Duke Law Journal

VOLUME 70 MARCH 2021 NUMBER 6

THE *YOUNGSTOWN* CANON: VETOED BILLS AND THE SEPARATION OF POWERS

KRISTEN E. EICHENSEHR†

ABSTRACT

As presidents make ever more expansive claims of executive power, Congress's ability and willingness to counter the executive is often limited. That makes all the more significant instances when Congress does overcome structural and political challenges to pass legislation to rein in the president. But thanks to the Supreme Court's invalidation of legislative vetoes in INS v. Chadha*, such congressional actions are necessarily subject to presidential veto. President Donald Trump, for example, vetoed joint resolutions aimed at restraining executive action relating to the border wall and war powers. Although vetoed bills are not binding law, this Article argues that neither are they legal nullities; instead, judges, executive branch lawyers, and other interpreters can use majoritarian congressional opposition to the executive as an interpretive tool. The result is a novel "*Youngstown *canon of construction": when Congress passes a bill or resolution by a majority of both houses and the president exercises the veto, preventing the act from becoming law, then the expressed congressional opposition to the president's view should be used to narrowly construe the underlying statutory or constitutional authority the president is claiming, if that*

† Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia School of Law. For helpful comments and conversations, I am grateful to Will Baude, Curtis Bradley, Sam Bray, Harlan Cohen, Ashley Deeks, Robert Goldstein, Oona Hathaway, Anita Krishnakumar, Jon Michaels, Victoria Nourse, Eric Posner, Saikrishna Prakash, Richard Re, Paul Stephan, Adam Winkler, and participants in the AALS Law and Interpretation Section Works-in-Progress Workshop, Northwestern Pritzker School of Law faculty workshop, and Southern California International Law Scholars Conference. Thanks to Ariel Cohen, Hannah Keefer, and Kimberly Turner for excellent research assistance.

authority is ambiguous. The proposed canon would help to counteract overbroad claims of executive power in important areas such as war powers, the National Emergencies Act, treaty termination, and the scope of federal preemption of state laws.

TABLE OF CONTENTS

Introduction 1246
I. *Youngstown* as a Canon 1249
A. *Youngstown* and Congressional Opposition 1249
B. Defining and Situating the *Youngstown* Canon 1254
C. Justifying the *Youngstown* Canon 1265
1. *Preserving the Separation of Powers and Constitutional Design* 1266
2. *Respecting the Democratic Pedigree of Vetoed Bills* ... 1269
3. *Redressing Bargains Disrupted by* Chadha 1274
4. *Clarifying Application of the* Youngstown *Framework* 1278
II. Applications 1285
A. War Powers 1286
B. Statutory Delegations Locked in by *Chadha* 1294
C. Congressional Action to Block Treaty Terminations 1301
D. The Scope of Federal Preemption 1309
III. Concerns and Consequences 1314
A. Cheap Talk and Symbolic Voting 1314
B. Notice and Retroactive Applicability 1316
C. Effects of Canon Adoption on Congressional Action ... 1318
Conclusion 1320

INTRODUCTION

Congress can't agree on much these days, and it's no secret that the legislature often has trouble reining in a determined president. But sometimes, at least, it tries. In several recent instances, Congress passed resolutions aimed at restraining the Trump administration. President Donald Trump, however, vetoed Congress's efforts. He issued the first veto of his presidency to defeat a joint resolution that would have terminated the national emergency he declared to pave the

way for constructing a border wall.[1] He vetoed another joint resolution directing the withdrawal of U.S. armed forces from hostilities in Yemen,[2] and yet another directing termination of hostilities with Iran in the wake of the killing of Major General Qassem Soleimani.[3]

In litigation over the border wall, the Trump administration argued that "Congress's failed attempt to override the President's veto of its disapproval of the national emergency declaration does not have the force of law or in any way restrict authority Congress previously granted to the Executive."[4] The first part of that sentence is correct as a matter of Supreme Court precedent. Legislative acts usually become binding law only if they are passed by majorities of both houses of Congress and signed into law by the president, or enacted by a supermajority of Congress after a presidential veto.[5] The vetoed joint resolutions were not. But is it really true that they cannot in *any* way cabin the executive?

This Article argues that in certain cases, courts, executive branch lawyers, and other interpreters can and should consider vetoed bills when construing the scope of presidential powers.[6] It proposes a *Youngstown* canon of construction, drawing inspiration from the insight in Justice Robert Jackson's *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*)[7] concurrence that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[8] The *Youngstown* canon would instruct that when Congress passes a bill or resolution by a majority of both houses and the president vetoes it, then the expressed

1. *See infra* notes 242–55 and accompanying text.

2. *See infra* notes 199–207 and accompanying text.

3. Message to the Senate Returning Without Approval Legislation To Terminate the Use of United States Armed Forces in Hostilities Against Iran, 2020 DAILY COMP. PRES. DOC. 1 (May 6, 2020) [hereinafter *Iran Veto*]; *see also* S.J. Res. 68, 116th Cong. § 2(a) (2020) (directing the termination of use of U.S. forces for hostilities with Iran).

4. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 27–28, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 4:19-cv-00892).

5. INS v. Chadha, 462 U.S. 919, 951 (1983). *But see* U.S. CONST. art. I, § 7 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

6. This Article builds upon ideas I first set out in a blog post. Kristen Eichensehr, *What To Do with Vetoed Bills*, JUST SEC. (Mar. 27, 2019), https://www.justsecurity.org/63380/what-to-do-with-vetoed-bills [https://perma.cc/2NYQ-6EZR].

7. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579 (1952).

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

congressional opposition to the president's view should be used to narrowly construe the underlying statutory or constitutional authority the president is claiming if that authority is ambiguous.[9] Using *Youngstown* as a canon of construction provides a way to account for congressional opposition to exercises of presidential power while also complying with the Supreme Court's decision in *INS v. Chadha*,[10] which held that legislative acts that do not comply with bicameralism and presentment cannot be legally binding.[11] The canon steers a middle course between treating vetoed bills as legal nullities and equating them with enacted statutes. It instructs that these bills are legally relevant as an input into statutory or constitutional construction without being legally binding.

Congress's attempts to restrain the Trump administration bring to the fore a larger problem: over the course of decades, the executive branch has accumulated power in ways that deviate from the allocation of authority that the Constitution envisions and contravene Congress's intent in coupling statutory delegations with legislative checks, later invalidated by the Supreme Court. Trump was not the first president to make expansive claims of executive power, and he won't be the last. The *Youngstown* canon can help to recalibrate the balance of power in Congress's favor and gird against future executive excesses.

This Article proceeds in three parts. Part I defines and explains the *Youngstown* canon and offers four normative justifications for its use. Part II explores the canon's practical application through several illustrative examples drawn from actual and hypothetical cases, including war powers, the National Emergencies Act ("NEA"), congressional action to block treaty termination, and the scope of federal preemption. Part III considers several likely concerns with the *Youngstown* canon and speculates about the possible consequences of its adoption.

---

9. I use "ambiguity" throughout this Article in the general sense often employed by courts and commentators to denote various forms of indeterminacy and uncertainty. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97 (2010) (explaining that "[i]n ordinary speech, . . . vagueness and ambiguity . . . are sometimes used interchangeably, and, when this is the case, they both mark a general lack of what we might call 'determinacy' (or 'clarity' or 'certainty') of meaning").

10. INS v. Chadha, 462 U.S. 919 (1983).

11. *Id.* at 951.

I. *YOUNGSTOWN* AS A CANON

The *Youngstown* canon both draws inspiration from Justice Jackson's iconic concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*) and sheds light on how best to apply it.[12] This Part reviews the *Youngstown* decision, defines and situates the *Youngstown* canon, and offers several justifications for the canon's use.

A. Youngstown *and Congressional Opposition*

In the midst of the Korean War and a labor dispute between steel workers and mill owners, President Harry Truman issued an executive order directing the secretary of commerce to seize control of U.S. steel mills to avert a work stoppage.[13] The mill owners, including Youngstown Sheet & Tube Co., sued, and in an opinion by Justice Hugo Black, the Court held the president's order unconstitutional.[14]

Over time, Jackson's concurring opinion has come to overshadow the majority.[15] Drawing on his prior experience as an executive branch

---

12. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); *see infra* Part I.C.4 (discussing how the canon clarifies the application of Jackson's tripartite *Youngstown* framework). Scholars of a more formalist or originalist bent have objected to Jackson's approach. *See, e.g.*, Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 512–13 (2002) (noting that they "do not believe that Justice Jackson's approach in *Youngstown* accurately captures the separation of powers"); Saikrishna Bangalore Prakash, Zivotofsky *and the Separation of Powers*, 2015 SUP. CT. REV. 1, 29–30 (critiquing Jackson's three-part framework on a variety of grounds, including that it is "quite vacuous" and "something of a doctrinal Rorschach test"). For purposes of this Article, I take as a given the conventional wisdom about the importance of Jackson's opinion to separation of powers jurisprudence. *See infra* note 15 (collecting sources).

13. *Youngstown*, 343 U.S. at 582–84.

14. *Id.* at 587, 589.

15. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 94 (2d ed. 1996) (calling Jackson's opinion "a starting point for constitutional discussion of concurrent powers"); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1257 (2018) (calling Jackson's framework "canonical"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2314 (2006) (calling Jackson's *Youngstown* opinion "the most celebrated judicial opinion of the separation-of-powers canon"); Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 266 (2010) (calling Jackson's tripartite framework "*Youngstown*'s enduring legacy"); *id.* at 269–70 (collecting quotations praising Jackson's opinion); *see also* Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 619–20 (2018) [hereinafter Eichensehr, *Conduct of Foreign Relations*] (noting that nineteen Supreme Court majority opinions, numerous Supreme Court separate opinions, and dozens of Office of Legal Counsel ("OLC") opinions had cited Jackson's concurrence through early 2018). Through the end of the Supreme Court's 2019 term in summer

lawyer,[16] Jackson noted "the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."[17] And he set out to create some.[18] Jackson described a tripartite framework for evaluating claims of executive power. In Category One, "the President acts pursuant to an express or implied authorization of Congress," and "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[19] In Category Two, "the President acts in absence of either a congressional grant or denial of authority," and he is therefore in a "zone of twilight" where the executive and Congress "may have concurrent authority, or in which its distribution is uncertain."[20] In Category Two, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[21] Finally, in Category Three, "the President takes measures incompatible with the expressed or implied will of Congress,"[22] and therefore, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of

---

2020, the statistic on citations to Jackson in majority opinions remains unchanged, but the opinion has garnered additional citations in significant separate opinions. *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., concurring in the judgment in part and dissenting in part) (citing Jackson's concurrence); Gundy v. United States, 139 S. Ct. 2116, 2137 n.42 (2019) (Gorsuch, J., dissenting) (same).

16. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (citing his prior experience as a "legal adviser to a President in time of transition and public anxiety"); *see also id.* at 647 ("[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.").

17. *Id.* at 634.

18. The frequency with which courts and commentators cite Jackson's opinion suggests that he succeeded, at least in creating a useful framework. Whether it is unambiguous is a separate matter.

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

20. *Id.* at 637.

21. *Id.* Jackson provides by far the least detail about the likely legal outcome with respect to Category Two. Instead of suggesting which way power leans, he notes "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* Commentators have rightly criticized the ambiguity inherent in Jackson's Category Two. *See, e.g.*, Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 603 (2008) ("[T]he soft law analytic frame makes clear that Justice Jackson's typology is actually incomplete. Speaking of congressional agreement, disapproval, or silence is unnecessarily crude. The House might authorize the presidential action and the Senate might expressly disavow it (or vice versa), creating a twilight of the twilight category.").

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

Congress over the matter."[23] Courts can uphold "exclusive Presidential control" in Category Three "only by disabling the Congress from acting upon the subject," and executive actions in this category, Jackson warned, "must be scrutinized with caution."[24] Although the tripartite framework is, as Jackson himself recognized, "over-simplified,"[25] it nonetheless provides a useful structure for understanding the separation of powers.

The framework's central insight is that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[26] Key to applying the framework and defining the scope of presidential powers is understanding what counts as congressional action relevant to the *Youngstown* analysis. Jackson spoke of congressional authorization, "congressional grant or denial of authority," and Congress's "express or implied will."[27] The most authoritative expressions of congressional views are undoubtedly those contained in enacted laws or ratified treaties, granting or delegating authority to the executive to act or prohibiting specific actions. But Jackson went further, contemplating implied authorization or the implied will of Congress as well.[28] *Youngstown* itself involved an implied prohibition by Congress. Three statutory schemes could potentially have allowed Truman to control the seized steel mills,[29] but Truman did not follow any of the available statutory options.[30] Instead, "[i]n choosing a different and inconsistent way of his own,"[31] the president fell into Category Three.[32] Still, in determining the implied will of Congress, Jackson extrapolated from enacted statutes, reasoning in a matter akin to the *expressio unius est exclusio*

23. *Id.*

24. *Id.* at 637–38.

25. *Id*. at 635.

26. *Id.*

27. *Id.* at 637.

28. *Cf.* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 188 (1994) ("*Youngstown* recognized what *Chadha* failed to recognize: Congress's 'voice' matters regarding the nature and scope of presidential power, and to hear that voice one must sometimes go beyond enacted authorizations or prohibitions.").

29. *See Youngstown*, 343 U.S. at 639 (Jackson, J., concurring) (discussing statutes).

30. *Id*.

31. *Id*. Indeed, as the majority opinion points out, Congress had considered and rejected a proposal to give the president authority to use governmental seizures "to solve labor disputes in order to prevent work stoppages." *Id.* at 586 (majority opinion).

32. *Id.* at 640 (Jackson, J., concurring).

alterius canon of statutory construction that Congress's approval of certain seizure mechanisms suggested its *disapproval* of others.[33]

Decades after *Youngstown*, the Supreme Court entrenched enacted statutes as the nearly exclusive means by which Congress could act with binding legal effect.[34] In *Chadha*, the Supreme Court considered the constitutionality of a one-house legislative veto[35]—one of hundreds of similar provisions that Congress had enacted in the twentieth century.[36] The Immigration and Nationality Act ("INA") gave the attorney general discretion to suspend the deportation and adjust the status of deportable aliens in the United States to lawful permanent residents, pursuant to certain conditions.[37] However, the INA specified that if either house of Congress passed a resolution disapproving "the suspension of such deportation, the Attorney General shall thereupon deport such alien."[38] Jagdish Rai Chadha was a deportable alien for whom an immigration judge and the attorney general recommended suspension of deportation.[39] The House passed a resolution of disapproval,[40] and the immigration judge reopened deportation proceedings.[41] Chadha challenged the constitutionality of the one-house legislative veto,[42] and ultimately, the Supreme Court agreed that the provision was unconstitutional.[43]

In an opinion by Chief Justice Warren Burger, the Court explained that "the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely

33. *Id.* at 639; 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2014) ("*Expressio unius* instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions." (footnotes omitted)).

34. Senate approvals of treaties, which are governed by the procedures set out in Article II, remain unaffected by the *Chadha* analysis.

35. INS v. Chadha, 462 U.S. 919, 923 (1983).

36. *See id.* at 944–45 (noting that the first legislative veto was enacted in 1932 and that 295 such provisions had been enacted overall).

37. *Id.* at 923–25 (citing Immigration and Nationality Act ("INA") § 244(a)(1), (c)(1)–(c)(2), 8 U.S.C. § 1254(a)(1), (c)(1)–(2) (1970)).

38. *Id.* at 925 (quoting INA § 244(c)(2), 8 U.S.C. § 1254(c)(2)).

39. *Id.* at 923–25.

40. *Id.* at 926–27.

41. *Id.* at 928.

42. *Id.*

43. *Id.*

wrought and exhaustively considered, procedure."[44] Congress cannot exercise legislative power except by complying with the bicameralism and presentment requirements set out in Article I.[45] The Court recognized that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Art. I,"[46] but established a presumption that acts by Congress are *legislative* acts, a presumption confirmed by the one-house resolution at issue.[47] The one-house resolution "was essentially legislative in purpose and effect" because it purported to "alter[] the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch."[48] Moreover, "[t]he legislative character of the one-House veto" was "confirmed by the character of the Congressional action it supplants": without the one-house veto, Congress would have had to pass legislation to alter Chadha's status.[49] The Court soundly rejected "utilitarian" arguments that the usefulness of the legislative veto provision should save it from unconstitutionality.[50]

The abiding lesson of *Chadha* is that legislative acts must conform to the bicameralism and presentment requirements of Article I, and, conversely, that attempted legislative acts that fall short of the Article I requirements cannot be treated as binding law. For the purposes of the *Youngstown* analysis, *Chadha* suggests that in most cases, what counts as congressional action is perfected *legislative* action—those actions that comply with Article I—and clear implications from enacted statutes, as evidenced by *Youngstown* itself.

Chadha was enormously disruptive to a number of existing statutory schemes. As the Court itself noted, and Justice Byron White emphasized in dissent,[51] Congress had used the Article I process to enact numerous delegations of power to the executive on the condition

44. *Id.* at 951.

45. *Id.*

46. *Id.* at 952.

47. *Id.* at 951–52.

48. *Id.* at 952.

49. *Id.* at 952–54.

50. *Id.* at 945.

51. *Id.* at 944–45; *id.* at 968 (White, J., dissenting) ("[O]ver the past five decades, the legislative veto has been placed in nearly 200 statutes . . . in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment, and the economy." (footnote omitted)).

that the delegations were subject to legislative vetoes—ways for Congress to pull back power through mechanisms that were not subject to the presidential veto. Although *Chadha* itself dealt only with a one-house legislative veto, the Court's reasoning strongly suggests that other sorts of legislative vetoes, including two-house legislative vetoes, are similarly impermissible.[52]

Enter the *Youngstown* canon.

B. Defining and Situating the Youngstown *Canon*

Canons of construction are judicially created principles that courts and other interpreters use to construe legal texts.[53] Scholars often group canons into three categories: textual, substantive, and extrinsic.[54] Textual canons are "inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the statute."[55] Textual canons include maxims such as *ejusdem generis*[56] and the rule against

52. *Chadha* formally involved a one-house negative legislative veto—that is, the statute "allow[ed] policy to be implemented unless Congress disapproves." Gersen & Posner, *supra* note 21, at 583. Nonetheless, its reasoning reached more broadly. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 523–24 (1992) (noting that *Chadha*'s "reasoning suggested the constitutional invalidity of two-house legislative vetoes and of legislative vetoes of agency rulemaking"); Gersen & Posner, *supra* note 21, at 583 (noting that the Supreme Court's "reasoning clearly suggested that the positive legislative or two-house veto would be unconstitutional as well").

53. *See, e.g.*, ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 114 (2d ed. 2002) ("Canons of construction are judicially crafted maxims or aphorisms for determining the meaning of statutes."); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013) (describing canons as "the default presumptions that judges apply to interpret ambiguous statutes").

54. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATIONS, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 448–49 (2014) (describing the three categories); Gluck & Bressman, *supra* note 53, at 924–25 (describing the three categories); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017) (describing "language canons and substantive canons").

55. ESKRIDGE ET AL., *supra* note 54, at 448.

56. *See* 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, *supra* note 33, § 47:17 (defining the canon to mean that "where general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (footnotes omitted)).

surplusage.[57] Substantive canons are "presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution,"[58] and they include well-known canons such as the rule of lenity and constitutional avoidance.[59] Extrinsic canons or "extrinsic aids . . . are presumptive rules telling the interpreter what other materials might be consulted to figure out what the statute means," including, most prominently, legislative history.[60]

The proposed *Youngstown* canon falls in the second category. It is a substantive canon that provides a way to account for congressional opposition to presidential exercises of power when a presidential veto stymies Congress from perfecting its opposition. The *Youngstown* canon can be stated as follows:

> When Congress passes a bill or resolution by a majority of both houses and the president exercises the veto, preventing the act from becoming law, then the expressed congressional opposition to the president's view should be used to narrowly construe the underlying statutory or constitutional authority the president is claiming if that authority is ambiguous.[61]

The *Youngstown* canon provides a way to account for congressional opposition to the president when constitutional or statutory authorities are ambiguous, but importantly, the canon is consistent with *Chadha*. The canon does not purport to give binding legal effect to bills passed by both houses of Congress but vetoed by the president, which *Chadha* would prohibit.[62] It respects the constitutional presentment requirement by maintaining a distinction between enacted laws, which have binding legal effect, and vetoed bills, which do not.[63] But the

---

57. *See* ESKRIDGE ET AL., *supra* note 54, at 467 (describing the "presumption . . . that every word and phrase adds something to the statutory command" and that "[a] construction that would leave without effect any part of the language of a statute will normally be rejected").

58. *Id.* at 448.

59. *See, e.g.*, Krishnakumar, *supra* note 54, at 833–35 (citing these and other examples of substantive canons).

60. ESKRIDGE ET AL., *supra* note 54, at 448–49.

61. See *supra* note 9 for the meaning of "ambiguity."

62. INS v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

63. *Cf.* Gersen & Posner, *supra* note 21, at 598 (identifying a "rule-of-law objection" or, some might say, formalist objection to using concurrent resolutions for interpretation on the grounds

canon suggests that vetoed bills can be one input into constructions of executive power and thereby have legal influence. In other words, the canon does not allow Congress to make law without the president, but it does ensure that Congress's views can be taken into account, at least when the existence or scope of the underlying authority for the president's action is ambiguous.

Not all vetoed bills have constitutional salience. Some bills and subsequent vetoes rest on pure policy disagreements, having nothing to do with the separation of powers.[64] Imagine, for example, that Congress passes a bill to raise taxes, and a president who campaigned on a no-new-taxes platform vetoes the tax hike.[65] Other vetoes, however, involve constitutional conflicts.[66] Consider, for example, vetoes asserting that Congress has infringed upon the executive's war powers,[67] power to conduct foreign relations,[68] or vetoes preventing

---

that "[i]f Congress can regulate with soft statutes, then the constitutional requirement of presentment is rendered void and the President's role in producing legislation is eliminated").

64. *See, e.g.*, Memorandum of Disapproval on the "Interstate Recognition of Notarizations Act of 2010," 2010 DAILY COMP. PRES. DOC. 1 (Oct. 8, 2010) (citing the need for "further deliberations about the possible unintended impact of H.R. 3808 . . . on consumer protections, including those for mortgages, before the bill can be finalized," noting that "[t]he authors of this bill no doubt had the best intentions in mind when trying to remove impediments to interstate commerce," and stating that the Obama administration "will work with them and other leaders in Congress to explore the best ways to achieve this goal going forward").

65. *Cf.* Message to the House of Representatives Returning Without Approval the Tax Fairness and Economic Growth Acceleration Act of 1992, 1 PUB. PAPERS 476, 477 (Mar. 20, 1992) (explaining the veto on the ground of policy disagreements with tax increases including that "[t]his is the wrong time to raise taxes, to increase the deficit, or to send a message of fiscal irresponsibility to financial markets"). One could argue that the *Youngstown* canon should apply even in such purely policy-based veto scenarios, but the justifications for considering the views of the later Congress on an existing statutory authority in such a case are, in my opinion, more subject to the criticisms associated with looking to subsequent legislative history. *See infra* notes 130–32 and accompanying text.

66. I use "involve" here rather than "assert" because the relevance of the *Youngstown* canon should not depend on whether the president overtly cites constitutional objections in a veto message. To put it another way, presidents should not be able to prevent application of the *Youngstown* canon in constitutional disputes with Congress merely by avoiding citations to constitutional authorities in their veto messages. This concern is largely hypothetical as presidents are not shy about claiming that Article II supports their vetoes, *see, e.g.*, *infra* notes 67–68, but it is worth flagging that the canon should not be so easily gamed or defeated.

67. *See, e.g.*, Veto of the War Powers Resolution, 1 PUB. PAPERS 893 (Oct. 24, 1973) (raising objections to the War Powers Resolution); *infra* notes 199–207 and accompanying text (discussing the veto of a war powers-related resolution).

68. *See, e.g.*, Message to the House of Representatives Returning Without Approval the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 1 PUB. PAPERS 1567–68 (Nov. 21, 1989) (objecting to statutory provisions that "threaten[] to subject to criminal investigation a

revisions to the scope of authority that Congress previously delegated to the president.[69] The *Youngstown* canon has the most force in these sorts of conflicts. In separation of powers disputes, the majoritarian actions of Congress have constitutional relevance. With the president's agreement or sufficient votes to override a veto, such actions set binding law. But even when they don't result in binding law, the *Youngstown* canon affords them interpretive relevance.

Judges use substantive canons, sometimes even the same substantive canon, in different ways. Judges may deploy a substantive canon "as a starting point for discussion, a balancing factor, or a decisive tiebreaker at the end of a discussion."[70] The *Youngstown* canon preserves this flexibility, allowing judges to tailor their application of the canon to their interpretive preferences and to the context of particular cases. A judge might cite the canon as a background principle to frame discussion of the level of deference due to the executive on claims about national security, and as a reason to curb such deference.[71] Consider, for example, litigation about the Trump administration's construction of the border wall that asks whether there is a national emergency that "requires the use of the armed forces" or whether constructing a border wall is a "military requirement."[72] Alternatively, a judge or other interpreter might reach for the *Youngstown* canon as a tiebreaker at the end of the analysis and use the canon to justify ruling against the executive only if ambiguity about the existence or scope of the executive's authority remains after exhausting other, traditional tools of statutory construction. For

---

wide range of entirely legitimate diplomatic activity, the authority and responsibility for which is vested in the executive branch by the Constitution").

69. *See, e.g.*, *infra* notes 242–55 and accompanying text (discussing the veto of a national emergency-related resolution).

70. ESKRIDGE ET AL., *supra* note 54, at 492. For an example of differing applications of the same canon, compare *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (describing the rule of lenity effectively as a tiebreaker that "applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended'" (quoting United States v. Wells, 519 U.S. 482, 499 (1997)), with *id.* at 148 (Ginsburg, J., dissenting) (describing the rule of lenity in terms approaching a presumption against the government in criminal cases).

71. As will become clear in the applications of the canon discussed in Part II, many separation-of-powers disputes involve foreign relations or national security, areas in which judges often afford the executive considerable deference based on expertise and other rationales. *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (discussing "national security fact deference" to the executive).

72. *See infra* Part II.B.

example, imagine a case in which the president argues that the Senate's prior consent to ratification of a treaty that includes a termination clause impliedly authorizes the president to terminate that treaty unilaterally, despite a later attempt by Congress to forbid the president from terminating the very same treaty. Courts might deploy the *Youngstown* canon there to rule against the president's claim that the treaty's termination clause impliedly authorizes his actions and puts him in *Youngstown* Category One, and instead determine that the case must be decided in *Youngstown* Category Two.[73]

The *Youngstown* canon can also interact with other canons, especially constitutional avoidance. Consider a case in which the executive argues that Congress has acquiesced in a claim of executive power. But Congress has passed and the president has vetoed bills that would have reined in executive action. Judges or other interpreters could cite the *Youngstown* canon for the proposition that the vetoed bills show that Congress has not acquiesced in the executive's broad claim.[74] Consideration of vetoed bills and Congress's nonacquiescence would raise questions about the constitutionality of the president's claim to power. Such questions in turn would trigger the canon of constitutional avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[75]

---

73. For a fuller discussion of this issue, see *infra* Part II.C.

74. For a detailed discussion of how the *Youngstown* canon interacts with historical gloss and claims of acquiescence, see *infra* notes 168–79 and accompanying text.

75. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (terming this "modern avoidance"); *see also* ESKRIDGE ET AL., *supra* note 54, at 517 (explaining that "[u]nder modern avoidance, the court does not actually decide the constitutional question before moving to an alternative interpretation," but instead "flags a *potential* constitutional question and so moves to an alternative interpretation to avoid having to address it").

The modern version of constitutional avoidance "supplanted" "classical avoidance," which requires that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act." Vermeule, *supra* (alteration in original) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)). As Professor Adrian Vermeule explains, "[t]he basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional." *Id.* The *Youngstown* canon and constitutional avoidance are similar in structure; both are "tool[s] for managing statutory ambiguity" that "do[] not eliminate ambiguity by resolving uncertainty about statutory meaning," but rather "manage[] ambiguity by assigning a consequence to the uncertainty."

The *Youngstown* canon could perhaps interact with constitutional avoidance in another way as well. When Congress has restrained the executive by statute, the executive may attempt to deploy constitutional avoidance in a "self-protective" way by "fabricating statutory ambiguity and exaggerating constitutional concerns" to trigger the canon of constitutional avoidance and justify narrowly construing the statutory restriction on executive power.[76] If Congress has successfully enacted one restriction on the executive and then the president vetoes congressional attempts to tighten the restriction further, the same ambiguity that the executive would have to cite to trigger constitutional avoidance would similarly trigger the *Youngstown* canon, and, along with it, the need to consider Congress's expressed opposition to the president's view. In this way, the *Youngstown* canon could help to counteract executive abuse of constitutional avoidance in circumstances where Congress has repeatedly attempted to limit executive power.

Importantly, judges are not the only interpreters who use canons. Congress knowingly drafts in the shadow of at least some canons,[77] and executive branch lawyers also deploy canons of construction.[78] In some cases, executive branch lawyers use canons in anticipation of litigation; if the United States will have to defend its constitutional or statutory interpretation in court, then it behooves executive branch lawyers to advise their clients on how judges are likely to view the interpretive question.[79] At the same time, many executive branch constitutional and

---

Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1240 (2006) (emphasis omitted).

76. Morrison, *supra* note 75, at 1236.

77. *See* Gluck & Bressman, *supra* note 53, at 906–08 (summarizing canons that Congress knows and does not know).

78. *See, e.g.*, Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Couns., U.S. Dep't of Just., to Att'ys of the Off. of the Assistant Att'y Gen., Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf [https://perma.cc/G34K-LQ7D] (explaining that, with respect to statutory interpretation, "OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts"); Morrison, *supra* note 75, at 1218–19 ("The [constitutional] avoidance canon appears frequently in OLC opinions; like the courts, OLC tends to regard it as a 'settled' rule." (quoting Limitations on the Detention Auth. of the Immigr. & Naturalization Serv., 27 Op. O.L.C. 58, 61 (2003))).

79. *Cf.* Morrison, *supra* note 75, at 1197 (arguing that when an agency knows that its statutory construction "will likely face judicial review, and if the reviewing court would predictably use a particular canon when construing the statute, then the agency has a tactical incentive to apply the canon even if the values supporting it apply only to the judiciary").

statutory interpretations are not subject to judicial review because of issues of justiciability and standing, among others.[80] In such cases, executive branch lawyers still have an independent duty to construe legal authorities accurately, and perhaps even a heightened duty of care because of the absence of independent judicial review.[81] Thus, to the extent that particular canons facilitate reaching the best or most accurate understanding of legal authorities, executive branch lawyers should use them, even in instances where judicial review is unlikely or impossible.

The proposed *Youngstown* canon is novel, but it is not unmoored from existing interpretive practice. As defined above, the *Youngstown* canon follows a well-trodden path of substantive canons that direct broad or narrow construction of statutes.[82]

Using ambiguity as the trigger for applying the *Youngstown* canon is in line with other constitutionally inflected substantive canons,[83] such as the principle of constitutional avoidance and the rule of lenity.[84]

---

80. *Id.* (noting that this is particularly true "[i]n matters implicating foreign affairs and national security" where "judicial review of executive branch statutory interpretation is extremely infrequent").

81. *Cf.* The Const. Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 180 (1996) (explaining that where judicial review is unavailable or deferential "the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements"); Morrison, *supra* note 75, at 1224 ("[T]he fact that the courts have essentially no role in implementing certain provisions of the Constitution does not license the executive branch to ignore those provisions. Instead, executive officials have a duty to abide by their own best understanding of the provisions.").

82. ESKRIDGE ET AL., *supra* note 54, at 490–91 (explaining that "[t]raditionally, the main substantive canons were directives to interpret different types of statutes 'liberally' or 'strictly,'" and citing the examples that "statutes in derogation of the common law were to be strictly interpreted," as are criminal statutes, per the rule of lenity). Substantive canons can also be phrased, however, as rebuttable presumptions or even as clear statement rules—"presumptions that can only be rebutted by express language in the text of the statute." *Id.* at 492–93. And through court decisions, canons sometimes evolve from one framing to another. *Id.* at 493 (noting "some mobility in the Court's articulation of these substantive canons" and citing the example of the transformation of the presumption against extraterritoriality from a presumption into a clear statement rule).

83. Of course, there exists some ambiguity about ambiguity. *See generally* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497 (2019) (discussing the role of ambiguity and its counterpart, legal clarity).

84. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012) ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."). Ambiguity is also the trigger for the rule of lenity. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 410 (2010) (discussing "the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of

Ambiguity is also the trigger for federalism canons,[85] which are not only substantive canons, but also, like the *Youngstown* canon, address structural constitutional issues, albeit ones focused on the allocation of power between the federal government and the states instead of among branches of the federal government.[86]

Giving interpretive effect to actions of Congress short of enacted legislation is not unique to this proposed canon.[87] Consider, for example, the interpretive principle known as the rejected proposal rule.[88] Pursuant to this principle, courts are reluctant to give a statute a meaning that Congress as a whole or even a congressional committee

---

lenity'" (quoting Cleveland v. United States, 531 U.S. 12, 25 (2000))). The rule of lenity is often explained as grounded in due process, specifically the need to put the public on fair notice of conduct that will be considered criminal. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931) (applying the rule of lenity to narrowly construe a statute and explaining that "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals," nonetheless "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed").

85. *See* Bond v. United States, 572 U.S. 844, 859–60 (2014) (specifying that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute," and explaining that "[i]n this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—'chemical weapon'—being defined" and "the deeply serious consequences of adopting such a boundless reading" before narrowly construing the statutory term); Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (using ambiguity as the trigger for the federalism canon).

86. *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (arguing that the nondelegation doctrine has persisted in "nondelegation canons" that "forbid administrative agencies from making decisions on their own" and instead require affirmative action by Congress).

87. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (suggesting that the Supreme Court uses interpretive canons to "articulate and protect underenforced constitutional norms," including the separation of powers).

88. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983) (reasoning that although "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation," here, "[i]n view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in [the agency interpretation at issue]"); Flood v. Kuhn, 407 U.S. 258, 283 (1972) (recounting how Congress, "with full and continuing . . . awareness," allowed baseball "to develop and to expand unhindered by federal legislative action" to subject it to antitrust laws over the course of decades and concluding that Congress's failure to pass "[r]emedial legislation [that] has been introduced repeatedly" constitutes "something other than mere congressional silence and passivity"); *see also* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 77 n.90 (2015) ("The Court has long applied a 'rejected proposal rule,' under which it refuses to construe statutes to incorporate provisions that Congress has expressly rejected.").

has considered and rejected.[89] When courts rely on the rejected proposal rule, they give interpretive weight to proposed bills and amendments that Congress *failed* to adopt. If even congressional *in*action and, as the rule's name suggests, *rejected* proposals are relevant interpretive guides in some circumstances, then logically *accepted* proposals—congressional action by a majority vote of both houses—should also be a relevant and even a superior guide to congressional intent.[90] The *Youngstown* canon relies on congressional action, not congressional disavowal or mere inaction. Short of overriding a veto, Congress cannot communicate its views any more clearly.

In addition, the Supreme Court looks to congressional actions short of enacted legislation when interpreting ambiguous constitutional provisions. For example, in *National Labor Relations Board v. Noel Canning*,[91] the Court considered the meaning of the Constitution's Recess Appointments Clause.[92] The Court determined that the Constitution's text was ambiguous with respect to whether presidents may make recess appointments during intrasession recesses and whether they may make recess appointments for vacancies that

89. *See, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 85 (1988) (describing the rejected proposal rule and noting "[w]here a committee, or one chamber of Congress, or a conference committee has voted against including specific language in a statute or an amendment to a statute, the Court will often refuse to read that interpretation into the statute").

Some rejected proposals may share similarities with vetoed bills. Consider a proposal discussed on the floor of both houses and voted down by a majority of each house. Such a circumstance shares a majoritarian aspect with the vetoed bill, albeit majoritarian *opposition* to action as well as bicameralism in a sense. Such characteristics might make courts and other interpreters give particular weight to the rejected proposal rule because it would be clear that the rejection resulted from significant congressional opposition, rather than some sort of preliminary vetogate. The rejected proposal rule and *Youngstown* canon could also apply together if, for example, the president sought statutory authorization from Congress, a majority of each house voted down the authorization, the president claimed authority from preexisting statutes, and then Congress attempted to rein in the president, provoking a veto. Both canons would operate to suggest the underlying statutory authority should be narrowly construed if, as seems likely, the existing authority is ambiguous.

90. *Cf.* Gersen & Posner, *supra* note 21, at 610 (arguing that "if subsequent congressional silence . . . is ever relevant for statutory interpretation, surely congressional voice (in the form of soft statutes) should be as well" because while "Congress may not always have an incentive to express its views candidly, . . . there is no reason to think that voice approved by a majority will be usually less reliable than silence" (footnotes omitted)).

91. NLRB v. Noel Canning, 573 U.S. 513 (2014).

92. *Id.* at 518–19.

begin prior to a recess.[93] Given the textual ambiguity, the Court "put significant weight upon historical practice,"[94] including actions of Congress. Among the congressional actions the Court considered were those by Senate committees—that is, actions clearly lacking the status of law or even the majoritarian aspect required for consideration of congressional action pursuant to the *Youngstown* canon.[95]

The proposed *Youngstown* canon is also consistent with scholarly proposals to give weight to congressional "soft law."[96] Soft law occurs in a variety of contexts,[97] but Professors Jacob Gersen and Eric Posner

---

93. *Id.* at 556 ("[T]he Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies.").

94. *Id.* at 524 (emphasis omitted).

95. *See id.* at 530–32 (discussing a Senate Judiciary Committee Report for the meaning of "recess" in the Constitution as including both intersession and intrasession recesses); *id.* at 547 (discussing a Senate Judiciary Committee Report regarding whether the Recess Appointments Clause permits presidential appointments to vacancies that begin prior to a recess); *see also id.* at 531 ("[N]either the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so."); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 66 n.273 (arguing that "[t]he majority in *Noel Canning* may have given a nudge to the consideration of soft law in" referring to the practice of Senate committees in interpreting the Recess Appointments Clause).

96. Gersen & Posner, *supra* note 21, at 612 ("A soft statute purporting to clarify the meaning of an earlier hard statute should not control if the text of the earlier statute is clear. In a case of statutory ambiguity however, a soft statute should be given weight."). *See generally* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012) (discussing congressional soft powers alongside the legislature's hard powers). In a related vein, Professor Abner S. Greene has proposed "[r]evising *Chadha*" such that, under certain circumstances, concurrent resolutions would be sufficient to block presidential actions. Greene, *supra* note 28, at 187, 193–95.

My proposed *Youngstown* canon differs from Greene's proposal in several ways. First, I focus primarily on constitutional questions, whereas he focuses in large part on statutory delegations. *See id.* at 193 (noting that he is "chiefly concerned" with "*Rust*-type case[s]," which involve a statutory delegation, though his "analysis applies . . . by analogy to the *Youngstown*-type case as well"). Second, his proposal is, as he concedes, not consistent with *Chadha* because it would give binding effect to certain concurrent resolutions. *See id.* at 187 (discussing "[r]evising *Chadha*"); *id.* at 195 (summarizing his proposal as follows: "If the President (or any executive agency) promulgates a regulation pursuant to a law that neither expressly authorizes presidential resolution of the particular issue nor clearly resolves the issue as a matter of antecedent congressional intent, a subsequent concurrent resolution should be construed as sufficient to block the regulation"). By contrast, my proposal is consistent with *Chadha* because it argues not for giving binding legal effect to congressional actions short of enacted law, but only for using such actions as one input into the process of interpreting certain constitutional or statutory provisions. In other words, vetoed bills can have legal influence, despite the fact that they do not have binding legal effect.

97. For discussions of soft law in the international and foreign relations law contexts, for example, see generally Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99

apply it to Congress, focusing in particular on congressional resolutions.[98] They define "soft law" as "a rule issued by a lawmaking authority that does not comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding."[99] Simple resolutions (passed by one house of Congress) and concurrent resolutions (passed by both houses of Congress, but not presented to the president) meet this definition,[100] and Gersen and Posner push back on what they label "[t]he conventional wisdom . . . that such measures lack importance because they do not create binding legal obligations."[101] Instead, they "advocate[] greater use of soft statutes by Congress and greater reliance on soft statu[t]es by courts" in both statutory interpretation and constitutional cases.[102]

Although Gersen and Posner do not discuss vetoed bills,[103] such bills or joint resolutions meet their definition of soft law: they are issued by Congress, but the lack of presidential signature renders them not legally binding.[104] In fact, vetoed bills present a *stronger* case for interpretive consideration than the simple and concurrent resolutions on which they focus. Vetoed bills are proto-laws. The legislators who

---

CORNELL L. REV. 735 (2014); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 (2010); and Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

98. Gersen & Posner, *supra* note 21, at 577–78 (identifying congressional resolutions as a type of soft law).

99. *Id.* at 579 (emphasis omitted) (footnote omitted).

100. *Id.* at 580 (noting that they focus on "[t]wo prime examples of soft legislation": simple resolutions passed by one house of Congress and concurrent resolutions passed by both houses of Congress (but *not* presented to the president)).

101. *Id.* at 578.

102. *Id.* at 617; *see also id.* at 607 (arguing that for statutory interpretation, a soft statute can be "useful" if it "reveals the legislative intent" underlying a "hard statute" that is relevant to interpretation of that hard statute or "if a later Congress's policy views are relevant for interpreting or construing the earlier statute"). *But see* Rankin M. Gibson, *Congressional Concurrent Resolutions: An Aid [to] Statutory Interpretation?*, 37 AM. BAR ASS'N J. 421, 482–83 (1951) (arguing against the use of concurrent resolutions to interpret previously enacted statutes).

103. Greene similarly does not explicitly address the interpretive effect of vetoed bills, but he seems implicitly to include vetoed bills through an unorthodox redefinition of concurrent resolutions. *See* Greene, *supra* note 28, at 193–94 (arguing that "only concurrent resolutions should suffice" as evidence of congressional intent, but noting that he "would count as a concurrent resolution any bill that gains majority support in both Houses, whether the bill is styled as a Concurrent Resolution and not submitted to the President, or styled as an Act or Joint Resolution and is submitted to the President").

104. Gersen & Posner, *supra* note 21, at 579.

voted for them *intended* them to be legally binding, but were thwarted by a presidential veto. The choice of a form of congressional action that can lead to enacted law sends a stronger signal of commitment on the part of Congress than even a concurrent resolution passed with the same majorities of both houses of Congress. The concurrent resolution, unlike the vetoed bill or joint resolution, was not designed to be, intended to become, or indeed capable of becoming legally binding.

The choice to use a bill or joint resolution instead of a concurrent resolution is not pure or costless signaling. In many cases, there may be uncertainty about a president's reaction to a bill that passes both houses of Congress.[105] There is at least some probability that the president will sign the bill into law (perhaps with a signing statement), such that legislators would have to live with the legally binding enactment. The choice of a potentially legally binding form of congressional action raises the stakes for Congress and makes it less likely that the legislature is engaged in cheap talk.[106] As Gersen and Posner explain, simple and concurrent resolutions are not costless for Congress to adopt.[107] Bills and joint resolutions are even more costly.

C. Justifying the Youngstown *Canon*

A variety of normative justifications support application of the *Youngstown* canon. The justifications range from the theoretical to the pragmatic, and the persuasiveness of each will depend to some extent on one's methodological priors. One's approach to interpretation may suggest a narrower or broader scope for application of the canon, but the reasons for applying the *Youngstown* canon are strongest in circumstances involving areas of shared constitutional power where the

105. In recent decades, the executive branch has typically conveyed its views on significant bills via the issuance of a Statement of Administration Policy ("SAP") prepared by the Office of Management and Budget. *See generally* MEGHAN M. STUESSY, CONG. RSCH. SERV., R44539, STATEMENTS OF ADMINISTRATION POLICY (2016), https://fas.org/sgp/crs/misc/R44539.pdf [https://perma.cc/5LP5-QPW6] (describing when and the process by which SAPs are produced). SAPs include the extent to which the president supports or opposes particular provisions or entire bills and may include veto threats. *Id.* at 1–3. Even when a SAP is issued for a particular bill, however, uncertainty may remain about whether the president will ultimately veto the bill if passed by Congress. *Id.* at Summary (explaining that when a SAP includes a veto threat "it appears in one of two ways: (1) a statement indicating that the President intends to veto the bill, or (2) a statement that agencies or senior advisors would recommend that the President veto the bill" and that "[t]hese two types indicate degrees of veto threat certainty").

106. *See infra* notes 330–36 and accompanying text.

107. *See infra* notes 330–31 and accompanying text.

allocation of authority between the legislature and the executive is unsettled. Such cases may involve direct constitutional disputes or statutory questions that nonetheless implicate such constitutional questions.

1. *Preserving the Separation of Powers and Constitutional Design.* One argument in favor of the *Youngstown* canon stems from the need to preserve checks and balances within the federal constitutional design. The Framers designed the Constitution with the aim of ensuring that the branches would check each other and so guard the liberty of the people.[108] This design is particularly salient where the Constitution divides authority over particular domains between multiple branches or gives competing powers to different branches, leaving ultimate authority underspecified.[109] The evident appeal of this structure is that the branches can effectively fight out constitutional disputes amongst themselves.

But the experience of U.S. government has come far from 1789. As Jackson noted in *Youngstown*, there is a "gap . . . between the President's paper powers and his real powers," and "[v]ast accretions of federal power . . . have magnified the scope of presidential activity."[110] That statement is even truer today. The executive has structural advantages over Congress that enable it to act quickly, definitively, and often independently of the legislature.[111] As Professor

108. *See* THE FEDERALIST NO. 51, at 320, 322 (James Madison) (Clinton Rossiter ed., 1961) (explaining that "maintaining . . . the necessary partition of power among the several departments, as laid down in the Constitution" requires "contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places" and that "[a]mbition must be made to counteract ambition"); *see also* Greene, *supra* note 28, at 125 ("To the extent that there is any 'original understanding' of the division of power between the President and Congress, it is that both are to be feared, neither is to be trusted, and if either one grows too strong we might be in trouble.").

109. *Cf.* Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting) (arguing that when an individual challenges governmental action "on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres," but when a challenge "pertains to separation of powers, and the political branches are . . . in disagreement, neither can be presumed correct").

110. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

111. *See, e.g.*, EDWIN S. CORWIN, THE PRESIDENT OFFICE AND POWERS: HISTORY AND ANALYSIS OF PRACTICE AND OPINION 200 (2d ed. 1941) (noting with respect to foreign policy that "the President has . . . certain great advantages" including "the *unity* of office, its capacity for

Louis Henkin explained, "[c]oncurrent power often begets a race for initiative and the President will usually 'get there first.'"[112]

Perhaps the biggest change since the Framing period, however, has been the rise of the party system.[113] Party loyalties have ensured that, contrary to the Framers' vision of interbranch competition, sometimes Congress helps the executive along in aggrandizing power at the expense of the legislature.[114] This is particularly likely when there is unified government, where one party controls both Congress and the presidency, making wins for one branch political wins for the other as well.[115]

The long, slow drift of power toward the executive for reasons of institutional design and party politics means that Congress faces an uphill battle when it attempts to assert its institutional interests as distinct from those of the president. The institutional interests of Congress and the president are especially likely to be in opposition—at least when there is divided government—on issues of concurrent constitutional powers, when both branches have some claim to power but its allocation between the two is unclear. In such cases, it becomes particularly important to understand Congress's institutional perspective.

---

secrecy and *despatch*, and its superior sources of *information*; to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time"); Eichensehr, *Conduct of Foreign Relations*, *supra* note 15, at 653–54 (discussing the executive's structural advantages over Congress); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999) (arguing that "the president's formal capacity for taking unilateral action, and thus for making law on his own" is "so central to an understanding of presidential power, that it virtually defines what is distinctively modern about the modern American presidency"); *cf.* NLRB v. Noel Canning, 573 U.S. 513, 532 (2014) ("[T]he Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose.").

112. HENKIN, *supra* note 15, at 93.

113. *See* Levinson & Pildes, *supra* note 15, at 2313 ("Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties.").

114. *Cf. Youngstown*, 343 U.S. at 645 (Jackson, J., concurring) (explaining that the "rise of the party system has made a significant extraconstitutional supplement to real executive power" and that with "[p]arty loyalties and interests, sometimes more binding than law," the president can "extend his effective control into branches of government other than his own and . . . often may win, as a political leader, what he cannot command under the Constitution").

115. *See* Levinson & Pildes, *supra* note 15, at 2329 (arguing that "when government is unified . . . , we should expect interbranch competition to dissipate," and instead will see "[i]ntraparty cooperation (as a strategy of interparty competition) smooth[] over branch boundaries and suppress[] the central dynamic assumed in the Madisonian model").

A superficially attractive approach for discerning Congress's views would be to look to enacted laws. However, considering only enacted laws is an insufficient and inaccurate method of determining Congress's perspective because—unless adopted over a presidential veto—enacted laws necessarily take into account the views of the president. The president is part of the legislative bargain needed to enact law, and so statutes reflect a compromise position.[116] Presidents have many mechanisms, such as executive orders, signing statements, and the like, through which to express their positions independent of Congress. Considering executive views expressed through such mechanisms plus enacted laws effectively double counts the position of the executive. Focusing only on enacted laws as a proxy for congressional views, therefore, risks systematically skewing the balance of constitutional powers in favor of the executive.[117]

To capture the views of the legislature requires looking to other congressional actions,[118] and the *Youngstown* canon helps to explain where one should look—namely, vetoed bills. Vetoed bills in areas of constitutional controversy are likely to more accurately convey the institutional views of Congress than enacted bills do, because vetoed bills do not reflect compromise—or at least, not much compromise—with the executive. It is possible that they include *some* attempt by Congress to anticipate and account for executive views in the hope of gaining presidential signature, but they are generally *less* influenced by executive views than enacted statutes to which the president agreed.

For similar reasons, Gersen and Posner argue that congressional resolutions "more accurately convey[] information about congressional views than hard law does," especially "in domains where Congress acts without the President's cooperation," such as "when it expresses its views about its constitutional role."[119] At least until the

116. *See, e.g.*, McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 719 (1992) ("[I]n the U.S. federal system, the President exercises considerable influence over legislation and is, therefore, a member of most enacting coalitions.").

117. *See, e.g.*, Gersen & Posner, *supra* note 21, at 614 ("Exclusive reliance on hard statutes will produce a body of constitutional law that is biased and incomplete.").

118. Professor Oona Hathaway has recently proposed other ways to empower Congress to act as an institutional counterweight to the executive, including establishing a congressional OLC that could issue authoritative opinions on legal questions and counter the pro-executive tilt of the Department of Justice OLC. Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 83–88 (2021).

119. Gersen & Posner, *supra* note 21, at 594; *see also id.* at 617 ("[S]oft statutes will generally be a superior mechanism for expressing legislative interpretations of the Constitution than

Youngstown canon is broadly adopted,[120] congressional resolutions may be an even purer indication of congressional views than vetoed bills because they do not attempt to gain presidential assent. But something is lost with nonbinding resolutions as well: because they have no possibility of becoming binding law, Congress may not take them as seriously or view them as an appropriate vehicle for expressing serious constitutional claims. Nonetheless, both nonbinding congressional resolutions and vetoed bills are better sources for discerning the institutional views of Congress than enacted statutes, which necessarily reflect an executive perspective as well.

The *Youngstown* canon's instruction to consider Congress's views helps to ensure that, in areas of shared, divided, and contested power, interpreters can take into account Congress's perspective, thus rebalancing the skew that comes from overreliance on enacted law. Doing so helps to preserve the balance of powers set out in the adversarial constitutional system.

2. *Respecting the Democratic Pedigree of Vetoed Bills.* The democratic pedigree of vetoed bills provides an additional justification for considering them in interpreting ambiguous provisions. Vetoed bills are majoritarian and thus on more robust democratic footing than other sources, like committee reports, floor statements, and congressional inaction, that courts and other interpreters often reference to understand Congress's views.[121] Considering congressional views expressed by vetoed bills as a canon of construction provides a way to give some meaning to congressional actions that would have constitutional significance, but for a presidential veto.[122] Such actions, of course, are not sufficient to make new law.[123] But at the same time, the views of Congress on the

committee hearings, floor speeches, confirmation hearings, committee reports, hard statutes, or the failure to enact hard statutes.").

120. The canon's adoption could decrease existing incentives for Congress to proceed via concurrent resolutions and instead prompt more frequent pushes to pass bills, even if the president ultimately vetoes them. *See infra* Part III.C.

121. Gersen & Posner, *supra* note 21, at 612 ("Unlike other forms of legislative history—commonly given weight by judges already—the soft statute is majoritarian and provides a better indication of congressional intent than congressional silence or inaction."); *see also supra* notes 87–90 and accompanying text (discussing congressional inaction and the rejected proposal rule).

122. For data on the frequency with which presidents veto legislation (and the frequency with which Congress overrides such vetoes), see MEGHAN M. STUESSY, CONG. RSCH. SERV., RS22188, REGULAR VETOES AND POCKET VETOES: IN BRIEF 3–7 (2019), https://fas.org/sgp/crs/misc/RS22188.pdf [https://perma.cc/LD6B-624T].

123. *See supra* notes 34–52 (discussing *INS v. Chadha*, 462 U.S. 919, 923 (1983)).

constitutional allocation of powers between branches of the federal government, expressed through a democratically legitimate vehicle, can cast light on constitutional debates.

Imagine, for example, a case in which the president argues that Congress has long acquiesced in unilateral executive action in a particular area. Majoritarian objection by Congress in the form of a bicamerally adopted bill—even if vetoed by the president—would provide strong evidence of Congress's nonacquiescence in the president's claim of authority. That nonacquiescence should be relevant for a court or executive branch interpreter in assessing historical gloss–related arguments about the validity of the president's claim. Or consider a case in which the president asserts that he is acting pursuant to a statutory delegation of power, but is pushing or possibly exceeding the delegation's bounds. Here, Congress's adoption of a bill to refute the president's reading of the scope of the delegation could serve as some evidence that the executive's reading is not the best or even a permissible one.[124] Assuming the president vetoes the bill, the *Youngstown* canon could be one consideration tipping the interpretive scales against the president by, for example, counteracting some of the usual deference courts afford the executive in national security or foreign relations cases.

The alternative of treating constitutional views expressed by a majority of both houses of Congress as a legal nullity is deeply unsatisfying. It seems especially odd to ignore congressional opposition to presidential action when that opposition is equal or greater in magnitude to the congressional action that the president claims puts him in *Youngstown* Category One. This would occur in instances where a president claims authority to act based on a statute, passed by a majority of both houses of Congress and signed by the president, but a subsequent Congress votes by an equal or greater majority to deny the president's authority to act. The only difference in the two situations is the view of the president; the intensity of the congressional view is at least equal across cases, if not greater in the subsequent attempt to restrict the president. In such a case, *Chadha* instructs that the later congressional opposition cannot be treated as binding law; it cannot undo an earlier delegation, absent presidential signature or a veto override. But the *Youngstown* canon charts a middle course. In such an instance, if there is ambiguity in the president's claim of authority—

124. *See infra* notes 208–14 and accompanying text (discussing the use of the 2002 Iraq Authorization for the Use of Military Force ("AUMF") to justify hostilities against Iran).

whether based in a statute or the Constitution—then Congress's later majoritarian opposition can shade the interpretation of the underlying authority. In other words, the *Youngstown* canon suggests that the president does not get the benefit of the interpretive doubt. Majority action by Congress can inflect interpretation in these circumstances. Using the expressed views of Congress—as reflected in majoritarian congressional action—as an interpretive tool to construe the scope of executive power bolsters the Constitution's allocation of powers to multiple branches of the federal government.[125]

The justification for valuing congressional views might be further strengthened if the congressional opposition to the president is bipartisan or otherwise crosses party lines, as in the case of majoritarian congressional opposition in a time of unified government. The existence of such opposition suggests both that the legislature's view results from something more than politics[126] and that it may represent a broad coalition, potentially enhancing its democratic pedigree.[127] At the same time, when government is divided—that is, when one party controls Congress and the opposite party holds the presidency—majoritarian action by Congress that falls purely along party lines should not be dismissed out of hand as mere politics. The congressional opposition may rest on strong constitutional objections, but the pull of party discipline may be even stronger.[128] In other words, congressional opposition that is not just bicameral but also *bipartisan* could act as a plus factor, strengthening the case for taking seriously Congress's views, but it is not a prerequisite.[129]

---

125. *Cf. Chadha*, 462 U.S. at 959–60 (Powell, J., concurring in the judgment) (arguing that because "Congress has included the [legislative] veto in literally hundreds of statutes, dating back to the 1930's[,] Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies" and that the Court should afford Congress the "respect due its judgment as a coordinate branch of Government" by deciding the case narrowly).

126. *See supra* notes 64–69 and accompanying text (distinguishing vetoes that are purely policy based from those that involve separation-of-powers disputes).

127. *Cf.* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1249 (2006) ("Given the diverse and eclectic makeup of Congress, any policy approved by that body will likely include a greater range of voices and input than a unilateral decision by the president.").

128. *Cf.* Levinson & Pildes, *supra* note 15, at 2352 (explaining that "[i]f a partisan majority in Congress generally shares the President's ideological and policy goals, abdication [of congressional prerogatives] might further the party's interest in uniting behind the President").

129. Notably, Professors Daryl Levinson and Richard Pildes propose that courts should consider whether government is unified or divided in construing statutes related to executive authority. *Id.* at 2354. Specifically, drawing on Jackson's *Youngstown* concurrence, they propose,

One might reasonably wonder whether considering vetoed bills is a species of subsequent legislative history. The Supreme Court has "often observed . . . that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"[130] The hazard is at least twofold. First, even among those whose interpretive approaches allow resort to congressional intent, "the legislative 'intent' relevant to statutory interpretation is the intent of the enacting Congress, not the continuing intent of subsequent Congresses."[131] And second, as a practical matter, subsequent legislative history "is highly unreliable and subject to strategic manipulation."[132]

As explained above, however, the views of Congress as expressed in vetoed bills need not fall prey to these criticisms of subsequent legislative history. The purpose of looking to vetoed bills is *not* to discern the intent of the enacting Congress. Courts and executive

---

"When it is not clear whether congressional statutes prohibit the executive action at issue or simply do not address it, and Congress is controlled by the President's political party, perhaps courts should . . . tilt[] toward prohibiting presidential action (particularly when that action amounts to a novel expansion of executive power)." *Id.* They also recognize "the flipside" of this rule, namely "that courts should more generously construe statutes as supporting executive authority when government is divided." *Id.* Although this proposal could encourage presidents to obtain congressional authorization during times of unified government, *id.* at 2354, 2356, it raises a number of difficulties. It could exacerbate the drift in power to the executive by incentivizing the president to seek broad statutory authorizations during unified government that will be difficult to pull back later and encouraging the president to push legal boundaries during times of divided government with the knowledge that he can veto any restrictions Congress attempts to adopt. Another challenge may come from courts' likely reaction to the proposal. As Levinson and Pildes themselves recognize, "it is hard to imagine courts expressly making legal doctrine turn on the partisan configuration of government (though it is easier to imagine them doing so sub rosa)." *Id.* at 2355. More fundamentally though, allowing the content of law to vary based solely on the political characteristics of the branches of the government, not any change to the law itself, creates due process-related challenges about notice and predictability. By contrast, the *Youngstown* canon asks courts and other interpreters to consider formal action by Congress—the passage of bills or joint resolutions. Although bipartisanship may provide evidence of the legal nature of congressional opposition and the breadth of the coalition supporting it, the proposed canon does not require courts to take politics or the existence of unified versus divided government into account.

130. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 355 (1998) (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 348–49 (1963)); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747 (2020) ("[S]peculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990))).

131. Eskridge, *supra* note 89, at 95; *see also* Gibson, *supra* note 102, at 483 ("A subsequently passed concurrent resolution should not be accepted as persuasive evidence of the legislative intent in fact existing at the time of the enactment of a public law.").

132. Eskridge, *supra* note 89, at 95.

interpreters can and should look to Congress's views for reasons other than discerning the intent of the Congress that initially enacted a statute. For many of the cases in which vetoed bills are at issue, the relevant text is the Constitution, not (or not exclusively) a statute.[133] In such cases, dismissing the views of the current Congress as mere subsequent legislative history would miss the point. Congress's action can be treated not as subsequent legislative history, but as current constitutional prerogative—as nonacquiescence to executive power grabs and legislative explication of the separation of powers. To be sure, Congress's views need not be determinative of the interpretive question at issue. Clear text—whether statutory or constitutional—will control. But where the relevant authority is unclear, there is no reason to exclude from consideration the views of Congress on a separation of powers question.

Moreover, for all its frequent statements about the hazards attending subsequent legislative history, the Court does rely on at least certain kinds of such history with some frequency. This is particularly true with respect to interpretive inferences from legislative inaction, where courts interpret a statute passed at Time One in light of subsequent Congresses' failures to act at Times Two, Three, etc.[134] Professor William Eskridge argues that "most of the legislative inaction cases . . . are inconsistent with the traditional proposition that the legislative 'intent' relevant to statutory interpretation is the intent of the enacting Congress, not the continuing intent of subsequent Congresses."[135] True, but such cases often cite congressional inaction not really for the purpose of determining congressional intent in the traditional sense—that is, the intent of the enacting Congress about a statute's meaning at the time of passage. Rather, they look to Congress's later inaction as evidence of congressional acquiescence in or approval of the actions of another branch, be it the judiciary or the

133. *See infra* Part II.B.

134. *See* Eskridge, *supra* note 89, at 84–85 ("In many of its acquiescence and reenactment cases, the Court fortifies its argument that legislative inaction has ratified the existing interpretation by pointing to the rejection of the opposite interpretation by either the enacting Congress or a subsequent one."); *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–44 (2000) (citing Congress's failure to adopt bills granting the Food and Drug Administration ("FDA") authority to regulate tobacco to support the holding that FDA lacked such authority); Flood v. Kuhn, 407 U.S. 258, 283 (1972) (discussing legislation that failed to pass in Congress over a period of fifty years).

135. Eskridge, *supra* note 89, at 95.

executive.[136] By a similar token, one could consider the subsequent views of Congress, as expressed in vetoed bills, when they show congressional *non*acquiescence or *disapproval* of another branch's action.[137] Looking to such congressional action also mitigates a pragmatic concern with drawing meaning from congressional inaction—namely, that it can be difficult to discern why Congress chose not to act.[138] With vetoed bills, such an assessment is unnecessary: Congress has acted.

3. *Redressing Bargains Disrupted by* Chadha. To push the argument further, another justification for applying the *Youngstown* canon even in certain cases involving purely statutory delegations of power rests on the idea of partially redressing the tremendous disruption to interbranch bargains that the Supreme Court caused in *Chadha*. The Court's decision to invalidate legislative vetoes severely disrupted the allocation of power that Congress had intended in numerous statutory schemes.[139] In hundreds of statutes, Congress delegated authority to the executive with the understanding that it could pull back that authority via mechanisms, like concurrent resolutions, that are not subject to presidential veto. *Chadha* rendered unconstitutional the legislative vetoes through which Congress had intended to police executive power; and in a later case, *Alaska Airlines*

136. *See, e.g.*, *Brown & Williamson*, 529 U.S. at 144 (explaining that Congress's later passage of specific statutes relating to tobacco regulation (and failure to pass statutes giving the FDA broad authority to regulate tobacco) "have effectively ratified the FDA's long-held position that it lacks jurisdiction under the . . . [original statute] to regulate tobacco products"); *Flood*, 407 U.S. at 283–84 (deeming Congress's failure over decades to overturn prior statutory interpretation decisions "positive inaction" and arguing that Congress "has clearly evinced a desire not to disapprove them legislatively").

137. *See supra* notes 87–90 (discussing the rejected proposal rule as an example of an existing interpretive principle relying on congressional inaction and the *Youngstown* canon's reliance on affirmative congressional action).

138. Eskridge, *supra* note 89, at 98 (identifying realist problems with inferring legislative intent from legislative inaction, in particular "problems of inference" in determining "[w]hat, in fact, does the inaction mean?").

139. For a compilation of statutory provisions impacted by *Chadha*, see THOMAS J. WICKHAM, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SIXTEENTH CONGRESS, H.R. DOC. NO. 115-177, at 1147–1338 (2019). Searching for "*Chadha*" highlights numerous statutory provisions affected by the Supreme Court's invalidation of the legislative veto. For an explanation of the congressional practice of legislative vetoes post-*Chadha*, see generally LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* (2005), http://www.loufisher.org/docs/lv/4116.pdf [https://perma.cc/QM4Q-RARE].

v. Brock,[140] the Court then "applied the standard severability test in a way that rendered all or virtually all legislative vetoes severable from their statutes."[141] The two decisions taken together have locked in delegations to the executive that Congress had intended to subject to ongoing congressional monitoring and clawback. Now, Congress can only readjust these delegations if the president agrees or if it can secure a supermajority to overcome a presidential veto.

Although this category of cases involves statutory delegations of power to the executive, there is a strong argument that even if later vetoed bills attempting to pull back on the delegations are technically subsequent legislative history, considering Congress's later expressed views is the least courts can do given that *Chadha* fundamentally disrupted the balance of power Congress intended to maintain. The operative text being interpreted in these cases is statutory—the scope of the statutory delegation—but the fundamental principles at issue are constitutional. The constitutional significance becomes apparent when looking at particular statutes that fall in this category, including the NEA and the War Powers Resolution ("WPR"), which are discussed in detail below.[142]

In practice, applying the *Youngstown* canon in this set of cases will interact with a severability analysis. Courts apply a presumption in favor of severability and follow a set of "fairly well established" rules, even if judges do not always apply them consistently.[143] In *Alaska Airlines*, the Court explained that the severability analysis turns on congressional intent.[144] The Court will decline to sever an unconstitutional provision "if the balance of the legislation is incapable of functioning independently" or if the remaining statute "is legislation

140. Alaska Airlines v. Brock, 480 U.S. 678, 697 (1987) (severing a legislative veto provision because the Court "cannot conclude that Congress would have failed to enact the Airline Deregulation Act . . . if the legislative veto had not been included").

141. Eskridge & Ferejohn, *supra* note 52, at 524.

142. *See infra* Parts II.A–B.

143. Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 884 (2005); *see also* ESKRIDGE ET AL., *supra* note 54, at 529–30 (2014) (noting that the Supreme Court "has not always applied consistent criteria to decide" severability questions and instead "applies what have been identified as multiple tests," including (1) "whether the statute *works* without the severed portion in the way that Congress *intended*"; (2) "whether Congress would have *enacted* the law absent the severed provisions"; (3) "whether the remaining provisions are *capable of functioning independently*"; and (4) whether Congress included "a *severability clause* in the statute itself declaring Congress's intentions").

144. *See Alaska Airlines*, 480 U.S. at 684.

that Congress would not have enacted."[145] The Court explained that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress."[146] With respect to severing unconstitutional legislative veto provisions, the Court was not blind to the separation of powers consequences of its *Chadha* decision, instead noting that "the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government."[147] The Court explained that with respect to legislative vetoes, courts should "consider the nature of the delegated authority that Congress made subject to a veto" because "[s]ome delegations of power to the Executive . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism."[148]

The *Youngstown* canon could interact with severability analysis in two ways. First, and most straightforwardly, the views of the current Congress on a prior delegation of authority—when that authority was made subject to a legislative veto later rendered unconstitutional—could be considered as part of the analysis of the "nature of the delegated authority" per *Alaska Airlines*.[149] Congressional attempts to push back on continued executive exercise of previously delegated authority in these circumstances may be taken as evidence that Congress would *not* have delegated in the first instance, and, therefore, that the presumption in favor of severability should be overcome. Here, the *Youngstown* canon's instruction to consider Congress's vetoed views functions as a counter-canon to the presumption in favor

145. *Id.* at 684–85; *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 291 (1994) ("A court can hold an invalid provision of a statute severable if: (1) the remaining statute functions as a coherent whole; and (2) the evidence does not show that Congress would not have enacted the statute absent the invalid provision."); Metzger, *supra* note 143, at 884 ("Severability in regard to federal statutes is ostensibly a question of congressional intent and functionality: Would Congress have enacted the remaining provisions without the severed portions, and can the remaining portions function independently?"); Vermeule, *supra* note 75, at 1950 ("[C]ourts presume that the constitutionally valid applications of statutes should be severed from any constitutionally invalid applications, leaving the valid applications in force, unless Congress would not have intended the valid applications to stand alone.").

146. *Alaska Airlines*, 480 U.S. at 685; *see also* Gluck, *supra* note 88, at 92 (explaining that "the presumption in favor of severability . . . centers almost entirely on the question of whether excising only the objectionable part of a statute will allow it to 'function' as 'Congress intended'").

147. *Alaska Airlines*, 480 U.S. at 685.

148. *Id.*

149. *Id.*

of severability. Alternatively, even if the *Youngstown* canon's focus on the current views of Congress is regarded as insufficient to rebut the presumption in favor of severing the unconstitutional legislative veto, the canon could nonetheless be deployed to narrowly construe the delegated authority in the remaining part of the statute, to the extent that such authority is ambiguous.

Used in either fashion, the majority votes of both houses of Congress that form the basis for the relevant action for the *Youngstown* canon are clearer expressions of Congress's views than the imaginative speculation that severability doctrine currently directs judges to undertake. Severability doctrine asks courts to engage in a hypothetical and counterfactual inquiry about "what the legislature would have done" if it had known that courts would hold a provision unconstitutional, "not what the legislature actually did."[150] This inquiry "often calls for rank speculation."[151] Better than such speculation is the *Youngstown* canon's ability to account for Congress's perspective, expressed in a majoritarian process and subsequent to understanding the invalidity of the legislative veto provision that the enacting Congress intended to ensure an ongoing check on the executive.[152]

---

150. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 744 (2010); *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2350 (2020) (plurality opinion) (explaining that "absent a severability or nonseverability clause, a court often cannot really know what the two Houses of Congress and the President from the time of original enactment of a law would have wanted if one provision of a law were later declared unconstitutional" and noting that "this formulation often leads to an analytical dead end").

151. Walsh, *supra* note 150, at 753; *see also* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 211 (1993) (criticizing the "present test for severability" on the ground that "in asking what the legislature would have done if it had known that part of a law would be invalidated, the test calls for an 'answer' that is often little more than speculation"); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 405 (2005) ("[C]ourts conducting severability analysis routinely have to speculate about how the enacting Congress would have answered a question that it did not actually face.").

152. Scholars have noted severability doctrine's risk to the balance of powers between the legislature and judiciary. *See, e.g.*, Dorf, *supra* note 145, at 292–93 (noting that severability doctrine's "heavy bias towards finding statutes severable threatens the separation of powers between Congress and the judiciary" because in severing unconstitutional provisions, the court "substitutes a judicially rewritten law"). This risk is further heightened where the statute the judiciary is rewriting implicates the balance of powers between the political branches. Although use of the *Youngstown* canon in these circumstances may be subject to the subsequent legislative history critique discussed above, *see supra* notes 130–35 and accompanying text, an exception to this critique may be warranted given the Court's creation of and reliance on an amorphous test of imaginative construction of supposed congressional views. The question becomes whose views should be substituted for those of the enacting Congress: The judiciary's or a later Congress's?

4. *Clarifying Application of the* Youngstown *Framework.* A final justification for and benefit of the *Youngstown* canon stems from its interaction with Jackson's *Youngstown* framework. Despite its frequent invocation and canonical status,[153] Jackson's tripartite scheme is rather underspecified and, as Jackson himself called it, "over-simplified."[154] The framework is underspecified especially with respect to Category Two cases, where it provides little guidance on case outcomes and even on the nature of the category itself.[155] Professor Laurence Tribe has criticized "the nearly sacrosanct triptych" as "deeply ambiguous on the key question of what to make of congressional silence."[156] The framework is oversimplified in suggesting that the three categories are clearly divisible. Rather, as the Supreme Court itself later explained, "executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[157] The *Youngstown* canon can help clarify application of Jackson's *Youngstown* framework in at least two ways.

First, the *Youngstown* canon suggests a way—consistent with *Chadha*—to address congressional opposition in cases where the president claims *implied* authorization from Congress. Jackson included within Category One instances where "the President acts pursuant to an express *or implied* authorization of Congress."[158] The most significant case in which the Supreme Court has found implied authorization is *Dames & Moore v. Regan*.[159] There, the Court assessed the lawfulness of executive actions related to the Iran hostage crisis,

---

Especially in separation of powers disputes between the executive and the legislature, considering the view of Congress—*any* Congress—may be preferable.

153. *See supra* note 15 and accompanying text.

154. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

155. *See* Eichensehr, *Conduct of Foreign Relations*, *supra* note 15, at 652–55 (discussing indeterminacy with respect to *Youngstown* Category Two). For an illuminating study of the diverse ways that lower federal courts approach and attempt to avoid *Youngstown* Category Two, see Michael Coenen & Scott M. Sullivan, *The Elusive Zone of Twilight*, 62 B.C. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583471 [https://perma.cc/89PL-GUZD].

156. Laurence H. Tribe, *Transcending the* Youngstown *Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. F. 86, 91 (2016).

157. Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

158. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (emphasis added).

159. Dames & Moore v. Regan, 453 U.S. 654 (1981).

including whether the president could suspend claims against Iran that remained pending in U.S. courts. The Court considered several statutes and determined that none "constitute[d] specific authorization of the President's action suspending claims."[160] Nonetheless, the Court considered them "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[161] The Court also noted a lack of congressional opposition and a "history of congressional acquiescence in conduct of the sort engaged in by the President."[162] In tension with *Youngstown* itself, where close-but-not-quite statutes were cited as evidence that Congress had rejected the president's claimed authority, the Court in *Dames & Moore* concluded that "the President was authorized to suspend pending claims" and that "Congress may be considered to have consented to the President's action."[163]

The idea of implied authorizations being sufficient for Category One may be troubling in and of itself.[164] Category One, after all, comes with "the strongest of presumptions and the widest latitude of judicial interpretation."[165] Presidents have an incentive to attempt to claim that Congress has impliedly authorized their actions, putting them in Category One. And courts may have an incentive to accept such claims because it simplifies their ultimate task of resolving the constitutionality of executive action, rather than admitting that

160. *Id.* at 677.

161. *Id.*

162. *Id.* at 678–79.

163. *Id.* at 686.

164. *Cf.* Tribe, *supra* note 156, at 92–93 (arguing that the bicameralism and presentment requirements "exist both to prevent the gradual deformation of our governmental structure and to protect individual liberty," and that "[b]y ignoring these obstacles, Jackson's celebrated *Youngstown* concurrence invites courts to give the force of law to extra-constitutional congressional action by directing judicial attention to the ineffable, and judicially constructed, 'implied will of Congress' rather than to the actual terms of duly enacted laws" (footnote omitted)). Tribe's main concern seems to be that considering the implied will of Congress empowers Congress to avoid bicameralism and presentment. I see a comparatively greater risk in the executive over-claiming authorization from Congress and convincing courts that executive action falls in Category One, with its thumb on the scale in the president's favor, rather than Category Two.

165. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Congress is silent and grappling with the indeterminacy of *Youngstown* Category Two.[166]

But for congressional prerogatives, implied authorizations are especially problematic. By definition, such cases rely on actions by Congress that *do not* authorize presidential action, perhaps combined with congressional *inaction*, which may be constitutionally meaningful or may simply result from institutional challenges and political gridlock. Here, the *Youngstown* canon can help. The canon ensures that explicit congressional action, even when vetoed by the president, counts in the *Youngstown* calculus.

Imagine a case in which the president appears poised to claim implied congressional authorization for a particular action that he could not take acting alone or that at least would be on shaky constitutional ground if done based solely on executive power. Congress then reacts by passing a bill explicitly denying the president the authority, but the president vetoes the bill. If there is ambiguity about the scope of the president's constitutional authority, as there often would be in this situation, the *Youngstown* canon instructs courts to construe the president's claimed authority narrowly. The canon therefore ensures that congressional opposition—expressed in a majoritarian fashion—is weighed against executive claims of implied authorization. The canon does not give the vetoed bill binding legal effect, which would run afoul of *Chadha*, but it ensures that the most explicit and on-point expression of Congress's views on a particular executive action can influence assessments of implied authorization and congressional acquiescence.

In some ways, *Dames & Moore* was an easy case for implied authorization because Congress had not objected in any way to the president's settlement of the hostage crisis or earlier claims settlements by the executive. The Court noted that "Congress has not enacted legislation, or *even passed a resolution*, indicating its displeasure with the Agreement," and "[w]e are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority."[167] The Court's suggestion that even a nonbinding resolution might have been sufficient to alter its analysis

166. *Cf.* Levinson & Pildes, *supra* note 15, at 2353–54 (arguing that to avoid "Justice Jackson's purgatorial 'zone of twilight,' . . . judges frequently attribute to vague legislation a 'clear' congressional endorsement (or sometimes, a 'clear' congressional prohibition) of the executive action at issue").

167. *Dames & Moore*, 453 U.S. at 687–88 (emphasis added).

lends credence to the *Youngstown* canon's approach. Neither congressional action—a resolution or a vetoed bill—would necessarily be determinative of the outcome of the ultimate constitutional question, but both could be relevant.

Second, the *Youngstown* canon can help to clarify the application of the *Youngstown* framework through its interaction with historical gloss. The idea of historical gloss is often traced to Justice Felix Frankfurter's concurring opinion in *Youngstown*. Frankfurter explained, "Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."[168] He counseled that

> 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 . . . may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[169]

Historical gloss can be relevant to any of Jackson's three *Youngstown* categories. Longstanding practice can demonstrate congressional approval or disapproval of executive action as required for Categories One and Three, or a longstanding practice of congressional silence may be evidence of the distribution of constitutional authority in the Category Two "zone of twilight."[170] The "most common reason" for invocation of historical practice in separation of powers disputes is "the idea that the cited practice involves the 'acquiescence' of one branch in the actions of the other"—typically, congressional acquiescence in the executive's actions.[171]

Invocations of historical gloss raise the issue of what it means for Congress to "question" executive practice. The clearest mechanism for Congress to question or register objections to executive action is, of course, enactment of a law, either with the president's concurrence or over the president's veto. As explained above, however, in constitutional clashes where Congress and the president have conflicting institutional interests, it is unrealistic to expect much

168. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

169. *Id*. at 610–11.

170. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419 (2012); Eichensehr, *Conduct of Foreign Relations*, *supra* note 15, at 621–22.

171. Bradley & Morrison, *supra* note 170, at 414.

evidence of this sort. The president is unlikely to agree with laws cabining executive power, and expecting Congress to act with a supermajority of both houses is asking too much. Looking only to enacted law to discern the views of Congress then risks skewing constitutional analysis sharply in favor of the executive. For these reasons, as well as more general concerns about institutional structures that make it difficult for Congress to enact even routine legislation,[172] scholars argue for looking beyond enacted law to congressional "soft law" to discern whether Congress has questioned executive practice.[173] As Professors Curtis Bradley and Trevor Morrison explain, "[t]he greatest risk" with respect to *Youngstown* Category Two cases "is in too readily concluding that Congress has remained silent . . . , and consequently inferring acquiescence from such purported silence."[174]

Considering the views of Congress expressed in vetoed bills alongside other soft law mechanisms helps to remedy the tendency to equate a lack of enacted bills with a lack of congressional objection. The views of Congress expressed in a vetoed bill may not be enough to put a president into Category Three on their own (depending on one's constitutional interpretation methodology), but at the very least, they can weaken a president's claim to be in Category Two. Majority action by both houses of Congress is hard to characterize as congressional silence, as required for Category Two. Other types of soft law, such as committee reports or one-house resolutions, are subject to the critique that they do not represent Congress's institutional views, and thus that even in the face of such action, Congress *as a whole* has perhaps been silent. But even if one disregards such actions in considering historical gloss or assessing congressional silence or acquiescence, vetoed bills, like concurrent resolutions, surmount that critique. Majority action by both houses is the antithesis of silence.

To return to the critiques of *Youngstown* noted above, the effect of the *Youngstown* canon on traditional *Youngstown* analysis is easier to grasp by moving beyond the "over-simplified" idea that the three *Youngstown* categories represent rigid differentiations. The canon works best if the framework is understood to represent a spectrum. Application of the canon moves the president down the spectrum and

172. *See id.* at 440–47 (discussing impediments to congressional actions, such as vetogates and collective action problems).

173. *See* Bradley & Siegel, *supra* note 95, at 66 ("[E]vidence of congressional nonacquiescence should extend beyond the enactment of opposing statutes and should include various forms of congressional 'soft law,' such as committee reports and nonbinding resolutions.").

174. Bradley & Morrison, *supra* note 170, at 450.

further away from congressional authorization, in the case of the implied Category One cases, or further away from congressional silence and toward congressional prohibition in the case of the Category Two cases where historical gloss is most prevalent. One could argue, in line with the simplified three-category approach, that the canon knocks the president from Category One into Category Two, or from Category Two into Category Three. Depending on one's preferred method, that approach may be attractive. But it is also subject to the possible formalist objection that it gives too much legal effect to congressional action short of law. Understanding the *Youngstown* framework as a spectrum on which there are many shades of gray largely moots this objection.

An important caveat is in order. The *Youngstown* canon's focus on vetoed bills is likely to favor Congress in most cases, but that may not be uniformly true. Having interpreters look to vetoed bills may simultaneously encourage them to look at presidential veto messages or other executive expressions of constitutional objections to vetoed bills.[175] For example, Chief Justice John Roberts's recent majority opinion in *Seila Law LLC v. Consumer Financial Protection Bureau*[176] cited constitutional objections in an Office of Legal Counsel ("OLC") opinion and a veto message from President Ronald Reagan to an earlier bill about a different federal agency as support for holding unconstitutional the for-cause removal protection afforded to the director of the Consumer Financial Protection Bureau.[177] One could imagine constitutional battle waged between the branches where on a particular issue Congress repeatedly passes bills that presidents of both parties consistently veto, along with veto messages explaining the executive's constitutional objections. A long-standing practice of executive vetoes of a particular congressional initiative on constitutional grounds could influence a historical gloss analysis by showing a consistent executive view of the issue over time, agreement among presidents of different parties, or a lack of acquiescence by the

175. For examples of veto messages, see *U.S. Senate, Vetoes, 1789 to Present*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/vetoCounts.htm [https://perma.cc/STY3-62WA].

176. Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020).

177. *Id.* at 2201 (discussing constitutional objections to the structure of the Office of the Special Counsel (citing Memorandum Op. from the Gen. Couns., Civil Serv. Comm'n, 2 Op. O.L.C. 120, 122 (1978); Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 PUB. PAPERS 1391–92 (Oct. 26, 1988))); *see also id.* at 2192 (holding that the Consumer Financial Protection Bureau director "must be removable by the President at will").

executive in Congress's constitutional views.[178] Looking to vetoed bills as interpretive aids may therefore not be an unalloyed good for Congress to the extent that it also prompts courts and other interpreters to consider countervailing and unilateral executive views.[179] For courts and for the rule of law, however, greater clarity about the branches' views is a net benefit, regardless of the precise outcome of the congressional–presidential power struggle.

* * *

The proposed *Youngstown* canon is just that—a canon of construction. For that reason, some may regard it as a weak bulwark against executive aggrandizement. Canons sometimes fall to countercanons[180] or suffer inconsistent application by courts.[181] But using attempted congressional opposition as an interpretive aid, rather than a legally binding rule, is precisely the feature of this Article's proposal that allows it to comply with *Chadha*. Considering congressional opposition as one among a number of factors or interpretive principles that courts and other interpreters should take into account is an improvement over disregarding such opposition as an irrelevant nullity.

---

178. *See supra* notes 168–69 and accompanying text (discussing Justice Frankfurter's *Youngstown* opinion and historical gloss); *see also infra* note 333 (discussing OLC's reliance on consistent practice of presidents of different parties in historical gloss analysis).

179. Courts already occasionally rely on unilateral executive expressions of constitutional views on statutes. *See, e.g.*, *Seila*, 140 S. Ct at 2202 (citing signing statement by President Bill Clinton that "questioned the constitutionality" of the single-director structure of a federal agency); *cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 523 (2010) (Breyer, J., dissenting) (citing the *absence* of a constitutional objection in a signing statement by President George W. Bush as support for the lack of constitutional problem with a two-level for-cause removal protection).

180. For the canonical discussion of canons and countercanons, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950), setting out a number of canons in "thrust but parry" format. *But see, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1191 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing that "[o]f course there are pairs of maxims susceptible of being invoked for opposing conclusions," but "[o]nce it is understood that meaning depends upon context, and that contexts vary, how could it be otherwise?").

181. *See, e.g.*, Eskridge, *supra* note 89, at 91 ("For every case where the Court rhapsodizes about deliberative inaction, there is a counter-case subjecting such inferences to scathing critique."); *id.* app. at 1–3 (showing the Supreme Court applying and failing to apply canons based on legislative inaction); Gluck & Bressman, *supra* note 53, at 951 ("[F]ederal courts are notoriously inconsistent in their application of the canons . . . .").

The *Youngstown* canon is also insulated from some critiques lodged against other canons. It is based, by definition, on congressional action, not congressional silence.[182] And it's the kind of canon that may become known to and internalized by Congress.[183] Professors Abbe Gluck and Lisa Bressman have shown that congressional drafters are aware of and draft legislation with a view toward some substantive canons, including federalism presumptions, which are similar to the *Youngstown* canon in seeking to preserve structural constitutional values.[184] In fact, Congress may already anticipate some form of a *Youngstown* canon. Some proposed bills that seek to push back on executive action—and that may be in the category of future vetoed bills—would authorize litigation on the part of Congress, during which counsel for Congress would likely argue to courts about congressional opposition.[185]

II. APPLICATIONS

Building on the definition of the *Youngstown* canon in Part I, this Part explores how the canon could apply in practice. It provides four illustrative examples of ways the canon might apply in areas of shared constitutional power where the allocation of authority between Congress and the president is unsettled.

182. *Cf.* Eskridge, *supra* note 89, at 90–108 (discussing a variety of problems with inferring legislative intent from congressional inaction).

183. For a seminal study on congressional awareness of canons and other interpretive rules, see generally Gluck & Bressman, *supra* note 53. For a discussion of how adopting the *Youngstown* canon might influence congressional behavior, see *infra* Part III.C.

184. Gluck & Bressman, *supra* note 53, at 942 (explaining that "some kind of courts-Congress interpretive feedback loop does exist, at least with respect to certain interpretive rules," including "federalism presumptions").

185. *See, e.g.*, S.J. Res. 4, 116th Cong. § 4 (Jan. 17, 2019) (authorizing the Senate Legal Counsel and General Counsel to the House of Representatives to "represent Congress in initiating or intervening in any judicial proceedings in any Federal court of competent jurisdiction on behalf of Congress in order to oppose any effort to suspend, terminate, or withdraw the United States from the North Atlantic Treaty in a manner inconsistent with this joint resolution"); *see also* Hathaway, *supra* note 118, at 87 (discussing the litigating authority of the House and Senate Offices of General Counsel). Litigation by one or both houses of Congress that brings to courts' attention prior opposition—especially majoritarian opposition—to presidential action may be more persuasive than congressional opposition that is voiced for the first time in a litigation brief. *Cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (explaining that the Court will not afford deference to agency views expressed for the first time in litigation).

A. War Powers

The allocation of war powers between the president and Congress is one of the most hotly contested areas of constitutional law,[186] and it is one where the *Youngstown* canon can add value. The Constitution confers war-related authorities on both Congress and the president. Article I grants Congress the powers, among other things, "[t]o declare War," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[187] Article II, on the other hand, makes the president the "Commander in Chief of the Army and Navy of the United States."[188] As Jackson noted, "[t]hese cryptic words have given rise to some of the most persistent controversies in our constitutional history."[189] Indeed, "just what authority goes with the name [Commander-in-Chief] has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends."[190] Presidents have long claimed a core—often a large one—of exclusive executive authority over war powers that is not subject to congressional regulation.

Congress has only rarely attempted to rein in executive war powers. Its "boldest attempt" is the WPR.[191] Passed in 1973 in the aftermath of the Vietnam War and over President Richard Nixon's veto, the WPR includes reporting requirements when the president introduces U.S. armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and where U.S. armed forces are deployed abroad while "equipped for combat."[192] It also includes provisions related to

186. *See, e.g.*, HENKIN, *supra* note 15, at 97 ("The division of authority [over war powers] between the President and Congress is the most controversial and intractable issue in the constitutional law of U.S. foreign relations."); Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1678 (2003) ("The meaning and scope of . . . [the declare war power] is contested, especially in modern times when presidents have asserted independent war powers more aggressively.").

187. U.S. CONST. art. I, § 8, cls. 11–14.

188. *Id.* art. II, § 2.

189. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

190. *Id.*

191. CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW CASES AND MATERIALS 689 (7th ed. 2020).

192. War Powers Resolution, Pub. L. No. 93-148, § 4(a), 87 Stat. 555, 555–56 (1973) (codified as amended at 50 U.S.C. §§ 1541–48 (2018)).

congressional action. Most prominently, it includes a requirement that within sixty days of the introduction of forces into hostilities, the president shall terminate the use of such forces unless Congress has declared war, authorized the use of such forces, extended the deadline, or cannot meet due to an armed attack on the United States.[193] In addition to the specified deadline, however, the WPR specifies that "any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."[194]

Because concurrent resolutions are not subject to presentment, *Chadha* appears to invalidate this mechanism that Congress intended to use to restrain presidential uses of force.[195] After *Chadha*, Congress enacted a statute providing a separate procedure to "force a vote to order the withdrawal of troops."[196] The amended process uses a joint resolution and so is subject to presentment and to presidential veto.[197]

Congress has rarely invoked the WPR, but it twice attempted to require Trump to terminate hostilities.[198] Congress's first attempt came in spring 2019, when both houses passed a joint resolution directing

193. *Id.* § 5(b), 87 Stat. at 556.

194. *Id.* § 5(c), 87 Stat. at 556–57.

195. *See, e.g.*, BRADLEY ET AL., *supra* note 191, at 693 ("Most scholars believe that such a concurrent resolution, if not presented to the President for signature and possible veto, is invalid under INS v. Chadha, 462 U.S. 919 (1983)."); MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 7–8 (2019), https://fas.org/sgp/crs/natsec/R42699.pdf [https://perma.cc/W8FR-YKKY] (discussing the concurrent resolution provision and the effect of *Chadha*); *see also id.* at 66 (noting proposals to amend the WPR to eliminate the concurrent resolution provision because of arguments that it is invalid after *Chadha*).

196. FISHER, *supra* note 139, at 2; *see* 50 U.S.C. § 1546(a) (providing an expedited procedure for congressional consideration of joint resolutions directing the removal of U.S. forces from hostilities).

197. For an explanation of the differences between bills and joint, concurrent, and simple resolutions, see *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm [https://perma.cc/S6JN-KT3U].

198. Another recent attempt failed to pass the House. In 2015, representatives introduced a concurrent resolution pursuant to the WPR that would have directed the Obama administration to withdraw U.S. forces deployed to fight the Islamic State. *See* MATTHEW C. WEED, CONG. RSCH. SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 8 (2017), https://crsreports.congress.gov/product/pdf/R/R43760/16 [https://perma.cc/6SBS-5VXE] (discussing H. Con. Res. 55). The House Foreign Affairs Committee approved the resolution, but it failed to pass the House. *Id.*

"the President to remove United States Armed Forces from hostilities in or affecting the Republic of Yemen" within thirty days of the resolution's enactment.[199] The resolution specified that the relevant "hostilities" included "in-flight refueling of non-United States aircraft conducting missions as part of the ongoing civil war in Yemen."[200] And it explicitly excepted U.S. armed forces "engaged in operations directed at al Qaeda or associated forces."[201]

Trump vetoed the resolution.[202] In his veto message, Trump first disputed the premise that there were hostilities to be terminated, arguing the resolution was "unnecessary because, apart from counterterrorism operations against al-Qa'ida in the Arabian Peninsula and ISIS, the United States is not engaged in hostilities in or affecting Yemen."[203] He then turned to constitutional claims. He called the resolution "dangerous" and argued that "Congress should not seek to prohibit certain tactical operations, such as in-flight refueling, or require military engagements to adhere to arbitrary timelines" because "[d]oing so would interfere with the President's constitutional authority as Commander in Chief of the Armed Forces."[204] The constitutional claim echoed the Statement of Administration Policy issued prior to the resolution's passage.[205] There, the administration argued, "[b]ecause the President has directed United States forces to support the Saudi-led coalition under his constitutional powers, the joint resolution would raise serious constitutional concerns to the

199. S.J. Res. 7, 116th Cong. § 2 (2019); *see* Catie Edmondson, *Senate Votes Again To End Aid to Saudi War in Yemen, Defying Trump*, N.Y. TIMES (Mar. 13, 2019), https://nyti.ms/2TByCgB [https://perma.cc/9LHC-5HTB] (discussing the Senate vote as "rebuk[ing] President Trump for his continued defense of Saudi Arabia after the killing of dissident journalist Jamal Khashoggi"); Catie Edmondson, *U.S. Role in Yemen War Will End Unless Trump Issues Second Veto*, N.Y. TIMES (Apr. 4, 2019), https://nyti.ms/2WMyUOu [https://perma.cc/2UFD-YDK5] (discussing the House's passage of the resolution).

200. S.J. Res. 7, 116th Cong. § 2 (2019).

201. *Id.*

202. Message to the Senate Returning Without Approval Legislation Regarding the Removal of United States Armed Forces from Hostilities in Yemen, 2019 DAILY COMP. PRES. DOC. 1 (Apr. 16, 2019).

203. *Id.*

204. *Id.*

205. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY S.J. RES. 7 – DIRECTING THE PRESIDENT TO REMOVE UNITED STATES ARMED FORCES FROM HOSTILITIES IN THE REPUBLIC OF YEMEN THAT HAVE NOT BEEN AUTHORIZED BY CONGRESS (2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/sapsj7s_20190313.pdf [https://perma.cc/BBH6-DMLQ] [hereinafter YEMEN SAP]. *See generally supra* note 105 (discussing SAPs).

extent that it seeks to override the President's determination as Commander in Chief."[206] Congress failed to override the veto.[207]

Congress's next attempt to rein in the Trump administration's use of war powers occurred in spring 2020. Amidst escalating tensions with Iran, the Trump administration launched a drone strike to kill Iranian Major General Qassem Soleimani at the Baghdad airport.[208] As legal authority, the executive invoked the 2002 Authorization for the Use of Military Force ("AUMF") against Iraq.[209] Commentators and congressmen pushed back, arguing, based in part on the Trump administration's own prior statements, that the 2002 AUMF on Iraq does not authorize the use of force against Iran.[210] Congress then passed a joint resolution explicitly stating that neither the 2001 AUMF passed in response to the 9/11 attacks nor the 2002 AUMF authorizes

206. YEMEN SAP, *supra* note 205 (addressing S.J. Res. 7).

207. *See Roll Call Vote 116th Congress—1st Session*, U.S. SENATE (2019), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=1&vote=00094 [https://perma.cc/KAH8-87DL] (showing fifty-three votes in favor of overriding the veto of S.J. Res. 7, and forty-five votes against, with two senators not voting).

208. *See* Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), https://nyti.ms/36iPzyp [https://perma.cc/NR29-JEAJ] (describing the strike).

209. EXEC. OFF. OF THE PRESIDENT, NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 1–2 (2020), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf [https://perma.cc/2FVJ-DF56] (citing the 2002 Iraq AUMF as authorization for the Soleimani strike and arguing "[t]he airstrike against Soleimani in Iraq is consistent with this longstanding interpretation of the President's authority under Article II [of the Constitution] and the 2002 AUMF"); *see also* Jean Galbraith, *U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani*, 114 AM. J. INT'L L. 313, 318–20 (2020) (providing an overview of the Trump administration's arguments about its domestic legal authority for the Soleimani strike).

210. *See, e.g.*, Catie Edmondson, *Mike Lee, a G.O.P. Senator, Calls Administration's Iran Briefing 'Insulting*,' N.Y. TIMES (Jan. 8, 2020), https://nyti.ms/2FzJa6p [https://perma.cc/7XFG-2JZZ] (reporting Senator Mike Lee's pointed criticism of a Trump administration briefing on the Soleimani strike); Ryan Goodman & Steve Vladeck, *Why the 2002 AUMF Does Not Apply to Iran*, JUST SEC. (Jan. 9, 2020), https://www.justsecurity.org/67993/why-the-2002-aumf-does-not-apply-to-iran [https://perma.cc/M4PF-AQNH] (citing prior statements by the Trump administration recognizing that the 2002 AUMF does not authorize force against Iran and calling it "beyond *any* reasonable interpretation" of the 2002 AUMF "that it applies to uses of force against Iran in Iraq"); Ryan Goodman, *White House '1264 Notice' and Novel Legal Claims for Military Action Against Iran*, JUST SEC. (Feb. 14, 2020), https://www.justsecurity.org/68594/white-house-1264-notice-and-novel-legal-claims-for-military-action-against-iran [https://perma.cc/6XDN-FLKQ] (calling the Trump administration's claim in its notice to Congress that the 2002 AUMF authorizes the use of force against Iran "astonishing" and "highly flawed").

the use of force against Iran.[211] The joint resolution further directed the president to terminate "hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran."[212] Trump vetoed the resolution.[213] His veto message argued both that the resolution was "unnecessary" because "the United States is not engaged in the use of force against Iran," and that the Soleimani strike "was fully authorized under both the [2002 AUMF] . . . and the President's constitutional authorities as Commander in Chief and Chief Executive."[214]

For Congress, voting against an ongoing presidential use of force usually presents difficulties. There may be domestic political costs to being perceived as voting against deployed troops. Individual members have little incentive to defend the prerogatives of Congress as an institution, causing collective action problems in the war powers arena, just as in other areas where the separation of powers is at issue.[215] For these and other reasons, congressional votes—especially successful majority votes of both houses—to terminate hostilities and withdraw

211. S.J. Res. 68, 116th Cong. § 1(3) (2020) ("The 2001 Authorization for Use of Military Force . . . against the perpetrators of the 9/11 attack and the Authorization for Use of Military Force Against Iraq Resolution of 2002 . . . do not serve as a specific statutory authorization for the use of force against Iran." (internal citations omitted)); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2018)) (authorizing the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498 (codified at 50 U.S.C. § 1541 note) (authorizing the president "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq").

212. S.J. Res. 68, 116th Cong. § 2(a) (2020).

213. *Iran Veto*, *supra* note 3. Notably, the White House's SAP on S.J. Res. 68 did not indicate that the president *would* veto the joint resolution, but instead only that "his advisors would recommend that he veto the joint resolution." OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY S.J. RES. 68 – A JOINT RESOLUTION TO DIRECT THE REMOVAL OF UNITED STATES ARMED FORCES FROM HOSTILITIES AGAINST THE ISLAMIC REPUBLIC OF IRAN THAT HAVE NOT BEEN AUTHORIZED BY CONGRESS 2 (Mar. 10, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/SAP_S.J.-RES.-68.pdf [https://perma.cc/762G-DTV6] (emphasis omitted). This language reflects the weaker and more uncertain version of a veto threat. *See supra* note 105 (discussing different levels of certainty in SAP veto threat language).

214. *Iran Veto*, *supra* note 3.

215. *See supra* note 172 and accompanying text.

U.S. troops are likely to be rare. But what happens when they do occur? If the president vetoes a bill or joint resolution terminating hostilities, is congressional opposition irrelevant? The *Youngstown* canon suggests no.

Use of the canon in the Yemen and Iran resolution situations is triggered by the majority vote of Congress, blocked by a presidential veto, coupled with underlying ambiguity in the scope of the president's war powers.[216] In practice, application of the canon would mean that the president's authority to act—whether constitutional or statutory—should be narrowly construed because of congressional opposition. This might manifest as a narrowing of the *type* of actions the executive could undertake, limiting executive actions to those clearly within exclusive executive authority, such as defense assistance. Such might be the case with respect to Yemen. Alternatively, applying the canon could mean a temporal, geographic, or substantive limit on the permissible targets for force. In the Iran case, as in many others over the past two decades, presidents have cited the 2001 and 2002 AUMFs and faced criticism for stretching the bounds of these statutory authorizations.[217] In a case like the strike against Soleimani, where a president cites one of these statutory authorizations and Congress

---

216. Notably, the conditions for the canon's application would *not* be met in circumstances where the president has exclusive authority, not subject to regulation by Congress. The scope of this category is debated, but it at least includes military action in self-defense. *See, e.g.*, HENKIN, *supra* note 15, at 47 ("In response to an attack upon the United States, the President has constitutional authority to defend the United States.").

217. In particular, the executive branch faced pushback for citing the 2001 and 2002 AUMFs to justify the use of force against the Islamic State. *See, e.g.*, Tess Bridgeman, *Now Is the Time To Repeal the 2002 AUMF*, JUST SEC. (July 11, 2019), https://www.justsecurity.org/64885/now-is-the-time-to-repeal-the-2002-aumf [https://perma.cc/PDS5-YQ4U] (arguing that Congress should repeal the 2002 AUMF for several reasons, including that it is open to abuse via excessive executive interpretations, such as suggestions by the Trump administration that it might "authorize war with Iran"); Ryan Goodman, *Sec. Kerry's Difficult Defense of 2001 AUMF Application to ISIL—And Senators' Disbelief*, JUST SEC. (Sept. 17, 2014), https://www.justsecurity.org/15152/sec-kerrys-defense-2001-aumf-applies-isil-senators-disbelief [https://perma.cc/VMS6-QYCN] (detailing congressional testimony by then-Secretary of State John Kerry about the 2001 AUMF as the legal basis for the use of force against the Islamic State and incredulity expressed by senators); Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), https://nyti.ms/1qQK14n [https://perma.cc/7B8B-26CF] (reporting that the Obama administration viewed the 2002 AUMF as an alternative legal basis—in addition to the 2001 AUMF—for the use of force against the Islamic State). For an overview of how the executive branch has cited the 2001 AUMF as authority for action, see generally, MATTHEW C. WEED, CONG. RSCH. SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION (2015), https://fas.org/sgp/crs/natsec/R43983.pdf [https://perma.cc/7T5U-SWPX].

objects, the *Youngstown* canon instructs that courts, executive branch lawyers, and other interpreters should narrowly construe the AUMF in light of later, specific congressional opposition to interpreting it to reach the use of force against Iran.[218]

As a normative matter, the use of the canon in war powers–related situations follows from several of the grounds discussed above.[219] War powers is an area of shared constitutional responsibility where the Framers, by dividing authority between the executive and the legislature, intended the branches to act as mutual checks and constraints. The *Youngstown* canon helps preserve this intent by hampering presidents' ability to stretch broad, ambiguous congressional authorizations beyond their intended scope, while at the same time using the veto to block congressional attempts to adjust or repeal existing authorizations. The canon functions similarly in cases where the president acts without any claimed congressional authorization; there, the ambiguous powers being narrowly construed would be constitutional ones.

Application of the *Youngstown* canon with respect to joint resolutions related to the WPR might be further justified as addressing bargains upset by *Chadha*. The WPR contemplated that Congress could force the president to cease hostilities with a concurrent resolution, which entails a majority vote of both houses and is not subject to a veto.[220] At times, the Department of Justice's OLC has treated the WPR—intended by Congress as a restraint on presidential war powers—as effectively an authorization to the president or recognition of the president's authority to engage in short-term hostilities *without* congressional approval.[221] In its 2011 opinion on U.S. involvement in Libya, OLC argued that in the WPR, "Congress . . . implicitly recognized" presidential authority to enter into hostilities for

218. This is a second-best solution to having clear, precisely tailored AUMFs in the first place.

219. *See supra* Part I.C.

220. *See supra* note 100 and accompanying text.

221. *See* BRADLEY ET AL., *supra* note 191, at 690 (explaining that the executive has construed § 5 of the WPR to "in effect authorize the President to engage in short-term military conflicts without congressional authorization" and citing OLC opinions on Haiti and Libya). OLC cites the WPR provision requiring the president to terminate hostilities within sixty days unless Congress declares war, authorizes use of the armed forces, extends the deadline, or cannot meet as a result of an armed attack. *See* Deployment of U.S. Armed Forced into Haiti, 18 Op. O.L.C. 173, 175 (1994) (citing 50 U.S.C. § 1544(b) (1994)). OLC has argued that, "This structure makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress . . . ." *Id.* at 175–76.

periods shorter than sixty days without congressional authorization,[222] and that "[b]y allowing United States involvement in hostilities to continue for 60 or 90 days, Congress signaled in the WPR that it considers congressional authorization most critical for 'major, prolonged conflicts such as the wars in Vietnam and Korea,' not more limited engagements."[223]

Taking this highly questionable interpretation of the WPR on its own terms renders the WPR another example of statutory delegations disrupted by *Chadha*. In the WPR, Congress did *not* recognize the president's authority or authorize the president to engage in hostilities without congressional approval; rather, it set a default rule that such hostilities must automatically terminate unless a specified exception applies *or Congress passes a concurrent resolution requiring their termination at an earlier time*. OLC's interpretation of the WPR as a congressional concession fails to take into account that if Congress intended to make such a concession or recognition at all, it did so only on the understanding that it could police presidential uses of force through concurrent resolutions not subject to presidential veto. *Chadha*, of course, eliminated that possibility. But OLC has continued to cite the potentially empowering portion of the WPR while ignoring the manner in which Congress intended the WPR to function.

Following on the last point, it may be especially ironic, but also important, to note that the main locus for interpretation of the WPR and AUMFs is the executive branch.[224] Courts generally do not adjudicate questions of war powers due to problems with, for example, standing, ripeness, and the political question doctrine.[225] To be sure,

---

222. Auth. To Use Mil. Force in Libya, 35 Op. O.L.C. slip op. at 8 (Apr. 1, 2011).

223. *Id.* at 8–9 (quoting Deployment of U.S. Armed Forces into Haiti, *supra* note 221, at 176).

224. This situation may be particularly ironic with respect to the WPR, which Congress enacted over a presidential veto. *Cf.* McNollgast, *supra* note 116, at 720 ("[I]f the President vetoed the legislation, and both houses voted to override his veto, then the President's preferences [in interpreting the legislation] can be accorded no weight.").

225. *See, e.g.*, Bin Ali Jaber v. United States, 861 F.3d 241, 250 (D.C. Cir. 2017) (dismissing as a political question a lawsuit challenging the legality of a U.S. drone strike in Yemen); Doe v. Bush, 323 F.3d 133, 134–35 (1st Cir. 2003) (dismissing suit by military members and congressmen seeking an injunction against Iraq War on the grounds that the case was not ripe); Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (dismissing for lack of standing a challenge by congressmen to U.S. participation in NATO forces' actions in Yugoslavia). *But see* Hathaway, *supra* note 118, at 93 (arguing that "one or both houses of Congress could challenge an act by the executive branch that has concrete and particular injuries to their respective powers" or pass a resolution to "authorize a congressional committee to sue for the same purpose," and making the

executive branch officials have a client—the president—but they have also sworn an oath to uphold the Constitution and laws of the United States, and they, just as much as courts, can use the *Youngstown* canon when construing the Constitution and war powers–related statutes.[226]

B. Statutory Delegations Locked in by Chadha

The WPR was only one way that Congress tried to reclaim power and exert oversight over the executive in the wake of the Vietnam War. Another statute of the same vintage came to prominence in 2019 when Trump declared a national emergency relating to the southern border of the United States in an attempt to divert money to build a border wall that Congress had declined to fund.[227] The declaration put a spotlight on the 1976 NEA, another statute that Congress designed to rein in the president via use of concurrent resolutions. After *Chadha*, congressional terminations of national emergencies can proceed only through joint resolutions, which are subject to presidential veto. Congress's attempt to terminate Trump's declaration of an emergency at the southern border prompted the first veto of Trump's presidency and a wave of litigation.[228]

This Section highlights the NEA as an example of statutory schemes disrupted by *Chadha*.[229] It discusses the history and structure of the NEA, provides an overview of the disputes over the southern-border declaration, and describes how the *Youngstown* canon may be relevant to ongoing or future litigation about the use of emergency powers pursuant to the NEA.

From the 1950s through the early 1970s, congressional concerns grew about presidents' continuation of national emergencies and associated extraordinary exercises of power long after the events that prompted the initial emergency declarations.[230] By 1973 when a special

---

further point that "[a] similar technique" could be used to overcome the political question doctrine).

226. *See supra* notes 78–82 and accompanying text (discussing use of canons by the executive branch).

227. *See, e.g.*, Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://nyti.ms/2V2h1dT [https://perma.cc/M4JX-L8D4].

228. *See infra* notes 249–55 and accompanying text.

229. For sources on other statutory schemes disrupted by *Chadha*, see *supra* note 139.

230. For an overview of the background of the National Emergencies Act ("NEA"), see L. ELAINE HALCHIN, CONG. RES. SERV., RL98505, NATIONAL EMERGENCY POWERS 8 (2020), https://fas.org/sgp/crs/natsec/98-505.pdf [https://perma.cc/HN7L-QL98].

congressional committee began investigating emergency powers, it considered declarations issued in 1933, 1950, 1970, and 1971—all of which were still in effect.[231] In 1976, Congress passed and President Gerald Ford signed the NEA.[232] The statute dealt with existing national emergencies by effectively requiring a new presidential emergency declaration for continued use of the underlying emergency powers.[233] It also "established an exclusive means for declaring a national emergency" going forward, specifying that such declarations would automatically expire after one year unless terminated by the president or Congress or extended by the president.[234]

In the floor debate over the NEA, Senator Frank Church, who cochaired the Senate committee that drafted the bill,[235] invoked Jackson's *Youngstown* concurrence.[236] Church noted:

> [O]ur legislation will constitute the exclusive authority for the exercise of Presidential powers in an emergency. The Congress having acted, the President's power will be, in Justice Jackson's words, "at its lowest ebb." In the future, every type and class of presidentially declared emergency will be subject to congressional control.[237]

He explained that "nothing in this bill would interfere with the President's right to declare a national emergency in the future or deprive him of the necessary power to cope with such an emergency."[238] Rather, the underlying statutes granting the president "emergency powers remain on the shelf, to be pulled off and used as may be required in order to deal with some future crisis."[239] However, he continued, "the procedures governing the use of emergency powers in the future will always be subject to congressional review and any declaration of an emergency may be terminated by a concurrent

231. *Id.* at 7.

232. National Emergencies Act, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601–51 (2018)).

233. *See* HALCHIN, *supra* note 230, at 10 (describing the NEA); *see also* 50 U.S.C. § 1601 (addressing "Termination of Existing Declared Emergencies").

234. HALCHIN, *supra* note 230, at 11; *see also* 50 U.S.C. §§ 1621–22, 1631 (addressing processes for declaration and termination of national emergencies). For a list of all emergencies declared pursuant to the NEA, see HALCHIN, *supra* note 230, at 11–16.

235. HALCHIN, *supra* note 230, at 7.

236. 122 CONG. REC. 28,227 (1976) (statement of Sen. Frank Church).

237. *Id.*

238. *Id.*

239. *Id.*

resolution of the Congress," leaving Congress "in a position to assert its ultimate authority."[240]

This envisioned structure, however, was not to be. *Chadha* effectively rendered this process invalid. In 1985, in *Chadha*'s wake, Congress amended the NEA to replace the concurrent resolution provision with one requiring a joint resolution for terminating national emergencies.[241]

The Trump administration's use of the NEA showed just how consequential this shift was. Trump's declaration of a national emergency related to the southern U.S. border followed months of dispute with Congress about funding construction of the border wall. The impasse between the branches over Congress's refusal to appropriate $5.7 billion that Trump had requested for border wall construction sparked a monthlong government shutdown from December 2018 into January 2019.[242] In February 2019, Congress passed and the president signed the Consolidated Appropriations Act, FY2019, which provided only $1.375 billion "for the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector."[243] The same day he signed the Consolidated Appropriations Act, Trump issued a proclamation "declar[ing] that a national emergency exists at

240. *Id.*

241. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, § 801, 99 Stat. 405, 448 (codified at 50 U.S.C. § 1622 (2018)). *Compare* National Emergencies Act, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1602) ("(a) Any national emergency declared by the President in accordance with this title shall terminate if—(1) Congress terminates the emergency by concurrent resolution; or (2) the President issues a proclamation terminating the emergency."), *with* 50 U.S.C. § 1622(a) ("Any national emergency declared by the President in accordance with this subchapter shall terminate if—(1) there is enacted into law a joint resolution terminating the emergency; or (2) the President issues a proclamation terminating the emergency.").

242. *See* Julie Hirschfeld Davis & Emily Cochrane, *Government Shuts Down as Talks Fail To Break Impasse*, N.Y. TIMES (Dec. 21, 2018), https://nyti.ms/2GzEfWo [https://perma.cc/2QVU-GB27] (explaining that the shutdown began "after congressional and White House officials failed to find a compromise on a spending bill that hinged on President Trump's demands for $5.7 billion for a border wall"); Nicholas Fandos, Sheryl Gay Stolberg & Peter Baker, *Trump Signs Bill Reopening Government for 3 Weeks in Surprise Retreat from Wall*, N.Y. TIMES (Jan. 25, 2019), https://nyti.ms/2S2Wx6Y [https://perma.cc/AZV8-MMTT] (explaining that the government shutdown ended with a stopgap spending bill allowing the government to reopen while negotiations continued between Congress and the executive over border wall funding).

243. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. A, § 230(a)(1), 133 Stat. 13, 28; *see also id.* div. D, § 739, 133 Stat. at 82 (prohibiting the use of appropriated funds "to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request" unless "such proposed change is subsequently enacted in an appropriation Act, or . . . made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act").

the southern border of the United States,"[244] citing the border as "a major entry point for criminals, gang members, and illicit narcotics" and a "problem of large-scale unlawful migration."[245] The proclamation declared that the "emergency requires use of the Armed Forces" and invoked, among other things, authority provided by 10 U.S.C. § 2808,[246] which in turn allows the secretary of defense to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces."[247] The White House asserted that the proclamation made available $3.6 billion from military construction funds pursuant to § 2808, plus additional funds from other sources, for a total of $8.1 billion available for border-wall construction.[248]

Congress responded by passing a joint resolution pursuant to the NEA declaring the national emergency to be terminated.[249] Trump, predictably, vetoed the resolution,[250] as well as a subsequent resolution along the same lines.[251]

---

244. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019).

245. *Id.*

246. *Id.*

247. 10 U.S.C. § 2808(a) (2018). The section further specifies, "Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated." *Id.*

248. *Fact Sheet: President Donald J. Trump's Border Security Victory*, WHITE HOUSE (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory [https://perma.cc/J8DS-N2GY].

249. H.R.J. Res. 46, 116th Cong. (2019). The NEA provides for expedited procedures of legislative consideration of joint resolutions terminating emergencies, and these provisions remained in effect after the shift from concurrent to joint resolutions. *See* HALCHIN, *supra* note 230, at 19–20.

250. Message to the House of Representatives Returning Without Approval Legislation To Terminate the National Emergency Concerning the Southern Border of the United States, 2019 DAILY COMP. PRES. DOC. 2 (Mar. 15, 2019) (calling H.J. Res. 46 "a dangerous resolution that would undermine United States sovereignty and threaten the lives and safety of countless Americans").

251. A Joint Resolution Relating to a National Emergency Declared by the President on February 15, 2019, S.J. Res. 54, 116th Cong. (2019); Message Returning Without Approval Legislation To Terminate the National Emergency Concerning the Southern Border of the United States, 2019 DAILY COMP. PRES. DOC. 1 (Oct. 15, 2019) (asserting that "the situation on our southern border remains a national emergency, and our Armed Forces are still needed to help confront it"). The NEA requires Congress to consider a joint resolution to terminate a national emergency every six months. 50 U.S.C. § 1622(b) (2018) ("Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.").

The emergency proclamation and repurposing of funds for border wall construction prompted a number of lawsuits.[252] The cases raise multiple questions of statutory interpretation, including, for example, whether there is a national emergency that "requires the use of the armed forces,"[253] whether transfer of funds previously appropriated for other purposes to border wall construction is "based on unforeseen military requirements,"[254] whether border wall construction projects constitute "military construction projects," and, if so, whether they are "necessary to support [the] use of the armed forces."[255]

Along with other principles of statutory construction, the *Youngstown* canon can assist in resolving these or similar interpretive questions that might arise. To the extent that there is ambiguity about the existence or scope of the president's authority, the *Youngstown* canon's triggering conditions are met: Congress has attempted—multiple times—to terminate the national emergency, but has been thwarted by presidential vetoes. The *Youngstown* canon therefore counsels in favor of narrowly construing the scope of presidential authority. In particular cases, this could mean narrowly construing, for example, the meaning of "national emergency," which is undefined in

252. *See, e.g.*, California v. Trump, 963 F.3d 926, 950 (9th Cir. 2020), *cert. granted sub. nom.* Trump v. Sierra Club, No. 20-138, 2020 WL 6121565 (U.S. Oct. 19, 2020) (holding that the transfer of funds for construction of the border wall was unlawful); Sierra Club v. Trump, 963 F.3d 874, 886–87 (9th Cir. 2020) (same), *cert. granted*, No. 20-138, 2020 WL 6121565 (U.S. Oct. 19, 2020); El Paso Cnty. v. Trump, 982 F.3d 332, 335 (5th Cir. 2020) (holding that El Paso County and the Border Network for Human Rights lack standing to challenge use of funds for border wall construction); U.S. House of Representatives v. Mnuchin, 976 F.3d 1 (D.C. Cir. 2020) (petition for rehearing en banc pending).

253. *See, e.g.*, Brief of the U.S. House of Representatives at 47–48, *Mnuchin*, 976 F.3d 1 (No. 19-5176) (quoting 10 U.S.C. § 2808(a) (2018)).

254. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act of 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018); *see, e.g.*, California v. Trump, 963 F.3d at 944–48 (holding that construction of the border wall was neither "unforeseen" nor related to a "military requirement").

255. 10 U.S.C. § 2808; *see, e.g.*, Sierra Club v. Trump, 977 F.3d 853, 879 (9th Cir. 2020) (holding that § 2808 does not authorize the border wall construction projects because "they are neither necessary to support the use of the armed forces, nor are they military construction projects").

the NEA,[256] or terms in underlying emergency powers statutes, such as "military construction project[]."[257]

The Ninth Circuit did just that in *Sierra Club v. Trump*.[258] Citing this Article, the court rejected the Trump administration's claim that § 2808 authorizes border wall construction.[259] The court did not identify ambiguity in the statutory language, but nonetheless explained that "[p]articularly . . . where Congress declined to fund the very projects at issue and attempted to terminate the declaration of a national emergency (twice), we cannot interpret the statute to give the Executive Branch unfettered discretion to divert funds to any land it deems under military jurisdiction."[260] The court reasoned that "[h]ere, though imperfectly, Congress has made clear that it does not support extensive border wall construction . . . and therefore, the existing

256. *See* Richard H. Pildes, *The Supreme Court's Contribution to the Confrontation over Emergency Powers*, LAWFARE (Feb. 19, 2019), https://www.lawfareblog.com/supreme-courts-contribution-confrontation-over-emergency-powers [https://perma.cc/QQL9-HFCZ] (noting that when Congress passed the NEA with a concurrent resolution provision for terminating national emergencies, "[a]ttempting to define 'emergencies' in advance was . . . not as pressing a concern, because Congress could decide, after a presidential declaration of emergency, whether it agreed"); *cf.* Ilya Somin, *Why Trump's Emergency Declaration Is Illegal*, VOLOKH CONSPIRACY (Feb. 23, 2019, 5:35 PM), https://reason.com/2019/02/23/why-trumps-emergency-declaration-is-ille [https://perma.cc/3TCZ-3NSS] (arguing that the ordinary meaning of "emergency" should constrain the president's discretion in declaring an emergency).

257. 10 U.S.C. § 2808(a).

258. Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020).

259. *Id.* at 887 n.12.

260. *Id.* at 887. The court made a similar point in rejecting the Trump administration's proposed interpretation of "necessary" in § 2808. *See id.* at 881 ("That Congress declined to provide more substantial funding for border wall construction and voted twice to terminate the President's declaration of a national emergency underscores that the border wall is not, in fact, required or needed."). The same panel also referenced the vetoed joint resolution in an earlier opinion, holding that the Department of Defense lacked authority to transfer previously appropriated funds for use in border wall construction because Congress had authorized such transfers "only in response to an 'unforeseen military requirement.'" California v. Trump, 963 F.3d 946, 944 (9th Cir. 2020), *cert. granted sub. nom.* Trump v. Sierra Club, No. 20-138, 2020 WL 6121565 (U.S. Oct. 19, 2020) (quoting Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018)). In construing "unforeseen," the court noted, "Congress's joint resolution terminating the President's declaration of a national emergency only reinforces this point: there was no unanticipated crisis at the border." *Id.* at 945. The majority's reference to the vetoed joint resolution prompted an objection from the dissent. *See id.* at 973 n.23 (Collins, J., dissenting) ("Congress's joint resolutions attempting to terminate the emergency declaration are irrelevant for the further reason that they were vetoed and never became law." (citation omitted)).

statutory authority provided by Section 2808 must be construed narrowly."[261]

The canon could also interact with executive claims that its actions are authorized by Congress and that they therefore fall within *Youngstown* Category One.[262] To the extent that tools of statutory interpretation, including the *Youngstown* canon, suggest that the president's actions do *not* fall within the scope of activities authorized by the NEA or underlying emergency powers statutes, courts should conclude that the president is in *Youngstown* Category Two—the zone of twilight—or even Category Three—where his power is at its lowest ebb. Pushing back on the scope of congressional authorizations and shifting out of *Youngstown* Category One eliminates the executive's reliance on "the strongest of presumptions and the widest latitude of judicial interpretation" that attend Category One actions.[263]

The NEA is a good case for considering congressional opposition blocked by vetoes because of *Chadha*'s disruptive effect. *Chadha* essentially created a one-way ratchet: Congress left prior delegations of emergency powers on the books when it passed the NEA because it believed it could claw back such delegations with concurrent resolutions as needed.[264] But *Chadha* rendered that plan impossible. Now, the only way to pull back emergency powers is with presidential agreement or a supermajority of Congress.[265] In the meantime, the *Youngstown* canon provides a way to give bicameral attempts to rein in presidential excesses *some* interpretive effect, without running afoul of *Chadha*.

---

261. *Sierra Club*, 977 F.3d at 887.

262. *See, e.g.*, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 27–28, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (No. 4:19-cv-00892) (arguing that the president's actions were authorized by Congress and therefore fell within *Youngstown* Category One).

263. Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

264. *See supra* note 236 and accompanying text (quoting Sen. Frank Church).

265. For an overview of proposals to reform presidential emergency powers, including NEA reform proposals that have garnered bipartisan support, see Elizabeth Goitein, *Good Governance Paper No. 18: Reforming Emergency Powers*, JUST SEC. (Oct. 31, 2020), https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers [https://perma.cc/SL6J-6J74].

C. Congressional Action to Block Treaty Terminations

The Trump administration reinvigorated debates about another unsettled area of constitutional law—whether the president has authority to withdraw from or terminate international agreements unilaterally. The Trump administration withdrew or announced its intention to withdraw the United States from numerous international agreements,[266] including the Intermediate-Range Nuclear Forces Treaty,[267] the Treaty of Amity, Economic Relations and Consular Rights with Iran,[268] the Paris Climate Agreement,[269] the Treaty on

266. *See* Harold Hongju Koh, *Presidential Power To Terminate International Agreements*, 128 YALE L.J. F. 432, 433–34 (2018) [hereinafter Koh, *Presidential Power*] (documenting agreements from which the Trump administration announced its withdrawal or threatened to withdraw); *see also* Harold Hongju Koh, *Could the President Unilaterally Terminate All International Agreements?*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 67, 67 & n.1 (Paul B. Stephan & Sarah H. Cleveland eds., 2020) [hereinafter Koh, *Unilaterally Terminate*] (providing an updated list of agreements from which the Trump administration withdrew or threatened to withdraw). I use "international agreement" to refer to agreements that are binding between states as a matter of international law and "treaties" to refer to the subset of such agreements that have undergone the Article II process of approval by two-thirds of the Senate and ratification by the president. I use the terms "withdrawal" and "termination" interchangeably to refer to a U.S. exit from any international agreement; technically however, exit of one or both parties from a bilateral international agreement would "terminate" such agreement, whereas exit of one party from a multilateral international agreement would constitute "withdrawal" rather than "termination," as the multilateral agreement would continue in force for the remaining states parties. *Cf.* Koh, *Presidential Power*, *supra*, at 435 n.8 ("When one or two partners lawfully terminate or abrogate a bilateral agreement, it is dead. But when one partner lawfully withdraws from, or abrogates its legal duties to comply with, a multilateral treaty, the agreement continues, minus that partner.").

267. Press Statement, Michael R. Pompeo, U.S. Sec'y of State, U.S. Withdrawal from the INF Treaty on Aug. 2, 2019 (Aug. 2, 2019), https://www.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019 [https://perma.cc/A4CE-JBS4] (announcing that the United States provided notice of its intent to withdraw pursuant to the treaty).

268. *See* Edward Wong & David E. Sanger, *U.S. Withdraws from 1955 Treaty Normalizing Relations with Iran*, N.Y. TIMES (Oct. 3, 2018), https://nyti.ms/2OvJFo8 [https://perma.cc/MHC2-BGYW] (discussing the withdrawal). On the same day, National Security Advisor John Bolton announced that the United States would withdraw from the Optional Protocol to the Vienna Convention on Diplomatic Relations. *See* Roberta Rampton, Lesley Wroughton & Stephanie van den Berg, *U.S. Withdraws from International Accords, Says U.N. World Court 'Politicized*,*'* REUTERS (Oct. 3, 2018), https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP [https://perma.cc/KP7L-CFUE] (discussing the announcement).

269. Media Note, Off. of the Spokesperson, U.S. Dep't of State, Communication Regarding Intent To Withdraw from Paris Agreement (Aug. 4, 2017), https://www.state.gov/communication-regarding-intent-to-withdraw-from-paris-agreement **[**https://perma.cc/JTK4-BQZQ**]** (stating that the United States communicated to the United Nations its "intent to withdraw from the Paris Agreement as soon as it is eligible to do so, consistent with the terms of the Agreement").

Open Skies,[270] and membership in the World Health Organization.[271] With a demonstrated willingness to terminate treaties and withdraw the United States from international agreements, the Trump administration's periodic suggestions that it might pull the United States out of the North Atlantic Treaty Organization ("NATO")—the 30-nation military alliance established in 1949 to counter the Soviet Union[272]—triggered particular alarm in Congress. Congressmen introduced several bills to prevent the president from withdrawing from NATO absent congressional consent. For example, Senate Joint Resolution Four, reported favorably by the Senate Foreign Relations Committee in December 2019,[273] specifies, "The President shall not suspend, terminate, or withdraw the United States from the North Atlantic Treaty, . . . except by and with the advice and consent of the Senate, provided that two thirds of the Senators present concur, or pursuant to an Act of Congress."[274]

---

270. Press Statement, Michael R. Pompeo, U.S. Sec'y of State, On the Treaty on Open Skies (May 21, 2020), https://www.state.gov/on-the-treaty-on-open-skies [https://perma.cc/69QP-PB3L] (announcing the U.S. intent to withdraw from the treaty); *see also* David E. Sanger, *Trump Will Withdraw from Open Skies Arms Control Treaty*, N.Y. TIMES (May 21, 2020), https://nyti.ms/3bQyePt [https://perma.cc/5HTF-9NDA] (discussing the U.S. withdrawal from the Open Skies treaty).

271. Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal from W.H.O.*, N.Y. TIMES (July 7, 2020), https://nyti.ms/2VYH5JT [https://perma.cc/JN2N-SHGV] (reporting that the United States transmitted a "notice of withdrawal, effective July 6, 2021" to the World Health Organization ("WHO")). *But see* Harold Hongju Koh, *Trump's Empty "Withdrawal" from the World Health Organization*, JUST SEC. (May 30, 2020) [hereinafter Koh, *Trump's Empty Withdrawal*], https://www.justsecurity.org/70493/trumps-empty-withdrawal-from-the-world-health-organization [https://perma.cc/AY8R-EFHN] (explaining the numerous hurdles or potential hurdles to actual withdrawal).

272. *What is NATO?*, NATO, https://www.nato.int/nato-welcome/index.html [https://perma.cc/NLX8-GTZW].

273. *All Actions, S.J. Res. 4 — 116th Congress (2019–2020)*, CONGRESS.GOV [hereinafter *All Actions, S.J. Res. 4*], https://www.congress.gov/bill/116th-congress/senate-joint-resolution/4/all-actions [https://perma.cc/PAU3-LVKX].

274. S.J. Res. 4, 116th Cong. § 1 (2019). A somewhat similar bill—the "NATO Support Act"—was introduced in and passed the House. H.R. 676, 116th Cong. (2019). The NATO Support Act expresses "the sense of Congress that . . . the President shall not withdraw the United States from NATO" and "Goldwater v. Carter is not controlling legal precedent," and states that it is U.S. policy to "remain a member in good standing of NATO," while also prohibiting the use of funds to withdraw from NATO. *Id.* §§ 3–5. The bill "appear[s] to be designed to prohibit the president from withdrawing from" NATO, though the prohibition is less clear than that in S.J. Res. 4. *See* Curtis Bradley & Jack Goldsmith, *Constitutional Issues Relating to the NATO Support Act*, LAWFARE (Jan. 28, 2019, 7:43 AM) [hereinafter Bradley & Goldsmith, *Constitutional Issues*], https://www.lawfareblog.com/constitutional-issues-relating-nato-support-act [https://perma.cc/M3MU-5XAC] (discussing the differences in the bills' provisions); *see also* No NATO

Trump's unilateral treaty withdrawals and the putative congressional opposition, at least to the NATO withdrawal, implicate unsettled questions about the Constitution's allocation of treaty termination authority. The Constitution specifies how treaties are made,[275] but says nothing about how they may be terminated.[276] The issue came to a head in 1978 when President Jimmy Carter acted unilaterally to terminate a mutual defense treaty with Taiwan as part of the process of recognizing the People's Republic of China, and a group of senators filed suit to challenge the treaty termination.[277] The Supreme Court failed to resolve the constitutional question in *Goldwater v. Carter*,[278] delivering a set of fractured opinions, none of which garnered a majority.[279] A four-Justice plurality opinion by Justice William Rehnquist considered the case to present a nonjusticiable political question.[280] Despite the fact that it is not binding precedent, the Rehnquist opinion has cast a long shadow, causing lower courts to dismiss several subsequent attempts to

---

Withdrawal Act, H.R. 6530, 115th Cong. (2018) (including provisions similar to the NATO Support Act); Defending American Security from Kremlin Aggression Act of 2018, S. 3336, 115th Cong. § 102 (2018) (prohibiting the use of appropriated funds to effectuate NATO withdrawal absent passage by two-thirds of the Senate of a resolution "advising and consenting to the withdrawal of the United States from the treaty"). The 2020 National Defense Authorization Act included a provision stating, "Notwithstanding any other provision of law, no funds may be obligated, expended, or otherwise made available" from the act's passage through "December 31, 2020, to take any action to suspend, terminate, or provide notice of denunciation of the North Atlantic Treaty, done at Washington, D.C. on April 4, 1949." National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1242, 133 Stat. 1198, 1656 (2019). The fact that the Senate Foreign Relations Committee favorably reported the clearer withdrawal ban on the same day that the full Senate adopted the above provision of the NDAA may suggest that the Committee is not confident that the NDAA's funding ban is sufficient to prohibit withdrawal. *Compare All Actions*, *S.J. Res. 4*, *supra* note 273 (showing committee passage on Dec. 17, 2019), *with All Actions, S. 1790 — 116th Congress (2019–2020)*, https://www.congress.gov/bill/116th-congress/senate-bill/1790/actions [https://perma.cc/LA32-MLWB] (showing Senate agreement to the conference report on Dec. 17, 2019).

275. U.S. CONST. art. II, § 2, cl. 2 (stating that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

276. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 313 cmt. b (AM. L. INST. 2018) ("The text of the Constitution . . . does not specify how the United States is to suspend, terminate, or withdraw from treaties."); Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 252 (2013) [hereinafter Eichensehr, *Treaty Termination*] (discussing the Constitution's silence on treaty termination).

277. Goldwater v. Carter, 617 F.2d 697, 699–701 (D.C. Cir. 1979) (en banc).

278. Goldwater v. Carter, 444 U.S. 996 (1979).

279. *See id.* at 997.

280. *Id.* at 1002 (Rehnquist, J., concurring in the judgment).

challenge unilateral presidential treaty terminations as political questions.[281]

In the absence of definitive resolution by the courts, practice has, unsurprisingly, shifted in favor of presidents terminating treaties unilaterally. Prior to the twentieth century, the practice was considerably more mixed.[282] Presidents terminated treaties with authorization from Congress as a whole and sometimes from the Senate alone,[283] and the first unilateral presidential termination did not occur until 1899.[284] In recent decades, however, the president has exercised termination authority unilaterally,[285] often with little controversy.[286] This historical practice led the recent *Restatement (Fourth) of the Foreign Relations Law of the United States* to conclude that "the President has the authority to act on behalf of the United States in suspending or terminating U.S. treaty commitments and in withdrawing the United States from treaties," at least so long as he does so "either on the basis of terms in the treaty allowing for such

281. *See* Kucinich v. Bush, 236 F. Supp. 2d 1, 2–3, 18 (D.D.C. 2002) (dismissing challenge to unilateral presidential withdrawal from the Anti-Ballistic Missile Treaty as a nonjusticiable political question); Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1192–93, 1199 (D. Mass. 1986) (dismissing a challenge to Reagan's unilateral termination of a Friendship, Commerce, and Navigation Treaty with Nicaragua as a political question).

282. *See* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 788–801 (2014) [hereinafter Bradley, *Treaty Termination*] (providing an account of U.S. treaty termination practice from the founding through the early twentieth century). The Reporters' Notes to the *Restatement (Fourth) of the Foreign Relations Law of the United States* provide a concise overview of congressional involvement in U.S. treaty terminations through the early twentieth century and the shift to unilateral presidential terminations in the twentieth century. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 313, reporters' notes 2-3 (AM. L. INST. 2018).

283. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. DOC. NO. 106-71, at 202–06 (Jan. 2001) (cataloguing examples of treaty terminations with prior or subsequent approval of Congress or the Senate); Bradley, *Treaty Termination*, *supra* note 282, at 788–96 (cataloguing examples of presidents terminating treaties pursuant to ex ante or occasionally ex post authorization from Congress or the Senate).

284. *See* Bradley, *Treaty Termination*, *supra* note 282, at 798–99 (dating the first unilateral presidential termination to the McKinley administration's termination of "certain clauses in an 1850 commercial treaty with Switzerland" in 1899).

285. *See id.* at 801–20 (describing the shift in the twentieth century toward unilateral presidential terminations); *see also* Jean Galbraith, *Treaty Termination as Foreign Affairs Exceptionalism*, 92 TEX. L. REV. *SEE ALSO* 121, 127–28 (2014) (highlighting the dramatic nature of the shift in practice and questioning whether it can thus properly be described as "historical gloss").

286. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 313 cmt. c (AM. L. INST. 2018).

action (such as a withdrawal clause) or on the basis of international law that would justify such action."[287]

But recognizing the practical reality of the president's authority to terminate treaties is not the same as saying that the president possesses an exclusive—and thus preclusive—power to terminate all treaties in all circumstances. Indeed, scholarly views since *Goldwater* have moved toward the idea that the question of constitutional authority over termination cannot be answered in general. Rather, whether the president may unilaterally terminate an international agreement may depend, for example, on whether the termination complies with international law,[288] the manner in which the agreement was concluded,[289] and, importantly, whether Congress has acted to restrain the president's authority to terminate unilaterally.[290] To date, Congress has not acted definitively to restrict the president's unilateral

287. *Id.* § 313(1). *But see* Koh, *Unilaterally Terminate*, *supra* note 266, at 73 (criticizing the Restatement's characterization that "established" practice supports presidential termination authority).

288. Importantly, the Restatement bakes this condition into its general rule that the president can unilaterally terminate international agreements, noting that the president may act to terminate when he does so in accordance with a treaty or other international law. *See supra* note 286 and accompanying text.

289. *See* Koh, *Presidential Power*, *supra* note 266, at 435–36 (arguing that treaty termination "cannot be addressed by a single rule that purports to be 'transsubstantive,' in the sense of governing the mechanics of withdrawal, suspension, or termination of national participation from each and every international agreement addressing every subject matter" and arguing instead that "absent exceptional circumstances, the degree of congressional participation constitutionally required to exit any particular agreement should mirror the degree of congressional participation that was required to enter that agreement in the first place").

290. *See, e.g.*, Eichensehr, *Treaty Termination*, *supra* note 276, at 279–86 (proposing that Congress could impose a "for-cause" restriction on treaty termination); *see also* Jean Galbraith, *The President's Power To Withdraw the United States from International Agreements at Present and in the Future*, 111 AJIL UNBOUND 445, 448 (2018) ("[T]he Senate could condition its advice and consent to a treaty on legislative approval of withdrawal or on for-cause justifications; Congress could do the same with respect to an ex post congressional-executive agreement . . . ." (footnote omitted)); *infra* notes 294–96 and accompanying text (discussing various ways Congress could limit the president's authority to withdraw from NATO).

termination authority.[291] Indeed, in *Goldwater v. Carter*,[292] the D.C. Circuit, which upheld President Carter's unilateral termination of the Mutual Defense Treaty prior to the Supreme Court's review, highlighted that:

> The Senate, in the course of giving its consent, exhibited no purpose and took no action to reserve a role for itself—by amendment, reservation, or condition—in the effectuation of this provision. Neither has the Senate, since the giving of the notice of termination, purported to take any final or decisive action with respect to it, either by way of approval or disapproval.[293]

What if Congress did act? Let's take a restriction on NATO withdrawal as an example. If Congress were to pass one of the bills prohibiting unilateral presidential withdrawal from NATO and the bill were to become law, Congress would shift a president who subsequently withdrew from NATO from *Youngstown* Category Two to Category Three.[294] In other words, if Congress enacted a prohibition on terminating NATO, "it would . . . substantially alter the calculus on whether Trump can withdraw from the North Atlantic Treaty."[295] As Professors Curtis Bradley and Jack Goldsmith have explained, "The question posed by an enacted [statute prohibiting NATO withdrawal] is whether the president's power to terminate is *exclusive*, which would

291. Congress came close in 2019, passing a statutory provision requiring congressional notification at least 120 days before the United States would provide formal notice of U.S. intent to withdraw from the Open Skies Treaty. *See* Jean Galbraith, *United States Gives Notice of Withdrawal from Treaty on Open Skies*, 114 AM. J. INT'L L. 779, 782–83 (2020) (describing and citing the statutory provision, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1234, 133 Stat. 1198 (2019)). The Trump administration disregarded the notice requirement, *id.* at 783, and the U.S. withdrawal from the treaty became final in November 2020, *see* Paulina Firozi, *Trump Administration Exits Open Skies Treaty*, WASH. POST (Nov. 22, 2020), https://www.washingtonpost.com/national-security/2020/11/22/trump-administration-exits-open-skies-treaty [https://perma.cc/QL2B-NMVJ].

292. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979).

293. *Id.* at 699.

294. In a recent article, Professor Harold Hongju Koh notes the possibilities of Congress enacting "general laws prospectively limiting the President's discretion to unilaterally terminate all Article II treaties and congressional agreements" or "adopt[ing] specific statutes limiting . . . executive discretion with respect to particularly important named treaties" and argues that "[e]ither kind of legislative enactment would place any such unilateral termination into *Youngstown* Category Three." Koh, *Presidential Power*, *supra* note 266, at 479. Koh also notes in the alternative that "the Senate could impose a reservation, understanding, or declaration on new or existing treaties, limiting future efforts at unilateral presidential terminations unless the termination is plainly 'for cause.'" *Id.*

295. Bradley & Goldsmith, *Constitutional Issues*, *supra* note 274.

mean that he could terminate a treaty even in the face of a restrictive congressional directive" and even in *Youngstown* Category Three.[296]

But these analyses assume that a NATO (or other treaty) withdrawal prohibition becomes enacted law, either via presidential signature or through presidential veto followed by congressional override.[297] What happens if Congress passes a NATO withdrawal prohibition by a majority vote of both houses, the president vetoes the bill, and Congress fails to override the veto? Is Congress's opposition then rendered a constitutional nullity? The *Youngstown* canon suggests not. As the discussion above demonstrates, the underlying allocation of constitutional authority over treaty termination is ambiguous and unsettled, which triggers application of the *Youngstown* canon. Thus, the authority of the president to withdraw the United States from NATO should be narrowly construed.

Unlike *Zivotofsky v. Kerry* (*Zivotofsky II*),[298] where President Barack Obama acted in defiance of an enacted statute,[299] the president would be acting in defiance of unperfected congressional opposition—that is, in defiance of a bill that did not become law because of a presidential veto and Congress's failure to override. The president would therefore not officially be in *Youngstown* Category Three as Obama was in *Zivotofsky II*, but the constitutional analysis would be similar. A court or executive branch lawyer evaluating the unilateral withdrawal from NATO would have to specify the scope of the

296. *Id.*; *see also* Bradley, *Treaty Termination*, *supra* note 282, at 824 (noting that if treaty termination is "a concurrent power shared with either the full Congress or the Senate, then either Congress or the Senate could potentially place limitations on it" and a president defying such limitations would fall within *Youngstown* Category Three); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615, 1644 (2018) ("If termination is, as it appears to be, a concurrent rather than exclusive power, Congress can regulate it.").

297. *See* Bradley & Goldsmith, *Constitutional Issues*, *supra* note 274 ("We cannot imagine Trump signing the NATO Support Act into law. But the bill passed in the House by a margin sufficient to override a veto, and the bill in the Senate might have similar support.").

298. Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076 (2015).

299. Congress passed the statute at issue—the Foreign Relations Authorization Act, Fiscal Year 2003—but in signing it into law, Bush issued a signing statement declaring that if the relevant provision allowing U.S. citizens born in Jerusalem to have their passports list their place of birth as "Jerusalem, Israel" was "mandatory rather than advisory," it would "'impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *See id.* at 2082 (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002)).

president's termination power as to this particular treaty. And the odds seem stacked against the president.

NATO termination would not involve the president's constitutional power over recognition of foreign sovereigns, an authority derived from the power to "receive Ambassadors"[300] and one that the Supreme Court in *Zivotofsky II* held was exclusive to the president.[301] *Zivotofsky II* suggests that the president may have power to terminate treaties incident to recognition decisions, like Carter's termination of the Taiwan treaty in conjunction with recognizing the People's Republic of China, but the Court declined the executive branch's invitation to acknowledge a broader exclusive foreign affairs power.[302] Instead, the Court explained that "[t]he *Curtiss–Wright* case does not extend so far as the Secretary suggests," and that "[a] formulation broader than the rule that the President alone determines what nations to formally recognize as legitimate—and that he consequently controls his statements on matters of recognition—presents different issues and is unnecessary to the resolution of this case."[303] Moreover, the North Atlantic Treaty was concluded as an Article II treaty, requiring advice and consent by two-thirds of the Senate[304] and suggesting an understanding by the executive that mutual defense is an area shared by Congress and the executive, as befitting a legislature empowered to declare war, provide and maintain armed forces, and make rules for such armed forces.[305] The *Youngstown* canon provides a principled rationale to justify narrowly construing the president's authority to terminate NATO in light of this constellation of factors. A scenario in which Congress has tried to object to the president's actions but is prevented from fully perfecting that opposition is not one in which courts should broadly construe presidential power.

Recent doctrinal shifts suggest that courts might be prepared to adjudicate the merits of future treaty termination cases. In *Zivotofsky*

---

300. U.S. CONST. art. II, § 3 (specifying that the president "shall receive Ambassadors and other public Ministers").

301. *Zivotofsky II*, 135 S. Ct. at 2088 ("[A] fair reading of the cases shows that the President's role in the recognition process is both central and exclusive.").

302. *Id.* at 2089.

303. *Id.*

304. U.S. CONST. art. II, § 2, cl. 2; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

305. U.S. CONST. art. I, § 8, cls. 11–14.

v. Clinton (*Zivotofsky I*),[306] the Supreme Court narrowed the political question doctrine in a way that strongly suggests that the constitutionality of treaty termination is now justiciable.[307] *Zivotofsky I* focused solely on the first two prongs of the political question doctrine set out in *Baker v. Carr*,[308] namely the existence of a textually demonstrable constitutional commitment of an issue to a coordinate political department and a lack of judicially discoverable or manageable standards.[309] The opinion ignored and apparently demoted or eliminated the other *Baker* factors, including "an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[310] Rehnquist's opinion in *Goldwater* was not clear about which of the *Baker* factors the Justices believed treaty termination to implicate.[311] To the extent that subsequent courts believe that treaty termination involves only the later (and lesser) *Baker* factors, *Zivotofsky I* suggests that courts should decide the merits of the treaty termination question.

In light of this analysis, executive branch lawyers should also consider congressional action in opposition to treaty termination in analyzing whether the president may proceed with a termination. Congressional opposition—even if not expressed in a veto override—should matter to executive branch lawyers' assessment of the scope of their client's constitutional authority. Congressional objections may not be dispositive, but neither should they be ignored. They should matter not just in an assessment of the policy wisdom of a treaty termination but also as a matter of constitutional construction.

D. The Scope of Federal Preemption

The *Youngstown* canon may also be relevant to determining the preemptive scope of federal law. In cases about the scope of federal

306. Zivotofsky v. Clinton (*Zivotofsky I*), 566 U.S. 189 (2012).

307. *Id.* at 195; *see* Koh, *Presidential Power*, *supra* note 266, at 445 ("Under *Zivotofsky I*'s narrowed two-pronged political question test, treaty termination is not a political question."). Standing would remain an additional, though perhaps surmountable, hurdle.

308. Baker v. Carr, 369 U.S. 186 (1962).

309. *See Zivotofsky I*, 566 U.S. at 195 (discussing the first two *Baker* factors).

310. *Baker*, 369 U.S. at 217.

311. *Cf.* Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 13 (2017) ("To the extent Justice Rehnquist was applying the *Baker* factors, he seemed to be scrunching all six into a ball . . . .").

preemption of state law, the Supreme Court has considered the extent to which the president was acting with the support of Congress and appears to have expanded the scope of federal preemption on that basis.[312] In *Crosby v. National Foreign Trade Council*,[313] the Court considered whether federal law preempted a Massachusetts law that prohibited state agencies from purchasing goods or services from entities "doing business with Burma" (Myanmar).[314] After Massachusetts passed its law, Congress passed a law that "impos[ed] a set of mandatory and conditional sanctions on Burma."[315] The law empowered the president to impose additional sanctions on Burma if the Burmese government engaged in repression of democratic opponents,[316] instructed him to develop a strategy to promote democracy and human rights in Burma, and authorized him to waive the sanctions if their imposition contravened U.S. national security interests.[317] After finding that Burma had "committed large-scale repression of the democratic opposition," President Bill Clinton issued an executive order imposing additional sanctions, prohibiting, among other things, any new investment in Burma by U.S. persons.[318]

The National Foreign Trade Council, which represented businesses covered by the Massachusetts law, sued, claiming that the

312. In earlier work, I argued that the Court's consideration of congressional objections to presidential action in determining the preemptive scope of federal law constitutes a reason for Congress to object to presidential actions with which it disagrees, even if such disagreement does not directly defeat or halt the actions. *See* Eichensehr, *Conduct of Foreign Relations*, *supra* note 15, at 651 n.195 (arguing that "if Congress and the president disagree, courts may use the disagreement as a justification for finding a *narrower* scope for federal preemption, leaving states with more freedom to act," and therefore that Congress should "disagree with President Trump—and . . . do so vocally—on issues like withdrawal from the Paris Climate Agreement," because "[e]ven if Congress's opposition does not stop the presidential action, it might have the more indirect effect of shrinking the preemptive scope of federal power to allow state initiatives to proceed").

313. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

314. *Id.* at 367. The country's government changed its name from "Burma" to "Myanmar" in 1989. *See* Thomas Fuller, *Burma? Myanmar? New Freedom To Debate Includes Name*, N.Y. TIMES (Oct. 4, 2012), https://nyti.ms/UHE3jO [https://perma.cc/6MSM-UMJD]. I use "Burma" here for consistency with the Supreme Court's decision. The Court noted that it uses "Burma," as did the lower court, because "both parties and *amici curiae*, the state law, and the federal law all do so" and that its "use of this term . . . is not intended to express any political view." *Crosby*, 530 U.S. at 366 n.1.

315. *Crosby*, 530 U.S. at 368.

316. *Id.* at 369.

317. *Id.* at 369–70.

318. *Id.* at 370 (quoting Exec. Order No. 13047, 3 C.F.R. 202 (1998)).

federal sanctions regime preempted the state law.[319] The Supreme Court agreed. In an opinion by Justice David Souter, the Court held that the Massachusetts law stood as "an obstacle to the accomplishment of Congress's full objectives under the federal Act."[320] The Court focused on the fact that Congress intended "to provide the President with flexible and effective authority over economic sanctions against Burma," empowering him to both increase and decrease the sanctions in particular circumstances.[321] Citing *Youngstown*'s description of Category One, the Court noted that "the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit."[322] The Court concluded that "it is just this plenitude of Executive authority that we think controls the issue of preemption here,"[323] and required the Massachusetts law, which reached more broadly than the federal sanctions, to yield.[324] Otherwise, the Massachusetts law would "undermine[] the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him."[325]

Again citing *Youngstown* Category One, the Court also held that the Massachusetts statute was an obstacle to the federal sanctions law because it impeded the president's ability to fulfill Congress's directive to cooperate with other countries in a strategy to advance democracy in Burma.[326] The Court explained that "Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government in harmony with the President's own constitutional powers."[327] This addition by Congress of its power to that

319. *Id.* at 370–71.

320. *Id.* at 373.

321. *Id.* at 374.

322. *Id.* at 375–76.

323. *Id.* at 376.

324. *Id.* at 376–77.

325. *Id.* at 377. The Court also cited the fact that the Massachusetts law stood as an obstacle to the federal sanctions by interfering with Congress's intent "to limit economic pressure against the Burmese Government to a specific range" and instead reaching considerably more broadly. *Id.* at 377–79.

326. *Id.* at 380.

327. *Id.* at 381 (citations omitted) (citing Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 635 (1952)).

of the president, the Court explained, "belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action."[328]

The Court's strong suggestion in these two holdings is that the fact that the president was in *Youngstown* Category One, acting pursuant to express authorization by Congress, caused the Court to interpret the preemptive scope of the federal statute relatively broadly. Of course, having the president in *Youngstown* Category One is not a prerequisite for presidential action to preempt state law; the president's independent constitutional authorities, particularly with respect to foreign relations, are sometimes sufficient to displace state law.[329] Nonetheless, the Court in *Crosby* treated Congress's authorization of the president's actions as a plus factor in determining the federal sanctions' preemptive scope. Having crossed the bridge of considering the horizontal allocation of powers among branches of the federal government in a case about the vertical allocation of powers between the federal government and the states, it is only a small step from considering congressional authorization of presidential action to considering congressional *opposition* to presidential action in a similar circumstance.

Take a hypothetical case in which the president seeks congressional support for a particular action that would preempt state laws, and Congress instead passes a bill *prohibiting* the president from taking the suggested action and expressing support for state initiatives in the area. The president then vetoes the bill and takes executive action on his own authority, claiming his constitutional powers standing alone are sufficient to support the action. When a court adjudicates the preemptive scope of the president's action, it might hold that the president lacks all power to act independent of Congress. But if, instead, the court believes the president has *some* power, what is it to make of Congress's passage of a prohibition on the president's action? The *Youngstown* canon instructs that, just as the Supreme

328. *Id.*

329. *Cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 n.14 (2003) (explaining that although "[i]t is true that the President in this case is acting without express congressional authority, and thus does not have the 'plenitude of Executive authority' that 'controll[ed] the issue of preemption' in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000)," the Court in *Crosby* was "careful to note that the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues . . . and conflict with the exercise of that authority is a comparably good reason to find preemption of state law" (internal citation omitted)).

Court in *Crosby* looked to Congress's authorization of presidential action as a plus in construing the preemptive scope of federal law, the court in the hypothetical should take into account Congress's opposition to narrow the preemptive scope of the president's action.

The difference in the two scenarios, of course, is that in *Crosby* the congressional action was perfected into law, whereas in the hypothetical, Congress failed to override the president's veto, rendering Congress's prohibitory bill *not* law. This is a significant difference. But even so, the congressional action in both cases is the same: passage by a majority vote of both houses. The difference is the approval (or lack thereof) of the president. What the Court relied on in *Crosby* was Congress's view of the president's authority. Such views are not—and need not be—expressed only via enacted law, which necessarily depends on the views of the president as well. If, as *Crosby* suggests, what is relevant to a court's analysis of the unsettled questions about the scope of the federal government's power vis-à-vis states is the views of Congress—a co-equal branch of the federal government, and the one designed to reflect and respect states' interests—then the president's views should not be determinative. Rather, when the underlying constitutional allocation of power between the federal government and the states is unclear, courts should take into account Congress's views of the scope of federal power, even where such views conflict with those of the executive.

When considering the scope of federal power to preempt state action, courts should consider congressional agreement *or* disagreement with the executive action doing the putative preempting. Doing so appropriately shades the constitutional inquiry based on the views of the branch of the federal government designed to protect states' interests and avoids entirely ceding the field to the executive, the branch designed to favor federal power.

* * *

These examples illustrate some of the different ways the *Youngstown* canon of construction can apply. In some circumstances, the canon counsels in favor of narrowly construing a prior ambiguous statutory authorization in light of subsequent congressional attempts to limit the authorization's scope, deny its application to particular facts, or repeal it entirely. The AUMF, NEA, and preemption examples best demonstrate these statute-focused approaches. In other cases, the fact of congressional objection to presidential action, as

evidenced by a vetoed bill, functions as an input into assessing the boundaries of shared constitutional power. In these constitutionally focused cases, vetoed bills can show nonacquiescence by Congress to broad claims of executive power or disrupt executive claims that there is an unbroken practice as required for historical gloss arguments. There, the *Youngstown* canon counsels in favor of narrowly construing the ambiguous constitutional authority the executive claims in a manner akin to constitutional avoidance. The examples of treaty termination and war powers based on the president's Article II authority best illustrate these types of application of the canon. Stepping back from particular applications shows that judges and other interpreters can deploy the *Youngstown* canon, like many canons, in a variety of ways to suit differing interpretive contexts and approaches.

III. CONCERNS AND CONSEQUENCES

This Part addresses several possible concerns with and consequences of adopting the *Youngstown* canon. It concludes by addressing the incentives the canon creates for Congress.

A. Cheap Talk and Symbolic Voting

One possible concern with the *Youngstown* canon is that it gives interpretive weight to actions that Congress intended to be cheap talk or symbolic voting. One might argue that legislators did not intend vetoed bills and joint resolutions to be taken seriously and would not have passed them but for the fact that they knew the president would veto them. The bills and resolutions, the argument goes, were meant to be symbolic rebukes of the president, but nothing more, so it would be inconsistent with Congress's intent to give the congressional actions interpretive weight.

This argument depends on a number of assumptions, which do not necessarily hold. First, vetoed bills and resolutions aren't really cheap. The cost of vetoed bills or resolutions can be considered at the level of the institution or at the level of individual legislators. With respect to Congress as an institution, the vetoed bills and resolutions have potentially significant opportunity costs. They take time and effort that could be devoted to other legislative priorities.[330] They are also costly

330. *Cf.* Gersen & Posner, *supra* note 21, at 589 (making the point about simple and concurrent resolutions that "[p]assing resolutions is costly: it takes time that could be used for

for individual legislators, who must (one hopes, at least) spend time learning about and considering the bill or resolution—time the legislators could have spent on other legislative efforts, constituent services, fundraising, or campaigning.[331] Legislative leaders or other proponents of the bill or resolution might also incur costs through log rolls or horse trades in the process of negotiating for other legislators' affirmative votes. Marginal voters may in fact be among the most invested in the process of passage—not because of what it costs them to get the bill passed, but because of what they stand to gain in exchange for their affirmative votes.

Yet another type of cost associated with vetoed bills comes from the layering on of party politics.[332] Passage of a bill that the president ultimately vetoes may be an especially credible signal of congressional commitment when the same party controls the presidency and one or both houses of Congress.[333] There, congressional votes cannot be dismissed as mere party politics posturing because they reveal a divergence among members of the same party. This was the case with the Yemen, Iran, and southern border resolutions discussed above. The Republican-controlled Senate passed them, and the Republican Trump administration vetoed them.[334] Where a veto comes in response

---

other things," such as "passing legislation"). Gersen and Posner argue, "it is incorrect to say that the simple resolution is cheap talk and therefore not credible; it entails some positive cost less than the cost of enacting a statute but more than the cost of a legislative speech." *Id.* at 597. The joint resolutions and other bills that this paper addresses are statutes-in-waiting, so to the extent that the arguments that simple and concurrent resolutions are costly are persuasive, they are even more true for the bills and joint resolutions that this Article addresses.

331. *Cf. id.* at 589 (noting that passing soft law instruments takes time away from "engaging in constituent service, meeting supporters, enjoying leisure"—activities that "benefit members of Congress either directly or by improving their chances for reelection").

332. *See supra* notes 126–29 and accompanying text (discussing how bipartisan congressional opposition to a president may strengthen the case for applying the *Youngstown* canon).

333. In assessing historical gloss on executive power, the executive branch itself has cited concurrence in the practice by presidents of *different* political parties as a point in favor of the existence of a presidential power. *See* Deployment of U.S. Armed Forced into Haiti, *supra* note 221, at 178 ("Such a pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, 'evidences the existence of broad constitutional power.'" (quoting Presidential Power To Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980))). Similarly, *bipartisan disagreement* with a president's claim of power might be particularly persuasive evidence of its nonexistence.

334. *Cf.* Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from* Hamdan, 91 MINN. L. REV. 1451, 1467 (2007) (noting that with "unified government with parties that are coalitions" the president can lose because "there is some chance that the minority party may be able to pull away enough members of the President's (coalitional) party for the minority party to prevail on specific issues").

to an action by a Congress or a house of Congress that is controlled by the same party as the president, the bill might be understood to signal a particularly credible commitment by Congress—one worth splitting a political party and incurring some political ramifications.[335]

A second assumption built into the cheap talk concern is that legislators know with certainty that the president will veto a bill or joint resolution. And that is not always the case. Many presidents have declined to veto bills with which they have concerns, even constitutional concerns, in favor of issuing a signing statement setting out constitutional objections and declining to enforce particular portions of bills.[336] Such a move might be particularly likely if Congress bundles the provisions to which the president objects into must-pass legislation, like defense funding bills or budget bills. In other words, what may in retrospect, after a presidential veto, look like congressional cheap talk or symbolic voting may very well have been less clearly so ex ante.

B. Notice and Retroactive Applicability

A second possible concern with adoption of the *Youngstown* canon might stem from lack of notice to Congress that vetoed bills and resolutions would be used as interpretive aids. On this rationale, and related to the cheap talk point above, Congress may not have passed vetoed bills if it had known that such bills would be used to construe constitutional or statutory powers. Thus, applying the canon to bills or resolutions passed and vetoed before the canon's adoption would unfairly surprise Congress or fail to reflect congressional intent.

This concern reaches more broadly than the *Youngstown* canon to all canons that courts announce and apply retroactively.[337] And the

335. *See* Levinson & Pildes, *supra* note 15, at 2352 (explaining that under unified government, "[f]or Congress to respond to executive initiatives is to give the opposition party an opportunity to call into question, criticize, or potentially embarrass the President" and "run the risk that unpleasant facts will be revealed in congressional deliberations or that blame for failures will fall on the party as a whole").

336. For an overview of recent presidential uses of signing statements, including to raise constitutional objections, see generally TODD GARVEY, CONG. RSCH. SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (2012), https://fas.org/sgp/crs/natsec/RL33667.pdf [https://perma.cc/C5YK-SRYD].

337. *See, e.g.*, William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584 (2020) (noting that "[t]he retroactive application of changed canons to statutes enacted before the changes may result in interpretations that are different from the ones the

Supreme Court creates or alters and then retroactively applies canons and other interpretive rules with some frequency.[338] To take just one example, when the Court announced the federalism canon in *Gregory v. Ashcroft*[339] in 1991, it applied the canon to construe the Age Discrimination in Employment Act as amended in 1974.[340] In any such circumstance, one could argue that Congress did not have fair notice of how the courts would interpret its work and might have acted differently if it had.

In the case of the *Youngstown* canon, however, the concern has less force. The canon effectively gives Congress at least a fraction of what its actions suggest that it wants. The *Youngstown* canon takes Congress at its word that it sought to make law—despite being thwarted by the presidential veto—and gives it something less, but still something, in the form of interpretive consideration. The *Youngstown* canon should be less of a surprise to Congress and would afford more respect to the legislature as an institution than other canons, like clear statement rules, that the Supreme Court creates or alters in ways that often appear to thwart congressional intent.[341]

---

enacting Congresses would have expected" and that "[t]his problem has received little attention").

338. *See, e.g.*, *id.* at 1589–1614 (tracing the significant changes over time in the presumption against extraterritoriality); Eskridge & Frickey, *supra* note 87, at 619 (explaining that in the 1980s, the Supreme Court "not only created new canons reflecting federalism-based values, but also transformed some of the existing clear statement rules into super-strong clear statement rules"); *id.* at 619–29 (tracing the evolution of various federalism-related canons throughout the 1980s).

339. Gregory v. Ashcroft, 501 U.S. 452 (1991).

340. *See id.* at 464–65 (discussing an amendment to the statute); *id.* at 470 (explaining that absent a "plain statement" by Congress, the Court "will not attribute to Congress an intent to intrude on state governmental functions"). For an additional example in a similar vein, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242–46 (1985), which holds that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself" and applies this super-strong clear statement rule against abrogation of state sovereign immunity to a statute amended in relevant part seven years earlier.

341. One could cite numerous examples where Congress legislates to accomplish something under existing interpretive rules, only to have the Supreme Court later alter its rules and apply them retroactively, sending Congress back to the drawing board to try again to accomplish what it thought it did in the first statute. This issue seems particularly acute when Congress transforms a regular presumption into a clear statement rule or a clear statement rule into a super-strong clear statement rule. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 280–82 (1994) (chronicling how, in drafting Title VII, Congress relied on the Supreme Court's characterization of the presumption against extraterritoriality as a presumption, only to have the Court in a later case (*EEOC v. Arabian American Oil Co.* (*Aramco*), 499 U.S. 244 (1991)) transform the presumption into a clear statement rule and hold that the preexisting statute did not satisfy the new rule); Eskridge & Frickey, *supra* note 87, at 638 (criticizing the

C. Effects of Canon Adoption on Congressional Action

A final potential concern or at least curiosity is the flip side of the concern about springing a canon on Congress: What will Congress do *after* courts and other interpreters adopt the *Youngstown* canon? Will the canon lead Congress to attempt to pass, and have vetoed, more bills and joint resolutions or fewer? This is an empirical question that cannot be answered definitively at this point. But it is possible to hypothesize different results.

If the cheap talk critique discussed above is correct, the canon could result in fewer attempts by Congress to restrain the president. Along these lines, vetoed bills are currently simply symbolic actions by Congress, and once senators and representatives realize that their supposed cheap talk might have interpretive consequences, they will cease putting forth bills in this vein that the president will veto. As explained above, I am skeptical of the premises underlying the symbolic voting hypothesis, and so I am also skeptical that the canon would cause a decrease in vetoed bills. But it's possible.

At the opposite extreme, perhaps the canon will incentivize *more* attempts by Congress to push back against or restrain the president, despite the likelihood of presidential vetoes. On this logic, Congress is currently insufficiently incentivized to attempt such actions because of the veto threat and the understanding that vetoed bills are effectively nullities. Why expend time and resources to pass something that will come to naught? If that is true, then adopting the canon could realign congressional incentives in favor of attempting to push back against or restrain the president more often. The canon counsels that despite a presidential veto, Congress may get some bang for its buck by having majoritarian opposition taken into account in interpreting an ambiguous constitutional or statutory authority.[342]

Court's revision of the presumption against extraterritoriality into a clear statement rule in *Aramco* as "strongly countermajoritarian" because it frustrated apparent congressional intent about the scope of Title VII's application); *see also id.* at 639 (noting that the Court's creation and application of a super-strong clear statement rule with respect to abrogation of state's immunity pursuant to the Eleventh Amendment was "extraordinarily countermajoritarian" and that it "took Congress three statutes and fifteen years to accomplish what Congress probably thought it had done in 1975" when it initially passed the statute at issue).

342. *Cf.* Gersen & Posner, *supra* note 21, at 612 (arguing with respect to simple and concurrent resolutions that "[g]iven that courts rarely permit Congress to offer interpretations of earlier statutes by passing resolutions, there is no reason for Congress to enact them," but "[i]f judicial practice changed, congressional behavior would likely shift as well").

Rounding out the potential effects of the *Youngstown* canon on congressional behavior is the possibility that adopting the canon would have . . . no effect. In their seminal study of congressional knowledge of canons of statutory interpretation, Gluck and Bressman show that there is wide variance in congressional staffers' knowledge about different canons, by name or by concept.[343] This lack of knowledge extends to such venerable canons as the rule of lenity.[344] The same fate could befall the *Youngstown* canon, in which case it would have no effect on Congress's behavior. On the other hand, Gluck and Bressman's study reveals that congressional staffers are very familiar with the federalism canon and the presumption against preemption[345]—both of which are, like the *Youngstown* canon, aimed at protecting structural constitutional values. Gluck and Bressman cite this finding as "the first evidence that some kind of courts-Congress interpretive feedback loop does exist, at least with respect to certain interpretive rules," and that "[k]nowing that the courts consider these federalism presumptions . . . has an effect both on the substance of statutes and on how that substance is expressed."[346] These findings may suggest that interpretive principles related to structural constitutional issues are comparatively high-salience for Congress and thus more likely than many interpretive principles to affect congressional behavior.

Although it is impossible to determine ex ante how or if Congress would react to adoption of the *Youngstown* canon, one thing the canon could do is remove a possible disincentive for Congress to attempt to act via legislation. Scholars have previously argued for considering soft law, especially simple and concurrent resolutions, as interpretive aids, but they have not discussed or considered vetoed bills in a similar context.[347] By showing the equivalence or even superiority of vetoed bills to other forms of congressional soft law, this Article aims to

343. Gluck & Bressman, *supra* note 53, at 927–29; *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 614–15 (2002) (concluding, based on a study of the Senate Judiciary Committee, that "canons of statutory construction are not systematically a central part of the drafting enterprise in which staffers participate, nor, for that matter, is interpretive research more generally").

344. Gluck & Bressman, *supra* note 53, at 946–47.

345. *Id.* at 942 (reporting that "[a]pproximately 80% of . . . respondents . . . were familiar with one of these rules by name and approximately 50% said they were familiar with both," and noting that "[o]f . . . respondents who were familiar with at least one of these presumptions, 65% said that at least one played a role when drafting").

346. *Id.* (emphasis omitted).

347. *See supra* notes 98–104 and accompanying text (discussing prior scholarship on soft law).

decrease the incentives for Congress to attempt to push back against the executive via only non-binding resolutions when a potentially binding mechanism of a bill or a joint resolution is available. To the extent that congressional drafters might have perceived that courts or other interpreters would give *greater* weight to concurrent resolutions than to vetoed bills or joint resolutions, this Article levels the playing field and provides a roadmap for ensuring that Congress's views are considered, even if the president exercises a veto.

CONCLUSION

Although *Youngstown* is a canonical case, it is not yet a canon of construction. But it should be. After decades of drift in power toward the executive, helped along by the courts, the time has come for at least a modest rebalancing. The proposed *Youngstown* canon rewards Congress for overcoming structural and political hurdles to assert its institutional prerogatives. It respects existing Supreme Court precedents. And it gives judges, executive branch lawyers, and other interpreters a clear roadmap for taking into account democratically legitimate, majoritarian action by the legislative branch.