The Constitutional Jurisprudence of Justice Kennedy on Separation of Powers and Federalism

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I. Introduction

The outer limits of federal power over the States, and presidential power vis-a-vis Congress, have been shrouded in mystery throughout the life of the Constitution. Recent situations involving these issues include criticism by Democrats of unilateral action by President George W. Bush, such as with respect to the war on terrorism, and criticism by Republicans of unilateral action by President Barack Obama, such as aiding in the overthrow of Khadafi in Libya without congressional approval, waiving deportation for some aliens illegally in the United States, and waiving for one year the employer mandate in the Affordable Care Act. As the swing vote on the Court, Justice Kennedy’s views on the doctrines of separation of powers and federalism have been, and would be in the future, critical in resolving these kinds of issues. This article discusses Justice Kennedy’s views against the backdrop of the Court’s separation of powers and federalism jurisprudence.¹


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II. Separation of Powers Doctrine

A. General Separation of Powers Doctrine

The separation of powers doctrine combines two ideas. The first is that the Constitution identifies three governmental functions: (1) the legislative power (Article I), a power to make a law; (2) the executive power (Article II), a power to apply law or call for its application, subject to judicial review; and (3) the judicial power (Article III), a power to declare authoritatively what the law is and to review its application in specific cases. The second idea is that no one branch of government can exercise the central power of any other branch or substantially disrupt the operations of that branch. Thus, Congress may not impose core executive or administrative duties, that is, duties of a non-judicial nature, on judges holding office under Article III. ² Similarly, the doctrine bars Congress from delegating to executive or judicial officers the legislative power to make rules without also creating standards by which the power is to be used.³

² See, e.g., United States v. Ferreira, 54 U.S. 40, 49-51 (1851) (courts cannot be given duties of an administrative nature); Hayburn’s Case, 2 U.S. 408, 410 n.* (1792) (courts cannot be called upon to give advisory opinions).

³ See, e.g., J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406-09 (1928) (permissible for Congress to use executive officials in application of policy declared by Congress). Since 1937, no federal statute has been held invalid by the Court because of an excessive delegation of legislative power to the executive. As the Court stated in Mistretta v. United States, 488 U.S. 361 (1989):

So long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”

Applying this “intelligible principle” test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. Accordingly, this Court has deemed it “constitutionally sufficient if Congress clearly delineates the general policy, the public agency
Lying behind the separation of powers doctrine is the notion of checks and balances. Checks and balances doctrine has two main principles. First, each branch must be given sufficient power to discharge its operations efficiently. Second, to prevent tyranny by any one branch, no branch should have unlimited power. As James Madison wrote in *The Federalist Papers* No. 51, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Designed in part to promote the goal of efficiency, the separation of powers doctrine does not prohibit one branch from ever exercising a power of the other branches. Indeed, the Constitution expressly authorizes certain blends. For example, Congress exercises a kind of judicial power when it engages in impeachment proceedings. The President exercises a kind of legislative power when vetoing a bill, and a kind of judicial power when granting a pardon. Courts exercised executive powers when, pursuant to the Appointments Clause, they appointed independent counsels under the Ethics in Government Act of 1978. Justice Powell, concurring in *INS v. Chadha*, and quoting from *Morrison v. Olson*, 487 U.S. 654, 660-65 (1987).
Justice Jackson, said that the Constitution contemplates that "practice will integrate the dispersed powers into a workable government."\textsuperscript{8}

In one of the most notable statements on the doctrine of the separation of powers, Justice Story said in 1833 in his book \textit{Commentaries on the Constitution of the United States}:

[The separation of powers doctrine] is not meant to affirm, that [the three branches of government] must be kept wholly separate and distinct, and have no common link or connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments. . . . [A]s a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.\textsuperscript{9}

In contrast to this sharing of powers/functional approach, an alternative approach focuses more on the literal text of the Constitution and developing “bright-line rules” to foster “restraint in judging,” and less on the purpose, context, and history of constitutional text. Such a literal, textualist approach, such as that of Justice Scalia, adopts more a strict separation of powers/formal approach toward issues of separation of powers.\textsuperscript{10} After all, the literal text of the Constitution provides in Article I, § 1, “All legislative Powers herein granted shall be vested in a Congress of the United States”; Article II, § 1, “The executive Power shall be vested in a President of the United States of America”; and Article III, § 1, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”


\textsuperscript{9} J. STORY, \textsc{Commentaries on the Constitution of the United States} § 525 (1833).

Olson, Justice Scalia stated, “[The majority’s opinion] is not analysis; it is ad hoc judgment. And it fails to explain why it is not true – as the text of the Constitution seems to require, . . . all purely executive power must be under the control of the President.”11 This view has been described as promoting a “Unitary Executive” model of government, with few checks and balances on executive action,12 although that view can be challenged on historical, precedential, and legislative and executive practice grounds.13 Justice Scalia also called for such a strict separation of powers approach, dissenting in Mistretta v. United States.14

Court opinions, as well as the opinions of most commentators, have generally supported the view that the framers and ratifiers adopted a sharing of powers approach to the issue of checks and balances.15 This is true for Justice Kennedy as well. In an opinion joined by all Justices on the Court except Justice Scalia, Justice Blackmun wrote in Mistretta v. United States:

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison’s view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our


14 Mistretta, 488 U.S. 361, 419 (Scalia, J., dissenting).

Constitution mandates that ‘each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,’ Humphrey’s Executor v. United States, 295 U.S. 602, 629 (1935), the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct.

... In adopting this flexible understanding of separation of powers, we simply have recognized Madison’s teaching that the greatest security against tyranny – the accumulation of excessive authority in a single branch – lies not in hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch.16

At the same time, Justice Kennedy has been a critical voice that where the Constitution provides for an allocation of power, that allocation should be followed. Justice Kennedy cautioned in Public Citizen v. United States Department of Justice17 both against adopting a strict separation of powers approach and rewriting the balance of power provided in the Constitution. He noted:

This is not to say that each of the three Branches must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers. . . . But as to the particular divisions of power lines the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.18

For example, in Clinton v. City of New York,19 a 6-3 Court declared unconstitutional the Line-Item Veto Act of 1996 on the ground that the procedures specified in the Act were not authorized by the Constitution. The Act gave the President authority to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." The Act set forth a detailed expedited procedure for the consideration by Congress of a “disapproved bill.” These

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18 Id. at 487 (Kennedy, J., joined by Rehnquist, C.J., and O’Connor, J., concurring).
procedures involved re-passing the bill without giving the President a line-item veto power this time around.\textsuperscript{20}

In \textit{City of New York}, the Court noted that the Constitution has clear language in Article 1, § 7, cl. 2 giving the President the power to veto entire bills, not exercise a line-item veto power. Constitutional text simply does not authorize Congress and the President to create a different law than one whose text was voted on by both Houses and presented to the President for signature, even if such a line-item veto power would be efficient for the President to have, a power which 43 of 50 Governors have under state constitutions.\textsuperscript{21}

Justice Kennedy wrote a concurrence explaining that the Constitution’s structure requires a stability which transcends the convenience of the moment. Kennedy noted:

The idea and the promise [of separation of powers] were that when the people delegate some degree of control to a remote central authority, one branch of government ought not posses the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.

\ldots The law established a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President’s powers beyond what the framers would have envisioned.

\ldots That a congressional cessation of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design.\textsuperscript{22}

In dissent, Justice Scalia, joined by Justice O’Connor and Justice Breyer, said that the Court had been misled by the title of the law since the action it authorizes is, in fact, not a line-item veto

\begin{itemize}
\item \textsuperscript{20} 2 U.S.C. § 691a, d.
\item \textsuperscript{21} 524 U.S. 417, 438-41, 447-49 (1998).
\item \textsuperscript{22} \textit{Id.} at 450-52 (Kennedy, J., concurring).
\end{itemize}
that would trigger concerns of consistency with the presentment clause of Article 1, §7, cl.2. Instead, Justice Scalia said, the statute was actually a form of executive impoundment of funds. Justice Scalia noted that an executive impoundment of funds, if authorized by Congress, as in the Congressional Budget and Impoundment Control Act of 1974, should be viewed as a proper legislative delegation of power to the President. There is no difference, Justice Scalia said, between authorizing the President to cancel a spending item, as in this Act, and authorizing that money be spent on a particular item or be impounded at the President’s discretion, which has been done since the founding.23 In response, the Court majority noted that unlike an impoundment of certain funds for a period of time, this Act permitted the President to cancel an appropriation of funds, and thus was more like an impermissible line-item veto, than a mere limited impoundment of funds.24

An additional separation of powers issue involves whether the judge is more sympathetic to exercises of legislative or executive power in cases where the two come into conflict. From the time of the Constitution until today, the Federalist/Whig/Republican party has always been more sympathetic to exercises of executive power, while the Jefferson/Jackson/Democratic party has always been more suspicious of executive power and more trusting of the legislative branch. Thus, judges appointed by Republican presidents tend to favor broad grants of executive power to the president, while judges appointed by Democratic presidents tend to restrain executive power in favor of legislative prerogatives.25

23 Id. at 464-69 (Scalia, J., joined by O’Connor, J., and joined in part by Breyer, J., concurring in part and dissenting in part), citing, inter alia, Train v. City of New York, 420 U.S. 35, 41 n.8 (1975) (discussing the Congressional Budget and Impoundment Control Act of 1974).

24 524 U.S. at 442-47.

25 For case support for these observations, see infra text accompanying notes 67-68, 72 (discussing the Youngstown Sheet case); infra notes 107-113 (discussing Boumediene v. Bush).
While judges appointed by Republican presidents tend to favor broad grants of executive power to the president, and judges appointed by Democratic presidents tend to restrain executive power in favor of legislative prerogatives, some conservative Democratic judges, like Chief Justice Vinson and Justice Reed during the 1950s, have tended to share the Republican predisposition for executive power.26 Some moderate Republicans, like Justice Kennedy, have occasionally rejected the Republican predisposition for executive power.27

The reasons for these predispositions are not altogether clear. It may be that more conservative individuals, typically Republican, are more comfortable with a “corporate” model of administration, with a strong CEO, and clearly-defined lines of authority, while more progressive individuals, with their faith in the “people,” prefer the most representative branch of government, the legislature. Certainly at the time of the founding, it was Jefferson and his associates who favored the legislative branch, and were more supportive of the strong notions of legislative supremacy consistent with the French Revolution, while conservatives, like Hamilton, favored stronger executive power closer to that of the English King, although without the King’s power to declare war.28

26 See infra text accompanying notes 69-71 (discussing the Youngstown Sheet case).


B. Justice Kennedy and the Natural Law Theory of Judicial Decisionmaking

As we have discussed elsewhere, Justice Kennedy tends to follow a natural law theory of judicial decisionmaking, reminiscent of Chief Justice John Marshall, Justice Story, and other Justices of the early 19th century Supreme Court.\textsuperscript{29} The natural law approach was summed up by James Madison. It has been noted about Madison’s approach, "[A]mong the obvious and just guides to [interpreting] the Const[itutio]n,' Madison listed: '1. The evils and defects for which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The early, deliberate, and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendancies.'\textsuperscript{30}

A more complete elaboration of this style of interpretation appears in Justice Joseph Story’s \textit{Commentaries on the Constitution of the United States}\.\textsuperscript{31} Building on Madison's insights, who had nominated him to the Supreme Court, Justice Story discussed the natural law approach toward separation of powers and federalism, embracing sharing of powers, checks and balances, and the need for a strong federal government. He also indicated an abiding faith in the Anglo-American common law system, and deciding cases on narrower grounds where possible. His faith in the


\textsuperscript{31} \textit{See} \textsc{Story, supra} note 9.
common law also meant he was suspicious of the 19th-century legislative codification movement. It has been noted, "Among the American lawyers and judges of [the early 19th century], Justice Story stands out as possibly the most learned and influential defender of the natural law tradition. To Story it was imperative that American lawyers understand natural law in interpreting and applying the principles of the Constitution and the common law. Being 'a philosophy of morals', natural law was to Story the substratum of the legal system, resting 'at the foundation of all other laws.'"\(^{33}\)

These sources of interpretation can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations. Contemporaneous sources are those sources that existed at the time a constitutional provision was ratified. These include the text of the Constitution; the context of that text, including verbal and policy maxims of construction, related provisions in the Constitution or other related documents, and the structure of government contemplated by the Constitution; and the history surrounding the provision's drafting and ratification. Subsequent considerations involve matters that occur after the constitutional provision is ratified. These include the sub-categories of (a) subsequent events, which involve legislative, executive, and social practice under the Constitution, and judicial precedent interpreting the Constitution, and (b) prudential considerations, which involve judicial speculation concerning the consequences of any particular judicial construction, including arguments of justice or sound social policy.


\(^{33}\) \textit{Id.} at 65.
These sources can also be organized by resort to whether they involve relatively specific and limited interpretive tasks, or resort to more general kinds of reasoning. Specific interpretive tasks involve more direct kinds of reasoning, such as determining the plain meaning of text or the specific historical intent of the framers and ratifiers. More general reasoning involves such considerations as reasoning from the purpose behind why text was adopted, or reasoning from general historical background about the intent of the framers and ratifiers. Table 1 may help make clearer the discussion in the remainder of this section.34

<table>
<thead>
<tr>
<th>Contemporaneous Sources</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Text</td>
<td>Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
</tr>
<tr>
<td></td>
<td>Verbal Maxims</td>
<td>Policy Maxims</td>
</tr>
<tr>
<td>Context</td>
<td>Related Provisions</td>
<td>Structural Arguments</td>
</tr>
<tr>
<td>History</td>
<td>Specific Historical Evidence</td>
<td>General Historical Evidence</td>
</tr>
<tr>
<td></td>
<td>(1) Specific Historical Intent</td>
<td>(1) Specific Historical Intent</td>
</tr>
<tr>
<td></td>
<td>(2) General Historical Intent</td>
<td>(2) General Historical Intent</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subsequent Considerations</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practice</td>
<td>Legislative or Executive Practice</td>
<td>Social Practice</td>
</tr>
<tr>
<td>Precedent</td>
<td>Core Holdings of Precedent</td>
<td>Reasoned Elaboration of Law</td>
</tr>
<tr>
<td>Prudential Considerations</td>
<td>Judicial Restraint Considerations</td>
<td>Other Prudential Concerns</td>
</tr>
<tr>
<td></td>
<td>(1a) Text (e.g., prudential principles of standing, ripeness, mootness)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1b) Context/Structure (e.g., political questions and Ashwander factors)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1c) Purpose/History (e.g., sensitivity to the needs of government)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) Practice &amp; Precedent;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(3) Principles of Justice and/or Social Policy Embedded in the Law</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(4) Justice and/or Social Policy Not So Embedded</td>
<td></td>
</tr>
</tbody>
</table>

34 For discussion of all these sources of interpretation, contemporaneous and subsequent, and specific and general, see KELSO & KELSO, supra note 29, at Ch. 5, citing, inter alia, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (discussing 7 factors of judicial restraint, including the Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it”; will not “formulate a rule of constitutional law broader than required by the precise facts to which it is to be applied”; and “will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.”).
The remainder of this section will discuss in order the natural law approach to text, context, history, practice, precedents, and prudential considerations as it relates to issues of separation of powers.

C. Constitutional Text, Context and History

After granting the Executive Power to the President in Article II, § 1, the Constitution continues by enumerating a number of specific powers relating to domestic and foreign affairs. Under Article II, § 2, cl. 1, the President is named “Commander in Chief,” and is given the power to “Pardon” individuals for federal crimes. Under Article II, § 2, cl. 2, the President is given the power, with the “Advice and Consent” of the Senate, to appoint “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States,” and the President is given the power to “make Treaties, provided two thirds of the Senators present concur,” and the power to “receive Ambassadors and other public Ministers” from foreign countries. Under Article II, cl. 3, the President has the duty to “take Care that the Laws shall be faithfully executed,” and the President “shall from time to time give to the Congress Information on the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient.” Under Article I, § 7, cl. 2, after a bill is passed by both houses of Congress, it must be “presented to the President,” who may sign the bill or veto it, such veto capable of being overridden by a 2/3 majority in each House.

Unlike Article I, § 8, which lists all of the powers of Congress in some detail, this Article II listing of Presidential powers includes a number of provisions, like the executive power “vested in the President” and the “Commander-in-Chief” power, which are stated in broader terms. This has led to a number of cases where considerations other than literal text have predominated in the
Court’s opinions. Perhaps the most famous of these cases is *Youngstown Sheet & Tube Co. v. Sawyer*,\(^{35}\) decided in 1952.

In addition to the Presidential subordination implicit in the constitutional text that allocates “All legislative Powers herein granted” to Congress, the Constitution provides that the President shall take care that the laws be faithfully executed (thus insuring that the President will not have the power of dispensation, *i.e.*, the power to set laws aside, which the English King had at the time that Constitution was drafted and ratified).\(^{36}\) Further, most of the enumerated powers relating to foreign affairs, as well as domestic matters, are granted to Congress. In Article I, § 8, Congress is given the power to tax and spend for the common defense of the United States and its general welfare, the power to regulate commerce with foreign nations, deal with naturalization, regulate foreign coinage, deal with all aspects of rules and regulations for the armed forces, declare war, and make all laws necessary and proper for executing those and all other powers vested in the government of the United States or any department. Under Article II, § 2, cl. 2 the Senate can refuse to ratify treaties.

Given these limitations, it appears that the President cannot make policy contrary to valid congressional enactments, because the President must faithfully execute the laws and swear to preserve and defend the Constitution. As the Court stated in *Hamdan v. Rumsfeld*, in an opinion joined by Justice Kennedy:

> Whether 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 power. See *Youngstown Steel & Tube Co.*

\(^{35}\) 343 U.S. 579 (1952), discussed *infra* at text accompanying notes 56-72.

\(^{36}\) On this difference between presidential power and the power of the English King in the 18th century, *see* WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION, Vol. 1, 411-28 (Univ. of Chicago, 1953).
v. Sawyer, 343 U.S. 579, 637, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J. concurring). The Government does not argue otherwise. 37

It therefore appears that considering only the text of the Constitution, the branches of the federal government, though separate, are not really equal. The text of the Constitution appears to make Congress the most powerful branch if Congress chooses to fulfill that role.

In support of this view of strong Congressional power, Professor Crosskey, in his treatise, POLITICS AND THE CONSTITUTION, pointed out that the purpose of enumerating various powers in Article I relating to foreign affairs was not to vest a limited power in Congress in order to reserve power to the States but, rather, to transfer to Congress a set of powers which, in England, were considered executive powers and, hence, belonged to the King. 38 According to Crosskey, the most popular legal writer at the time of the Constitution Convention was Blackstone, and Blackstone had written that all of the above powers, and many others enumerated for Congress, belonged to the King, as did the power over patents, inferior tribunals, and the post office. 39

On the other hand, it can be argued that the President enjoys a "residual" foreign affairs power under Article II, § 1's grant of "the executive Power." It has been noted, as an historical matter, "the ordinary eighteenth-century meaning of executive power – as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone – included foreign affairs powers. . . . To slight the foreign affairs meaning of executive power is to downplay Locke, Montesquieu, Blackstone, Washington, Jay,

37 584 U.S. 557, 593 n.23 (2006).
38 CROSSKEY, supra note 36, at 411-28.
39 Id. at 415-17.
Jefferson, Hamilton, and even Madison.40 However, it has been noted that Locke and other 18th-century natural law writers distinguished the “executive power,” which was the power to execute laws, from the “federative” power, or other such term, which was a power over foreign affairs. While Article II did vest “executive” power in the President, the “federative” power was split between Congress and the President in various constitutional provisions dealing with declaring war, negotiating and ratifying treaties, nomination and confirmation of Ambassadors, and the like.41

In considering text, context, and history, the natural law decisionmaking style emphasizes the importance of understanding a provision's purpose. As Professor Michael Moore wrote in A Natural Law Theory of Interpretation, "Once a judge determines the ordinary meaning of the words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question. The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart."42

The rules of interpretation ordinarily followed in the 18th century and early 19th century reflected this approach. As Professor William Crosskey wrote about interpretation in the 18th century, "[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules


of interpretation customarily followed by the courts."43 This focus on a provision's purpose was most famously stated in "The Rule of Heydon's Case" in 1584. In *Heydon's Case*, Lord Coke stated that a judge should inquire into the "mischief and defect" that the drafter was seeking to remedy and "the true reason for the remedy," and the judge should "make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force to the cure and remedy, according to the true intent of makers of the act."44

The Supreme Court addressed this approach toward interpretation in a number of early 19th-century cases. For example, in *McCulloch v. Maryland*, Chief Justice Marshall stated, "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."45

43 CROSSKEY, supra note 36, at 363. See also Louis J. Sirico, Jr., *Original Intent in the First Congress*, 71 Mo. L. Rev. 687 (2006) (First Congress focused on framers and ratifiers’ general purposes in adopting constitutional text, not specific plain meaning).

44 76 Eng. Rptr. 637, 638 (1584).

This approach can be contrasted with a formalist, or textualist, style of interpretation. As many commentators have noted, a formalist approach, such as that adopted by Justice Scalia, typically focuses on textual plain meaning devoid of purposive analysis, unless the plain meaning of text is determined to be ambiguous or absurd.46 In contrast, the natural law style of interpretation is always willing to utilize both the plain meaning (or letter) of a constitutional provision and the provision’s purpose (or spirit) to help determine constitutional meaning.47

In deciding cases, Justice Kennedy is careful to give full weight to the purpose behind constitutional provisions, consistent with James Madison’s advice to search for the “evils and defects for which the Constitution was called for & introduced.”48 For example, in Boumediene v. Bush,49 Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that the writ


48 See supra text accompanying note 30.

of habeas corpus applied to detainees in Guantanamo Bay, and that the procedures available in the newly revised military commissions for review of the causes for detention were not an adequate substitute for the writ of habeas corpus that is guaranteed by the Constitution. In his opinion, Justice Kennedy cited history and precedent, as well as the literal words of the Constitution, \(^{50}\) but, ultimately, what appeared to carry the opinion were important general principles of separation of powers and the purposes behind the writ of Habeas Corpus. Here are several quotations:

(1) The [Habeas Corpus] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty. \(^{51}\)

(2) The writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. \(^{52}\)

(3) The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law. \(^{53}\)

Justice Scalia’s dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, focused less on this purpose, but more on literal textualism. Justice Scalia noted that the writ of habeas corpus does not, and never has, run in favor of aliens who have never been within the “territorial jurisdiction” of the United States, and since Guantanamo Bay is not literally United

\(^{50}\) Id. at 739-45, 779-82.

\(^{51}\) Id. at 745.

\(^{52}\) Id. at 765.

\(^{53}\) Id. at 798.
States territory, that should end the matter.\textsuperscript{54} For Justice Kennedy, however, the purpose of habeas corpus protection applies where the United States has practical control over the territory, and the United States has practical control over Guantanamo Bay.\textsuperscript{55}

D. Government Practice

1. The Youngstown Sheet Case

In \textit{Youngstown Sheet & Tube Co. v. Sawyer},\textsuperscript{56} decided in 1952, the Court ruled that the President cannot make policy by seizing steel mills to avert a nation-wide strike during wartime.\textsuperscript{57} In his opinion for the Court, Justice Black said that the President’s powers are limited to the textually enumerated powers, such as faithfully executing the laws and serving as Commander-in-Chief.\textsuperscript{58} Although acknowledging that the “theater of war” may be “an expanding concept,” Justice Black stated that the Commander-in-Chief power cannot be used to give the President power to take possession of private property to keep “labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”\textsuperscript{59} The requirement that the President “faithfully execute” the laws “refutes the idea that he is to be a lawmaker. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good times and bad.”\textsuperscript{60}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 832-43 (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas & Alito, JJ.), \textit{citing} Johnson v. Eisentrager, 339 U.S. 763 (1950).
\item \textsuperscript{55} \textit{Id.} at 755-71.
\item \textsuperscript{56} 343 U.S. 579 (1952).
\item \textsuperscript{57} \textit{Id.} at 587-89.
\item \textsuperscript{58} \textit{Id.} at 587.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 588-89.
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Despite Justice Black’s focus on literal text in *Youngstown Sheet*, no other Justice agreed in *Youngstown Sheet* that the President's power was limited to textual analysis. Focusing on arguments addressed to legislative and executive practice, Justice Frankfurter noted in his concurrence, “A systematic, unbroken, executive practice, long pursued by the knowledge of 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.”61

Justice Jackson's analysis in the case also suggested that Presidential power is dependent upon a functional analysis based upon prior legislative and executive action. Jackson noted:

1) The President has maximum power when acting pursuant to an express or implied congressional authorization.
2) A troublesome "zone of twilight" occurs if the President acts when Congress is silent. In this area, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."62
3) The President has the least power when acting contrary to the expressed or implied will of Congress. Courts can then sustain the President's action only by finding that Congress' will was expressed in an unconstitutional manner or that it has no power over the subject.63

The other Justices on the Court also agreed with this kind of legislative, functional analysis approach.64

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61 *Id.* at 610-11 (Frankfurter, J., concurring).
62 *Id.* at 637. Justice Clark added that the nature of that power probably depended on the gravity of the situation. *Id.* at 663 (Clark, J., concurring).
63 *Id.* at 638.
64 *Id.* at 629-33 (Douglas, J., concurring); *id.* at 656-60 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring in the judgment); *id.* at 667-70 (Vinson, C.J., joined by Reed & Minton, JJ., dissenting).
Cases have also discussed presidential power where Congress may not have approved the President’s action in advance, but subsequently ratified the President’s action, or may not have disapproved the President’s action in advance, but subsequently expressed their dissatisfaction with presidential decisionmaking. Indeed, Justice Frankfurter discussed aspects of subsequent congressional ratification in his concurrence in *Youngstown Sheet*.65

The general separation of powers concern with promoting efficiency, while protecting against tyranny, also has shaped court decisions. Specifically, Congress has frequently allowed the President to take the lead in foreign affairs to promote efficiency in foreign policy decisionmaking.66 Thus, in considering executive versus legislative powers, the Court will likely give the President more leeway in cases involving foreign affairs, than those involving domestic power, where Congress’ policy-making power is more dominant. For domestic policy, the concern with prevention of presidential tyranny has been viewed as the greater concern than governmental efficiency.

Based on these considerations, the following Table 2 summarizes these “Justice Jackson” factors that the Court considers under the post-1937 non-formalist approach to presidential powers, in addition to Justice Black’s formalist focus on literal text, and Justice Frankfurter’s focus on “glosses” on executive power. In *Youngstown Sheet*, Justice Frankfurter’s “gloss on meaning” use of legislative and executive practice did not provide President Truman with much help. Justice Frankfurter noted that while President Roosevelt had taken unilateral action in the events leading

65 *Id.* at 612-13 (Frankfurter, J., concurring).

66 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting the “power of the President as the sole organ of the federal government in the field of international relations” and the President “has the better opportunity to knowing the conditions which prevail in foreign countries.”).
up to World War II 12 times, 6 of those times were pursuant to congressional approval, 3 times involved subsequent ratification by Congress, and thus only 3 times even remotely resembled President Truman’s action in this case.\(^{67}\)

Where the case involves a category nearer the top of Table 2, the President’s authority to act will be greater than when the case involves a case near the bottom of the Table 2:

**Table 2**

**Basic Factors Used to Predict Results in Determining Constitutionality of Exercises of Executive Power Under Jackson’s Non-Formalist Approach**

<table>
<thead>
<tr>
<th>Nature of the Problem</th>
<th>Nature of the Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Pure Foreign Affairs (e.g., Recognizing Foreign Governments)</td>
<td>1. Action Taken Pursuant to Express or Implied Congressional Approval</td>
</tr>
<tr>
<td>2. Primarily Foreign Affairs (e.g., Curtiss-Wright)</td>
<td>2. Subsequent Congressional Ratification</td>
</tr>
<tr>
<td>3. Mixed Foreign/Domestic (e.g., Dames &amp; Moore)</td>
<td>3. Action Taken Pursuant to Congressional Silence</td>
</tr>
<tr>
<td>4. Primarily Domestic (e.g., Youngstown Sheet)</td>
<td>4. Subsequent Congressional Disapproval of Action</td>
</tr>
<tr>
<td>5. Pure Domestic (e.g., Impounding Funds Passed Pursuant to Cong. Enactment)</td>
<td>5. Action Taken Pursuant to Implied or Express Congressional Disapproval</td>
</tr>
</tbody>
</table>

In *Youngstown Sheet*, the President’s authority was near the bottom of this Table, as the case involved primarily a domestic issue, the seizure of steel mills, although it did have a foreign component, the proposed effect of a steel strike on the ability to provide military equipment for the Korean War. The case also involved action taken pursuant to implied congressional disapproval,

\(^{67}\) *Id.* at 612-13 (Frankfurter, J. concurring). Justice Frankfurter also provided an exhaustive Table summarizing executive seizures of private property in the past. *Id.* at 615 et. seq.
as Congress had provided for alternative ways to resolve domestic strikes in times of emergency, such as the provision in the Taft-Hartley Act of 1947 for a 60-day cooling-off period with an injunction against a strike, followed by 20 days for a secret ballot upon the final offer of settlement, or referral of the controversy to the Wage Stabilization Board, which President Truman did, but whose recommendations were viewed as too favorable to the workers by steel management. Further, Congress had specifically rejected giving the President the power to seize plants unilaterally when considering the issue in the Taft-Hartley Act, as Justice Burton noted in his concurrence.68

The dissenters in *Youngstown Sheet*, Chief Justice Vinson and Justices Reed and Minton, also resorted to arguments of legislative and executive action. They merely balanced them differently than did Justice Jackson. They concluded that the President was attempting to execute defense programs for the Korean War, and thus was acting pursuant to implied congressional authorization.69 Justice Vinson's opinion also contained language focusing on the need for efficiency in government operations, suggesting that the President may have power where Congress is silent to deal with emergencies in ways that save legislative programs or which protect the country, at least where the President informs Congress and states an intention to abide by legislative will.70

Chief Justice Vinson’s opinion reflects the predisposition of more conservative judges, such as Chief Justice Vinson and Justices Reed and Minton, to resolve close cases in favor of presidential authority, and downplay concerns with presidential tyranny. As Chief Justice Vinson noted in his

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69 343 U.S. at 670-72 (Vinson, C.J., joined by Reed & Minton, JJ., dissenting).

70 *Id.* at 682-83, 702-04.
opinion, “A review of executive action demonstrates that on many occasions Presidents have exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to ‘take Care that the laws be faithfully executed.’”\footnote{\textit{Id.} at 683.}

In contrast, liberal judges tend to resolve close questions more in favor of the legislative branch, and to be suspicious of broad grants of power to the President. As liberal instrumentalist Justice Douglas noted in his concurrence in \textit{Youngstown Sheet}, focusing on the policy behind the President’s action in this case and in other potential future cases, “Today a kindly President uses the seizure power to effect a wage increase [based on the Wage Stabilization Board’s recommendations] and to keep steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.”\footnote{\textit{Id.} at 633-34 (Douglas, J., concurring). On \textit{Youngstown Sheet}, see generally Ken Gormley, \textit{Foreward: President Truman and the Steel Seizure Case: A Symposium}, 41 Duq. L. Rev. 667 (2003).} As a moderate jurist, Justice Kennedy has shown no extreme predisposition for or against Presidential power.\footnote{\textit{See infra} notes 81-84, 123-26 (supporting Presidential power); \textit{infra} text accompanying notes 90-98, 107-113 (limiting Presidential power).}

2. Other Considerations

In practice, Congress has frequently allowed the President to take the lead in foreign affairs, a lead supported by numerous Supreme Court cases.\footnote{\textit{See Jefferson Powell, The Founders and the President's Authority over Foreign Affairs}, 40 Wm. & Mary L. Rev. 1471, 1473 n.7 (1999) (collecting cases) (Sale v. Haitian Ctrs. Council, 509 U.S. 155, 188 (1993) (Stevens, J., writing for an eight-justice majority) (citing \textit{Curtiss-Wright} in referring to the "foreign and military affairs for which the President has unique responsibility"); Webster v. Doe, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and}
President has some independent power even absent Congressional approval. For example, during the Presidency of Franklin Delano Roosevelt, the Court said in *United States v. Pink*\textsuperscript{75} and *United States v. Belmont*\textsuperscript{76} that state laws are superseded by a Presidential executive agreement with foreign nations. In 1981, the Court was a bit more cautious in *Dames & Moore v. Regan*,\textsuperscript{77} saying only that the President has "some measure of power" to enter into executive agreements without obtaining the advice and consent of the Senate, and holding very narrowly that "where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims."\textsuperscript{78}

dissenting in part) (quoting *Curtiss-Wright's* description of the President's "delicate, plenary and exclusive power"); Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (Powell, J., writing for an eight-justice majority) (referring to "such 'central' Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate"); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (Rehnquist, J., plurality opinion) (noting that "this Court has recognized the primacy of the Executive in the conduct of foreign relations [and] emphasized the lead role of the Executive in foreign policy"); New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., joined by White, J., concurring) (explaining that "the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs"); *id.* at 756 (Harlan, J., dissenting) (stating that the President has "constitutional primacy in the field of foreign affairs"); Ward v. Skinner, 943 F.2d 157, 160 (1\textsuperscript{st} Cir. 1991) (Breyer, C.J.) (arguing that "the Constitution makes the Executive Branch . . . primarily responsible" for the "foreign affairs power").


\textsuperscript{76} *United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

\textsuperscript{77} 453 U.S. 654 (1981).

\textsuperscript{78} *Id.* at 688.
When it came to dealing with the Vietnam hostilities, the Supreme Court manifested considerable reluctance to take a case in which the issue was whether, war not having been declared, the military action of the United States was "illegal." A lower court did decide in 1971 that Congress had sufficiently authorized the South-East Asian commitments of the United States.

Where the President commits armed forces in an effort to rescue American hostages, the President can invoke the Hostage Act of 1868. That Act puts the President’s action within the first category of Jackson’s three-part analysis by providing that:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of the government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizens, the President shall forthwith demand the release of such citizens, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release, and all the facts and proceedings relating thereto shall as soon as practicable be communicated by the President to Congress.

As this quote indicates, the Court has approved the exercise of considerable presidential power where authorized by Congress. Justice Kennedy has supported such exercises of power. For example, in *Hamdi v. Rumsfeld*, the Court ruled that Congress validly authorized the President to detain enemy combatants, including American citizens, for the duration of the conflict in which they were captured. In an opinion joined by Justice Kennedy, a 4-Justice plurality said this was a fundamental and accepted incident of war, but added that the Constitution requires through the Fifth Amendment...
Amendment Due Process Clause that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.\(^{83}\) A concurrence by Justices Souter and Ginsburg agreed with this disposition of the case.\(^{84}\)

**F. Constitutional Precedents**

In 1803, in *Marbury v. Madison*,\(^ {85}\) John Marshall wrote that the exercise of discretionary presidential power would not be given judicial review. The next major Presidential powers case occurred in 1863. In the *Prize Cases*, the Court considered, without deciding, whether without congressional approval the President could constitutionally use power to resist armed force with force, because the Court decided that President Lincoln’s declaring a naval blockage after Fort Sumter had been fired upon was authorized by Congress. The Court did say that whether armed resistance calls for others to be treated as belligerents is a question to be decided by the President.\(^ {86}\)

The next major Presidential powers cases occurred during the 1930's and 1940's. As discussed earlier,\(^ {87}\) in *United States v. Belmont* and *United States v. Pink* the Court held that the President has the power to enter into executive agreements with foreign countries which preempt state laws, even without congressional directive. However, as noted earlier,\(^ {88}\) roughly 40 years

\(^{83}\) *Id.* at 536-59 (O’Connor, J., announced the judgment of the Court, and delivered an opinion, in which Rehnquist, C.J., and Kennedy & Breyer, JJ., joined).

\(^{84}\) *Id.* at 553 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

\(^{85}\) 5 U.S. (1 Cranch) 137, 165-67 (1803).

\(^{86}\) 67 U.S. (2 Black) 635, 668-70 (1863).

\(^{87}\) *See supra* text accompanying notes 75-76 (discussing *Belmont* and *Pink*).

\(^{88}\) *See supra* text accompanying note 77 (discussing *Dames & Moore*).
later, in *Dames & Moore v. Regan*, the Court was more cautious, saying only that the president has “some measure of power” to enter into executive agreements without obtaining congressional express or implied approval.

These cases suggest that in foreign affairs there is an area of presidential power in situations where Congress has not sought either to limit or to authorize presidential action. In 1952, this principle became part of the analysis of presidential power embodied in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.89 Under Justice Jackson’s analysis, the most troublesome issues are whether the President has acted within a power validly authorized by Congress, or within the zone of twilight, and whether the President has used power that Congress cannot control.

In 2008, in *Medellin v. Texas*,90 the Court expressed concern over any exclusive unlimited presidential powers, with regard to either the zone of twilight zone or whether was express or simplified congressional disapproval. Writing for the Court in *Medellin*, in an opinion joined by Justice Kennedy, Chief Justice Roberts said, “It is a fundamental constitutional principle that ‘[t]he power to make the necessary laws is in Congress; the power to execute is in the President.’”91

A majority of the Court considered it necessary in *Medellin v. Texas* to hold that the President cannot unilaterally provide for the domestic enforceability of a treaty which creates an international law obligation on the part of the United States, but does not convey an intention that

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89  See supra text accompanying note 63 (discussing *Youngstown Sheet*).


it should have self-executing domestic legal effects.\footnote{92} Explaining that holding, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, said:

Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.’ . . . Indeed, ‘the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”’ Youngstown, 243 U.S., at 587, 72 S.Ct. 863.\footnote{93}

Analyzing the Medellin case in terms of the three-part Jackson analysis, the Chief Justice said that the situation did not fall within the first category of the Youngstown Sheet framework because a non-self-executing treaty is one that was ratified with the understanding that it is not to have domestic effect of its own force and, thus, congressional ratification does not expressly or impliedly vest the President with the unilateral authority to make such a treaty self-executing.\footnote{94} Nor is the situation within the second category because when the President asserts the power to enforce a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with an implicit understanding of the ratifying Senate that the treaty is not to be self-executing.\footnote{95} As to the third category, said the Chief Justice, wherein the President has power but the Congress does not, if a ratified treaty is not self-executing, Congress can enact implementing legislation approved by the President or passed over his veto but the Constitution does not contemplate vesting such power in the Executive alone.\footnote{96} The Court left open the possibility that Congress could acquiesce in support

\footnote{92} Id. at 526-27.  
\footnote{93} Id. at 526.  
\footnote{94} Id. at 526-27.  
\footnote{95} Id. at 527-28.  
\footnote{96} Id. at 530-32.
of the President’s authority to create domestic law pursuant to a non-self-executing treaty, but
discovered no support in the precedents for finding acquiescence in the President transforming an
international obligation into domestic law and thereby displacing state law.\textsuperscript{97}

Evincing a similar concern with unlimited Presidential power, the Court in \textit{Hamdan v. Rumsfeld} endorsed a quote from \textit{Ex Parte Quirin} that “Congress and the President, like the courts, possess no power not derived from the Constitution.”\textsuperscript{98}

\textbf{F. Prudential Considerations}

Cases decided recently have involved situations in which the Court considered the extent of presidential power to act independently of congressional authorization. The most important of these cases are \textit{Hamdan v. Rumsfeld}\textsuperscript{99} and \textit{Boumediene v. Bush}.\textsuperscript{100} In \textit{Hamdan}, the Court held that regardless of whether 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.\textsuperscript{101} As to whether the President has such independent power, the Court cited a statement by Chief Justice Chase in \textit{Ex Parte Milligan} that he has such power in cases of “controlling necessity,” but quickly added that this question has not been answered definitely by the Court, and need not be answered in the \textit{Hamdan} case inasmuch as Congress had authorized military commissions to try only violations of the law of war, and the

\begin{footnotesize}
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\item[\textsuperscript{97}] \textit{Id.} at 532.
\item[\textsuperscript{99}] 548 U.S. 557 (2006).
\item[\textsuperscript{100}] 553 U.S. 723 (2008).
\item[\textsuperscript{101}] 548 U.S. at 593 n.23.
\end{itemize}
\end{footnotesize}
conspiracy charges brought against Hamdan were not violations of the law of war.\textsuperscript{102} Further, Congress had required that the procedures used in military commissions must be in accord with courts-martial requirements unless the President finds them impracticable to administer – a finding not made in the case.\textsuperscript{103} Finally, the Court held that procedures set forth by the President for military commissions violated Common Article 3 of the Geneva Convention, a treaty ratified by Congress, insofar as those procedures purported to dispense with the principles that an accused must, absent disruptive conduct or consent, be present for his trial and privy to the evidence against him.\textsuperscript{104} Justice Breyer, concurring with Justices Kennedy, Souter, and Ginsberg, noted that nothing prevents the President from returning to Congress and seeking the authority he believes necessary.\textsuperscript{105}

The President did indeed return to Congress, which previously had enacted the Detainee Treatment Act of 2005 (DTE), and the Congress responded to the President’s new request by enacting the Military Commissions Act of 2006 (MCA).\textsuperscript{106} Section 7 of the MCA purported to strip jurisdiction from all federal courts over petitions for habeas corpus filed by detainees at Guantanamo, and to place in military commissions the power to consider their status and their crimes, with review by a single Court of Appeals.

\textsuperscript{102} Id. at 591-92, quoting Ex Parte Milligan, 471 U.S. (4 Wall.) 2, 139-40 (1886); id. at 598-613.

\textsuperscript{103} Id. at 623-24.

\textsuperscript{104} Id. at 625-33. Justice Alito, joined by Justices Scalia and Thomas, concluded that Common Article 3 was satisfied because the military commissions qualify as courts, were appointed and established in accord with domestic law, and any procedural improprieties that might occur can be reviewed in those particular cases. Id. at 731-33 (Alito, J., joined by Scalia & Thomas, JJ., dissenting).

\textsuperscript{105} Id. at 636 (Breyer, J., joined by Kennedy, Souter & Ginsburg, JJ., concurring).

In an opinion by Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court held in *Boumediene v. Bush*, 553 U.S. 723, 787-92 (2008), that the writ of habeas corpus applied to detainees in Guantanamo, and that the procedures available in the newly revised military commissions for review of the causes for detention and the Executive’s power to detain were not an adequate substitute for the writ of habeas corpus that is guaranteed by the Constitution. The MCA procedures fell short especially because there was no opportunity for the detainee on appeal to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.

Chief Justice Roberts was joined in dissent by Justices Scalia, Thomas, and Alito. Reflecting his deference-to-government decisionmaking style, Roberts criticized Justice Kennedy’s opinion for not being sufficiently deferential to decisions by Congress and military authorities. Roberts criticized what he called the majority’s “ambitious opinion” as being really about control by the judiciary of federal policy regarding enemy combatants. Roberts said that the system created by Congress protects whatever rights the detainees may possess. As for use of later discovered exculpatory evidence, Roberts noted that the D.C. Circuit has power to remand a case to the tribunal below to allow that body to consider such evidence in the first instance.

Justice Scalia also dissented, joined by Chief Justice Roberts and Justices Thomas and Alito. Uncharacteristically, Scalia began with an analysis of projected consequences, that is, prudential concerns. Henceforth, he said, “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”

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108 *Id.* at 801-824 (Roberts, C.J., joined by Scalia, Thomas & Alito, J.J., dissenting).
of Scalia’s opinion, however, was based on focus on text and history. He concluded that the writ of habeas corpus does not, and never has, run in favor of aliens who have never been within the “territorial jurisdiction” of the United States, as supported by language in *Johnson v. Eisentrager*. Since Guantanamo Bay is not literally United States territory, that should end the matter.110

Justice Kennedy said in reply that the reference in *Eisentrager* to “territorial jurisdiction” was a reference to one of several factors used in a “functional” test to determine whether habeas corpus is available. Under that test the Court should consider the objective degree of control over the location, the practicability of having a trial there, and the availability of possible alternatives. Under this functional test, *de jure* sovereignty is a factor that bears on the applicability of constitutional guarantees, but questions of extraterritoriality turn on objective factors and practical concerns, not formalism – and the United States has practical control over Guantanamo Bay.111

Although joining Kennedy’s majority opinion in its entirety, Justice Souter concurred to make two points. This concurrence was joined by Justices Ginsburg and Breyer. First, Justice Souter said that the Court’s holding was not a surprise inasmuch as a 5-4 Court wrote in *Rasul v. Bush* that “[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus.”112 Second, Souter said that something more was involved in this case than “pulling and hauling between the judicial and political branches.” He noted, “After six years of sustained executive detentions in Guantanamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today’s decision is no judicial victory, but an act

110 Id. at 831-50, citing Johnson v. Eisentrager, 339 U.S. 763 (1950).

111 Id. at 753-71.

of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.113

Evaluating this case from a prudential perspective is not easy. It is reassuring that the Court is determined to protect the writ of habeas corpus as a fundamental principle, and has done it in a way that can be viewed as supporting the separation of powers. On the other hand, the final paragraph of Chief Justice Robert’s dissent deserves repetition. The Chief Justice said:

So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas rights, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit – where they could have started had they invoked the DTA procedure. Not Congress, whose attempt to “determine – through democratic means – how best” to balance the security of the American people with the detainee’s liberty interests . . . has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.114

Since Boumediene, a number of cases involving enemy combatants have been tried. In a number of these cases, the detainees have been ordered released – officially designated as No Longer Enemy Combatant (NLEC) – due to a lack of evidence even under flexible evidentiary standards suggested in Hamdan and Boumediene.115 In other cases, individuals have been detained, and their cases appealed to the Court of Appeals for the District of Columbia. In these cases, the procedures adopted below have been held adequate to satisfy due process concerns, including a

113 Id. at 801 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring).
114 Id. at 826 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).
preponderance of the evidence standard to determine guilt; use of hearsay testimony, as long as it is “reliable”; and reasonable discovery procedures.116

G. Separation of Powers Doctrine Applied to Modern Issues

1. Domestic Cases

Considering the above materials, it is clear that the Court, with Justice Kennedy often being the critical deciding vote, has been reluctant to draw sharp lines in fleshing out the Jackson three-part analysis. However, several tentative generalizations can be made. It clearly appears that if Congress has authorized the President to take actions in domestic or foreign affairs, and the Congress has acted within its powers, the President can act on that authorization so long as a prohibition is not violated. If Congress has not acted, the President may have a limited power in the twilight zone to make domestic policy, especially if there is an emergency, and perhaps if the President indicates an intent to follow congressional decisions. With regard to foreign affairs, the President has an array of political and diplomatic means available to enforce international obligations.

If Congress has sought to limit the power of the President with respect to domestic affairs, and Congress has acted within its powers, there seems to be no judicial precedent that would allow the President to violate those limitations, even in case of an emergency, and even if the President indicates a willingness to follow future directions by Congress. Of course, Congress must act within its powers. For example, regarding Congress’ power to limit the President’s ability to fire executive employees at will, the Court said in 1988 in Morrison v. Olson, “[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.\textsuperscript{117}

For Cabinet officers and their high-level subordinates, the Court has stated that Congress cannot limit the President’s ability to remove if that would impermissibly “impede” the President’s ability efficiently to run his administration. As the Court noted in \textit{Morrison}, “[T]here are some ‘purely executive’ officials who must be removable by the President at will if he is to accomplish his constitutional role.”\textsuperscript{118} This is particularly true for those policymaking positions typically viewed as part of the President’s policymaking team.

In contrast, for lower level federal employees, who are not in a policy-making role, Congress can provide civil service protection from at-will Presidential firing. Indeed, in a 1978 analysis, a Senate Committee estimated that there were 2.9 million civil employees on the federal payroll, of whom 93\% were subject to civil service protection prohibiting suspension or removal of such employees,\textsuperscript{119} except as provided in 5 U.S.C. § 7503(a) for suspensions of 14 days or less, or, under 5 U.S.C. § 7513(a), for more serious action, including removal, "for such cause as will promote the efficiency of the service," which must be demonstrated at an administrative hearing. Civil service protection also typically applies to Administrative Law Judges and other Judges serving in Article I or II courts who do not have Article III protections of life-tenure and no diminution of salary while

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\textsuperscript{117} 487 U.S. 654, 689-90 (1988).
\textsuperscript{118} \textit{Id.} at 690-91.
\end{flushleft}
in office.\textsuperscript{120} Sometimes, however, there are proposals to restrict or amend such civil service protection, as in the Omnibus Patent Act of 1997 for patent examiners.\textsuperscript{121} Staff for federal judges, including secretaries and law clerks, do not have civil service protection under existing law.\textsuperscript{122}

There are limits, however, on what restrictions Congress may place on removal of lower-level federal officials. For example, in \textit{Free Enterprise Fund v. Public Accounting Oversight Board},\textsuperscript{123} the Court was faced with a situation where the President could only remove Securities and Exchange Commissioners for good cause, and those Commissioners could only remove members of the Public Accounting Oversight Board for good cause. A 5-4 Court majority, with Justice Kennedy the critical fifth vote in the majority, held that such “double” good-cause removal protection – a unique arrangement not used in any other federal statute – did “impede” the President’s ability to perform his constitutional duties.\textsuperscript{124} The Court therefore struck down the limitation on the SEC Commissioners’ removal authority, leaving them free to remove the Oversight Board members at will.\textsuperscript{125} In dissent, Justice Breyer, joined by Justices Stevens, Ginsburg, and

\begin{itemize}
\item \textsuperscript{120} See generally Harold J. Krent & Lindsay DuVall, \textit{Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary}, 25 J. Nat'l Ass'n Admin. L. Judges 1, 45-46 (2005).
\item \textsuperscript{122} See Williams v. McClellan, 569 F.2d 1031, 1033 (8th Cir. 1978).
\item \textsuperscript{123} 130 S. Ct. 3138 (2010).
\item \textsuperscript{124} Id. at 3151-55.
\item \textsuperscript{125} Id. at 3161-62.
\end{itemize}
Sotomayor, concluded that the “double” good-cause removal did not significantly interfere with the President’s executive power.\footnote{Id. at 3164 (Breyer, J., joined by Stevens, Ginsburg & Sotomayor, JJ., dissenting).}

In addition to this basic doctrine regarding appointment and removal, Article II, § 2, cl. 3 provides, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire as the End of their next Session.” It could be argued that this literal text only gives the President this “Recess” power if the vacancy is created during a period that the Senate is in Recess.\footnote{See generally Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487 (2005).} Alexander Hamilton’s discussion of the clause in \textit{The Federalist Papers} No. 67 supports this view.\footnote{The Federalist No. 67 (A. Hamilton) (“The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, singly, to make temporary appointments ‘during the recess of the Senate, by granting commissions which shall expire at the end of their next session.’”).}

By executive practice, however, Presidents have always interpreted this provision as a power to fill any vacant position that otherwise would require Senate confirmation by an appointment when the Senate is in recess, and congressional acquiescence supports this as the accepted view.\footnote{See Edward A. Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 Cardozo L. Rev. 377, 381-407 (2005).} Professor Michael Herz has noted:

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  \item \footnote{Id. at 3164 (Breyer, J., joined by Stevens, Ginsburg & Sotomayor, JJ., dissenting).}
  \item \footnote{See generally Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487 (2005).}
  \item \footnote{The Federalist No. 67 (A. Hamilton) (“The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, singly, to make temporary appointments ‘during the recess of the Senate, by granting commissions which shall expire at the end of their next session.’”).}
  \item \footnote{See Edward A. Hartnett, Recess Appointments of Article III Judges: Three Constitutional Questions, 26 Cardozo L. Rev. 377, 381-407 (2005).}
\end{itemize}
Indeed, the matter lacks major controversy . . . . Why does the clause so clearly mean something it does not say? It can only be because the "arise" interpretation does not make sense in light of the clause's purpose. If the president needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it must be filled now. This represents a straightforward instance of purpose trumping, or at least informing our reading of, the text.

An implicit understanding of purpose comes into play in one other way in this argument. Attorney General Henry Stanbury once argued if "happen" meant "occurring during the recess," then the president could possess authority to make a recess appointment when the Senate is in session. This would happen if a position opened during the Senate's recess, triggering the recess appointment authority, but was still not filled when Senate returned; an appointment made then would still fill a vacancy that "happen[ed] during the recess of the Senate." Therefore, "happen during the recess" must mean "exist" rather than "occur." The force of this argument arises from the fact any interpretation that allows the president to make a recess appointment when there is no recess must be wrong, because it is so flatly at odds with the clause's purpose. . . .

In short, the interplay of text and purpose here seems to be as follows. The text suggests one outcome, but does not necessarily compel it. The textual uncertainty is increased by the fact that the most natural reading seems to produce an absurd result in one particular setting. Because of the textual uncertainty, considerations of purpose become critical and are sufficient to trump the text.130

Two recent Court of Appeals decision have challenged the accepted view of the Recess Power. In *NLRB v. New Vista Nursing & Rehabilitation*,131 the Third Circuit Court of Appeals held that the recess power only applies during “intersession” recess of the Senate, between the first and second sessions of a biennial Congress, not during intrasession adjournments. Going even farther, in *Noel Canning Division of Noel Corp. v. NLRB*,132 the District of Columbia Court of Appeals held that the recess power only applies to vacancies created during the Senate “intersession” recess, and recess appointments to those positions must be made during that recess period. The Supreme Court

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131 719 F.3d 203 (3rd Cir. 2013).
132 705 F.3d 490 (D.C. Cir. 2013).
has granted certiorari in *NLRB v. Noel Canning*,\(^{133}\) and asked the parties to brief, in addition to the issues raised in *Noel Canning*, whether the recess power can be used when the Senate is convening every three days in *pro forma* sessions, the precise circumstances in the case. To the extent a majority of the Court, including Justice Kennedy, remains consistent with the Court’s rejection of pure literalism, and embrace of arguments of purpose and legislative and executive practice, the precise holdings of the Court of Appeals cases would be reversed. The Court might resolve the case on narrow grounds, however, saying either that the President cannot use the Recess power when the Senate is convening in *pro forma* sessions, or declare the case moot, as the individuals involved in the Recess Appointments have already left their positions, and new appointees have been confirmed under the regular Senate Advice and Consent process.\(^{134}\)

President Obama has recently faced criticism for executive actions to waive deportation for some aliens illegally in the United States,\(^{135}\) and waiving for one year the employer mandate in the Affordable Care Act.\(^{136}\) Under a literal approach, such action could be criticized as inconsistent with

\(^{133}\) 133 S. Ct. 2861 (2013).

\(^{134}\) See Huffington Post, Obama NLRB Picks Confirmed by Senate, Ending Months-Long Political Fight (July 30, 2013) (http://www.huffingtonpost.com/2013/07/30/nlrb-confirmations_n_3677595.html).

\(^{135}\) See USA Today, Obama easing deportation rules for young people (Jun 15, 2012) (http://content.usatoday.com/communities/theoval/post/2012/06/obama-to-speak-on-new-immigration-rules/1) (deportation waived for illegal immigrants who arrived before they turned 16, are under 30, with at least five continuous years in the United States. They must either be in school, be high school graduates, has a GED or have served in the military, with no felony or significant misdemeanor convictions).

the President’s responsibility to “take Care that the Laws shall be faithfully executed.” On the other hand, it is established executive practice that executive officials, both at the federal and state levels, have prosecutorial discretion not to enforce every law to its 100% limit. Such accepted executive practice would likely insulate the President from any serious attack on these actions, unless a majority of the Court switched to a literal approach to separation of powers issues.

2. Foreign Affairs

With respect to foreign affairs, the Congress probably cannot direct field operations of the military once a general course of action has been approved, since that would interfere with the President’s Commander-in-Chief powers. Otherwise, Congress can probably regulate presidential actions, so long as Congress does not violate the separation of powers by completely depriving the President of his central role in dealing with foreign affairs, particularly with respect to international obligations.

Under this view, Congress’ power to pass the War Powers Resolution of 1973 would be constitutional. Among other things, that law requires consultation between Congress and the President "in every possible instance" before introducing United States Armed Forces into situations where imminent involvement in hostilities is clearly indicated by the circumstances. The law also calls for a report within 48 hours on the introduction of armed forces in such a situation, and requires the termination of the use of such forces whenever Congress so directs by concurrent resolution.

137 See, e.g., Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause, 91 Tex. L. Rev. 781 (2013) (President Obama’s actions should be viewed as unconstitutional, adopting a more literalist approach toward the “Take Care” clause).

(basically a two-house veto of the President’s action), or within 60 days unless Congress has
declared war, or has extended by law such 60-day period, or is physically unable to meet as a result
of an armed attack upon the United States. The President can trigger an additional 30-day grace
period if “unavoidable military necessity respecting the safety” of the troops requires continued
presence “in the course of bringing about a prompt removal of such forces.” The Act also provides
that the President has authority to act in times of a “national emergency” created by a sudden attack
on the United States, its territories and possessions, or its armed forces.\footnote{139}

The legislative veto contained within this law is very likely invalid,\footnote{140} but the rest of the law
stands separate from the veto provision. Presidents have avoided a direct conflict with Congress
over this issue by reporting various use of the armed forces, but saying that the action was taken in
accord with a desire to inform Congress and “consistent with the War Powers Resolution.”

In considering Congress’ power over military matters, the Framers’ first draft gave Congress
the power to “make war.” At the suggestion of James Madison, this was amended to give Congress
the power to “declare war” in order to make it clear that the President should have the power to repel
sudden attacks, while Congress has the power to “declare” war and reprisals, that is, to authorize
major or minor offensive military action, as opposed to defensive military action. The shift in
terminology also made it clear that the President had the Commander-in-Chief power to direct, or
“make” war, while Congress had the power to trigger military action, that is, “declare” war. The
War Powers Resolution provisions explicitly authorizing Presidential action to respond to sudden

\footnote{139} See Pub.L. No 93-148; H.J.Res. 542, 93\textsuperscript{rd} Cong., 1\textsuperscript{st} Sess., 97 Stat. 555 (1973),
codified at 50 U.S.C. § 1541 \textit{et. seq.}

\footnote{140} See Immigration and Naturalization Service v. Chadha, 462 U.S. 2764 (1983)
(holding that to make law Congress must follow the presentment and bicameral provisions in the
Constitution, and cannot use a congressional veto procedure).
attacks is consistent with this understanding of congressional versus presidential constitutional
powers.141

Since 1973, the only technical failure to comply with the War Powers Resolution occurred
in 1999, when President Clinton continued bombing Serbia for 19 days longer than permitted by the
Act, as part of a response to Serbia’s pattern of ethnic cleansing in Kosovo. That continued bombing
was not approved by the House of Representatives, based upon a 213-213 tie vote.142 When a
member of the House brought suit against President Clinton challenging his actions, lower federal
courts dismissed the complaint on grounds of standing, and the case was not appealed to the
Supreme Court.143

A similar issue was raised in the Summer of 2011, when President Obama authorized United
States participation, along with France and Great Britain, in support of the rebels fighting against
the Khadafi regime in Libya. In that case, President Obama claimed that the War Powers Resolution
was not triggered, since the United States role was merely to provide back-up for France and British
bombing runs and other military action, and thus United States forces were not introduced in a
position of imminent hostilities themselves. Although members of Congress complained about this
justification at the time, and there is a legitimate issue whether imminent hostilities existed, no

141 See generally Jeffrey D. Jackson, The Dog of War as a Puppy: The Constitutional
Power to Initiate Hostilities as Answered by the Framing, 1 Geo. J.L. Pub. Ply. 361 (2003); J.
Richard Broughton, What Is It Good For? War Power, Judicial Review, and Constitutional
Deliberation, 54 Okla. L. Rev. 685 (2001) (supporting the congressional position); John C. Yoo, The
Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Cal. L.
Rev. 167, 257 (1996); John C. Yoo, Applying the War Powers Resolution to the War on Terrorism,


143 Id. at 40-42, , aff’d, 203 F.3d 19 (D.C. Cir. 2000), citing Raines v. Byrd, 521 U.S. 811
(1997).
congressional lawsuit was filed. The issue became functionally moot with the fall of the Libyan regime and the end of on-going U.S. military support obligations by the end of 2011.\footnote{144}

In sum, a degree of uncertainty is likely to continue, particularly with regard to the twilight zone, and the identification and legal effect of congressional acquiescence. This may be good thing, since it may tend to promote moderation and compromise by the President and Congress, and avoid a need for the Court to draw lines where consequences are difficult for the judiciary to foresee.

\section*{III. Federalism Doctrine and the Tenth Amendment}

In 1976, a 5-4 Court held in \textit{National League of Cities v. Usery}\footnote{145} that the 10\textsuperscript{th} Amendment prohibits Congress, when exercising its Commerce Clause power, from directly displacing a state's freedom to structure integral operations in areas of traditional governmental functions. There were four liberal dissents in \textit{National League}.\footnote{146} The critical fifth vote in \textit{National League} belonged to Justice Blackmun. In \textit{National League}, Justice Blackmun balanced the demands of federal versus state power, creating an area for state sovereignty, but noted that federal power should not be outlawed “in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”\footnote{147}


\footnote{145} 426 U.S. 833, 851 (1976).

\footnote{146} \textit{Id.} at 856, 867-68 (Brennan, J., joined by White & Marshall, JJ., dissenting); \textit{id.} at 880-81 (Stevens, J., dissenting).

\footnote{147} \textit{Id.} at 856 (1976) (Blackmun, J., concurring).
In 1985, nine years after National League, Justice Blackmun abandoned his balancing approach in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, he joined with the liberal dissenters in National League to overrule National League in favor of a strong pro-federal power decision. Justice Blackmun said in his opinion for the Court that it was unworkable to seek limits on Congress' power in terms of particular governmental functions, whether "traditional," "integral," "ordinary," or "necessary." Such distinctions merely invite judges to decide on what state policies they favor or dislike. Blackmun noted that any 10th Amendment limits on Congress' Commerce Clause power are in the procedural safeguards inherent in the structure and political processes of the federal system, including the lobbying ability of groups like the National Governors' Association, the National Conference of State Legislatures, the U.S. Conference of Mayors, or the Council of State Governments.

Despite conservative Justices typically having a strong states’ rights predisposition in deciding cases, during his tenure on the Court Justice Kennedy has shown no willingness to reconsider this holding in Garcia. This is true despite four more conservative Justices on the Court today no doubt willing to overrule Garcia, similar to the four conservative Justices in dissent in Garcia.

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149 Id. at 547-54.

150 Id. at 557-60 (Powell, J., joined by Burger, C.J., and Rehnquist & O’Connor, JJ., dissenting).
Despite the 10th Amendment doctrine of Garcia, state rights have been indirectly enhanced after Garcia in two ways – both supported by Justice Kennedy. First, in Gregory v. Ashcroft,\(^{151}\) the Court held that Congress needs to make a clear statement in federal statutes for those statutes to apply also to states. This O'Connor opinion was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Souter. Second, the moderate conservative Justices have carved out some meaning for the 10th Amendment by banning federal commandeering of state legislative, executive, or administrative agencies.

In New York v. United States,\(^{152}\) Justice O'Connor wrote for a 6-3 Court, including Justices Kennedy and Souter, that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" This doctrine is based upon the “dual theory of sovereignty.” Under that theory, as explained by Justice Kennedy in U.S. Term Limits, Inc v. Thornton,\(^{153}\) the genius of our founding generation was to split sovereignty in the United States system into two parts: states and federal government. As Chief Justice Marshall had noted in McCulloch v. Maryland, the founding generation established dual systems of government – states and federal government – each deriving its authority independently from the consent of the people. The Constitution, after all, was adopted, as stated in the first three words of the Constitution, by “We, the People,” not “We, the States.” Further the Constitution was ratified in special state conventions elected specially by the people for that purpose, not ratified by the existing state legislatures. Thus, in our system, there are two sovereign entities, the federal


government and the states, which are linked by the Constitution’s Supremacy Clause of Article VI, § 2.

Under this dual theory of sovereignty, the federal government can regulate both individuals and states where constitutional power exists under the United States Constitution, and states can regulate individuals and the federal government under their own state constitutions and the United States Constitution consistent with doctrines of intergovernmental immunity. However, the federal government cannot tell the states in any manner how they should regulate their own people because that would be infringing on the states’ reserved sovereign power. The rule in New York was phrased a categorical barrier, not a balancing test depending on the extent of the commandeering or the importance of the federal government’s interest involved. For this reason, despite the strong federal interest involved, it can been argued that congressional statutes, first passed in 1842, requiring states to elect members to Congress in single-member districts represent a commandeering of state authority to determine how to elect members to Congress. Under the text in Art. I, § 4, Congress could “make or alter” state regulations and draw single-member districts itself, but Congress cannot tell the states how to organize their voters into districts. Of course, given political realities, no state would likely wish to depart today from single-member districts, and such congressional statutes may well be viewed as constitutional anyway as a matter of “settled law.”154

Reflecting the liberal predisposition to favor more the federal government, Justice White, dissenting with Justices Blackmun and Stevens, questioned how this case could be distinguished from Garcia. He pointed out that in no previous case had the Court rested its holding on a

distinction between a federal statute's regulation of states and private parties. He continued, “An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that ‘commands’ specific action also applies to private parties.”155 However, this quote misses the point of New York that there is a difference between the federal government regulating states directly, and telling states how they have to regulate their own people.

The theory of New York v. United States that there is a difference between commanding a state to do something, and commanding a state how to regulate its own citizens, was extended in the 5-4 case of Printz v. United States.156 There the Court held that Congress could not require state officials to conduct a background check on persons who had applied to purchase a gun. Relying on the structural arguments of the dual theory of sovereignty, history, and legislative and executive practice, the Court concluded that just as Congress could not commandeer the state legislature in New York, Congress cannot commandeer state executive or administrative officials. The holding has potentially broad applications, as it has been used by state officials following Gonzales v. Raich,157 which upheld federal marijuana laws conflicting with state medical marijuana laws, for the proposition that local law enforcement officers do not have to enforce federal marijuana laws, and perhaps must acquiesce in medical marijuana use authorized under state laws.158

155 Id. at 201-02 (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).


157 545 U.S. 1, 14-33 (2005).

158 See, e.g., State v. Okun, 296 P.3d 998 (Ariz. App. Div. 1, 2013) (Because Arizona law allows Okun to possess medical marijuana, it is not subject to forfeiture under state law, and sheriff must return marijuana to Okun despite federal law banning marijuana possession).
Based upon history and practice, the Court suggested strongly in *dicta* in *Printz* that Congress can commandeer state judges to enforce the United States Constitution. This is based on the view that the framers and ratifiers’ expectations, given no federal court system under the Articles of Confederation, and no requirement in Article III that Congress create lower federal courts, was that state courts would be the primary initial enforcers of federal constitutional and statutory rights.\(^{159}\) It is also supported by the language in the Supremacy Clause, Article VI, cl. 2, that “Judges in every State shall be bound [to the United States Constitution] thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Further, the change in the balance of power between the states and the federal government caused by the outcome of the Civil War, and represented in the Civil War Amendments, would mean that any states’ rights argument that state courts are not bound to follow federal law, which was raised in some Southern state courts before the Civil War, would no longer be valid today, as the Court noted in 1947 in *Testa v. Katt*.\(^{160}\)

The *Printz* majority was made up of the same Justices who formed the majority in *New York v. United States*, minus Justice Souter. Thus, Justice Kennedy was the critical fifth vote for the majority opinion. In his dissent in *Printz*, Justice Souter noted that while he agreed with Justices O’Connor and Kennedy regarding Congress’ lack of an ability to commandeer the state legislative process in *New York*, Justice Souter read *The Federalist Papers*, particularly language in Hamilton’s No. 27, to suggest that just as the framers and ratifiers assumed state judges could be commandeered for federal purposes, they assumed state executive officers could be commandeered. The passage from Hamilton stated that “the Legislatures, Courts, and Magistrates, of the respective members will

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\(^{159}\) *Printz*, 521 U.S. at 903-08.

be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.” The majority in Printz disagreed with this meaning, viewing the passages as only requiring state officials not to obstruct the operation of federal law, and permitting auxiliary aid, if they wished. The majority seems to have the better of this debate reading these passages against the backdrop of the “dual theory of sovereignty” and the lack of federal legislative or executive practice attempting to “commandeer” state executive or legislative officials for most of the Nation’s history.

Reflecting their liberal approach, Justices Stevens, Ginsburg, and Breyer also dissented in Printz. They limited their dissent to questioning the rationale of New York as applied to state judicial or executive officers, thus inducing Justice Souter to join their dissent. In a later case it is likely that Justices Ginsburg and Breyer, perhaps joined by Justices Sotomayor and Kagan, might be willing to question the rationale of the “commandeering” language in New York and Printz, just as Justice Stevens, along with Justices White and Blackmun, had questioned that rationale in New York.

The Court has made it clear that the New York and Printz cases apply only where Congress attempts to “use” or “commandeer” state officials for federal purposes. These cases pose no 10th Amendment limit on Congress’ power to regulate states or individuals directly. Thus, in Reno v. Condon, a federal act barring unconsented disclosure of driver’s license information was applied to both the states and private persons. The Court stated that New York and Printz did not apply

161 521 U.S. at 911-18; id. at 970-76 (Souter, J., dissenting).
162 Id. at 939-40 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
where the federal exercise of Commerce Clause power regulated state activities directly, rather than seeking to control or influence the manner in which the states regulated private parties. In Condon, since the federal statute regulated state workers at the state’s Department of Motor Vehicles, and did not tell those workers how to regulate their own citizens, the federal act was constitutional. If the federal government attempted to tell states how to regulate their own citizens, such as requiring driver’s licenses to contain certain information or be done in a standardized manner, that would likely be viewed as commandeering, although Congress could likely use its conditional spending power under the Spending Clause to induce states to adopt such uniform licenses.

Under Condon, the federal government presumably could tell local law enforcement officials to forward any information they have collected on their own regarding terrorist activity, as that would be regulating the officers directly, while the federal government could not require the local law enforcement officials to aid the federal government in collecting such information. In a case decided before Condon, in City of New York v. United States,164 the Second Circuit Court of Appeals refused to hold unconstitutional two federal statutes that preempted a city executive order prohibiting city officials from voluntarily providing federal authorities with information about the immigration status of aliens unless certain conditions were met. Since the federal statutes did intrude on the city’s management of its local officials regarding how to deal with aliens, they would likely be ruled unconstitutional under Printz. The Second Circuit case, however, upheld the statutes.165 On the other hand, the case involved a facial challenge to the federal statutes, in the absence of any showing of injury by the city of New York, despite the fact that the court “invited

164 179 F.3d 29, 35-37 (2nd Cir. 1999).
165 Id.
the city to inform us” of their “legitimate municipal functions” that might be impaired by the federal statute. The court specifically noted that had such justification been provided, it would have been a different case and “we offer no opinion on that question.”

In each of these cases, states, or cities, were parties to the litigation. In some cases, states, or cities, might choose not to challenge such federal regulation. They may want to conserve resources, they may not find the legislation sufficiently intrusive to warrant a constitutional challenge, or they may elect to enforce such regulations either to avoid antagonizing the federal government or because they approve of the legislation but do not want to face the political ramifications of enacting the statutory scheme themselves. Under any of these scenarios, private parties affected by the federal regulation may still wish to challenge the regulation in court. Cases have not made clear whether private parties have standing to challenge these laws when states decline to do so.

The Court made it clear in Printz that states can choose to aid the federal government in enforcement if states so wish, as was done under an Act of 1882 with respect to immigration matters, or in 1917 with respect to aspects of the draft during World War I. Thus, the better approach would seem to be to deny private parties any right to raise these issues in the absence of any official state complaint. One author has noted, “Courts generally have recognized that a political subdivision of a state has standing to raise a Tenth Amendment claim. At that point, however, some

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166 *Id.* at 37.

167 *Printz*, 521 U.S. at 916-18. *See generally* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 Wm. & Mary L. Rev. 1343, 1355 (2005) (“So long as some state or local official voluntarily attempts to assume federal duties, Congress has not forced state or local action, and no commandeering threat is present.”).
courts have drawn the line, ruling that private plaintiffs not affiliated with the government may not raise such a challenge. Other courts have extended standing to private plaintiffs begrudgingly, or have assumed such standing while questioning whether it constitutionally can exist. A third set has affirmatively recognized that private parties have standing to raise these claims."\textsuperscript{168}

Of course, where the government’s action affects an individual directly, the individual can always raise that complaint. As a unanimous Court held in \textit{Bond v. United States},\textsuperscript{169} litigants can enforce limits on the federal government by bringing actions requiring justification of regulatory authority under other Clauses of the Constitution, as the federal government is one of enumerated powers. Justice Kennedy noted, “Fidelity to principles of federalism is not for the States alone to vindicate.”\textsuperscript{170}

\textbf{VIII. Conclusion}

As the swing vote on the current Court, Justice Kennedy’s views on the doctrine of federalism and separation of powers are often critical. This article has discussed Justice Kennedy’s views on these issues against the backdrop of the Court’s general federalism and separation of powers jurisprudence. In each case, Justice Kennedy has rejected the approach of the conservative and liberal ideological extremes on the Court, and has instead forged a pragmatic, practical approach to separation of powers and federalism doctrines. As the critical fifth vote in a number of these cases, Justice Kennedy has kept the Court in a balanced, centrist approach on these issues.


\textsuperscript{169} 131 S. Ct. 2355, 2359 (2011).

\textsuperscript{170} Id. at 2364.