

YOUNGSTOWN SHEET TO BOUMEDIENE: A STORY OF JUDICIAL ETHOS AND THE (UN)FASTIDIOUS USE OF LANGUAGE

*Laura A. Cisneros**

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I. INTRODUCTION

Sixty years ago, the Supreme Court produced its greatest statement about the separation of powers, *Youngstown Sheet & Tube Co. v. Sawyer*.¹ Since it was issued in 1952, the case has served as the starting point for questions concerning the constitutionality of executive action and, though not initially adopted by a majority, the tripartite framework in Justice Jackson’s concurrence has emerged as the Court’s controlling paradigm for confronting these separation of powers issues.² Sanford Levinson has described Justice

¹ 343 U.S. 579 (1952).

² *Id.*; *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring) (“The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*”); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (“[W]e have in the past found and do today find Justice Jackson’s classification of executive actions into three general categories analytically useful”); *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754, 777 (E.D. Mich. 2006) (“Justice Jackson’s concurring opinion in that case has become historic.”), *rev’d for lack of standing*, 493 F.3d 644 (6th Cir. 2007); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be An Associate Justice of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 97 (2009) (statement of Judge Sonia Sotomayor), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-SOTOMAYOR/pdf/GPO-CHRG-SOTOMAYOR.pdf> (“[T]he best expression of how to address [an issue of executive power] . . . in a particular situation was made by Justice Jackson in his concurrence in the *Youngstown* seizure cases.”); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 323–24 (2006) (statement of Judge Samuel Alito),

Jackson's concurrence in *Youngstown* as his favorite Supreme Court opinion, citing its excellent prose and the unusually satisfying nature of the three-part analytical structure Jackson developed for analyzing questions of presidential power.³

But Jackson's is not the only concurrence from *Youngstown* that warrants close attention. While perhaps less satisfying from a procedural standpoint, Justice Frankfurter's concurrence is no less intellectually intriguing. The two concurrences could not be more different, at least in terms of their writing style. There is a tidiness—an air-tight comprehensiveness—to Jackson's framework. It seems capable of accommodating, and resolving, virtually any challenge to the exercise of presidential power. Frankfurter's, on

available at [http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=GPO-CHRG-ALITO-4-3-134 &packageId=GPO-CHRG-ALITO&bread=true](http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=GPO-CHRG-ALITO-4-3-134&packageId=GPO-CHRG-ALITO&bread=true) (“I think [Jackson's concurring opinion in *Youngstown*] provides a very useful framework . . . [I]t doesn't answer every question that comes up in this area, but it provides a very useful way of looking at them.”); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 152 (2005) (statement of Judge John G. Roberts, Jr.) (“Now, there often arise issues where there's a conflict between the Legislature and the Executive over an exercise of Executive authority, asserted Executive authority. The framework for analyzing that is in the *Youngstown Sheet and Tube* case, the famous case coming out of President Truman's seizure of the steel mills.”); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006) (noting that “Jackson's concurrence has become popular because it provides a roadmap for lawmakers to follow.”); Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA Is Constitutional and the President's Terrorist Surveillance Program Is Illegal*, 16 WM. & MARY BILL RTS. J. 537, 582 (2007) (“The separate concurring opinion of Justice Robert H. Jackson in *Youngstown* has come to be viewed as the leading statement of the theory of separation of powers.”); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 564 (1996) (stating that Justice Jackson's concurring opinion “overshadowed Justice Black's more circumscribed opinion for the Court”); Jeffrey Rudd, *Restructuring America's Government to Create Sustainable Development*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 371, 398, 400 (2006) (arguing that “Justice Jackson's concurrence in *Youngstown* presents a classic analysis of the constitutional limits of presidential powers and his opinion's significance extends well beyond national security issues,” and characterizing it as “[o]ne of Jackson's great contributions to American government”); *see, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 494 (2008) (“Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”); *see also* Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of “Enemy Combatants,”* 68 ALB. L. REV. 1127, 1129 (2005) (“The *Youngstown* concurrence . . . offers a structural mechanism for identifying the existence of enumerated power and ensuring that the constitutional separation of powers is preserved.”). *But see* Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown's Shadow*, 53 ST. LOUIS U. L.J. 29, 34 (2008) (“What is ironic about Jackson's opinion . . . is that it solves practically nothing. Even under Jackson's trifurcation, the President can lose in category one, he can win in category three, and one is left to wonder just what category two means by ‘contemporary imponderables.’”).

³ Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, 187, 202 (Peter Brooks & Paul Gerwitz eds., 1996). Professor Levinson opines that Jackson's concurrence in *Youngstown* is “the most intellectually satisfying . . . opinion in our two-hundred year constitutional history.” *Id.*

the other hand, is dense and tightly packed with obscure allusions and insinuations. Yet, both yield profound ideas about the separation of powers and the Constitution generally.

Though stylistically different, the two concurrences share a similar ethos about separation of powers: an ethos of judicial humility. And by that term, I do not mean simple judicial restraint or judicial deference, although these two concepts certainly are consistent with judicial humility and are not likely to be exercised by judges without it. Instead, I am talking about an attitude, a philosophical position, in which the judge or justice views the political branches as partners with the Court for purposes of interpreting the Constitution. When a justice assumes this philosophical stance, he or she is highly wary of encroaching into the province of the executive or legislative branch, for fear of eliminating the space they require to run the country with the kind of flexibility the Constitution otherwise affords. Only in the most extreme circumstances, when duty to the Constitution itself outweighs the desire to leave the political branches to their own devices, does the humble justice step in and rule on the actions of Congress or the President. In *Youngstown*, both Jackson and Frankfurter struggled to justify the Court's intrusion into the political relationship between Congress and the President. Jackson described one troublesome area within that relationship as the "zone of twilight."⁴ Frankfurter, less the poet and more the political philosopher, referred to it as a place infused with the "delicate problems of power."⁵ As a law student, these phrases captivated me. They grappled with the real-world implications of the idea of separation of powers and placed the Court in a necessary, albeit reticent, posture. Jackson and Frankfurter's words seemed to deftly straddle the balance between the necessity and danger of judicial intervention.

And yet, when one compares these two concurrences to more recent separation of powers opinions, it becomes clear that the Court has shifted from an ethos of humility to an ethos of interpretive arrogance, the hallmarks of which are judicial centrism, judicial primacy on matters of Constitutional interpretation, and a general attitude that every separation of powers question can be resolved through the application of legal rules. My goal in this Article is not to provide a comprehensive survey of the Court's separation of powers cases from 1952 to the present. Rather, I want to present a modest-sized account of this shift from humility to arrogance and to do so not by the direct method of scrupulous narration, but through a combination of stealth and selectivity, with the idea that less could be more. With this model in mind, I have focused on the language of a few representative opinions: Jackson and Frankfurter's concurrences in *Youngstown*, Chief Justice Rehnquist's majority

⁴ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁵ *Id.* at 595 (Frankfurter, J., concurring).

opinion in *Dames & Moore v. Regan*,⁶ Chief Justice Roberts's majority opinion in *Medellín v. Texas*,⁷ and Justice Kennedy's majority opinion in *Boumediene v. Bush*.⁸ It is my hope that plucking these few specimens from the great ocean of material to be examined with careful curiosity will yield an interesting analysis of how the Court made the transformation from reticence to insistence on judicial supremacy. My narrative, while willfully episodic in character—again, no comprehensive coverage of all events is claimed—follows a chronological line.

Part II provides a textual analysis of Jackson's concurrence in *Youngstown*, with emphasis on his tripartite framework for evaluating presidential action. I am especially interested in Jackson's Category 2, the so-called "zone of twilight." I contend that Jackson, in identifying the zone of twilight as an area where presidential power is exercised in the absence of guiding legal referents, was actually describing a political reality, not establishing a normative legal category. As a result, Jackson's Category 2, properly understood, contains cases that are nonjusticiable (at least until an act of Congress provides the necessary legal parameters and removes such cases to either Category 1 or 3). By including an area of nonjusticiability within his taxonomical system, Jackson was following, and giving expression to, an ethos of humility.

Part III provides a similar textual analysis of Frankfurter's concurrence in *Youngstown*, with emphasis on his desire to avoid the "explosive potentialities" of constitutional adjudication. Here, I argue that Frankfurter's concurrence has a dual dynamic. On the one hand his concurrence represents the ethos of humility and eloquently espouses the value of judicial restraint as he warns of the danger of aggressive judicial intervention. On the other hand, his insistence on the need to respect the historical gloss on executive power as manifested through "systematic, unbroken, executive practice" has provided a platform for subsequent Courts to engage in the very intervention he warned against.⁹

Part IV reviews two post-*Youngstown* cases—*Dames & Moore v. Regan*¹⁰ and *Medellín v. Texas*¹¹—and shows how the Court capitalized on Frankfurter's historical gloss language and married it with Jackson's taxonomical structure to usher in a new era of judicial dominance in the separation of powers arena. This linguistic turn transformed Jackson's zone of twilight from an area of nonjusticiability to one that allowed for more judicial

⁶ 453 U.S. 654, 659–90 (1981).

⁷ 552 U.S. 491, 497–532 (2008).

⁸ 553 U.S. 723, 732–98 (2008).

⁹ *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

¹⁰ 453 U.S. 654 (1981).

¹¹ 552 U.S. 491 (2008).

flexibility. The Court blurred the lines that Jackson created by infusing his tripartite framework with Frankfurter's interpretive approach. The Court's adoption of Frankfurter's approach, however, was not wholesale. Rather, the Court appropriated Frankfurter's "gloss" theory while discarding Frankfurter's institutional statements about the Court's limited role in separation of powers cases. In so doing, the Court cast off the ethos of humility individually contained in Jackson and Frankfurter's concurrences and replaced that ethos with one of interpretive arrogance.

Finally, Part V examines this new ethos as expressed in the majority opinion in *Boumediene v. Bush*,¹² one of the so-called "War on Terror" cases. In contrast to Jackson and Frankfurter's concurrences in *Youngstown*, Justice Kennedy's majority opinion in *Boumediene* assumes an authoritative posture. The underlying ethos is one of judicial dominance on matters of constitutional interpretation. The language, which is at times scolding and at others merely business-like in its diction, does not confine itself within a frame of restraint or reservation. Instead, it presumes that the circumstances created by the War on Terror require the judiciary to enter the debate over the war powers of the political branches.

This shift in interpretive ethos and corresponding change in the Court's posture toward the political branches, at least in separation of powers cases, has left few questions—if any—beyond the reach of judicial review. Moreover, this assertive language frame entails the temptation for the Court to base its separation of powers decisions on constitutional grounds—narrowly confined or not. For some, this attitudinal shift is a comforting one, as it ensures that political action complies with a set of legal rules. In a word, the Court's approach keeps the President and Congress "honest." On the other hand, however, we may have lost something valuable in the exchange. The institutional space afforded by judicial humility cannot be maintained when the Court intercedes in every separation of powers dispute and makes legal pronouncements on each alleged violation of the Constitution. When the Court wields exclusive dominance over how the Constitution is to be interpreted and, by extension, implemented, the President and Congress are given less room to maneuver, and meaningful constitutional dialogue among the branches diminishes. As a result, the Constitution becomes more rigid and less useful than was originally intended. Worse, the executive and legislative branches lose their institutional parity vis-à-vis the judiciary.

¹² 553 U.S. 723, 732–98 (2008).

II. A TEXTUAL ANALYSIS OF JACKSON'S TRIPARTITE FRAMEWORK IN *YOUNGSTOWN SHEET*: LOCATING THE ETHOS OF HUMILITY IN THE ZONE OF TWILIGHT

The story of *Youngstown* has become so widely known that a brief account of the case here will suffice.¹³ In April of 1952, during the Korean War, President Truman issued an executive order directing Secretary of Commerce, Charles Sawyer, to seize and operate most of the nation's steel mills.¹⁴ This was done to avert the expected effects of a strike by the United Steelworkers of America.¹⁵ Within an hour of the President's address, counsel for two of the main steel companies, Youngstown Sheet & Tube and Republic Steel Corporation initiated legal proceedings.¹⁶ In a little over a month, the case had worked its way through the lower courts and came up for argument before the Supreme Court of the United States.¹⁷ In a 6–3 decision, the Court invalidated the executive order. Writing for the majority, Justice Black said that “the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”¹⁸ The Court found that Truman had not acted pursuant to congressional authority or any express constitutional language granting the power.¹⁹ Additionally, the Court held that the President could not rely on his constitutional powers because the taking of private property was a legislative act reserved to Congress.²⁰

Justice Black's majority opinion, while lacking any artistic pretense, ably disposed of the Government's case. Nevertheless, the case elicited seven opinions.²¹ Along with his brethren, Justice Jackson was moved to speak and in

¹³ The definitive treatment of *Youngstown* remains MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER*, at xxi–xxiii (1994); see also ALAN F. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1995). For a collection of more recent contemplations on the significance of *Youngstown*, see generally Symposium, *Youngstown at Fifty*, 19 CONST. COMMENT.1 (2002).

¹⁴ Exec. Order No. 10,340, 3 C.F.R. 861(1952).

¹⁵ See MARCUS, *supra* note 13, at 80.

¹⁶ *Id.* at 102–03.

¹⁷ For a comprehensive discussion of the lower court proceedings, see Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES*, 233, 244–52 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹⁸ *Youngstown*, 343 U.S. at 585.

¹⁹ *Id.* at 585–87.

²⁰ *Id.* at 587–89.

²¹ See Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 401–20 (2002) (listing and analyzing all seven opinions: Justice Black's majority opinion for the Court, joined by Justices Frankfurter, Jackson, Douglas, and Burton each of whom wrote separate concurrences; Justice Clark's concurrence (Clark joined in the judgment, but not the opinion of the Court); and Justice Vinson's dissent, joined by Justices Reed and Minton).

so doing introduced a pragmatic analytical approach that used a taxonomic structure to decide difficult conflicts among the branches of government.

A. *Jackson on the Limits of Legal Rules When Assessing Presidential Action*

Before Jackson could begin building his tripartite analytical system, however, he first had to demonstrate that he understood the high level of deference owed by the judiciary to the executive branch. He did this by describing how the exigencies of the modern world often require the President to maneuver around political obstacles without a great deal of legal guidance.²² The difficulty for a Supreme Court Justice, according to Jackson, is identifying legal tools sufficient to rule on a Presidential action that was taken to meet a critical and urgent political problem.²³ Indeed, much of the power of Jackson's concurrence derives from its ability to weave together legal and political discourse. The dual discourse tempers judicial desire to interfere with political experience. Jackson displays this "alternating current" in his introductory remarks about the interrelated but different roles played by the President's legal advisor on one hand, and a federal judge on the other, each of whom must grapple with questions concerning the nature and scope of presidential power, though not necessarily in the same way.²⁴

For example, the first line of the concurrence makes it clear that unchecked executive power is as dangerous as it is useful, often putting the President's legal adviser in a conflicted position,²⁵ a lesson impressed on Jackson while serving as Attorney General under Franklin Roosevelt.²⁶ That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal advisor to a President in time of transition and public anxiety.²⁷

The candor of this statement is impressive as it acknowledges the seductiveness and opportunities for abuse that attend undelineated (and therefore unconstrained) executive authority. By focusing on the pressures felt

²² *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jackson served as Attorney General to Franklin Delano Roosevelt from 1940 to 1941, which corresponds with the months leading up to America's entry into WWII—indisputably a situation that demands consideration of the extent of presidential powers during a "time of transition and public anxiety." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). In addition to Jackson, two other justices had served under Roosevelt: Stanley Reed (dissenting in *Youngstown*) served as Roosevelt's Solicitor General, and Tom Clark, like Jackson, served as Roosevelt's Attorney General.

²⁷ *Id.*

by those in the advisor's position, Jackson provides a much-needed political context for analyzing executive branch actions. He also establishes his bona fides to speak on this topic, and even goes so far as to admit that his past experience as Attorney General has caused him to prefer practical over legal solutions when addressing difficult "separation of powers" problems: "While an interval of detached reflection may temper teachings of that experience [as President Roosevelt's lawyer], they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."²⁸ For Jackson, then, there is little question that the political institutions possess better, more flexible tools than does the judiciary to address the proper division of power between the President and Congress. Perhaps more than any other language in the concurrence, this passage explains Jackson's respectful stance vis-à-vis the executive branch: he understood that presidents need room to maneuver to be effective.

Jackson begins his second paragraph by bemoaning the fact that any student of the law—whether a judge, a government solicitor, or a legal scholar—has few tools with which to address the practical problem of presidential power.

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.²⁹

In this passage, Jackson assumes an almost anti-judicial posture. He not only laments the paucity of legal tools, he expresses frustration with the legal community writ large and its inability to provide clear guidance. Jackson points out that each level of the legal community is ill-equipped: the Founders, the judge, the lawyer (as executive adviser), and legal academics. The underlying message is that the Court must be careful when ruling on the legal propriety of presidential action.

²⁸ *Id.*

²⁹ *Id.* at 634–35.

Jackson's opening paragraphs function as a kind of prelude to his efforts to categorize presidential action. This prelude is both appealing and discomfiting because it conveys a complicated truth: that the political *does* intrude on the legal and, in some cases, overwhelms it. For the judiciary, this complication creates a dilemma: whether to be faithful to its role and issue rulings based solely on legal standards derived from formal authority (i.e., the Constitution or congressional statute), or to be responsive to the exigencies of the situation and make an ad hoc ruling that might avert an immediate crisis but may erode the integrity of the Constitution in the long run.

Jackson's three-part taxonomy for cataloguing the situations where the President's actions may be challenged—which Jackson himself describes as a “somewhat over-simplified grouping”³⁰—provides a kind of intellectual relief from the complications identified in the prelude, implying they will be eliminated by the mere act of categorization. Jackson's taxonomy seduces the reader into a false state of judicial ease, where all disputes can be solved by the application of legal rules. Indeed, to some readers, the opinion's construction appears to provide a clean, analytical solution to the complicated misery of judicially delineating the nature and scope of presidential power: Just place the President's action into one of the three boxes and wait for the taxonomy to yield the proper legal outcome. The temptation to believe in this simple “input-output” formula stems from the strong desire for a solution. However, to give into this temptation is to overlook the political versus legal elements of the solution and to misread the subtleties of Jackson's words.

B. *Reconciling the Dual Narrative: Jackson's Tripartite Framework*

When Jackson moves to describe his tripartite framework for analyzing presidential power, he continues to alternate between legal and political discourse, with categories one and three containing legal referents, and category two—the zone of twilight—containing none. Instead, the zone of twilight is filled with political/practical referents. The zone of twilight, in fact, does not really operate as a legal category at all. Instead, it describes a political situation that has not sufficiently developed into a legal dispute. Thus, the Court has little or no ability to resolve the issue at the time it is presented.

1. Institutional Competencies

The structure and text of Jackson's concurrence emphasizes the need for a definitive process to address those rare instances when the exercise of presidential authority has the potential to result in “enduring consequences upon the balanced power structure of our Republic.”³¹ In its first three

³⁰ *Id.* at 635.

³¹ *Id.* at 634.

paragraphs, the opinion has already referred to the inadequacy of “authority applicable to *concrete* problems of executive power as they *actually* present themselves”,³² the “*actual* art of governing”,³³ and “*practical* situations in which a President may doubt, or others may challenge, his powers.”³⁴ Jackson’s desire to find a concrete solution to a concrete problem leads him to develop a three-part taxonomical framework for analyzing Truman’s seizure of the steel mills.

The framework itself builds on the tensions between the judicial and political branches expressed in the opening paragraphs of Jackson’s concurrence. Constrained by the “conventional materials of judicial decision,”³⁵ federal courts are passive, theoretical, isolated, and overly text-bound. These institutional limitations impede the judiciary’s ability to construct resolutions that can be implemented practicably. By contrast, the political branches are active, pragmatic, and contextual. Institutionally, they can meet the need for a concrete solution because they can consider circumstance:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.³⁶

The dualisms articulated in this last paragraph—“separateness” and “interdependence” and “autonomy” and “reciprocity”—reflect a judicial stance that is not so much ambiguous or equivocal but cognizant of the actual mechanics of constitutional government. Here, Jackson is giving expression to a judicial ethos that does not assign primacy to the Court on matters of constitutional interpretation. Instead, it is an ethos that recognizes the strengths and weaknesses of each of the three branches when facing constitutional and political challenges. Having described the relative institutional competencies of the judicial and political branches, the opinion next explains the three categories within which to analyze presidential power.

³² *Id.* (emphasis added).

³³ *Id.* at 635 (emphasis added).

³⁴ *Id.* (emphasis added).

³⁵ *Id.* at 634.

³⁶ *Id.*

2. The Legal Discourse of Categories One and Three

The first category contains presidential actions in accord with “an express or implied authorization of Congress.”³⁷ Here, “[the President’s] authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”³⁸ The third category contains presidential actions that are “incompatible with the expressed or implied will of Congress.”³⁹ In these cases, “[the President’s] power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁴⁰ Between these two categories lies what Justice Jackson called a “zone of twilight.”⁴¹ Jackson filled this zone with situations “[in which] the President acts in absence of either a congressional grant or denial of authority”⁴² and those “in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁴³

The distinctions between categories one and three versus category two begin with the definition of the practical situation. Category one considers those situations “[w]hen the President acts pursuant to an express or implied authorization of Congress.”⁴⁴ Category three is similarly based. It covers those situations “[w]hen the President takes measures incompatible with the expressed or implied will of Congress.”⁴⁵ Both of these categories ground the practical situation in what can be understood as congressional intent. Whether that intent is express or implied is immaterial so long as there exists some type of factual element to “prove” that the perceived reality (here, the grant or denial of presidential power) was already established prior to the President taking the challenged action. In this sense, one can point to a justifying past-tense event that is distinctly legal (i.e., statutory) in nature. Thus, in either circumstance, the judiciary is able to identify something *legally* tangible to rationalize its evaluation of presidential power. Congressional intent, however, can be a slippery thing and often manifests itself in silence.

Category two, by contrast, uses not a concrete legislative event but a poetic metaphor—the zone of twilight—to carry the weight of explanation.⁴⁶

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 637.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 635.

⁴⁵ *Id.* at 637.

⁴⁶ *Id.*

This metaphor, however, does not clarify the circumstances of the situation. Rather, it designates even more subtle properties than the situation it attempts to define. While there is value in relying on metaphor to introduce a new idea or deepen understanding, its properties can only approximate the concept. As a result, it complicates the judiciary's task of identifying tangible sources of authority and evaluating those sources as they relate to questions of presidential power. Accordingly, the use of metaphor to describe the practical situation where the boundaries of presidential power are unknown introduces problems for judicial process.⁴⁷ However, this is Jackson's point. The zone of twilight is an area where judicial process is not only ineffective; it is not required or even desirable.

Nevertheless, Jackson's taxonomical structure invites the judiciary to evaluate each of the three categories on the same terms. However, doing so obscures the differences between categories one and three in relation to category two. The words of categories one and three are so calmly legal that they encourage one to treat the whole analytical framework as one that evaluates presidential power with a legal vocabulary. But this is false. The vocabulary of category two is decidedly non-legal and instead describes a political reality devoid of legal rules and guidance. In this way, category two identifies an area beyond legitimate judicial decision-making (i.e., an area of non-justiciability).

Ultimately, the examination of process overlaps with the examination of legal consequences. With that in mind, let us return to the language Jackson uses to describe his first and third categories. According to the taxonomy, category one contains, "all that [the President] possesses in his own right plus all that Congress can delegate."⁴⁸ Category three contains, "[the President's] own constitutional powers minus any constitutional powers of Congress over the matter."⁴⁹ In these categories, presidential power is either buttressed or undermined by delegations of authority set forth in the Constitution and applicable federal statutes. For this reason, the process of judicial analysis is

⁴⁷ The federal court's use of the phrase reveals a problem with the act of defining by metaphor, this one in particular. A search of Westlaw [ALLFEDS zone of twilight before 1953] revealed that no federal case used the phrase zone of twilight before Jackson's opinion in *Youngstown*. However, before 1953 there were approximately 118 federal cases that used the phrase "twilight zone." Although these cases tended to use the phrase descriptively as well, what is interesting to note is that there seemed to be a corresponding understanding of the inability to locate legal standards within the described twilight zone. *See, e.g.,* *Walling v. Sanders*, 136 F.2d 78, 80 (6th Cir. 1943) ("[W]e find ourselves in the twilight zone, and precise formula being unavailable, common sense and reason must alone determine controverted issues."); *Cincinnati, N.O. & T.P. Ry. Co. v. Thompson*, 236 F. 1, 16 (6th Cir. 1916) (Denison, J., concurring) ("[I]ndeed there may be cases seemingly within the twilight zone, where no satisfactory and intelligible rule of distinction can be stated . . .").

⁴⁸ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

⁴⁹ *Id.* at 637.

guided by the text of the Constitution and/or the text of congressional statutes. Thus, every question of interpretation under these two categories begins with the legal language.⁵⁰

Note that these categories contemplate circumstances of implied as well as express legal sanction, because congressional intent, if indeed it exists with respect to the issue at hand, can usually be determined through standard judicial techniques. The Court has plenty of well-established and accepted methods of judicial interpretation at its disposal. Legal scholarship has produced extensive literature formulating and examining principles for interpreting statutes when the language of the text has been exhausted.⁵¹ This work proceeds on the assumption that interpretive projects are viable despite the occasional confounding effects of political pressure and the indeterminacy of language. Here, I am less concerned with the manner in which these interpretive techniques are employed than with their generally accepted applications.⁵²

In general, the literature recommends an interpretive scheme consisting roughly of the following components: consideration of the overall structure and purpose of the statute as written, consideration of the overall structure and purpose of other related statutes where relevant, consultation of legislative history, evaluation of the provision's alignment with representative democracy, and consideration of normative principles (varying among the authors) to inform application or resolution of remaining ambiguity. Again, differences exist regarding the extent to which any one component is consulted. Even so, all work in this field contemplates the occasional need to go beyond the language of a statute to determine a judicially defensible purpose, which can then be rationally attributed to the legislative body that passed the law in question. Thus, regardless of whether Congress's intent is express or implied, the legal consequences that flow from the analytical processes employed in Jackson's categories one and three—i.e., the judicial determination that the

⁵⁰ See, e.g., *United States v. Aguilar*, 21 F.3d 1475, 1480 (9th Cir. 1994) (stating “The primary indication of [Congress’s] intent is the language of the statute.”), *aff’d in part, rev’d in part on other grounds*, 515 U.S. 593 (1995).

⁵¹ For literature on interpretation, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

⁵² I make no claim as to the legitimacy or primacy of one interpretive strategy over another. For literature representing an original intentionalists’ perspective, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton University Press, 1997); RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1 (1985). For literature explaining statutory interpretation as dynamic and evolutive, see, for example, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179 (1982).

President's power "is at its maximum"⁵³ or "at its lowest ebb"⁵⁴—are rooted in conventionally-accepted judicial practices and constraints.

3. The Political Discourse of Category Two

Unlike categories one and three, category two uses political, not legal, language to construct its corresponding form of process, and it operates on the assumption that there is no congressional intent to be teased out of committee hearing transcripts and other sources of legislative discourse. To understand the political character of category two, one must first consider the parameters of containment central to the category's evaluative process. These parameters emanate from congressional silence. And for Jackson, there are different degrees of silence, each occupying a different position on a resistance/non-resistance continuum:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, *congressional inertia, indifference or quiescence* may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.⁵⁵

The three words that Jackson uses to describe congressional silence are interesting choices, but none of them signals consent or a decision to yield to the executive branch, a point that will become important later in my analysis of the Court's use of the congressional acquiescence doctrine in post-*Youngstown* decisions.⁵⁶

The first word, "inertia" (resistance or disinclination to motion, action, or change),⁵⁷ indicates the strongest "conflict" between presidential action and congressional silence. Resistance or disinclination suggests that there is a reason for not wanting to move, act, or change. Thus, inertia may signify Congress's deliberate decision *not* to act. It does not follow, however, that inertia, a decision not to act for some reason, necessarily cedes power to the President. The second word, "indifference" (having no particular interest or concern; having no marked feeling for or against),⁵⁸ seems to suggest a middle

⁵³ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

⁵⁴ *Id.* at 637.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *See infra* Part IV.A.

⁵⁷ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 898 (Houghton Mifflin Harcourt 5th ed. 2011).

⁵⁸ *Id.* at 894.

ground where Congress may have considered the issue, but is not persuaded to act either positively or negatively. Again, there is nothing inherent in the word indifference to suggest a surrender of power. And finally, “quiescence” (being quiet still or at rest; inactive)⁵⁹ ostensibly signifies the least amount of “conflict” between presidential action and congressional silence. Nevertheless, being quiet, still, at rest, or inactive does not by itself suggest that Congress has deliberated on the matter in question or manifested an intent to yield to presidential prerogatives. It simply signifies a lack of movement. Therefore, while legislative inaction—described by Jackson as inertia,⁶⁰ indifference,⁶¹ and/or quiescence⁶²—might lead one to presume that Congress either possesses no power or has relinquished it to the executive, such a presumption would be incorrect.

The difficulty inherent in category two situations is that they may involve *latent* congressional power that has not yet been activated in a way to direct the President’s actions or guide the Court’s efforts to judge those actions. It is this latency of congressional power—the fact that Congress may *in the future* act on the question at hand—that distinguishes zone of twilight non-justiciability from classical “political question” non-justiciability. In the latter case, the issue under review is intrinsically and exclusively political (i.e., textually committed by the Constitution to the political branches) and cannot through a simple act of Congress be changed into a legal one. For example, whether the President should name the former governor of Missouri as ambassador to Spain is a matter that will never be subject to judicial inquiry.⁶³ With respect to zone of twilight cases, however, the issue may be inherently political but more often is one that could be addressed by statute if Congress had chosen to pass one applicable to the situation. The problem, of course, is that at the time the matter is brought to court, Congress has neither acted nor indicated it has ceded the issue to the executive branch, leaving the Court, at least temporarily, with no means to fashion a ruling.

Once Jackson has identified the zone of twilight, he next places the President and Congress within it, and then marks out narrow (inertia), middle (indifference), and broad (quiescence) parameters of containment.⁶⁴ What remains is to finalize the process by which the Court can determine how to distribute the authority between the President and Congress.” In this area, any actual test of power is likely to depend on the imperatives of events and

⁵⁹ *Id.* at 1865.

⁶⁰ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁶¹ *Id.*

⁶² *Id.*

⁶³ U.S. CONST. art. II, §2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .”).

⁶⁴ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

contemporary imponderables rather than on abstract theories of law.⁶⁵ In other words, the interpretive process in category two is governed by a clear-eyed practical assessment of factual conditions—an assessment that cannot be predetermined or constrained by legal rules. The source and allocation of power is determined by “imperatives of events and contemporary imponderables,” not legal doctrine.⁶⁶ Here, Jackson is saying that the grant/distribution of authority primarily depends on the political, historical, and social circumstances that gave rise to the executive action being challenged. And in these situations, the Court must be mindful of its practical, political, and institutional limitations. It must yield to the political branches or risk its legitimacy within the institutional structure established by the Constitution.

C. *The Effect of the Categories’ Legal and Political Discourse on Judicial Process*

Conventional scholarship contends that Jackson’s judicial philosophy was markedly process-oriented, and there is little in Jackson’s opinions—in *Youngstown* and elsewhere—to dispute this.⁶⁷ However, if we accept that Jackson was primarily a process-driven jurist, it is unlikely that he would have considered claims falling within the zone of twilight justiciable, if only because, in the absence of congressional direction, the only decision-making process available to the Court is one that is entirely fact-determinant, ad hoc, admits of no standardized rules, and produces inconsistent and/or unpredictable results.

When Jackson writes that, for disputes falling within category two, the “actual test of power is likely to depend on the imperatives of events and contemporary imponderables,”⁶⁸ he is not describing a legal consequence at all. Unlike category one and three, where the Court employs the tools of statutory interpretation to discern implied congressional intent,⁶⁹ category two provides no such procedural guides or safeguards. If we grant Jackson’s penchant for legal process, it follows that a category, which provides no discernible means of legal process to aid judicial interpretation describes an area of nonjusticiability for a certain (albeit small) number of presidential actions.⁷⁰

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See, e.g., Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson’s Wartime Security Jurisprudence and the Detention of “Enemy Combatants,”* 68 ALA. L. REV. 1127, 1135 (2005) (“[F]or Jackson, the bulwark of liberty in the Constitution was process.”).

⁶⁸ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁶⁹ *Id.* at 635–38.

⁷⁰ Edward J. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 282 (2010). In this holistic treatment of *Youngstown*, Professor Swaine notes that Jackson’s description of the zone of twilight “moves from unclear to tentative in sketching the appropriate

This then begs the question: Does Jackson's zone of twilight serve any judicial purpose at all? I think the answer is yes. The usefulness of the zone of twilight derives from its ability to identify and describe a political fact—i.e., that in rare situations, the President acts without benefit of congressional legislation (either authorizing or denying the action) or a clear grant of power from the Constitution. In such circumstances, the President's action compels a response to the question: Does the President have authority to act? Constitutional or congressional silence removes the legal rules the Court requires to provide an answer anchored in law rather than politics. In other words, the constitutional text or a congressional statute is a condition precedent to judicial review of the scope of the President's legal authority to take the action in question. Otherwise, the judiciary acts without resort to legal standards; it would be forced to make a politically directed, legally untethered decision. The value of the zone of twilight, then, lies in its capacity to (1) remind the President and Congress that in those rare but significant circumstances of constitutional or statutory silence, they must define their inter-relationship without aid of judicial guidance, and (2) remind the Court that some questions of presidential authority fall outside its jurisdiction, at least until Congress acts and fills the legal void with an applicable statute.

To summarize, then, Jackson's taxonomy, does not actually establish three neat legal boxes into which one can place and evaluate presidential action. Instead, it creates two that are informed by legal rules and one that is not. Whereas categories one and three describe presidential action in relation to constitutional and congressional grants or denials of power, category two describes a zone of twilight where the President acts amidst vague constitutional guidance and congressional silence. By identifying the zone of twilight as an area where presidential power is exercised in the absence of guiding legal referents, Jackson was actually describing a political reality, not establishing a normative legal category.

Simply put, the zone of twilight, as a legal category, is a rhetorical myth. As originally constructed, it contains no discrete analytical tools that allow the Court to illuminate the division of power between the President and Congress in situations where there may be an overlapping, vague, or undefined distribution of authority.⁷¹ Thus, the zone of twilight, when properly understood as a political depiction, is an area of nonjusticiability.

standard to be applied in Category Two" thereby leaving open the question "[w]hether this [explanation] provides an approach to constitutional interpretation in this class of cases or a theory of abstention." I contend the latter.

⁷¹ Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 109 (2002) ("The language in Justice Jackson's . . . opinion . . . provides no specific guidance as to how courts should decide any concrete dispute.").

The Court, however, has not been content to leave it as such. Instead, in two prominent post-*Youngstown* cases—*Dames & Moore v. Regan*⁷² and *Medellín v. Texas*⁷³—the Court transformed Jackson’s zone of twilight into an area of justiciability by infusing it with legal rules and standards in a way that mischaracterizes the text of Jackson’s opinion.⁷⁴ In doing so, the Court in these later opinions abandoned Jackson’s ethos of judicial humility in favor of one that prizes adjudication in all circumstances, even where legal guideposts are weak, tenuous, or absent altogether. However, before discussing these post-*Youngstown* decisions and examining whether they evince a drift away from Jackson’s taxonomy, I want to return to *Youngstown* itself and unpack the concurring opinion drafted by Justice Frankfurter as it too reflects an ethos of judicial humility when confronted with separation of powers disputes. Frankfurter’s approach differs from Jackson’s in that he focuses more on institutional respect than on the practical needs of governance. Nevertheless, he and Jackson adopt a similar posture vis-à-vis the political branches. Neither justice insists on judicial supremacy in the context of constitutional interpretation. Yet, as I will show, later Courts have misappropriated Frankfurter’s approach, just as they did Jackson’s, to locate judicial authority where, arguably, it does not exist.

III. A TEXTUAL ANALYSIS OF FRANKFURTER’S CONCURRING OPINION IN *YOUNGSTOWN SHEET*

Two overriding factors help to frame any analytical examination of Justice Felix Frankfurter’s writing style: his resolute, near-unyielding adherence to the philosophy of judicial restraint and his intense need to educate. This examination of Frankfurter’s concurrence in *Youngstown* is not a discussion of Frankfurter’s analysis of the Labor Management Relations Act of 1947 or any other applicable statute. Nor is it an assessment of past presidential seizures of industrial property. Instead, what this section will analyze is Frankfurter’s opinion as a representation of an ethos of humility. In particular, this section will assess the structure and rhetorical strategies contained in Frankfurter’s concurrence, which expresses this ethos, paying particular

⁷² 453 U.S. 654 (1981).

⁷³ 552 U.S. 491 (2008).

⁷⁴ It is perhaps not surprising that these two cases attempt to explicate the nuances of Jackson’s tripartite framework in *Youngstown* given the connection among the writing justices: The author of the majority opinion in *Dames & Moore*, Justice Rehnquist, began working as a law clerk for Justice Jackson during the Court’s 1952–1953 term. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 169–71 (2002) (discussing his familiarity with the *Youngstown* case). Similarly, the author of *Medellín*, Chief Justice Roberts, clerked for Justice Rehnquist during the Court’s 1980 term, the same term *Dames & Moore* was decided. See *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 6, 2012).

attention to the arrangement of Frankfurter's opinion, his writing style, and his choice of the intellectual elite as his main rhetorical audience.

A. *The Structure of Frankfurter's Concurrence: An Expression of Judicial Restraint*

The very organization of Frankfurter's concurrence reflects his commitment to judicial restraint—a philosophy grounded in an ethos of judicial humility. *Youngstown* dealt most basically with the question of presidential power.⁷⁵ Yet, in a twenty-one page concurrence, Frankfurter does not address the question of whether the President's own constitutional powers authorize him to seize the steel mills until the seventeenth page.⁷⁶ Instead, he begins his opinion with a discussion of the Founders' intent to devise a government based on the dual idea of separation of powers and checks and balances.⁷⁷ After framing his opinion with a discussion of the overall scheme of our constitutional government, he next focuses on the judicial role within that scheme.⁷⁸ Frankfurter spends the next seven paragraphs arguing for “[r]igorous adherence to the narrow scope of the judicial function”⁷⁹ and contending that the judicial task is “confined [by the Constitution] . . . within the narrow domain of appropriate adjudication”⁸⁰ and limited by “a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”⁸¹

After his discussion of the proper judicial role, Frankfurter proceeds to a discussion of Congress and a twelve-paragraph exposition of the relevant legislative history, which he argues demonstrates unequivocally Congress's intention to withhold seizure authority from the President in this matter.⁸² It is only after a thorough discussion of both the judiciary and the legislature that Frankfurter considers the President's seizure action, finally evaluating Truman's Executive Order⁸³ offering an analytical framework for inherent presidential power based on the legislative/executive relationship⁸⁴ and

⁷⁵ 343 U.S. 579 (1952).

⁷⁶ *Id.* at 610 (Frankfurter, J., concurring).

⁷⁷ *Id.* at 593.

⁷⁸ *Id.* at 594–97.

⁷⁹ *Id.* at 594.

⁸⁰ *Id.* at 595.

⁸¹ *Id.* (citations omitted).

⁸² *Id.* at 597–610.

⁸³ *Id.* at 610–13.

⁸⁴ *Id.* at 610–11 (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure

evaluating Truman's Executive Order under that analytical framework⁸⁵ Frankfurter closes his concurrence in bookend fashion, with a return to the Founders:

When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay, on behalf of our Court, wrote thus to the Father of this Country:

"We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States."

In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.⁸⁶

Frankfurter's inclusion of this anecdote from the Founding generation accomplishes three things. First, it locates the basis for Frankfurter's judgment outside of himself as he is simply following the structure and intentions laid out by the Founding generation. Second, reliance on this historical evidence adds credibility to Frankfurter's advocacy of the philosophy of judicial restraint because it demonstrates fidelity to the Founders. Finally, the anecdote provides Frankfurter with a rhetorical opportunity not only to identify his vision of the current Court with the Founding generation, but also to present the current Court as the fulfillment of the promise given by the first Supreme Court of judicial reticence in political matters. Taken together, Frankfurter's inclusion of the anecdote from the Founding generation encapsulates the ethos of humility expressed throughout his concurrence.

of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

⁸⁵ *Id.* at 612.

⁸⁶ *Id.* at 614 (citations omitted).

B. *Choosing a Rhetorical Audience: The Educated Intellectual*

A professor by trade and temperament, Frankfurter never missed an opportunity to educate.⁸⁷ His writing style reflects the posture of the “rarified expert.”⁸⁸ His prose has been described as “complicated and even tortuous.”⁸⁹ Frankfurter’s focus on this selective audience, however, comports with his belief that the gravity of the issues with which he was dealing were the concerns of the elite.⁹⁰ Withholding judgment as to the propriety of Frankfurter’s target audience, we can still dissect his *Youngstown* concurrence to reveal the representation of reality his language constructs. That representation focuses on educating the audience on three things: the proper role of the Court, the need for constitutional ambiguity, and the rejection of judicial interpretive arrogance.

1. The Proper Role of the Court

Frankfurter enlists the amorphous “general” public to make his first point about the paramount importance of a restrained judiciary concerning constitutional issues.

The attitude with which this Court must approach its duty when confronted with [constitutional] issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the

⁸⁷ LIVA BAKER, FELIX FRANKFURTER 220 (1969) (noting that Justice Frankfurter would stand at a podium and lecture to the other Justices—sometimes as long as an hour or so—during the Supreme Court’s weekly conference meetings, much to the dismay and agitation of some of his brethren.); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 203 (2002) (“[Frankfurter’s] belief in the Justice as educator survived in his opinions.”).

⁸⁸ Ray, *supra* note 87, at 202.

⁸⁹ *Id.* at 201–02 (“Whereas [Justice] Black’s style implied a direct link between the Court’s decisions and all Americans, Frankfurter’s style implied the need for an intermediary to translate the message into the language of the layman.”).

⁹⁰ *Id.* (citing G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 326 (1976) (describing Frankfurter’s conviction about the obligations of the elite in a democracy: “He believed that the masses needed opportunities to achieve elite status, but that they could recognize those opportunities only if educated by an elite. Public-mindedness was the obligation attendant on one’s rise in the meritocracy. The expertise and elite status achieved in reward for surviving the competition of the educational system was to be used to prepare the way for other entrants. American citizens had the capacity for self-improvement, and even self-government, Frankfurter believed, if shown the proper techniques; those techniques were to be conveyed to them by elite leadership.”)).

broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.⁹¹

Here, Frankfurter claims that the public is “fascinated” with wanting to “settle” constitutional questions, this fascination leading to a desire for the Court to make broad declarations on the law. Frankfurter, however, warns that the Court cannot give into the impatient desires of the public. Instead, he argues that the duty of the Court is exactly the opposite of what he believes the public wants. According to Frankfurter, the Supreme Court must approach constitutional adjudication with caution and reserve, limiting its interpretation of the Constitution to only the narrowest pronouncements.

What accounts for this public fascination? The year is 1952. A mere fifteen years has passed since the Court-packing Plan fight.⁹² The public to which Frankfurter refers is the same one that was embroiled in the clash between the branches brought about by Franklin Roosevelt’s attempt to legislatively reconfigure the Supreme Court.⁹³ During Roosevelt’s first term, the Supreme Court repeatedly struck down New Deal legislative measures aimed at economic recovery as being outside the scope of the federal government’s power.⁹⁴ Roosevelt proposed a legislative initiative in an attempt to counter this judicial opposition to his political agenda.⁹⁵ The bill’s most controversial provision permitted the President to appoint an additional Justice to the Supreme Court for each sitting Justice who did not retire within six

⁹¹ *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).

⁹² For treatments on the Court-packing Plan Crisis and the “Constitutional Revolution” of 1937, see JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* (1967); EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 121–28 (1958); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 161–69, 174–79 (1960); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

⁹³ The text of the bill and accompanying messages from Roosevelt and Attorney General Homer Cummings are printed at 81 CONG. REC. 877–81 (1937) [hereinafter RECORD].

⁹⁴ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding the Bituminous Coal Conservation Act of 1935 unconstitutional); *United States v. Butler*, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act unconstitutional); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (holding the Frazier-Lemke Act unconstitutional); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act unconstitutional); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding § 9(c) of the National Industrial Recovery Act unconstitutional); *R.R. Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935) (holding the Railroad Retirement Act unconstitutional).

⁹⁵ RECORD, *supra* note 93.

months of his seventieth birthday.⁹⁶ If passed, the President would have been able to appoint six additional Justices immediately, as six sitting Justices on the Court fit the provision's criterion.⁹⁷ Although the bill was ultimately met with failure, the conflict between the judiciary and the political branches and among the political branches themselves over the New Deal and judicial reform had played out in the public arena since 1935.⁹⁸

This was a public that had seen the Supreme Court's decisions fundamentally affect their lives. For example, in 1935, the Supreme Court upheld government restrictions on the ownership of gold in a series of cases known as *The Gold Clause Cases*.⁹⁹ In particular, the Court upheld the restriction abrogating the gold clauses in public and private contracts finding the restrictions were within Congress's authority based on its plenary power to regulate money.¹⁰⁰ This ruling declared that the courts would no longer enforce gold indexation clauses, which allowed for a modicum of debt relief, because if the gold clauses (which were in virtually every public and private contract) had been enforced, the debt burden of borrowers would have increased to the extent of the devaluation of the dollar, which was roughly sixty-nine percent.¹⁰¹ This was a public who in 1936 saw a Supreme Court declare New York's minimum wage law unconstitutional.¹⁰² Yet, in 1937, the public saw that same Supreme Court uphold a nearly identical minimum wage law from Washington state.¹⁰³ And finally, this was a public who in 1937 saw the Social Security Act of 1935¹⁰⁴ sustain two constitutional challenges at the Supreme Court.¹⁰⁵ While these were by no means the only or even the most important decisions handed down by the Supreme Court during its 1935–1937 terms, they represent a culture of understanding about the law. Because these decisions defined Congress's power to regulate economic life, it is plausible to believe that the

⁹⁶ *Id.* at 880.

⁹⁷ BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 233 (1993).

⁹⁸ For a discussion of FDR's Court-packing Plan and public opinion see WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82–162 (1995).

⁹⁹ *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935).

¹⁰⁰ *Perry*, 294 U.S. at 350–51; *Norman*, 294 U.S. at 311.

¹⁰¹ Anna Gelpert & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075, 1131 (2009).

¹⁰² *Moorehead v. New York ex rel. Tivaldo*, 298 U.S. 587 (1936).

¹⁰³ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰⁴ 42 U.S.C. §§ 301–304 (1935).

¹⁰⁵ *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the constitutionality of the Social Security tax on employers); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935).

public may have viewed the Supreme Court as a necessary catalyst for political change affecting their daily lives.

Is this fascination a bad thing? Frankfurter's passage seems to suggest that it is.¹⁰⁶ But, taken at face value, a desire for clarity, especially with regard to fundamental constitutional issues like governmental power and individual rights, is not necessarily a ruinous endeavor. Frankfurter's admonition, however, reveals a deeper concern. His true concern is that the general members of the public lack the sophistication to appreciate the institutional differences between the Court and the political branches.¹⁰⁷ Congress and the President must enact and implement laws, respectively, directed at resolving problems of the day, but the Court's institutional duty is set along a longer time horizon.

The Supreme Court's duty, unlike the legislative and executive branches, is not to fix immediate *political* problems.¹⁰⁸ This is not to suggest that the Court plays no role in the day-to-day lives of the public (or that the Court's decisions do not entail consequences that affect politics). Indeed, the Court's dispute resolution function has significant impact on the daily lives of ordinary citizens. The distinction is tied instead to appreciating the difference between a political problem and a legal problem. Again, this distinction is not precise. Legal problems are often tangled with political issues. Still, in regard to the Court's political responsibilities, for lack of a better phrase, the Court's duty is to protect the legal space within which the political branches may act. Frankfurter's jeer at the public's "fascination" communicates a fear—the fear that giving into the public's desire for broad constitutional pronouncements will

¹⁰⁶ *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring) ("The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits.").

¹⁰⁷ *Id.* at 595 ("A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.").

¹⁰⁸ U.S. CONST. art. III § 2 (limiting the judicial power to resolution of "cases" and "controversies"); *see also Youngstown*, 301 U.S. at 594 (Frankfurter, J., concurring) ("The Framers, however, did not make the judiciary the overseer of our government. They were familiar with the revisory functions entrusted to judges in a few of the States and refused to lodge such powers in this Court. Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'Cases' or 'Controversies.' Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation.").

not only make the Court susceptible to public passion, impeding the Court's integrity, but more importantly, it will destabilize our governmental system at the structural level. The passage represents a warning that to yield to the public's misperception of the judicial role not only displaces accountability (from the political branches to the judiciary) for instant reform, but entails a far more dangerous vulnerability of the democratic system to structural damage.¹⁰⁹

Frankfurter continues to use the general public as a point of contrast to make a second point about the paramount importance of a restrained judiciary concerning constitutional issues:

To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340.¹¹⁰

The first thing to note about this passage is the underlying assumption that inquiring into the President's power damages the public interest. This assumption reinforces Frankfurter's belief that the "common man" maintains an oversimplified understanding of the operation of government.¹¹¹ The assumption concedes that there is a portion of the general public whose security in the establishment of law and order flows from their faith in the personality of the President as the "leader of the people" rather than from an appreciation of the institutional functions of the three branches. In other words, the passage acknowledges that those who are unable to appreciate the nuanced structure of government could suffer a crisis of faith from a perceived personal attack on "their leader." Nevertheless, the passage affirms that to refrain from review simply because it would disrupt the President's exercise of authority, which some members of the public may not appropriately be able to process, is not a valid reason to abstain from action.

What is interesting about this passage is its use of the word "inquire" as a framing verb, the word that characterizes the sentence's action. Other word choices for a framing verb could be "review," "evaluate," or "examine." What is significant about the choice of "inquire" is that it suggests that the Court's reticence begins at the threshold activity of simply asking about the President's activities. "Review," "evaluate," and "examine" contain a depth of

¹⁰⁹ *Youngstown*, 301 U.S. at 594.

¹¹⁰ *Id.* at 596.

¹¹¹ See PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 1, 224 (1971) (explaining Frankfurter's commitment to the idea of an "elite").

investigation that is not present in the initial activity of “inquiring” or rather, simply asking. By choosing “inquire” as its framing verb, the passage implies that the judiciary’s hesitation is born out of respect for the other two branches, rather than a lack of procedural or substantive authority. This is noteworthy because by not grounding the hesitation in a lack of authority, it legitimizes the judiciary’s function and validates their institutional place in the constitutional order. This framing allows the passage to create a binary between duty and desire, and places the Court squarely within duty. The Court, in essence, is doing what it was created to do, nothing more and nothing less. By grounding the binary in the attitude of respect, the passage’s claim works to reinforce a non-threatening, non-hierarchical conception of the separation of powers.

The two above-referenced passages illustrate how Frankfurter used the general public as a character device to advocate for judicial restraint. He exploited their detachment from the inner-workings of government to oversimplify their appreciation of government institutional placement and function within the constitutional order. The general public’s role in Frankfurter’s concurrence in *Youngstown* allowed him to construct a clear binary between desire and duty and show how the Court avoided the former while obeying the latter.

2. The Need for Constitutional Ambiguity

Frankfurter also used his concurrence to argue that judicial delineations about the Constitution were likely to create more problems than they resolved. Furthermore, he argued that judicial declaration about the Constitution was capable of worsening the gaps inherent in the Constitution’s allocation of decision-making authority by uncovering them, that judicial pronouncement about the Constitution reduced the space within which government may exist to work out the details of governing, and that each time the judiciary makes a decision about the Constitution, government and the people are both a little less free:

A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.¹¹²

¹¹² *Id.* at 595.

This statement communicates that the public does not realize the ramifications for the system if the Court runs headlong into every constitutional question. Again, this reliance on the public as Frankfurter's target audience allows him to use the common man as a stand-in, even though his message is meant for all (i.e., the other members of the Court, the other branches of government, those members of the educated elite whom Frankfurter felt were obligated to secure and perpetuate the democratic system). What this statement sets up is the distinction between what the Constitution says and what the Constitution does. Implicit in this statement is the idea that the Constitution serves a greater purpose beyond simply declaring governmental power and establishing individual rights. That purpose is structural. The Constitution creates a space for each of the actors in a democratic republic to move: the President, the Congress, the Judiciary, and the Citizen. These spaces are broadly stated and imprecise. They are bounded in grey. But it is this very quality of indefiniteness that allows for the Constitution's unlimited potential.

The passage begins with Frankfurter's familiar commitment to judicial restraint: "A basic rule is the duty of the Court not to pass on a constitutional issue at all . . . if the case may . . . be decided without even considering delicate problems of power under the Constitution."¹¹³ What is interesting to note is the depth of argument Frankfurter's word choice invites. The express fear the passage declares is that the Court may widen, rather than resolve, the gaps inherent in the Constitution's allocation of decision-making power. Frankfurter referred to these gaps as "the delicate problems of power under the Constitution."¹¹⁴ This word choice is interesting. Delicate has a vulnerable quality. Referring to the problems of power under the Constitution as "delicate" expresses an inherent instability (perhaps volatility?) in the relationship among the branches, an instability that could be aggravated by judicial intrusion.

Frankfurter's word choice to characterize the nature of constitutional power allocation, coupled with the foreboding consequences of judicial intervention, invite the reader to connect with an older argument warning of the dangers of judicial interference. This institutional critique can be summed-up in two words: *Dred Scott*.¹¹⁵ In *Scott*, Justice Taney's majority opinion held not only that freed slaves were not American citizens and thus could not avail themselves of diversity jurisdiction to sue in federal court,¹¹⁶ but also that slavery could not be banned in the American territories.¹¹⁷ The most sustained reproach of *Dred Scott* is grounded in claims of institutional incompetency; that as an institution, the judiciary lacks the power, knowledge, and skill essential to

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹¹⁶ *Id.* at 424–27.

¹¹⁷ *Id.* at 431–54.

resolve divisive national controversies among the citizenry.¹¹⁸ Professor Mark Graber commented on the use of the decision as a proxy for judicial restraint:

Dred Scott v. Sandford is Exhibit A for the view that the judicial tendency to follow principles to extreme conclusions inhibits legislative bargaining. Proponents of judicial restraint consistently invoke that ruling to illustrate the dubious results they believe occur whenever Justices attempt to settle those major policy disputes that in our system should be resolved by the elected branches of government.¹¹⁹

Scholars have long criticized the *Dred Scott* decision as judicial overreaching and condemned the Court's hubris in thinking that it could avert the Civil War by "deciding" the slavery issue for good.¹²⁰ The components of Frankfurter's passage connect to the institutional criticisms of *Dred Scott* by denouncing the same pillars of argument: judicial meddling in issues better handled by the political branches and judicial hubris. The lesson that emerges: constitutional ambiguity is best managed by an electorate through those whom they choose.

Frankfurter concludes this passage with a statement about the destructive consequences to ensue if the judiciary attempts to control constitutional ambiguity.¹²¹ A morphological analysis reveals one of the devices Frankfurter used to give this statement force. Morphology is a branch

¹¹⁸ Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1214 (2009).

¹¹⁹ Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N. C. L. REV. 1229, 1231 (2005).

¹²⁰ See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 5 (1978) ("[T]he *Dred Scott* decision . . . remains the most striking instance of the Supreme Court's attempting to play the role of deus ex machina in a setting of national crisis."); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 63 (Sanford Levinson 2nd ed. 2000) ("[The Taney Court mistakenly] imagine[d] that a flaming political issue could be quenched by calling it a 'legal' issue and deciding it judicially."); Jenna Bednar & William N. Eskridge Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1480 (1995) ("*Dred Scott* helped precipitate secession. . . [b]y discrediting a previous congressional compromise . . . [b]y destabiliz[ing] efforts to mediate the slavery and antislavery states; [and] by forcing the slavery issue back to the top of the national agenda . . . [which] fractured the Democratic Party and contributed to the election of Lincoln as president."); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 318 (1999) ("The [*Dred Scott*] decision triggered a political firestorm, hurt the prospects for a compromise solution, and undermined the prestige of the Court."); Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1036 (1992) ("[T]he *Dred Scott* decision . . . by denying national political power to deal with the slavery issue, seemed to make the Civil War inevitable.").

¹²¹ *Youngstown*, at 595 (Frankfurter, J., concurring).

of linguistics that studies the internal structure of words.¹²² A morpheme is the smallest semantically meaningful unit in language.¹²³ A morpheme is similar but not identical to a word because morphemes can be either free (and functional in themselves as a freestanding unit of meaning like a word) or bound.¹²⁴ Prefixes like “ex” are bound morphemes because they can only appear as part of a word, always in combination with a root or other bound morphemes.¹²⁵ The prefix “ex” is defined as out or from.¹²⁶ Privation, the taking away or loss is a typical characterization of words beginning with the prefix “ex.” For example, “exit” (to leave, or a door leading out); “expel” (to push or force out); “export” (to ship or carry out); and “exclaim” (to shout out).¹²⁷

Frankfurter’s statement against constitutional adjudication is given force by the repeated use of the morpheme “ex” in the last two lines: “explosive,” “exposing,” and “exacerbate.”¹²⁸ This alliterative structure links the words to a corresponding meaning that gains force at each repetition. It is significant that the first word in this string is “explosive” because it sets up the connotation for the remaining two words. The word “explosive,” understood as volatile or unstable,¹²⁹ frames the interpretation of the words “expose” and “exacerbate.” Webster’s defines “expose,” as “to lay open,” “make accessible,” and “to submit or subject to action or influence.”¹³⁰ While this definition simply describes a state of being, the placement of “expose” after the word “explosive” implies a meaning characterized by negative force. In other words, “expose” after “explosive” becomes: to lay open *as to attack or danger* or to make accessible or submit/subject to action or influence *to something that may prove detrimental*. Concluding the series with the word “exacerbate” contributes to this implication of negative force. The root “acerbate” is defined as “irritate.”¹³¹ The meaning of this root is amplified by the addition of the prefix “ex” as Webster’s demonstrates by defining “exacerbate” as “to make more violent, intensify the bad qualities of” and “to cause to be more severe.”¹³² Taken

¹²² GEERT E. BOOIJ, *THE GRAMMAR OF WORDS: AN INTRODUCTION TO LINGUISTIC MORPHOLOGY* 7 (Oxford University Press 2d ed. 2007).

¹²³ *Id.* at 8–9.

¹²⁴ *Id.* at 86.

¹²⁵ LAURIE BAUER, *ENGLISH WORD-FORMATION* 17–18 (1983).

¹²⁶ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 790 (1993) [hereinafter WEBSTER’S THIRD].

¹²⁷ *Id.* at 1805.

¹²⁸ *Youngstown*, 343 U.S. at 595 (Frankfurter, J., concurring).

¹²⁹ WEBSTER’S NEW WORLD THESAURUS 283 (3d ed. 1997).

¹³⁰ WEBSTER’S THIRD, *supra* note 126, at 802.

¹³¹ *Id.* at 14.

¹³² *Id.* at 790.

together, the placement of these three words create a sentence shape that expresses the need for constitutional ambiguity and the looming danger to the structural integrity of our constitutional system should the judiciary fail to heed this warning.

3. The Rejection of Judicial Interpretive Arrogance

The third theme that runs throughout Frankfurter's *Youngstown* concurrence is the need to reject judicial interpretive arrogance. This theme is an extension of his two prior themes about judicial restraint as the proper role for the Court and the avoidance of judicially managing constitutional ambiguity. This section analyzes two passages from Frankfurter's concurrence. The first passage represents a criticism of the judicially centered analytical framework offered by Justice Jackson. The second passage proffers Frankfurter's own analytical framework the authority for which he locates outside of the judiciary. Taken together, these passages attempt to preserve an ethos of judicial humility and reject an ethos of judicial interpretive arrogance.

In this first passage, Frankfurter alludes to the analytical framework suggested by Justice Jackson's tripartite framework, offering it as an example of what not to do.

I shall not attempt to delineate what belongs to [the President] by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President or both . . . what power must be exercised by the Congress and cannot be delegated to the President. It is an unprofitable to lump together in an indiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases.¹³³

The text of this passage works in two ways. The first is through the statement, "I shall not attempt to delineate," which sets up the expectation of a general reproach to judicial interpretive arrogance.¹³⁴ This expectation is fulfilled in the repetition of "Congress."¹³⁵ The second function of the passage is as a more pointed criticism of Justice Jackson's tripartite framework.

The first noteworthy feature of this passage is Frankfurter's use of "I" rather than "this Court."¹³⁶ The word choice focuses attention on the individual. This move demonstrates the ease with which the hubris of an individual

¹³³ *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

speaking for the Court can displace the institution. Of course, the word choice could simply be justified by the fact that Frankfurter is writing a concurrence, whose function is to serve as a vehicle for an individual Justice to express agreement with the Court's decision, supported by a different rationale. Understood in this light, the choice of the language of the individual is not only unsurprising—it is almost required. Nevertheless, while the use of the first person in a concurrence is to some extent required, the remainder of the passage as well as Frankfurter's concurrence as a whole provide sufficient context to support as plausible a deeper interpretation of the word choice. To that end, it is important to recall that my purpose in deconstructing the passage's word choice is not to argue for one definitive authorial intention. Rather, it is to add to our understanding of the range of interpretive possibilities available based on what the text provides and how the text of the passage, as an isolated part, works with the whole.

The use of "I" in this passage parallels the language of the individual used in Jackson's concurrence.¹³⁷ Recall that Justice Jackson's concurrence contains a fair amount of personalization. For example, it begins by admitting that his time in the Attorney General's office shaped his views on the boundaries of presidential power.¹³⁸ This personal history forms the basis of Jackson's tripartite framework, wherein the historical exercises of presidential authority are abstracted and catalogued into three distinct categories; the categorical process itself converting the political experience of a former Attorney General into a judicially manageable tool.¹³⁹

Although Frankfurter does not mention it by name, the construction of this passage systematically criticizes Jackson's tripartite framework. "I shall not attempt to delineate what belongs to him by virtue of his office beyond the power even of Congress to contract"¹⁴⁰ can be read as a reference to Jackson's third category, where the President can "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter"¹⁴¹ and "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."¹⁴² "I shall not attempt to delineate . . . what authority belongs to him until Congress acts"¹⁴³ can be read as a reference to Jackson's second category, "[w]hen the President acts in

¹³⁷ *Id.* at 597 (Frankfurter, J., concurring); *id.* at 634 (Jackson, J., concurring).

¹³⁸ *See id.* at 634 (Jackson, J., concurring).

¹³⁹ William R. Castro, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 366 (2010) ("In crafting these categories, Jackson consciously drew upon his experiences as Attorney General advising President Roosevelt.").

¹⁴⁰ *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring).

¹⁴¹ *Id.* at 637 (Jackson, J., concurring).

¹⁴² *Id.* at 637–38.

¹⁴³ *Id.* at 597 (Frankfurter, J., concurring).

absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”¹⁴⁴ And finally, “I shall not delineate what kind of problems may be dealt with either by the Congress or by the President or by both,”¹⁴⁵ can be read as a reference to Jackson’s category one, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate”¹⁴⁶ and category two, “[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.”¹⁴⁷ The sentence structure of this passage—the introductory phrase of “I shall not attempt to delineate” followed by successive independent clauses—systematically dismantles Jackson’s categorical system as being beyond the scope of judicial power. By analogizing to the individual language frame in Jackson’s concurrence and expressing (without mentioning names) that he (Frankfurter) was not going to do what others (Jackson) had, this passage demonstrates and condemns the hubris involved in accepting a jurist-centered analytical framework as the preferred method to resolve questions about the power boundary between Congress and the President.

After rejecting the jurist-centered analytical framework, Frankfurter proposes an alternative that locates control over the congressional-presidential relationship outside of the judiciary.

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questions, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercises of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.¹⁴⁸

This passage claims that Congress and the President, through political practice, may legitimately construct and graft substantive meaning onto the Constitution. This passage, placed near the end of the concurrence, fulfills the expectation near its beginning created by two citations to Chief Justice John

¹⁴⁴ *Id.* at 637 (Jackson, J., concurring).

¹⁴⁵ *Id.* at 597 (Frankfurter, J., concurring).

¹⁴⁶ *Id.* at 635–37 (Jackson, J., concurring).

¹⁴⁷ *Id.* at 637.

¹⁴⁸ *Id.* at 610–11 (Frankfurter, J., concurring).

Marshall's opinion in *McCulloch v. Maryland*.¹⁴⁹ Marshall's opinions are often cited by the Court to legitimize institutional authority with respect to judicial review and judicial supremacy in terms of constitutional interpretation. In particular, federal courts tend to rely heavily on Chief Justice Marshall's statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."¹⁵⁰

Frankfurter's concurrence, however, foregoes the rhetorical power of this statement in *Marbury* in favor of another that seamlessly supports, nay prefigures, the concurrence's ultimate conclusion approving construction of constitutional meaning by political actors. And he does it not once, but twice: "The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that 'it is a constitution we are expounding'" and again, five lines later, "Marshall's admonition that 'it is a constitution we are expounding.'"¹⁵¹ By focusing on the activity of explaining the Constitution rather than interpreting it, Frankfurter is able to offer an analytical framework that prefers political construction of constitutional meaning without having to discuss interpretive supremacy.

This passage putting forth the theory of executive power created through historical gloss and congressional acquiescence is Frankfurter's most significant contribution to the separation of powers discussion vis-à-vis the balance of power between the political branches. Indeed, as this Article explains in the next section, subsequent Supreme Courts have appropriated Frankfurter's idea of congressional acquiescence in this passage and used it as an interpretive tool to explain Jackson's category two. This infusion accomplishes two things. First, it transforms Justice Jackson's second category from a political descriptor to a legal standard. Second, the merger of the two concurrences, which independently endorse an ethos of judicial humility, create a platform for the Supreme Court to approach separation of powers issues from a decidedly different ethos, one of judicial interpretive arrogance.

IV. THE TRANSFORMATIVE EFFECTS OF FRANKFURTER'S LANGUAGE ON JACKSON'S ZONE OF TWILIGHT

Since 1952, when Jackson created his tripartite framework in *Youngstown*, the Supreme Court has not grounded the constitutionality (or

¹⁴⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

¹⁵⁰ *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In fact, a Westlaw search in the ALLFEDS database for "to say what the law is & Marbury" resulted in 392 cases. Search conducted by the Author on March 2, 2012; results on file with the Author.

¹⁵¹ *Youngstown*, 343 U.S. at 596 (Frankfurter, J., concurring) (quoting *McCulloch*, 17 U.S. at 407).

unconstitutionality) of a presidential action in category two.¹⁵² That is not to say, however, that the category has remained static. Indeed, two subsequent Supreme Court cases—*Dames & Moore* and *Medellín*—transformed the substance and nature of Jackson’s zone of twilight.¹⁵³

A. *Language and the Mechanics of Change: Dames & Moore v. Regan and Medellín v. Texas*

In *Dames & Moore*, the Court associated congressional silence with the congressional acquiescence doctrine.¹⁵⁴ Then, based on *Dames & Moore*’s construction, the Court in *Medellín* reinforced this identification and considered them as one idea rather than recognizing them as a complication of two ideas put together. This Section does not provide a disquisition on how the judiciary should interpret congressional silence.¹⁵⁵ Rather, this Section explains how *Dames & Moore* and *Medellín* operate to transform Jackson’s category two from an arena where power relationships are defined by politics to one where such relationships are determined by the application of legal rules and

¹⁵² Although subsequent cases have discussed challenged presidential actions under category two they have only done so in dicta; the Court grounded the ultimate decision of the constitutionality of the issue in each case on an analysis of either category one or three. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 527 (2008) (concluding that the President’s authority is “within Justice Jackson’s third category.”); *Dames & Moore v. Regan*, 453 U.S. 654, 677–88 (1981). Despite affirming that the controlling statute, the International Emergency Economic Powers Act (“IEEPA”), did not grant the President authority to suspend claims against Iran pending in U.S. courts, the Court combined ostensibly related congressional action, such as general legislation in the area, the absence of express congressional prohibition, and a history of congressional leniency in the executive practice, to conclude that Congress had “implicitly approved” the action under Jackson’s category one. *Dames & Moore*, 453 U.S. at 680.

¹⁵³ *See, e.g., Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair* 138–39 (1990) (arguing that *Dames & Moore* rewrote *Youngstown* and “marked a dramatic de facto expansion of Categories One and Two and a constriction of Category Three”); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamden*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 933, 948–49 (2007) (arguing that, “[in] finding clear statutory acquiescence in President Carter’s actions in a statute that was, at best, ambiguous, Justice Rehnquist effectively vitiated Jackson’s taxonomy—or, at least, turned it on its head”).

¹⁵⁴ Generally stated, the Congressional Acquiescence Doctrine permits judicial inference of implied congressional authority for presidential actions that Congress has failed to somehow signal disagreement with or opposition to over time. *See generally* John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 *B.U. L. REV.* 737, 745–47 (1984).

¹⁵⁵ For examples of in-depth treatments speaking to the Court’s analysis of congressional silence, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 *MICH. L. REV.* 67 (1988); Grabow, *supra* note 154; Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 *U. MIAMI L. REV.* 375 (1992); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *IND. L.J.* 515, 516 (1982).

interpretive techniques—a shift that is not easily squared with the actual text of Jackson’s opinion.

1. *Dames & Moore v. Regan*

In 1979, Iranian militants infiltrated and seized the U.S. Embassy in Tehran and held approximately seventy Americans captive for over four hundred days.¹⁵⁶ Negotiations between Iran and the United States resulted in the release of the hostages in exchange for the transfer of billions of dollars in frozen Iranian assets to Iran.¹⁵⁷ The Carter Administration issued a series of executive agreements, which, among other things, terminated all U.S. national legal proceedings against the Iranian government.¹⁵⁸ *Dames & Moore*, an American consulting firm that had done business with Iran prior to the hostage crisis, challenged the constitutionality of the executive orders, claiming that the agreement’s nullification of legal claims and transfer of Iranian funds to Iran exceeded the scope of presidential power. In an 8–1 decision, the Court disagreed with *Dames & Moore* and held that Congress had statutorily authorized the President to nullify claims and transfer Iranian assets.¹⁵⁹ The Court further held that although there was no express statutory authority for the President to suspend legal claims, prior acts of Congress had “implicitly approved” such executive methods of settlement.¹⁶⁰ The majority opinion,

¹⁵⁶ DAVID R. FARBER, TAKEN HOSTAGE: THE IRAN HOSTAGE CRISIS AND AMERICAN FIRST ENCOUNTER WITH RADICAL ISLAM 12 (2005). For an analysis of the American-Iran connection from its beginning in 1835, see generally JAMES A. BILL, THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS (1988). See also Richard Harwood & T.R. Reid, *U.S. Announces Resolution of Dispute Blocking Return of Hostages from Iran*, WASH. POST, Jan. 20, 1981, at A1 (reporting that on November 4, 1979, sixty-six U.S. diplomats and citizens were taken captive by a group of Iranian student militants loyal to the new Iranian government and that fifty-two of the captives were held inside the U.S. Embassy in Tehran for 444 days while the other fourteen were released earlier).

¹⁵⁷ See FARBER, *supra* note 156, at 182.

¹⁵⁸ Exec. Order No. 12,170, 3 C.F.R. 457 (1979).

¹⁵⁹ *Dames & Moore v. Reagan*, 453 U.S. 654, 669–75 (1981) (The Court held that the plain language of the International Emergency Economic Powers Act authorized the President to exercise the power he asserted); see *id.* at 672 (“We . . . refuse to read out of § 1702 all meaning to the words ‘transfer,’ ‘compel,’ or ‘nullify.’”).

¹⁶⁰ *Id.* at 677–78. The Court began by concluding that the absence of explicit legislative authority for the President to suspend claims did not signify congressional disapproval, especially in the “areas of foreign policy and national security.” *Id.* at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). Next, the Court relied on the record of foreign claims settlement authority under the International Claims Settlement Act of 1949 as evidence of a long history of congressional acquiescence and delegation to the Executive and concluded that “Congress ha[d] implicitly approved the practice of claims settlement by executive agreement.” *Id.* at 680. And lastly, the Court cited a series of amendments and agreements stemming from the International Claims Settlement Act as evidence that Congress had either not questioned the President’s

penned by then-Justice Rehnquist, acknowledged the paucity of judicial guidance in this area of constitutional law and emphasized the narrowness of its ruling:

[A]s Justice Jackson noted, “[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves”

Our decision today will not radically alter this situation

We attempt to lay down no general “guidelines” covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.¹⁶¹

Rehnquist’s words are disingenuous.¹⁶² *Dames & Moore* fundamentally altered the *Youngstown* analytic framework upon which courts rely when considering questions of presidential power, for it transformed Jackson’s category two—which in *Youngstown* functioned as a description of a political situation void of legal guidance—into a judicial category complete with legal rules and standards.

Dames & Moore domesticated the process of category two by shifting its focus from a political acknowledgment of circumstance to a legal analysis of legislative intent.¹⁶³ Recall that *Youngstown*’s category two admits of a gray area wherein “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables.”¹⁶⁴ This suggests that the situational circumstances direct the analytical focus. And, when one analyzes

foreign claims settlement authority or explicitly authorized future executive settlement agreements. *Id.* at 680–83.

¹⁶¹ *Id.* at 660–61 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

¹⁶² For scholarship arguing that *Dames & Moore* is far less modest than it portends, see, for example, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION*, 227 (2d ed. 1996); KOH, *supra* note 153, at 138–40; Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982); Peter J. Spiro, *Treaties, Executive Agreements, and the Constitutional Method*, 79 TEX. L. REV. 961 (2001); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

¹⁶³ Here, I am using the term “domesticate” to mean a reduction to rules, criteria, or standards. For an application of the term in another context, see, for example, Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 47, 50–51 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007). Tushnet uses the term “domesticate” to describe the process by which the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210 (1962), transformed the concept of the political question doctrine to a “form of law” via legal rules constructed for its application. *Id.*

¹⁶⁴ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

circumstance to determine power boundaries between the President and Congress, and does so without reference to or guidance from legal authority, one embarks on a political task, not a judicial one. However, in relaying the *Youngstown* categories, the majority opinion in *Dames & Moore* focuses not on imperatives of events and imponderables (i.e., circumstances) but on the meaning of congressional silence. This semantic shift changes the character of *Youngstown*'s category two because it expands the analytic scope beyond the exigent political circumstances which triggered the presidential action to include the entire history of congressional (in)action on the issue itself. This expansion allows the Court (1) more material to review and (2) a legal standard by which to review it.

When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence."¹⁶⁵

Jackson's original statement of category two treats congressional silence or inaction as a political condition that may invite the President to act. Rehnquist's statement above changes the character of congressional silence from a condition precedent to presidential action into legal rationale for that action.

Moreover, this focal shift in process blurred the lines between the categories, as the opinion confused the idea of congressional silence under category two with implied congressional authority under category one.¹⁶⁶ In *Youngstown*, a finding of presidential authority in category one may rely on a finding of implied congressional consent. Such a finding suggests that the President acted because of perceived (and real) congressional approval. Jackson's category two, however, contemplates situations where no such perception is possible because Congress has been silent. In other words, in Jackson's category two, there is no implied consent to be discerned. It simply does not exist. Under category two, the President can only rely on his own independent powers; thus, his power can emanate only from the general authority granted him under Constitution. In this situation, the President acts

¹⁶⁵ *Dames & Moore*, 453 U.S. at 668–69 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

¹⁶⁶ As a practical matter, category three also would accommodate "implied" congressional intent; the difference being that under category three the President acts contrary to, not consistent with that implied intent. For an example of this shift in practice, see discussion *infra* Part III.A.2.

when (1) he believes the Constitution has given him the power to do so in the particular situation, and (2) Congress has failed (either by unspoken resistance, indifference, or inaction) to address the issue. It is Congress's failure to act that *Youngstown's* category two says may enable, if not "invite, measures on independent presidential responsibility."¹⁶⁷ If a challenge to the presidential action subsequently emerges, then *Youngstown* directs us to the circumstances that triggered the need for action (i.e., political crisis and congressional inaction). Those circumstances are wholly contained within the political realm. *Dames & Moore*, however, misuses the "invitation" languages from the *Youngstown* concurrence to further associate the idea of congressional silence with implied congressional authority through acquiescence.

On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord to the President broad discretion [category one] may be considered to "invite" "measures on independent presidential responsibility [category two]." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.¹⁶⁸

By muddling the distinction between implied congressional authority in category one and congressional silence in category two, Rehnquist shifted the focus of the analytical process, requiring a corresponding shift from the use of political language (to describe a political reality in need of a practical political solution) to legal language (to assign legal standards that could guide judicial decision-making). This was accomplished by giving the congressional acquiescence doctrine primacy of place in the analytic framework.

Congressional acquiescence is actually a necessary ingredient—and by-product—of efficient and effective government.¹⁶⁹ For this reason, the judiciary has long acknowledged that the relative capacity of the President and Congress to respond to political crisis may affect the distribution of powers between them. In recognition of this fact, the Court, in 1915, developed the

¹⁶⁷ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁶⁸ *Dames & Moore*, 453 U.S. at 678–79 (internal citations omitted).

¹⁶⁹ Indeed, scholars have commented on the doctrine's impact, by virtue of its practicability, on the development of constitutional law. See, e.g., LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 220 (3d ed. 1999) ("The boundaries between the three branches of government are . . . strongly affected by the role of custom or acquiescence. When one branch engages in a certain practice and the other branches acquiesce, the practice gains legitimacy and can fix the meaning of the Constitution.").

Congressional Acquiescence Doctrine,¹⁷⁰ applying it for the first time in *United States v. Midwest*.¹⁷¹ In that case, the Court held that a long-standing executive practice of withdrawing public lands despite congressional provisions opening them to public acquisition legitimated the President's authority to issue a temporary withdrawal order.¹⁷² To encourage public exploration and purchase of land, Congress passed legislation in 1897 opening up public lands for discovery and removal of mineral deposits.¹⁷³ A short decade later, however, the "oil was so rapidly extracted" that President William H. Taft issued an executive order temporarily withdrawing nearly three million acres from public purchase and exploration.¹⁷⁴ Citing to 252 executive orders over the last sixty years wherein Presidents had withdrawn public lands despite the existence of congressional legislation opening them to public acquisition, the Court concluded that there existed an implied grant of power in Congress's acquiescence of the withdrawal.¹⁷⁵ The Court's reasoning articulated the essential components of the Congressional Acquiescence Doctrine:

[G]overnment is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation.¹⁷⁶

¹⁷⁰ The principle of the Congressional Acquiescence Doctrine is rooted in the words of John Marshall. *Stuart v. Laird*, 5 U.S. 299, 309 (1803). At issue in *Stuart* was whether the Judiciary Act of 1789's grant of circuit powers to Supreme Court justices was unconstitutional. *Id.* In a response upholding the constitutionality of the jurisdictional grant, Chief Justice Marshall stated,

[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.

Id.

¹⁷¹ *United States v. Midwest*, 236 U.S. 459 (1915).

¹⁷² *Id.* at 474–75.

¹⁷³ *Id.* at 466.

¹⁷⁴ *Id.* at 466–67.

¹⁷⁵ *Id.* at 473–75. These "orders were known to Congress. . . and in not a single instance was the act of the [President] disapproved." *Id.* at 475.

¹⁷⁶ *Id.* at 472–73.

The *Midwest* Court stated that congressional acquiescence “would raise a presumption that the withdrawals had been made in pursuance of [Congress’s] consent or of a recognized administrative power of the Executive in the management of public lands.”¹⁷⁷ It is important, however, not to lose sight of the context in which the *Midwest* Court made its ruling. Having determined that the Constitution vested management of public lands in Congress, the Court went on to describe the practical situation at hand and characterize the distribution of power over the management of those lands in terms of a proprietor (Congress) and agent (President) relationship.¹⁷⁸ Thus, the Court’s statement regarding congressional acquiescence cannot appropriately be interpreted as an expansion of the President’s independent power under Article II of the Constitution. According to the Court, the President—at least in this instance—was acting as Congress’s agent. However, it was Justice Frankfurter, in his *Youngstown* concurrence, who first posited the idea that Congress, through its acquiescence, could effectively increase the Executive’s Article II power. And it is on this idea that Rehnquist relies: “As Justice Frankfurter pointed out in *Youngstown*, ‘a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.’”¹⁷⁹ Furthermore, Rehnquist noted the “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.”¹⁸⁰

What is interesting to note here is that, although *Dames & Moore* placed the President’s action in category one, it relied on the framework of *Youngstown*’s category two to show how congressional silence should be treated as implied congressional intent. *Dames & Moore* then used this associative link not only to support its use of the congressional acquiescence doctrine, but also to suggest that use of the doctrine was natural and inevitable.

In short, *Dames & Moore* shifted the process of category two from political to legal and infused it with legal standards. This effectively transformed category two presidential power questions involving congressional silence into category one (or three) questions triggering an analysis of implied congressional intent. Although this conversion wards against the Court

¹⁷⁷ *Id.* at 474.

¹⁷⁸ *Id.* at 474–75.

¹⁷⁹ *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (internal citations omitted). Scholars have suggested other problems with the *Dames & Moore* Court’s reliance on Frankfurter’s statement in *Youngstown*. See, e.g., Marks & Grabow, *supra* note 162, at 68 (asserting that “the quoted passage [from Justice Frankfurter’s concurrence] reasoned that such long-standing practices ‘may be treated as a gloss on “Executive power” vested in the President by § 1 of Art. II,’ whereas the *Dames & Moore* Court based its decision on implied congressional authority”).

¹⁸⁰ *Dames & Moore*, 453 U.S. at 687 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)) (internal quotation marks omitted).

intruding too far into the political fray, permitting it to make a legal rather than political judgment, it expands the Court's jurisdiction by converting previously nonjusticiable descriptions of political reality (situations under Jackson's category two) into judicially manipulable analyses of implied congressional intent.

2. *Medellín v. Texas*

Medellín, decided in 2008, also interpreted and applied Jackson's *Youngstown* tripartite framework to a question regarding the scope of presidential power.¹⁸¹ In *Medellín*, a Mexican national appealed his murder conviction and death sentence, arguing that the state violated the Vienna Convention on Consular Relations ("VCCR")¹⁸² when it failed to notify him of his right to seek assistance from his consulate.¹⁸³ The issue had come to the International Court of Justice ("ICJ") in a case known as *Avena*, by virtue of a complaint filed by the government of Mexico against the United States.¹⁸⁴ In *Avena*, the ICJ (1) found the United States had violated the VCCR¹⁸⁵ and (2) called for a review and reconsideration of the affected nationals' U.S. state court convictions and sentences.¹⁸⁶ Based on his belief that the United States, by virtue of being a signatory to the Optional Protocol¹⁸⁷ of the VCCR, was bound by the ICJ's ruling in *Avena*, President Bush issued a Memorandum directing the state courts to "give effect to the [ICJ's] decision."¹⁸⁸ That is, he

¹⁸¹ *Medellín v. Texas*, 522 U.S. 491, 494 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.").

¹⁸² Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (creating reciprocal obligations on signatories to notify other signatories' nationals of their right of access to their consulate "without delay" upon arrest).

¹⁸³ *Medellín*, 522 U.S. at 500–04.

¹⁸⁴ See Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

¹⁸⁵ *Id.* at 53–54.

¹⁸⁶ *Id.* at 72. The international obligation to comply with the ICJ's decision was thought to be created by a separate treaty: U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."), available at <http://www.un.org/en/documents/charter/chapter14.shtml>.

¹⁸⁷ The Optional Protocol, a third treaty, vested the ICJ with jurisdiction. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf.

¹⁸⁸ Memorandum from President George W. Bush to Alberto R. Gonzales, U.S. Att'y Gen. (Feb. 28, 2005), available at <http://georgewbush-whichouse.archives.gov/news/releases/2005/02/20050228-18.html>.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United

directed state courts to review (and possibly reverse) any convictions or sentencing decisions not consistent with the directives of the VCCR.

In a 6–3 decision, the Court held that the Optional Protocol of the VCCR, which had been ratified by the Senate in 1969, did not render the treaty self-executing, but rather required an act of Congress before it could be implemented and enforced.¹⁸⁹ Congress, however, never took such action. As a result, the treaty had no domestic effect and could not bind the state courts.¹⁹⁰ That is, the state courts were not required to honor the treaty obligation and enforce the ICJ’s decision. The majority opinion also held that the President’s Memorandum, which attempted to execute a non-self-executing treaty without benefit of enabling legislation from Congress, exceeded the President’s constitutional and statutory foreign affairs authority.¹⁹¹ Consequently, the Court concluded that the President’s Memorandum was no more binding on state courts than the Optional Protocol itself.

My interest here is with the second holding. Despite paying homage to *Youngstown*’s analytical model, it actually deviates from that model in subtle but profound ways.

Medellín accomplishes this deviation in two ways: First, it completes the “domestication” of the zone of twilight (i.e., transforming it into a judicially manageable category) by treating congressional acquiescence as a dispositive indicator of implied consent to a presidential action. In this way, *Medellín* builds off of *Dames & Moore*’s statement that congressional acquiescence was one of several criteria that might be considered when determining whether a presidential action is valid. Second, through a conversation (sometimes polite, sometimes not) between the majority and the dissent, *Medellín* illustrates the legal impracticability of judicial analysis in the zone of twilight as conceived by Jackson in *Youngstown*. Simply put, the debate between Roberts (majority) and Breyer (dissent) leads to the inescapable conclusion that Jackson’s category two, if it is to retain its political dimension, is not susceptible to legal rules or the standard techniques of judicial analysis. Ultimately, this debate ends in Roberts’s favor, with the congressional acquiescence doctrine operating as a map for maneuvering through the zone of twilight—a space once described by Jackson as being governed by “the imperative of events and contemporary imponderables.”¹⁹²

States will discharge its inter-national obligations under the [Avena] decision . . . by having State courts give effect to the decision in accordance with the general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Id.

¹⁸⁹ *Medellín v. Texas*, 552 U.S. 491, 506 (2008).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 526–27.

¹⁹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Thus, *Medellín* completes the transformation of Jackson's category two. In light of *Medellín*, the zone of twilight transforms from a description of a political reality, where the President's power to act is determined (and constrained) by the interaction between the executive and legislative branches, into a judicially manageable standard, where the President's legal authority to act (if it exists) is derived from discernible legislative intent, whether express or implied. In other words, *Medellín* completes the task, begun in *Dames & Moore*, of re-forming the zone of twilight from an area of nonjusticiable political discourse into one where the Court can rule, thus leaving the Court's imprimatur on the presidential action being challenged.

Chief Justice Roberts, writing for the majority, begins his discussion of President Bush's Memorandum by identifying Justice Jackson's *Youngstown* framework as the appropriate starting point for considering whether the Memorandum is legally valid and, as such, can force state courts to follow the procedures set forth in international treaties to which the United States is a party: "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."¹⁹³ Next, Roberts restates Jackson's three categories of presidential action. The restatement of the first and third categories closely mirrors Jackson's original:

First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." . . . Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"¹⁹⁴

However, when Roberts describes and then elaborates on Jackson's category two, he mischaracterizes it to the point of materially changing its meaning. To see how this semantic shift works, one must return first to Jackson's language in *Youngstown* and then to Rehnquist's slight twist on that language in *Dames & Moore*.

Recall that Jackson used "congressional inertia, indifference or quiescence" to describe the political conditions that may prompt a President to act:

[B]ut there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence *may sometimes, at least as a practical matter,*

¹⁹³ *Id.* at 494.

¹⁹⁴ *Medellín*, 552 U.S. at 494 (quoting *Youngstown*, 343 U.S. at 635, 637-38 (Jackson, J., concurring)).

enable, if not invite, measures on independent presidential responsibility.¹⁹⁵

In *Dames & Moore*, Rehnquist recharacterized congressional silence, treating it not as a description of a political condition precedent to presidential action, but as one criterion for determining whether that action was legally valid:

In such a case the analysis becomes more complicated, and *the validity of the President's action*, at least so far as separation-of-powers principles are concerned, *hinges on a consideration* of all the circumstances which might shed light on the views of the Legislative Branch toward such action, *including "congressional inertia, indifference or quiescence."*¹⁹⁶

Roberts then goes one step farther. He takes Rehnquist's suggestion from *Dames & Moore* that congressional silence or inaction is one factor among many that may "shed light on the views of the Legislative Branch"¹⁹⁷ and then states expressly that congressional acquiescence—on its own—is a sufficient basis from which to derive presidential authority to act. Consequently, *how* Roberts uses the terms "congressional inertia, indifference or quiescence"¹⁹⁸ changes them from descriptors of practical conditions of political reality to actual indicators of legislative intent. This likewise elevates their significance, as now they can be used to determine legally valid uses of presidential power.

Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a circumstance, *Presidential authority can derive support from "congressional inertia, indifference or quiescence."*¹⁹⁹

At this point, it is helpful to take a step back and examine some text that occurs earlier in the *Medellín* opinion. Roberts prefaced his recitation of Jackson's tripartite framework by reaffirming Justice Black's now-classic formula for discerning the legal sources of presidential power: "The President's authority to act, as with the exercise of any governmental power, 'must stem

¹⁹⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

¹⁹⁶ *Dames & Moore v. Reagan*, 453 U.S. 654, 668–69 (1981) (emphasis added) (quoting *Youngstown*, 343 U.S. at 637).

¹⁹⁷ *Id.* at 668.

¹⁹⁸ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

¹⁹⁹ *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (emphasis added) (quoting *Youngstown*, 343 U.S. at 637).

either from an act of Congress or from the Constitution itself.”²⁰⁰ Here, Roberts is structuring his opinion so as to maximize its rhetorical thrust and display its legal pedigree. Not only does he quote Justice Black’s “first principle” of presidential authority from *Youngstown*, he also cites to *Dames & Moore* as additional legal support. With a simple string citation, Roberts places *Dames & Moore*, a decision battered by commentary critical of its expansive allowance of presidential power,²⁰¹ on equal footing with *Youngstown*, a decision viewed as one of the bulwarks against executive excesses. This is quite a balancing act, but one with a distinct purpose. By treating *Dames & Moore* as equal to and consistent with *Youngstown*, Roberts lays the groundwork for accepting *Dames & Moore*’s use of the congressional acquiescence doctrine as a graft upon both Black’s majority opinion and Jackson’s concurrence in the earlier case.

From this point forward in the opinion, Roberts works within Jackson’s tripartite framework, but with the congressional acquiescence doctrine, as expounded in *Dames & Moore*, ready at hand. In effect then, Roberts collapses category two from inside the tent, using standard legal language that is at once non-threatening to the modern reader and erosive of Jackson’s original meaning. This can be seen by watching how Roberts disposes of each argument advanced by the government.

In its initial argument, the government asserted that the President’s Memorandum was “well grounded in the first category of Jackson’s *Youngstown* framework.”²⁰² The majority, however, rejected this contention and concluded that neither the Constitution nor the treaties themselves, which were reviewed and ratified by the Senate, gave the President the power to “execute” the treaties’ provisions absent enabling legislation from Congress; that is, the treaties were non-self-executing.²⁰³ The Court determined that, under the Constitution, Congress, not the President, implements a non-self-executing treaty²⁰⁴ and that, regardless of the *international* obligations the treaties imposed on the United States, the President had no authority to implement the terms of the treaties *domestically* without Congressional action.²⁰⁵ Moreover, the Court confirmed that the government had failed to cite

²⁰⁰ *Id.* For a Comment arguing that “[t]his formalistic quote provides the appropriate lens through which to view the rest of Chief Justice Roberts’s application of Justice Jackson’s taxonomy,” see Michael J. Turner, *Fade to Black: The Formalization of Jackson’s Youngstown Taxonomy* by Hamdan and Medellín, 58 AM. U. L. REV. 665, 685 (2009).

²⁰¹ See, e.g., Grabow, *supra* note 154.

²⁰² *Medellín*, 552 U.S. at 525.

²⁰³ *Id.* at 525–26.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 525 (“The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.”).

any statute authorizing the President to act.²⁰⁶ Furthermore, the Court found that, due to the need for congressional enabling legislation, “a non-self-executing treaty, by definition . . . precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.”²⁰⁷ Thus, the President’s action did not fall within Jackson’s category one.²⁰⁸

Having excluded the President’s Memorandum as an appropriate category one action, the Court placed the President’s assertion of authority within Jackson’s category three—an action taken contrary to discernible congressional intent.²⁰⁹ Roberts then had no difficulty dispatching the President’s Memorandum as legally defective. He noted that the Senate, during the ratification process, elected not to describe the treaties as self-executing—a non-action that could be construed as an implicit prohibition of contradictory presidential action.²¹⁰

Indeed, the preceding discussion should make clear that the non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so. When the President asserts the power to “enforce” a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson’s third category²¹¹

Roberts next turns to an issue that, while seemingly irrelevant to the majority’s holding, is rhetorically significant (i.e., whether the President’s Memorandum should be given the effect of domestic law by virtue of congressional acquiescence).²¹² The issue is perhaps irrelevant because, by this point in the opinion, the Court had already classified the President’s action under category three and determined that it was “incompatible with the expressed or implied will of Congress” and, therefore, defective as a matter of

²⁰⁶ *Id.* at 506.

²⁰⁷ *Id.* at 495.

²⁰⁸ *Id.* at 494–95.

²⁰⁹ *Id.* at 527.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 528.

law.²¹³ However, Roberts's discussion of congressional acquiescence is important rhetorically in that it advances a critical semantic shift—one that allows the Court to escape the nonjusticiability conundrum created by the political nature of Jackson's category two.

Roberts introduces the issue with a statement which indicates that the congressional acquiescence doctrine is what allows one to legally navigate the zone of twilight: "Under the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President's action falls within the second category."²¹⁴ This suggests that the congressional acquiescence doctrine derives expressly from Jackson's category two, which is false.

The question at issue when the Court considers congressional acquiescence is whether there was an implied grant of congressional authority sustaining the President's action.²¹⁵ That focus on implied congressional intent moves the analysis out of category two and into either category one or three. Jackson's category two contemplated those rare situations where the textual grant of power from the Constitution was vague and any textual delegation from Congress was absent.²¹⁶ For Jackson, category two covered those situations where no implied grants or denials of authority could be discerned from the actions of Congress, no matter how much the Court sifts through the historical evidence.

The majority opinions in both *Dames & Moore* and *Medellín* either missed this key point or disregarded it. According to Jackson's *Youngstown* concurrence, the President's authority to act, as described in category two, does not come from congressional intent, express or implied, but from his independent power under the Constitution to address unanticipated contingencies (i.e., those "imperatives of events" and "contemporary imponderables").²¹⁷ Rehnquist in *Dames & Moore* and Roberts in *Medellín* infused congressional intent into the analysis by claiming, incorrectly, that presidential actions falling within Jackson's category two could and should be evaluated using the congressional acquiescence doctrine.²¹⁸ This doctrine, however, was developed to discern implied congressional consent—the very thing that Jackson believed was missing from (and could not be found in) category two situations.

²¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²¹⁴ *Medellín*, 552 U.S. at 528.

²¹⁵ *Id.* 528–30.

²¹⁶ *Youngstown*, 343 U.S. at 637 n.3 (Jackson, J., concurring) ("Since the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it as an executive function in the face of judicial challenge and doubt.").

²¹⁷ *Id.* at 637.

²¹⁸ *Medellín*, 552 U.S. at 528; *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981).

The consequence of Roberts's semantic shift becomes evident as he develops his analysis of the authority of the President's Memorandum.²¹⁹ Having determined that the non-self-executing nature of the relevant treaties entails an implied congressional prohibition of contradictory presidential actions, the Court excludes the President's Memorandum from category two because congressional denial of authority is not absent.²²⁰ But Roberts does not rest here; he analyzes whether congressional acquiescence supports the President's authority to create domestic law pursuant to a non-self-executing treaty.²²¹ Not surprisingly, he finds that no such acquiescence exists:

In any event, even if we were persuaded that congressional acquiescence could support the President's asserted authority to create domestic law pursuant to a non-self executing treaty, such acquiescence does not exist here A review of the Executive's actions in . . . prior cases, however, cannot support the claim that Congress acquiesced in this particular exercise of Presidential authority, for none of them remotely involved transforming an international obligation into domestic law and thereby displacing state law.²²²

The upshot of this exercise is clear enough: The Supreme Court has now crystallized congressional acquiescence as the legal standard of Jackson's category two.²²³ Indeed, the seductiveness of this semantic shift becomes apparent as the opinion proceeds. If we accept Roberts's proposition that congressional acquiescence is the appropriate legal standard for judging those situations where the textual grant of power from the Constitution is vague or incomplete—the zone of twilight—then no argument based on the President's inherent authority to resolve international disputes will pass muster:

The United States relies on a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement. In these cases, this Court has explained that, if pervasive enough, a history of congressional acquiescence can be treated as a “gloss on ‘Executive Power’ vested in the President by § 1 of Art. II

[W]e find that our claims-settlement cases [e.g., *Dames & Moore*] do not support the authority that the President asserts in this case

²¹⁹ *Medellín*, 552 U.S. at 525–30.

²²⁰ *Id.* at 527.

²²¹ *Id.* at 528–30.

²²² *Id.* at 528.

²²³ *Id.*

The President's Memorandum is not supported by a "particularly longstanding practice" of congressional acquiescence²²⁴

Roberts's technique lets him retroactively plant the congressional acquiescence doctrine into Jackson's category two as if it had been there along, which it had not. And if it is true that the congressional acquiescence doctrine directs the analysis of presidential power in the zone of twilight—or, more accurately, takes the analysis out of the zone of twilight altogether—then the conclusion here is obvious: Roberts's analysis in *Medellín* is legally sound, and the President's action fails. But, this "truth" is imperfect, because it depends on the acceptance of the congressional acquiescence doctrine as the appropriate legal standard of Jackson's category two, which can only be accomplished by obliterating the political nature of the zone of twilight.

Jackson's category two contains two main components: congressional silence and contextual circumstance (i.e., "imperatives of events and contemporary imponderables"),²²⁵ both of which describe inescapable features of the political reality surrounding questions of presidential power. *Dames & Moore* and *Medellín* impair category two's integrity by attempting to bestow on it a legal functionality via the congressional acquiescence doctrine. The text of Jackson's category two recognizes distinctions in political activity represented by various degrees of congressional inaction (i.e., inertia, indifference, quiescence). *Dames & Moore* and *Medellín* reabsorb this inactivity and transform it from political identification to legal interpretation. Consequently, *Dames & Moore* and *Medellín* reorient the silence acknowledged in Jackson's opinion into implied authority or denial, requiring reclassification of any initial category two presidential action into category one or three. In the process, the political dimension of Jackson's category two is lost, and so too is that real and necessary space where the executive and legislative branches compete for power without judicial intervention.

V. A REPRESENTATION OF THE ETHOS OF JUDICIAL INTERPRETIVE ARROGANCE: *BOUMEDIENE V. BUSH*

Any discussion about *Youngstown* undertaken in a post-9/11 world lends itself to a consideration of the War on Terror cases.²²⁶ This Article

²²⁴ *Id.* at 530–32 (citations omitted).

²²⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²²⁶ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 702 (2008) (explaining that early scholarship on the War on Terror detainee cases continued to share the "conventional post-*Youngstown* orientation"); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050–51

follows that inclination by examining *Boumediene* as representative of the class of decisions flowing from the U.S. government's detention of enemy combatants at Guantanamo Bay, Cuba. However, it should be noted that *Boumediene* is not a classic *Youngstown* case because it does not ask *Youngstown*'s fundamental question: Does the executive have constitutional or congressional authority to act?²²⁷ Unlike *Youngstown*, *Boumediene* addresses congressional, not presidential action (although the executive branch is affected by implication). In particular, *Boumediene* considered the following questions: Did the Military Commissions Act ("MCA") of 2006²²⁸ strip the federal courts of jurisdiction to hear habeas petitions from aliens detained as enemy combatants at Guantanamo Bay?²²⁹ If so, then did the MCA violate the Suspension Clause of the Constitution?²³⁰ And finally, were the procedures set forth in the Detainee Treatment Act ("DTA") of 2005²³¹ an adequate substitute for habeas corpus?²³² Thus, *Boumediene* focused primarily on the constitutionality of congressional action.²³³

Still, Justice Kennedy's majority opinion in *Boumediene* provides an appropriate coda for this Article's discussion of *Youngstown*, not necessarily because of what the *Boumediene* opinion said but because of how it said it. The language of Kennedy's *Boumediene* opinion casts the Court in a highly authoritative and sometimes threatening posture toward the political branches. The Court's language in *Boumediene* abandoned the attitudes of Jackson's institutional flexibility or Frankfurter's institutional respect from *Youngstown*. In part, this can be explained by the government's legislative attempt to strip the federal judiciary of its jurisdiction to hear habeas writs brought by detainees. But this is not the whole story. Examining *Boumediene*'s linguistic cues reveals its connection to *Youngstown* in terms of judicial posture. Understanding *Boumediene* and *Youngstown* in terms of language reveals the former's connection to the latter and the significance of *Youngstown* as a story about judicial rather than executive power. But before examining the language of that opinion, it is important to establish the basic facts of the case.

(2005) (examining executive action in the war on terror under Justice Jackson's *Youngstown* approach); see also Samuel Issacharof & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 28 (2004) (describing Jackson's opinion in *Youngstown* as "the foundation of the constitutional inquiry").

²²⁷ See *Youngstown*, 343 U.S. at 585.

²²⁸ 28 U.S.C. § 2241(e) (Supp. I 2007).

²²⁹ See *Boumediene*, 553 U.S. at 736.

²³⁰ *Id.* at 771.

²³¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended at 28 U.S.C. § 2241(e) (2006)).

²³² *Boumediene*, 553 U.S. at 771-72.

²³³ *Id.* at 732-33.

A. *Case Summary of Boumediene v. Bush*

In *Boumediene*, the Supreme Court was confronted with statutes that not only suspended the rights of detainees to petition for habeas corpus but stripped the Court of jurisdiction to hear such petitions.²³⁴ As its first order of business, therefore, the Court had to decide whether the MCA could be read to deprive the federal courts of the authority to hear habeas petitions from the detainees.²³⁵ The Court found that the plain language of the statute did in fact remove such cases from the purview of the federal judiciary: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus”²³⁶ The Court also found that the legislative intent likewise answered this question in the affirmative.²³⁷ Accordingly, if the MCA were valid, then petitioners’ claims would have to be dismissed.²³⁸ Next, the Court had to consider whether the Suspension Clause²³⁹ reached the class of petitioners held as enemy combatants at Guantanamo Bay.²⁴⁰ If it did not reach them, the petitioners likewise would have no claim. On this point, the *Boumediene* Court reversed the D.C. Circuit Court’s ruling and held that the Suspension Clause did apply to Guantanamo Bay.²⁴¹ Given that the petitioners had access to the writ as a constitutional matter, the Supreme Court next considered whether the jurisdiction-stripping language of the MCA avoided violating the Suspension Clause because of the alternate writ procedures legislatively put in place by the DTA.²⁴² The Court ultimately held, however, that because the DTA’s substitute writ procedures were inadequate and ineffective, the jurisdiction-stripping language of Section 7 of the MCA was an unconstitutional suspension of the writ.²⁴³

²³⁴ Military Commissions Act of 2006, Pub. L. No. 109-366 Stat. 2600 (codified as amended at 28 U.S.C. § 2241 (e)(1) (Supp. I 2007)).

²³⁵ *Boumediene*, 553 U.S. at 736.

²³⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 28 U.S.C. § 2241(e)(1) (Supp. I 2007)).

²³⁷ *Boumediene*, 553 U.S. at 737–39.

²³⁸ *Id.* at 736.

²³⁹ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

²⁴⁰ *Boumediene*, 553 U.S. at 739.

²⁴¹ *Id.* at 771.

²⁴² *Id.* at 787–92.

²⁴³ *Id.* at 795.

B. Justice Kennedy's Majority Opinion: The Abandonment of Judicial Humility

Given that the *Boumediene* Court's decision dismantled the government's enemy combatant "detain and review" process, it is no surprise that the case has generated considerable scholarship regarding the applications and implications of the Court's decision.²⁴⁴ Rather than engage in a discussion about *Boumediene*'s doctrinal significance, however, this Article examines the writing of Justice Kennedy's majority opinion for a different reason. Specifically, I intend to uncover its judicial ethos with respect to separation of powers, especially as that ethos differs from the one expressed by the concurring opinions of Jackson and Frankfurter in *Youngstown*. As part of this analysis, I also examine the dissents of Chief Justice Roberts and Justice Scalia.

1. Kennedy's Defiance of the Political Branches Through Rhetorical Structure

The first thing to notice in Justice Kennedy's majority opinion is that it begins *in medias res*. That is, it starts not at the beginning but at some mid-point in the War on Terror narrative. For example, Kennedy does not discuss the attacks of 9/11 that led Congress to pass the statutes now under review. Nor does he make more than a passing reference to the ongoing wars in Iraq and Afghanistan or the near-global battle against al Qaeda—the very conflicts that resulted in the capture and detention of the petitioners.²⁴⁵ Instead, Kennedy

²⁴⁴ See, e.g., Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 103 (2011) (critically assessing the Court's treatment of the Insular Cases in *Boumediene*, 553 U.S. 723 (2008), and *Munaf v. Geren*, 553 U.S. 674 (2008), and arguing that "the Court misread the few Insular Cases it discussed, failed to consider many more Insular Cases that were on point, and misconstrued key historical facts regarding the U.S. intervention in Cuba and acquisition of the Guantanamo Bay naval facility"); see also Pedro A. Malavet, *The Inconvenience of a "Constitution [that] Follows the Flag . . . but Doesn't Quite Catch Up With It": From Downes v. Bidwell to Boumediene v. Bush*, 80 MISS. L.J. 181 (2010) (discussing the "Insular Cases in their historical and sociological context to illustrate how the Court's interpretation of the Territorial Clause constitutionally 'inconveniences' the territorial citizens by relegating them to second-class legal status"); Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) (examining the charge against the D.C. Circuit that it is actively undermining *Boumediene* by adopting holdings and deciding cases that have both the intent and the effect rendering the Supreme Court's 2008 decision ineffectual); Sonia R. Farber, Comment, *Forgotten at Guantanamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration*, 98 CALIF. L. REV. 989, 989 (2010) (arguing that *Boumediene*'s holding that the privilege of habeas corpus applies to enemy combatants detained at Guantanamo Bay should extend to refugees detained at the base).

²⁴⁵ The extent of Kennedy's discussion of these conflicts is the following:

Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the

jumps immediately to the narrow legal issues presented by the MCA and DTA—e.g., habeas corpus, the Suspension Clause, and extraterritorial sovereignty.²⁴⁶ As set up by Kennedy, the issues to be examined relate to the rights of the detainees, not to the larger national security and foreign policy problems associated with the War on Terror.

By structuring the opinion in this way, Kennedy downplays the significance of the war-making powers of the President and Congress. That the plaintiffs were captured and held at Guantanamo Bay as part of the nation's largest military operation since Vietnam does not enter the narrative. It is almost as if the war's duration operates to reduce its importance. So, rather than discuss the case in the context of the government's role as protector of national security—which has a positive connotation—the opinion focuses more narrowly on the government's role as “jailer”—which has a distinctly negative connotation.²⁴⁷ This largely explains the opinion's long excursus into the history of the writ of habeas corpus. Most of this history is irrelevant to the matter at hand, as few of the precedents discussed have any bearing on the precise legal issues raised by the petitioners, and many of the historical events that Kennedy relates took place in England and other countries long before the founding of the United States.²⁴⁸ Nevertheless, the examples Kennedy gives show that the writ has been a “bulwark” against government tyranny, especially as practiced by kings drunk with power.²⁴⁹ By deemphasizing the role of the President and Congress as protectors against terrorism and by associating them instead with historical abuses of power, the opinion diminishes their stature vis-à-vis that of the Court.

This is institutional defiance manifested in literary structure. The organizational scheme of Kennedy's opinion differs markedly from the structures used by Jackson and Frankfurter in their respective concurrences in *Youngstown*. Whereas Kennedy moves swiftly to connect the government, and more particularly, the President, to violations of the near-sacred right of habeas corpus,²⁵⁰ Jackson opens his opinion by describing the practical difficulties of governing in a dangerous modern world and decrying the fact that the judiciary

United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime that provided sanctuary for al Qaeda.

Boumediene, 553 U.S. at 734.

²⁴⁶ See *id.* at 732–33.

²⁴⁷ *Id.* at 741, 745–46, 780.

²⁴⁸ *Id.* at 739–42, 745.

²⁴⁹ *Id.* at 742 (Kennedy cited to Blackstone, who described the Habeas Corpus Act of 1679 as the “stable bulwark of our liberties”) (citation omitted).

²⁵⁰ *Id.* at 739–46.

has few tools with which to judge the actions of a sitting President.²⁵¹ And whereas Kennedy asserts without hesitation that it is the Court that determines “what the law is,”²⁵² Frankfurter begins by cautioning against any such judicial supremacy on matters of separation of power.²⁵³

The structure of Kennedy’s opinion, by placing the political branches in such a negative position, allows Kennedy to employ a vocabulary that is self-asserting, defiant, and, at times, threatening to the authority of the President and Congress. Moreover, as I will show below, it also allows Kennedy to omit certain words that one would otherwise expect to see in a separation of powers decision.

2. Kennedy’s Defiance of the Political Branches Through Linguistic Emphasis

Justice Kennedy’s opinion in *Boumediene* consumes some sixty-six pages.²⁵⁴ In the first ten of those sixty-six pages, he uses the word “king” (or some related term such as “monarchial” or “crown”) nearly twenty times.²⁵⁵ And in one two-paragraph burst, he uses the word “arbitrary” four times.²⁵⁶ “Tyranny” and “abuse” are sprinkled throughout.²⁵⁷ These words set a tone—one that announces from the very beginning that the Court is going to pay no deference to the government generally and to the executive branch in particular on matters relating to habeas corpus. Further, the words establish the political branches as the enemy of liberty, and the judiciary as its sole and ultimate protector. It is interesting to note that in the first sixty-four pages of the opinion, Kennedy never employs the terms “national security,” “foreign policy,” or “Commander in Chief.”²⁵⁸ It is as if these concepts have no tangible

²⁵¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (“A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”).

²⁵² *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

²⁵³ *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring) (“The Framers, however, did not make the judiciary the overseer of the government. . . . Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution.”).

²⁵⁴ *Boumediene*, 553 U.S. at 732–98.

²⁵⁵ *Id.* at 732–42.

²⁵⁶ *Id.* at 744–45.

²⁵⁷ *See, e.g., id.* at 742–43 (noting that “[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny” (quoting *Loving v. United States*, 517 U.S. 748, 756 (1996))); *id.* at 744 (“[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.” (quoting *THE FEDERALIST* NO. 84512 (Alexander Hamilton))).

²⁵⁸ *Boumediene*, 553 U.S. at 732–96.

connection to the issues that pertain to terrorist detainees. It is not until the very end of the opinion that Kennedy pays minor lip service to the role the President and Congress play in safeguarding the American people from threats posed by terrorists and others who would do the nation harm:

Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.²⁵⁹

However, before this brief nod to the executive can be registered, the opinion resumes its assertive judicial posture:

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.²⁶⁰

Note the language Kennedy uses here. The President, when acting as Commander in Chief, must have his powers "*vindicated*" and "*confirmed*" by federal judges.²⁶¹ And the exercise of judicial "*power*" is especially "*legitimate*" and "*necessary*" when addressing challenges to the executive branch's authority to imprison a person, even when that person is an enemy combatant.²⁶² Unlike the Court in Frankfurter's construction, which inquires into the President's actions reservedly, with much trepidation and deference, the Court in Kennedy's construction willingly sits in judgment of the executive branch.

From the passage quoted above, it would appear that the Court's transformation from judicial humility to judicial arrogance is complete. But Kennedy is not finished. In perhaps the most startling statement in the whole opinion, he suggests that the Court may, in the future, take a more active role in overseeing the executive's war making powers:

Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer

²⁵⁹ *Id.* at 797.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.²⁶³

It is difficult to imagine a more direct threat to the separation of powers than a judiciary that intercedes on matters of military affairs conducted in foreign countries. One need only read the dissents of Chief Justice Roberts and Justice Scalia to grasp the seriousness of this implication.

3. The Dissent of Chief Justice Roberts: Channeling Frankfurter

Recall that it was Chief Justice Roberts who, in his majority opinion in *Medellín*, used the “congressional acquiescence” doctrine to collapse Jackson’s category two (zone of twilight) so that virtually every action of the President could be placed in category one or three, where it would be subject to judicial review.²⁶⁴ By doing so, he helped to push the Court’s transformation toward an ethos of interpretive arrogance. In his *Boumediene* dissent, however, Roberts adopts a classic pose of judicial humility, at times sounding remarkably like Justice Frankfurter. For example, he reasserts two tenets of Frankfurter’s ideology: (1) that elected officials, not the unelected judiciary, should make foreign policy and decide how it is to be implemented,²⁶⁵ and (2) that the Court, to the greatest extent possible, should avoid deciding cases on constitutional grounds,²⁶⁶ especially when doing so results in judicial intrusion into the spheres of the political branches.²⁶⁷ I discuss these points further below.

Roberts immediately accuses the *Boumediene* majority of “overreaching.”²⁶⁸ In the first paragraph of his dissent, he criticizes the majority for striking down the DTA without first requiring the plaintiffs to exhaust the substitute habeas procedures afforded by that statute.²⁶⁹ He then describes what he believes is the true subtext of the majority’s opinion:

The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to

²⁶³ *Id.* at 797–98.

²⁶⁴ *See supra* Part III.B.2.

²⁶⁵ *Boumediene*, 553 U.S. at 826 (Roberts, C.J., dissenting).

²⁶⁶ *See id.* at 801–02 (“[T]he Court should have resolved these cases on other grounds. Habeas is most fundamentally a procedural right, a mechanism for contesting the legality of executive detention. The critical threshold question in these cases, prior to any inquiry about the writ’s scope, is whether the system the political branches designed protects whatever rights the detainees may possess.”).

²⁶⁷ *Id.* at 801.

²⁶⁸ *Id.* at 808 (“The majority’s overreaching is particularly egregious given the weakness of its objections to the DTA.”).

²⁶⁹ *Id.* at 801.

be defined by federal courts at some future date. One cannot help but think after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.²⁷⁰

The terms to focus on here are “the people’s representatives” and “control of federal policy.”²⁷¹ In employing the first, Roberts seeks immediately to distinguish the elected and politically accountable branches—the executive and the legislative—from the unelected and politically unaccountable branch—the judiciary. This is a classic Frankfurter move reprised in a contemporary narrative. And like Frankfurter, Roberts is not content to strike once and move on. He hits this same theme again three paragraphs later when criticizing the Court for substituting its preferred (albeit undefined) detainee review procedures for those crafted by Congress in the DTA:

But the habeas process the Court mandates will most likely end up looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners’ detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. *All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.*²⁷²

Again, the language Roberts uses is telling. Unlike Kennedy, Roberts not only employs the terms “foreign policy” and “national security,” he links them directly to the phrases “terrorist threat” and “American people.”²⁷³ Moreover, he momentarily replaces the common term “political branches” with “*elected* branches” to describe the presidency and Congress, thereby emphasizing their connection to the people whose safety they must protect.²⁷⁴ In this way, Roberts attempts to resuscitate the executive and legislative branches within the constitutional structure and reverse the damage done to their status by the majority opinion. For, as Roberts points out a few pages later, the members of Congress “take the same oath we [the justices of the Supreme Court] do to uphold the Constitution.”²⁷⁵ In elevating the political

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 802 (emphasis added).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 805.

branches to a position of parity with the Court, Roberts strikes a blow against the judicial supremacy articulated in Kennedy's opinion and returns us to Frankfurter's position that the Framers "did not make the judiciary the overseer of the government."²⁷⁶

This is not, however, the only homage that Roberts pays to Frankfurter. Throughout his dissent, Roberts chides the majority for deciding the case on constitutional and separation of powers grounds when it need not do so:

In the absence of any assessment of the DTA's remedies, the question whether detainees are entitled to habeas is an entirely speculative one. Our precedents have long counseled us to avoid deciding such hypothetical questions of constitutional law. This is a "fundamental rule of judicial restraint."

The Court acknowledges that "the ordinary course" would be not to decide the constitutionality of the DTA at this state, but abandons that "ordinary course" in light of the "gravity" of the constitutional issues presented and the prospect of additional delay. It is, however, precisely when the issues presented are grave that adherence to the ordinary course is most important. A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue they are following normal practices.²⁷⁷

This passage is remarkably reminiscent of the following quotation from Frankfurter's *Youngstown* concurrence:

A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.²⁷⁸

For Roberts, as for Frankfurter, the Court enters dangerous ground when it too eagerly seeks to define (or, in some cases, change) the boundaries

²⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

²⁷⁷ *Boumediene*, 553 U.S. at 805–06 (Roberts, C.J., dissenting) (citations omitted).

²⁷⁸ *Youngstown*, 343 U.S. at 595 (Frankfurter, J., concurring).

of power between the three branches of government. Frankfurter cautions that the Court should be “wary and humble” in such situations.²⁷⁹ Roberts is less abstract but equally emphatic. When he asks at the end of his dissent, “[W]ho has won?” he answers by showing that *no one* benefits from the majority’s incursion into the process by which the military determines which enemy combatants to detain and which to release— “[n]ot the detainees, [n]ot Congress,”²⁸⁰ not even the law of habeas corpus:

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 for the American people, who today lose a bit more control over the conduct of this Nation’s foreign policy to unelected, politically unaccountable judges.²⁸¹

Roberts’s dissent is a powerful piece of judicial writing, but it is powerful, in part, because it resonates with themes articulated by Justice Frankfurter in *Youngstown*. Moreover, it satisfies one’s sense of balance, as it provides a counterweight to the position taken by the Kennedy majority. It suggests that the Court’s posture of interpretive arrogance has gone too far in asserting its constitutional supremacy and that a return to judicial humility is in order. It is elegant in its defense of the political (or “elected”) branches while still being mindful of the Court’s responsibility to ensure that even enemy combatants are afforded some type of habeas rights.

4. The Dissent of Justice Scalia: Reasserting the Importance of Jackson’s “Imperatives of Events and Contemporary Imponderables”

In his *Youngstown* concurrence, Justice Jackson stated that where the President acts without benefit of established legal guidelines, “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”²⁸² Justice Scalia, in his dissent in *Boumediene*, uses this concept to mount a direct attack on the majority’s legalistic approach to the Guantanamo Bay detainee problem. As I pointed out above, Justice Kennedy’s opinion barely mentions the war or

²⁷⁹ *Id.* at 597.

²⁸⁰ *Boumediene*, 553 U.S. at 826 (Roberts, C.J., dissenting).

²⁸¹ *Id.*

²⁸² *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

terrorism;²⁸³ the analysis is narrowly focused on the issue of detention and access to courts. In this sense, it operates at significant remove from its underlying context. Justice Scalia, however, means to correct this. From the beginning of his dissent, he reminds the reader what is at stake and why there are detainees at Guantanamo Bay:

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen. On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.²⁸⁴

The rhetorical force of this paragraph is impressive. Americans, including Supreme Court justices, sometimes have short memories; but in these few sentences, three of which serve as casualty lists, Scalia not only reminds the reader how long the battle with “radical Islamists” has been going on, but how much has been lost in terms of human life and everyday freedom.²⁸⁵ In addition, the last two sentences, with their references to Armed forces “in the field” and the thirteen soldiers killed the previous week, underscore the ongoing and bloody nature of the conflict.²⁸⁶ All of this works to de-stabilize the issues addressed in the majority opinion, to muddy them up, as it were, with the “imperatives of events and contemporary imponderables.”²⁸⁷ As if Scalia’s point needed more emphasis, he goes on to assert that the majority’s opinion “will almost certainly cause more Americans to be killed,”²⁸⁸ thus implying that the Court will be culpable for any future casualties of terrorism.

Then, to show that the threat posed by detainees released from custody is not abstract, he cites news reports of former Guantanamo Bay inmates who “have returned to the battlefield” where they “have succeeded in carrying on

²⁸³ *Boumediene*, 553 U.S. at 734.

²⁸⁴ *Id.* at 827 (Scalia, J., dissenting) (citations omitted).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²⁸⁸ *Boumediene*, 553 U.S. at 828 (Scalia, J., dissenting).

their atrocities against innocent civilians.”²⁸⁹ The point of this rhetorical exercise, I believe, is to demonstrate that the foundational issues at hand relate not to legal procedure but to national security and military exigency—areas well outside the competence of the judiciary. For this reason, Scalia criticizes the Court’s arrogance that it knows how best to handle the unique threats posed by enemy combatants who are unattached to any standing army:

The Court today decrees that no good reason to accept the judgment of the other two branches is “apparent.” “The Government,” it declares, “presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.” What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows the least about the national security concerns that the subject entails.²⁹⁰

Not only does Scalia argue that the Court lacks the expertise necessary to judge the President and Congress on the issue of Guantanamo detainees, he suggests strongly that the legal rules regarding the application of habeas corpus outside the United States are so ambiguous as to be of no use. In such situations, contends Scalia, the Court should stay out of the debate:²⁹¹

The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. Together, these two concessions establish that it is (in the Court’s view) perfectly ambiguous whether the common-law writ would have provided a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.²⁹²

By taking this position, Scalia makes a gentle nod toward Jackson’s category two—the zone of twilight—first articulated in *Youngstown*.²⁹³ Like

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 831 (citations omitted).

²⁹¹ *Id.* at 832–33 (citations omitted).

²⁹² *Id.*

²⁹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Jackson, Scalia argues that the Court, when confronted with a controversy that is not susceptible to the application of clear legal rules, must abstain and let the political branches resolve the matter.²⁹⁴

Again, the attitude here is one of judicial humility. It argues for a return to constitutional parity among the three branches and expressly rejects the idea that the judiciary is the presumptive and dispositive authority on every issue that touches upon separation of powers. “What drives today’s decision,” writes Scalia, “is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy.”²⁹⁵ Scalia states that the majority “warps our Constitution” by “invoking judicially brainstormed separation-of-powers principles” to extend the reach of the right of habeas corpus to foreign enemy combatants held outside the United States.²⁹⁶ In the end, this “inflated notion of judicial supremacy” does more than undermine the power-sharing structure of the Constitution.²⁹⁷ For Scalia, it actually makes the world physically unsafe: “The Nation will live to regret what the Court has done today.”²⁹⁸

5. The Triumph of Interpretive Arrogance in *Boumediene*

Early in the majority opinion, Justice Kennedy states that the writ of habeas corpus is a “time-tested device” by which the judiciary “maintain[s] the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”²⁹⁹ The language employed clearly puts the judiciary on a constitutional plane superior to that of the other branches. Federal judges—not the President and not members of Congress—are given the tools and the authority to “maintain” the Constitution’s checks and balances and thereby protect liberty. In fact, within the habeas corpus context, the President and Congress are little more than prison wardens whose behavior must be monitored by the Court: “The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”³⁰⁰ What is so striking about this last sentence is the distance Kennedy places between the judiciary on one hand and the political branches on the other. When he refers to the latter as “jailer[s],”³⁰¹ he reduces them to a rhetorical pejorative and strips them of their role within the constitutional decision-making matrix.

²⁹⁴ *Boumediene*, 553 U.S. at 833 (Scalia, J., dissenting).

²⁹⁵ *Id.* at 842.

²⁹⁶ *Id.* at 849–50.

²⁹⁷ *Id.* at 858.

²⁹⁸ *Id.* at 850.

²⁹⁹ *Id.* at 745 (majority opinion)(quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

³⁰⁰ *Id.*

³⁰¹ *Id.*

It is beyond the scope of this article to examine whether the ultimate result in *Boumediene* is legally correct. In the end, the majority may be right: The DTA and MCA may be legally deficient in terms of the habeas corpus protections they provide enemy combatants.³⁰² And this is hardly the first case where the Court has ruled against a sitting President; one need only look at *Youngstown* to confirm this fact.³⁰³ Nevertheless, it is the ethos expressed in the *Boumediene* opinion that makes its comparison with *Youngstown* relevant. The language Kennedy uses gives no quarter to the political branches. He employs a vocabulary that is at times indignant and contemptuous, and at others aggressively self-asserting. As a decision issued more than fifty-five years after *Youngstown*, *Boumediene* reflects a judicial posture that assumes the preeminence of the Court's ability and authority to interpret the Constitution. Of course, on one level, *Boumediene* simply represents the government's struggle to balance freedom and security during the newly dawned age of terrorism. But there is more. Appreciating the linguistic signals in *Youngstown* in terms of their expression of judicial interpretive ethos and recognizing how post-*Youngstown* cases infused Frankfurter's language into Jackson's tripartite framework to enable this shift in judicial posture from humility to arrogance demonstrate *Youngstown* and *Boumediene*'s connection. In this sense, *Youngstown*'s linguistic legacy provides a new interpretive lens to understand the war on terror cases in terms of the Court's institutional development.

VI. CONCLUSION

As Justice Jackson's tripartite framework demonstrates, there is a natural inclination to label something so that it can be understood. *Youngstown* is the quintessential executive power case. *Boumediene* has found a home in the War on Terror Cases (or more specifically, the Detainee Cases). The problem with relying too heavily on the particular niche a case occupies is that identification may displace meaning. At the very least it can limit our understanding of connections between cases that at first blush seem inapposite.

In this Article, I have tried to show how language and structure in a judicial opinion signals judicial interpretive ethos. I have demonstrated how language creates an ethos that translates into institutional self-perception. And I have revealed how the merger of judicial representations of humility can create a platform for an institutional posture of arrogance. In *Youngstown*, it was a question of voice, how to express the philosophy of judicial restraint through an ethos of humility. Jackson and Frankfurter both advocated the same philosophy, but through a different linguistic model. In *Boumediene*, it was more a question of power. There is less fastidiousness with language. The

³⁰² *Id.* at 778–92.

³⁰³ *See, e.g.,* *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (limiting the President's removal power).

sentences are straightforward, direct, and declarative of an unapologetic posture of arrogance. In between, there are *Dames & Moore* and *Medellín*, where the infusion of Frankfurter's language into Jackson's framework works as a catalyst for the transformation of judicial posture.

One of the challenges inherent in this type of rhetorical orientation to case analysis is the indeterminacy of language and the perception that rhetoric is simply a way of dressing up lies and making poor decisions sound respectable. While healthy skepticism adds value, I for one caution against this reductionist view. Notwithstanding these concerns, my analysis in this Article suggests that attention to the language and structure in a judicial opinion is important for understanding changes in institutional structure and power boundaries.

In an interview just two years after his appointment to the Supreme Court, Chief Justice Roberts made the following comment about the importance for lawyers of paying attention to the language they use:

Language is the central tool of our trade [Words] are the building blocks of the law. And so if we're not fastidious . . . it dilutes the effectiveness and clarity of the law At every stage, the more careful [lawyers, legislators, and judges] are with their language, I think, the better job they're going to do in capturing in those words exactly what they want the law to do³⁰⁴

It is overbroad to think that there is hidden meaning lurking behind every word in every sentence. Such an approach to reading judicial opinions indulges too much beyond a critical tolerance for conspiracy. The more modest approach, however, recognizes that a linguistic interpretation adds value as a means to inform our understanding of the institutional development of the Court. Having seen this, one wonders how the linguistic value of the opinions of the Supreme Court will impact its institutional posture, as well as the doctrinal value of the body of law it develops, with Chief Justice Roberts at the helm.

³⁰⁴ Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 5 (2010).