive's claim that the Passport Act authorized it to withhold a passport on grounds of political association. The majority did not then proceed to consider whether the President could claim an implied authority to withhold a passport, believing that *Youngstown* foreclosed that conclusion.[198] The four dissenting Justices—including two who concurred in the *Youngstown* decision, Justices Clark and Burton—disagreed with the Court's construction of the statute, but apparently also with its conclusion that the Secretary of State's discretion necessarily depended upon the statute. They observed that "all during our history" the Secretary of State "has had discretion to grant or withhold passports," and that this power was "first exercised without the benefit of statute."[199] In *Zemel*, where the Court approved the Secretary of State's practice of imposing area restrictions, the dissenting Justices believed that the absence of specific congressional intent to authorize area restrictions meant that the Secre-

194. Id. at 302.
195. 22 C.F.R. § 51.70(b)(4) (1980).
196. 453 U.S. at 303.
197. Id. ("The Secretary has construed and applied his regulations consistently and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy in practice.").
198. 357 U.S. at 129.
199. Id. at 131.

tary of State's action rested on a claim of inherent authority with respect to issuance of passports, and in their view *Youngstown* foreclosed that argument.[200]

Second, in construing foreign affairs delegations, the Supreme Court has departed in three ways from its ordinary approach to construing statutes granting authority to the Executive. First, the Court has invoked a special principle of deference to executive action in foreign affairs even when ordinary deference to an executive construction of a statute would suffice to decide the case. In *Agee*, for example, the Court acknowledged that courts generally must defer to a consistent administrative construction of a statute, but stated, relying on *Curtiss-Wright*, that the case for deference is even stronger in the foreign affairs context.[201] Even though the Court's modern approach to delegation issues affords great latitude to the Executive Branch—requiring a court to defer to a reasonable executive construction of a statute when Congress does not speak directly to the issue[202]—the Court continues to use the *Agee* approach in cases

200. 381 U.S. at 20-21 (Black, J., dissenting) ("I cannot accept the Government's argument that the President has 'inherent' power to make regulations governing the issuance and use of passports. We emphatically and I think properly rejected a similar argument advanced to support a seizure of the Nation's steel companies by the President."); id. at 28 (Goldberg, J., dissenting) ("I do not believe that the Executive has inherent authority to impose area restrictions in time of peace."); id. at 30 ("I would rule here, as this Court did in *Kent v. Dulles*, that passport restrictions may be imposed only when Congress makes provision therefor 'in explicit terms' consistent with constitutional guarantees." (quoting *Kent*, 357 U.S. at 130; citing *Youngstown*, 343 U.S. at 613)).

201. 453 U.S. at 291 ("[A] consistent administrative construction of [a] statute must be followed by the courts unless there are compelling indications that it is wrong. This is especially so in areas of foreign policy and national security, where congressional silence is not to be equated with congressional disapproval.") (citations and internal quotation, omitted).

202. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* deference applies when Congress charges an agency with administration of a federal statute. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). There are several open questions about what sorts of administrative actions qualify for *Chevron* deference. See, e.g., *United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (declining to apply *Chevron* deference to letter rulings issued by U.S. Customs Service); Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 840-52 (2001) (describing open questions regarding *Chevron*'s application); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. Reg. 1 (1990) (analyzing whether *Chevron* should apply to various categories of agency action). *Chevron* deference would apply, however, to the sorts of formal rules at issue in the foreign affairs cases described thus far. Each case involved a regulation issued under delegated authority to promulgate rules with the force of law. The three passport cases each involved the 1926 statute granting the Secretary of State authority to issue passports "under such rules as the President shall designate." The President in turn delegated his authority to prescribe rules to the Secretary of State. Exec. Order No. 7856, par. 126, 3 Fed. Reg. 681, 687 (1938) (authorizing Secretary of State "to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports addi-

involving foreign affairs delegations.[203] Second, in foreign affairs cases the Court has gone beyond deferring to the Executive's construction of a statute, taking the additional step of imputing the construction back to Congress. In *Agee,* the Court not only itself adopted the Executive's construction of a statute, it found that *Congress* had done so—that Congress's failure to reject the Executive's construction amounted to acquiescence in or approval of that construction. The deference ordinarily afforded the Executive Branch in its construction of statutes, from the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[204] forward, is not based on a theory of *congressional acquiescence or approval* of a particular executive reading of a statute. Rather, it flows from courts' construction of Congress's likely intent in delegating power in the first place.[205] If Congress has left a gap in a statutory scheme, a court will presume that Congress intended the Executive to fill the gap.[206] Instead of concluding that Congress acquiesced in or approved of the executive reading of the statute, the *Agee* Court clearly could have sustained the Executive Branch's action on the theory that Congress had explicitly granted the Executive Branch discretion in formulating rules regulating the use of passports. The statute, after all, authorized the Secretary of State to grant passports "under such rules as the President shall designate and prescribe."[207] Even though the result in the *Agee* case would have

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tional to these rules and not inconsistent therewith"); see 5 U.S.C. § 156 (1958) (redesignated as 22 U.S.C. § 2656 (1994)) (requiring Secretary of State to perform foreign affairs related duties assigned by the President). In each case, the Secretary of State imposed the relevant limitation by regulation or by regulation and public notice. See 17 Fed. Reg. 8013 (1952) (regulation at issue in *Agee*); 26 Fed. Reg. 482, 492 (1961) (regulation and public notice at issue in *Zemel*); 31 Fed. Reg. 13537, 13544 (1966) (regulation at issue in *Agee*). *Chevron* deference would also apply to the Treasury regulations at issue in *Regan v. Wald*, 468 U.S. 222 (1984), which I discuss below, see notes 203, 228. See 47 Fed. Reg. 17030 (1982) (regulation at issue in *Wald*).

203. See, e.g., *Regan v. Wald*, 468 U.S. 222, 243 (1984) (sustaining travel restriction in part based on "traditional deference to executive judgment" in foreign affairs). For an argument that courts have departed from ordinary principles of statutory construction in cases involving international environmental statutes, see David M. Driesen, *The Congressional Role in International Environmental Law and its Implications for Statutory Interpretation*, 18 Envt'l Aff. 287, 289-90, 309-11 (1991).

204. 467 U.S. 837 (1984).

205. See Merrill and Hickman, 89 Geo. L.J. at 863-73 (cited in note 202) (assessing possible legal foundations for the *Chevron* doctrine and concluding that the doctrine is best explained as resting on a presumption of congressional intent); cf. Bradley, 86 Va. L. Rev. at 671 (cited in note 177) (arguing that *Chevron* "is not based, at least not strongly, on congressional intent. Instead, it is based partly on the Court's sense of what Congress *would have wanted* if it had thought about the issue.").

206. *Chevron*, 467 U.S. at 844.

207. Act of July 3, 1926, ch. 772, 44 Stat. 887 (codified as amended at 22 U.S.C. §

been the same under either approach, it is not difficult to imagine a court elevating a finding of acquiescence or approval over indications of contrary congressional intent and thereby sustaining under the *Agee* approach an executive policy that would not survive under *Chevron*.[208] *Agee*, of course, predated *Chevron* by three Terms, but the concept of judicial deference to agency construction of a statute was not a new one.[209] Finally, the Court has treated foreign affairs delegations differently from purely domestic delegations with respect to Executive constructions that raise constitutional questions. In cases involving purely domestic delegations, the Court has at times stated that *Chevron* deference must give way when the Executive's construction of a regulation raises a serious constitutional question.[210] The passport cases all involved claims that the Executive's restrictions infringed a constitutionally protected right to travel. Only in *Kent* did that claim affect the Court's construction of the statue. In the remaining cases, the Court turned to the constitutional claim only after deferring to the executive interpretation, and in each case the Court dismissed that claim.

Because delegation and implied powers questions are closely related, and because courts have been deferential to the Executive Branch in statutory construction cases in foreign affairs, it is not surprising that congressional primacy scholars criticize courts' approach to delegation questions and argue that courts should more narrowly construe foreign affairs delegations.[211] What is interesting for our purposes is that the arguments for narrow construction are not typically premised on a view that principles governing construction of purely domestic delegations would suggest that deference is inappropriate with respect to specific foreign affairs statutes. To take the passport cases again, scholars do not argue that the Court should have de-

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211a (1994)).

208. One might argue that the Court did something like this in *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981), where it found congressional acquiescence in or approval of the President's decision to suspend claims of U.S. citizens against Iran and its enterprises, despite the absence of clear statutory authority for that decision. See notes 252-263 and accompanying text.

209. See *Agee*, 453 U.S. at 291 (citing cases holding that courts must follow a consistent administrative construction of a statute).

210. See, e.g., *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

211. See Bradley, 86 Va. L. Rev. at 664-65 (cited in note 177) (noting commentators' criticism of courts' deference to the Executive Branch in foreign affairs matters); see also note 21 (citing criticisms).

clined to defer to the Secretary of State's construction of the 1926 Passport Act statute because, for example, Congress conferred rulemaking authority on the President rather than on the Secretary of State,[212] or because the regulations in question were not issued after notice and comment.[213] Nor do they necessarily argue that the Court's construction of the passport authority is inconsistent with the Court's typical approach to deference to an executive construction that raises constitutional questions.[214] Rather, the argument is more general—that foreign affairs statutes should be construed against the Executive.

Scholars attribute what they view as excessive judicial deference in this context in part to a courts' failure to adhere to Justice Jackson's framework for evaluating executive conduct. The suggestion is that courts adhering to the framework would read congressional delegations more narrowly. But that is by no means clear. Under Justice Jackson's framework, the first question is whether the President acts "pursuant to an express or implied authorization of Congress."[215] The difficulty in any case is determining what might constitute Congress's "implied" will. Nothing in Justice Jackson's discussion indicates whether courts should construe delegations in favor of or against the Executive. It might be argued that Justice Jackson's premise that presidential powers "fluctuate" according to their "disjunction or conjunction with those of Congress"[216] suggests a recognition of congressional primacy, and on that view courts should construe delegations against the Executive. This argument, however, begs the question: if the very issue in dispute is what Congress intended to delegate to the Executive, a court cannot simply presuppose that Congress intended its delegation to be interpreted narrowly based solely on Justice Jackson's rhetorical choices.

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212. The argument would be a weak one, since Congress also presumed that the President would delegate foreign affairs related functions to the Secretary of State. See 5 U.S.C. § 156 (1958) (redesignated as 22 U.S.C. § 2656 (1994)) (requiring Secretary of State to perform foreign affairs related duties assigned by the President).

213. Where the Executive Branch addressed the notice and comment issue in connection with the passport regulations, it has suggested that the notice and comment provisions of the Administrative Procedure Act did not apply because the regulations involved the foreign affairs functions of the United States. See, e.g., 16 Fed. Reg. 482 (1961) (regulation at issue in *Zemel*).

214. Compare Adler, *Court, Constitution, and Foreign Affairs*, in Adler and George, eds., *The Constitution and the Conduct of American Foreign Policy* at 32-35 (cited in note 21) with Koh, *The National Security Constitution* at 136-41 (cited in note 11).

215. 343 U.S. at 635 (Jackson, J., concurring).

216. Id.

Because Justice Jackson gave no clear guidance on how to construe a congressional delegation, the claim that courts should construe delegations narrowly—that is, more narrowly than courts construe domestic delegations—depends on other normative arguments. Those arguments are not particularly persuasive. Since delegation questions and questions about the scope of a President's constitutional powers are closely linked, one could argue that an overbroad construction of a delegation will effectively give judicial sanction to a power not in the Constitution. Even if that were true, it would counsel in favor of construing a foreign affairs delegation in the same way as a purely domestic delegation, not more narrowly. Alternatively, the argument for a narrow construction of a delegation may depend on a view that Congress simply should not delegate broad powers to the President in the foreign affairs context.[217] Because this argument is largely prudential rather than constitutional,[218] it does not provide a useful basis for a court to choose between a broad or narrow construction of a delegation. At most, concerns about whether a broad executive interpretation of a delegation would leave the Executive unsupervised by Congress might suggest that

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217. See Silverstein, *Imbalance of Powers* at 185-86 (cited in note 11) (considering whether separation of powers principles limit what foreign affairs powers Congress may constitutionally delegate to the President).

218. The Supreme Court has not used the nondelegation doctrine to invalidate a federal statute since 1935. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court has, however, used a weak form of the doctrine to channel statutory interpretation. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 642-46 (1980); *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974); see also Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1409-10 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 242-46; Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 330-35 (2000). In 1999, the Court of Appeals for the D.C. Circuit invalidated the Environmental Protection Agency's interpretation of the scope of certain provisions of the Clean Air Act on the ground that the interpretation left the agency unsupervised by Congress in its regulation of pollution levels. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Some have argued that the case signaled the birth of a new nondelegation doctrine, under which courts would invalidate open-ended statutory terms unless agencies adopt a narrowing construction. See, e.g., Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1415 (2000) (describing "newly emerging delegation doctrine" that "requires administrative agencies to issue rules containing reasonable limits on their discretion in exchange for broad grants of regulatory authority"); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 309 (1999) ("Under the new [nondelegation] doctrine, open-ended statutory terms will be invalidated unless agencies are able to specify the governing legal criteria—to discipline their own authority through narrowing interpretations."). The Supreme Court reversed the D.C. Circuit's *American Trucking* decision, concluding that neither the statute nor the agency's interpretation left the agency unsupervised by Congress. *Whitman v. Am. Trucking Ass'n*, 121 S. Ct. 903, 913 (2001).

in such a case a court should adopt an alternative, more limited construction.[219] But nothing about foreign affairs delegations makes a unique general rule of narrow construction appropriate.

Nor do concerns about the scope of the President's constitutional powers or concerns about Congress delegating too much of its foreign affairs authority overcome arguments for construing foreign affairs delegations in the same way as domestic delegations. As noted, when Congress confers administrative authority on an Executive Branch entity, it is presumed to have delegated to that entity the power to fill statutory gaps. One theory underlying this approach—that an Executive Branch entity possesses greater expertise and accountability than courts in connection with the statutes that it administers[220]—applies with full force in the foreign affairs area.[221] More important, the fact that Congress legislates against the backdrop of these ordinary delegation principles places on Congress the burden to be more specific about its policy choices when it confers authority on the Executive, lest a court defer to an executive interpretation with which Congress disagrees. In other words, because a failure to resolve a policy dispute will enhance executive power, Congress will be more likely to be specific about its policy choices if the background rule is that a court will defer to executive interpretations of ambiguous statutes than it would be if the rule were that a court will adopt its own interpretation of a statute.[222]

In arguing that courts should treat foreign affairs and domestic delegations similarly, I do not suggest that courts should always defer to an executive construction of a foreign affairs

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219. See Manning, 2000 Sup. Ct. Rev. at 242-46 (cited in note 218) (discussing Court's use of the nondelegation doctrine as a canon of avoidance); Bressman, 109 Yale L.J. at 1409-10 (cited in note 218) (same); Sunstein, 67 U. Chi. L. Rev. at 330-35 (cited in note 218).

220. *Chevron*, 467 U.S. at 865-66.

221. See Bradley, 86 Va. L. Rev. at 680 (cited in note 177) (suggesting that *Chevron* may apply "with special force" to foreign affairs statutes).

222. See id. at 674 ("[T]o the extent that Step One of *Chevron* encourages Congress to be more specific in its enactments, it may actually reduce Executive power over time."); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Ad. L.J. 269, 281 (1988) ("[I]f it is desirable to have the legislature be more precise in its delegations . . . it is more likely to result from judicial deference than from judicial lawmaking. . . . [A] policy of deference clearly tells Congress that if it wants any meaningful control of the executive, post-*Chadha*, it can no longer rely upon the Court to complete its work."); Richard J. Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391, 413-14 ("Once Congress realizes that broad delegations of vast prescriptive policymaking power constitute a form of legiscide and a transference of policymaking power to the executive, powerful institutional forces in the legislature can be relied on to induce major changes in Congress' attitude toward such delegations.").

statute, or even that it will always be easy for a court to resolve whether it should defer. The point is that the answers to these questions do not vary simply because they arise in the foreign affairs context. There are several unanswered questions about when and how *Chevron* deference generally applies.[223] Two difficulties are worth noting here.

First is a question likely to recur in the foreign affairs area: whether a court should defer to an executive interpretation of a statute when that interpretation raises a constitutional question. As previously noted, the Court has on some occasions declined to defer to executive interpretations that raise constitutional questions in the context of purely domestic delegations.[224] In other words, the Court has concluded that its "avoidance canon"—a rule of statutory construction requiring it to avoid a reading of a statute that raises serious constitutional questions if another reading is available[225]—trumps *Chevron* deference. On at least one occasion, however, the Court has taken an approach more consistent with a different version of the avoidance canon—one of avoiding a construction of a statute that would be unconstitutional.[226] The choice between these approaches is obviously an important one: *Kent* is more consistent with a view that the courts should not defer to an executive construction of a statute that raises constitutional questions; *Zemel* and *Agee*, as

223. See generally Merrill and Hickman, 89 Geo. L.J. at 840-52 (cited in note 202).

224. See note 210 and accompanying text.

225. For discussion of the development of the avoidance canon, see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 836-43 (2001); John Copeland Nagle, *Delaware & Hudson Revisited*, 72 Notre Dame L. Rev. 1495 (1997).

226. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); see also Kelley, 86 Cornell L. Rev. at 894 (cited in note 225) (observing that "notwithstanding the Court's claims to the contrary, the constitutional objections raised" in *Rust* "were fairly termed serious"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 989 n.87 (1992) (suggesting that the opinion in *Rust* "can arguably be read as limiting the *DeBartolo* canon to cases in which the agency interpretation *would be* unconstitutional, as opposed to merely raising a 'serious question' of constitutionality") (emphasis added). For discussion of the two versions of the avoidance canon, see Kelley, 86 Cornell L. Rev. at 893-41 (cited in note 225) (describing Court's shift from "classical avoidance," under which courts would avoid readings of statutes that were actually unconstitutional, to "modern avoidance," under which courts would avoid readings of statutes that raised constitutional questions); Nagle, 72 Notre Dame L. Rev. at 1495-98 (cited in note 225) (discussing shift in Court's approach in United States ex rel. *Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1949 (1997) (distinguishing classical avoidance and modern avoidance; suggesting that "the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional") (emphasis added).

well as *Regan v. Wald*,[227] a case involving Treasury Department regulations that had the effect of restricting travel to Cuba, are more consistent with a view that courts can defer to an executive construction of a statute that raises constitutional questions so long as the executive action is not actually unconstitutional.[228] The point for present purposes is that the question whether the avoidance of constitutional questions canon should trump *Chevron* deference arises in connection with purely domestic delegations as well as foreign affairs delegations.[229] The fact that some foreign affairs delegations raise constitutional questions, then, does not mean that all foreign affairs delegations should be treated differently from domestic delegations.[230]

The second question is whether courts should defer not only to an executive entity's policy when Congress has left a gap in a statutory scheme, but also to the executive entity's interpretation of the scope of its own authority. The Supreme Court has never

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227. 468 U.S. 222 (1984).

228. *Wald* involved Treasury Department regulations that prohibited certain transactions involving property in which Cuba or any of its nationals had an interest, but that exempted transactions incident to travel to, from, and within Cuba. Id. at 224. The regulation was initially promulgated under the Trading with the Enemy Act (TWEA), 50 U.S.C. app. § 5b, which authorized the President to regulate certain transactions in times of war and during peacetime emergencies. In 1977, Congress amended TWEA to limit the President's power to act pursuant to TWEA to times of war, but by means of a grandfather clause allowed the President to continue to exercise "authorities . . . which were being exercised" with respect to particular countries as of the effective date of the amendment (July 1, 1977). Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, 91 Stat. 1625 (codified as amended at 50 U.S.C. app. § 5 note). The Treasury Department subsequently amended its Cuba regulation to remove the exemption for travel-related economic transactions. 47 Fed. Reg. 17030 (1982). The Executive Branch construed the grandfather clause in the 1977 amendment to TWEA to allow it to promulgate the more restrictive regulation, on the theory that the general property regulation in place before the amendment constituted an "exercise[ ]" of the relevant "authorit[y]" with respect to Cuba, thereby preserving the Executive's ability to impose additional property-related restrictions. *Wald*, 468 U.S. at 231. The Court could have rejected the government's argument on the theory that a construction of TWEA or the grandfather clause that would permit travel-related restrictions would raise constitutional questions. Instead, it affirmed the Executive's construction of the grandfather clause and rejected the constitutional claims.

229. For competing views about whether the avoidance of constitutional questions canon should trump *Chevron* deference, compare Sunstein, 67 U. Chi. L. Rev. at 335 (cited in note 218) (arguing that certain canons can be justified as ensuring that "judgments are made by the democratically preferable institution"—that is, Congress) with Merrill and Hickman, 89 Geo. L.J. at 914-15 (cited in note 202) (arguing that courts should defer to an executive construction that merely raises constitutional questions, because such deference serves goals of democratic accountability by preferring agency resolution of indeterminacy rather than judicial resolution of indeterminacy).

230. For a discussion of how certain other canons of construction specific to the foreign affairs context should affect *Chevron* deference, see Bradley, 86 Va. L. Rev. at 685-94 (cited in note 177).

squarely faced this question, although it has, without discussion, applied the *Chevron* framework to scope-of-authority issues.[231] One court recently rejected, without detailed explanation, an argument that *Chevron* deference should apply to the Executive's construction of its scope of authority under a 1998 amendment to the Foreign Sovereign Immunities Act.[232] One of the problems of applying a different standard to scope-of-authority questions is that those questions can be difficult to distinguish from ordinary interpretative questions.[233] However the Court ultimately resolves this issue, there is nothing peculiar about a foreign affairs delegation that makes the scope-of-authority issue more difficult in that context.[234]

As this discussion suggests, although it is difficult to defend the Court's reasoning in many of the cases involving construction of foreign affairs delegations, it is also difficult to defend the argument that courts should construe foreign affairs delegations more narrowly than purely domestic delegations—or that Justice Jackson's concurrence tells us so. The hard questions about foreign affairs delegations, such as how to treat an executive construction that raises a constitutional question or how to treat an executive construction of its own scope of authority, are also some of the hard questions about domestic delegations. Congress legislates against the backdrop of the principles that govern courts' construction of statutes delegating administrative authority, grey areas and all. It serves no particular interests for the

231. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (acknowledging principle that "agencies are generally entitled to deference in the interpretation of statutes that they administer," but concluding that Congress "has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products").

232. See *Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla. 1999) ("The President's decision to exercise his waiver is given great deference by this Court; however, his interpretation of the breadth of that waiver cannot belie the legislative authority from which it stems."), rev'd on other grounds sub nom. *Alejandre v. Telefonica Larga Distancia de P.R.*, 183 F.3d 1277 (11th Cir. 1999). For a discussion of the case, see Oren Eisner, Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 Cornell L. Rev. 411, 420-22 (2001).

233. Consider, for example, the debate between Justice Scalia and Justice Brennan in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). See id. at 381-82 (Scalia, J., concurring in judgment); id. at 386-87 (Brennan, J., dissenting).

234. At least one commentator has suggested that "there are particular reasons to apply *Chevron* deference to scope-of-authority issues in the foreign affairs context," because "[c]hanging world conditions and the executive branch's unique access to foreign affairs information suggest that when Congress delegates foreign affairs authority to the executive branch, it often 'must of necessity paint with a brush broader than that it customarily wields in domestic areas.'" Bradley, 86 Va. L. Rev. at 682-83 (cited in note 177) (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

Court narrowly to construe foreign affairs delegations. If Congress's failure to articulate a policy judgment threatens to shift power to the President, then Congress is more likely to make that judgment clear.

If we shift the focus in cases involving construction of congressional delegations from Justice Jackson's inquiry into "implied" congressional will to an application of ordinary delegation principles, the respective roles of the courts and Congress shift. If a court's task ends in most cases with an application of ordinary delegation principles, it follows that it falls to Congress to protect the other interests at stake—to ensure that a mistaken construction of its delegation does not result in recognition of implied powers, or to ensure that an accurate construction of its delegation leaves sufficient power in its own hands as a matter of policy. To the extent that congressional primacy scholars advocate a broader vote for courts, they call upon the wrong branch to police executive conduct—and they are mistaken to think that Justice Jackson's concurrence dictates this approach.

2. Executive Action in the Absence of Statutory Delegation

I now turn to cases involving disputes over presidential power in which the Executive Branch is unable to point to specific statutory authorization for its conduct. In some cases, a court will have rejected the Executive's construction of a statutory delegation;[235] in others, there is no statute at all for the Executive Branch to call upon.[236] As I will suggest, although scholars criticize these cases as being excessively deferential to the Executive Branch, nothing in Justice Jackson's concurrence in *Youngstown* supplies a limiting principle.

a. Inferences of Congressional Opposition from the Legislative Landscape

For a court proceeding under Justice Jackson's framework, the absence of an authorizing statute does not necessarily resolve whether the Executive acted in "disjunction or conjunction" with the will of Congress. The concurring Justices in

235. See *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981) (rejecting claim that statutes authorized President to suspend claims in U.S. courts again Iran and its state enterprises).

236. See note 115 (discussing the *Keith* case, in which the absence of statutory authority was readily apparent, although the Court resolved the case on other grounds); note 243 and accompanying text (discussing the *Pentagon Papers* case).

Youngstown based their conclusion that President Truman had acted in the face of congressional opposition on two factors. First, they identified several statutes giving the President tools to forestall threatened industrial disruptions but omitting the power to seize the industry.[237] In effect, the concurring Justices found that Congress had occupied the field, thereby blocking the course of conduct President Truman chose to pursue.[238] Second, Justice Frankfurter focused in part on the fact that, in considering the Taft-Hartley Act, the House had rejected an amendment that would have granted the President seizure authority.[239] In addition, one of the Senate sponsors of the legislation specifically noted that the Senate Labor Committee had considered and rejected including a seizure provision.[240] The other concurring Justices embraced Justice Frankfurter's conclusion.[241] In other words, Congress's consideration and rejection of a particular tool for dealing with industrial strife precluded the President's reliance on it. Even if Congress had not occupied the field by providing alternative procedures, legislative history indicating a specific rejection of the seizure authority signaled Congress's opposition to that course of action. Inferences from the legislative landscape thus influenced the Court's determination that the President acted in opposition to Congress's will.

These two approaches to finding congressional opposition resurfaced in the *Pentagon Papers* case.[242] There, the Executive Branch sought, in the conceded absence of specific legislative authority, to enjoin newspapers from publishing excerpts from a classified government study on the United States' policy in Vietnam.[243] In a per curiam opinion, the Court held that the government had not met its "heavy burden" of demonstrating that a prior restraint was justified.[244] In concurring opinions, Justices Black, Douglas, and Brennan emphasized the First Amendment

237. See notes 62-69 and accompanying text.

238. Compare this approach to executive power questions with courts' approach to state law preemption questions. If there is no actual conflict between state and federal law, a court will inquire whether "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). See also notes 287-289 and accompanying text.

239. *Youngstown*, 343 U.S. at 600 (Frankfurter, J., concurring).

240. Id.

241. See note 70.

242. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

243. Id. at 714.

244. Id.

aspects of the case and argued that no prior restraint on the publication of newsworthy information could ever be justified.[245] Justices Stewart, White, and Marshall, however, focused in part on the absence of congressional authority for the Executive Branch to seek an injunction in the case. Justice White (joined by Justice Stewart) and Justice Marshall each observed that Congress had passed several provisions designed to protect sensitive government documents, but had not authorized the Government to seek to enjoin publication.[246] This fact put the case on all fours with *Youngstown*. As Justice White put it, citing *Youngstown*, "Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. It has not, however, authorized the injunctive remedy against threatened publication."[247] And like four of the concurring Justices in *Youngstown*, Justice Marshall found it relevant that Congress "has specifically rejected passing legislation that would have clearly given the President the power he seeks here."[248] As in *Youngstown*, the concurring Justices in the *Pentagon Papers* case found both that Congress had occupied the field with statutes that did not grant the President the authority he sought and that Congress had specifically rejected legislation that would have done so.

A court determining whether the existence of related legislation or the rejection of other legislation forecloses presidential conduct, however, faces a difficult task. Under the first approach, a court must somehow distinguish a situation in which Congress's action in an area related to the challenged conduct should preclude the executive action from a situation in which Congress's failure to speak directly to the issue "invite[s]" the executive conduct.[249] Indeed, the notion that congressional action in a related area precludes presidential conduct seems to

245. Id. at 715 (Black, J., concurring) ("In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."); id. at 720 (Douglas, J. concurring) (arguing that the First Amendment "leaves . . . no room for governmental restraint on the press"); id. at 725 (Brennan, J., concurring) ("[T]he First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.").

246. Id. at 735-40 (White, J., concurring); id. at 743 (Marshall, J., concurring) ("Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States.").

247. Id. at 740 (White, J., concurring) (citation omitted).

248. Id. at 745 (Marshall, J., concurring).

249. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

presume that Congress anticipates all circumstances in which the President may find it necessary to act. Under the second approach, a court must make highly dubious use of legislative history, relying on it not to aid its interpretation of a specific statute—which is controversial enough—but rather to discern what range of legislative proposals Congress can be thought to have rejected.[250] In other words, under the approach of the *Youngstown* concurrences, a court can give significant weight to inferences from the legislative landscape, independently of its interpretation of a specific law.[251]

b. Inferences of Congressional Approval From the Legislative Landscape

This last point shows why the approach of Justice Jackson's concurrence is an ineffective restraint on executive conduct. If inferences from the legislative landscape are fair game in an assessment of Congress's implied *opposition* to executive conduct, it is unclear why such inferences would not also be fair game in an assessment of Congress's implied *approval* of presidential conduct. The Supreme Court's much criticized decision in *Dames & Moore v. Regan*[252] illustrates the point. In *Dames & Moore*, the Court again confronted the question whether the President could take action not specifically authorized by Congress in an area where Congress had passed detailed legislation, but this time the Court upheld the executive action. The dispute arose from U.S. implementation of the Algiers Accords, the January 1981 agreements providing for the release of the hostages taken in the seizure of the American Embassy in Tehran. The International Emergency Economic Powers Act (IEEPA) authorized the President, in the case of an "unusual and extraor-

250. See text accompanying notes 239-240, 248.

251. For an interesting argument that courts should rely on inferences from the legislative landscape, not merely explicit authorizations or prohibitions, to keep presidential power in check in the domestic context, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 189 (1994) ("[O]ne can see Jackson's *Youngstown* methodology as a balancing response to the demise of the nondelegation doctrine: even though courts will not invalidate delegations as too broad, they still can construe the landscape of legislation to forbid delegation, if delegation seems in tension with Congress's wishes."). Professor Greene confines his argument to the domestic context, suggesting that in the foreign affairs context "the President should be permitted to act, subject to congressional denial of power *by law*," because "the division of power between Congress and the President has always been murky and . . . the President has long taken the initiative, with considerable congressional acquiescence." Id. at 191-92 (emphasis added).

252. 453 U.S. 654 (1981).

dinary threat . . . to the national security" of the United States, to declare a national emergency and to regulate transactions in property in which a foreign country or national has an interest.[253] The President had exercised his authority under IEEPA in 1979 to block the transfer of Iranian assets, while permitting certain judicial proceedings, including prejudgment attachment of assets, against Iran.[254] The Algiers Accords obligated the United States "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein . . . and to bring about the termination of such claims through binding arbitration" in the U.S.-Iran Claims Tribunal established by the agreements.[255] The President issued Executive Orders that nullified attachments of Iranian assets, ordered the transfer of such assets, and suspended any claims in U.S. courts that could be presented to the Tribunal.[256] When a district court relied on those orders to vacate a prejudgment attachment that Dames & Moore had received in a suit against Iran and its Atomic Energy Organization, Dames & Moore claimed the President had exceeded his statutory authority.

The Court relied heavily on Justice Jackson's opinion in *Youngstown*, and in particular on Justice Jackson's identification of three categories of executive action—action taken pursuant to congressional authorization, in the face of congressional silence, and in contravention of Congress's will.[257] As to the nullification of interests in Iranian assets and the order that such assets be transferred, the Court found specific congressional authorization in the IEEPA.[258] As to the suspension of claims, however, the Court found no specific authorization, either in the IEEPA or in the Hostage Act, an 1868 statute permitting the President to use "such means . . . as he may think necessary" to obtain the release of a U.S. citizen held by a foreign government "wrongful[ly] and

253. 50 U.S.C. §§ 1701(a), 1702(a) (1994).

254. 453 U.S. at 662-63.

255. Id. at 665.

256. See id. at 664-65 (describing orders by President Carter that nullified non-Iranian interests in Iranian assets and required the transfer of such assets for disposition by the Secretary of Treasury, and orders by President Reagan that ratified President Carter's orders and also suspended claims).

257. Id. at 668-69. The Court did observe that executive action falls "not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." Id. at 669.

258. Id. at 674.

in violation of the rights of citizenship."[259] Rather than concluding that IEEPA in effect preempted the President's action, the Court found that Congress had approved of or acquiesced in the conduct in question. The key to the case was the Court's identification of Congress's "implied" will. First, the existence of the IEEPA alone could not signal Congress's opposition to the President's conduct. Congress, the Court pointed out, "cannot anticipate and legislate with respect to every possible action the President may find it necessary to take or every possible situation in which he might act."[260] Moreover, the absence of a specific statute that could be interpreted to delegate authority to the Executive did not foreclose the argument that Congress approved of the Executive's action. Both the IEEPA and the Hostage Act, the Court reasoned, indicated "congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[261] The Court focused on the fact that the Executive Branch had a long practice of settling claims of its nationals against foreign countries. Congress, the court concluded, could be said to have acquiesced in the practice.[262] Here the Court relied on language in Justice Frankfurter's opinion indicating that a court could treat a long, unbroken string of executive conduct as a "gloss" on executive power.[263] But the Court misused Justice Frankfurter's language: Justice Frankfurter reasoned that a court could glean something about what the Executive and Legislative Branches thought about the President's *constitutional* powers by examining Executive practice and the congressional response.[264] The *Dames & Moore* Court interpreted Congress's silence not as its understanding of the scope of the Executive's constitutional powers, but rather as a legislative authorization or approval of the Executive's conduct.

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259. Id. at 676 (quoting 22 U.S.C. § 1732). The Court concluded, among other things, that the statute "was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will." Id.

260. Id. at 678.

261. Id. at 677.

262. Id. at 679-70.

263. Id. at 686.

264. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated *as a gloss on 'executive Power' vested in the President by § 1 of Art. II.*") (emphasis added).

The conventional critique of the Court's decision in *Dames & Moore*, like the critique of the Court's approach to cases involving statutory delegation, is that the Court softened the barriers between Justice Jackson's categories, allowing congressional opposition (inferred from the fact that IEEPA gave the President several emergency authorities but omitted the very authority he sought to exercise) to be interpreted as congressional silence;[265] or allowing congressional silence (the absence of a specific statute that authorized the President's conduct) to be interpreted as congressional approval.[266] As with questions of congressional delegation, however, the Court's decision in *Dames & Moore* in fact highlights the ambiguities in the *Youngstown* framework—in the instruction to search for Congress's "implied" will. Justice Jackson's approach suggests that congressional opposition to executive conduct need not take the form of a statutory rejection of the authority the Executive seeks to use; a negative inference from the legislative landscape will suffice. If that approach is correct, then it is not clear why congressional approval of executive conduct must take the form of statutory delegation; positive inferences from the legislative landscape should suffice. In other words, the problem is not that the Court in *Dames & Moore* disregarded Justice Jackson's framework; the problem is that the framework always had a significant structural weakness.

3. The Costs of Avoiding Presidential Power Questions

The proposition that a court should not find that Congress authorized or approved Executive conduct in the absence of a statute delegating power—that *Dames & Moore* was wrongly reasoned—may be relatively uncontroversial.[267] But the problem

265. Silverstein, *Imbalance of Powers* at 15 (cited in note 11) (noting that "the Court has subtly turned the default presumption to one that assumes congressional acquiescence in the absence of explicit and narrowly drawn statutes that would *deny* discretion to the executive").

266. Koh, *The National Security Constitution* at 139 (cited in note 11) (arguing that Justice Rehnquist "effectively followed the dissenting view in *Youngstown*, which had converted legislative silence into consent, thereby delegating to the president authority that Congress itself had arguably withheld").

267. See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1025-26 (1989) (criticizing Court's approach to statutory interpretation in *Dames & Moore* and suggesting that the "perceived public value" of the Executive's action underlay the Court's opinion); Lee R. Marks and John C. Grabow, *The President's Foreign Economic Powers After* Dames & Moore v. Regan*: Legislation by Acquiescence*, 68 Cornell L. Rev. 68, 83-95 (1982) (criticizing Court's finding of "delegation by acquiescence" with respect to the suspension of claims issue); Arthur S. Miller,

goes far beyond *Dames & Moore*. One senses in *Dames & Moore*, as well as in the passport cases and *Regan v. Wald*, a desire to avoid, wherever possible, resting presidential conduct on constitutional rather than statutory authority. Courts, of course, try to avoid constitutional questions if there are other grounds for decision.[268] But this norm gives courts no license to construe congressional delegations more broadly than ordinary judicial principles would support or to find congressional authorization outside of the context of a statute. These actions create the very constitutional questions they are supposed to avoid.

We can in fact detect the seeds of this reluctance to give content to the President's constitutional powers in Justice Jackson's concurrence. Recall Justice Jackson's observation about his second category of executive action, where Congress is silent. Congressional silence, he wrote, may "invite[ ] measures on independent presidential responsibility."[269] The outcome of the dispute is likely to turn more on "contemporary imponderables" than "on abstract theories of law."[270] If Justice Jackson's statement was purely predictive, he was right. Justiciability doctrines require or permit courts to avoid resolving many significant separation of powers disputes.[271] But Justice Jackson's claim that powers "fluctuate" according to Congress's will also yields two related normative conclusions. The first is a prudential point that the task of policing the Executive should fall to Congress, not the courts, because the political branches are more likely to arrive at a narrow resolution that will preserve the Government's flexibility in later, unforeseen circumstances. This view seemed to animate Justice Powell's concurrence in the Supreme Court's decision to deny review in *Goldwater v. Carter*,[272] a dispute over President Carter's termination of the United States' mutual defense treaty with Taiwan. Justice Powell argued that judicial in-

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Dames & Moore v. Regan: *A Political Decision by a Political Court*, 29 UCLA L. Rev. 1104, 1112-13 (1982) (criticizing *Dames & Moore* Court's approach to the suspension of claims issue as resting on the conclusion that "an invitation for the president to act" "lurk[ed] somewhere in the interstices of the two statutes" the Court construed).

268. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

269. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

270. Id.

271. See Henkin, *Foreign Affairs and the U.S. Constitution* at 141-48 (cited in note 11); Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* 10-60 (Princeton U. Press, 1992).

272. 444 U.S. 996 (1979).

tervention was inappropriate because Congress and the President had not yet reached a "constitutional impasse."[273] The Senate had considered a resolution declaring that Senate approval is necessary for termination of a treaty but had taken no final action.[274] Justice Powell suggested that "[i]t cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so."[275] In other words, so long as Congress was silent, Justice Powell saw no role for the Court in resolving questions about the appropriate division of power.[276]

The second normative point that flows from Justice Jackson's claim that powers "fluctuate" is one made by some executive primacy scholars—that because the Constitution confers authority over foreign affairs and national security to the political branches, there is a "risk that judicial intervention will itself be a serious violation of separation of powers."[277] Under this theory, judicial intervention would be inappropriate where Congress is silent, and may not even be appropriate when there is a conflict between congressional and presidential will. Four of the Justices who concurred in the decision not to grant review in *Goldwater* took this view. Because the Justices found no constitutional provision expressly governing the termination of treaties, the dispute presented a political question that "should be left for resolution by the Executive and Legislative Branches of the Government."[278] The concurring Justices observed that a court's resolution of a political question can create "disruption among the three coequal branches of government."[279]

As this discussion suggests, judicial reluctance to explore the scope of the President's constitutional foreign affairs powers has an impeccable pedigree: it was predicted if not promoted by Justice Jackson's *Youngstown* concurrence. The theory that judicial intervention is inappropriate as long as the political branches have not reached a constitutional impasse, or as long as resolving the dispute requires looking beyond textual provisions of the

273. Id. at 997 (Powell, J., concurring in judgment).

274. See 125 Cong. Rec. 13673 (setting forth text of resolution); *Goldwater*, 444 U.S. at 998 (Powell, J., concurring in judgment).

275. *Goldwater*, 444 U.S. at 998 (Powell, J., concurring in judgment).

276. For an argument that the Court should not resolve such questions, see Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 260-379 (U. Chicago Press, 1980).

277. Powell, 67 Geo. Wash. L. Rev. at 537 (cited in note 26).

278. *Goldwater*, 444 U.S. at 1003 (Rehnquist, J., concurring in judgment).

279. Id. at 1005-06.

Constitution, allows courts to skirt questions of executive power even when other justiciability requirements are met. To return to the Taiwan treaty termination example, none of the Justices who would have denied review focused on the justiciability problem that would most likely be fatal under current doctrine—that the legislators who challenged the President's conduct lacked standing to do so.[280] Rather, their opinions were premised on the fact that Congress had not spoken and on the fact that the Constitution provided no textual standards by which a court could judge the dispute. If those factors are the relevant ones, then they provide a route for judicial abstention from deciding the scope of presidential power even in a case like *Dames & Moore*, where the justiciability requirements are clearly met.

Courts' reluctance to explore the scope of presidential foreign affairs powers has several problematic consequences. Returning to *Dames & Moore*, first consider the effect of the Court's deference to legislative silence on the relative power of the President and Congress in the legislative process. Congress could have attempted to show its opposition to the President's conduct, but to do so formally it would have had to muster the two-thirds majority necessary to override a presidential veto.[281] Although the same is true when Congress delegates power to the Executive and a court validates an overbroad executive interpretation of that delegation, Congress legislates in the first instance against the background principles that guide courts in interpreting statutory grants of authority. A fear that the Executive Branch will expansively interpret the statute and that a court will defer to that interpretation should prompt Congress to make its policy choices clear.[282] When no statute is at issue, in contrast, Congress cannot be presumed to know what background principles will govern courts' evaluation of its intent or courts' determination that Congress has by its silence acquiesced in a particular executive practice. In other words, it is more difficult for Congress to anticipate and respond to perceived instances of executive overreaching if courts simply defer to congressional silence.

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280. See *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

281. For a similar argument with respect to the domestic context, see Greene, 61 U. Chi. L. Rev. at 189 (cited in note 251) (suggesting that in a case like *Youngstown*, where the President acts as the initiator of federal action, "one could argue that requiring a supermajority in both Houses to check the President throws the balance of powers out of whack, threatening to leave the President with an extraordinary combination of policy making and executive powers").

282. See note 222 and accompanying text.

Consider second the fact that the combination of congressional silence and judicial abstention will create power where the Constitution does not. If presidential powers are legitimate, they must stem from some source—statutory or constitutional. In this sense, the notion that presidential powers "fluctuate" is misleading. The Constitution either grants the President power or it does not. It is true that Congress may, through the exercise of its own constitutionally granted authority, limit some presidential conduct, but its failure to do so does not create presidential power. At most, congressional silence despite awareness that the executive is engaging in certain conduct provides, as Justice Frankfurter suggested, a "gloss" on the President's constitutional powers. In other words, congressional silence may indicate something about Congress's understanding of the scope of the President's constitutional powers, but it does not create a presidential power independent of the Constitution. For this reason, it is somewhat surprising that many congressional primacy scholars recognize that the President possesses certain "initiating"[283] or "concurrent"[284] powers, the exercise of which is contingently constitutional.[285] Since these powers are not enumerated in the constitutional text, to recognize their existence is to recognize that some of the President's foreign affairs powers are nontextual—that they must be inferred from the constitutional text and the structure the Constitution creates. If this is the case, then any justification for courts' posture of deference to executive action and congressional silence evaporates. Whatever the scope of the political question doctrine might be, it does not apply when the question presented concerns only the constitutional division of authority between Congress and the President. The fact that a resolution of the question demands interstitial rather than textual analysis does not make the question a political one.[286] Congress is in the best position to decide whether it concurs in a policy the Executive develops, but it is in no better position than a

283. Glennon, *Constitutional Diplomacy* at 15 (cited in note 23).

284. Henkin, *Foreign Affairs and the U.S. Constitution* at 92, 94 (cited in note 11) (recognizing "some undefined zone of concurrent authority in which [the President and Congress] might act, at least when the other has not acted"; noting that concept of concurrent authority "is now accepted"); Koh, *The National Security Constitution* at 109 (cited in note 11).

285. Glennon, *Constitutional Diplomacy* at 15-16 (cited in note 23) ("The Constitution sometimes appears silent with respect to issues of decision-making authority. In such circumstances, concurrent power is said to exist in both political branches. . . . The President's initiatives here are contingently constitutional; their validity depends upon congressional *inaction*."); see also note 156.

286. Cf. *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring in judgment).

court to determine whether the Executive has authority to develop that policy.

To see the problems in giving dispositive weight to inferences from congressional action (or inaction), we need only examine the similarities between courts' approach to executive power questions and courts' approach to federal-state preemption questions. If a state law conflicts with a specific federal enactment,[287] or if Congress displaces the state law by occupying the field,[288] a court cannot give the state law effect. Similarly, if executive action conflicts with a specific congressional policy (reflected in a statute or, as *Youngstown* suggests, legislative history), or if Congress passes related measures not authorizing the presidential conduct, courts cannot give the executive action effect.[289] When Congress is silent, however, the state law will stand; when Congress is silent, the executive action will stand. This analysis makes much sense with respect to state governments with reserved powers, but it makes little sense with respect to an Executive Branch lacking such powers. The combination of congressional silence and judicial inaction has the practical effect of creating power.

Courts' reluctance to face questions about the scope of the President's constitutional powers—express and implied—creates three other problems. First, the implied presidential power given effect by virtue of congressional silence and judicial inaction can solidify into a broader claim. When the Executive exercises an "initiating" or "concurrent" power, it will tie that power to a textual provision or to a claim about the structure of the Constitution. Congress's silence as a practical matter tends to validate the executive rationale, and the Executive Branch may then claim a power not only to exercise the disputed authority in the face of congressional silence, but also to exercise the disputed authority in the face of congressional opposition. In other words, a power that the Executive Branch claims is "implied" in the Constitution may soon become an "implied" and "plenary" one. Questions about presidential power to terminate treaties provide a

287. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev't Comm'n*, 461 U.S. 190, 204 (1983).

288. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (finding preemption appropriate where "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it'") (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

289. Assuming, of course, that the court finds no independent and plenary presidential power to engage in the conduct in question.

ready example. The Executive's claim that the President has the power to terminate a treaty—the power in controversy in *Goldwater v. Carter*, where Congress was silent—now takes a stronger form: that congressional efforts to curb the power are themselves unconstitutional.[290]

Second, courts' failure to resolve the contours of the President's constitutional powers creates uncertainty about whether some forms of constitutionally based executive action have the same legal force as a federal statute. Returning to *Dames & Moore*, the fact that the Court rested the President's authority on grounds of congressional approval rather than implied constitutional authority avoided the difficult question of how the President could by his sole authority displace the application of the federal statutes that had provided the basis for *Dames & Moore*'s original cause of action against the Iranian enterprises.[291] Similar questions arise with respect to the displacement of state law by operation of sole executive agreements. The result is confusion about whether sole executive agreements are the "supreme Law of the Land,"[292] with the available precedents suggesting that they are[293] and the weight of recent commentary suggesting that they are not.[294]

Third and most important, courts' failure to resolve the scope of the President's constitutional powers compromises one of the most effective restraints on Executive Branch conduct—the legal evaluations of the Executive Branch itself. Congressional primacy scholars tend to give little weight to the Executive

290. See Christopher Schroeder, Acting Assistant Att'y General, Office of Legal Counsel, Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under an Existing Treaty, 1996 WL 1185163 (Nov. 25, 1996) (noting Executive Branch's position that President has constitutional authority to terminate treaties without advice and consent of Senate).

291. Cf. Marks and Grabow, 68 Cornell L. Rev. at 97 (cited in note 267) ("[T]he Court nowhere explained how the President's international agreement can change the substantive law governing litigation in United States courts.").

292. U.S. Const., Art. VI.

293. See *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

294. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133, 234-35 (1998) (arguing that *Belmont* was wrongly reasoned because the executive agreement "would have provided no source of rights in U.S. law until it was (as it presumably could have been) enacted by Congress"); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 115-16 (1999) (criticizing Court's reasoning in *Belmont*); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1445-49 (2001) (discussing whether sole executive agreement at issue in *Belmont* could preempt state law).

Branch's views on the Constitution's allocation of power over foreign affairs and national security,[295] as embodied in the fact of executive practice and in the formal opinions explaining that practice.[296] As others have argued, there is more to executive practice and opinion than some congressional primacy scholars recognize: they reflect the Executive Branch's interpretation of the Constitution—an interpretation that is entitled to at least some deference; they tend to rely on the same sources and use the same methodological approach as judicial opinions; and they provide a body of constitutional interpretation in an area where case law is sparse.[297] That said, the dearth of case law gives Executive Branch lawyers little to work with in the foreign affairs context. Under the prevailing approach, much interpretation of the President's foreign affairs powers is concededly nontextual. For example, the Executive Branch claims a power to recognize foreign governments and to dictate the terms on which recognition occurs.[298] No clause of the Constitution explicitly grants that power; Executive Branch lawyers rely both on the President's textual authority to receive foreign ambassadors, and on inferences from the structure the Constitution creates. The nation must speak with one voice in dealings with foreign governments; the President is in a better position than Congress to do so; the President is therefore the nation's "sole representative" in dealings with foreign governments.[299] Many congressional primacy scholars accept the proposition that the President is the nation's

295. See Powell, 67 Geo. Wash. L. Rev. at 530 (cited in note 26). ("Neither the Supreme Court nor a great many scholars . . . appear to place any confidence in the capacity of either political branch for principled constitutional interpretation."); see also Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1303 (2000) ("Much has been written about the role of the courts in interpreting the law. In contrast, executive branch legal interpretation has received considerably less attention.").

296. The Attorney General has the duty "to give his advice and opinion on questions of law when required by the President," 28 U.S.C. § 511 (1994). The Attorney General has in turn delegated that responsibility to the Office of Legal Counsel, 28 C.F.R. § 0.25(b) (2000), which renders formal opinions on, among other things, questions of presidential power.

297. Powell, 67 Geo. Wash. L. Rev. at 530-39 (cited in note 26); see also Moss, 52 Admin. L. Rev. at 1306-16 (cited in note 295) (describing "neutral expositor" model of the Attorney General's opinion function, which envisions a quasi-judicial role).

298. See, e.g., Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21 (1992) (arguing that the Constitution "authorize[s] the President to determine the form and manner in which the United States will maintain relations with foreign nations").

299. One could imagine a plausible textual approach, grounding the recognition power in the "executive Power" the Constitution vests in the President in Article II, section 1. See Prakash and Ramsey, 111 Yale L.J. at 262 (cited in note 142). That is not, however, the Executive's traditional approach.

sole representative, but they too do not tie this power to a particular constitutional provision. On many other issues, the Executive Branch and congressional primacy scholars use the same nontextual methodologies to arrive at vastly different views of the foreign affairs powers.[300]

My point is not that the structural methodology reflected in Executive Branch practice—and in the work of some congressional primacy scholars—is improper. Rather, my point is that without some authoritative guidance developed in the crucible of contested cases and controversies, advocates of the executive and legislative positions will always talk past each other. If formal Executive Branch opinions on foreign affairs matters are most legitimate when they adhere to the same methodologies as judicial opinions—and I believe they are—the lack of a coherent theory of the scope of presidential power in the case law removes an opportunity for disciplining executive practice. With Justice Jackson's framework prevailing, the Executive Branch can establish congressional "approval" of its conduct untethered to any statute, and the Executive Branch can rely on claims from historical practice linked with congressional silence to establish its constitutional authority.

As this discussion suggests, we make a mistake if we assume that courts' role is to police the boundaries of the "zone of twilight," but not its center. This instruction, taken together with the instruction to courts to detect "implied" congressional will, tends to yield outcomes vulnerable to charges that courts and Congress are both unduly deferential in the foreign policy process: A court that searches for and finds Congress's "implied" will, particularly a will untethered to a specific statute, will be thought to impart legitimacy to a questionable exercise of executive power; a Congress that stays silent in the face of an exercise of executive power is vulnerable to charges that it is legitimizing executive encroachment. The analytical tasks are clearer than Justice Jackson's framework suggests. Where the Constitution does not clearly confer a particular power on the President, courts can evaluate executive action against the contours of a statute conferring authority on the President, giving deference to the Executive's construction where appropriate. Beyond that, questions of executive power in foreign affairs are questions about the scope of constitutional powers. Assuming other justiciability requirements are met, courts should face those ques-

300. See id. at 236-52.

tions head on, even when doing so might require them to acknowledge the existence of certain powers "implied" in the text and structure of the Constitution.

CONCLUSION

Fifty years after the Supreme Court's decision in *Youngstown*, we can confidently say that the case was never "destined to be ignored."[301] The Court's decision—in essence, that the government's actions do not achieve the status of law merely because they are the actions of the government—came as a surprise to many at the time who had expected the Supreme Court to uphold the President's action. For lawyers in the Executive Branch who deal with separation of powers questions, *Youngstown* may offer little explicit guidance, but the case no doubt has a symbolic significance. As Marcus reports in the final footnote of her book, in a statement as valid today as it was in the mid-1970s, such attorneys "do not often cite the case, but it is always in the back of their minds."[302]

What perhaps made it difficult for commentators of the day to foresee *Youngstown*'s symbolic importance to our constitutional system, and what perhaps makes it easy today to place too much emphasis on *Youngstown*'s doctrinal importance, is that at every turn we can detect two *Youngstowns*. *Youngstown* is at once formal and functional. *Youngstown* at once finds a violation of separation of powers and offers a methodology for courts to avoid doing so. Justice Jackson's concurrence at once recognizes the importance of limiting presidential conduct and provides courts with ready routes for upholding questionable presidential conduct. In short, the *Youngstown* decision at once casts a shadow over assertions of presidential power and invites assertions of presidential power to lurk in its shadows.

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301. Schubert, W. Pol. Q. at 64 (cited in note 3).

302. Marcus, *Truman and the Steel Seizure Case* at 58-358 n.31 (cited in note 14) (citing telephone interview with Leon Lipson, former Deputy Assistant Attorney General, Office of Legal Counsel).