IMPLIED PRESIDENTIAL AND CONGRESSIONAL POWERS

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INTRODUCTION

A significant question of constitutional law has received a lot of attention lately—whether the Department of Justice (DOJ) may indict a sitting President.[1] The Constitution's text does not prohibit indictment of a sitting President, so the idea that he has the power to avoid indictment while in office raises an issue of implied presidential power.[2]

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1 *See, e.g.*, Salvador Rizzo, *Can the President be Indicted or Subpoenaed?*, WASH. POST (May 22, 2018, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed [https://perma.cc/PLR2-PG3B].

2 Like most scholars, we do not distinguish "implied" from "inherent" authority. *See* Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 40–41 (2008) (explaining that no sharp distinction exists between inherent and implied power); *accord* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring) (suggesting that these and other terms are interchangeable). Louis Fisher, however, defines implied power as power derived from an express power and inherent power as power not "reasonably" derived "from express grants" but rather from the nature of the office. Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 586, 588–89 (2010). We do not find this distinction useful as one's conception of an office's nature depends, in part, on the express authorities it possesses. Furthermore, the narrow conception of implied power as that derived from an express power seems inconsistent with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the leading case on implied power, which approved an implied power to charter a national bank without deriving that power from a particular express power. Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 MINN. L. REV. 699, 779 (2016).

This Article compares the modern Supreme Court's treatment of implied presidential power to its treatment of implied congressional power across a wide variety of subject matter areas. It takes care to define implied powers, something neglected in the literature. That definition leads to the conclusion already articulated, that presidential indictment, while usually characterized as an immunity issue, is also an implied power issue.

The literature on implied powers usually focuses on a specific implied power or the implied powers of a particular branch of government, but it does not compare the application of implied power concepts to different branches of government.[3] The President's power over foreign affairs and national security, which is primarily an implied power, has received the most scholarly attention.[4] Former Yale Law School Dean Harold Koh once opined that the President almost always wins in foreign affairs cases.[5] Koh and many other constitutional scholars maintained that the judiciary cooperated in increasing the implied power of the President over foreign affairs and

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3 *See, e.g.*, GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) (focusing on the textual source of implied congressional power); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002) (focusing on implied presidential power); Anclien, *supra* note 2, at 56 (focusing on the courts' implied powers); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006) (focusing on implied presidential power to complete a statutory scheme); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271 (1993) (focusing on congressional power). *But see* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 793–94 (1975) (arguing that generally only Congress may add implied presidential and judicial authority).

4 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–20 (1936) (implying an exclusive, plenary presidential power over foreign relations primarily from the attributes of sovereignty and functional considerations); *see, e.g.*, LOUIS FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS (2017); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Abraham D. Sofaer, *The Power over War,* 50 U. MIAMI L. REV. 33 (1995); *cf.* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 246, 256–57 (2001) (conceding that most scholars assume that constitutional text does not resolve debates about the President's foreign affairs power while arguing that the Vesting Clause creates the President's foreign affairs power); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (refuting Prakash and Ramsey's Vesting Clause thesis).

5 *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

national security by habitually deferring to or declining to review presidential initiatives in that area.[6]

Ganesh Sitaraman and Ingrid Wuerth, however, recently argued that the counterterrorism cases and the Roberts Court have moved away from special treatment of foreign affairs, including the Court's especially generous implication of presidential power over foreign affairs.[7] This Article's transsubstantive analysis raises the question of whether the Court's favoritism toward the executive branch over Congress over the last forty-five years goes beyond a solicitude for executive power over foreign affairs. A finding that the Court favors the President over Congress across the board in implied power cases would be consistent with their thesis that the Court has begun to normalize foreign relations law. But it might suggest that the Court has done so by tilting its implied power jurisprudence toward the President across the board rather than by greatly diminishing implied presidential power in the foreign affairs area.[8]

Our analysis provides a means of comparing the Court's treatment of presidential power to its treatment of congressional power to identify its institutional preferences. Implied power cases tend to reveal these preferences because they require judicial judgments about what powers to create. The comparison not only furthers our understanding of separation of powers; it also surfaces novel questions about the relationship between separation of powers and federalism, which scholars usually analyze separately.[9] Finally, our findings lead to the question of whether the Court's

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6 *See, e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 5, 72 (1990) (citing judicial deference to executive branch initiatives as a factor leading to a vision of "inherent" presidential authority over all of foreign affairs); DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER (2016).

7 Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1902–05 (2015) (claiming that the counterterrorism cases and the Roberts Court have increasingly normalized foreign relations law including with respect to "executive dominance"). Sitaraman and Wuerth situate this recent normalization in a broader trend going back to the 1990s, but they do not claim that judicial decisions changed much before the counterterrorism cases. *See id.* at 1902, 1921 (stating that the Supreme Court "dipped its toe in the waters of normalization" in the 1990s).

8 *See* Saikrishna Bangalore Prakash, Zivotofsky *and the Separation of Powers*, 2015 SUP. CT. REV. 1, 33 (claiming that the Supreme Court has "an enduring inclination to understand presidential power in much broader terms" than Article II, Section 2 implies).

9 *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011) (describing the idea that the Constitution "embraces any overarching separation of powers doctrine" as something imagined based on a misunderstanding).

institutional preferences undermine democracy and the rule of law, which we explore but cannot resolve here.

A broader comparison of the Court's treatment of Congress and the President that included cases dealing only with express powers would likely reveal little about the Court's institutional preferences and require a book-length treatment. Furthermore, the comparison would require us to compare rulings under varying textual sources of congressional power to rulings under different text governing presidential power. Therefore, we confine our analysis to cases where a party has raised an implied power claim.

Our focus on cases illuminating comparisons between treatment of Congress and the President leaves out rulings that focus on claims that the President or Congress violates individuals' express constitutional rights. Such an analysis would have to compare individual rights limitations on legislation to individual rights limitations on presidential initiatives, and would require a separate article and greatly complicate analysis of the Court's preferences as between Congress and the President. Thus, we leave for another day cases such as *Trump v. Hawaii* and some of the counterterrorism rulings. Those cases implicate how far implied presidential power might go in undermining individual rights but say little about how the Court treats congressional power in situations where the Court creates implied presidential power in the first place.[10]

We also leave aside cases that focus on clashes between judicial and executive branch control over statutes such as the extraterritoriality doctrine, for similar reasons.[11] Such a comparison would implicate numerous statutory interpretation cases and reveal more about the Court's attitude about judicial supremacy than explain its preferences for Congress

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10 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418–23 (2018) (invoking the President's implied authority over foreign affairs and national security to justify giving short shrift to immigrants' religious discrimination claims); Munaf v. Geren, 553 U.S. 674, 700 (2008) (denying habeas relief to Americans held in Iraq); Hamdi v. Rumsfeld, 542 U.S. 507, 524–39 (2004) (plurality opinion) (providing a due process regime for enemy combatants influenced by the executive branch's special needs); Rasul v. Bush, 542 U.S. 466, 484 (2004) (upholding a right to habeas corpus review of executive decisions imprisoning alleged "enemy combatants" in Guantanamo Bay); *see also* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (holding that the Military Commissions Act unconstitutionally suspends habeas corpus). Because all separation of powers cases may implicate individual rights, excluding express individual rights claims may appear artificial. But separation of powers cases reveal institutional preferences and can be included without broadening the analysis beyond manageable proportions.

11 *Cf.* Sitaraman & Wuerth, *supra* note 7, at 1932 (discussing recent extraterritoriality cases).

or the President. We do include, however, statutory cases that directly implicate the battle between the President and Congress over policy.

Our primary goal is descriptive—to use the implied powers analysis to compare the Court's treatment of Congress and the President. But we do identify and address some of the analysis's many normative implications.

Scholars usually trace the implied presidential powers doctrine to *Youngstown Sheet & Tube Co. v. Sawyer*.[12] In *Youngstown*, the Court confronted the question of whether President Truman had authority to seize steel mills in support of the Korean War. The Court held that he did not.[13] For Justice Black, writing for the majority, the lack of express authority to seize steel mills resolved the case. Since no legislation authorized seizure of steel mills, the President's executive authority under Article II did not authorize him to seize steel mills.[14] Since the steel mills lay outside the "theater of war," the Commander-in-Chief Clause did not authorize the seizure either.[15] Because the President lacked express authority to seize the mills, he could not do it.

Justices Jackson and Frankfurter, however, wrote concurring opinions establishing bases for implying presidential authority absent express authority. Justice Jackson suggested that sometimes the courts properly imply presidential power from signs of congressional support falling short of explicit legislative approval or even from congressional silence when circumstances indicate that the President needs a certain authority.[16] Justice Frankfurter separately articulated the idea of constitutional custom as a ground for implying presidential power, opining that a longstanding

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12 343 U.S. 579 (1952); *see, e.g.*, Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 111 (2014) (employing *Youngstown* as a baseline against which to measure the legality of the assertion of implied executive authority in the creation of DACA). *Youngstown* is the leading case on presidential power generally, not only implied power. *See* Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 355 (2013) (characterizing *Youngstown* as "the leading Supreme Court case on presidential powers").

13 *Youngstown*, 343 U.S. at 589.

14 *See id.* at 587 (explaining why neither the Commander-in-Chief power nor the executive power authorizes seizure of the steel mills).

15 *See id.* (explaining that the "theater of war" concept cannot expand to embrace taking private property under the Commander-in-Chief Clause).

16 *See id.* at 635–38 (Jackson, J., concurring) (explaining that presidential power is "at its maximum" in cases of express or "*implied*" congressional approval and that the "test of power" depends upon the "imperatives of events" when Congress is silent (emphasis added)).

executive practice combined with a history of congressional acquiescence can put a gloss on the "executive power," which the Constitution vests in the President.[17] The *Youngstown* concurrences, while essential to resolution of implied power claims, also can apply to express power claims.[18]

The idea of implied congressional power has an explicit textual basis in the Constitution, the Necessary and Proper Clause, which authorizes Congress to enact all laws necessary and proper to the execution of the powers listed in the Constitution.[19] An early case, *McCulloch v. Maryland*, holds that this clause not only authorizes laws essential to carrying out enumerated powers, but also laws useful in accomplishing the objectives the enumerated powers suggest.[20]

Given the broad enumerated powers afforded Congress under the Constitution, the *McCulloch* Court's construction of the Necessary and Proper Clause creates a quite generous implied congressional powers doctrine. In contrast, the Constitution provides no textual support for judicially implied presidential power.[21] So, one might expect grudging judicial approval of limited implied powers for the President, especially from Justices espousing allegiance to constitutional text and original intent, but quite generous acceptance of implied congressional power.[22]

This Article demonstrates, however, that the reverse proves true. The modern Court gives its implied presidential powers doctrine a wide

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17 *Id.* at 610–11 (Frankfurter, J., concurring). *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

18 *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 525, 549 (2014) (citing the Frankfurter concurrence in *Youngstown* to justify consideration of constitutional custom relevant to the meaning of the Recess Appointments Clause).

19 U.S. CONST. art. I, § 8, cl. 18.

20 *See* McCulloch. v. Maryland, 17 U.S. (4 Wheat.) 316, 413–20 (1819) (rejecting the argument that necessary and proper measures are only those "indispensable" to the "execution of . . . granted powers" in favor of accepting measures useful to realization of constitutional ends).

21 *See* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 614 (1869), *overruled on other grounds by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) (describing *McCulloch* as establishing the implied power test for "legislative enactments"); *cf.* Goldsmith & Manning, *supra* note 3, at 2282 (noting that even though "only Article I contains an express Necessary and Proper Clause, each of the three branches has some degree" of implied power); Prakash, *supra* note 8, at 33 (claiming that the Court "[a]t times . . . acts as if the presidency has its own Necessary and Proper Clause to draw upon").

22 *See* Myers v. United States, 272 U.S. 52, 246–47 (1926) (Brandeis, J., dissenting) (reading presidential implied powers narrowly in light of the lack of an express grant of implied powers to the President).

application, whilst often confining the Constitution's implied congressional powers doctrine to a narrow and shrinking area. Because of the limited scope of our analysis, we reach no conclusions about whether the Court's solicitude for implied presidential power goes so far as to directly limit individual rights.[23]

This Article's first Part provides basic background. It offers an overview of the express powers of Congress and the President, emphasizing the Framers' intent to vest policymaking authority in Congress.[24] It then explains the doctrines of implied presidential and congressional powers. This explanation includes development of key concepts in implied powers jurisprudence and a definition of implied power derived from the teachings of *Youngstown* and *McCulloch*.

Part II, the heart of the Article, shows that the Court has been more generous in implying presidential power than congressional power. It analyzes the asymmetry using the key concepts developed in Part I. First, the congressional stance, the key consideration under the Jackson framework governing implied presidential powers, does not explain cases very well. We find that judicial policy preferences play a larger role in presidential power cases than congressional views. Second, the modern Court does not apply constitutional custom evenly. It gives great weight to even checkered history of congressional support for presidential initiatives, while generally assigning no weight to a history of congressional and presidential concurrence on issues of congressional power. Finally, the means/ends reasoning featured in *McCulloch* has come to play a lesser role in cases challenging congressional power and a greater role in cases involving presidential power than the leading cases—*McCulloch* and *Youngstown*—would lead one to expect.

Part III evaluates and analyzes the asymmetry. The breadth of the case law and the justifications offered for particular rulings make a full

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[23] Thus, we do not necessarily question Jack Goldsmith's finding of a tendency to read presidential power narrowly in recent years, as the Court did so in counterterrorism individual rights cases. Jack Goldsmith, Zivotofksy II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 133 (2015). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2418–24 (2018). Our argument suggests, however, a need to qualify the claim that "the Supreme Court has no institutional predilection in favor of presidential power." Goldsmith, *supra*, at 133; *cf.* Sitaraman & Wuerth, *supra* note 7, at 1950–58 (explaining that "normalization" of foreign affairs is incomplete in part because of the persistence of the *Youngstown* framework and cases giving too much deference to executive power).

[24] *See* Van Alstyne, *supra* note 3, at 791 (referring to the idea that Congress would be the primary branch of government as the "obsolete notion of 1789").

examination of the various rationales influencing cases creating the discrepancy impractical. Instead, we evaluate the asymmetries revealed in Part II and identify questions the asymmetry reveals. We show that the asymmetry seems suspect on its face. Moreover, we point out that the modern Court's most obvious preferences—for presidential control over foreign affairs, states' rights, and judicial supremacy—do not explain all of the cases, because the Court's resistance to legal devices enhancing presidential and executive branch legal accountability in domestic affairs plays an important role. We raise concerns about the Court's approach to implied powers tending to undermine legislative supremacy, a key constitutional principle.

Part IV provides a case study based on the question of whether a prosecutor may indict a sitting President. The case study shows how our implied power analysis illuminates our understanding of a concrete problem and extends the analysis to take into account the role of formalism in implied power jurisprudence.[25]

We conclude that the implied power jurisprudence suggests that the Court creatively reshapes constitutional powers of the President and Congress to meet contemporary needs as it sees them. We suggest that new threats to democracy stemming from a global increase in authoritarianism may require a different form of adaptation than we have seen taking hold in the late twentieth century, but one quite congruent with the concerns of the American Republic's founders.[26]

I. EXPRESS AND IMPLIED POWERS OF THE PRESIDENT AND CONGRESS: CONCEPTS AND DEFINITIONS

This Part begins with an account of the express powers of Congress and the President. It continues with a review of the basics of implied presidential and congressional power.

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25 *Cf.* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384–85 (2015) (arguing that the Court has moved from functionalism to formalism in foreign relations law).

26 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2126 (2015) (Scalia, J., dissenting) (likening "broad unenumerated" presidential power to the power of George III).

A. *Express Power*

The Constitution assigns policymaking authority to Congress primarily through a long list of enumerated powers. On the other hand, it assigns the President relatively few, albeit important, powers. This Section reviews each political branch's express authority in turn and establishes two important points. First, the Constitution expressly bestows primary policymaking authority upon Congress rather than upon the President. Second, the President's authority generally depends upon or overlaps with congressional authority.

1. Express Congressional Authority

Article I, Section 8 of the Constitution grants Congress a vast array of policymaking authority.[27] It contains a long list of domestic economic powers. The most important of these powers is the power to regulate interstate commerce.[28] Section 8 also authorizes Congress to borrow and coin money, "establish Post Offices and post Roads," pass bankruptcy laws, and grant patents and copyrights.[29] It grants Congress a broad power over the purse as well, authorizing it to "lay and collect Taxes, . . . pay . . . Debts" and provide for the "general Welfare of the United States."[30]

The constitutional amendments enacted shortly after the Civil War supplement these powers with powers to enforce civil rights. These post-Civil War amendments authorize Congress to enforce the Fourteenth Amendment's guarantees of equal protection, due process, and citizens' "privileges or immunities," and the Fifteenth Amendment's guarantee of voting rights with "appropriate legislation."[31]

Section 8 also grants Congress numerous powers over defense and foreign affairs.[32] It authorizes Congress to "provide for the common

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27 *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–08 (1819) (characterizing the enumerated powers as "great" and "vast").

28 *See* U.S. CONST. art. I, § 8.

29 *See id.*

30 *See id.*

31 *See id.* amends. XIV–XV.

32 *Id.* art. I, § 8; *see* Perez v. Brownell, 356 U.S. 44, 57 (1958); Ping v. United States, 130 U.S. 581, 603–04 (1889).

Defense," "declare War," deploy irregular forces against an enemy, and establish rules for captured persons and property.[33] Furthermore, it authorizes Congress to raise, support, and make rules for the armed forces.[34] Turning to domestic defense, Section 8 grants Congress power to "provide for calling forth . . . . organizing, arming, and disciplining, the Militia" in order to "execute the Laws of the Union, suppress Insurrections and repel Invasions."[35] It empowers Congress to "define and punish" crimes committed on the high seas and "Offences against the Law of Nations," and to establish the punishment for treason.[36] The Constitution also grants Congress the power to regulate foreign commerce, commerce with Indian tribes, and naturalization.[37]

2. Express Presidential Authority

Article II provides a list of the President's powers and the list is not long.[38] Section 1 of that Article contains a Vesting Clause, which grants the President the executive power and Section 3 requires him to "take Care that the Laws be faithfully executed."[39] The Constitution reinforces this duty to implement the laws by requiring the President to swear fidelity to the Constitution.[40] To facilitate this executive power, the Constitution

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33 U.S. CONST. art. I, § 8.

34 *Id.*

35 *Id. See generally* WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016).

36 U.S. CONST. art. I, § 8, cl. 11; *id.* art. III, § 3, cl. 2.

37 *Id.* art. I, § 8.

38 *See* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 142 (2018) (describing Article II's presidential powers as "skeletal" and creating a presidency "teeter[ing] on the ceremonial"); *see, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 736 n.144 (2008) (characterizing virtually all presidential war powers as implied rather than express); Goldsmith, *supra* note 23, at 116 (noting that Article II "on its face" grants the President little power over foreign affairs, whilst granting Congress vast foreign affairs authority).

39 U.S. CONST. art. II, § 3. *See generally* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016) (explaining that the Supreme Court has not carefully interpreted the Take Care Clause).

40 *See* U.S. CONST. art. II, § 1; David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 81–85 (2009) (explaining that the Take Care and Oath Clauses create a duty to enforce law passed over a presidential veto); *cf.* Goldsmith & Manning, *supra* note 3, at 2303–04

authorizes the President to "require" cabinet officers to provide written opinions on subjects relating to their duties.[41] On the other hand, it authorizes the President to pardon federal offenses.[42]

The Constitution expressly grants the President some powers relevant to foreign affairs. It makes the President the Commander in Chief of the Armed Forces.[43] And it requires him to "Commission" United States "Officers"[44] and "receive Ambassadors and other public Ministers."[45]

3. Shared Express Powers

The Constitution shares practically all express authority between Congress and the President.[46] This is most obvious with respect to the crucial powers of appointment and removal of federal officials. The Constitution denies the President sole control over the executive and judicial branches by giving Congress a role in appointment and, through impeachment, in the power of removal.[47] Thus, Article II authorizes the President to nominate "Officers of the United States," ambassadors, and federal judges, but these important officials only assume office if the Senate concurs.[48]

The Constitution also makes the primary eighteenth century foreign affairs power, the power to make treaties, a shared power.[49] It authorizes the President to negotiate treaties, but only allows them to take effect with the Senate's advice and consent.[50]

(noting that some scholars have read the Take Care Clause as creating a power to interpret law, not just a duty to faithfully carry it out).

41 U.S. CONST. art. II, § 2.

42 *Id.*

43 *Id.*

44 *Id.* § 3.

45 *Id.*

46 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2126 (2015) (Scalia, J., dissenting) (finding that the Constitution does not give the President or Congress "sole power" to make policy about "any subject").

47 *See* Driesen, *supra* note 40, at 87–92 (reviewing provisions, including the Appointments and Impeachment Clauses, giving Congress some control over the executive branch).

48 *See* U.S. CONST. art. II, § 2.

49 *See* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 246 (2013) (describing the treaty power as "extensive" at the time of the founding).

50 *Id.*

Congress has vast legislative authority, but the President may veto legislation (unless a supermajority overrides the veto).[51] With respect to the war power, the Constitution authorizes only Congress to initiate war and allows it to regulate the armed forces, while making the President "Commander in Chief."[52]

Perhaps most importantly, the scope of the President's express authority to execute the law depends on the scope of congressional legislation.[53] Delegation of increasingly broad powers in the industrial age played a key role in increasing presidential power, helping create what Arthur Schlesinger called "The Imperial Presidency."[54] Thus, express authorities are not necessarily static and fixed. And the President's most sweeping and important power, the power to execute the law, generally depends for its scope upon congressional decisions.[55]

Finally, the Constitution authorizes Congress to enact laws "necessary and proper for carrying into execution" not only its own powers, but also powers exercised by "any . . . Officer" of the government.[56] This part of the

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[51] *Id.* art. I, § 7.

[52] *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 972–74 (2008).

[53] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633–34 (1952) (Douglas, J., concurring) (noting that the President's authority under the Take Care Clause "starts and ends with the laws Congress has enacted"); GINSBURG & HUQ, *supra* note 38, at 142 (describing the President's express Article II powers as "subordinate" to Congress); Adler, *supra* note 3, at 163–73 (explaining a shared understanding at the founding that the executive power was the power to "carry into execution" the laws Congress enacts free of "royal prerogatives"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 579–89 (1994) (defining the executive power as the power to put enacted laws into effect).

[54] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1205–06 (2018) (associating the rise of presidential power over a variety of areas with broad congressional delegations of authority and executive branch practice "in the face of congressional inaction").

[55] *See* Myers v. United States, 272 U.S. 52, 117, 177 (1926) (majority and dissenting opinions) (describing the executive power as the power to execute the laws passed by Congress); Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019) (explaining that the Founders understood the Vesting power to refer only to executing the laws); Bradley & Flaherty, *supra* note 4, at 687–88 (noting that the most "widely understood" meaning of the Vesting Clause was "simply a power to execute the laws"). *But see* Prakash & Ramsey, *supra* note 4, at 234 (reading the "executive power" as creating a broad authority over foreign affairs).

[56] U.S. CONST. art. I, § 8, cl. 18.

Necessary and Proper Clause shows that Congress may shape presidential administration.[57]

B. *Implied Power*

Since this Article analyzes the question of whether the Court more generously implies powers for one branch than for another, this Section first looks at implied congressional power and then at implied presidential power. It develops a conceptual vocabulary, which emphasizes the ideas of means/ends reasoning, constitutional custom, and the congressional stance toward presidential power (from *Youngstown*). It offers a definition of implied power. It then compares the treatment of congressional and presidential implied power in the leading cases establishing the doctrines—*Youngstown* and *McCulloch*.

1. Implied Congressional Power: *McCulloch v. Maryland*

The leading case on implied congressional power, *McCulloch v. Maryland*, upholds a federal statute chartering a national bank.[58] This ruling relies, in part, on the Constitution's Necessary and Proper Clause.[59] Justice Marshall, writing for the Court, read the Necessary and Proper Clause broadly, as allowing Congress to employ any means it deems useful to achieve the objectives suggested by the powers given it in the Constitution.[60] He rejected a construction that would read the Necessary and Proper Clause as only authorizing actions indispensable to carrying out an enumerated power.[61] Marshall concluded that the Constitution authorizes the use of any legitimate means to legitimate ends within the letter and spirit of the

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[57] David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 593 (2017) (describing this clause as authorizing Congress, "at a minimum," to "pass laws necessary and proper to the exercise of implied . . . powers outside Article I, including those purportedly vested in the President"). *See generally* Van Alstyne, *supra* note 3 (arguing that this clause generally constitutes the sole legitimate source of presidential implied power).

[58] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819).

[59] *See id.* at 411–22.

[60] *See id.* at 413–14.

[61] *See id.* at 413.

Constitution.[62] This Article will refer to this principle as *McCulloch*'s means/ends reasoning. As a corollary, Marshall explained that Congress generally has the right to choose freely among the means of achieving a desired end.[63]

The Necessary and Proper Clause applies only to acts of Congress, not to actions by other branches of the government.[64] A concern that applies to acts of Congress, that a rejection or narrow construction of implied powers would debilitate the entire federal government, pervades Marshall's *McCulloch* opinion.[65]

Yet, *McCulloch* contains other justifications for implying powers that might apply to the President, in spite of the lack of a clause in the Constitution authorizing judicial creation of implied presidential power. Famously, Justice Marshall argued that the nature of a Constitution supports the existence of implied powers. He noted that a Constitution necessarily omits details and therefore the lack of express power cannot be dispositive.[66] Furthermore, Marshall pointed out that a Constitution must permit the government to adapt to new circumstances, indeed to confront the crises of human affairs.[67] Marshall's admonition that in considering implied power "we must never forget that it is a constitution we are expounding" might apply to all branches of government.[68]

Furthermore, *McCulloch* articulates an idea of constitutional custom, which Justice Frankfurter expanded and applied to the President in *Youngstown*.[69] Justice Marshall opined that the history of legislative acts

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62 *See id.* at 421.

63 *See id.* at 409–10.

64 *See id.* at 419 (noting that this "clause is placed among the powers of congress").

65 *See id.* at 406–10.

66 *See id.* at 406–07 (noting that a constitution specifically cataloguing all powers in detail would resemble a legal code and prove incomprehensible to the public).

67 *See id.* at 415 (explaining that the Constitution is "intended to endure for ages . . . and . . . to be adapted to the various *crises* of human affairs"); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 (1952) (Clark, J., concurring) (suggesting that this statement applies to Article II).

68 *See McCulloch*, 17 U.S. (4 Wheat.) at 407 (stating this before mentioning the Necessary and Proper Clause); *cf.* Goldsmith & Manning, *supra* note 3, at 2305–06 (noting that Justice Marshall's argument that a grant of substantive power "necessarily" implies some incidental power to "carry that power into effect" applies to the President); Van Alstyne, *supra* note 3, at 809–17 (arguing that the *United States v. Nixon* Court erred in assuming that this reasoning applies to the executive branch).

69 *See McCulloch*, 17 U.S. (4 Wheat.) at 402 (suggesting that the Court would have found the law constitutional even absent customary support).

establishing the Bank of the United States deserved great weight in addressing its constitutionality.[70] He noted, however, that the Court should not acquiesce to acts impinging individual liberty or constituting "bold and daring usurpation."[71]

2. Implied Presidential Power

Justice Sutherland articulated a broad vision of implied presidential power over foreign affairs in *United States v. Curtiss-Wright Export Corp.*[72] In an otherwise unremarkable case that turned on finding an adequate delegation from Congress to the President to sustain his proclamation restricting arms sales to Bolivia, Justice Sutherland chose in dictum to articulate an expansive theory of presidential power.[73] He unmoored foreign affairs from constitutional text by finding that "the powers of external sovereignty did not depend upon affirmative grants of the Constitution."[74] Justice Sutherland wrote of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."[75] Justice Sutherland did not explain how such a broad presidential power over foreign affairs could be implied from the spare text of Article II in light of the numerous provisions granting Congress broad foreign affairs powers.[76] Nonetheless, his opinion and the "sole organ"

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70 *See id.* at 401 (stating that the legislative acts "ought not to be lightly disregarded").

71 *See id.* (stating that a "bold and daring usurpation might be resisted" and that where "the great principles of liberty are not concerned" practice should influence the decision).

72 299 U.S. 304 (1936). We start with *Curtiss-Wright* because it plays an important role in the modern implied powers cases we analyze. The idea of implied presidential power, however, has earlier roots. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.) (dicta) (suggesting the possibility of implied presidential power to seize vessels during hostilities).

73 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2089–90 (2015) (recognizing that the broad statements of plenary presidential authority in *Curtiss-Wright* were dicta since the case involved a nondelegation doctrine challenge to delegated authority).

74 *Curtiss-Wright*, 299 U.S. at 318. *Contra* Goldsmith, *supra* note 23, at 128 (characterizing the *Curtiss-Wright* Court's "extraconstitutional theory" of the foreign relations power as "clearly wrong").

75 *Curtiss-Wright*, 299 U.S. at 319–20.

76 *Cf.* Goldsmith, *supra* note 23, at 128 (noting that "[s]cholars have excoriated *Curtiss-Wright*" because "its dicta about presidential exclusivity threaten to swallow up Congress's Article I foreign relations powers").

doctrine has enjoyed considerable vitality as a justification for broad implied presidential powers over foreign affairs.[77]

The subsequent case of *Youngstown Sheet & Tube Co. v. Sawyer* has become the leading case on implied presidential powers. *Youngstown* adjudicated the validity of President Truman's order directing the seizure of steel mills to head off labor strife that might interfere with his unilaterally initiated war in Korea.[78] The government argued that the President's power as Commander in Chief and executor of the laws justified the seizure of steel mills in this context.[79] The government asked the Court to "impl[y]" a power to seize mills from the aggregation of these two powers.[80]

Justice Black, writing for the majority, declined to imply unstated powers. Instead, he analyzed the government's argument as a claim of express authority, asking first whether the Commander-in-Chief authority authorized Truman's order and then whether the executive power did so.[81] The majority opinion concluded that Truman's order implemented no act of Congress and lay beyond his power as Commander in Chief.[82]

Justice Jackson's *Youngstown* concurrence, however, endorsed implied executive power and has enjoyed the most influence. He opined that presidential powers "fluctuate, depending upon their disjunction or conjunction with those of Congress."[83]

He then set out a tripartite framework for deciding implied power cases. Under this framework, the President's power is "at its maximum" when "the President acts pursuant to an express or implied authorization of Congress."[84] By introducing the idea of "implied" congressional authorization, he endorsed implying a presidential power without an explicit textual statutory basis. After all, implied congressional authorization

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77 *See id.* (explaining that the courts rely on *Curtiss-Wright*'s dicta "to support a generous reading of the President's foreign relations power").

78 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–83, 642 (1952); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 610 (2005) (explaining that President Truman conducted an "undeclared war in Korea . . . on his own authority").

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

80 *Id.* at 587.

81 *See id.* at 587–88.

82 *See id.* at 585–87.

83 *Id.* at 635 (Jackson, J., concurring).

84 *Id.*

would only figure in cases where Congress has not expressly authorized the presidential action triggering litigation. In cases where legislation expressly authorizes a challenged action, the President merely executes the law and therefore acts pursuant to his express power under Article II's Vesting Clause. Justice Jackson then describes a complex second category where Congress has neither authorized nor denied authority to carry out the act in question.[85] Within this category, Jackson finds a "twilight" zone, in which the President and Congress have "concurrent authority."[86] In this area, he writes, results will likely depend on "imperatives of events and contemporary imponderables."[87] Thus, Jackson sometimes accepts implying presidential power from contemporary events. Jackson concludes by describing a third category, when the President's "power is at its lowest ebb."[88] This category describes presidential measures "incompatible with the express or implied will of Congress."[89] In this area, Justice Jackson would apparently only uphold actions based on some sort of exclusive presidential authority, meaning, presumably an express constitutional authority not potentially overlapping with congressional constitutional authority.[90]

In this way, Justice Jackson suggests that the courts may imply the existence of a presidential power from either congressional silence or implied congressional consent. But Jackson may eschew implied presidential power in the face of express or implied congressional opposition.

Justice Frankfurter's concurring opinion endorsed "systematic, unbroken, executive practice" as a source of implied power when Congress knows about the practice and has never questioned it.[91] He justifies this in part by pointing out that Presidents have "sworn to uphold the Constitution."[92] It follows that the doctrine of implied presidential power stemming from custom rests upon a presumption that Presidents act in good faith.

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85 *See id.* at 637.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *See id.* at 637–38 (stating that in category three the President can only rely "upon his own constitutional power minus any constitutional power of Congress over the matter").

91 *See id.* at 610–11 (Frankfurter, J., concurring).

92 *See id.*

Frankfurter and Jackson's approaches can overlap, as indications of congressional intent prove relevant to both. Although Justices Frankfurter and Jackson agreed with Justice Black that the President has no authority to seize steel mills, their opinions go out of their way to create bases for judicial implication of presidential power in future cases.

The paucity of presidential power explicitly provided for in the Constitution may have motivated Justice Jackson. His opinion responds to a "poverty of really useful . . . authority" applicable to "problems of executive power."[93] But he also expressed concern about the "ambiguity" of the authority that does exist, partly because presidential power generally overlaps with congressional power.[94] His concurrence also reflects a conviction about the uselessness of original intent in resolving separation of powers cases. He characterizes the materials available for divining original intent as "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[95] Seen in this light, and in light of his experience as President Roosevelt's advisor in the years leading up to World War II, his concurrence may be seen as an endorsement of a "living Constitution" that changes in response to experience.[96]

The concurring opinions of Justices Burton and Clark also endorse implied presidential power but suggest that the existence of implied presidential powers depends on the "imponderables" that Jackson put in the twilight zone. For Justice Burton, "present circumstances" did not justify supporting the President's power to seize the mills.[97] Yet Justice Burton stated that in the event of "an imminent invasion or threatened attack" his view of presidential power might be different.[98] In a similar vein, Justice Clark noted that "[t]he limits of presidential power are obscure."[99] For him,

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93 *See id.* at 634 (Jackson, J., concurring).

94 *See id.* at 634–35 (mentioning the "poverty of . . . unambiguous authority" and the "interdependence" of the branches of government).

95 *See id.* at 634.

96 *See id.* at 634–35 (referring to the experience of advising the President in a "time of transition and public anxiety" and expressing the view that his powers "are not fixed, but fluctuate"); WILLIAM R. CASTRO, ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT 2 (2018) (explaining the role Justice Jackson played as Attorney General and the historical significance of his legal advice to President Roosevelt).

97 *Youngstown*, 343 U.S. at 659 (Burton, J., concurring).

98 *Id.*

99 *Id.* at 661 (Clark, J., concurring).

in the absence of clear direction specified by Congress, "the President's independent power to act depends upon the gravity of the situation confronting the nation."[100]

Finally, the three dissenting Justices in *Youngstown* provided a somewhat different approach toward implying presidential powers. Chief Justice Vinson's dissenting opinion stressed that the President, unlike an agency administrator administering a single program or statute, must take care that a "'mass of legislation' be executed."[101] "Flexibility as to mode of execution to meet critical situations is a matter of practical necessity."[102] The Vinson argument may vest the President with a whole of executive power greater than the sum of the delegated parts.[103]

In *Youngstown*, the President arguably lost the battle but won the war. Only Justices Black and Douglas failed to endorse judicial implication of presidential powers not stated in the Constitution. The four remaining concurring Justices and the three dissenters indicated support for judicially implied presidential powers.

While law professors often teach *Youngstown* as a foreign affairs case, its framework extends beyond the realm of foreign affairs to encompass any claim of implied presidential power.[104] Indeed, the Court's rejection of the Commander-in-Chief argument and the inference of congressional disapproval from the treatment of property seizure in the law of labor relations suggest that the Court viewed *Youngstown* as a domestic law case.[105] At the same time, the government's Korean War justification reveals that no bright line divides foreign from domestic affairs.[106]

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100 *Id.* at 662.

101 *Id.* at 702 (Vinson, C.J., dissenting).

102 *Id.*

103 *See* Goldsmith & Manning, *supra* note 3, at 2282 (identifying the Vinson dissent as the "most comprehensive" articulation of a presidential power to add details to a legislative scheme).

104 *See* Sitaraman & Wuerth, *supra* note 7, at 1952 (noting that "*Youngstown* is not limited to foreign affairs cases").

105 *See Youngstown*, 343 U.S. at 586 (discussing Congress's decision not to incorporate emergency provisions into the Taft-Hartley Act to provide for seizure of property).

106 *See generally* Bradley & Goldsmith, *supra* note 54, at 1252–53 (explaining that the President's "international lawmaking" has "significant" domestic consequences).

3. Defining Implied Power

The literature has remarkably little to say about what exactly implied powers are, but *Youngstown* and *McCulloch* suggest a definition. First, they are not express powers. *McCulloch* illustrates the point. Nobody claimed that the Constitution expressly authorizes incorporating a national bank.[107] But, as the *McCulloch* Court pointed out, the Constitution's clauses creating express powers are broad and open-ended.[108] Express power questions usually involve contested claims that a broadly worded clause authorizes a particular measure not expressly mentioned in the Constitution. Thus, when President Truman ordered General MacArthur to withdraw from Korea, he acted under his express authority as Commander in Chief, even though the Constitution does not mention withdrawal commands. The Commander-in-Chief Clause includes the authority to issue orders to generals. Justice Marshall obscures this point in his *McCulloch* opinion, but establishing a national bank cannot be considered a levying of a tax or a regulation of interstate commerce.[109] Hence, the Constitution does not create an express power to found a national bank. Second, as suggested by *McCulloch*, implied powers include cases where a Court finds a power useful in carrying out some express authority but that power does not itself lie within the express power's scope.[110] Justice Marshall alludes to this possibility when he suggests that a national bank might aid tax collection.[111] Third, an implied power may prove useful in meeting the objectives that an express authority serves. As the *Youngstown* dissent suggests, the authority to seize steel mills might be useful to the prosecution of a war and therefore serve the objectives motivating the creation of the Commander-in-Chief power, even though it does not aid the issuance of commands that the Commander-in-Chief

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107 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (stating that we do not find "establishing a bank" "[a]mong the enumerated powers").

108 *Id.* at 407 (describing the Constitution's enumeration of congressional power as based on "great outlines" without the detail found in legal codes).

109 *See id.* at 407–08 (mentioning the powers of taxation and regulating interstate commerce and then suggesting that the national bank constitutes a means of executing enumerated powers without explicitly linking the national bank to a specific power).

110 *See* Schwartz, *supra* note 57, at 609 (explaining that the hiring of federal tax collectors is more naturally thought of as an implied power than as an instance of tax collection directly authorized by the power to "collect taxes").

111 *See McCulloch*, 17 U.S. (4 Wheat.) at 408 (referring to revenue collection).

Clause authorizes.[112] Fourth, a court may also imply a power because that power will be useful in carrying out several express powers.[113] *McCulloch* suggests such a cumulative powers argument could justify the national bank,[114] but the *Youngstown* Court did not accept Justice Vinson's suggestion that an amalgamation of Article II powers could justify presidential seizure of steel mills. Finally, a Court may imply a power without making a case for it serving specific powers or their goals because it views it as appropriate or indispensable to the well-being of the country.[115]

The line between an express and an implied power can become hazy.[116] In our view, and that of some other scholars, the power of Congress or the President to control removal of officers without impeachment is an implied power.[117] The Constitution provides express removal authority in the Impeachment Clause. Any powers of Congress and the President to control removal of officers outside the impeachment context constitute implied powers because they are not express powers. Some unitary executive proponents (unitarians) might beg to differ. They argue that the executive authority that Article II, Section 1 vests in the President includes the power to fire executive branch officials.[118] One of us has argued elsewhere that this is not a plausible reading of the Constitution as a whole and its history.[119] If one accepts the unitarians' argument, then removal of a federal officer might

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112 *See Youngstown*, 343 U.S. at 679–80 (Vinson, J., dissenting) (arguing that the seizure should be upheld as necessary to the war effort).

113 *See* Schwartz, *supra* note 57, at 622 (referring to amalgamated implied power as "synergy").

114 *See McCulloch*, 17 U.S. (4 Wheat.) at 407–08 (mentioning the vast array of congressional powers and then suggesting that a bank might be useful in raising revenue and then deploying it to support armies); Kaczorowski, *supra* note 2, at 729 (characterizing *McCulloch* as inferring implied power from an amalgamation of enumerated authority).

115 *See McCulloch*, 17 U.S. (4 Wheat.) at 417–18 (suggesting that Congress must have all powers essential to a sovereign state); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1409–12 (1989); *cf. Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) (rejecting the notion that "necessity knows no law"); Schwartz, *supra* note 57, at 622 (discussing the idea of implying a power because it constitutes an incident of national sovereignty).

116 *Cf.* Barron & Lederman, *supra* note 38, at 736 n.144 (doubting the efficacy of distinguishing between textual and implied congressional authority).

117 *See* Lawrence Lessig & Cass R. Sunstein, *The President and His Administration*, 94 COLUM. L. REV. 1, 26 n.119 (1994) (treating the question of whether the President has the power to remove officials as one of implied power); Van Alstyne, *supra* note 3, at 800–01 (same).

118 *See, e.g.*, Calabresi & Prakash, *supra* note 53, at 593–99.

119 *See* Driesen, *supra* note 40, at 89–91, 97–104 (explaining why pre-enactment history and text show that the Vesting and Take Care Clauses do not include removal authority).

be an express power of the President.[120] If one reads the Vesting Clause more narrowly, then the question becomes one of implied power. Hence, a court can cut off a legitimate implied powers question by broad readings of express powers.

4. Congressional Versus Executive Authority under *Youngstown* and *McCulloch*

These leading cases suggest that the Constitution favors congressional implied power over executive implied power. The constitutional text supports such a reading, as it only expressly creates congressional implied power.[121]

One can see this favoritism for Congress by comparing what the Court did in *McCulloch* to what it did not do in *Youngstown*. The *McCulloch* Court read the Constitution to grant implied power to pass legislation that serves as a legitimate means to a constitutionally permissible end. The *Youngstown* Court implicitly rejected the application of such a broad approach to issues of presidential power.[122] Even though seizing the steel mills might have advanced the Korean War effort, the Court refused to imply a power to seize the mills. The Court could have said that the purpose of the Commander-in-Chief Clause is to aid the national defense. Seizing the steel mills provides at least a useful means toward achieving that end. Since, in Justice Marshall's words, if the end is "legitimate" and the means "plainly adapted to that end" then the measure is "constitutional."[123] But the Court declined to say this. Justice Douglas, concurring in *Youngstown*, explained why the need to seize steel mills does not create authority to do so. "[T]he fact that it was necessary . . . does not mean that the President, rather than the Congress,

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120 *Cf.* Van Alstyne, *supra* note 3, at 800–05 (characterizing the Vesting Clause argument as one of implied power because presidential removal is helpful but not essential to executive power).

121 *See* Schwartz, *supra* note 57, at 627 (noting that offering broad implied power to the President but not Congress is inconsistent with the Necessary and Proper Clause).

122 *See* Adler, *supra* note 3, at 197 (noting that Justice Vinson's *Youngstown* dissent advocated a "second necessary and proper clause" applicable to presidential power, but that the majority rejected it).

123 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring) (reading the Constitution as granting the "President extensive authority in times of grave and imperative national emergency").

had the constitutional authority to act."[124] And Justice Jackson affirmed that Congress had expeditiously granted emergency powers when the need arose.[125]

The Douglas concurrence helps explain why the *Youngstown* approach to implied powers is less hospitable to implied power claims than *McCulloch*. Congressional power questions implicate the capacity of the federal government as a whole and therefore require liberal construction of implied powers. By contrast, denying the President an implied power does not generally incapacitate the federal government. Instead, a court denying a presidential request for judicially implied power simply insists on a deliberative legislative process prior to action.[126]

Yet, even as *Youngstown* implicitly rejected means/ends reasoning, Justice Frankfurter broadened the bases for treating presidential action as a "gloss" on the Constitution, allowing Presidents to change the Constitution's meaning without congressional approval or a demonstration of necessity.[127] *McCulloch*'s gloss, by contrast, came from acts of Congress approved, after due consideration, by Presidents and their cabinets. And Justice Jackson's opinion opens the door to allowing a single President to create constitutional meaning without affirmative legislation authorizing the action by accepting the concepts of implied congressional approval and a twilight zone where the President in some cases might legitimately act on his own.

II. ASYMMETRIC IMPLIED POWER

We have seen that the implied powers doctrine at the time of *Youngstown* favored Congress over the President. Since *Youngstown*, the Court has largely reversed the preference.[128] It generally accepts presidential

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124 *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring).

125 *See id.* at 653 (Jackson, J., concurring); *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 403–04 (2013) (explaining that Congress expanded electronic surveillance in response to the 9/11 attacks); Boumediene v. Bush, 553 U.S. 723, 735 (2008) (recognizing that Congress responded to its invalidation of President Bush's system of military commissions by passing a statute authorizing military commissions to try enemy combatants).

126 *See Youngstown*, 343 U.S. at 629 (Douglas, J., concurring) (discussing the deliberative process of legislation).

127 *See id.* at 610–11 (Frankfurter, J., concurring).

128 *Cf.* GINSBURG & HUQ, *supra* note 38, at 142 (noting that "modern-day originalists" have ironically inverted the textual preference for "a robustly empowered" Congress).

claims of implied power while very often rejecting congressional implied power claims in adjudicating challenges to legislation under *McCulloch*.

This Part explains how this occurred. It first shows that in spite of the prominence of the Jackson framework in judicial decisions, the Court often does not give congressional intent much weight in analyzing questions of implied presidential power. It then demonstrates that the modern Court generally fails to treat a history of legislative enactments signed into law by Presidents as a constitutional gloss on congressional power, while often giving substantial weight to executive branch custom. Finally, it explains that the modern Court often applies *McCulloch*'s means/ends principle to presidential implied powers claims, while sometimes declining to apply it to congressional enactments, contrary to what *Youngstown* and *McCulloch* suggest. The Necessary and Proper Clause sometimes gets short shrift from the modern Court, but the notion of judicially implied presidential power usually gets generous treatment.

A. *The Failure to Give Congressional Views Much Credence in Presidential Power Cases*

While the Supreme Court and scholars generally endorse the Jackson concurrence as the proper framework for analyzing implied presidential powers, the Jackson framework does not explain cases very well. Instead, congressional intent plays a smaller role in implied presidential power cases than one might think. Indeed, the Court sometimes uses implied powers to emasculate express congressional checks on presidential power.

The Jackson concurrence proves important in cases where conventional statutory interpretation does not directly answer the question of whether the President enjoys a claimed power. Indeed, the statute addressed in *Youngstown* itself did not directly address the President's power to seize steel mills. In these cases, application of the Jackson framework requires drawing inferences from statutory silences and the history of congressional consideration of the subject matter. Accordingly, judges can manipulate the framework to obtain desired outcomes.[129]

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[129] *See* Goldsmith, *supra* note 23, at 125 (noting that scholars have criticized the Jackson framework based on the ease with which judges can manipulate it).

In *Youngstown*, Justice Jackson inferred congressional disapproval (category three) from congressional silence. But in a subsequent case, the Court read congressional silence as approval. Justice Jackson's concurrence refused to place the seizure of steel mills in category one because of a lack of express authority for the seizure.[130] Jackson declined to place the case in his twilight zone (category two), because Congress had legislated in the field of property seizure, even though the legislation does not explicitly prohibit or forbid the seizure before the Court.[131] Instead, he implied a congressional intent to forbid the seizure (category three) from its consideration of the problem of property seizure in the Taft-Hartley legislation coupled with the failure to include seizures in support of a war effort in the law.[132] Thus, congressional legislation in the field coupled with a failure to mention the specific issue before the Court, in Jackson's view, justified an inference that Congress disapproved of the seizure. More recently, in *Medellín v. Texas*, the Court read congressional silence on the issue of whether the President has unilateral authority to implement an International Court of Justice (ICJ) judgment as signaling congressional disapproval without any direct indicia of congressional disapproval.[133]

In *Dames & Moore v. Regan*, however, the Court took the opposite approach to applying the Jackson framework.[134] *Dames & Moore* addressed the question of whether the President had authority to nullify legal claims against Iran to implement an executive agreement settling a dispute over the seizure of hostages.[135] Congress had legislated in the field of dispute settlement, but had not explicitly granted the President an authority to nullify private claims against a settling government.[136] The Court found that

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130 *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (finding no "congressional authorization . . . for this seizure").

131 *See id.* at 639 (discussing the law authorizing property seizures in other contexts).

132 *See id.* at 639–40.

133 *See* Medellín v. Texas, 552 U.S. 491, 527 (2008) (reading the Senate's silence on the President's authority as implicit rejection in light of the "non-self-executing character of the relevant treaties").

134 *See* Koh, *supra* note 5, at 1311 (noting that the *Dames & Moore* Court treated congressional silence as "implicit approval for a challenged executive action").

135 *See* Dames & Moore v. Regan, 453 U.S. 654, 662–68, 675 (1981).

136 *See id.* at 677–78 (noting that the International Emergency Economic Powers Act (IEEPA) does not directly authorize nullification of claims).

the existence of legislation in the field granting other types of power justified an inference that Congress also approved nullification of claims.[137]

The Justices invoking the Jackson framework could have placed these cases in the twilight zone, where decisions rest upon their assessment of events rather than on congressional intent. In *Dames & Moore*, as leading scholars have pointed out, the legislative history indicating a congressional intent to limit the President's emergency powers seems to place the question of cancellation of claims in the twilight zone (or even in the area of disapproval).[138] And in *Medellín*, the dissent argued that the case lay in the twilight zone, because there were no concrete indicia of congressional intent.[139]

If Congress has legislated on relevant subject matter, but not on the matter before the Court, it becomes difficult to know what Congress intended with respect to the dispute the Court must resolve.[140] In spite of this, the Court has never admitted that a dispute between President and Congress falls in the twilight zone, perhaps out of discomfort with the idea of independent judicial judgment about whether the President should have a specific power.[141] The subjectivity involved in interpreting the congressional stance coupled with the inconsistency of the Court's approach to interpreting congressional silence casts doubt on the hypothesis that

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137 *See id.* at 678 (treating closely related legislation as inviting "independent" presidential measures).

138 *See, e.g.*, Koh, *supra* note 5, at 1310 (suggesting that that the nullification of claims issue belonged in the twilight zone because Congress passed IEEPA to limit claims settlement authority); Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1108–09 (1983) (suggesting that IEEPA sought to limit seizure of foreign assets during peacetime); *cf.* Regan v. Wald, 468 U.S. 222, 248 (1984) (Blackmun J., dissenting) (pointing out that IEEPA aimed to limit, not confirm, presidential foreign affairs authority assumed under prior legislation).

139 *See Medellín*, 552 U.S. at 564 (Breyer, J., dissenting) (placing the President's enforcement of the ICJ judgment in the "middle range" where Congress has neither authorized nor forbidden the President's action).

140 *See* Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 261 (2010) (characterizing the process of "[divining what Congress would have wanted] if it had thought about the question before the court" as producing "judicial-speculation" (brackets in original)).

141 The Breyer dissent for three Justices in *Medellín* reflects judicial discomfort with the twilight zone, declining to resolve the question he places there because of "the Court's comparative lack of expertise in foreign relations" and "the difficulty of finding the proper constitutional balance" in such a case. *See Medellín*, 552 U.S. at 565–66.

Congress's views have a major influence on implied presidential power cases.

Zivotofsky v. Kerry, a case where Congress was not silent on the matter at hand, provides an especially telling example of the lack of weight the Court gives congressional views in cases involving presidential power under *Youngstown*.[142] *Zivotofsky* adjudicated the constitutionality of a statute directing the Secretary of State to list Israel as the place of birth of American citizens born in Jerusalem in passports and other official documents if requested to do so by the citizen.[143] This statute interfered with a presidential policy of neutrality toward Jerusalem's status.[144] Congress has authority over naturalization and foreign commerce, which would suggest that it has authority over the documents permitting travel and recognizing citizenship.[145] On the other hand, the President's authority to receive ambassadors might imply a power to choose whether to recognize a government, a power interfered with by the statute.[146] The Court recognized that the President's power to deny listing of Israel on documents for American citizens living in Jerusalem fell in Jackson category three, where Congress disagrees with the President and therefore his power lies at its lowest ebb.[147] Yet, the Court implied a broad presidential authority over recognition to overcome an express assertion of congressional authority under Article I.[148]

The broad implied foreign affairs power recognized in *Curtiss-Wright* has motivated narrow readings of congressional efforts to limit presidential authority, as many commentators have recognized.[149] The Court often suspends the ordinary rules of statutory construction in order to grant the

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142 135 S. Ct. 2076 (2015).

143 *See id.* at 2082.

144 *See id.* at 2081 (discussing the history of U.S. neutrality toward Jerusalem).

145 *See id.* at 2117–18, 2123–24 (Scalia, J., dissenting).

146 *See id.* at 2084–85 (majority opinion) (indicating that prominent international scholars at the founding equated receiving ambassadors with recognition).

147 *Id.* at 2084.

148 *Id.* at 2094–96 (characterizing the recognition power as the President's "alone" and then extending it to cover statements in a passport in spite of Congress's "substantial authority over passports").

149 *See, e.g.*, KOH, *supra* note 6, at 138 (claiming that on "each occasion" the Burger Court approved self-serving executive branch construction of statutes in the national security area); Sitaraman & Wuerth, *supra* note 7, at 1952 (noting that the "Court has sometimes read foreign congressional enactments broadly to favor the executive branch in foreign relations cases").

President broad implied authority over foreign affairs, sometimes in the teeth of contrary legislation.[150] These rulings have the effect of expanding the President's implied power over foreign affairs while narrowing effective congressional authority over foreign affairs through extraordinary construction.

Japan Whaling Ass'n v. American Cetacean Society provides an excellent illustration of the Court's willingness to ignore statutes in order to grant the executive branch broad authority over foreign affairs.[151] In *Japan Whaling*, the Court, in a five-to-four decision, construed a statute requiring the Secretary of Commerce to impose sanctions for actions that "diminish the effectiveness of an international fisheries conservation program" as not requiring sanctioning fishing in excess of quotas under the International Convention for the Regulation of Whaling.[152] By basically ignoring the statutory language and its history, it validated a diplomatic solution preferred by the Reagan administration.[153]

In recent separation of powers cases fairly directly implicating individual rights, the Court does not always ignore congressional intent in order to favor presidential power. In *Hamdi v. Rumsfeld*, however, the Court declined to give effect to the Non-Detention Act, which prohibits imprisonment of American citizens except pursuant to an act of Congress.

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150 *See, e.g.*, Regan v. Wald, 468 U.S. 222, 228–29 (1984) (arguably ignoring plain statutory language to uphold travel restrictions to Cuba); Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 144–45 (1981) (ignoring statutory language requiring the Court to determine de novo whether the government had properly classified information). This tendency does not necessarily prevail in recent cases that do not challenge a presidential legislative decision directly. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 473 (2004) (reading courts' authority to hear habeas petitions "within their . . . jurisdictions" to apply to inmates at Guantanamo); Republic of Argentina v. NML Capital, 573 U.S. 134 (2014) (declining to accept an executive branch plea to limit the scope of private party discovery under a Federal Rule of Civil Procedure through a broad construction of the Foreign Sovereign Immunities Act).

151 478 U.S. 221 (1986) (5-4 decision).

152 *See id.* at 225–26, 232–33.

153 *See id.* at 227–28 (describing an executive agreement to refrain from issuing sanctions in exchange for Japanese commitments to reduce and then eliminate whaling); David M. Driesen, *The Congressional Role in International Environmental Law and Its Implications for Statutory Interpretation*, 19 B.C. ENVTL. AFF. L. REV. 287, 310 (1991) (stating that all commentators agree that the statutory text and legislative history cannot explain the *Japanese Whaling* Court's deference to the executive branch); *cf.* Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1919 (2012) (noting that some scholars use *Chevron* and executive branch expertise as rationales for super-strong deference to presidential emergency powers decisions).

Instead, it read an authorization to use "necessary and appropriate" force against those involved with Al Qaeda's attacks on September 11, 2001, as authorizing detention of an American citizen captured on the battlefield.[154] Four Justices, however, dissented on the ground that the Non-Detention Act, a more specific statute, requires a clear statement authorizing detention.[155]

On the other hand, in *Hamdan v. Rumsfeld*, the Court invalidated the President's creation of military commissions as contrary to several statutes and the Geneva Conventions.[156] The Court cited Justice Jackson's tripartite framework in explaining why the President "may not disregard limitations that Congress has, in proper exercise of its own war power, placed on his powers."[157]

The Court, however, does not limit its use of extraordinary statutory interpretation to expand presidential power to foreign affairs cases. It reads statutes in extraordinary ways in order to limit judicial and congressional control over abuses of presidential authority domestically. In *Franklin v. Massachusetts*, the Court read an exemption for presidential actions into the Administrative Procedure Act (APA), thereby exempting presidential actions from APA review.[158] The APA, however, "defines [an] 'agency' as 'each authority of the [g]overnment,'"[159] and the President is a government authority. Furthermore, the APA exempts Congress, several other listed entities, and presidential actions over foreign affairs from its strictures, but contains no exemption for the President's domestic decisions.[160] Thus, the

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154 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

155 *See id.* at 542–45 (Souter, J., dissenting); *id.* at 574 (Scalia, J., dissenting) (stating the AUMF is not clear enough to overcome the Anti-Detention Act's "prescription"); *cf.* Sitaraman & Wuerth, *supra* note 7, at 1903 (citing *Hamdi* as an exemplar of "typical statutory interpretation").

156 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

157 *Id.* at 593 n.23.

158 *See* Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the President's actions are not reviewable under the APA); *cf.* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1014, 1019 (2018) (arguing that the Constitution still generally requires arbitrary and capricious review of presidential action); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1622 (1997) (explaining that "nonstatutory review" of presidential action remains available).

159 *Franklin*, 505 U.S. at 800 (citing 5 U.S.C. § 551(1) (2018)).

160 *Id.* (citing 5 U.S.C. § 701(b)(1) (2018)); Bradley & Goldsmith, *supra* note 54, at 1272 (discussing the APA's foreign affairs exemption); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

APA's plain language subjects domestic presidential actions to APA review, as administrative law professors recognized prior to the 1980s.[161] But the *Franklin* Court declined to respect the broad statutory language's clear import, instead requiring an "express statement" that the President is included.[162] The scholarly literature conveys the impression that extraordinary statutory construction to advance presidential power confines itself to foreign affairs and national security, but it sometimes goes further than that.

The cases suggest that the Court's independent judgment about whether the President should have the unilateral power he has assumed often plays a greater role in resolving presidential implied powers claims than congressional intent.[163] In *Dames & Moore*, a judicial judgment that the Court must uphold a deal securing releases of American hostages held by Iran justified the result much more convincingly than a reading of congressional intent.[164] And in *Medellín*, attitudes about international law and federalism explain the result much better than congressional intent. Justice Roberts's opinion for the *Medellín* Court expressed concern about allowing a President to require a change in state criminal procedure in order to enforce an international judgment and reluctance to allow treaties to become the supreme law of the land absent specific congressional implementing legislation in that context.[165]

Even in *Youngstown*, most of the Justices did not rely as much on congressional disapproval of the steel mill seizure as they did on the lack of an independent source of constitutional authority for the President to justify his actions. For Justices Black and Douglas, the lack of an affirmative

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161 *See, e.g.*, Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 997 (1969); Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 832 (1966); *cf.* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 2 (1982) (finding the APA "not clearly applicable to the President").

162 *See Franklin*, 505 U.S. at 801; Driesen, *supra* note 158, at 1036.

163 *See* Prakash, *supra* note 8, at 38 (suggesting that many Supreme Court Justices' backgrounds as executive branch lawyers may make them too comfortable with strong claims of presidential power).

164 *See* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (characterizing the settlement of claims as a "necessary incident to the resolution of a major foreign policy dispute").

165 *See* Medellín v. Texas, 552 U.S. 491, 522–23, 528–30 (2008) (Roberts, C.J.) (rejecting presidential enforcement of an ICJ judgment displacing "state restrictions on . . . filing . . . successive habeas petitions"); *cf. id.* at 538–39, 564–65, 567 (Breyer, J., dissenting) (indicating that in light of treaties' status as supreme law and case law allowing executive agreements to preempt state law, he would allow the President to enforce this ICJ judgment).

legislative delegation or Article II power ended the case. Conversely, the three dissenters supported implying power to seize the steel mills. Even Justice Jackson's opinion devotes more attention to justifying broad independent constitutional constraints on presidential power than it does to the congressional stance.[166] Justice Jackson inveighed against the idea that a President could augment his own domestic powers by unilaterally initiating a war, as Truman had done in Korea.[167] He cited the judgments of "the forefathers" and then-recent experience in Europe to support the idea that allowing unilateral creation of emergency powers tempts heads of government to create emergencies in order to usurp power.[168] As explained above, Justices Frankfurter, Burton, and Clark each recognized that circumstances not then present might justify finding implied presidential power. Hence, judicial constitutional and policy judgment often plays a greater role in implied power cases than congressional intent, express or implied, in spite of the Jackson framework's prominence.[169]

B. *The Asymmetric Use of Historical Practice*

During the last several decades, the Court has largely abandoned the *McCulloch* principle that treats a history of congressional enactments approved by Presidents as a constitutional gloss.[170] This is rather startling in light of the well-nigh dispositive role the *McCulloch* Court endorsed for such strong constitutional custom. The *McCulloch* Court had treated the history of presidential and congressional approval of the national bank as rendering the issue of its constitutionality "scarcely . . . an open question."[171]

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166 *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–40 (1952) (Jackson, J., concurring) (elaborating and applying the framework for considering congressional intent), *with id.* at 645–55 (elaborating a constitutional case against unrestricted presidential power).

167 *See id.* at 642 (characterizing as "sinister and alarming" a doctrine allowing a President's unilateral initiation of a war to "enlarge his mastery over . . . internal affairs").

168 *See id.* at 649–52.

169 *Accord* Van Alstyne, *supra* note 3, at 805 (characterizing claims of implied powers as raising quintessential questions of "*political* judgment" (emphasis in original)).

170 *See*, *e.g.*, Clinton v. City of New York, 524 U.S. 417, 421 (1998) (failing to give weight to a long statutory custom of giving the President the discretion not to spend all appropriated funds in striking down a statute authorizing a line item veto); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401–02 (1819).

171 *See McCulloch*, 17 U.S. (4 Wheat.) at 401.

Most strikingly perhaps, the Court gave no weight to a strong history of congressional enactment of requirements that states with a history of hindering minority voting obtain clearance from the DOJ before adopting new state voting rules in *Shelby County v. Holder*.[172] These preclearance requirements had a longer and more continuous history of political approval than the act establishing the national bank, which *McCulloch* approved.[173]

Similarly, the Burger Court gave no weight to a history of congressional approval of legislative vetoes in *INS v. Chadha*.[174] In *Chadha*, the Court invalidated the one-house veto, a mechanism for checking executive branch exercise of delegated authority by allowing one house of Congress to veto an executive branch action under a statute.[175] Congress, however, had approved the legislative veto in hundreds of statutes over a fifty-year period.[176] While numerous Presidents officially acquiesced by signing legislation containing legislative vetoes, eleven Presidents at some point expressed doubts about the legislative veto's constitutionality.[177] In spite of the legislative veto's firm establishment in the law, the Court not only declined to uphold the legislative veto at issue in *Chadha* itself, which involved a decision to suspend deportation of an alien, but chose a broad ground for decision that invalidated one-house vetoes in very different contexts, such as vetoes of quasi-legislative rules.[178]

Even when upholding a federal statute under the Necessary and Proper Clause, the Court suggested a departure from *McCulloch*'s strong

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172 Shelby Cty. v. Holder, 570 U.S. 529, 556 (2013) (finding that the forty-year-old age of the formula governing which states must undergo preclearance does not "insulate" it from judicial review).

173 *Compare id.* at 535, 538–39 (indicating that preclearance requirements had been in effect for nearly fifty years and that Congress and the President had reauthorized preclearance four times), *with McCulloch*, 17 U.S. (4 Wheat.) at 323, 333, 401–02 (showing that the national bank had operated for less than thirty years and that Congress had suspended its operation for five years); *cf.* Goldsmith & Manning, *supra* note 3, at 2311 (noting that custom has "special force if the pattern originated in the early days of the Republic").

174 462 U.S. 919 (1983); Bradley & Morrison, *supra* note 17, at 423; *see also* Bowsher v. Synar, 478 U.S. 714, 731 (1986) (using the history of the Comptroller General as an organ of Congress as an argument against assigning it budget cutting functions).

175 *See Chadha*, 462 U.S. at 925, 959.

176 *See id.* at 959–60 (Powell, J., concurring).

177 *See id.* at 942 n.13 (majority opinion).

178 *Cf. id.* at 960–61 (Powell, J., concurring) (arguing that the Court should invalidate the veto at issue in *Chadha* on the narrow ground that it involves congressional exercise of a judicial power because of the respect due Congress).

presumption of validity for actions supported by statutory custom. In *United States v. Comstock*, the Court reviewed the history of federal "prison-related mental-health statutes" in upholding a new civil-commitment statute under the Necessary and Proper Clause.[179] But instead of treating this history as well-nigh dispositive, it stated "that . . . a longstanding history of related federal action does not demonstrate a statute's constitutionality."[180] The *Comstock* Court used history as an aid to understanding the "statutory scheme" and assessing "the reasonableness of the relation between the new statute and pre-existing federal interests."[181]

By contrast, the Court tends to honor histories of executive action acquiesced in by Congress. In both *Dames & Moore* and *American Insurance Ass'n v. Garamendi*, the Court authorized the President to resolve international disputes unilaterally with executive agreements, notwithstanding the constitutional requirement of Senate treaty approval.[182] In *Zivotofsky*, the Court gave effect to a checkered history of congressional acquiescence to executive branch recognition authority, wherein Congress had occasionally initiated recognition decisions and some Presidents had expressed doubt about the exclusivity of presidential authority.[183]

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179 *See* United States v. Comstock, 560 U.S. 126, 137–41 (2010) (providing a detailed review of such statutes).

180 *Id.* at 137 (emphasis added).

181 *Id.*

182 *See* Dames & Moore v. Regan, 453 U.S. 654, 679, 682–83 (1981); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003); *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 429, 441 (1977) (upholding a statute governing presidential records partly on the basis of executive branch acquiescence).

183 Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015) (acknowledging that the history of recognition is "not all on one side"). The Court and dissent agreed that Congress had sometimes made recognition decisions and that some Presidents have expressed doubt about the exclusivity of the President's recognition authority. *See id.* at 2092–93 (majority opinion); *id.* at 2121 (Scalia, J., dissenting). The Court also gave substantial weight to checkered history in finding that the Recess Appointments Clause grants more substantial authority to evade Senate confirmation than the most natural reading of the clause would suggest. *See* NLRB v. Noel Canning, 573 U.S. 513, 575–95 (2014) (Scalia J., concurring) (showing why a restrictive reading is more natural and discussing a history of executive practice that began relatively late in the nation's history and encountered congressional resistance once it became common).

C. *Applying* McCulloch*'s Means/Ends Reasoning to Presidential Actions but Not Always to Congressional Enactments*

In recent years, the Court has increasingly applied *McCulloch*'s means/ends reasoning to justify expanding presidential power and decreased its use to validate congressional enactments. Perhaps the most cited example of using means/ends reasoning to create implied presidential power comes from *United States v. Nixon*, where the Court relied on *McCulloch* to justify creating a presidential power to resist a subpoena.[184] The Court concluded that privileging presidential information would help him get candid advice and therefore read a presidential power to keep information confidential into the Constitution.[185] In other words, keeping information private serves as a legitimate means to a constitutionally valid end of getting the President candid advice.

The Court also used means/ends reasoning to create implied presidential power defeating mechanisms, advancing presidential accountability in *Nixon v. Fitzgerald*. The *Fitzgerald* Court created a presumptive presidential immunity from damages actions, lest the possibility of such suits deter vigorous execution of presidential responsibilities.[186]

The Court often rejects the use of means/ends reasoning to amplify congressional power and even expressed disdain for giving the Necessary and Proper Clause weight in reviewing federal legislation, calling it the "last, best hope of those who defend ultra vires congressional action."[187] For example, in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB), the Court invalidated a statute authorizing the Security and Exchange Commission (SEC) to remove members of the PCAOB for cause.[188] The Court explained that a presidential removal power aids the

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184 *See* United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) (rejecting the Special Prosecutors' argument against executive privilege, relying on *McCulloch*'s rule accepting implied power "reasonably appropriate and relevant to the exercise of a granted power"); Van Alstyne, *supra* note 3, at 794 (characterizing executive privilege as "the most obvious current illustration of implied power").

185 *See Nixon*, 418 U.S. at 708.

186 Nixon v. Fitzgerald, 457 U.S. 731, 749–53 (1982); *see* Harlow v. Fitzgerald, 457 U.S. 800 (1981) (establishing qualified immunity for White House aides).

187 Printz v. United States, 521 U.S. 898, 923 (1997).

188 561 U.S. 477, 484–86 (2010) (describing the statutory removal provisions and declaring them unconstitutional).

President in carrying out his executive power and "tak[ing] Care that the Laws be faithfully executed."[189] The Court had previously upheld independent agencies, but the *PCAOB* Court invalidated the statute's "multilevel protection from [presidential] removal," since the President could not remove SEC commissioners with the authority to remove PCAOB officers, except for cause.[190] Justice Breyer, writing for four dissenting Justices, argued that the statute was a necessary and proper means of carrying out congressional authority to create and structure federal offices, citing *McCulloch*.[191] Justice Roberts's opinion for the Court does not respond to Breyer's invocation of the Necessary and Proper Clause.

Zivotofsky also employs *McCulloch*'s logic to vindicate implied presidential power whilst rejecting the Necessary and Proper Clause's use to expand congressional authority. The *Zivotofsky* Court held that the purpose of the presidential power to receive ambassadors is to recognize the country the ambassador represents.[192] The purpose of recognizing a country requires an authority to determine the "territorial bounds" of the recognition.[193] The Court implied a presidential power to insist that government-issued passports for American citizens reinforce rather than undermine the recognition decision because it provides a means to a legitimate end.[194]

At the same time, the *Zivotofsky* Court gave the Necessary and Proper Clause no role in assessing the validity of congressional legislation governing the passports.[195] It declined to attach controlling weight to the dissent's argument that congressional authority over immigration and naturalization authorizes congressional control over passports in light of the Necessary and Proper Clause.[196]

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189 *See id.* at 484.

190 See *id.* at 483–86 (citing Humphrey's Executor v. United States, 295 U. S. 602 (1935)).

191 *See id.* at 515 (Breyer, J., dissenting).

192 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085 (2015) (holding that because international scholars at the founding recognized reception of an ambassador as effectuating recognition of the ambassador's country, the President's power to receive ambassadors bestowed an authority to recognize countries).

193 *See id.* at 2087 (defining the President's recognition authority as including an authority to determine the territorial claims recognized).

194 *See id.* at 2094–96 (finding that presidential control over a passport's description of the place of origin advances the goal of clearly effectuating the recognition decision).

195 *See id.* at 2087 (recognizing that Congress has powers that may affect the value of recognition under its enumerated powers and the Necessary and Proper Clause, but not recognition itself).

196 *See id.* at 2117 (Scalia, J., dissenting).

Zivotofsky and *PCAOB* mirror several other separation of powers cases declining to give the Necessary and Proper Clause any role in separation of powers challenges to congressional actions.[197] For example, in *Bowsher v. Synar*, Justice White argued in dissent that the Necessary and Proper Clause authorized Congress to delegate budget-cutting authority to an independent officer because this delegation offered a useful means of achieving a goal of automatic deficit reduction.[198] Justice Burger's opinion for the Court did not even address the Necessary and Proper Clause, instead striking down the measure as a usurpation of executive power.[199]

Moreover, the Court's reluctance to apply the Necessary and Proper Clause to questions of congressional authority goes beyond separation of powers cases. The Court most clearly rejected *McCulloch*'s broad means/ends reasoning in its decisions cabining congressional authority to enforce the Fourteenth and Fifteenth Amendments with appropriate legislation.[200] The Court generally accepted that *McCulloch*'s means/ends reasoning applies to these post-Civil War amendments from the nineteenth century until the mid-1990s.[201] In *City of Boerne v. Flores*, however, the Court adopted an approach to the Fourteenth Amendment that split the difference between the broad approach of *McCulloch* and the absolutely-indispensable test that Justice Marshall rejected. It refused to countenance legislation

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197 *See, e.g.*, INS v. Chadha, 462 U.S. 919, 983–89 (1983) (White, J., dissenting) (arguing in vain that the Necessary and Proper Clause justifies the one-house veto in light of the Court's acceptance of delegation of quasi-legislative authority to executive branch agencies).

198 *See* Bowsher v. Synar, 478 U.S. 714, 761–64 (1986) (White, J., dissenting) (arguing that delegating authority to an officer independent of the President was "necessary and proper" and an "eminently reasonable" way to achieve "automatic budget-cutting measures" (internal quotations omitted)).

199 *See id.* at 732–34 (majority opinion) (striking down the removal provision for the Comptroller General because the budget reduction function is an "executive" power).

200 U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

201 *See* South Carolina v. Katzenbach, 383 U.S. 301, 326–27 (1966) (explaining that *McCulloch*'s means/ends reasoning applies to the Fifteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (explaining that *McCulloch*'s means/ends reasoning applies to the Fourteenth Amendment); *Ex Parte* Virginia, 100 U.S. 339, 345–46 (1879) (explaining that the congressional power to enforce the Fourteenth Amendment allows for legislation "adapted to carry out the objects the amendments have in view"); *see also* Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 136 (2006) (describing the provisions authorizing congressional enforcement of the three Reconstruction Amendments as "intended to place *M'Culloch*'s [sic] view of the Necessary and Proper Clause into the new constitutional text"); *cf.* The Civil Rights Cases, 109 U.S. 3, 13–14 (1883) (interpreting the congressional enforcement power to apply only to state law, not private conduct); United States v. Harris, 106 U.S. 629, 640 (1883) (same).

tending to advance the Constitution's goals, instead requiring that the means chosen by Congress be congruent and proportional to the injury Congress sought to prevent.[202] In doing so, it not only rejected *McCulloch*'s broad means/ends reasoning, it also implicitly declined to apply its holding that Congress, not the Court, gets to choose the appropriate means to desirable ends.[203]

The Court also refused to apply *McCulloch*'s broad means/ends reasoning and deference to congressional legislation under the Fourteenth and Fifteenth Amendments when it considered the constitutionality of preclearance requirements under the Voting Rights Act in *Shelby County v. Holder*.[204] *Shelby* featured a spirited debate on *McCulloch* between the majority, which invalidated the preclearance requirements as unnecessary, and the dissent, which would have upheld them based on deference to congressional judgment.[205] The Court simply disagreed with the congressional judgment that the country needs preclearance.[206]

The Court also gives means/ends reasoning little weight in its most recent Commerce Clause jurisprudence.[207] Five Justices declined to uphold the mandate that individuals purchase insurance as a measure necessary and proper to regulation of the health care market under the Affordable Care Act

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202 *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

203 *See id.* at 530–32 (questioning congressional judgment that the problem of burdens on religion was serious enough to justify the measure it chose); Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (characterizing the congruence and proportionality test as a "standing invitation to judicial arbitrariness and policy-driven decisionmaking"); *cf.* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 163 (1997) (characterizing the majority's view of judicial supremacy as "startlingly strong").

204 570 U.S. 529, 568 (2013).

205 *See id.* at 555 (majority opinion) (finding the preclearance requirements inconsistent with the "letter and spirit of the constitution" under *McCulloch* on federalism grounds); *id.* at 570 (Ginsburg, J., dissenting) (finding preclearance "plainly adapted" to a constitutionally legitimate end).

206 *See id.* at 547–50 (majority opinion) (discussing progress in securing voting rights that, in the majority's view, make the requirements unnecessary); *see also* United States v. Morrison, 529 U.S. 598, 626–27 (2000) (second-guessing a congressional determination about the geographic scope of a remedy for gender discrimination); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 333 (1819) (responding to the argument that changed circumstances rendered the national bank unneeded by affirming that congress may choose among the available means of meeting its goals).

207 *Cf. Morrison*, 529 U.S. at 640 (Souter, J., dissenting) (stating that placing "noncommercial . . . activity" beyond the commerce power's scope is "at least . . . suspect" under the Necessary and Proper Clause (internal quotations omitted)).

(ACA), albeit in dicta.[208] Justice Ginsburg's strong argument for four Justices that the individual mandate was not only useful in carrying out valid goals under the Constitution, but indispensable to substantial portions of the ACA failed to carry the day.[209] Justice Roberts, with support of the other conservative Justices, acknowledged that the individual mandate was "'necessary' to the [ACA's] insurance reforms" but found them improper.[210] Thus, five Justices read the Constitution as authorizing the Supreme Court to define the scope of proper alternatives, rather than leave that judgment to Congress.

While the Court refuses to apply *McCulloch*'s means/ends reasoning to statutes in separation of powers or civil rights cases, it does apply it to laws regulating federal prisoners.[211] The *Comstock* Court relied heavily on the broad statements in *McCulloch* that recognize congressional power to enact laws that are "convenient," "useful," or "conducive" to the exercise of an enumerated power.[212] It was thus up to Congress to choose how to further its custodial interest in protecting members of society from violent acts by mentally ill federal prisoners.[213] The Constitution does not explicitly mention a congressional power to criminalize conduct, to imprison individuals who engage in that conduct, or to enact laws governing prisons and prisoners.[214] Yet, the Court found that "Congress nonetheless possesses broad authority to do each of those things in the course of 'carrying into Execution' the enumerated powers 'vested by' the 'Constitution in the Government of the United States'—authority granted by the Necessary and Proper Clause."[215]

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208 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558–61, 650–55 (2012) (dicta). The majority, however, upheld the individual mandate as a valid tax. *See id.* at 561–74, 589.

209 *See id.* at 618–19 (Ginsburg, J., dissenting) (explaining that Congress included the individual mandate in the ACA to prevent premium increases or exiting of insurance markets from defeating the goal of making health care affordable).

210 *See id.* at 560 (majority opinion); 649–60 (Scalia, J., dissenting).

211 *See, e.g.*, United States v. Kebodeaux, 570 U.S. 387, 389 (2013) (upholding federal regulation of federal sex offenders).

212 United States v. Comstock, 560 U.S. 126, 133–34 (2010) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)).

213 *Id.* at 143 (finding the statute "reasonably adapted" to the purpose of protecting the public from violence from mentally ill federal inmates).

214 *See id.* at 137.

215 *Id.* (internal quotation marks omitted) (citing U.S. CONST. art. I, § 8, cl. 18).

More narrowly, in *Sabri v. United States*, the Court upheld a statute forbidding bribery of recipients of federal funds.[216] Citing *McCulloch*, it found the measure a necessary and proper means to ensure that federal funds are properly spent.[217]

Thus, the post-*Youngstown* Court sometimes employs *McCulloch*'s means/ends reasoning to create implied presidential power. But it does not apply that approach, and the deference that goes with it, to vindicate congressional power in civil rights or separation of powers cases.[218]

III. NORMATIVE EVALUATION OF THE ASYMMETRY

This Part evaluates the discrepancy between the modern Court's approach to implied presidential power and its approach to implied congressional power. This evaluation necessarily remains limited. The goal is not to evaluate the wisdom of each implied power decision issued by the Supreme Court, but to evaluate the broad pattern of favoritism toward the President. Because of the cross-cutting nature of these issues, the analysis identifies as many questions as answers, and many of the answers suggested are tentative.

The analysis in Part II revealed three broad and perhaps surprising patterns. First, the modern Court gives contemporary congressional views much less weight than one might expect from a reading of *Youngstown*, sometimes negating express legislation binding the President either directly or through aggressive construction.[219] Second, in assessing whether constitutional custom justifies an implied power, the Court gives more weight to executive branch practice than to legislation passed by Congress and signed by the President. Third, the Court sometimes accepts

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216 *See* Sabri v. United States, 541 U.S. 600, 602 (2004).

217 *See id.* at 605 (citing *McCulloch* and finding that Congress has "authority under the Necessary and Proper Clause . . . to see to it that . . . taxpayer dollars . . . [are] not frittered away in graft"); *see also* Jinks v. Richland Cty., 538 U.S. 456 (2003) (holding that Congress may enact a statute tolling state statutes of limitations for cases pending in federal courts as Necessary and Proper to the exercise of congressional power to create inferior federal courts).

218 *See* Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (characterizing the customary judicial statement of deference to congressional judgment about a statute's constitutionality as an "almost formulary caution").

219 We employ *Youngstown* as a reference point, because the Court generally purports to use it as a framework when it decides implied presidential power cases, even though implied presidential powers cases are few and the Court's use of *Youngstown* inconsistent.

McCulloch's means/ends reasoning in implying new presidential powers, but generally declines to employ it in evaluating congressional power in cases addressing separation of powers and civil rights.

This Part develops a prima facie case that this pattern lacks an adequate justification. It also explores the implications this pattern suggests for democracy and the rule of law.

It then explores possible justifications for this pattern drawn from the decisions—the principle of judicial supremacy, the need to restrain Congress to preserve federalism, and the desirability of a broad presidential foreign affairs authority. Since federalism and the President's foreign affairs power have already generated vast literatures, we do not propose some new theory of federalism or foreign affairs.[220] Instead, we show that the implied powers jurisprudence goes beyond federalism and foreign affairs to limit presidential accountability domestically and explore some of the questions asymmetric treatment of federalism and foreign affairs raises.

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220 On federalism, see, e.g., Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (criticizing and providing an alternative to the Court's formalist turn in its Commerce Clause jurisprudence); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000); David M. Driesen, *The Economic/Noneconomic Activity Distinction Under the Commerce Clause*, 67 CASE W. RES. L. REV. 337 (2016) [hereinafter Driesen, *Economic/Noneconomic Activity Distinction*]; David M. Driesen, *Inactivity, Deregulation, and the Commerce Clause: A Thought Experiment*, 53 WAKE FOREST L. REV. 479 (2018) [hereinafter Driesen, *Inactivity*] (asking whether the Court's substantial effects test under the Commerce Clause might ban deregulation just as it may ban regulation of inactivity); Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in* United States v. Morrison, 18 CONST. COMMENT. 563 (2002); Mollie Lee, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456 (2006); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125; Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 627–29 (2001) (arguing that a vision of exclusive categories of federal and state law underlies recent federalism cases). On foreign affairs, see *supra* notes 4–6.

A. *Prima Facie Problems with the Asymmetry*

1. Lack of Contemporary Congressional Influence on Implied Power Cases

The statutory cases conflict with the principle that Congress determines policy; at least with respect to foreign affairs and presidential accountability. The Court arguably has created super-strong clear statement rules for enactments limiting the President's actions in foreign affairs or holding him accountable for failing to faithfully and reasonably execute the law.[221] Such clear statement rules, as William Eskridge and Philip Frickey explain, reflect judicial value choices.[222] The Court has not provided an explanation or even, in many cases, an identification of the constitutional value choices underlying its clear statement rules expanding implied presidential power.[223]

The cases arising under the Jackson framework, while inconsistent in outcome, also call into question the Court's willingness to let Congress have a say. But the Court faces difficulty in most of these cases in discerning what Congress believes, which raises questions about the viability of Jackson's tripartite framework. As one might expect from an increasingly formalist Court applying a functional framework that does not determine answers to constitutional questions, the Court has begun to subtly question and narrow the framework.[224]

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[221] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 617 (1992) (discussing the super-strong clear statement rule against "congressional derogation of the President's foreign affairs power").

[222] *See id.* at 595–96 (explaining that the "substantive canons" reflect judicial value choices).

[223] *See id.* at 630 (noting that the Court "has not thoroughly thought through its use of [normative] . . . canons" and may be using them unconsciously); Driesen, *supra* note 158, at 1051 (pointing out that the *Franklin* Court stated that "separation of powers" motivated its clear statement rule, but did not explain what separation of powers concern the APA implicates); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (discussing the Supreme Court's use of "active avoidance" to rewrite statutes based on sloppy constitutional reasoning); *cf.* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (explaining that courts should only invoke the canon of construing statutes to avoid constitutional issues when there is a serious doubt about the statute's constitutionality lest courts "distort" legislative "policy choices").

[224] *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (recognizing that Congress cannot anticipate foreign policy crises in any detail and finding the Jackson framework oversimplified).

In *Medellín*, although the Court purported to apply the Jackson framework, Justice Black's formalist conception of presidential power played a larger role in the decision. Justice Robert's majority decision in *Medellín* relied on Justice Black's rejection of a lawmaking role for the President to buttress a conclusion that the lack of clear treaty provisions giving ICJ judgments domestic effect should preclude presidential enforcement of an ICJ judgment.[225] The Court's conclusion that Congress disapproved of presidential enforcement of an ICJ judgment does not rely on direct indicia of congressional intent, but instead upon an assumption that the Senate approves a treaty with awareness and acceptance of the Court's views on self-executing treaties.[226]

The *Medellín* Court also narrowed the scope of inquiry into congressional intent by shrinking the role of the inquiry into congressional acquiescence to executive branch custom. It suggested that the inquiry into congressional acquiescence only applies to cases in the twilight zone.[227] That statement implies that the Court should not consider congressional custom in adjudicating the question of whether Congress has impliedly approved or disapproved of a claimed presidential authority.

Zivotofsky even more clearly calls into question scholars' and lawyers' assumption that the Court has some allegiance to the Jackson concurrence. While Justice Jackson indicated that congressional intent would help settle cases of overlapping powers, the Court created an exclusive presidential power over recognition to defeat congressional enactment of statutory measures under its immigration authority in tension with that power.

The difficulty in determining whether Congress intended to approve or disapprove of a presidential action when it has not legislated on the issue

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225 *See* Medellín v. Texas, 552 U.S. 491, 526–27 (2008) (citing Black's opinion and the "fundamental constitutional principle" that Congress makes laws to deny the President power to enforce a treaty lacking provisions "clearly according it domestic effect").

226 *See id.* at 527 (assuming that the "ratifying Senate" has an "implicit understanding" that the President cannot "unilaterally create domestic law" to enforce a non-self-executing treaty); Sitaraman & Wuerth, *supra* note 7, at 1931–32 (characterizing the Court's argument that "the Senate implicitly prohibited the President" from enforcing the ICJ judgment as "weak" in light of the treaty's silence and the Court's own division on issues of self-executing treaties).

227 *See Medellín*, 552 U.S. at 528 (finding congressional acquiescence relevant only "when the President's action falls within the second category—that is, when he acts in absence of either a congressional grant or denial of authority" (internal quotation and citation omitted)).

before the Court implies that many cases lie in the "twilight zone."[228] The case law suggests that resolving such cases will prove difficult because cases in the twilight zone require judicial judgment about imponderables.

The Jackson framework, although difficult to apply, performs some useful functions. First, it acknowledges a congressional role in determining the scope of presidential power, which is consistent with the Necessary and Proper Clause and the scope of congressional power.[229] Second, it provides a useful device to allow the Court to appear modest while adding new interpretations of the Constitution, which is sometimes necessary in order to adapt it to new circumstances. Third, properly applied, it should almost always allow Congress to dictate policy when it wants to.[230]

Perhaps the most important contribution of the Jackson concurrence involves the admonition that presidential power is not fixed but fluctuates. A ruling based on congressional approval or disapproval does not necessarily create or deny the President power for all time. Instead, what Congress authorizes today it can forbid tomorrow and vice versa.[231] By doing this, the framework encourages cooperation between the President and Congress and allows the peoples' representatives in Congress to continue playing a role.

While the Court may be right to question the Jackson framework, in light of its workability problems, any move away from it should try to conserve these virtues. While this topic justifies a whole article, a few points seem in order here.[232]

The Court can preserve a congressional role in a case by simply making it clear that further congressional action could change the result.[233] The

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228 *See, e.g.*, Bradley & Goldsmith, *supra* note 54, at 1260–61 (noting that congressional acceptance of some executive agreements does not necessarily indicate acceptance of others).

229 *See* Koh, *supra* note 5, at 1284 (reading Jackson's opinion as establishing a principle that Congress must have an opportunity to participate in setting foreign policy objectives).

230 *Id.* at 1285 (reading Jackson's opinion as intimating that courts should not uphold presidential actions contrary to express authorizations); Goldsmith, *supra* note 23, at 120 (reading the Jackson concurrence as presuming congressional supremacy in almost all cases). *But see* Prakash, *supra* note 8, at 30–31 (pointing out that the President does not automatically lose in category three).

231 *Cf.* Goldsmith & Manning, *supra* note 3, at 2282 (explaining that Congress may limit implied presidential power to complete legislative schemes).

232 *Cf.* Sitaraman & Wuerth, *supra* note 7, at 1953–58 (offering a revision of the Jackson framework).

233 *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (affirming presidential settlement of claims in the case before it while denying that the President has "plenary power" to do so). *See generally* Goldsmith, *supra* note 23, at 123 (arguing that functional considerations may justify the

Court, however, may want to continue to move toward the Black approach as suggested by *Medellín*. The Black approach has the advantage of systematically empowering Congress without necessarily paralyzing the President.[234] Since the Constitution offers few express executive powers, Black's formalist approach would force the President to seek needed powers from the Congress, rather than the judiciary. This might be useful because the courts are not well equipped to evaluate the many competing policy considerations that should inform grants of implied powers to the President. For example, the Supreme Court assumed that allowing a subpoena of all information that a President might want to keep out of a criminal proceeding would impede candid advice to the President.[235] While this seems logical enough for a Court adjudicating the case of a President who has apparently engaged in criminal conduct, it might reveal itself to be a specious rationale if evaluated from the perspective of a body accustomed to enacting laws rather than deciding cases. Perhaps presidential criminal conduct occurs so seldom that demanding full disclosure when it allegedly occurs will not deter candid advice.[236] Or perhaps it will only deter advice recommending criminal conduct—advice that society might wish to deter. The Congress may have an advantage over the courts in evaluating such public policy issues.[237]

2. Asymmetric Custom

Giving more weight to executive branch custom than to the history of enacted legislation in adjudicating constitutional questions is undemocratic. Endorsement of a measure by multiple Presidents and several Congresses

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President "getting the first word" on an issue, but does not explain why Congress cannot reverse the decision).

234 *See generally* Adler, *supra* note 3, at 202 (finding "considerable merit" in Black's clear demarcation of legal and illegal presidential activity).

235 *See* United States v. Nixon, 418 U.S. 683, 705–06 (1974).

236 *Cf.* Clinton v. Jones, 520 U.S. 681, 701–02 (1997) (doubting that presidential liability will greatly distract Presidents because of the infrequency lawsuits brought against Presidents).

237 *See* Nixon v. Fitzgerald, 457 U.S. 731, 779 (1982) (White, J., dissenting) (characterizing arguments for absolute immunity as public policy arguments).

should matter more than a history of presidential action that Congress fails to countermand for several reasons.[238]

Congressional enactment of measures with presidential approval suggests that not only the President, but also a majority of both houses of Congress consider the measure constitutional. Justice Jackson pointed out that Presidents swear an oath of fealty to the Constitution and therefore presumes that they act in good faith.[239] Members of Congress swear a similar oath and legislation usually reflects good faith judgments of both the President and the Congress.[240]

Congressional and presidential endorsement of a measure shows broader political support for the measure than unilateral presidential action supported by congressional inaction or action on related, but not identical, matters. And the point of the Constitution is to give the People control of the government through their elected representatives.

Giving more weight to presidential actions than to statutes encourages unilateral presidential action rather than interbranch consensus. If a President can establish an authority by asserting it and then avoiding a congressional vote against the exercise of the authority (or vetoing a measure seeking to reign him in), then he has no incentive to persuade Congress that his view is a wise one meriting affirmative endorsement or to modify his course of action in response to legitimate congressional concerns.

Furthermore, giving more weight to statutes than to presidential actions maintains the balance of power between Presidents and Congress. Congress can authorize presidential action by majority vote, since the President will almost surely sign legislation increasing his power.[241] But curtailing presidential power once created by a court or engaged in by executive practice may often require a two-thirds majority to overcome a presidential veto.[242]

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238 *Cf.* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014) (arguing that the Constitution requires deference to Congress in determining the scope of constitutional power).

239 U.S. CONST. art. VI, cl. 3.

240 Boumediene v. Bush, 553 U.S. 723, 738 (2008) (mentioning the congressional oath).

241 *See* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 576 (2005) (noting that Congress can ratify an incorrectly reversed presidential action with a majority vote).

242 *See id.* (noting that Congress must overcome a veto to reverse illegal executive orders ratified by the courts).

Endorsement by both branches of government suggests more strongly than executive branch custom that a measure under review is normatively desirable. It suggests that a host of political actors of diverse backgrounds and usually diverse views find the measure desirable or at least acceptable.[243]

3. Means/Ends Reasoning

Acceptance of means/ends reasoning for presidential claims of implied authority whilst frequently rejecting it as a justification for statutes also seems inappropriate on its face. As *McCulloch* pointed out, allowing Congress ample means to achieve desirable ends allows the federal government as a whole to respond adequately to the nation's needs and even to adapt to crises. On the other hand, application of means/ends reasoning to presidential power risks impairment of congressional power and encourages unilateral actions instead of joint responsibility.

The Court does not usually give possible impairment of congressional power through judicial enhancement of presidential power much weight when it vindicates implied presidential power claims based on means/ends reasoning.[244] Where the courts create implied presidential power absent a relevant statute, the courts can overlook the issue of impairing congressional power entirely.[245] This problem becomes especially acute when the case arises from a tension between the judicial function and presidential power. Thus, in *Nixon*, the Court resolved the case as a clash between the judicial power to adjudicate criminal cases and the President's power to get candid advice, because of the context in which the case arose. It did not consider how the privilege it created might interfere with congressional oversight. In *Nixon v. Fitzgerald*, when the Court immunized the President from damages actions, the majority did not consider the impact on Congress.[246] President Nixon had allegedly fired Fitzgerald for disclosing information about cost

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243 *See* Driesen, *supra* note 158, at 1028–29 (explaining how this collective judgment rationale justifies the judicial posture of extreme deference to legislation absent a violation of constitutional rights).

244 *See* Goldsmith, *supra* note 23, at 120–22 (showing that the *Zivotofsky* Court gave congressional powers short shrift even though Congress acted under them); Prakash, *supra* note 8, at 2, 17 (same).

245 *Cf.* Bradley & Morrison, *supra* note 17, at 416–17 (noting that in separation of powers cases, conduct of one branch generally "implicates" the other's "interests and prerogatives").

246 *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

overruns for a transport plane, information useful for congressional oversight and responsible exercise of its spending authority.[247] Accordingly, Fitzgerald sought damages for violations of statutes protecting communication of information to Congress.[248] Yet, the Court did not consider the impact of its ruling on congressional powers of spending or oversight.[249]

The Court, however, does consider a parallel problem—the possibility of impairment of judicial power. Thus, in *Nixon*, the Court qualified the executive privilege it created in order to safeguard the judicial function of obtaining needed evidence to resolve criminal cases.[250] And in *Clinton v. Jones*, it went further to protect the judicial function, declining to postpone a civil case to relieve the President of litigation-related burdens while in office.[251] The Court gives concerns about interference with the judiciary more weight than concerns about encroachment on Congress in applying *McCulloch*'s means/ends reasoning.

4. Democracy and the Rule of Law

The Court's approach to implied authority erodes congressional power. It does so by facilitating judicial decisions striking down or rewriting acts of Congress. It also does this by delegitimizing Congress while enhancing the President's prestige.[252]

The favoritism toward the President also undermines the rule of law. It shrinks the domain in which policies that Congress enacts create a consistent

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247 *See id.* at 734–37.

248 *See id.* at 785–86 (White, J., dissenting) (explaining that one statute prohibits interference with federal employee's rights to transmit information to Congress and the other criminalizes obstruction of congressional testimony).

249 *Cf. id.* at 786–87 (pointing out that the President's actions interfered with congressional responsibilities served by the statutes underlying the damages action); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 453 (1977) (considering disclosure's impact on public confidence in the political system and therefore upon congressional legislative process and investigative power).

250 *See* United States v. Nixon, 418 U.S. 683, 707–13 (1974) (balancing the need for candid advice to the President against the need for fair adjudication of a criminal case).

251 *See* Clinton v. Jones, 520 U.S. 681, 705–06 (1997) (declining to postpone private damage action against the President).

252 *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (exempting the President from APA review "[o]ut of respect for" his "unique constitutional position").

rule governing exercise of executive authority over time and enlarges the domain in which a President may take an ad hoc approach, doing as he sees fit free from legal strictures.

It follows that the Court's practice undermines the constitutional principle of legislative supremacy. One of us has argued elsewhere that the Framers, eager to avoid monarchy, envisioned a much less powerful President than we have today.[253] Thus, we might understand the modern Court's implied power jurisprudence as an effort to revise the Constitution to fit perceived contemporary needs to empower a President to meet twentieth century demands upon a world power, augmented in recent years by concerns about terrorism.[254]

Professor Pamela Karlan's thesis that the Court harbors "contempt" for Congress suggests a possible explanation for this tendency.[255] There is some evidence of this disdain in the implied powers jurisprudence canvassed here. Karlan herself finds such disdain in the ACA case, *National Federation of Independent Businesses v. Sebelius*.[256] Furthermore, one might read Justice Burger's opinion for the Court in *Chadha* suggesting that the multiple congresses' decision to include legislative vetoes in legislation delegating power to the President "sharpen[s]" the Court's review as disdainfully suggesting that Congress did not consider the legislative veto constitutional, but rather sought, in bad faith, to work around the Constitution.[257] In *Bowsher v. Synar*, the Court expressed doubt that Congress would respect the requirement that it only remove the Comptroller "for cause."[258]

While the Court recognizes that the executive branch actually considers constitutional issues, the Court's recent opinions do not display any awareness that Congress actually considers issues of constitutionality as

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253 *See* Driesen, *supra* note 40, at 73 (explaining that the Framers did not expect the "Chief Magistrate" to "distinctively shape[] the law").

254 *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 32–34 (2012) (suggesting that the courts "largely acquiesced in the rise of the imperial presidency" after *Youngstown* because of Cold War imperatives).

255 *See* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

256 567 U.S. 519 (2012) (upholding the ACA while suggesting that the Commerce Clause does not justify it); *see* Karlan, *supra* note 255, at 47–55.

257 *See* INS v. Chadha, 462 U.S. 919, 944 (1983).

258 *See* Bowsher v. Synar, 478 U.S. 714, 726, 729 (1986) (suggesting that Congress would read provisions authorizing removal for "inefficiency, neglect of duty, or malfeasance" as permitting removal for any actions it "found to be unsatisfactory" (internal quotations omitted)).

well.[259] Congress requires bills to include a statement about the constitutional authority for new legislation,[260] created the Office of Senate Legal Counsel,[261] and charged a Joint Committee on Congressional Operations with informing Congress of case law and other constitutional developments.[262] While the foregoing suggests that the Court may not take congressional views about constitutionality seriously, some commentators have disputed Professor Karlan's disdain claim.[263]

Whether disdain lies behind these rulings or not, granting implied power to the executive is usually more dangerous than granting it to Congress, because the executive branch often acts in secrecy or in other ways that evade judicial review.[264] The secrecy point suggests that almost all congressional exercises of implied powers will remain subject to political constraints, while a significant portion of the President's actions may not.[265]

Furthermore, the logic of grants of implied presidential power may lead to executive branch inferences further expanding presidential power that escape judicial review.[266] Congress is much more poorly positioned to

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259 *Cf.* Boumediene v. Bush, 553 U.S. 723, 738 (2008) (*presuming* that congressmen consider legislation's constitutionality in light of their oath); ANDREW NOLAN, CONG. RESEARCH SERV., R44729, CONSTITUTIONAL AUTHORITY STATEMENTS AND THE POWERS OF CONGRESS: AN OVERVIEW (2019).

260 H.R. Res. 5, 112th Cong. (2011).

261 *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 701, 92 Stat. 1824, 1875.

262 Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 402(a)(2), 84 Stat. 1140, 1187.

263 *See* Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. 1 (2012); Steven G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. FORUM 13 (2012).

264 Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (noting that government officials' actions are often "not subject to judicial scrutiny" while admonishing them to "adhere to the Constitution"); *see, e.g.*, Bradley & Goldsmith, *supra* note 54, at 1222 (the "President's interpretations of international agreements" usually escape judicial review).

265 *See, e.g.*, Bradley & Goldsmith, *supra* note 54, at 1208–09 (contrasting the public approval of treaties in the Senate with the lack of transparency governing executive agreements); *cf.* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (claiming that political accountability mechanisms make a judicial check of a President's illegal conduct through damage actions unnecessary); GINSBURG & HUQ, *supra* note 38, at 193–94 (explaining why elections are inadequate to deter unlawful conduct without checks and balances); GOLDSMITH, *supra* note 254, at 211–12 (noting that "most aspects of most secret operations do not leak," but that a significant amount of secret information does leak out); Driesen, *supra* note 158, at 1052–56 (explaining why political oversight mechanisms only weakly deter unlawful conduct).

266 *See, e.g.*, Goldsmith & Manning, *supra* note 3, at 2291–93 (noting that presidential advisors have relied on implied powers cases and congressional appropriations to justify military action abroad); Goldsmith, *supra* note 23, at 133–45 (predicting that executive branch lawyers will read *Zivotofsky* generously in favor of the President in resolving foreign policy disputes with Congress); Koh, *supra*

identify and exploit potential extensions of grants of implied power because it is a collective body divided into two houses acting in public.

B. *Reasons to Resist the Prima Facie Case*

Although in isolation these arguments look compelling, the cases reveal some possible counterarguments. These arguments stem primarily from federalism, the need for presidential power over foreign affairs and national security, and the principle of judicial supremacy—that the Court should "say what the law is."[267]

1. Judicial Supremacy

The asymmetry raises the question of whether judicial supremacy justifies a more searching review of congressional implied power claims than of presidential implied power claims.[268] Judicial competence concerns point in the opposite direction. A court might be better suited to reviewing the legality of a discrete government action (like declining to sanction a foreign power undermining a whaling treaty) than a broad statutory enactment with myriad implications that a court might have trouble evaluating (like a voting rights law). But this would depend in part on the nature of the constitutional argument and the type of action under review.

Formal constitutional limitations, however, justify assertions of judicial supremacy. As Curtis Bradley and Trevor Morrison have pointed out, the Court will not likely give custom much weight if there are other strong reasons to go against the custom.[269] The same might be said about implied powers more generally, not just custom.

The observation that formal constitutional reasoning may properly displace implied power does not systematically justify the disparate treatment unless the Constitution places more formal limitations on

note 5, at 1309–10 (noting that executive branch attorneys have read *Curtiss-Wright* as establishing a canon of construction favoring reading statutory loopholes broadly to allow executive actions).

267 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

268 *Cf.* Bradley & Morrison, *supra* note 17, at 434 (suggesting that it is common for "the courts to defer . . . to the constitutional judgments of the political *branches*" (emphasis added, plural in the original)).

269 *See id.* at 430 (noting that if the Court finds text or original intent to be clear, it is "less likely . . . to credit historical practice that points in a different direction").

congressional power than on presidential power. But the opposite is the case. The Constitution affords many more express powers to Congress than to the President, and the limitations on powers found in the Constitution apply to the whole government. In addition, the Necessary and Proper Clause's text only authorizes the Congress to augment implied powers.

The Court frequently employs formalism to cabin congressional authority while usually failing to do so in cases of presidential power. The commitment to functionalism in presidential power cases has led the Court to invoke the Jackson framework with Frankfurter glosses, while often neglecting Justice Black's opinion for the *Youngstown* majority. The tendency to give congressional custom no weight and to sometimes resist applying *McCulloch*'s means/ends reasoning to congressional enactments suggests more formalism in adjudicating cases of implied congressional power. *Chadha*, *Bowsher v. Synar*, the line item veto case, and some of the recent federalism cases affirm this tendency.

We doubt that the strength of formal logic in the case law explains the discrepancy, although we cannot defend that suggestion here.[270] We will, however, examine the role of formalism in our case study of indicting a sitting President. And that analysis suggests that the formal weaknesses of congressional power claims and the formal strength of presidential power claims might not explain the observed discrepancies.

One might argue that the paucity of explicit presidential authority in the Constitution requires judicial openness to presidential implied power that is unnecessary with respect to implied congressional power.[271] But that is not necessarily so. Perhaps the paucity of explicit authority suggests that the Constitution limits executive branch authority to avoid tyranny and that executive authority should remain quite limited unless Congress explicitly expands it.[272]

The Necessary and Proper Clause suggests that the judiciary should hesitate to imply powers for the President, because Congress has the power to grant any authority needed to allow the President to carry his powers into

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270 *See generally* Cohen, *supra* note 25, at 388 (suggesting that formalism (like functionalism) is a rhetorical device rather than dictator of results).

271 *See* Bradley & Morrison, *supra* note 17, at 428 (suggesting that greater use of constitutional custom may be required in ascertaining the scope of presidential power because of the sparseness of express constitutional provisions on executive authority and judicial precedent).

272 *Cf.* GINSBURG & HUQ, *supra* note 38, at 144 (characterizing the President's strength in practice and weakness on paper as paradoxical).

execution.[273] By contrast, when the Court declines to recognize implied congressional power, no political remedy exists to correct errors. Hence, the Constitution hardly justifies cabining Congress through the principle of judicial supremacy while declining to do so with respect to the President.

2. Federalism and National Security

Federalism concerns motivate many of the Court's decisions rejecting implied congressional power. *McCulloch* itself flags the federalism concern, expressing the view that issues about the appropriate scope of federal power will continue to arise as long as the Republic endures.[274] At the same time, *McCulloch* authorizes federal exercise of the traditional state power to found a corporation and suspended state authority to even tax federally chartered banks.[275] So, *McCulloch*'s holdings do not support allowing states' rights to trump the Necessary and Proper Clause.[276] When the Court wants to avoid *McCulloch*'s rationale and holdings, it frequently cites its dicta that acknowledge some limitations on federal power, such as the principle that congressional exercises of power be within the "letter and spirit of the Constitution."[277]

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[273] U.S. CONST. art. I, § 8; *see* Schwartz, *supra* note 57, at 593 (describing this clause as authorizing Congress, "[a]t a minimum," to "pass laws necessary and proper to the exercise of implied or inherent powers outside Article I, including those purportedly vested in the President"); Van Alstyne, *supra* note 3, at 793–94 (claiming that the Necessary and Proper Clause gives Congress alone the power to imply powers not "indispensable" to performance of presidential duties under Article II); *see, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 603–04 (1952) (Frankfurter, J., concurring) (explaining that the lack of presidential authority to deal with the Korean crisis does not vest the authority in the President, but rather might suggest a need for Congress to amend the law); *cf.* Calabresi & Prakash, *supra* note 53, at 590–91 (interpreting this clause as authorizing congressional specification of means of law execution but not its ends).

[274] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (opining that "the question respecting the extent of the powers actually granted" in the Constitution "will probably continue to arise" as long as the Republic endures).

[275] *See id.* at 424, 436–37 (declaring that the Court has unanimously concluded that the Constitution permits founding the national bank and forbids the states from taxing it); U.S. Term Limits v. Thornton, 514 U.S. 779, 853 (1995) (Thomas, J., dissenting) (pointing out that *McCulloch* does not support a Tenth Amendment exemption from implied powers).

[276] *See generally* Kaczorowski, *supra* note 2, at 762 (characterizing construction of the Tenth Amendment at the founding as the opposite of today's).

[277] *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529, 555 (2013) (arguing that preclearance requirements are inconsistent with the Constitution's "letter and spirit"); *see also* Lawson & Granger, *supra* note 3, at

Similarly, many of the Supreme Court's cases liberally implying presidential authority arise in the areas of foreign affairs and national security. The insight that the modern Court's solicitude toward federalism and presidential power over foreign affairs and national security influences implied powers cases will not surprise constitutional law scholars.

Our analysis, however, reveals that the asymmetry goes beyond these areas, reaching cases where the Court limits legal accountability mechanisms to free up the executive domestically. That is the common theme not only in cases like *Nixon*[278] and *Fitzgerald*,[279] but also in *Chadha*[280] and *Franklin*.[281] By revealing institutional preferences across subject matter areas, the asymmetry analysis shows that constraints on implied congressional power go beyond federalism cases and grants of implied presidential power go beyond foreign affairs cases.[282]

Furthermore, the recognition of a broad presidential authority over foreign affairs has influenced implied powers cases outside of that area.[283] In *Nixon v. Fitzgerald*, for example, the Court justified creation of a broad immunity from damages actions, in part, by citing the need to protect the President's foreign affairs authority from judicial encroachment.[284] The *Franklin* Court, in turn, cited *Fitzgerald*'s explanation of why it exempted the President from legal accountability instead of providing an adequate

271 (interpreting the word "proper" in "necessary and proper" to imply limits on federal power based on state rights).

278 418 U.S. 683, 713–14 (1974) (applying a balancing test to potentially limit the scope of discoverable material obtainable from the President and his advisors in a criminal case).

279 Nixon v. Fitzgerald, 457 U.S. 731 (1982) (immunizing the President from damage actions).

280 INS v. Chadha, 462 U.S. 919 (1983) (freeing the executive branch from a one-house veto enhancing executive branch political accountability); *see* Koh, *supra* note 5, 1300–01 (explaining that *Chadha* deprived Congress of one of its most important tools for controlling presidential authority over foreign affairs).

281 Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the President's actions are not actions of an agency reviewable under the APA).

282 *Cf.* GINSBURG & HUQ, *supra* note 38, at 144 (noting that by permitting delegation of quasi-legislative authority to the executive while disabling congressional "supervisory authority over the delegated power" through the legislative veto the Court has created an asymmetry); Goldsmith & Manning, *supra* note 3, at 2302–04 (explaining that implied presidential power to complete statutory schemes goes beyond foreign affairs).

283 *Cf.* Driesen, *supra* note 158, at 1038–39, 1039 n.157 (explaining that foreign affairs cases influenced a plurality decision declining to review presidential base closure decisions).

284 *See Fitzgerald*, 457 U.S. at 750 (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)).

justification for its decision to exempt the President from APA review.[285] The Court also stated in *Nixon* that executive privilege should be especially strong in cases implicating foreign affairs and national security.[286] Our analysis shows that the Court's liberality toward implied presidential power has diminished executive branch accountability domestically by creating an executive privilege, presumptively immunizing a President from damage actions, defeating a legislative veto, and exempting executive orders from APA review.

We do not propose to rehash the many issues that the Court's commitments to a strong presidential foreign affairs power and federalism raise. The asymmetry in these contexts, however, raises different analytical points leading to some fresh questions.

This broad look at implied powers and its inclusion of federalism cases reveals a transsubstantive difference in the treatment of constitutional custom that merits analysis. The Court considers custom in the federalism context by giving weight to traditional state functions and a norm of equal treatment of states in the adjudication of federalism cases.[287] But unlike in the separation of powers context, the Court gives no weight to acquiescence. When adjudicating the scope of presidential power, evidence that Congress has acquiesced in a challenged executive practice supports the constitutionality of that practice. But the Court gives no weight to state acquiescence to exercises of federal power in deciding whether to accept implied congressional authority.[288]

In some respects, the argument for treating state acquiescence as constitutionally relevant proves stronger in the federalism context than the argument for making congressional acquiescence a sufficient basis for validating executive practice in the separation of powers context. If no state

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285 *See Franklin*, 505 U.S. at 800–01 (vaguely mentioning separation of powers as a justification for the exemption, whilst citing *Fitzgerald*); *cf.* Driesen, *supra* note 158, at 1051–56 (explaining why *Fitzgerald* does not adequately justify exempting the President from arbitrary and capricious review).

286 *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (suggesting special deference to claim of privilege with respect to "military and diplomatic secrets").

287 *See* Shelby Cty. v. Holder, 570 U.S. 529, 544, 555–57 (2013) (relying on a historic norm of equal treatment of the states to help justify judicial elimination of federal preclearance of new voting rules in select states); Resnik, *supra* note 220 (discussing and criticizing the reliance on historic state functions in Commerce Clause cases).

288 Gonzalez v. Raich, 545 U.S. 1, 29 (2005) (noting that "state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause"); United States v. Darby, 312 U.S. 100, 114 (1941) (noting that the "non-exercise of state power" cannot enlarge federal power).

objects to a federal statute, then this probably indicates a very broad political consensus and normative desirability. Bradley and Morrison have noted that the collective action problems that make it difficult for Congress to take action on anything counsel against reading congressional inaction as assent to a presidential assumption of power.[289] While each state faces comparable collective action problems, the chances of one of them overcoming the "legislative process" inertia is much greater than the chance of the lone federal legislature overcoming all the formidable obstacles to federal legislation. Accordingly, accepting state acquiescence as evidence of constitutionality might be more justified than accepting congressional inaction as acquiescence to an executive branch action.

A full treatment of this issue would consider the value of focusing judicial review on cases involving a real rather than just potential loss of state sovereignty.[290] The Supremacy Clause implies that state resistance cannot strengthen the case against federal legislation.[291] But the converse proposition—that state acquiescence does not strengthen the case for accepting federal power—does not run afoul of any express constitutional limitation.[292] The Court uses awkward formalist reasoning to distinguish which enactments to accept and which to reject within the subject matter areas it considers to be historically under state control.[293] Treating state acquiescence as a factor counseling more adherence to the rational basis test formally governing judicial review of federal laws under the Commerce Clause or even generating limitations on justiciability might lessen the

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289 *See* Bradley & Morrison, *supra* note 17, at 440–48 (cataloguing the impediments to congressional action and arguing that they counsel against treating congressional silence as acquiescence); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (explaining that congressional representatives do not defend Congress's institutional prerogatives as envisioned by Madison, but instead seek to advance partisan interests).

290 *Cf.* Driesen, *Inactivity*, *supra* note 220, at 505 (noting that the statutes at issue in *Lopez* and *Morrison* did not interfere "with any . . . state law or policy").

291 *See Raich*, 545 U.S. at 29 (noting that the Supremacy Clause makes it impossible for state action to "circumscribe Congress' plenary commerce power").

292 *Cf. id.* (claiming that "state acquiescence . . . cannot expand" the Commerce Clause's bounds, because state law cannot "circumscribe" it).

293 *See generally* Cushman, *supra* note 220 (discussing formalism in the Court's Commerce Clause jurisprudence); Driesen, *Economic/Noneconomic Activity*, *supra* note 220, at 369–70 (pointing out that even if the economic/noneconomic distinction is less malleable than commentators think, it lacks a convincing justification and establishes "traps for . . . unwary" judges and litigants); Lessig, *supra* note 220, at 205 (finding the distinction between the Court's formal categories of economic and noneconomic activity unclear).

potential for arbitrary results.[294] At any rate, the asymmetry analysis reveals an intriguing question about whether state acquiescence should receive short shrift, while congressional acquiescence receives attention in separation of powers cases.

Just as concern about preserving state power provides a reason to limit implied congressional power, concerns about preserving congressional power might justify limiting implied presidential authority, as Justice Douglas's *Youngstown* concurrence pointed out. The asymmetry suggests that the Court gives more weight to concerns about federal erosion of state authority than to concerns about presidential authority over national security and foreign affairs eroding congressional authority.

This insight raises the question of whether the Court should give federalism concerns more weight than concerns about eroding congressional authority over national security and foreign affairs. Does presidential power over national security and foreign affairs pose a greater threat to liberty and democracy than growth of federal power at the expense of states?

The Framers and ratifiers of the Constitution sought to avoid creation of a monarchy. They sought to cabin presidential power and create checks and balances in part because they expected that someday an ambitious autocrat might get elected and try to subdue the Republic, as has happened throughout history. In recent years, a number of elected leaders have destroyed democracies, highlighting the validity of the founding generation's concern.[295] National security threats, real or imagined, provide a convenient excuse for amassing power, and have historically played a role in undoing democracy.[296] Weakening checks on the presidential foreign

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294 *Cf.* United States v. Morrison, 529 U.S. 598, 637–39 (2000) (Souter, J., dissenting) (suggesting that the Court adjust its standard of review for legislation passed under the Commerce Clause based, in part, on federalism custom); Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (finding an issue not ripe until both branches of government have asserted their constitutional authority).

295 *See* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (Armin von Bogdandy & Pál Sonnevend eds., 2015) (detailing democratic decline in Hungary and Romania); CONSTITUTIONAL DEMOCRACY IN CRISIS? 3 (Mark A. Graber et al. eds., 2018) (noting that several constitutional democracies are now failing, while others are backsliding or holding steady).

296 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642–43, 650–52 (1952) (Jackson, J., concurring) (arguing that emergency powers provide a "pretext for usurpation" based in part on Hitler's abuse of emergency powers to suspend the Weimar Constitution); Steven Levitsky & Daniel

affairs power may work well with Presidents acting in good faith, but might prove disastrous in other cases.[297]

Too much federal power over states constitutes a much weaker threat to democracy and liberty. We have seen stable democracies in both unitary and federal states around the world. The Framers, in fact, saw checks and balances as the key to preserving liberty and democracy, not federalism.

While federalism can strengthen democracy by increasing state capacity to resist autocracy, it can also help undermine democracy.[298] The anti-commandeering principle and constraints on coercive use of federal spending played a role in protecting states from President Trump's attempt to force them to round up and deport immigrants.[299] Elected leaders have sometimes created public support for autocracy by demonizing and mistreating immigrants or minorities, so the role of federalism principles in limiting targeting of immigrants for especially vigorous law enforcement arguably supports the argument that federalism principles can play a role in strengthening democracy.[300] On the other hand, federalism principles can constrain congressional efforts to protect democracies from state level efforts to tilt elections through gerrymandering and restrictions on the

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Ziblatt, *Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2019), https://www.nytimes.com/2019/01/12/opinion/sunday/trump-national-emergency-wall.html [https://perma.cc/A6CT-LCH7] (discussing numerous examples of leaders establishing dictatorships in response to real or imagined national security threats).

297 *See Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring) (recognizing that the "generative force" of failing to cabin uses of disinterested authority can lead to "the accretion of dangerous power"); GINSBURG & HUQ, *supra* note 38, at 223–24 (suggesting that the possibility of a "reckless President" seeking to "take over the system" counsels against accepting centralized presidential administration); Driesen, *supra* note 158, at 1051 (noting that the President's status as an elected official may motivate him to disobey laws to avoid the difficulties of changing laws through bicameralism and presentment); *cf.* SHANE, *supra* note 4, at 58–81 (showing that unilateral good-faith presidential policy choices have sometimes proven disastrous).

298 *See* GINSBURG & HUQ, *supra* note 38, at 149 (describing the question of whether federalism would aid or hinder authoritarianism as unknowable before the fact).

299 *See* Cty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1215–16 (N.D. Cal. 2017), *aff'd*, City and Cty. of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (holding that President Trump's sanctuary cities executive order violates the Tenth Amendment anti-commandeering principle and the Spending Clause's prohibition of using the spending power to coerce states).

300 *See, e.g.*, Opinion, *In Poland, the Limits of Solidarity*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/opinion/gdansk-mayor-murder.html [https://perma.cc/5Z5Z-BWHH] (mentioning the anti-immigrant stance of the hatred-spreading government of Jaroslaw Kaczynski in Poland).

franchise.[301] Tilting of elections through such devices has played a big role in entrenching elected leaders in power, thereby eroding or curtailing democracy.[302]

On balance, restraint of executive power, especially over national security, constitutes a more important aid to democracy and liberty than states' rights. But both protection of Congress and of states can play a role in preserving liberty and preventing autocracy.

We do not wish to overstate the threat that the Court's asymmetric implied power jurisprudence poses to democracy. We do not mean to suggest that Supreme Court decisions constitute the most important developments threatening democracy. Nor do we mean to suggest that the Court's implied power decisions constitute more important threats to democracy than its rejection of limits on the use of money to influence political outcomes or its failure to restrain partisan gerrymandering.[303] Nevertheless, an implied powers jurisprudence that favors unilateral presidential power can play a role in undermining democracy.[304]

IV. ASYMMETRIC IMPLIED POWER AND PRESIDENTIAL IMMUNITY FROM CRIMINAL PROSECUTION

The Russian intervention in the 2016 election has led observers to ask whether President Trump conspired with Russian representatives or

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301 *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2672 (2015) (stating that a purpose of the Election Clause was to prevent a faction from "entrench[ing] themselves" through gerrymandering and other devices); *cf.* GINSBURG & HUQ, *supra* note 38, at 160 (noting that some states and localities have less competitive elections because of "antidemocratic measures" such as gerrymandering and restrictions on voting targeting "minority voters").

302 *See, e.g.*, Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 n.11 (2018) (discussing the role of gerrymandering in undermining Hungarian democracy). *See generally* GINSBURG & HUQ, *supra* note 38, at 113–19 (explaining the key role of limiting political competition in undermining democracy).

303 *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that all partisan gerrymandering claims constitute nonjusticiable political questions); *cf.* Karlan, *supra* note 255, at 34–35 (suggesting that *Citizens United* led to an explosion of anonymous political spending undermining faith in the democratic process).

304 *See* Myers v. United States, 272 U.S. 52, 179 (1926) (McReynolds, J., dissenting) (explaining that an unlimited power of removal can become "an instrument of the worst oppression and most vindictive vengeance" (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1539 (1833))).

committed some other crime. The possibility of criminal conduct leads to the question of whether the special counsel can indict a sitting President. This question has arisen when prosecutors have suspected other Presidents of misconduct, and several memoranda from the DOJ's Office of Legal Counsel (OLC) and scholarly articles address it.[305]

This Part shows that the analysis offered in this Article helps illuminate the presidential indictment issue. It also uses the analysis of the indictment issue to explain why we doubt that stronger formalist arguments against congressional power explain the tilt toward presidential power in the implied power jurisprudence.

The definition of implied power shows that the question of whether the President enjoys immunity from indictment is an implied power question. The power to avoid indictment is not an exercise of executive power or any other listed presidential power. Instead, as the OLC memoranda make clear, the argument for presidential immunity applies *McCulloch*'s means/ends reasoning to presidential power. That is, exemption from indictment for conduct while in office (or postponement of an indictment) would be a useful means, the argument runs, toward the legitimate end of enabling the President to carry out his responsibilities without distraction.[306] The conclusion that a presidential immunity also constitutes an implied power comports with the scholarship on *Nixon*, which characterizes the *Nixon*

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[305] *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 237–38 (2000) [hereinafter OLC Memo] (finding that implied powers precedent supports the conclusion that the DOJ should not indict a sitting President); Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel, Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973); Akhil Reed Amar, *On Prosecuting Presidents*, 27 HOFSTRA L. REV. 671 (1999); Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11 (1997); Susan Low Bloch, *Foreword*, 2 NEXUS 7 (1997); Jay S. Bybee, *Who Executes the Executioner?: Impeachment, Indictment and Other Alternatives to Assassination*, 2 NEXUS 53 (1997); Erwin Chemerinsky, *Justice Delayed Is Justice Denied*, 2 NEXUS 24 (1997); Benjamin G. Davis, *United or Untied: On Confronting Presidential Criminality in the Savage Wars of Peace*, 84 TENN. L. REV. 671 (2017); Eric M. Freedman, *Achieving Political Adulthood*, 2 NEXUS 67 (1997); Scott W. Howe, *The Prospect of a President Incarcerated*, 2 NEXUS 86 (1997); Keith King, *Indicting the President: Can a Sitting President Be Criminally Indicted?*, 30 SW. U. L. REV. 417 (2001); Laurence Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018, 11:58 AM), https://www.lawfareblog.com/yes-constitution-allows-indictment-president [https://perma.cc/YJW8-K5XT].

[306] *See* OLC Memo, *supra* note 305, at 236–38 (identifying the argument that indictment would interfere with the President carrying out his duties as the basis for an earlier OLC conclusion that the DOJ may not indict the President and endorsing that conclusion).

Court's decision to create a presidential privilege as an implied power decision.[307] Indeed, creation of any indefeasible implied presidential power immunizes the President from restrictions and thus judicial orders that might otherwise apply.[308]

The Court's tendency to ignore legislation as constitutional custom will matter to the resolution of such an issue if the Court ever faces it. Congress has passed numerous criminal statutes since the dawn of the Republic making the President liable for criminal conduct and leaving indictment timing subject to prosecutorial discretion, except for statutes of limitation. Congress does not usually accomplish this by naming the President but simply by forbidding any person not exempted from engaging in proscribed conduct.[309] The cases ignoring general statutory language would support ignoring the criminal law statutes or misconstruing statutes justifying indictment. The Court might also fail to count these statutes as indicating any intent or establishing any custom with respect to this issue, because it rarely gives weight to legislation in resolving separation of powers questions. In this case, immunity proponents would argue that Congress did not think about the problem of applying criminal statutes to Presidents.

Issues of respect for Congress might influence the reception of such an argument. The Court might assume that Congress legislated against a background assumption that the President is not above the law, since Congress did not exempt Presidents from timely prosecution.[310] Or the Court could treat a lack of specific evidence that the legislative body

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307 *See* Van Alstyne, *supra* note 3, at 794 (characterizing executive privilege as "[t]he most obvious current illustration of an implied executive power").

308 *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083, 2095 (2015) (immunizing the executive branch from judicial orders to list Israel as the place of birth for passports of Americans living in Jerusalem).

309 *See, e.g.*, Daniel J. Hemel & Eric A. Posner, *The President Is Still Subject to Generally Applicable Criminal Laws: A Response to Barr and Goldsmith*, LAWFARE BLOG (Jan. 8, 2019, 10:00 AM), https://www.lawfareblog.com/president-still-subject-generally-applicable-criminal-laws-response-barr-and-goldsmith [https://perma.cc/4EVB-RR8N] (noting that under "ordinary principles of statutory construction" the obstruction of justice statute applies to the President because it establishes criminal liability for "whoever" obstructs justice); *cf.* Jack Goldsmith, *A Qualified Defense of the Barr Memo: Part I*, LAWFARE BLOG (Jan. 4, 2019, 9:20 AM), https://www.lawfareblog.com/qualified-defense-barr-memo-part-i [https://perma.cc/7W3X-S4G4] (reading William Barr's memo objecting to prosecution of President Trump for obstruction of justice as in keeping with a narrower plain statement rule than one exempting Trump from all generally applicable criminal law).

310 *Cf.* Medellín v. Texas, 552 U.S. 491, 527–28 (2008) (assuming that Congress understood that the treaties creating ICJ jurisdiction were not self-executing).

considered the President's specialness as evidence of a lack of competence, or at least as inviting the judiciary to ignore legislation's plain meaning or the custom of prosecutorial control over timing. The tendency in the cases to discount general statutes establishing presidential accountability suggests that the Court might well reject the relevance of statutory custom.

Our analysis would predict that regardless of how the Court came out, the Justices would pay more attention to executive branch custom. The executive branch has brought criminal charges against numerous federal officials while in office over the years. The debate may center on whether this custom (and precedent stemming from it) should govern the issue of the President's amenability to indictment.

Whether or not the Court applies *Youngstown* directly, our normative suggestions to respond to the tendency not to use congressional intent to control cases apply to this case.[311] Our suggestion that the Court preserve the Jackson framework's virtues no matter what role it plays in a case suggests that no matter what the Court does, it should specifically preserve the right of congressional revision.[312]

If the Court takes a formalist approach to presidential power in keeping with Black, it should allow Congress to keep control over the policy balancing in the future. The Black-like formalist analysis would indicate that the Constitution does not mention any immunity from indictment while in office, so the President has no power to resist an indictment or demand a stay until he leaves office.[313] Congress could amend such a ruling with a majority vote under its power to enact legislation necessary and proper to the execution of presidential power.[314]

On the other hand, Congress could only amend a judicial ruling that a President has a right to postpone or resist indictment absent specific language targeting the President by overcoming a potential veto. The Court should consider whether it should risk freezing its quasi-legislative judgment in place, even if a majority of Congress at some point in history comes to disagree with the Justices' policy judgment.

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311 In presidential accountability cases arising from judicial proceedings, the Court has not applied the *Youngstown* framework. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982); United States v. Nixon, 418 U.S. 683 (1974).

312 *Contra* Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157 n.65 (1998) (opining that Congress may not make a President criminally liable).

313 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (Black, J.) (declining to find a power to seize steel mills absent "express constitutional language" authorizing it).

314 *Cf. id.* (urging Congress to immunize the President from indictment while in office).

A case adjudicating indictment of a sitting President would also implicate issues of judicial supremacy. The Court could modestly honor the congressional decisions not to exempt the President from general criminal statutes and to leave timing decisions to prosecutorial discretion (save for the statutes of limitations). This would honor political settlement, as Presidents have long acquiesced in a certain amount of prosecutorial independence and in the many statutes that contain no presidential exemptions.

The Court, however, might well ignore statutes and customs by addressing the case on formalist grounds. We cannot resolve the formalist arguments here, but some examination of what is going on formally will suggest that the asymmetry creates a tendency to apply formalist limitations to limit Congress while using functionalism to empower the President.[315]

A zealous proponent of either exemption or postponement might argue that the Impeachment Clauses provide a "finely wrought and exhaustively considered[] procedure" for remedying presidential misconduct and therefore no authority exists to indict a President while in office.[316] On this reading, impeachment, like bicameralism and presentment, constitutes the constitutional method for addressing the matter at hand.

But an asymmetry in formalist constitutional adjudication defeats this argument and so the leading memoranda supporting an exemption do not squarely rely on it.[317] Yes, the Court has held that bicameralism and presentment are exclusive procedures. But that was in a case cabining

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315 *See* Cohen, *supra* note 25, at 393–94 (noting that because of the paucity of express presidential power in the Constitution, functionalism expands presidential power); *cf.* Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 69 S. CAL. L. REV. 1083, 1084 (1987) (characterizing the Burger Court's separation of powers jurisprudence as originalist in evaluating congressional actions but non-originalist in evaluating presidential action).

316 *See* U.S. CONST. art. I, §§ 2–3; *cf.* INS v. Chadha, 462 U.S. 919, 951 (1983) (characterizing bicameralism and presentment as a "finely wrought and exhaustively considered[] procedure" for passing legislation). Article I, Section 3 makes it clear that impeachment does not create a criminal penalty, but that the government can criminally punish an official removed from office. This clause does not say anything about whether the government may indict a person prior to or instead of impeachment. *See* U.S. CONST. art. I, § 3.

317 *See, e.g.*, OLC Memo, *supra* note 305, at 233–36, 244 (suggesting that the Impeachment Clause's mention of criminal liability only forecloses double jeopardy claims, but advancing other arguments based on history and structure). *But see* Kavanaugh, *supra* note 312, at 2159–61 (suggesting that the Impeachment Clause implicitly precludes indictment of a sitting President).

Congress. In the area of remedying executive branch misconduct, the Court never treats impeachment as an exclusive remedy, in spite of its detailed elaboration in four constitutional clauses.[318] Instead, it has held that the President or other officials may remove officials, but that the body explicitly vested with removal authority in the Constitution—the Senate—may never remove officials except via impeachment.[319] One of us has argued that the Impeachment Clauses and the pre-enactment history supports the now abandoned idea that the Senate may control removal of officers of the United States.[320] The Senate role that the Framers and ratifiers contemplated, however, eroded early on and the Court eliminated it early in the twentieth century as the era of congressional predominance drew to a close and presidentialism began its ascent.[321] Thus, we see in the background to the presidential indictment question some evidence of asymmetry as to when the Court invokes formalism.[322]

Judicial favoritism toward the President in when the Court employs formalism implicates two other dimensions of the critique, the recognition that judicial policy views, not congressional intent or even-handed construction of constitutional texts, likely govern implied power cases. A ruling in such a case may reflect a quasi-legislative judgment about whether allowing criminal prosecution of a sitting President is wise.

The possibility of the Court creating a presidential immunity from prosecution while in office connects with concerns about the Court's presidential tilt undermining democracy and the rule of law. Allowing a President's criminal conduct to persist unchecked while in office risks the establishment of an autocracy sooner or later and we believe that the Court should place heavy weight on that. Many of the extant materials on

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318 *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7; *id.* art. II, § 4.

319 *See* Myers v. United States, 272 U.S. 52, 107, 162–64 (1926) (invalidating a requirement of Senate approval for removal of the Postmaster General).

320 *See* Driesen, *supra* note 40, at 89–91, 97–103, 114–15 (explaining the basis for this conclusion).

321 *See* Raines v. Byrd, 521 U.S. 811, 826–28 (1997) (noting that Congress required Senate approval of removal of cabinet officers from 1867 until 1887, but that the Supreme Court rejected the requirement of Senate approval in *Myers*); McAllister v. United States, 141 U.S. 174, 188–89 (1891) (recognizing that Congress may forbid the President from removing territorial judges); United States v. Perkins, 116 U.S. 483, 485 (1886) (affirming that Congress may place the authority to remove inferior officers in a department); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) (affirming that Congress need not authorize federal removal of a federal officer).

322 *Cf.* Chemerinsky, *supra* note 315, at 1093 (discussing the Court's rejection of formalist arguments against unilateral executive agreements).

indictment of a sitting President implicitly rely on Justice Frankfurter's good faith assumption and focus on the problem of an indictment distracting a President honestly engaged in pursuing public objectives from fulfilling the office's duties.[323] The cases do not grapple with the problem of a President pursuing private interests or those of a foreign power, although the Framers were very concerned about this problem.[324] Supporting a claim that autocracy concerns should play a large role in cases about implied presidential power in spite of competing concerns requires a book and one of us is writing one. The foregoing analysis suggests that the Court's policy views will determine the outcome.

CONCLUSION

The modern Supreme Court's implied power jurisprudence usually favors enhancing presidential power at the expense of Congress. We can view the Court's implied power jurisprudence's support for presidential over congressional power as an effort to adapt the Constitution to the needs of the last century, as the United States emerged as a global power, constructed a broad regulatory state, and then faced the issue of terrorism. Time will tell if the Court will adapt its reconstruction of the Constitution to the pressing twenty-first century need to resist authoritarian government. Doing so might require a return to the foundational principles undergirding the effort to establish a lone Republic in a sea of monarchy.[325]

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[323] *See, e.g.*, OLC Memo, *supra* note 305, at 246 (exempting the President from indictment while in office based on the need to avoid interference with presidential discharge of his duties, thereby assuming a President is discharging his duties prior to indictment).

[324] *See* U.S. CONST. art. I, § 9, cl. 8; *id.* art. II, § 1, cl. 7. *See generally* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* (2014).

[325] *See* GINSBURG & HUQ, *supra* note 38, at 177 (noting that monarchy rather than democracy remained the norm in Europe "until well into the nineteenth and early twentieth centuries").