The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoff through the Prism of Youngstown Steel

Chad DeVeaux
THE FOURTH ZONE OF PRESIDENTIAL POWER: ANALYZING THE DEBT-CEILING STANDOFF THROUGH THE PRISM OF YOUNGSTOWN STEEL

Chad DeVeaux*

“The weakness of Congress is the strength of the President.”1

INTRODUCTION

The late Juan J. Linz posited that the survival of America’s separation of powers is predicated on the existence of a “public consensus [that] hovers reliably around the middle of the political spectrum.”2 This predilection toward centrism ensures “the limited weight of fringe parties” dictating that “no candidate will have any incentive to coalesce with . . . extremists.”3 For when extremist elements gain political clout in tripartite governments their polarizing influence “exacerbates . . . conflicts between the legislative and executive [branches]” leading to intractable constitutional crises.4 The ongoing debt-ceiling fiasco put the merits of Dr. Linz’s thesis on display for all the world to see.

The election of President Barack Obama inspired the rise of the Tea Party faction of the American Republican Party.5 The group embraces a take-no-prisoners approach, often exhibiting contempt for some of the most basic historical precepts governing the relationship between the coordinate branches of our government.6 Since the faction’s emergence, Senate

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3 Id.
4 Id. at 54. Dr. Linz focused his research largely on Latin American republics that modeled their constitutions on the U.S.’s separation-of-powers scheme. Id. at 51.
5 See Jared A. Goldstein, Can Popular Constitutionalism Survive the Tea Party Movement?, 105 NW. U. L. REV. COLLOQUIY 288, 296 (2011) (Arguing that the Tea Party movement rose is animated by the belief that “President Obama and his liberal supporters are foreign usurpers, not real Americans, and all true patriots must rise up to defeat them before they destroy everything that is great about America.”).
6 Paul Krugman argues that the Tea Party’s contempt for the rules of civility qualify the group as what Henry Kissinger called a “revolutionary power”—“a power that no longer accept[s] any of the norms of politics as usual, that [i]s willing not just to take radical positions but to act in ways that undermine the whole system of governance people thought they understood.” Paul Krugman, Things Come to a Head, N.Y. TIMES, Sept. 18, 2013, available at http://krugman.blogs.nytimes.com/2013/09/18/things-come-to-a-head/?_php=true&_type=blogs&_r=0.
Republics have repeatedly blocked the confirmation of qualified judicial nominees\(^7\) and employed the filibuster at a staggering rate unmatched in more than 237 years of American history.\(^8\) Their House counterparts even threatened to impeach the president over disagreements of pure policy, ignoring the long-standing tradition that impeachment may not be used as a political tool.\(^9\)

The new faction’s antics took yet another unexpected turn in the summer of 2011. Capitalizing on their new-found influence,\(^10\) the group persuaded the Republican caucus—an institution that long “hover[ed] reliably around the middle of the political spectrum”\(^11\)—to embrace an unprecedented nihilistic strategy. Congressional Republicans threatened to block an increase in the federal debt ceiling if their political demands were not met, potentially forcing the federal government to default on its debts.\(^12\)

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\(^8\) MIMI MARZIANI & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, FILIBUSTER ABUSE 3 (2011) (noting unprecedented spike in filibusters following election of President Obama).

\(^9\) At the behest of congressional Republicans, the House Committee on the Judiciary recently met to consider impeaching President Obama. Pam Platt, *GOP Fixated on Impeachment*, COURIER-JOURNAL, Dec. 6, 2013, at A-15. This evidences a patent disregard for the long-respected separation-of-powers tradition—established by the failed impeachment of Justice Samuel Chase in 1805—that the threat of impeachment will not be used for political ends. E.g., Mark Tushnet, *The “Constitution Restoration Act” and Judicial Independence: Some Observations*, 56 CASE W. RES. 1071, 1079 (2006) (“There is a fixed point in impeachment law, emerging from the failed impeachment of Samuel Chase. That failure has been taken to establish the legal proposition that Congress may not remove a federal judge from office merely on the basis of disagreement with the judge’s rulings.”); Jeff Sessions & Andrew Sigler, *Judicial Independence: Did the Clinton Impeachment Trial Erode the Principle?*, 29 CUMB. L. REV. 489, 503 (1999) (“The result of Chase’s acquittal established the firm precedent that impeachment would not be used as a political tool.”); Robert R. Bair & Robin D. Koblentz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365, 385 (1967) (“the most important consequences of the [Chase impeachment] trial were a reduction of the fear of the use of impeachment for political ends”).


\(^11\) Linz, *supra* note 2 at 60.

Such an event would likely trigger a world-wide economic depression.\textsuperscript{13} The resulting standoff, if unresolved, threatened to confront the president with a no-win scenario. Federal statutes command the president to implement a myriad of specific programs and projects.\textsuperscript{14} Other laws authorize him to obtain the revenue necessary to subsidize these endeavors by collecting taxes\textsuperscript{15} and borrowing funds.\textsuperscript{16} The debt-ceiling statute caps the amount of money the government can borrow at any particular time.\textsuperscript{17} Based on the level of revenue the government is permitted to collect annually through taxation, basic arithmetic dictates that the president would need to borrow funds exceeding the debt limit to comply with Congress’s appropriation mandates.\textsuperscript{18} As Professor Laurence Tribe succinctly explained, when “legislatively authorized spending commitments outstrip legislatively authorized revenue, it is impossible to honor both of these allocational arrangements at once. One must give way.”\textsuperscript{19}

The 2011 standoff culminated in an eleventh-hour settlement that averted default.\textsuperscript{20} But this last-minute resolution came at great cost. Ratings agencies lowered the federal government’s credit rating, raising interest rates on U.S. government loans.\textsuperscript{21} Undeterred, congressional Republicans


\textsuperscript{15} See 26 U.S.C. § 1 (authorizing the Treasury to collect a myriad of taxes).

\textsuperscript{16} 31 U.S.C. § 3104(a) (“The Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law . . . .”).

\textsuperscript{17} 31 U.S.C. § 3101.

\textsuperscript{18} See Eric A. Posner & Adrian Vermeule, \textit{Obama Should Raise the Debt Ceiling on His Own}, N.Y. TIMES, July 22, 2011, available at http://www.nytimes.com/2011/07/22/opinion/22posner.html (“A deadlocked Congress has become incapable of acting consistently; it commits to entitlements it will not reduce, appropriates funds it does not have, borrows money it cannot repay and then imposes a debt ceiling it will not raise.”).


threatened default once more as federal debt crept toward the borrowing limit again in the fall of 2013, this time in an attempt to derail the Affordable Care Act. While their gambit ultimately failed, the standoff further eroded confidence in our government, and damaged both the domestic and global economy. As of this writing, the Treasury is expected to reach the debt ceiling again in late February 2014. Once more, congressional Republicans are holding the global economy hostage, threatening to plunge the United States into default if the White House does not accede to their policy demands.

The seminal scholarly analysis of the standoffs comes from Professors Neil Buchanan and Michael Dorf. They contend that Congress has confronted the president with an unprecedented Hobson’s choice they refer to as the “trilemma.” Any action he might take—be it unilaterally cancelling programs, increasing taxation, or borrowing more money—is in direct conflict with an express congressional command. Thus, Professors

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24 I completed the present draft of this Article on February 7, 2014. I intend to update it, as necessary, to reflect the debt ceiling’s current status at the time of publication.


26 Id. (“House Speaker John Boehner’s office dismissed . . . the possibility that Congress would raise the debt limit without concessions. ‘The Speaker has said that we should not default on our debt, or even get close to it, but a clean debt-limit increase simply won’t pass in the House,’ Boehner spokesman Michael Steel said.”).


28 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1196-97.
Buchanan and Dorf posit that any choice the president makes will violate the Constitution “because he will have failed to execute at least one duly enacted law of the United States.”

It is with this contention that I part company with Professors Buchanan and Dorf. I agree that the “take Care” Clause lies at the heart of the present controversy. But their analysis fails to employ the appropriate standard. The “proper framework” for evaluating what it means to faithfully execute the law “is the three-part scheme used by Justice Jackson in his opinion in Youngstown Sheet & Tube Co. v. Sawyer.”

In his oft-quoted opinion, Justice Jackson asserted that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” He offered his famous three-zone template to evaluate the scope of executive power.

In the first zone, “the President acts pursuant to . . . express or implied” congressional authorization. Endowed with such legislative approval, the president’s power “is at is maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate.”

In the second zone, “the President acts in absence of either a congressional grant or denial of authority.” In this “zone of twilight” Congress and the president possess authority that is either “concurrent” or “its distribution is uncertain.”

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29 Id. (emphasis added). Confronted with the question of whether they view Article II’s command that the president “faithfully execute” statutes renders “every less-than-total enforcement of federal law” unconstitutional, Professors Buchanan and Dorf demur, asserting that they “find deeply troubling any suggestion that the president can simply choose not to enforce some law on the ground that he disagrees with the policy underlying that law.” Neil H. Buchanan & Michael C. Dorf, Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option, 112 COLUM. L. REV. SIDE BAR 237, 247-48 (2012) [hereinafter Buchanan & Dorf, Nullifying the Debt Ceiling Threat].

30 U.S. CONST. art. II, § 3.

31 Hamdan v. Rumsfeld, 548 U.S. 557, 638 (Breyer, J., concurring) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); accord Dames & Moore v. Regan, 453 U.S. 654, 661, 674 (1981); Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979, 993 (3d Cir. 1986) (“The President’s duty under the Constitution ‘to take care that the laws are faithfully executed,’ . . . is accompanied by the grant of ‘the executive power.’ . . . The scope of this power depends on the amount of discretion that law leaves to the executive: in a sense, the power to execute the laws commences where Congress’s exercise of the power to legislate leaves off.”).

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

33 Id. at 635-36.

34 Id.

35 Id. at 636.

36 Id.
Zone three involves situations where “the President takes measures incompatible with the express or implied will of Congress.”37 Here, “his power is at its lowest ebb, for . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”38

At first blush, each of the president’s three options in the standoff appears to fall into the third zone of Justice Jackson’s taxonomy. Article I bestows the powers to “tax,”39 “spend,”40 and “borrow”41 exclusively upon Congress. Thus, such authority is far removed from those plenary powers that the president may wield irrespective of the will of Congress.42

But on closer examination, I posit that the standoff does not fit within any of the zones identified by Justice Jackson. His three zones contemplate coherent legislative action falling within “a spectrum running from explicit congressional authorization to explicit congressional prohibition.”43 Congress can sanction presidential action, it may be silent on the subject, or it may prohibit it. Congressional acts in conformity with any of these three coherent choices will affect the president’s powers accordingly. But in the present case Congress has directed the president to take specified action and simultaneously forbade him from taking that very same action. Such contradictory legislative instructions cannot find a home anywhere within Youngstown’s existing taxonomy. As such, the debt-ceiling standoff requires expansion of Youngstown’s spectrum to accommodate a previously unexplored fourth zone of presidential power.

In this unexplored zone, I assert that Congress—by deliberately confronting the chief executive with a no-win scenario—actually increased his power. While it is axiomatic that the president “cannot of himself make a law,”44 irreconcilably conflicting legislative commands necessarily invest the executive with a measure of discretion that resembles law making.45 Congress cannot—in the guise of “legislating”—direct the Executive Branch to complete an impossible task and then claim that it is the president who is delinquent in his constitutional duty to faithfully “execute” the law when the assigned goal goes unfulfilled. By commanding the president to implement

37 Id.
38 Id.
40 Id.
41 U.S. CONST. art. I, § 8, cl. 2.
42 “Any presidential decision to tax, borrow, or spend, or not spend without congressional authorization violates the principle of separation of powers because the powers to tax, to borrow, and to spend, or not to spend are all allocated to Congress, not the president.” Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1222-23.
45 See Part II-C, infra.
particular programs, while explicitly denying him the funds necessary to pay for these endeavors, Congress has tacitly afforded the president the discretion to take any of the three corrective actions suggested above.

This Article consists of three Parts. Part I examines the web of laws that create the debt-ceiling standoff. As a result of the interaction of these decrees, if Congress does not pass a new law that raises the debt ceiling, increases tax rates, or reduces spending before existing funds are exhausted the president will be forced to disobey a statutory command. He may unilaterally: (1) cancel spending programs, (2) direct the Treasury to borrow funds in excess of the debt limit, or (3) raise tax rates to collect sufficient revenue to satisfy congressionally mandated expenditures.

Part II examines the president’s options in light of the framework proposed by Justice Jackson in Youngstown. Justice Jackson’s three zones do not contemplate situations where Congress has issued the president contradictory commands. As such, the standoff requires the expansion of his taxonomy to include a previously unexamined fourth zone of presidential power. In this new zone, I contend that Congress by issuing conflicting instructions tacitly invested the president with the discretion to respond to the standoff by taking any of the three corrective actions suggested above.

Finally, in Part III, drawing on the work of Dr. Juan Linz, I assert that by forcing the president to aggrandize his own power to obey its commands, Congress has threatened the long term stability of the United States government. Youngstown and its progeny recognize that the delineation of federal power does not follow inherently from the Constitution’s text, but rather “practice . . . integrate[s] the dispersed powers into a workable government.”46 The power-sharing relationship between the three departments evolved over time and its sustenance is premised in large measure on the continued respect for historical precedent by succeeding generations of lawmakers. Because of the inherent mutability of this relationship, the exercise of power thought beyond the pale by preceding generations may later become the norm. Acquiescence by one branch can lead to the gradual accretion of power to another.

I argue that by issuing the president conflicting commands and leaving it to him to resolve the conflict, Congress has acquiesced unprecedented power to the Executive Branch. This act sets a perilous precedent that, if continued, could lead to a dangerous aggrandizement of presidential power upending the delicate bonds on which our freedom rests.

46 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
I. THE DEBT-CEILING STANDOFF

Congress prescribes the federal budget through a panoply of appropriation laws. These statutes instruct the Treasury to tap the federal fisc to subsidize a myriad of programs and projects. Since the Republic’s founding, Congress has passed these acts with full knowledge that the funds available in federal coffers will invariably prove inadequate to cover the required expenditures. When this happens, other laws direct the Treasury to periodically borrow enough money to cover the shortfall. Among the appropriations subsidized in this manner are payments on the national debt.

But Congress’s appropriation statutes stand in inexorable conflict with the debt-ceiling law. This statute caps the amount of debt the federal government can owe at any particular time. Since enacting the statute in 1917, Congress has routinely passed budgets mandating spending that so plainly exceeds projected tax revenues that they will require the Treasury to borrow funds in excess of the debt ceiling to make good on federal obligations. And for decades Congress approved increases to the debt ceiling as a matter of course on each occasion the Treasury reached the borrowing limit. All that changed in the summer of 2011.

A. The Nature of the Standoff

Spurred on by the growing Tea Party faction of their party, in the summer of 2011, congressional Republicans disregarded nearly a century of precedent, using the threat of federal default to extract political concessions

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50 31 U.S.C. § 3104(a) (“The Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law . . . .”).

51 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1192.


53 See Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1187 (“As history has unfolded in the years since the debt ceiling statute was first enacted, Congress has generally acted to increase the debt ceiling as necessary, in line with the new accumulated borrowing needs implied by annual budgets.”).

54 Id.
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from the president. The standoff culminated in an eleventh-hour settlement that averted default, an event that probably would have triggered a global economic depression. Nonetheless, by every measure, the consequences of the 2011 fiasco were dire. The government’s credit rating—a measure that controls the interest rates on federal debt—was downgraded. And the “gulf between the political parties” shook global confidence in the maturity of American politicians and the stability and “effectiveness” of our government.

Emboldened by their perceived success, congressional Republicans promised to repeat their gambit to extract future concessions from the White House. Kentucky Senator Mitch McConnell proclaimed, “never again will any President, from either party, be allowed to raise the debt ceiling . . . without having to engage in the kind of debate we have just come through.”

True to their word, congressional Republicans threatened default again as federal debt crept toward the borrowing limit in the fall of 2013, this time in an attempt to derail the Affordable Care Act. While their plan ultimately failed, the standoff further eroded confidence in the U.S. government, and damaged both the domestic and global economy. As of this writing, the Treasury is expected to reach the debt ceiling again in late February 2014. And once more, congressional Republicans are using the threat of default as a political weapon.

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55 Tribe, A Ceiling We Can’t Wish Away, supra note 12 at A-21.
57 See authorities cited supra note 13.
58 Appelbaum & Dash, supra note 21 at A-1.
59 Id.
62 Id.
63 I completed the present draft of this Article on February 7, 2014. I intend to update it, as necessary, to reflect the debt ceiling’s current status at the time of publication.
65 Id. (“House Speaker John Boehner’s office dismissed . . . the possibility that Congress would raise the debt limit without concessions. ‘The Speaker has said that we should not default on our debt, or even get close to it, but a clean debt-limit increase simply won’t pass in the House,’ Boehner spokesman Michael Steel said.”).
B. The Public Debt Clause

The Fourteenth Amendment’s Public Debt Clause commands that “[t]he validity of the public debt of the United States . . . shall not be questioned.”\textsuperscript{66} The States ratified this provision in the aftermath of the Civil War to quell fears that Congress would default on bonds purchased by creditors who funded the Union war effort.\textsuperscript{67}

In the nearly century and a half since its ratification, the provision has been interpreted by only a single Supreme Court decision,\textit{ Perry v. United States},\textsuperscript{68} in 1935. Widely regarded as one of the most poorly written opinions in the United State Reports, \textit{Perry’s} ultimate meaning remains something of a mystery.\textsuperscript{69} \textit{Perry} is so confounding that the great Henry Hart, Jr. remarked that “few more baffling pronouncements . . . have ever issued from the United States Supreme Court.”\textsuperscript{70} Nonetheless, the decision seemingly confirms that the Public Debt Clause denies Congress the power “to alter or repudiate” debts owed to Treasury bondholders because “it has borrowed [such] money under the authority which the Constitution confers.”\textsuperscript{71}

A federal default would likely prevent the Treasury from making timely payment to the nation’s creditors.\textsuperscript{72} Thus, many commentators posit that the debt-ceiling statute is unconstitutional\textsuperscript{73} and that the Public Debt

\textsuperscript{66} U.S. CONST. amend. XIV, § 4.

\textsuperscript{67} Michael Abramowicz, \textit{Beyond Balanced Budgets, Fourteenth Amendment Style}, 33 TULSA L.J. 561, 585 (1997) (citing historical evidence that the Public Debt Clause was intended to quell “skittishness about the possibility that the United States might default” on its Civil War debt).

\textsuperscript{68} 294 U.S. 330 (1935).

\textsuperscript{69} Henry M. Hart, Jr., \textit{The Gold Clause in United States Bonds}, 48 HARV. L. REV. 1057, 1057 (1935) [hereinafter Hart, \textit{Gold Clause}]. In \textit{Perry}, the Petitioner possessed United States bonds that had been called for redemption. The bonds in question contained a “gold clause”—a promise upon redemption to pay the holder “in United States gold coin of the present standard of value.” \textit{Perry}, 294 U.S. at 346-47. Prior to redemption, Congress enacted a statute invalidating the gold clause, instructing the Treasury to pay bondholders in standard U.S. dollars. The Petitioner sued, asserting that Congress’s invalidation of the gold clause questioned “the validity of public debt” in violation of the Public Debt Clause. \textit{Id}. The Court, per Justice Hughes, seemed to agree, apparently holding that, by reneging on its promise to pay holders in gold coin, Congress had violated the Public Debt Clause. \textit{Id}. at 350-52. But perplexingly the Court proceeded to deny the Petitioner’s prayer for relief, concluding that he had suffered no “actual damages.” \textit{Id}. at 357-58.

\textsuperscript{70} Hart, \textit{Gold Clause}, supra note 69 at 1057.

\textsuperscript{71} \textit{Perry}, 294 U.S. at 350-51.

\textsuperscript{72} Buchanan & Dorf, \textit{Nullifying the Debt Ceiling Threat}, supra note 29 at 240-41.

Clause independently empowers the president to borrow proceeds in excess of the ceiling.\textsuperscript{74} Both these premises are incorrect.

First, while missed payments to bondholders would likely constitute an “alter[ation]” of loan agreements concerning funds “borrowed . . . under the authority which the Constitution confers,”\textsuperscript{75} this outcome is no more attributable to the debt-ceiling law than to statutes governing appropriations or taxation. As Professor Tribe explained, “the debt-limit statute merely limits one source of revenue that the government might use to pay its bills. Similarly, the tax code limits a different source of revenue—taxation—that the government might also use to cover its expenditures.”\textsuperscript{76} Any violation of the Public Debt Clause stems from the interaction of the various spending, borrowing, and taxation statutes.\textsuperscript{77} The debt-ceiling law is no more unconstitutional than these other legislative acts.

Second, the Public Debt Clause conveys no independent powers to the president. Article I invests Congress with the exclusive powers to “tax,”\textsuperscript{78} “spend,”\textsuperscript{79} and “borrow.”\textsuperscript{80} The Public Debt Clause does not alter this basic allocation.\textsuperscript{81} In my view, the clause does make timely payment to Treasury bondholders a constitutional obligation. But this is no different from constitutional provisions requiring the payment of judicial salaries\textsuperscript{82} and just compensation for takings of private property.\textsuperscript{83} These clauses likewise make the timely payment of money constitutional duties.\textsuperscript{84} Nonetheless, none of

\textsuperscript{75} Perry, 294 U.S. at 350-51.
\textsuperscript{77} Id.
\textsuperscript{78} U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{79} Id.
\textsuperscript{80} U.S. CONST. art. I, § 8, cl. 2.
\textsuperscript{81} See Buchanan & Dorf, \textit{Least Unconstitutional Option}, \textit{supra} note 27 at 1222-23 (“Any presidential decision to tax, borrow, or spend, or not spend without congressional authorization violates the principle of separation of powers because the powers to tax, to borrow, and to spend, or not to spend are all allocated to Congress, not the president.”).
\textsuperscript{82} U.S. CONST. art. III, § 1.
\textsuperscript{83} U.S. CONST. amend. V.
\textsuperscript{84} The Supreme Court has stated that its own precedents “make clear that . . . the
these provisions alter Article I’s proscriptions concerning spending, borrowing, and revenue collection.  

C. The President’s Options

The interaction of Congress’s respective spending, borrowing, and taxation directives presents the president with a no-win scenario. If Congress fails to raise the debt ceiling before available funds are exhausted, he will be forced to choose between three options. He may: (1) ignore the appropriations statutes and cancel spending programs; (2) employ the so-called “nuclear option”—disregard the debt ceiling and borrow sufficient funds to pay for Congress’s appropriations; or (3) unilaterally raise tax rates to produce sufficient revenue to fund Congress’s appropriations.

Each of these choices violates an express statutory command.

Constitution . . . dictates that [money damages are a necessary] remedy for interference with property rights amounting to a taking.” First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 n.9 (1987). As such, a legislative promise to pay is unnecessary in such cases because a promise to pay “[i]s implied because of the duty to pay imposed by the [Fifth] Amendment.” Jacobs v. United States, 290 U.S. 13, 16 (1933). The right to “[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute.” Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923); accord Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

I posit, without elaborating further in this Article, that the Public Debt Clause is a constitutional waiver of sovereign immunity that, in the event of default, empowers bondholders to recover damages from the government if payment obligations are not honored. It is true that constitutional provisions requiring a remedy for their violation usually leave Congress with “a wide choice in the selection of remedies” and thus, ordinarily the denial of particular remedy “can rarely be of constitutional dimension.” Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1366 (1953) [hereinafter Hart, Dialectic]. But the Public Debt Clause denies Congress the power “to alter or repudiate” monetary debts owed bond holders “when it has borrowed money under the authority which the Constitution confers.” Perry v. United States, 294 U.S. 330, 350-51 (1935) (emphasis added). In my view, as with the Fifth Amendment’s just compensation provision, the Clause makes the payment of money a constitutionally necessary remedy. Both provisions “make clear that . . . the Constitution . . . dictates that [money damages are a necessary] remedy . . . .” First English Evangelical Lutheran Church, 482 U.S. at 316 n.9. I likewise contend that Article III, section 1’s protection of judicial salaries constitutes a constitutional waiver of sovereign immunity applicable to suits brought by judges resulting from a legislative decision to defund the federal courts. See also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731, 1787-91 (1991) (arguing that the Constitution requires judicial remedies be available for certain constitutional violations).

D. Profsessors Buchanan and Dorf’s “Trilemma”

Professors Buchanan and Dorf cast the constitutional stakes of the debt-ceiling standoff in a darker context. They contend the president faces an existential constitutional crisis they dub the “trilemma.” In their view, if Congress fails to raise the debt ceiling before the Treasury’s funds are exhausted, this legislative subterfuge will force the president to violate his constitutional duty to faithfully execute federal law.

“Faced with the constitutional duty to execute the spending laws that Congress enacted, to collect tax revenues under the laws that Congress enacted, and to borrow no more than the amount . . . specified in the debt ceiling statute, the president would have to violate at least one of those laws when the debt ceiling is reached.” Thus, Professors Buchanan and Dorf posit that any choice the president makes will violate the Constitution “because he will have failed to execute at least one duly enacted law of the United States.”

I concur with Professors Buchanan and Dorf’s assessment that the “take Care” Clause lies at the heart of the debt-ceiling impasse. But their analysis fails to take account of the seminal opinion addressing the meaning of this provision and the scope of executive power in general.

II. The Fourth Zone of Presidential Power

The constitutionality of the president’s options ultimately turns on a proper understanding of the “take Care” Clause. But the meaning of this provision is much more vexing than the simple “black-and-white” gloss some other commentators put on it. “The President’s duty under the Constitution ‘to take care that the laws are faithfully executed,’ . . . is accompanied by the grant of ‘the executive power.’ . . . The scope of this power depends on the amount of discretion that law leaves to the executive: in a sense, the power to execute the laws commences where Congress’s exercise of the power to legislate leaves off.” The “proper framework” for evaluating such

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87 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1196.
88 Buchanan & Dorf, Nullifying the Debt Ceiling Threat, supra note 29 at 239 (emphasis in original).
89 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1196-97.
90 U.S. CONST. art. II, § 3.
92 Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979, 993 (3d Cir. 1986) (emphasis added) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
questions of executive power “is the three-part scheme used by Justice Jackson in his opinion in Youngstown Sheet & Tube Co. v. Sawyer.”

While Professors Buchanan and Dorf and other scholars have sacrificed untold forests lamenting the potential constitutional crisis arising from the standoff, none have made more than a passing reference to Justice Jackson’s scheme. I assert that viewed in light of Youngstown’s taxonomy, Congress’s paradoxical actions invest the president with unprecedented power.

A. Justice Jackson’s Three Zones

Youngstown addressed President Truman’s unilateral seizure of the American steel industry when a labor dispute threatened production during the height of the Korean War. The Court struck down the president’s action. In his oft-quoted concurring opinion, Justice Jackson asserted that “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” He offered his famous three-zone template to evaluate the scope of executive power.

In the first zone, “the President acts pursuant to . . . express or implied” congressional authorization. Endowed with such legislative approval, the president’s power “is at its maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate.”

In the second zone, “the President acts in absence of either a

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94 See Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1198 n.98 (noting that “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, which do not include those powers expressly granted by Article I, Section 8, to Congress”); Tribe, A Ceiling We Can’t Wish Away, supra note 12 at A-21 (noting that “it is well established that the president’s power drops to what Justice Robert H. Jackson called its ‘lowest ebb’ when exercised against the express will of Congress”).

95 As one prominent scholar noted, “courts invoke Youngstown in the most delicate of cases . . . even when the case is quite far off point.” Patricia L. Bellia, Executive Power in Youngstown’s Shadows, 19 CONST. COMMENT. 87, 90 (2002). For this reason, I am surprised that no one else has offered a detailed analysis of the debt-ceiling standoff under Youngstown’s taxonomy.

96 Youngstown, 343 U.S. at 582-83.

97 Id. at 589.

98 Id. at 635 (Jackson, J., concurring).

99 Id. at 635-36.

100 Id.
congressional grant or denial of authority.”

This is the netherworld of Justice Jackson’s scheme—“a zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain.” Here, “congressional inertia, indifference, or acquiescence may sometimes, at least as a practical matter enable, if not invite, measures on independent presidential responsibility.” Abstract definitions of executive and legislative power are of little utility. “In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than abstract theories of law.”

Zone three involves situations where “the President takes measures incompatible with the express or implied will of Congress.” Here, “his power is at its lowest ebb, for . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” In this zone the president’s action may be sustained “only by disabling the Congress from action upon the subject.”

Justice Jackson concluded that the steel seizure fell within the third zone because prior statutes tacitly prohibited the president’s action. “Congress has not left seizure of private property an open field,” Jackson wrote, “but has covered it by . . . statutory policies inconsistent with th[e] seizure.” Because the power to seize private property does not fall within any field of preclusive executive authority, the Court invalidated the

101 Id. at 636.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id. at 638.
108 Id. at 639. Justice Jackson explained:

Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government; another, condemnation of facilities, including temporary use under the power of eminent domain. The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests. None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

102 Id.
president’s order.\footnote{Id. at 660; accord id. at 585-86 (majority opinion).}

The Supreme Court later applied Justice Jackson’s methodology unanimously in \textit{Dames & Moore v. Regan}.\footnote{453 U.S. 654, 661, 674 (1981). Justice Stevens wrote separately, asserting that the president’s action constituted a Fifth Amendment “taking,” requiring just compensation. Id. at 690 (Stevens, J., concurring). Nonetheless, he expressed agreement with the Court’s separation-of-powers analysis. Id. at 691 (Stevens, J., concurring).} In that case, the Court assessed the constitutionality of the “Algiers Accords,” an executive agreement between the United States and Iran finalized in the waning hours of the Carter Administration.\footnote{Rebecca A. D’Arce, \textit{The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine}, 79 NOTRE DAME L. REV. 291, 292 (2003) (discussing the background of the Algiers Accords).}

The Accords secured the release of fifty two diplomats held hostage by Iran,\footnote{Id. at 292 n.2.} but in exchange, President Carter “obligated” American courts to “terminate all legal proceedings” involving claims by U.S. nationals against Iran.\footnote{Dames & Moore, 453 U.S. at 664-65. The \textit{Dames & Moore} Court also confronted a second \textit{Youngstown} issue. President Carter’s executive agreement established an Iran-United States Claims Tribunal to arbitrate the American creditors’ dismissed claims against Iran and called for the nullification of attachments placed by American courts upon Iranian funds held in U.S. banks, save one billion dollars. Id. at 665. The agreement dictated that the one billion dollars not returned to Iran was to be deposited “in a security account in the Bank of England . . . and used to satisfy awards rendered against Iran by the Claims Tribunal.” Id. The Court found that Congress had authorized the president’s nullification of attachments in the International Emergency Economic Powers Act. Id. at 675. Because the president’s nullification fell within the first zone of Justice Jackson’s scheme, the Court sustained it. Id.}

Dames & Moore, a creditor pursuing claims against Iran, challenged the Accords, alleging that the president lacked the authority to unilaterally suspend private lawsuits against a foreign government.\footnote{Id. at 663-64.} The Supreme Court, per Justice Rehnquist, concluded that the case turned on the application of Justice Jackson’s \textit{Youngstown} taxonomy.\footnote{Id. at 668.} Because Congress had not expressly or impliedly authorized or prohibited the president’s act, the Court concluded that his suspension of claims fell within the second field of Justice Jackson’s taxonomy—the enigmatic “zone of twilight.”\footnote{Id. at 678-80.}

Examining “the general tenor” of Congress’s acts concerning the dismissal of claims, the Court noted “a history of congressional acquiescence in conduct of the sort engaged in by the President.”\footnote{Id. at 678-79.} Specifically, the Court

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\textit{THE FOURTH ZONE OF PRESIDENTIAL POWER}
observed that Congress had enacting several statutes approving of claim settlement by executive agreement in prior situations.\textsuperscript{118} The Court concluded that this pattern of legislation “evinces legislative intent to accord the President broad discretion” and that conferring such discretion “‘invite[s]’ measures on independent presidential responsibility.”\textsuperscript{119} Ultimately, the Court found that in agreeing to the Algiers Accords, President Carter accepted Congress’s invitation and consequently his suspension of claims was a valid exercise of executive power.\textsuperscript{120}

In the years that followed \textit{Dames & Moore}, the Court periodically reaffirmed that Justice Jackson’s taxonomy represents the “proper framework” for assessing the scope of executive power in uncertain cases.\textsuperscript{121}

\textsuperscript{118} The Court cited the International Emergency Economic Powers Act (IEEPA) and the Hostages Act. \textit{Id.} at 675-76. The IEEPA authorizes the nullification of attachments issued by courts against foreign nations. \textit{Id.} at 675. The Hostages Act directs the president to “use such means, not amounting to acts of war, as he may think necessary and proper to . . . effectuate the release” of American citizens unjustly held by a foreign government. \textit{Id.} at 676. While the Court found that neither statute “directly authorize[d] the President’s suspension of claims,” it concluded the acts demonstrated that “the general tenor of Congress’ legislation in this area” evinced legislative intent to accord the President broad discretion’ and “invite[d] measures of independent responsibility” in situations like the Iran hostage crisis, which gave rise to case. \textit{Id.} at 678-79.

\textsuperscript{119} \textit{Id.} at 678.

\textsuperscript{120} \textit{Id.} at 686.

\textsuperscript{121} \textit{Hamdan v. Rumsfeld}, 548 U.S. 557, 638 (2006) (Breyer, J., concurring) (citing \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); \textit{accord} e.g., \textit{Medellín v. Texas}, 552 U.S. 491, 524-25 (2008); \textit{Clinton v. Jones}, 520 U.S. 681, 696-701 (1997). \textit{Medellín v. Texas} addressed a Memorandum issued by President George W. Bush ordering state courts to “review and reconsider” the convictions of fifty one Mexican nationals convicted of crimes by American courts without being advised of their right to consult with their consulates. \textit{Medellín}, 552 U.S. at 497-98. The president premised his Memorandum on the Vienna Convention on Consular Relations, a treaty ratified by the Senate in 1969. \textit{Id.} at 499. The Convention “provides that if a person detained by a foreign country ‘so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State’ of such detention, and ‘inform the [detainee] of his righ[t]’ to request assistance from the consul of his own state.” \textit{Id.} The treaty was not self-executing—its proscriptions did not “operate[s] of [of themselves] without the aid of any legislative provision.” \textit{Id.} at 505. Because treaties constitute the “supreme law of the land,” the president asserted his Memorandum was a valid exercise of presidential authority. \textit{Id.} at 506. The Court held that “Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating” such an exertion of presidential power. \textit{Id.} at 524. Applying this framework, the Court found that the president’s Memorandum fell within the third zone of Justice Jackson’s scheme:

A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. . . . [This] non-self-executing character . . . implicitly prohibits [the president] from doing so. When the President asserts the power to “enforce” a non-self-executing treaty by
B. Professors Buchanan and Dorf’s Interpretation of the Take Care Clause Does Not Comport with Youngstown

At first blush, the debt-ceiling standoff appears, as Professors Buchanan and Dorf posit, to confront the president with a constitutional “trilemma.”\(^{122}\) Congress has commanded the president to spend specified sums on particular projects but expressly limited the amount of revenue he can collect, either through taxation or borrowing, to fund these endeavors. Short of multiplying loaves and fishes, any action he might take—be it unilaterally cancelling federal programs, increasing taxation, or borrowing more money—is in direct conflict with an express congressional command. Thus, each of these options seems to fall squarely within the third zone of Justice Jackson’s formulation. “When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”\(^{123}\)

Article I bestows the powers to “tax,”\(^{124}\) “spend,”\(^{125}\) and “borrow”\(^{126}\) exclusively upon Congress. As such, no credible argument can support the notion that such authority falls within those plenary powers that the president may wield irrespective of the will of Congress.\(^ {127}\) Thus, Professors Buchanan and Dorf posit that any choice the president makes will violate the Constitution “because he will have failed to execute at least one duly enacted law of the United States.”\(^ {128}\) In reaching this conclusion, they assess each of the president’s three options and Congress’s corresponding statutory admonition in isolation.

\(\text{Id. at 527. Because the power to enforce non-executing treaties does not fall within those plenary powers that the president can exercise irrespective of the will of Congress, the Court found that the president’s Memorandum was not binding. Id. at 532.}

\(^{122}\) Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1196.

\(^{123}\) Youngstown, 343 U.S. at 638 (Jackson, J., concurring).

\(^{124}\) U.S. CONST. art. I, § 8, cl. 1.

\(^{125}\) Id.

\(^{126}\) U.S. CONST. art. I, § 8, cl. 2.

\(^{127}\) “Any presidential decision to tax, borrow, or spend, or not spend without congressional authorization violates the principle of separation of powers because the powers to tax, to borrow, and to spend, or not to spend are all allocated to Congress, not the president.” Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1222-23.

\(^{128}\) Id. at 1196-97.
First, they assert that because appropriation statutes “specif[y] precise amounts of money . . . that the president must spend for each authorized program,” Congress has “effectively order[ed] the president to spend no more and no less than those amounts.” Thus, they conclude that a reduction in spending would constitute a failure to “execute” the law because “a president’s failure to spend funds that Congress has required him to spend is a constitutional violation.”

Second, they assert that increasing taxation beyond the levels authorized by Congress would constitute a quintessential “usurpation of congressional power.”

Finally, they contend that authorizing the Treasury to borrow sufficient funds to subsidize mandated spending would constitute a failure to “execute” the law because “[t]he debt ceiling statute prohibits borrowing enough money to make up the difference between funds in the Treasury and legal obligations to spend.”

When the specific spending, taxation, and borrowing statutes cited above are viewed in isolation, Professors Buchanan and Dorf’s corresponding assessment of each of the president’s options is unassailable. Article II does not afford the president “the power to defeat the will of the people or of the legislature as embodied in law.” But their rigid, one-dimensional conception of what it means to execute the law does not comport with the more nuanced conception of that term implicit in Justice Jackson’s framework.

“The great ordinances of the Constitution do not establish and divide fields of black and white.” As Justice Jackson observed, “[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.” For this reason, Youngstown and

129 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1199.
130 Buchanan & Dorf, Nullifying the Debt Ceiling Threat, supra note 29 at 245-46 (emphasis omitted); accord Train v. City of New York, 420 U.S. 35, 41 (1975) (president lacks power to unilaterally refuse to implement Congress’s appropriation mandates); Clinton v. City of New York, 524 U.S. 417, 440-47 (1998); (Line-Item Veto Act violated separation of powers by enabling president to unilaterally cancel appropriations passed by both Houses of Congress).
131 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1199.
135 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
its progeny recognize that when multiple statutes bear upon the president’s powers, the scope of his authority cannot be gleaned by looking at any single law in isolation, but from careful consideration of “the general tenor” of all Congress’s commands viewed collectively.\textsuperscript{136}

With these principles in mind, I assert in the following sub-Part, that Congress—by deliberately confronting the chief executive with a no-win scenario—actually increased his power. While it is axiomatic that the president “in whom the whole executive power resides cannot of himself make a law,”\textsuperscript{137} irreconcilably conflicting legislative commands necessarily invest the executive with a measure of discretion that resembles law making.\textsuperscript{138} Congress cannot—in the guise of “legislating”—direct the Executive Branch to complete an impossible task and then claim that it is the president who is delinquent in his constitutional duty to faithfully “execute” the law when the assigned goal goes unfulfilled. To paraphrase Justice Jackson, I respectfully contend that Professors Buchanan and Dorf’s interpretation of the “take Care” Clause is predicated on the application of “judicial definitions . . . torn from context.”\textsuperscript{139}

Applying Youngstown and its progeny, I posit that Congress, by issuing contradictory commands, tacitly afforded the president the discretion to take any of the three suggested corrective actions. In reaching this conclusion, I assert Congress’s acts fall so far afield of any scenario previously confronted (or contemplated) by the Court that they require a venture into a previously unexplored fourth zone of presidential power.

C. The Debt-Ceiling Standoff Falls within a Previously Uncontemplated Fourth Zone

1. The Standoff Does Not Fit within any of Justice Jackson’s Three Zones

The debt-ceiling standoff does not fit within any of the zones identified by Justice Jackson. His three zones contemplate coherent legislative action falling within “a spectrum running from explicit congressional authorization to explicit congressional prohibition.”\textsuperscript{140} Congress can sanction presidential action, it may be silent on the subject, or


\textsuperscript{137} THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

\textsuperscript{138} See Part II-C, infra.

\textsuperscript{139} Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

\textsuperscript{140} Dames & Moore, 453 U.S. at 669.
it may prohibit it. Congressional acts in conformity with any of these three coherent choices will affect the president’s powers accordingly. But in the present case Congress has paradoxically directed the president to take specified action (implement legislative programs) and forbade him from taking that very same action (by denying him access to the revenue necessary to fund these endeavors). Such legislative instructions cannot find a home anywhere within Youngstown’s existing spectrum.

Justice Jackson quite understandably never contemplated such a scenario. Nonetheless, he acknowledged that his three-zone grouping is “somewhat oversimplified” and advised that the lack of precedent should not impede courts from adapting his taxonomy to fit new scenarios. ¹⁴¹ This adaptability is necessitated, he noted, by “the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”¹⁴²

The debt-ceiling standoff requires expansion of Youngstown’s spectrum to accommodate a previously uncontemplated fourth zone of presidential power. In this unchartered realm, attainment of Justice Jackson’s thesis—the “integrat[ion] [of] the dispersed powers into a workable government”¹⁴³—requires reconciliation of incompatible and contradictory congressional commands.

2. Principles Applicable in the Fourth Zone

While the debt-ceiling standoff requires a venture beyond the familiar confines of Youngstown’s three-zone framework, presidential action falling within this previously unexplored zone does not require the abandonment of principles applicable to the other zones. Dames & Moore recognized that congressional action “evinc[ing] legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”¹⁴⁴ Determining whether Congress extended such an invitation, requires careful examination of not only isolated legislative commandments, but also “the general tenor of Congress’ legislation in th[e] area . . . to determine whether the President is acting alone or at least with the acceptance of Congress.”¹⁴⁵

In cases falling within the traditional three-zone scheme, such legislative conduct is only considered “pertinent when the President’s action

¹⁴¹ Youngstown, 343 U.S. at 634-35 (Jackson, J., concurring).
¹⁴² Id. at 634.
¹⁴³ Id. at 635.
¹⁴⁴ Dames & Moore, 453 U.S. at 678 (emphasis added) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
¹⁴⁵ Dames & Moore, 453 U.S. at 678.
falls within the second [zone]—that is, when he ‘acts in absence of either a congressional grant or denial of authority.'

This is so because when Congress commands the president to undertake (or refrain from undertaking) a particular action, the Constitution normally affords him no discretion. He must follow his legislative instructions, lest he engage in “lawmaking, a legislative function which the Constitution has expressly confided to the Congress.” The president “must confine himself to his executive duties—to obey and execute, not make the laws.”

But when Congress gives the president contradictory commands, he cannot simply “obey and execute” Congress’s instructions. Obeying one command necessarily requires disobeying another. For this reason, zone two’s invitation principle should be applied in the fourth zone of the Youngstown scheme. Contradictory legislative instructions, by their nature implicitly “accord the President broad discretion.”

The president’s plenary power “to execute” a law promulgated by Congress “impl[ies] many subordinate and auxiliary powers” including “all authorities essential to its due exercise.” And it is axiomatic that “[i]t is a flawed and unreasonable construction” to read the Acts of Congress “in a manner that demands the impossible.”

Thus, when Congress commands the president to complete a particular task but expressly denies him those

146 Medellín v. Texas, 552 U.S. 491, 528 (2008) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).

147 Youngstown, 343 U.S. at 582.

148 B.F. Wade & H. Winter Davis, The War Upon the President: Manifesto of Ben Wade and H. Winter Davis Against the President’s Proclamation, N.Y. TIMES, Aug. 9, 1864, available at http://www.nytimes.com/1864/08/09/news/war-upon-president-manifesto-ben-wade-h-winter-davis-against-president-s.html (emphasis added); accord Youngstown, 343 U.S. at 582; Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”).

149 See Tribe, Debt Ceiling, supra note 19, available at http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html (When “legislatively authorized spending commitments outstrip legislatively authorized revenue, it is impossible to honor both of these allocational arrangements at once. One must give way.”).


powers “essential to its due exercise,” the only way to construe these conflicting legislative instructions in a manner that does not “demand the impossible” is to infer a congressional intent to “accord the President broad discretion”—to entrust him to make tradeoffs to best accommodate the conflicting mandates.

Suppose, for example, that in Youngstown, Congress had not merely instructed President Truman that he may not intervene in labor disputes by seizing steel mills, but also commanded him to ensure at all costs that the military be supplied with an adequate supply of steel to maintain the war effort. A prolonged strike would likely make accomplishment of the second commandment impossible without breaking the first. Such circumstances would change the outcome of the case. Because accomplishment of both legislative mandates is impossible, the statutes, read together, implicitly “invite” “measures on independent presidential responsibility.”

The president must sacrifice at least part of one of his legislative mandates to save the other.

This follows from the very nature of the lawmaking process. “Once Congress makes its choice in enacting legislation, its participation [in the implementation of the law] ends.” At that point, the legislative baton passes to the president who is tasked with “interpreting” Congress’s instructions to best “implement the legislative mandate.”

Moreover, it is well settled that “conflicting” statutory commands “render the facial meaning of [a] statute ambiguous.” And the task of deciphering legislative intent from such ambiguous instructions “is the very essence of ‘execution’ of the law.” Accordingly, conflicting legislative commands by their very nature “invite” “measures on independent presidential responsibility.”

Since literal compliance with all Congress’s commands is impossible, such contradictory legislation implicitly authorizes the president to exercise independent judgment to make compromises in order to “implement the legislative mandate.”

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152 Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
154 Id. at 733.
155 Comm'r v. Tufts, 461 U.S. 300, 315 (1983); see also Bowsher, 478 U.S. at 732 (where exercise of “independent judgment and evaluation” is required to implement statute, quintessential task of executing law is implicated).
156 Bowsher, 478 U.S. at 733.
157 Dames & Moore, 453 U.S. at 678 (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
3. Application of These Principles to the Debt-Ceiling Standoff

The interaction between the debt-ceiling statute and the relevant taxing and spending laws render compliance with all three statutory mandates impossible. Congress has commanded the president to complete a task—implement specified programs—but denied him the “authorities essential to its due exercise”—the power to acquire sufficient revenue to pay for the mandated expenditures.158

Because statutes are not interpreted “in a manner that demands the impossible,”159 “the general tenor” of Congress’s commands, read collectively, inherently “‘invite ‘measures on independent presidential responsibility.’”160 So what does this conferral of discretion actually authorize the president to do if the Treasury runs out of sufficient funds to meet the payment obligations imposed by Congress?

Following the lead of Youngstown and its progeny, the relevant legislation should be examined for indications that Congress expressly or impliedly prioritized one command over the others.161 As Professors Buchanan and Dorf put it: “[B]ecause the president, no matter what he does, will end up stepping on the toes of Congress, he ought to ensure that Congress can specify which toes it wants stepped on.”162 But in this case, the applicable statutes provide no guidance concerning which command should take precedence over the others in the face of this conflict. Each Act states its command in absolute terms without contemplating the possibility that its decree might conflict with another statutory mandate.163

160 Dames & Moore, 453 U.S. at 678 (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
161 See Dames & Moore, 453 U.S. at 678-79 (finding that implied intent can sometimes be inferred by examining “the general tenor” of Congress’s actions).
162 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1242.
163 Congress has commanded the Executive Branch to implement specific programs and pay for them with “money drawn on the Treasury,” 31 U.S.C. § 321(a)(3), and to “borrow on the credit of the United States Government amounts necessary for expenditures authorized by law,” 31 U.S.C. § 3104(a). But it has also instructed the president not to borrow funds exceeding the debt ceiling. 31 U.S.C. § 3101.
Since the president cannot fully comply with all of Congress’s commands and the relevant legislation evidences no preference for one over the others, the statutory impasse invests him with limited discretion to implement any of the three options posited by Professors Buchanan and Dorf. He may cancel federal programs to reduce spending,\(^\text{164}\) direct the Treasury to borrow funds in excess of the debt ceiling,\(^\text{165}\) or even order modest tax increases to satisfy the government’s fiscal obligations.\(^\text{166}\)

\(^{164}\) If the president exercises this so-called “nuclear option”—he may only authorize borrowing the minimum necessary required to fund congressionally mandated spending programs. Greater borrowing would exceed Congress’s implied authorization to compromise the debt ceiling in order to honor its command to implement the appropriation statutes. But true to its name, the “nuclear option” poses significant normative economic consequences. “As a hedge against the possibility that the government would later default on debt issued by a president acting without congressional authorization, bond purchasers might demand very high rates of interest for the ‘radioactive’ bonds, thus destabilizing rather than calming financial markets.” Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1178.

\(^{165}\) “The Constitution itself requires giving some expenditures . . . such as the payment of judicial salaries, Article III, section 1, or payments on the public debt, Amendment XIV, section 4 . . . priority over others.” Tribe, Debt Ceiling, supra note 19, available at http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html. Thus, if he impounds funds, the president must ensure that these constitutionally mandated expenditures are satisfied before subsidizing other projects. Even subject to these limits, the recognition of unilateral presidential control over spending imposes significant risks to the long-term stability of our constitutional order. As Professors Buchanan and Dorf note:

[Even] seemingly simple rules like “across-the-board cuts” or “prioritization of bondholders” turn out, on the ground, to be anything but simple. Telling the president to pick winners and losers—even if he does so in a way that seems to employ a ‘clean’ rule, without the apparent exercise of day-to-day discretion—both confers awesome power on the president and increases the likelihood of arbitrary harm to innocent parties. Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1208. Accordingly, exercise of this option—considered by most commentators to be the most restrained of the president’s alternatives—represents an unprecedented aggrandizement of presidential power.

\(^{166}\) This is by far the most hazardous of the president’s three possible courses, both in political and constitutional terms. “The political branches of government are at their most political . . . when taxing and spending are involved.” Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1213. If the president were to exercise this option, he must limit any tax increases to the minimum necessary to obtain sufficient revenue to make good on the financial obligations imposed by Congress. And any increases may not be used as a tool to reward political allies, or punish enemies—a limitation that is difficult to enforce in real-world situations. While I believe that under these unprecedented circumstances, Congress’s paradoxical actions have authorized the president to unilaterally raise tax rates, I would strongly advise that he pursue one of the other two options. Given the persistent and baffling calls for impeachment this president...
The calamitous real-world stakes associated with a federal default also fortify the president’s powers. As Justice Jackson noted, the constitutional propriety of a chief executive’s acceptance of a congressional “invit[ation]” to exercise “independent presidential responsibility” cannot be judged by “abstract theories of law,” but “depend[s] on the imperatives of events and contemporary imponderables.” This calls for an examination of the “sub-constitutional” consequences of the president’s failure to act—“real harm—economic hardship or even lost lives” that does not itself “amount to a constitutional violation.”

The United States is the world’s largest borrower, and its dollar serves as the world’s reserve currency. For these reasons, default would likely trigger a world-wide economic depression. The crippling magnitude of such an event entails unimaginable economic and social hardships. “When large numbers of people experience declining quality of life . . . social instability is likely to result. This instability may manifest itself in the form of . . . civil war, ethnic strife, famine . . ., or terrorism.” While each of the president’s options is fraught with political and economic peril, if Congress does not act, “the imperatives of events” demand he implement one of his three options to avert disaster. Accordingly, viewed in light of Youngstown’s principles, a presidential exercise of any of the three proposed options rests on solid constitutional ground.

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168 Buchanan & Dorf, Least Unconstitutional Option, supra note 27 at 1229.
171 See authorities cited supra note 13.
III. THE DEBT-CEILING STANDOFF THREATENS THE SURVIVAL OF AMERICA’S TRIPARTITE SYSTEM OF GOVERNMENT

James Madison characterized the Constitution as enigmatic—an “obscure and equivocal” document.173 He posited that its ultimate meaning would be “liquidated and ascertained” once put into practice.174 This liquidation process has been accomplished in part through judicial precedent.175 But the most significant aspects of America’s tripartite system of government stem from extra-judicial sources. The modern conception of the separation of powers does not flow inherently from the Constitution’s text.176 Rather, “practice . . . integrate[s] the dispersed powers into a workable government.”177 The relationship between the three departments evolved over time and its sustenance is premised, in large measure, on the continued respect for historical precedent by succeeding generations of legislators, presidents, and judges.178

Because the three branches’ respective powers are not fixed, but evolve with practice, the exercise of power thought beyond the pale by preceding generations, may later become the norm. The facts underlying Youngstown reflect this reality. From the Constitution’s ratification through the culmination of World War II, presidents regarded the decision to commit the nation to war to be a legislative judgment.179 So strong was this intuition that President John Adams even sought a declaration of “limited war” before dispatching naval forces to protect mariners from French privateers in 1799.180 This practice gave way with President Truman’s unilateral initiation of full-scale war with North Korea in 1950.181 More precisely, it fell with

174 Id.
175 See LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 11 (2008) (The Constitution rests upon “an edifice of judicial opinions” which “forms a kind of ‘common law’ that . . . facilitates predictions about what courts will do in particular cases.”).
176 See THE FEDERALIST No. 73, p. 442 (B. Wright ed. 1961) (A. Hamilton) (recognizing “the insufficiency of a mere parchment delineation of the boundaries” to effectuate the separation of powers).
177 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
178 E.g., Michael J. Gerhardt, Non-Judicial Precedent, 61 VAND. L. REV. 713, 749 (2008) (arguing that “custom” in the form of “institutional or cultural habits and conventions” forms the basis for America’s separation of powers principles).
179 E.g., William Van Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. PA. L. REV. 1, 5-13 (1972) (discussing the original meaning of Article I’s “declare war” clause).
180 Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43-44 (1800) (Chase, J.).
181 Stephen M. Griffin, A Bibliography of Executive Branch War Powers Opinions
Congress’s acquiescence to Truman’s will. Through this process a formidable power—indeed “the highest sovereign prerogative”—passed from Congress to the president. It never went back.

The Youngstown doctrine recognizes this inherent mutability. Acquiescence by one branch of government can lead to the gradual accretion of power to another. “Past [presidential] practice does not by itself create power, but long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent.” Over time, these changes can fundamentally shift the balance of power. Twentieth century presidential domination of the war powers demonstrates this fact. As Lord Bryce recognized, “[t]he weakness of Congress is the strength of the President.”

Recognizing the wavering character of power, Justice Jackson warned that the long-term survival of our Constitution depends on a mature spirit of cooperation between the three departments. The realization of a “workable government,” he wrote, rests as much on the branches’ “interdependence” and “reciprocity” as on their “separateness.” A commitment to civility and

Since 1950, 87 TUL. L. REV. 649, 655 (2013) (noting that “President Truman’s Korea ‘precedent’” led to acceptance of the view that “the ‘declare war’ clause was not a limit on presidential power”).

Id.


Former Defense Secretary Robert Gates has opined that Congress erred by not declaring war with Iraq before sponsoring the initiation of hostilities in 2003. Mark Thompson, Gates: U.S. “Probably” Should Have Declared War on Iraq Before Launching It, TIME, Jan. 17, 2014, available at http://swampland.time.com/2014/01/17/gates-u-s-probably-should-have-declared-war-on-iraq-before-launching-it/. Gates reportedly averred: “I think that the hurdle for the use of military force, particularly in the absence of an immediate threat to the United States, imposed by requiring a congressional act, would not necessarily be a bad thing.” Id. He further noted that “[o]n these matters of war and peace . . . the Congress has been very timid.” Id.

See e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“practice” not “judicial definitions” define and “integrate” the branches’ respective powers); id. at 637 (“congressional inertia, indifference or acquiescence” may accrete power to the executive branch); id. at 654 (“only Congress . . . can prevent power from slipping through its hands”); Dames & Moore v. Regan, 453 U.S. 654 (1981) (quoting Youngstown, 343 U.S. at 678) (“congressional action ‘evinc[ing] legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”); id. at 686 (“long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the action had been taken in pursuance of its consent”).

Dames & Moore, 453 U.S. at 686.

Bryce, supra note 1 at 696.

Youngstown, 343 U.S. at 635.
cooperation is thus essential to the success of the enterprise. Disregard for this fundamental commitment not only brought about the debt-ceiling standoff, but threatens the long term sustainability of our democracy.

The famed Yale political scientist Juan J. Linz asserted that the survival of our separation of powers is predicated on the existence of a “public consensus [that] hovers reliably around the middle of the political spectrum.” Such centrism ensures “the limited weight of fringe parties” dictating that “no candidate will have any incentive to coalesce with . . . extremists.” When extremist elements gain political clout in tripartite governments, their polarizing influence “exacerbates . . . conflicts between the legislative and executive [branches]” leading to constitutional crises.

Dr. Linz and other political scientists focused their research on Latin American countries who modeled their national charters on the U.S. separation-of-powers scheme. While these constitutions substantially mirror our own on paper, to borrow Madison’s terminology, they liquidated quite differently in practice. Where the United States’s model evolved to embrace two centrist parties that exhibited “exceptionally limited ideological polarization,” most Latin American republics have endured “polarized multiparty system[s] including extremist parties.”

The resulting diffusion of legislative power afforded extremist partisans a voice in the process that the United States’s centrist two-party system denied. They frequently used this influence to obstruct the executive branch for political ends. To slow the resulting drive toward “deadlock and immobilism” many Latin American presidents

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189 Scott Mainwaring, Presidentialism, Multipartism, and Democracy: The Difficult Combination, COMP. POL. STUD. 198, 223 (1993) (arguing that success of U.S. separation-of-powers scheme is predicated on existence of its “two party system, loose parties, and exceptionally limited ideological polarization”).
190 Linz, supra note 2 at 60.
191 Id.
192 Id. at 54.
194 See Ludwikowski, supra note 193 at 29-30 (noting many Latin American nations modeled their constitutions on U.S. separation-of-powers scheme).
195 E.g., Linz, supra note 2 at 60; Ludwikowski, supra note 193 at 29-30.
196 Mainwaring, supra note 189 at 223.
197 Linz, supra note 2 at 60.
198 Id.; Mainwaring, supra note 189 at 223-24.
199 E.g., Linz, supra note 2 at 60; Mainwaring, supra note 189 at 214-17.
200 Mainwaring, supra note 189 at 215.
circumvented their legislatures by implementing programs directly.\textsuperscript{201} Some even resorted “to extra-constitutional mechanisms to accomplish their ends.”\textsuperscript{202} The result all too often has been chaos, instability, and violence.\textsuperscript{203}

The rise of the Tea Party has confronted the United States with a similar dilemma. Changing political winds pushed a major party that long “hover[ed] reliably around the middle of the political spectrum”\textsuperscript{204} to “coalesce with . . . extremists.”\textsuperscript{205} And like their Latin American brethren, these new power holders exhibit a scorched-earth mentality, “act[ing] in ways that undermine[] the whole system of governance people thought they understood.”\textsuperscript{206} So strong is their commitment to winning, they have threatened to plunge us headlong into a global economic depression to achieve a political victory. History tells us this story, if continued, will not end well.

This regrettable prognosis brings us full-circle, back to the principal thesis of this Article. By issuing the president contradictory commands, Congress has tacitly delegated him unprecedented power—power he may well be forced to utilize to avert a global economic catastrophe. But even if disaster is avoided, a dangerous precedent will be set. In Youngstown, Justice Jackson concluded his opinion by noting that left unchecked, President Truman’s actions “would [not] plunge us straightway into dictatorship, but it [would be] at least a step in that wrong direction.”\textsuperscript{207} Justice Jackson may have failed to foresee the broader consequences of Youngstown's historical station. The Court’s opinion became its seminal testament concerning the restraint of executive power. The steel seizure was thwarted. But the president’s unilateral commitment to a full-scale war that gave rise to the case continued unabated. As a result of Congress’s abdication of its historical power to “declare war,” succeeding generations of politicians and judges.

\textsuperscript{201} Cox & Morgenstern, supra note 193 at 177. During his 2014 State of the Union address, President Obama similarly vowed to “take steps” to unilaterally implement programs “wherever and whenever” he could “without legislation” to achieve his professed policy goal of “expand[ing] opportunity for more American families . . . .” Peter Bakerjan, In State of the Union Address, Obama Vows to Act Alone on the Economy, N.Y. TIMES, Jan. 28, 2014, available at \url{http://www.nytimes.com/2014/01/29/us/politics/obama-state-of-the-union.html?hpw&rref=us&_r=0}.

\textsuperscript{202} Mainwaring, supra note 189 at 217.

\textsuperscript{203} Id. at 215, 218; Linz, supra note 2 at 52.

\textsuperscript{204} Linz, supra note 2 at 60.

\textsuperscript{205} Id.

\textsuperscript{206} Krugman, supra note 6, available at \url{http://krugman.blogs.nytimes.com/2013/09/18/things-come-to-a-head/?_php=true&_type=blogs&_r=0}; see also authorities cited supra notes 7-9.

\textsuperscript{207} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).
gradually came to regard this decision to lie in the president’s hands.\textsuperscript{208}

History may be repeating itself. The “power to legislate for emergencies,” Justice Jackson warned, “belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”\textsuperscript{209} Today, Congress has allowed power to slip from its grasp, by forcing the president to confront an emergency of Congress’s own creation. Like President Truman’s steel seizure, continued pursuit of this baffling course may not “plunge us straightway into dictatorship, but it is at least a step”—if not a giant leap—“in that wrong direction.”\textsuperscript{210}

**CONCLUSION**

Just as King Canute futilely commanded the tide not to rise,\textsuperscript{211} Congress now demands that the president accomplish the impossible—implement particularized programs without the funds necessary to subsidize them. This cynical legislative strategy demonstrates contempt for the historical norms that govern the power-sharing relationship between the coordinate branches of our government.

The modern conception of the separation of powers does not flow inherently from the Constitution’s text.\textsuperscript{212} Rather, “practice . . . integrate[s] the dispersed powers into a workable government.”\textsuperscript{213} The relationship between the three departments evolved over time and its sustenance is premised, in large measure, on the continued respect for historical precedent by succeeding generations of lawmakers.\textsuperscript{214} By confronting the president with a no-win scenario, Congress has not only turned its back to history\textsuperscript{215} but threatened to unleash an unprecedented economic cataclysm upon the world.\textsuperscript{216}

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\textsuperscript{208} Griffin, \textit{supra} note 181 at 655 (noting that “President Truman’s Korea ‘precedent’” led to acceptance of the view that “the ‘declare war’ clause was not a limit on presidential power”).

\textsuperscript{209} \textit{Youngstown}, 343 U.S. at 654.

\textsuperscript{210} \textit{Id.} at 653.

\textsuperscript{211} King Canute was an eleventh century English king who, according to legend, ordered the tide not to rise. Edmund Pitcher, Charles DeLisi, Michael Gollin, Wendy McGoodwin, & Lawrence Wittenberg, \textit{Probing the Human Genome: Who Owns Genetic Information?}, 4 B.U. J. SCI. & TECH. L. 2, 2 n.152 (1997).

\textsuperscript{212} \textit{See} \textit{THE FEDERALIST} No. 73, p. 442 (A. Hamilton) (recognizing “the insufficiency of a mere parchment delineation of the boundaries” to effectuate the separation of powers).

\textsuperscript{213} \textit{Youngstown}, 343 U.S. at 635 (Jackson, J., concurring).

\textsuperscript{214} \textit{E.g.}, Michael J. Gerhardt, \textit{Non-Judicial Precedent}, 61 VAND. L. REV. 713, 749 (2008) (arguing that “custom” in the form of “institutional or cultural habits and conventions” forms the basis for America’s separation of powers principles).

\textsuperscript{215} \textit{See} authorities cited \textit{supra} notes 6-9.

\textsuperscript{216} \textit{See} authorities cited \textit{supra} note 13.
But this nihilistic strategy, if followed to its logical conclusion, will ultimately backfire. Congress cannot—in the guise of “legislating”—direct the Executive Branch to complete an impossible task and then claim that it is the president who is delinquent in his constitutional duty to faithfully “execute” the law when the assigned goal goes unfulfilled. The president’s plenary power “to execute” a law promulgated by Congress “impl[ies] many subordinate and auxiliary powers” including “all authorities essential to its due exercise.” And “[i]t is a flawed and unreasonable construction” to read the Acts of Congress “in a manner that demands the impossible.” Thus, when Congress commands the president to complete a particular task but expressly denies him those powers “essential to its due exercise,” the only way to construe these conflicting legislative acts in a manner that does not “demand the impossible” is to infer a congressional intent to “accord the President broad discretion”—to entrust him to do his best to accommodate the conflicting instructions.

By commanding the president to achieve the impossible, Congress has delegated him unprecedented discretion to unilaterally cancel legislative programs, borrow money, or even raise taxes. Such an acquiescence of authority constitutes an existential threat to the delicate balance of power upon which our freedom ultimately rests.

I do not wish for any of my critiques presented here to join the slowly rising tide of voices placing blame for the present crisis on the Constitution itself. Like Professor Hart, I am committed to the belief that “ours is . . . a perfectly good Constitution”—at least if “we know how to interpret it.” But it is pure naiveté to believe that a way of life can be sustained by


220 Hart, Dialectic, supra note 85 at 1362.
parchment alone.\textsuperscript{221} As Madison and Justice Jackson both acknowledged, it is not in its \textit{words} that the Constitution takes life, but in the \textit{actions} of the people charged with implementing it.\textsuperscript{222}

Preservation of the formula for government we have come to expect rests with the choices ordinary Americans make at the ballot box. As Chief Justice Marshall recognized long ago, the Constitution invests our government with awesome powers and the principle check on abuse of those powers resides not in the Bill of Rights, but in “the influence which . . . constituents possess at elections.”\textsuperscript{223}

Voters bear the ultimate responsibility to supply Congress with the mature and cooperate statesmen and women necessary to preserve America’s historical separation of powers. Too many of Capitol Hill’s present denizens lack these essential qualities. The present derogation of legislative power is the unfortunate, but predictable result. If constituents reward the cynical approach that created the present emergency with re-election, they will have no one else to blame if future Congresses continue to follow the same suicidal playbook.

\textsuperscript{221} See \textit{Morrison v. Olson}, 487 U.S. 654, 698 (1988) (Scalia, J., concurring) (“the mere words of a Bill of Rights are not self-effectuating”).

\textsuperscript{222} See \textit{The Federalist} No. 73, p. 442 (A. Hamilton) (recognizing “the insufficiency of a mere parchment delineation of the boundaries” to effectuate the separation of powers); \textit{Youngstown}, 343 U.S. at 635 (Jackson, J., concurring) (“The 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.”).

\textsuperscript{223} \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1, 197 (1824).