

REVISITING YOUNGSTOWN: AGAINST THE VIEW THAT JACKSON'S CONCURRENCE RESOLVES THE RELATION BETWEEN CONGRESS AND THE COMMANDER-IN-CHIEF

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*Virtually all legal analysts believe that the tripartite framework from Justice Jackson's *Youngstown Sheet & Tube Co. v. Sawyer* concurrence provides the correct framework for resolving contests between the U.S. Congress and the president when he acts pursuant to his commander-in-chief powers. This Article identifies a core assumption of the tripartite framework that, up to now, has not been recognized and that consequently has not been adequately analyzed or justified. While Jackson's framework importantly recognizes that Congress's regulatory powers may overlap with the president's commander-in-chief powers, the framework assumes that, as regards this overlap, lawful congressional enactments categorically trump the commander-in-chief's contrary desires. After explaining that this assumption of "categorical congressional supremacy" (CCS) is a mechanism for sorting out conflicts that arise when two governmental institutions share overlapping power, the Article identifies five additional "conflict-sorting" rules that are found in other contexts in American law where governmental institutions have overlapping powers. With the understanding that Jackson's concurrence in effect made a choice among several candidate conflict-sorting principles, the Article then explains why his opinion did not adequately justify the particular conflict-sorting principle it adopted.*

To be clear, the Article does not conclude that CCS is the wrong conflict-sorting principle, but instead makes the negative argument that the case has not yet been made as to what sorting principle should resolve conflicts between Congress and the commander-in-chief. The Article closes by identifying the type of analysis that has been relied on to select conflict-sorting principles in other contexts. The Article suggests that the same institution-sensitive, context-

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specific analysis should be used to decide whether CCS should be formally adopted, modified, or rejected.

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INTRODUCTION

Alongside the furious contemporary debate concerning such matters as the constitutionality of President Bush's secret domestic spying program and the special military tribunals in Guantanamo Bay, there is one matter about which virtually all have agreed: that the tripartite framework from Justice Jackson's magisterial concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹ provides the appropriate frame for resolving contests between the U.S. Congress (when it acts pursuant to its powers to make rules and regulations for the land and naval forces, for instance) and the president when he claims to be acting pursuant to his commander-in-chief powers. This Article identifies a core assumption of Jackson's tripartite framework that, up to now, has not been recognized and that consequently has not been adequately analyzed or justified. The Article then identifies the type of analysis that should be undertaken to determine whether the assumption should be accepted, modified, or rejected.

1. 343 U.S. 579 (1952) (Jackson, J., concurring).

The hidden assumption is the backbone of the concurrence's second and third categories, and is central to the way in which Jackson's tripartite framework sorts conflicts between Congress's powers and the president's commander-in-chief powers. It is best seen by first briefly reviewing *Youngstown's* facts and the concurrence's three categories. The case asked whether President Truman had the power to order the seizure of steel mills to ensure continued steel production during the Korean War, notwithstanding the absence of statutory authorization for him to do so. In his concurrence, Jackson famously propounded a tripartite framework for analyzing the constitutionality of presidential actions. Category one concerns circumstances "[w]hen the President acts pursuant to an express or implied authorization of Congress," in which case the president's "authority is at its maximum . . ."² Category two refers to situations in which the "President acts in absence of either a congressional grant or denial of authority" and the president "can only rely upon his own independent powers." This, according to Jackson, is a "zone of twilight in which he and Congress may have concurrent authority . . ."³ Category three embraces situations "[w]hen the President takes measures incompatible with the expressed or implied will of Congress," which he can constitutionally do, according to Jackson, only if he can "rely . . . upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁴ Though this canonical language describing category three is admittedly opaque, Justice Jackson more clearly described category three later in his concurrence when he stated that Truman's seizure of the steel mills

can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is *within his domain and beyond control by Congress*.⁵

Categories two and three are themselves the product of three assumptions, the third of which is this Article's target.⁶ The first assumption is that the U.S. Constitution directly grants the president some

2. *Id.* at 635.

3. *Id.* at 637.

4. *Id.*

5. *Id.* at 640 (emphasis added).

6. A work in progress focuses considerable attention to the first two assumptions. See Mark D. Rosen, *Congress and the Commander in Chief: The "Coordinacy" Theory* (manuscript, on file with the *UCLA Law Review*). The work in progress defends both assumptions, and, in so doing, defends the second against some contemporary critics.

powers to act that exist without any need for Congress to do anything and are thus antecedent to congressional action. This is what Jackson meant by the president's "independent powers." The second assumption is that some portion of these antecedent presidential powers overlaps with congressional powers. This is what the concurrence's reference to "concurrent authority" means. The third constituting assumption—the crucial assumption to which this Article is directed—is that wherever congressional power overlaps with antecedent presidential powers, congressional action categorically trumps.

The third assumption has escaped attention up to now because, unlike the first two assumptions, it is not explicitly stated in Jackson's concurrence. But this third assumption, what I call "categorical congressional supremacy" (CCS), pervades categories two and three. To see it, observe that the concurrence recognizes the possibility of "concurrent" power between the president and Congress, but note that categories two and three permit the president to act pursuant to his antecedent constitutional powers only when Congress has not acted pursuant to its overlapping constitutional powers. Category two allows the president to act when he has independent constitutional power to do so and Congress has not acted. Category three allows the president to undertake act "X" pursuant to his independent constitutional power notwithstanding congressional action disallowing act "X," but only if the congressional action exceeds Congress's constitutional power. This is what the concurrence's reference to "within [the president's] domain and beyond control by Congress" means.

In other words, according to the tripartite framework, where the president has preexisting constitutional powers that overlap with Congress's powers and Congress regulates pursuant to its constitutional powers, the president is categorically bound to follow what Congress lays down and can no longer act pursuant to what his preexisting powers would have otherwise authorized him to do. It is in this sense that Jackson's framework embraces the assumption of CCS: Congress is supreme in respect of all powers that are jointly shared by Congress and the president. Thus, CCS functions as a rule under which certain congressional actions trump presidential actions.

While the Constitution grants the president many independent powers,⁷ this Article focuses on the tripartite framework's application to the

7. For example, the U.S. Constitution grants power to the president to issue pardons, to require that principal officers of executive departments deliver opinions relating to the duties of their respective offices, and to appoint ambassadors. See U.S. CONST. art. II, § 2.

commander-in-chief powers. To see how the framework's CCS assumption plays out in relation to Congress and the president's commander-in-chief powers, consider the controversy concerning the National Security Agency's (NSA) secret electronic surveillance program, in which President Bush authorized the NSA to intercept electronic communications without first obtaining the judicial approval required by the Foreign Intelligence Surveillance Act (FISA). Fourteen academics and former government officials, from across a surprisingly broad swath of the political spectrum, wrote a letter to Congress propounding an argument that tracks the three assumptions identified above. Consistent with the first assumption that the president has independent powers, the letter did "not dispute that, absent congressional action, the President might have inherent constitutional authority to collect 'signals intelligence' about the enemy" via domestic surveillance. Consistent with the second assumption of overlapping governmental authority, the letter then argued that "Congress plainly ha[d] authority to regulate domestic wiretapping by federal agencies" by means of FISA. Citing only to Jackson's *Youngstown* concurrence, the letter then quickly concluded that the president accordingly "must follow that dictate"⁸ because "[w]here Congress has . . . regulated, the President can act in contravention of statute only if his authority is *exclusive* . . ."⁹ The third assumption of CCS could not have been clearer.

This Article primarily makes the negative point that Jackson's concurrence does not adequately justify its reliance upon the CCS assumption as a conflict-sorting rule. The first step in discerning the concurring opinion's deficiency in this respect is recognizing that there are alternatives. This can be seen by looking elsewhere in American constitutional law. Functionally, the CCS rule serves the role of sorting out conflicts where more than one governing entity has authority over a given matter. Such circumstances of overlapping governmental authority regularly arise because American law frequently (if not typically) distributes governmental authority between or among multiple government entities. For example, even though the Constitution grants Congress the power to regulate interstate commerce, states also may regulate interstate commerce. Similarly, states have the power to regulate so as to enforce equal protection even as Congress has the power to do the same under section 5 of the Fourteenth Amendment. Of course, overlapping jurisdiction between

8. Beth Nolan et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS, Feb. 9, 2006, available at <http://www.nybooks.com/articles/18650>.

9. *Id.*

Congress and the states creates the possibility of conflict in the event that the two governmental entities enact laws that are inconsistent. It so happens that the Constitution itself provides a trumping rule for conflicts that can arise as a result of overlapping federal and state regulatory jurisdiction: the Supremacy Clause declares that federal law is categorically supreme.¹⁰

The Supremacy Clause's provision of categorical federal supremacy is structurally akin to Jackson's assumption that Congress is categorically supreme in relation to the president, in that both treat the actions of one governmental entity as categorically trumping the actions of another entity. Categorical trumping rules are not, however, the only method found in constitutional law to sort out conflicts among governmental bodies with overlapping authority. Sometimes constitutional law does not provide any principle to decide between or among governmental bodies that have overlapping jurisdiction. To illustrate, states have significant areas of overlapping regulatory jurisdiction, meaning that two or more states frequently can regulate a single person, transaction, or occurrence.¹¹ Contemporary constitutional doctrine does not provide a principle for determining which state has the power to regulate.¹² Conflict instead is resolved by means of subconstitutional legal principles (the body of law known as "conflicts of law"), as well as political negotiation within Congress (leading to federal statutes) and among states (leading to compacts and model uniform laws).

There are yet other possible conflict-sorting rules that this Article canvasses.¹³ The understanding that there are several candidate principles for resolving conflicts between the president and Congress serves as a lens for discerning this Article's main point: that Jackson's concurrence did not adequately justify the principle it adopted. Further, the recognition that the Constitution explicitly provides one constitutional trumping principle (the Supremacy Clause)¹⁴ brings into stark relief the fact that the Constitution itself does not provide a principle for sorting out conflicts between Congress and the president's commander-in-chief powers. These

10. See U.S. CONST. art. VI, cl. 2.

11. See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 946–55 (2002).

12. This was not always the case. See *id.* at 961–62.

13. See *infra* Part II.

14. There may well be others. The Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, which mandates that one state give "full faith and credit" to the "public acts" of other states could be another. In parts of the early twentieth century, it indeed was construed in this manner. See *infra* Part II.

two understandings—that there are several possible conflict-sorting principles and that the Constitution itself does not identify which one applies to conflicts between Congress's powers and the president's commander-in-chief powers—together suggest the type of considerations that should guide the choice among the candidate sorting principles.¹⁵

One might object that whether or not the CCS assumption has been adequately justified, the Article's argument is beside the point because it is inconsistent with settled law. After all, Justice Jackson's *Youngstown* concurrence is hoary precedent, and footnote twenty-three of the recent *Hamdan v. Rumsfeld*¹⁶ decision cited to the *Youngstown* concurrence and asserted that “[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”¹⁷

The Article offers two rejoinders. The first and main response is that an inadequately considered proposition should not be treated as settled law even if the Justice or Justices who authored the proposition intend it to be a settled answer. Second, the Article shows that Jackson's concurrence is best interpreted as not having definitively resolved the relationship between Congress's powers and the president's commander-in-chief powers.¹⁸ The Article argues that the widely held view that the concurrence provides the legal framework for resolving conflicts between Congress and the commander-in-chief is a misreading—or, at the least, an overly broad reading—of the opinion. The Article shows that to the extent that Jackson's concurrence analyzed the relation between Congress and the commander-in-chief, Jackson did not rely on the tripartite framework in the mechanical manner that today's disputants do. More than this, Jackson's concurrence contains inconsistent musings concerning the degree to which Congress can regulate matters that fall within the president's commander-in-chief powers.

For these reasons, Jackson's concurrence, at most, contains dicta on the relationship between Congress's powers and the president's commander-in-chief powers, and is best read as not offering guidance on how conflicts between Congress and the commander-in-chief should be resolved. Either way, it is a mistake to read Jackson's opinion as having

15. See *infra* Conclusion.

16. 126 S. Ct. 2749 (2006).

17. *Id.* at 2774 n.23.

18. See *infra* Part III.

provided a firm, well-considered resolution to conflicts that may arise between Congress and the commander-in-chief. And it would be unfortunate to continue to view the concurrence as if it answered questions to which its analysis was not directed, for, as the Article later suggests, determining the parameters of the relationship between Congress and the commander-in-chief is best done by a form of comparative institutional analysis that, while not inconsistent with Jackson's opinion, was not performed in his concurrence.¹⁹

The new understanding of the limits of the Jackson concurrence propounded in this Article has implications for footnote twenty-three of *Hamdan*. Although the *Hamdan* majority opinion relied upon Jackson's concurrence, and in so doing endorsed the CCS assumption, it did so without critical thought, on the assumption that it was merely confirming what everyone already knew to be correct. Indeed, as the *Hamdan* opinion noted, the U.S. government did not even challenge the tripartite framework's applicability during the *Hamdan* litigation.²⁰ For these reasons, *Hamdan*'s cursory affirmation of the Jackson concurrence should not foreclose the full analysis that ought to precede the CCS assumption's formal adoption, modification, or rejection.²¹

This Article's argument unfolds in four parts. Part I shows the pervasiveness of the CCS assumption across both the government and the scholarly community. Part II shows that the CCS assumption is one of several possible conflict-sorting principles. Recognizing this range of conflict-sorting principles, Part III initially explains why Jackson's *Youngstown* concurrence did not adequately defend the application of CCS to resolve conflicts between Congress's powers and the president's commander-in-chief powers. Part III then responds to the possible objection that the CCS assumption nonetheless is deeply embedded in our case law and is thus a settled legal principle. The Article closes by suggesting the type of analysis that is properly utilized to choose which of

19. See *infra* Conclusion.

20. See *infra* Conclusion.

21. Although footnote twenty-three's perfunctory discussion may suggest that it was only dicta, this is not so. After the majority opinion determined that the military commissions established in Guantanamo Bay did not comply with statutory requirements, the Court necessarily had to consider the issue that was addressed in footnote twenty-three of whether the president had the power to disregard the statute and establish the tribunals. Though the majority opinion gave short shrift to the question, footnote twenty-three was logically necessary to the Court's ultimate holding that President Bush was without authority to establish the military tribunals in question, and thus, it would not be correct to describe footnote twenty-three as mere dicta.

the possible conflict-sorting principles should apply to contests between Congress and the commander-in-chief.

I. THE COMMON WISDOM

The tripartite framework that appears in Justice Jackson's *Youngstown* concurrence, and its implicit assumption of CCS, have become the widely accepted approach to analyzing the scope of the president's power to undertake act "X" where Congress either has been silent or has legislated that act "X" not be done.²² Indeed, Jackson's concurrence and its accompanying assumption of CCS have pervaded the contemporary debate concerning the constitutionality of the most controversial pieces of the Bush Administration's self-proclaimed war on terrorism. First, consider the controversy concerning the constitutionality of the NSA's secret program to intercept international communications into and out of the United States of persons thought to be linked to Al Qaeda or related terrorist organizations. FISA authorizes electronic surveillance upon specified showings²³ and requires approval by a special court that FISA created.²⁴ The NSA program did not comply with FISA's requirements because, among other things, the NSA collected electronic surveillance without first obtaining (or, much less, even requesting) court approval.²⁵

22. The reliance upon the tripartite framework is not undermined by the *Dames & Moore v. Regan* decision, in which the U.S. Supreme Court adopted the *Youngstown Sheet & Tube Co. v. Sawyer* concurrence's tripartite framework, but observed that "it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition." 453 U.S. 654, 669 (1981). The softening of the distinctions between the three categories does not affect the assumption that the U.S. Congress's preferences trump when they both fall within Congress's powers and conflict with the commander-in-chief's contrary desires. Indeed, as described in this Part, the categorical congressional supremacy (CCS) assumption has played a central role in contemporary debates concerning the constitutionality of several of the Bush Administration's antiterrorism policies.

23. See 50 U.S.C. §§ 1803–1806 (2000). The Foreign Intelligence Surveillance Act (FISA) requires that the attorney general approve any application to conduct "electronic surveillance" for the purpose of obtaining "foreign intelligence information." *Id.* §§ 1803–1804. The attorney general-approved application then has to be approved by the Foreign Intelligence Surveillance Court. *Id.* §§ 1803–1804. Among other things, the application has to show probable cause that the target of the surveillance is a foreign power, or an agent of a foreign power, and has to contain a certification from a high executive official that what is sought is foreign intelligence information that cannot reasonably be acquired through ordinary investigative means. *Id.* § 1804(a)(7).

24. See FISA, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1811 (2000)).

25. The U.S. Department of Justice's comprehensive defense of the National Security Agency (NSA) program pointedly did not claim that the program complied with FISA's

Both the criticisms leveled against the NSA program and the Bush Administration's defense of it are grounded in Jackson's *Youngstown* concurrence in general, and the CCS assumption in particular. As shown above, the fourteen professors and former government officials who wrote to Congress to respond to the Bush Administration's defense of its domestic spying program argued that although the president may have had inherent powers to collect the information under his commander-in-chief powers, Congress had the power to enact the FISA and the president thereafter was categorically obligated to comply with Congress's directive.²⁶ This argument is premised on the CCS assumption, and the letter's authors cited to Jackson's *Youngstown* concurrence—and only to Jackson's *Youngstown* concurrence—for support.

Interestingly, the Bush Administration's defense of the NSA program also relied on Jackson's *Youngstown* concurrence. In its memorandum defending the NSA program (DOJ memo), the U.S. Department of Justice (DOJ) cited to the *Youngstown* concurrence when it argued that the Authorization for the Use of Military Force Against Iraq Resolution of 2002,²⁷ “transform[ed] the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called ‘a zone of twilight,’ in which the President and the Congress may have concurrent powers whose ‘distribution is uncertain,’ into a situation in which the President’s authority is at its maximum,” thereby “plac[ing] the President’s authority at its zenith under *Youngstown*.”²⁸ There also is strong, though indirect, evidence that the DOJ memo relied upon the concurrence’s assumption of CCS. The strongest evidence of this is an inference from omission: The absence of any argument to the effect that the NSA program was justified because legislative requirements in FISA could not categorically trump the president’s independent judgment under his commander-in-chief powers vis-à-vis the collection of electronic intelligence. Though inferences from silence are treacherous, drawing this inference here seems plausible on

provisions. See U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 23 (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (arguing that “FISA permits an exception to the ‘procedures’ of FISA . . . where authorized by another statute, even if the other authorizing statute does not specifically amend [FISA]”).

26. See Nolan et al., *supra* note 8.

27. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

28. U.S. DEP’T OF JUSTICE, *supra* note 25, at 11; see also *id.* at 17 (“The President’s power in authorizing the NSA activities is at its zenith because he has acted ‘pursuant to an express or implied authorization of Congress.’” (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring))).

account of both the concurrence's prominent role in the DOJ's analysis and the comprehensive, no-holds-barred quality of the rest of the DOJ memo.

Further evidence of CCS's presence is found in the DOJ memo's explanation as to why FISA should not be construed to preclude the NSA program. The memo argued that such an interpretation of FISA would raise "serious constitutional questions"²⁹ because, inter alia, it would "impermissibly impede"³⁰ the president's exercise of his commander-in-chief duties. This argument is plausible when one assumes CCS, but is quite weak without the CCS assumption. With the CCS assumption, interpreting FISA so as to prohibit the NSA program could plausibly be said to "impede" the president because FISA would categorically bind the president and, accordingly, would categorically prohibit the NSA program. Without the CCS assumption, however, the DOJ's argument is severely undercut, for it is difficult to understand how a statutory interpretation under which the statute aimed to wholly displace presidential authority where the statute could not do so (on account of the absence of CCS) would impermissibly impede the president;³¹ such a statutory provision might be futile, but it would not impermissibly impede him. The DOJ's argument is thus best understood as tacitly piggybacking on the assumption of CCS.

The same pattern of argumentation reflecting the CCS assumption runs through the controversy concerning the Bush Administration's military commissions in Guantanamo Bay that were the subject of the *Hamdan* lawsuit. Paralleling the previously examined argument made by the fourteen academics and former governmental officials in the FISA controversy, footnote twenty-three of the *Hamdan* decision cites to Jackson's *Youngstown* concurrence and declares that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his

29. *Id.* at 28.

30. *Id.* at 29.

31. This observation sheds light on an unintended consequence of the CCS rule's interaction with the interpretive canon of constitutional avoidance. The CCS rule makes it more likely that statutes will be interpreted as having a universally narrow application. By contrast, a noncategorical rule of congressional supremacy makes it possible to construe a statute as having generally broad application, but being subject to select presidential overrides when, in the president's judgment, the particular circumstances lead him to conclude that his commander-in-chief duties require that he not "take care" that the particular statute be enforced. For an enlightening discussion of the appropriate use of the canon of constitutional avoidance in the executive branch, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

powers.”³² This is the CCS assumption, pure and simple: It recognizes possible “independent” presidential power to act in the absence of congressional action, but asserts that the president categorically “may not disregard limitations” on his powers that Congress enacts pursuant to the “proper exercise” of its own powers.³³ CCS was advanced by the appellants in the *Hamdan* case and embraced by a majority of the Court. The *Hamdan* opinion also tells us that, with regard to the above-mentioned embodiment of the CCS assumption, “[t]he Government does not argue otherwise.”³⁴ In short, both the government and the critics of the Bush Administration’s military commissions held fast to the CCS assumption in *Hamdan*.

Scholars from across the political spectrum have recognized the influence that Jackson’s concurrence has attained. Curtis Bradley and Jack Goldsmith have observed that the framework has been “widely accepted.”³⁵ Neal Katyal and Laurence Tribe have said that the concurrence provides “the three now-canonical categories that guide modern analysis of separation of powers. . . .”³⁶ In embracing the framework and the CCS rule that is embedded within it, however, scholars have not made serious efforts to justify the assumption of CCS. First, consider Saikrishna Prakash, among this country’s most prolific and insightful scholars on the subject of

32. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006).

33. Admittedly, there is an alternative reading of this language from *Hamdan v. Rumsfeld* (and, indeed, of Jackson’s category three) that does not assume CCS. The sentence could be read as meaning that congressional action trumps the president’s independent powers only when the congressional effort to trump the president amounts to a “proper exercise” of Congress’s powers. On this reading, the sentence from *Hamdan* does not provide an analytical tool for sorting out conflicts between the Congress and the president, but only tautologically recites that Congress trumps when it properly trumps, without providing any guidance as to *when* Congress trumps.

Such an understanding, however, deprives footnote twenty-three and Jackson’s category three of all analytical power and renders them into wholly conclusory assertions. This is not the way that modern scholars (such as the authors of the letter to Congress criticizing FISA), the *Hamdan* majority, or the government (in conceding this point in the *Hamdan* litigation, *see infra* note 34) have understood Jackson’s concurrence. After all, if category three had been understood by these parties merely as making a conclusory statement, their recitations of category three would necessarily have been preceded by a discussion of why Congress’s effort to displace the president’s independent powers was “proper” under these circumstances. Yet none of these parties sought to do this, but instead ended their analyses by concluding that Congress had the power to enact the legislation at issue. The absence of any such justificatory effort is incontrovertible evidence that category three and footnote twenty-three have been understood as resting on the assumption that Congress trumps when, pursuant to its constitutional powers, it regulates on matters that also fall within the president’s commander-in-chief powers. And this, once again, is the assumption of CCS that, this Article argues, has not been adequately justified.

34. *Hamdan*, 126 S. Ct. at 2774 n.23.

35. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005).

36. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002).

the president's foreign affairs powers.³⁷ One of his recent pieces considered the relationship between Congress's powers and the commander-in-chief powers. The piece helpfully marked out four possibilities: (1) The two governmental entities' powers are wholly nonoverlapping; (2) they are wholly coterminous; (3) there is partial overlap such that each has some areas of exclusive power; and (4) Congress has a subset of the president's powers with the result that the president has exclusive power over matters in respect of which Congress's powers do not reach.³⁸ Prakash notes that possibilities two through four contemplate that Congress and the president have some overlapping powers and insightfully observes that where two governmental institutions' powers overlap, "it naturally invites the question of whose rules will govern when there is a conflict." Prakash is careful to refrain from coming to any firm conclusions as to which of the four possibilities best characterizes the relationship between Congress's and the commander-in-chief's powers,³⁹ yet he does not bring this concern of avoiding premature conclusions to the question of how conflicts between overlapping presidential and congressional power (under possibilities two through four) should be resolved. Though he fleetingly considers the possibility that the president could trump, Prakash concludes with literally no justification whatsoever that Congress's acts "always trump the President's,"⁴⁰ such that "the President has his way until Congress speaks to the contrary."⁴¹ Prakash's conflict principle, of course, is the CCS assumption.

Other times, the CCS assumption is less explicit though still evidently present. Michael Ramsey, another important scholar of the president's foreign affairs powers, has embraced the position that Congress's powers and the president's commander-in-chief powers are overlapping to some

37. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001); Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005) (book review).

38. See Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1320–22 (2006). There of course is a fifth possibility: that the president has a subset of Congress's powers.

39. See *id.* at 1323 ("We just cannot say which theory is right in the abstract. Until we do some difficult historical research about the original meaning of these various powers, all we can do is make somewhat educated guesses.").

40. *Id.* at 1321–22.

41. *Id.* at 1321.

degree.⁴² In an article on the subject, Ramsey explained the two sorts of power that the president enjoys under the president's commander-in-chief powers: (1) the initiatory power "to act in the absence of legislation in certain foreign affairs matters"; and (2) "some limit on the enumerated powers Congress otherwise would have, at least in the limited sense of preventing Congress from making another person the commander."⁴³ The former is the power to act where Congress has not, and the latter is the presidential power to act notwithstanding congressional action on account of the congressional action having been illegitimate. Missing is any suggestion that the commander-in-chief powers include the power to override actions undertaken by Congress pursuant to its constitutional powers.⁴⁴ Ramsey's list of presidential powers, in conjunction with the notable absence just mentioned, strongly suggest that Ramsey has adopted the CCS rule. Language elsewhere in his scholarship supports this conclusion.⁴⁵

Given the Jackson concurrence's "canonical" status,⁴⁶ it is not surprising that most scholars who invoke the opinion give even less attention to the framework's foundational assumptions than Prakash and Ramsey provide. Even the most sophisticated analyses of presidential power typically invoke the concurrence's CCS assumption as a truism and dedicate their first-rate analytics to arguing that a given presidential action is unconstitutional insofar as it is inconsistent with a statute, falls within

42. See Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1243 (2005) (concluding that "the Commander-in-Chief Clause preserves a *concurrent* power in the President" with the Congress).

43. *Id.*

44. A similar pattern of argumentation arises when Michael Ramsey criticizes the argument that "[r]arely, if ever . . . have the president's advisors claimed an authority to ignore the law as written by Congress." *Id.* at 1239 (quoting David Savage & Richard Schmitt, *Lawyers Ascribed Broad Power to Bush on Torture*, L.A. TIMES, June 10, 2004, at A16). His sole response is that the president may ignore laws that were beyond Congress's power to enact. Once again, it is what is omitted that is significant: Ramsey pointedly does not suggest that the president may disregard laws that, though not beyond Congress's authority and that accordingly are not unconstitutional, would under present circumstances be inconsistent with the president's good faith understanding of what his commander-in-chief powers demand. Stated differently, from what it leaves out, Ramsey's response appears to assume that the president necessarily would be bound by laws that were enacted by Congress pursuant to its constitutional powers.

45. See *id.* at 1243. He argues that his theory of presidential power "does not demand that any of the President's foreign affairs powers be immune from interference by congressional regulation, so long as Congress is acting pursuant to an enumerated power." Ramsey's theory "establishes the President's ability to act in the absence of legislation in certain foreign affairs matters. It does not say anything about the President's right to be free from congressional interference." *Id.*

46. Katyal & Tribe, *supra* note 36, at 1274.

category three, and accordingly violates the concurrence's rule that Congress categorically trumps.⁴⁷

II. POTENTIAL CONFLICT-SORTING RULES

This Part explains that CCS is a type of "conflict-sorting" rule and shows that there are several different candidate rules that can sort out conflicts in circumstances in which more than one governmental institution has authority. Armed with the understanding that there is a range of possible conflict-sorting rules, Part III then shows that Jackson's concurrence does not sufficiently justify the particular conflict-sorting rule it adopts.

A. What Is a Conflict-sorting Rule?

CCS plays a conflict-sorting role. Conflict-sorting rules are turned to when identical authority rests with two or more institutions, for it must be decided which institution's decision is to be authoritative when multiple institutions with overlapping authority issue conflicting demands. CCS operates by declaring one of the two institutions hierarchically superior such that its decision, when lawfully made, categorically trumps the decision of the other. More concretely, CCS provides that (1) where the president's commander-in-chief powers overlap with congressional powers, and (2) Congress has acted pursuant to its legitimate powers in relation to the commander-in-chief powers (for example, by enacting legislation pursuant to its power to regulate the land and naval forces), then (3) Congress's decisions categorically trump any contrary desire that the commander-in-chief may have. CCS is a type of conflict-sorting rule that usefully may be called a "single-institution supremacy" principle. Our constitutional order has other conflict-sorting rules of this sort: The Supremacy Clause, for example, declares that federal law trumps state law in circumstances in which states and the federal government have overlapping regulatory authority.

Once one recognizes the function that CCS plays, two things follow. First, as a purely theoretical matter, it is obvious that there are other plausible conflict-sorting rules. Second, as an empirical matter, a careful look at our country's actual constitutional practice discloses that

47. See, e.g., Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 6–8 (2006); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2361–74 (2006).

alternatives to single-institution supremacy are found in other contexts of overlapping governmental authority.

B. Four Types of Conflict-sorting Rules

Conflict-sorting principles can usefully be divided into four main categories: (1) those that resolve conflict on the basis of institution; (2) those that resolve conflict on the basis of time; (3) those that eschew any single criterion for resolving conflict and instead rely on multifactor analyses; and (4) those that forsake the need for resolving conflict. The first two categories, in turn, can be usefully subdivided, as explained below. Moreover, not all of these conflict-sorting principles are directed to the judiciary. Some are directed to, or can also be implemented by, nonjudicial governmental actors. Furthermore—and wholly independent of the preceding point—many of the conflict-sorting principles do not have the status of constitutional law, but instead are subconstitutional principles.⁴⁸ Finally, whether the conflict-sorting principle has the status of constitutional or subconstitutional law, virtually all conflict-sorting principles that are currently used have been selected on the basis of institution-specific policy considerations. All the above points are crucial to recognizing why Jackson's concurrence did not adequately justify the conflict-sorting principle it adopted.

1. Institution-based Sorting Rules

Turning our attention to the first category, there are two sorts of institution-based conflict resolution rules. What I shall call a Type 1A sorting rule identifies one institution as hierarchically superior to the others such that its decisions categorically trump others if and when there is conflict. CCS and the Supremacy Clause are examples of a Type 1A sorting rule.

48. This point is wholly independent of the preceding point because nonjudicial actors can create, or help to develop, constitutional principles. For an extended discussion of this, see H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by [Section] 1 of [Article] II.”).

What I shall call a Type 1B sorting rule establishes a presumptive, but noncategorical, hierarchy among institutions. This type of sorting rule is found in the context of the division of fact-finding authority as between judge and jury under the Seventh Amendment. Consider the doctrine concerning motions for judgment as a matter of law following a trial under Federal Rule of Civil Procedure 50(b), which are also sometimes called judgments notwithstanding the verdict. Although the jury is the institution with the primary responsibility for fact-finding,⁴⁹ federal judges have the power to ask whether the evidence was sufficient to support the jury's verdict⁵⁰ and, if the question is answered in the negative, to displace the jury's verdict and put in place a verdict for a different party.⁵¹ The judge's sufficiency inquiry almost invariably requires the court to make credibility determinations and to perform other fact-finding functions,⁵² meaning that the two institutions (judge and jury) have some overlapping

49. See, e.g., *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (stating that the "aim of the [seventh] amendment" is that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury").

50. *Id.* at 659.

51. See FED. R. CIV. PRO. 50(b).

52. While the precise standard for granting a Rule 50 motion varies across courts, a common formulation that has received scholarly praise is whether "there can be but one conclusion as to the verdict that reasonable [persons] could have reached." See 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 262 & n.15 (alteration in original) (quoting *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970)). Although courts dutifully recite that they are to decide Rule 50 motions without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, *see id.*, it would seem that a judge's decision to grant a Rule 50(b) motion (and to thereby decide that a jury's verdict is not one that reasonable persons could have reached) often will constitute the court's credibility judgment and/or weighing of the evidence. A particularly clear illustration of this is found in the pre-Rules case of *Pa. R.R. v. Chamberlain*, 288 U.S. 333 (1933), which concerned the propriety of a trial court's order that a jury grant verdict for defendant. Writing for the Second Circuit, Judge Learned Hand reversed the district court's judgment, ruling that the case should have been allowed to proceed to the jury because there was sufficient evidence to support a verdict for the plaintiff. The Supreme Court reversed, deciding that the testimony of plaintiff's sole witness could not have supported a verdict for the plaintiff. It is hard to escape the conclusion that the Supreme Court made credibility determinations and weighed the evidence in its decision to uphold the grant of directed verdict. Plaintiff's witness was an experienced train yard worker who saw a faster-moving 9-car train closely trailing a slower-moving 2-car train, heard a loud crash, and thereafter discovered the decedent's body. The Supreme Court ruled that this testimony would have been inadequate to sustain a plaintiff's verdict because there was testimony from several other witnesses that there in fact had been no train crash. The Court's decision that there was no conflict in the parties' testimony as to the facts because plaintiff's witness did not say there was a collision, but only said he heard a "loud crash," *id.* at 338, sounds suspiciously akin to factfinding. Likewise, it is implausible to describe the Court's conclusion that "[t]he fact that [the defendant railroad's] witnesses were employees of the [railroad]... does not impair this conclusion," *id.* at 343, as anything short of an assessment that the railroad's witnesses were credible.

authority. Potential conflict between the two institutions is navigated by a Type 1B rule under which the jury's findings are presumptively determinative; the judge is not permitted to act as a "thirteenth juror" and substitute her judgment for that of the jury, but only is allowed to overturn the jury's verdict in extreme situations.⁵³

Another example of a Type 1B conflict-sorting rule can be found in the writings of several respected academics who discuss yet another context of overlapping governmental authority. So-called "departmentalists" argue that each branch of the federal government has the constitutional power, indeed the duty, to act in accordance with its own good faith constitutional interpretations.⁵⁴ Under this view, the federal executive, legislative, and judicial departments have overlapping governmental authority in respect of interpreting the Constitution.⁵⁵ Virtually all departmentalists are of the view, however, that the president is required to enforce court judgments even if he should believe the judgment to be unconstitutional.⁵⁶ Yet, these scholars do not believe the president's duty to be absolute. For example, Steven Calabresi argues that "presidents are absolutely constitutionally bound to execute even those court judgments with which they disagree . . . [a]bsent a clear mistake."⁵⁷ The strong, yet noncategorical, presumption that court judgments are to be enforced by the executive branch is a Type 1B sorting rule. Regardless of whether this argument is convincing in this context, the embrace by serious scholars of a Type 1B conflict-sorting rule constitutes additional evidence that such a sorting rule is, at the very least, conceptually plausible.

53. See *id.*

54. See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1421–22 (1999); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268–69 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

55. See Part II.B.4.

56. Lawson & Moore, *supra* note 54, at 1313–14; see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1033–34 & nn.28–31 (2004).

57. See Calabresi, *supra* note 54, at 1433 n.54 (emphasis added). Interestingly, Calabresi argues that there has been only one such clear mistake in our nation's entire history, that of Chief Justice Taney in *Ex Parte Merryman*. See *id.* Similarly, Gary Lawson argues that the "President may legally refuse to enforce a court judgment, but only if the President concludes, in accordance with an appropriately demanding standard of proof, that the judgment was constitutionally erroneous" and adds that "where private rights are at stake, the President can engage in executive review of judgments only when such review results in nonenforcement of a judgment of liability." Lawson & Moore, *supra* note 54, at 1325–26.

2. Time-based Sorting Rules

Let us now turn to the second category of conflict-sorting principles: those that sort on the basis of time. Two such time-based principles can be found in American law. Type 2A principles provide that where two or more governmental institutions have overlapping authority, the institution that acts first will trump subsequently acting institutions—a “first-in-time” rule. A Type 2B rule, by contrast, grants trumping power to the institution that acts last.

Type 2A principles are the predominant tool for resolving conflicts between or among courts that have overlapping adjudicatory jurisdiction. To see this, it first is necessary to recognize that overlapping adjudicatory jurisdiction occurs at all levels of our judicial system. Two or more federal courts frequently have jurisdiction to hear a given matter. More than this, where a federal court has jurisdiction, it almost always is the case that at least one state court also has jurisdiction. Finally, the courts of two or more states frequently also have adjudicatory power to hear a given controversy.

In this arena of overlapping governmental authority, there are no constitutional, institution-based sorting principles of the Type 1 variety. For example, no constitutional principle provides that federal courts shall have sole jurisdiction in respect of matters that also fall within state court jurisdiction or, in matters where two or more state courts have overlapping jurisdiction, that jurisdiction shall lie (for example) in the state where the primary defendant dwells. The bulk of the potential conflicts between or among courts instead are sorted out by means of Type 2 principles (most of which are nonconstitutional), in conjunction with a subconstitutional Type 1 rule. The Type 1 rule is the federal removal statute, which generally allows defendants to remove a lawsuit originally filed in state court to federal court if the federal court also has jurisdiction over the matter.⁵⁸

Though important, the removal statute does not on its own eliminate all potential conflicts. Two hypotheticals reveal the conflicts that remain, as well as the Type 2 principles that are utilized to sort out the resulting conflicts. First, consider a situation where Y sues Z in court A with regard to matter M. Assume further that Z thereafter sues Y in court B in relation to the identical matter M, and that courts A and B both have jurisdiction over matter M.

To begin our analysis, much of the time, parallel lawsuits in courts A and B can (and do) occur. This is the product of several legal doctrines.

58. See 28 U.S.C. § 1441 (2000).

First, no constitutional principle precludes both courts from proceeding with their lawsuits.⁵⁹ Second, if courts A and B are both state courts, court A may issue an antisuit injunction purporting to enjoin state court B from continuing with its proceedings, but state courts tend not to feel bound by sister states' antisuit injunctions, and the U.S. Supreme Court has strongly suggested (and arguably has held) that this is perfectly constitutional under the Full Faith and Credit Clause.⁶⁰ Third, if court A is federal and court B is state, then the federal antisuit injunction statute contemplates only limited federal court powers to enjoin parallel state court proceedings.⁶¹ This, along with the absence of state court power to enjoin federal court proceedings,⁶² means that parallel state and federal court proceedings can occur.

If both courts A and B simultaneously adjudicate matter M, the possibility arises that the courts could issue inconsistent judgments. Such potential conflicts are eliminated by means of time-based sorting rules. The nonconstitutional principles of bar and merger, claim preclusion, and issue preclusion avoid conflict by providing trumping force to the first court that issues a final judgment.⁶³ Hence, these doctrines are all examples of time-based conflict-sorting rules. These doctrines emphatically are not institution-based conflict-sorting rules, for what matters is not the identity of the institution (state or federal), but only which institution has acted first (which, in this context, means which institution was first in generating a final judgment).

To see this, assume for present purposes that court A is the first to issue a final judgment. If courts A and B both are state courts, then the Full Faith and Credit Clause obligates state court B to give the effect to court

59. Though abstention doctrines rooted in equity may allow (or sometimes even require) that a federal court stay or dismiss its proceedings pending resolution of the other action, *see, e.g.*, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), abstention's only periodic availability underscores the point made above in the text that parallel suits are not generally precluded.

60. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 236 (1998) (“[A]ntisuit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree, *see Cole v. Cunningham*, 133 U.S. 107 (1890), in fact have not controlled the second court’s actions regarding litigation in that court.”); *see also id.* at n.9.

61. *See* 28 U.S.C. § 2283 (2000) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”). For an example of a case that simultaneously found express authorization of federal antisuit injunctions and shows the anti-injunction statute’s narrow scope, *see Mitchum v. Foster*, 407 U.S. 225 (1972).

62. *See Donovan v. Dallas*, 377 U.S. 408 (1964).

63. *See generally Baker*, 522 U.S. at 233 & n.5.

A's judgment that state A would give to court A's judgment.⁶⁴ If court A is a state court and court B is a federal court, then a federal statute that is deemed to give force to the constitutional principles of full faith and credit requires that federal court B give the effect to court A's judgment that state A would give to court A's judgment.⁶⁵ If both courts A and B are federal courts, then the federal common law rules of merger, claim preclusion, and issue preclusion require that court B give effect to court A's judgment.⁶⁶ If court A is a federal court and court B is a state court, then court B is required to give the effect to court A's judgment that is required under the rules of merger, claim preclusion, and issue preclusion.⁶⁷

In short, regardless of whether the first court to reach final judgment is a state or federal court, the first final judgment trumps subsequent adjudications. The doctrines of merger, claim preclusion, and issue preclusion are time-based conflict-sorting rules that, depending on the identify of the courts and the order of the judgments, resolve conflicts by either constitutional or subconstitutional doctrines.

Let us now turn to a second hypothetical to understand the potential conflicts that remain notwithstanding the federal removal statute. Whereas the first hypothetical contemplated simultaneous lawsuits, this second one considers sequential lawsuits. Imagine lawsuit 1 in which Y sues Z in court A with regard to matter M and final judgment issues. Thereafter, lawsuit 2 is filed in court B and, for present purposes, assume that court B has jurisdiction. There are many ways that the second lawsuit in court B potentially could generate a result that is inconsistent with the first lawsuit. For instance, Y may have successfully sued Z for breach of contract in lawsuit 1, while Z may have sued Y in lawsuit 2 on the theory that the contract at issue in lawsuit 1 was actually part of an antitrust conspiracy. If Z succeeds in lawsuit 2, this would suggest that the final judgment in

64. See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that the judgment of a Missouri court is entitled to full faith and credit in Mississippi even if the Missouri judgment rested on a misapprehension of Mississippi law).

65. The federal statute is 28 U.S.C. § 1738 (2000). In support of the notion that this statute advances the constitutional principle of full faith and credit, see *Durfee v. Duke*, 375 U.S. 106, 109 (1963) ("The constitutional command of full faith and credit, as implemented by Congress, requires that 'judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.'" (quoting 28 U.S.C. § 1738)).

66. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (finding issue preclusion in a second federal action on account of a judgment issued in a prior federal lawsuit).

67. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (determining the claim preclusion effect that a state court must give to a judgment issued by a federal court sitting in diversity).

lawsuit 1 was erroneous.⁶⁸ The doctrines of merger, claim preclusion, and issue preclusion examined above operate in sequential litigations as they do in simultaneous litigations and largely eliminate the problem of inconsistencies across institutions that have overlapping jurisdiction. For example, claim preclusion would prevent Z from pressing an antitrust claim in lawsuit 2.⁶⁹ Indeed, federal rules go so far as to permit the assertion of nonmutual offensive collateral estoppel (issue preclusion); that is, Z may be disallowed from relitigating the breach of contract in lawsuit 3 that is brought by X, a nonparty to the first lawsuit.⁷⁰

All the above-mentioned time-based sorting rules are of the Type 2A variety insofar as they give trumping authority to the institution that acts first. As a matter of pure logic, an alternative time-based conflict-sorting rule could give precedence to the institution that has most recently acted—a “last-in-time” rule that I have denominated a Type 2B rule. Empirical inquiry confirms this theoretic possibility, for American law currently utilizes a Type 2B rule to solve one unusual conflict that can arise in the context of overlapping adjudicatory jurisdiction. In the words of the Restatement (Second) of Judgments, “[w]hen in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of *res judicata*.”⁷¹ Though these sorts of cases do not arise frequently, they do in fact happen, and the Restatement’s last-in-time rule is based on several Supreme Court opinions that have addressed these very circumstances.⁷² Last-in-time rules are found elsewhere as well. Conflicts between treaties and federal statutes are resolved on the basis of a last-in-time rule.⁷³ Last-in-time rules also predominate in contexts of intra-institutional conflict: In conflicts between earlier and later legislatures, the later statute trumps the earlier statute, and

68. See *Martino v. McDonald’s Sys., Inc.*, 598 F.2d 1079 (7th Cir. 1979), *cert. denied*, 444 U.S. 966 (1979).

69. See *id.*

70. See *Parklane Hosiery*, 439 U.S. 322 (allowing plaintiff in a second suit, who was not a party in the first lawsuit, to collaterally estop the defendant from relitigating the finding in the first lawsuit that its proxy statement was materially misleading).

71. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982).

72. See *Morris v. Jones*, 329 U.S. 545 (1947); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); see also *Sutton v. Leib*, 342 U.S. 402, 408 (1952) (stating that the Full Faith and Credit Clause required a Nevada court to give effect to a New York decree that invalidated a divorce decree that had been issued in Nevada). These cases are ably discussed in Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 802–11 (1969).

73. See Julian Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319 (2005).

conflicts between the constitutional interpretations of earlier and more recent Supreme Courts likewise are resolved on the basis of a last-in-time rule.⁷⁴

Let us return to the Restatement (Second) of Judgments's last-in-time rule. The presence of one last-in-time sorting rule in the context of overlapping adjudicatory jurisdiction, which is dominated by first-in-time rules, spotlights a crucial question: On what basis is the choice among conflict-sorting rules to be made? Where constitutional text does not provide a ready answer—and it does not in the context of overlapping adjudicatory jurisdiction—it is true as a purely descriptive matter that American law has chosen the sorting rule on the basis of functional and institution-specific considerations. For example, the Type 2A rules of claim and issue preclusion were selected for the purpose of achieving the well-known policy objectives of securing the finality of judgments, achieving judicial efficiency, ensuring consistency across judgments, and relieving parties of the burden of being subject to multiple lawsuits.⁷⁵ The Type 2B last-in-time rule in the case of multiple inconsistent final verdicts likewise was selected by the Supreme Court on the basis of functional and institution-specific considerations: The second inconsistent judgment came about because parties to the second lawsuit neglected to press their claim or issue preclusion arguments or failed to pursue appeal of their rejected arguments to the highest possible appellate court, and the last-in-time rule refuses to reward such neglect.⁷⁶

To be clear, the point for present purposes is not that the Court has made good or bad decisions in choosing the conflict-sorting principles it has. Rather, what is significant is that there is no single, a priori conflict-sorting principle for circumstances in which multiple governmental institutions have overlapping power. And the choice among the options has consistently been made on the basis of institution-specific policy considerations.

74. To be sure, *stare decisis* complicates the effort to fully describe the way that conflicts as to constitutional interpretation between earlier and later supreme courts are sorted out insofar as *stare decisis* grants some presumptive weight to the earlier rulings. The other examples provided above in text, however, are instances of pure Type 2B rules.

75. See generally *Parklane Hosiery*, 439 U.S. at 326–27 (discussing policy behind *res judicata* and collateral estoppel).

76. See, e.g., *Morris*, 329 U.S. at 552 (1947); Ginsburg, *supra* note 72, at 811 (explaining that the Court's "last-in-time" rule is driven by the "policy requiring a party in the second forum to pursue diligently his claim for recognition of the first judgment").

3. Multifactor Sorting Rules

Let us now turn to a third approach to resolving conflicts among governmental institutions having overlapping authority: the multifactor sorting rule, which I denominate the Type 3 rule. This approach is found in American law in the context in which two or more states have overlapping regulatory jurisdiction. As I have shown elsewhere, there is a significant number of persons and transactions with respect to which two or more states have the power to regulate.⁷⁷ Early Supreme Court case law sought to determine under the rubric of the Full Faith and Credit Clause which state's law appropriately applied.⁷⁸ The constitutional sorting rule the Court adopted in that line of cases was not institution-based or time-based, but instead inquired whether one state had an overwhelming interest in having its law applied.⁷⁹ Contemporary constitutional doctrine continues to acknowledge that states' regulatory jurisdiction may overlap, but declines to lay down a constitutional sorting principle. Instead, the current law is that "the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."⁸⁰

While there is thus no constitutional sorting principle to determine which state's law applies in circumstances in which multiple states have overlapping regulatory jurisdiction, subconstitutional principles and practices have emerged to address the issue of potential conflict. The doctrinal response is the subconstitutional—indeed, the state law—jurisprudence that is known as choice of law. In contrast with the institution-based and time-based solutions, both of which look to a single criterion to sort out conflicts, choice-of-law doctrine is infamously multifactored.⁸¹ There also have been some legislative responses. Congress enacted the Full Faith and Credit for Child Support Orders Act and the Parental Kidnapping Prevention Act of 1980. These statutes, enacted

77. See Rosen, *supra* note 12, at 946–55; Mark D. Rosen, *Hard or Soft Pluralism?—Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 718–26 (2007).

78. See, e.g., *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 624–25 (1947); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 163 (1932).

79. See *Wolfe*, 331 U.S. at 624–25.

80. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939).

81. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

pursuant to the Full Faith and Credit Clause,⁸² determine which of several possible states' laws is to govern matters relating to child support and child custody matters. Respected scholars also have argued that states themselves could enter into compacts to resolve conflicts disputes.⁸³ An important example of state-driven political solutions to the selection of conflict-sorting rules is the Uniform Child Custody Jurisdictional Act.⁸⁴ These legislative solutions also are multifactored; each takes account of multiple considerations in determining which state's court has jurisdiction and which state's law is to apply.⁸⁵

Three important lessons arise from the sorting techniques that are found in the context of overlapping state regulatory jurisdiction. First, both choice-of-law doctrine and the legislative solutions are examples of Type 3 solutions insofar as both eschew single-factor sorting principles and embrace more holistic considerations of what they deem to be normatively relevant considerations. So, for example, the Restatement (Second) of Conflict of Laws enumerates a laundry list of factors that are appropriate to take into account when deciding which state's law is to apply.⁸⁶ The legislative solutions embodied in the above-mentioned statutory schemes likewise take account of many factors, resulting in a complex rule structure that yields resolutions as to which state's law applies that vary on the basis of sometimes apparently small fact changes. In short, the sorting techniques in the field of overlapping state regulatory jurisdiction exemplify an approach to conflict sorting that is analytically distinct from Type 1 and Type 2 solutions.

Second, the sorting techniques in the context of overlapping state regulatory jurisdiction make clear that courts are not the only governmental institutions capable of formulating and enforcing conflict-sorting principles.

82. See Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 965 & n.187 (2006).

83. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

84. See generally Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

85. For example, the Parental Kidnapping Prevention Act provides that the child's "home state" shall have presumptive adjudicatory jurisdiction. See 28 U.S.C. §§ 1738A(c), (g) (2000). The Act gives a complex set of criteria for determining "home state" and provides an alternative basis for determining which state has jurisdiction in the event a child is deemed to have no "home state." *Id.* § 1738A(c)(2).

86. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

The political solutions were created by legislatures—both Congress and the states—not courts.⁸⁷

The third lesson is a byproduct of the first two lessons: recognizing a third type of conflict-sorting principle and understanding that nonjudicial institutions may play a role in fashioning and enforcing conflict-sorting principles make it even more urgent to determine what criteria properly inform the selection of the conflict-sorting principle that should apply in a given context of overlapping governmental authority. Because there is a range of options both as to what conflict-sorting principles should be adopted, and what governmental institution or institutions should be responsible for fashioning and implementing the principle, whatever choice is made must be carefully justified and defended.

4. No-sorting Rules

There is one other possible response to overlapping governmental power. The law could refuse to choose among the two or more institutions with overlapping powers, and instead allow both (or all) the institutions to simultaneously regulate, even if one institution creates a duty that is not consistent with the others. Such a “no-sorting rule,” which I denote as a Type 4 rule, rejects the premise of all the aforementioned sorting rules that where two or more institutions have overlapping jurisdiction and impose inconsistent requirements, only one institution must be found to have had power.

There are not many no-sorting rules in contemporary constitutional practice, but they do exist. Such rules can be seen in the context of states’ overlapping criminal regulatory jurisdictions. It is well established that two or more states may have overlapping criminal jurisdiction, meaning that two or more states may have regulatory jurisdiction to determine whether a given transaction or occurrence is permissible or criminally proscribed. This regulatory power exists even where the two states’ substantive laws conflict, meaning that state A may criminalize an activity “X” that state B permits. If “causing a specified result or a purpose to cause or danger of

87. This insight may have important implications with respect to the Restatement (Second) of Conflict of Laws, whose multifaceted, context-sensitive doctrinal solution has been widely criticized as being unworkable. See DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 222 (6th ed. 2001). Even if valid, the criticisms do not necessarily mean that the principles the Restatement has identified are wrongheaded, but instead may mean that courts are not the appropriate governmental institutions for making the inquiries that are necessary for fair resolutions of such conflicts.

causing such a result is an element of an offense [in state A] and the result occurs or is designed or likely to occur only in another jurisdiction [state B] where the conduct charged would not constitute an offense," state A nonetheless may prosecute person Z who caused the specified result in state B, despite the fact that only state A, and not state B, criminalizes the act.⁸⁸ What matters for present purposes is that despite the fact that state A's and state B's laws conflict—state A proscribes activity "X" whereas state B permits it—there is no sorting rule to determine which state's law applies and which state's law does not apply. Both laws apply: State B cannot prosecute person Z for act "X" insofar as state B permits the act, yet state A can prosecute Z for having violated its laws by virtue of performing act "X".

The Double Jeopardy Clause's⁸⁹ "dual sovereignty" doctrine is yet another example of a no-sorting rule, but it opens the door to even more overt conflicts among the multiple regulating states. As noted above, it frequently is the case that two states may criminalize a given transaction or occurrence.⁹⁰ Full faith and credit does not apply to state A's criminal judgment,⁹¹ and the dual sovereignty doctrine permits state B to prosecute person D for the very same conduct that was the basis for state A's prosecution of person D regardless of whether state A's prosecution resulted in conviction or acquittal.⁹² The dual sovereignty doctrine thus stands in stark contrast to the civil context, where overlapping state adjudicatory jurisdiction has given rise to time-based sorting rules that guard against inconsistent judgments. The dual sovereignty doctrine is yet another Type 4 rule.

As with the other conflict-sorting rules, it is useful to inquire as to why this particular rule is found in this particular context. The answer is not constitutional text; though the dual sovereignty doctrine is not inconsistent with the Double Jeopardy Clause's instruction that no person shall be

88. See MODEL PENAL CODE § 1.03(2) (1985).

89. U.S. CONST. amend. V.

90. For a discussion of the constitutional criteria that determine the maximal scope of states' regulatory jurisdiction, see Rosen, *supra* note 12, at 871–91. For an example of two states permissibly asserting their overlapping criminal jurisdiction, see *Heath v. Alabama*, 474 U.S. 82 (1985).

91. See *Nelson v. George*, 399 U.S. 224, 229 (1970).

92. See *Heath*, 474 U.S. at 88 (1985). The *Heath* case involved a situation in which the defendant had been convicted in the first state's prosecution, but its rationale leads to the conclusion that the second state may prosecute regardless of the first case's outcome. See generally Rosen, *supra* note 12, at 951–52. This, indeed, is how the doctrine operates. See, e.g., *United States v. Sewell*, 252 F.3d 647, 651 (2d Cir. 2001) (holding that the federal government may prosecute following a previous state court acquittal for the same offense).

“subject for the same offence to be twice put in jeopardy of life or limb,”⁹³ it cannot be said to be required by the constitutional text either. Instead, as is true of most conflict-sorting rules, the Supreme Court’s selection of this Type 4 rule was fueled by institution-sensitive, contextual analysis. A no-sorting rule was appropriate in respect of states’ criminal jurisdiction because, the Court explained, crime is “an offense against the sovereignty of the government” and “[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offences.”⁹⁴ Consequently, “successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.”⁹⁵ In short, the Court justified its Type 4 conflict-sorting rule by means of a context-sensitive consideration of the nature of our country’s system of horizontal federalism, not via abstract, transsubstantive considerations of the acceptability or impossibility of there being conflicting judgments by multiple governmental institutions as to the permissibility of a person’s activity.

The existence of even one no-sorting rule in contemporary law is strong evidence of the conceptual plausibility of Type 4 rules. Additional proof, should any be needed, comes from the so-called departmentalist scholars who argue that the president, Congress, and federal courts each have an obligation to perform their duties on the basis of their own interpretation of the Constitution.⁹⁶ On this view, the three branches of the federal government have overlapping authority to interpret the Constitution. What is to be done if their interpretations are disharmonious? Departmentalists argue that each branch has the duty to act in accordance with its own understanding of what the Constitution means. For example, though Congress might enact a statute on the view that it falls within its constitutional power, departmentalists argue that the president must refuse to enforce the statute if he believes it to be unconstitutional.⁹⁷ Similarly, though Congress might pass a criminal statute believing it to be constitutional and a federal court may convict a person pursuant to the statute on the belief that the statute is constitutional, the president may issue a pardon on the belief that the law is unconstitutional.⁹⁸ Departmentalists accordingly have adopted a Type 4 no-sorting rule insofar

93. U.S. CONST. amend. V.

94. *Heath*, 474 U.S. at 88 (internal quotation marks omitted).

95. *Id.*

96. *See supra* note 54.

97. Lawson & Moore, *supra* note 54, at 1303.

98. *Id.* at 1302–03.

as there is no effort to select which of the conflicting understandings is to govern. Rather, all interpretations govern, each in its respective sphere.⁹⁹

C. Others?

To quickly conclude, governmental power to do “X” frequently rests with more than one governmental institution within our country. The existence of overlapping governmental authority creates the possibility of conflict among the various governmental institutions. The CCS assumption is one sort of conflict-sorting principle—a rule that resolves conflicts by establishing a categorical hierarchy among institutions. Subpart B established that there are other types of conflict-sorting principles that are present in contemporary law. There is no reason to believe that the four types of conflict-sorting principles identified in Subpart B exhaust the possibilities. Context-sensitive analysis that is tailored to institutional particulars has given rise to the conflict-sorting rules that have been created to date, and there is no basis for concluding that the process of doctrinal evolution has come to an end.

99. Consider as well the controversy concerning President Washington's issuance of the Neutrality Proclamation of 1793. The question confronting Washington was whether the 1778 treaty of alliance between France and the United States required the United States to enter the war that France had declared on Great Britain and Holland in 1793. Although the Constitution grants Congress the power to declare war, see U.S. CONST. art. I, § 8, cl. 11, Washington concluded that he had power under the Constitution to interpret the United States' treaty with France and proclaimed that it did not obligate the United States to join France's war with Great Britain. Alexander Hamilton's defense of President Washington's power to issue the Neutrality Proclamation rested on the understanding that the president's and Congress's powers overlapped and that each institution could act according to its best understanding of what should be done. Hamilton rejected the view that Congress's power of declaring war “naturally includes the right of judging whether the nation is or is not under obligations to make war” and concluded instead that the President has the right

to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the Legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The Legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions. The division of the executive power in the Constitution creates a *concurrent* authority in the cases to which it relates.

Alexander Hamilton, *Letters of Pacificus No. 1* (June 29, 1793), reprinted in 4 THE WORKS OF ALEXANDER HAMILTON 432, 440, 442 (Henry Cabot Lodge ed., 1904). Hamilton's argument, applying my taxonomy, both recognizes overlapping governmental authority between the president and Congress, and proposes a Type 4 no-sorting rule.

III. WHY JACKSON'S CONCURRENCE DOES NOT ADEQUATELY JUSTIFY THE CCS ASSUMPTION

This Part argues that Jackson's *Youngstown* concurrence should not be interpreted as providing the definitive solution for how conflicts between Congress's power and the president's commander-in-chief powers should be resolved. Subpart A shows that the concurrence provides inadequate justifications for the CCS assumption. Subpart B provides additional reasons for not understanding Jackson's concurrence as giving the last word on the relationship between Congress and the commander-in-chief. A careful reading of the concurrence reveals that Justice Jackson did not actually apply the rigid tripartite framework and the CCS rule when considering this relationship. Instead, Justice Jackson's discussion regarding the relation between Congress and the commander-in-chief was far more ambivalent and ambiguous than the apparent simplicity of the CCS rule suggests. Indeed, for reasons made clear in Subpart B, the concurrence's discussion of the relationship between Congress and the commander-in-chief is best understood as *dicta*. Subpart C then addresses the potential objection that this Article's argument is irrelevant because, on the basis of *stare decisis*, the Jackson concurrence should be understood as having settled the relation between Congress and the commander-in-chief.

A. Inadequate Justifications for the CCS Assumption

Armed with the understanding from Part II that there are many possible conflict-sorting principles, and that many different conflict-sorting principles are present in our jurisprudence, we now are in a position to understand why Justice Jackson's famed *Youngstown* concurrence does not adequately justify the assumption of CCS that the concurrence regularly is assumed to embrace.

To see this, we first must know where in Jackson's concurrence we must direct our attention to find his justification for the assumption of CCS. This is not as simple a task as one might hope because, as discussed above, the concurrence does not explicitly identify the CCS assumption. The assumption nonetheless is there, and it is found where Jackson discusses what has become known as category three. Says Jackson:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can

sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.¹⁰⁰

The language here of “disabling the Congress from acting upon the subject” is admittedly opaque, but the sense that Jackson is conveying is more clearly expressed two pages later in his opinion:

[The] current seizure [can be] justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain *and beyond control by Congress*.¹⁰¹

Thus, it is in the discussion of category three that the CCS assumption makes its appearance: The president is free to act contrary to Congress's will, the concurrence states, only if the president has independent power to act and Congress's act was beyond its constitutional powers. This means that where presidential and congressional powers overlap and Congress has spoken, the president is categorically bound to follow Congress's instruction and cannot follow his own desires. And this, of course, is precisely the meaning of the rule of CCS.

1. Precedent

Having located where the CCS assumption appears, we now are in a position to scrutinize the support the concurrence provides for this crucial principle. Virtually none can be found. Jackson first turns to precedent. He cites to only one case, *Humphrey's Executor v. United States*,¹⁰² which he explains (only in a footnote) as follows: “President Roosevelt's effort to remove a Federal Trade Commissioner was found to be contrary to the policy of Congress and impinging upon an area of congressional control, and so his removal power was cut down accordingly.”¹⁰³

To begin, a case concerning the bounds of the president's removal powers under the Take Care Clause hardly qualifies as solid grounding for determining the scope of presidential powers that flow from his other constitutional powers (such as, for instance, his commander-in-chief powers). In other words, even if *Humphrey's Executor* adopted a Type 1A

100. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

101. *Id.* at 640 (emphasis added).

102. 295 U.S. 602 (1935).

103. *Youngstown*, 343 U.S. at 638 n.4.

conflict-sorting rule—that is to say, even if the case decided that congressional power to specify how a statute is to be administered takes categorical precedence over the president’s judgment as to what he must do to take care that the law is faithfully executed—it does not necessarily follow that conflicts that arise from the overlap of Congress’s powers and other presidential powers also would be sorted out on the basis of a Type 1A rule. After all, as shown above, there is a wide array of possible conflict-sorting rules, and the text of the Constitution has not selected any one of these vis-à-vis conflicts between Congress and the commander-in-chief.

Further, a careful look at *Humphrey’s Executor* discloses that the case does not support a rule of CCS but instead was decided on the basis of very different legal principles. Rather than instructing how conflicts between presidential powers and congressional powers are to be sorted out, *Humphrey’s Executor* held that the power to determine on what basis Federal Trade Commission (FTC) commissioners are to be removed fell solely to Congress and lay outside the president’s executive powers. *Humphrey’s Executor* reasoned that the president did not exercise “executive power in the constitutional sense” in respect of the FTC because the FTC was not an “arm or an eye of the executive” but instead functioned “in part quasi legislatively and in part quasi judicially.”¹⁰⁴ The majority opinion embraced the then-contemporary wisdom concerning “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others,” and concluded that “[t]he power of removal here claimed for the President” in relation to the commission is “wholly disconnected from the executive department” insofar as the FTC “was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.”¹⁰⁵ In short, *Humphrey’s Executor* resolved the problem before it by concluding that only one governmental institution (Congress) had power, not by deciding that two institutions had overlapping power but that powers of one trumped the other. As such, *Humphrey’s Executor* provides no precedential support whatsoever for choosing among conflict-sorting principles. *Humphrey’s Executor* accordingly cannot be said to provide support for CCS.

Moreover, regardless of the validity of *Humphrey’s Executor* in the days that *Youngstown* was decided, any modern reliance upon *Humphrey’s*

104. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935).

105. *Id.* at 629–30.

Executor as a font for the rule of CCS would be dubious in light of the Court's reconceptualization of the case in *Morrison v. Olsen*.¹⁰⁶ As shown above, *Humphrey's Executor* upheld Congress's power to limit the president's power to remove an FTC commissioner by means of highly formalistic reasoning that focused on whether the official whose removal was congressionally limited "act[ed] in part quasi legislatively and in part quasi judicially," in which case limiting the president's removal power was permissible, or instead was a "purely executive officer[]," in which case the president's removal power had to be unfettered.¹⁰⁷ As has been widely recognized, the majority opinion in *Morrison* rejected *Humphrey's Executor's* formalism¹⁰⁸ and instead embraced what has been termed a more functionalist approach that was "designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."¹⁰⁹ *Morrison's* rejection of *Humphrey's Executor's* rigid categories and its adoption instead of a context-sensitive analysis that inquires whether one branch's actions interfere with the other branch's "ability to perform [its] constitutional duty"¹¹⁰ is in tension with the rule of CCS. CCS is more in keeping with old-style formalism than *Morrison's* functionalism insofar as analysis under the CCS assumption ends once it is determined that congressional regulatory power reaches matter "X." Another tension between the CCS assumption and *Morrison's* approach is that the former encourages analysis that focuses attention on only one institution whereas *Morrison's* functionalism calls for the consideration of how the governmental action

106. 487 U.S. 654 (1988).

107. See *Humphrey's Ex'r*, 295 U.S. at 628–29.

108. The *Morrison* majority opinion acknowledged that the *Humphrey's Executor* Court "undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but [took the] present considered view . . . that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Morrison*, 487 U.S. at 689.

109. *Id.* at 658 (citations omitted); see also *id.* at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.").

110. *Id.*

under consideration is likely to play out when analyzed from the perspective of all governmental institutions.¹¹¹

To be clear, I do not mean to suggest that the Court's functionalist turn in *Morrison* on its own strikes a death blow to formalist approaches to separation of powers questions generally, or to the CCS assumption in particular. After all, contemporary jurisprudence inconsistently adopts both formalist and functionalist approaches.¹¹² My point here is that even putting aside the substantive critique leveled above as to why *Humphrey's Executor* does not speak at all to the selection of conflict-sorting principles, the precedential justification that Jackson's concurrence provides for the CCS assumption must be understood today as insufficient on account of the fact that *Humphrey's Executor's* formalist methodology no longer enjoys unquestioning and unqualified support.

In short, Jackson provides virtually no precedential justification for the proposition that Congress categorically trumps the president where their powers overlap. And the case law on which he does rely has been reconceptualized in a manner that undermines whatever vitality it may have had in respect of supporting the CCS assumption. These observations do not, on their own, establish that CCS is wrong. But they do suggest that the concurrence's precedential arguments are inadequate justifications for CCS.

2. Structural and Functional Considerations

Jackson's concurrence provides one additional justification for its assumption of CCS. The opinion states that a "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."¹¹³ This statement is undoubtedly correct, but the

111. It may seem curious that the CCS assumption should come from the pen of Justice Jackson, who ordinarily is associated with the move toward functionalism in separation of powers jurisprudence. I discuss this point later in this Article. The short of it is this: Though the tripartite framework, taken out of context, appears to incorporate an assumption of CCS, the Jackson concurrence did not apply the framework in a formalistic manner, but instead applied it in a way that is relatively consistent with functionalism. See *infra* Part III.B.

112. See Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 613 n.223 (2006) (noting the court's methodological "eclecticism" in utilizing both formalist and functionalist approaches). Compare *Bowsher v. Synar*, 478 U.S. 714 (1986) (utilizing formalist approach), with *Morrison v. Olsen*, 487 U.S. 654 (1988) (using functionalist approach).

113. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

question for present purposes is whether it is sufficient to justify the absolutist rule of CCS that the concurrence propounds. That is to say, although the concerns Jackson mentions are very real, there are ways apart from a categorical rule to address them.¹¹⁴ After all, virtually all constitutional principles are operationalized by noncategorical legal tests.¹¹⁵ Even where the Constitution's language is readily construed as imposing a categorical proscription—consider, for example, the First Amendment's declaration that “Congress shall make *no* law . . . abridging the freedom of speech”—it is well established (and almost universally accepted as well) that government may regulate (for example, by proscribing a broad range of speech).¹¹⁶ What is true for the constitutional principle of free speech—what unquestionably is among contemporary American constitutionalism's most protected principles—is true for every other constitutional right.¹¹⁷ And American constitutional law's widespread rejection of categorical rules extends to structural constitutional principles as well. The “equilibrium established by our constitutional system”¹¹⁸ is threatened in all situations that implicate separation of powers or federal concerns, and yet the Court virtually always eschews the adoption of categorical rules.

A question readily arises: Why are constitutional principles frequently—indeed, typically—protected by means of noncategorical legal tests? The answer is that noncategoricalism responds to the complexity of social life. To begin, noncategoricalism is virtually a foregone conclusion in a political culture that champions more than one constitutional principle. This is so because the existence of multiple constitutional principles introduces the possibility that the principles will conflict with one

114. Cf. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182–83 (1998) (making a similar critique of the *Printz v. United States* case's adoption of a categorical constitutional rule); see also Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 703–04 (2005).

115. See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

116. In addition to the federal statutes that criminalize the speech that is called extortion and espionage, and that civilly sanction speech that antitrust jurisprudence deems troublesome, the Supreme Court has upheld state laws that proscribe content-based, purely political speech, see *Burson v. Freeman*, 504 U.S. 191 (1992), as well as a federal law that banned “intemperate . . . disloyal, contemptuous, and disrespectful” speech, see *Parker v. Levy*, 417 U.S. 733, 739, 758–61 (1974).

117. So, for example, though the Constitution declares that “[n]o state shall” enact a “Law impairing the Obligation of Contracts,” see U.S. CONST. art. I, § 10, the Court long ago upheld a state law that prevented mortgagees from foreclosing on defaulting mortgagors pursuant to lawful provisions of lawful mortgage contracts; see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

118. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

another,¹¹⁹ and the right that ultimately is subordinated cannot readily be understood to be categorical.

This turns out to be only a small part of the story behind noncategoricalism, however, for the practice of noncategoricalism in the United States is far more extensive than the above account suggests. Most of the time, American constitutional rights are held to be noncategorical not on account of the existence of competing constitutional rights, but due to competing nonconstitutional policy considerations. This is captured in the canonical legal test that is utilized to operationalize America's most prized constitutional rights, the so-called strict scrutiny test: Governmental regulation of the handful of rights that trigger strict scrutiny¹²⁰ is constitutional so long as there is a compelling governmental interest,¹²¹ not a constitutional governmental interest. Consistent with this formulation, virtually all governmental interests that have been upheld as compelling have not themselves been of constitutional moment. Not infrequently, in fact, the Court has allowed fundamental constitutional interests to be regulated on account of governmental interests that even fall short of compelling.¹²² For example, although fetuses do not have a constitutional life interest, the Court has decided that states have a sufficiently important interest in protecting them that states may seek to dissuade pregnant women from exercising their constitutional abortion rights and, after a certain point in the pregnancy, may prohibit abortions altogether.¹²³

In short, U.S. constitutional law regularly permits nonconstitutional, governmental interests to prevail over constitutionally protected rights. Constitutional doctrine permits this because the law recognizes that life is

119. For example, women's equal protection right can come into conflict with men's association rights, see William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 68–69 (1986), and the private property right of a shopping center owner can conflict with the public's free speech rights, see, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

120. This includes speech, fundamental rights, and the Equal Protection Clause's treatment of racial classifications. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–801 (2006).

121. In addition to this requirement, strict scrutiny also famously demands that the means used by government be narrowly tailored. See *id.* at 800–01.

122. See Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 277 (2007).

123. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992). Such a prohibition is subject to there being an exception should the life or health of the mother be threatened, a caveat that does not affect the point made above in text. See also *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000). The Court's recent decision in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), provides additional vivid evidence of the noncategorical protection that the abortion right affords in relation to even nonconstitutional countervailing consideration.

complex. Giving absolutist, categorical effect to constitutional principles is not possible insofar as constitutional principles conflict with one another. And even where there are no such constitutional conflicts, giving categorical effect frequently is undesirable on account of the severe costs that categoricalism would pose to important, albeit nonconstitutional, governmental interests (such as protecting fetal life).

But, one might ask, is there a noncategorical option that realistically could serve as an alternative to CCS in the context of conflicts between Congress and the president's commander-in-chief powers? The answer is yes. As catalogued above, there are four types of conflict-sorting principles that are found in American constitutional law that resolve conflicts between or among governmental institutions that have overlapping powers. All of these are theoretical possibilities, though the nature of the conflict in this context likely eliminates several of them. But to concretely illustrate one plausible candidate, conflicts between the president's commander-in-chief powers and Congress's power to regulate the land and naval forces could be analyzed using a strict but noncategorical rule under which presidential action pursuant to the commander-in-chief powers that was inconsistent with statutory requirements would be strongly presumed to be unconstitutional. Drawing on well-established legal tests that operationalize many of our most cherished constitutional rights, the presumption of unconstitutionality might be rebutted only upon a showing of a compelling governmental interest and that the president's actions were narrowly tailored.¹²⁴

There are yet other alternatives to a categorical rule that could also protect the "equilibrium established by our constitutional system." The point for present purposes is not to defend preferable alternatives (something I attempt to do elsewhere¹²⁵) but to show that Jackson's unquestionably correct observation—"Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at

124. As a concrete example, consider the McCain Amendment, which appears to categorically proscribe torture on the battlefield. See 42 U.S.C. § 2000dd(a). Assume for now that the power to direct battlefield interrogations falls under both the president's commander-in-chief powers and Congress's power to regulate the land and naval forces. Under CCS, the president would be absolutely forbidden to torture. Under a strict but noncategorical conflict-sorting rule, the president could disregard the statute under very pressing circumstances. I hasten to add that although I provide this example for the purpose of illustrating the operation of a Type 1B conflict-sorting rule, this is not the approach I favor to resolving conflicts between Congress and the commander-in-chief. I elaborate my preferred approach in a work in progress. See Rosen, *supra* note 6.

125. See Rosen, *supra* note 114, at 703–04. A work in progress elaborates yet another option. See Rosen, *supra* note 6.

stake is the equilibrium established by our constitutional system”¹²⁶—is not sufficient on its own to justify the principle of CCS.

B. The Concurrence’s Ambiguities and Equivocations

In this Subpart, I describe four additional reasons why Jackson’s concurrence should not be understood as having sufficiently justified its assumption of CCS in relation to conflicts between Congress and the commander-in-chief.

First, there is tension within the concurrence itself as to how mechanical in operation the tripartite framework is intended to be. As discussed above, the framework itself—and category three in particular—is premised on an assumption of CCS that appears to give rise to a mechanical method of analysis that resolves conflicts between Congress and the commander-in-chief by simply inquiring whether Congress has regulated pursuant to its enumerated powers. If Congress has done so, then the president is obligated to follow Congress’s instruction. But other parts of the Jackson concurrence eschew the mechanical approach that the framework itself suggests. Jackson introduced the framework with the caveat of its being a “somewhat over-simplified grouping of practical situations in which a President may doubt . . . his powers.”¹²⁷ Further, immediately before presenting his famous framework, Jackson cautioned that “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”¹²⁸ Rather, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”¹²⁹ This introductory guidance stands in tension with analyzing the scope of the commander-in-chief’s powers by means of the discrete, nearly mechanical analysis that the framework’s category three appears to call for, and that has been advocated by contemporary critics of the Bush Administration.¹³⁰

Second, the concurrence did not apply the tripartite framework in the mechanical way that the framework, viewed in isolation, appears to require. Jackson spent nearly five U.S. Reports pages of his opinion explaining why

126. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

127. *Id.* at 635.

128. *Id.*

129. *Id.*

130. See *supra* notes 8–9 and accompanying text.

the president's commander-in-chief powers did not extend to seizing domestic production facilities that potentially could be paralyzed due to an economic struggle between labor and industry.¹³¹ This entire discussion would be irrelevant under a mechanical reading of Jackson's framework. Because Congress unquestionably had the power to regulate labor relations in the steel industry and had in fact regulated (denying the president the power he sought to exercise), whether the Commander-in-Chief Clause also had application to labor relations in the steel industry would have been immaterial under CCS's assumption that legislation categorically trumps the president's commander-in-chief powers.¹³² The fact that Jackson spent so much time ascertaining the scope of the president's commander-in-chief powers suggests that he did not actually apply the framework in the mechanical, single-institution focused way that CCS calls for.

A third reason not to understand Jackson's concurrence as establishing that conflicts between Congress and the commander-in-chief are to be resolved by the CCS rule is that the concurrence's discussion concerning the relationship between the president's commander-in-chief powers and Congress's powers is dicta. This is so because, as noted immediately above, Jackson ultimately concluded that Truman's actions did not fall within the president's commander-in-chief powers.¹³³ Jackson accordingly did not have to decide how to sort out a conflict between the president's commander-in-chief powers and Congress's powers.

Finally, the central justification for not according dicta the weight of a holding—that analysis not necessary for the holding is less apt to be carefully thought through¹³⁴—is applicable to Jackson's concurrence. His opinion makes observations about the relationship between the

131. See *Youngstown*, 343 U.S. at 641–46.

132. I am indebted to Dean Hal Krent for this point. To be sure, it could be responded that Jackson intended the entire discussion concerning the scope of the president's commander-in-chief powers solely to be a response to the government's argument that President Truman's actions were justified on the basis of the Commander-in-Chief Clause. See *id.* at 641. Even so, it is striking that Jackson did not respond to the solicitor general's argument simply by saying—or, at the very least, by also saying—that, as per his framework, the president could not seize the steel mills because Congress has exercised the regulatory authority it has over them.

133. *Id.* at 644–45.

134. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.”).

commander-in-chief powers and Congress's powers that are in deep tension with one another. At one point in the concurrence, Jackson stated that he would "indulge the widest latitude of interpretation to sustain [the President's] *exclusive* function to command the instruments of national force" pursuant to the Commander-in-Chief Clause.¹³⁵ Elsewhere, however, Jackson maintained that Congress is "empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."¹³⁶ These statements stand in obvious tension with one another. Jackson was not required to write more carefully on this topic because, under his analysis, there was no conflict between Congress and the president as commander-in-chief. For these very reasons, the lessons concerning the limits of dicta are well taken with regard to the concurrence's discussion of how conflicts between Congress's and the president's commander-in-chief powers are to be resolved.

In short, though recent commentators treat the concurrence's framework as having provided a definitive resolution of conflicts between Congress and the commander-in-chief by adopting a rule of CCS that calls for a mechanical inquiry that focuses on whether Congress acted pursuant to its delegated powers, there are good reasons to conclude that Jackson neither used nor intended his framework to be used in this way.

C. Answering a Potential Objection

To this Article's argument that the Jackson concurrence does not adequately justify the rule of CCS, it might be objected that CCS is a settled rule on the basis of stare decisis principles. There are two strong responses to any such objection.

First, stare decisis does not demand that the concurrence be treated as having settled the relation between Congress and the commander-in-chief because, as shown immediately above, the concurrence did not understand itself to have resolved that question. By intention and in actual effect, any discussion the concurrence provided concerning the relation between Congress and the commander-in-chief was mere dicta. Granting definitive and final status to the CCS assumption for these reasons would be unwise, indeed perverse.

135. *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (emphasis added).

136. *Id.* at 644.

Second, even if the concurrence viewed itself as providing a settled and firm answer to the question of how conflicts between Congress and the commander-in-chief are to be resolved, any such perception should not be determinative where it can be shown that the “firm” answer was arrived at without a full appreciation and consideration of the options from among which the opinion made a selection. One of the well-established bases for eschewing *stare decisis* and overturning precedent is where the reasoning (or lack thereof) of the earlier decision has been deemed to be inadequate by the clarity afforded by the passage of time.¹³⁷ The Jackson concurrence’s inadequate appreciation of the range of available conflict-sorting rules from among which a choice had to be made fatally undermines any conclusion that CCS is appropriately viewed as a settled constitutional principle. This conclusion should not be weakened by the fact that a subsequent case—namely, the *Hamdan* decision—has mistakenly viewed the rule of CCS as having been definitively settled by the Jackson concurrence. The difficulty of amending the Court’s constitutional judgments strongly counsels against an approach to *stare decisis* that treats as definitively settled a constitutional question that has not received adequate consideration. To be clear, though, my argument in this Article is not that CCS is wrong and should be overturned, but simply that it should not be viewed as a definitive and settled constitutional principle.

CONCLUSION

The CCS assumption underwrites the logic of categories two and three. Yet Jackson’s *Youngstown* concurrence did not provide sufficiently robust reasons to adopt this assumption. The justificatory inadequacies are particularly troubling once one recognizes that the CCS assumption is a conflict-sorting rule and that American law has adopted alternative conflict-sorting rules in other circumstances in which two or more governmental institutions have overlapping authority.

A crucial question then arises: On what basis is the choice among conflict-sorting rules to be made? A careful study of the other contexts of overlapping authority points the way to answering this crucial question. In one context of overlapping governmental authority—that of federal and state law—constitutional text itself provides a clear answer; the Supremacy

137. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (quoting from *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), and concluding “[t]hat statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake” and proceeding to overturn the case).

Clause unequivocally provides a Type 1A categorical institution-trumping rule. But, in virtually all other circumstances of overlapping governmental powers, including as between Congress and the commander-in-chief, constitutional text does not provide a conflict-sorting rule. In these other contexts of overlapping governmental authority, a significant—indeed, arguably the overwhelming—basis for choosing among conflict-sorting rules has been an analysis of the likely consequences of adopting the conflict-sorting rule under consideration. Such analyses perforce have been highly institution sensitive, taking account of the context at hand, what is at stake, and the characteristics of the various institutions involved in the conflict.

Consider, for example, courts' overlapping adjudicatory jurisdiction. Type 2A time-based rules that give trumping power to the first court's final judgment have been justified not on abstract grounds concerning the nature of how conflicts need be resolved, but on the institution-sensitive grounds that such a rule is necessary to avoid inconsistent results, secure efficiency, and protect parties against a series of lawsuits.¹³⁸ Similarly, the one Type 2B time-based rule that appears in the context of overlapping adjudicatory jurisdiction, which gives precedence to the later judgment, has been selected and justified on the basis of institutional considerations,¹³⁹ not on higher level theories of conflict resolution. Giving effect to the first of several judgments, the Court has reasoned, would undercut the incentives that are necessary to ensure that parties invoke the defenses of merger, claim preclusion, and issue preclusion at the earliest possible time.

This pattern of institution-sensitive analysis in the selection of conflict-sorting rules is present in other contexts of overlapping governmental authority. A Type 4 no-sorting rule has been adopted in the context of overlapping state criminal jurisdiction on the basis of considerations that are specific to that institutional context; two or more states can criminally regulate a given transaction or occurrence because each may have distinct interests that may be properly vindicated in each state's criminal law system.¹⁴⁰

Finally, consider the overlapping powers of the different branches of the federal government to interpret the Constitution. The Supreme Court has adopted a Type 1B institution-based sorting rule that grants the Supreme Court final interpretive authority, but requires that the Court give

138. See *supra* text accompanying note 75.

139. See *supra* text accompanying note 76.

140. See *supra* text accompanying notes 93–95.

deference to the constitutional judgments of the other branches of federal government.¹⁴¹ Those justifying this rule have done so largely on institutional grounds, and those criticizing it have done the same. Larry Alexander and Fred Schauer's defense of "judicial supremacy" (the part of the Type 1B conflict-sorting rule that gives courts the final say) rests primarily on functionalist considerations of what the consequences of its denial would entail;¹⁴² predictions of such consequences rest entirely on assessments of the characteristics of the various governmental and nongovernmental institutions. Judicial deference to the interpretations of the other branches of the federal government has been justified on the institutional basis that Congress and the president are coordinate branches of government that are entrusted with interpreting the Constitution and are deserving of respect. Similarly, the strongest criticisms of judicial supremacy that have been pressed by contemporary critics have been institutional in nature. Jeremy Waldron's recent article *The Core of the Case Against Judicial Review*, for instance, considers the nature of the reasoning that is called for by constitutional interpretation and argues that the nonjudicial branches of the government are well suited to playing this role.¹⁴³

Indeed, Justice Jackson's *Youngstown* concurrence itself gestured toward institution-based analysis. As shown above, one of the opinion's two fleeting justifications for category three was that "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."¹⁴⁴ This argument points us toward considering the context at hand and the possible consequences of adopting a particular conflict-sorting rule vis-à-vis institutional dynamics. Unfortunately,

141. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (deferring to Congress's constitutional judgment in the equal protection context); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) (deferring to Congress's judgment in the First Amendment context); see also *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 61 (1989) ("To be sure, we owe some deference to Congress' judgment after it has given careful consideration to the constitutionality of a legislative provision.").

142. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *CONST. COMMENT.* 455, 457 (2000) (arguing that "a central moral function of law is to settle what ought to be done" and that this is best effectuated by means of judicial supremacy); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *HARV. L. REV.* 1359 (1997).

143. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1368–76 (2006).

144. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

Jackson's opinion does not adequately follow through with this line of analysis. There are many possible reasons for the concurrence's incompleteness in this regard: It may be a product of the compressed time during which the *Youngstown* opinions were written, a result of the fact that any discussions about resolving conflicts between Congress and the commander-in-chief were unnecessary dicta insofar as Jackson did not believe that Truman's actions fell within the commander-in-chief's powers, or because Jackson did not fully appreciate the range of available conflict-sorting options among which he had to choose. At the end of the day, the precise reasons for the concurrence's inadequacies are not terribly important. What does matter is that the American legal community not continue to think that the relation between Congress and the commander-in-chief was definitively resolved by Jackson's majestic *Youngstown* concurrence. Rather, the conflict-sorting rule of CCS that underwrites the tripartite framework has not yet been adequately justified despite the availability of several alternative conflict-sorting rules.